

## Ombudsman's Determination

Applicant	Mrs G
Scheme	Teachers' Pension Scheme ( <b>the Scheme</b> )
Respondent	Teachers' Pensions

### Complaint Summary

Mrs G has complained that Teachers' Pensions is requiring her to repay an overpayment of £96,320.20, which she says that it is responsible for.

### Summary of the Ombudsman's preliminary decision and reasons

The complaint is partly upheld because Teachers' Pensions repeatedly failed to take appropriate action to adequately investigate Mrs G's assertion that her pension was incorrectly calculated.

## **Detailed Determination**

### **Material facts**

1. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
2. Prior to 1 April 1971, Mrs G was employed in the education of children with Special Educational Needs and Disabilities. At the time, employees in this field had the option of membership of the Local Government Pension Scheme or the NHS Pension Scheme. Mrs G opted to be a member of the NHS Pension Scheme.
3. From 1 April 1971, responsibility for this area of education passed to the education sector. Teachers in these roles were given the option of remaining in their existing pension scheme, the LGPS or the NHS Pension Scheme, or transferring to the Teachers' Pension Scheme with effect from 1 April 1971.
4. On 6 December 1971, Mrs G made a retrospective election to remain in the NHS Pension Scheme.
5. Although a member of the NHS Pension Scheme, Teachers' Pensions' predecessors maintained a record of her service. Mrs G's service was recorded as '02' service, meaning it was deemed non pensionable. At the time, this designation was used for the small number of individuals who, while eligible to join the Scheme, remained members of other schemes. It is now predominantly used for non-pensionable part time service.
6. On 31 March 2001, Mrs G ceased full-time employment and was employed in a part-time capacity. Due to this she was no longer eligible for membership of the NHS Pension Scheme. At the time, part-time employment was not automatically pensionable within the Scheme, and Mrs G did not elect for her service to be pensionable until September 2006.
7. From 1 October 2006, Mrs G started accruing pensionable service in the Scheme.
8. Around this time, Mrs G began receiving benefits from the NHS Pension Scheme for her period of service between 1971 and 2001.
9. In February 2013, Teachers' Pension updated its computer system, a change which erroneously affected members who had different strands of service with other pension schemes while employed as teachers. Mrs G's records were affected, switching her period of non-pensionable service between 1971 and 2001 to showing as pensionable on Teachers' Pensions' records.
10. In March 2013, Teachers' Pensions issued a statement to Mrs G confirming her reckonable service was 7 years 48 days.

11. On 12 June 2013, Teachers' Pensions provided Mrs G with a benefit statement in anticipation of her retirement. This included the following details:-
  - Pensionable Service: 34 Years 143 Days
  - Annual Pension: £18,697.10
  - Lump Sum: £56,091.29
12. On receipt of this information, Mrs G contacted Teachers' Pensions in a series of telephone calls. She explained that she thought that the pension being quoted was overstated and that she was already in receipt of a pension from the NHS Pension Scheme for the period 1971 to 2001. She wanted Teachers' Pensions to check the accuracy of the pension quoted to her and explained the background of her employment where she elected to remain in the NHS Pension Scheme. Teachers' Pensions said that it could see no error in her service record and that it thought that its records were correct based on the information provided by her employer.
13. On 24 June 2013, Mrs G spoke with Teachers' Pensions again. She reiterated that she thought its calculations were incorrect and that she had only been a member of the Scheme since October 2006. She confirmed that she had spoken to her employer's HR department, Lancashire County Council (**LCC**) about the situation, saying:

"I've just rung HR about it and they said yes you started paying into the Teachers' Pension on 1 October 2006."
14. She also noted that Teachers' Pensions communications up to 2013 had correctly recorded this and explained the specific circumstances of her employment in 1971. Teachers' Pensions said that it would contact LCC to clarify the situation and if a recalculation was required then it would do that. Teachers' Pensions confirmed that she would be contacted in writing within eight working days.
15. On 25 June 2013, Teachers' Pensions contacted LCC requesting it to investigate whether Mrs G's service between 2 April 1971 and 3 March 2001 should be pensionable service under the Scheme.
16. On 15 July 2013, Mrs G spoke with Teachers' Pensions again. A recording of this telephone call has been provided, including the following exchange at the end of the call:

Mrs G – "I've rung several times. I don't agree with what they're actually sending me. It's very nice but I don't think I'm entitled to as much as I've got and I'm just thinking somewhere down the line they're going to find out and I'm going to have to pay it all back."

Teachers' Pensions – "Right. OK."

Mrs G – “So what they said they would do was they would contact Lancashire County Council and they would reply to me within 8 working days, and nothing’s happened and of course the time’s getting on now.”

Teachers’ Pensions – “A referral was put through on 24 June that was answered on 25 June. Let’s have a wee look... I’m just going to ring through to the lady that’s been dealing with your case...

... Hi. A letter hasn’t actually gone out to you just yet. It’s actually under investigation. When I look on the record Val the lady that has been dealing with it she’s actually emailed over the day after you telephoned. She emailed Lancashire direct just to basically say that you had been in contact with us regarding your service... Now that went through to them on the 25 June at half past 10 on that morning. We’re still to wait for a reply for that, so I don’t know whether you want to ring Lancashire direct to ask, well just for peace of mind for yourself what their turnaround is, really.

Mrs G – “Okay”

Teachers’ Pensions – “But we can’t really do much more on that until we get a response from them.”

17. Mrs G was then provided with a contact number for LCC.
18. On 1 September 2013, Mrs G retired and her pension was put into payment.
19. On 19 June 2015 and 16 December 2016, Teachers’ Pensions wrote again to LCC querying Mrs G’s service history.
20. On 8 February 2017, Teachers’ Pensions contacted LCC again.
21. On the same day, LCC responded, stating that its records indicated that Teachers’ Pensions contributions started on 1 October 2006. It could not confirm any NHS Pension contributions and NHS BSA, which administers the NHS Pension Scheme, would not provide LCC with information without Mrs G’s written authority.
22. Later that day, Teachers’ Pensions wrote to Mrs G stating that it had just become aware that the issue discussed in July 2013 remained unresolved. It had been in contact with LCC which had confirmed that Mrs G had contacted it in 2013. LCC said that it was trying to confirm Mrs G’s NHS Pension Scheme service, but that NHS BSA would not confirm that information without her consent. Teachers’ Pensions suggested that Mrs G contact NHS BSA herself and asked that she share any information she might have regarding her employment between 1 April 1971 and 31 March 2001.
23. On 13 February 2017, Mrs G responded explaining that she had queried the situation at the time and had understood that the issue had been resolved. She did not accept that she could be responsible or penalised for Teachers’ Pension’s mistake. Mrs G provided authority for Teachers’ Pensions to contact NHS BSA.

24. On 16 March 2017, Teachers' Pensions contacted Mrs G to confirm her corrected benefits:-
- Pensionable Service: 4 Years 152 Days
  - Annual Pension: £2,428.13
  - Lump Sum: £7,284.38
25. On 24 March 2017, Mrs G responded, querying details of Teachers' Pensions' letter.
26. On 5 April 2017, Teachers' Pensions addressed Mrs G's queries and confirmed that the revised details were correct. On the same day Teachers' Pensions provided an annualised breakdown of her service.
27. On 22 April 2017, Mrs G provided Teachers' Pensions with a breakdown of her NHS Pension benefits. She questioned the accuracy of Teachers' Pensions' recent calculation and the legality of the reduction to her pension that had been put in place.
28. On 18 May 2017, Teachers' Pensions provided further detail on how her service was calculated, noting that her service between 2001 and 2006 was non-pensionable.
29. On 23 May 2017, Mrs G submitted a complaint to Teachers' Pensions, invoking the Internal Dispute Resolution Procedure (**IDRP**), saying in summary:-
- She had been assured in the 2013 telephone calls that the calculations were correct and had been checked and rechecked.
  - LCC also confirmed that she had been paying into the Scheme. It had recently confirmed that while they "cannot access information which pre-dates both Oracle and the APEX payroll system but that the Annual Service Return reports 'Teaching Service.'"
  - She was now informed after almost four years that Teachers' Pensions had made a mistake and that she had been right.
  - She had cooperated throughout the process and provided any requested information.
  - The situation had caused her and her family significant stress.
  - Teachers Pensions had been negligent in its handling of the situation. She accepted no blame and would not and could not repay any of the overpayment.

She asked:-

- Why had she been told that she must have been paying into two schemes?
- Why, despite her repeatedly saying that she was already in receipt of an NHS Pension did Teachers' Pensions not investigate this further or request written evidence of this?

- Why had it taken Teachers' Pensions so long to identify the error?
30. On 1 June 2017, Teachers' Pensions wrote to Mrs G informing her that the overpayment amounted to £96,320.20 and requested that she repay the full amount.
31. On 8 June 2017, Teachers' Pensions provided its Stage One response to Mrs G's complaint. It summarised the conversations from June and July 2013, apologised for the situation and the fact that Teachers' Pensions had not been more proactive in investigating the situation. It concluded Mrs G had been aware that the pension benefits were incorrect and that none of the parties involved had been satisfactorily proactive in correcting the situation. Once Teachers' Pensions had identified that the matter remained outstanding corrective action was taken.
32. Teachers' Pensions understood that Mrs G could not repay the money owed but nonetheless, it was required to recover the overpayment and was prepared to enter into an agreement for repayment. It provided an income and expenditure form for that purpose.
33. On 20 July 2017, Mrs G's legal representative wrote to the Department for Education (DfE) under Stage Two of the IDRP. It raised the following arguments:-
- Mrs G had relied on Teachers' Pensions' repeated assurances that the pension was correct to her detriment. The money had been spent, and in law, she should not be obliged to repay the overpayment.
  - The justified reliance on Teachers' Pensions' assurances was enhanced by the length of time it had taken Teachers' Pensions to correct the error and the fact that she had immediately informed it of the error.
  - Mrs G had acted honestly throughout the process. The case of *Gorman v Karpnale* [1998] showed that where a recipient of incorrect money can show that their position has altered in good faith, it would be inequitable to require the amount be repaid.
  - This is supported by the cases of *Avon County Council v Howlett* [1983] which concluded that the key question in the issue of change of position was whether it would be unjust to allow restitution. In Mrs G's case she had not acted dishonestly and had no reason to know the pension was incorrect given the reassurances received from Teachers' Pensions.
  - Based on Teachers' Pensions' assurances, the money was spent to her detriment, and it is not entitled to recover the money now.
  - Teachers' Pensions should cease recovery actions against Mrs G.
34. On 15 August 2017, the DfE issued the Stage Two IDRP response:-
- It acknowledged that there was no dispute that an overpayment had occurred and that this stemmed from a Teachers' Pensions system error.

- It accepted that Mrs G had proactively informed Teachers' Pensions of this error. However, on the basis of the last conversation Mrs G had with Teachers' Pensions on the issue, on 15 July 2013 (see paragraph 16 above), it considered that she cannot have come away from the conversation believing the issue was resolved or that she was entitled to the money she subsequently received. As a result, there were no grounds for writing off the overpayment because the money had not been spent in good faith.
  - DfE explained that Teachers' Pensions has a duty to recover the money in line with the Treasury's guidance on "Managing Public Money" and is required to seek recovery of an overpayment regardless of the circumstances. If immediate repayment is not possible, a reasonable repayment plan could be agreed.
  - On the issue of non-financial injustice, Mrs G would need to raise this with Teachers' Pensions directly. The DfE did not uphold the complaint and was satisfied that Teachers' Pensions had acted appropriately in its handling of the complaint.
35. Mrs G's legal representative referred the matter back to Teachers' Pensions as suggested by DfE.
36. On 10 November 2017, Teachers' Pensions legal representative wrote to Mrs G's legal representative and argued that regardless of Mrs G spending the money in good faith or not, Teachers' Pensions was entitled to restitution of the unjust enrichment. A demand for repayment by 27 November 2017 was given.
37. There were further exchanges between the parties before it was referred to The Pensions Ombudsman (**TPO**) on 7 November 2018.
38. On 3 December 2018, Teachers' Pensions provided TPO with its formal response, including telephone call recordings. It maintained that given the exchanges with Teachers' Pensions in 2013, Mrs G cannot have received the overpaid pension on the understanding that she was entitled to it. She is not entitled to the money and Teachers' Pensions is obliged to seek recovery.
39. Teachers' Pensions noted that Mrs G is being treated as every other similarly affected member has been, the only difference being the involvement of a solicitor at additional cost. Mrs G has failed to complete a Statement of Income and Expenditure to enable Teachers' Pensions to assess her ability to repay the debt.
40. In recognition of its error, it would offer her £1,000, to be deducted from the debt owed.
41. On reviewing Teachers' Pensions formal response, Mrs G's legal representative made the following arguments:
- The call of 15 July 2013 only suggests that Mrs G contact LCC "for peace of mind". This did not negate Teachers' Pensions' responsibility to continue its investigation.

- “We are instructed that our client spoke to Lancashire County Council about the sums being paid to her and they confirmed that the sums which Teacher’s Pension had calculated were correct. As such, it is our position that even if our client had contacted Lancashire County Council following the call on 15 July 2013 (which she was not obliged to do) then she would have once again been reassured that the sums were correct. If necessary, we will obtain audios of the calls with Lancashire County Council, if they exist.”
- Mrs G clearly informed Teachers’ Pensions of the situation and cannot have acted in bad faith. She was thanked for her honesty in a call with Teachers’ Pensions.
- Mrs G went over and above the requirement to query the overpayment. At some point it was reasonable for her to stop querying something she had been assured was correct. It took several years for Teachers’ Pensions to progress the matter, was Mrs G required to chase every week for the duration?
- In one call, Mrs G was told that “If there is a recalculation then that will be done but you should be contacted in 8 working days.” There was no recalculation and so Mrs G was entitled to think the matter was resolved.
- The offer of £1,000 is wholly insufficient in these circumstances.

42. In later submissions, Mrs G’s representative noted:-

- Teachers’ Pensions has not provided recordings of every telephone call Mrs G had with it. In particular, two telephone calls in 2017, the second of which was with the Head of Teachers’ Pensions who apologised and said that Teachers’ Pensions was entirely responsible and that the matter should be referred to the Ombudsman.
- She had been reassured by Teachers’ Pensions in the telephone calls that she had been paying into two pension schemes and this was also confirmed by LCC, which she called after the first letter from Teachers’ Pensions.
- On receipt of the pension in September 2013, it was reasonable for her to assume the issue was resolved.
- For Teachers’ Pensions to have repeatedly overpaid Mrs G for almost four years is grossly negligent.
- If Mrs G had not believed the matter was resolved she would have been in touch with Teachers’ Pensions. She had been honest in her dealings with Teachers’ Pensions and proactive. Why would she not have continued to investigate if she did not believe the matter was resolved?
- To not benefit from a change of position defence, Mrs G must have acted in bad faith. Mrs G acted in good faith by contacting Teachers’ Pensions when she did and it is evident from her correspondence with Teachers’ Pensions in February



2017, prior to the appointment of legal advisers, that she believed the matter had been resolved.

- In *Gorman v Karpnale* [1998], Lord Goff said:

“In these circumstances, it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant’s position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position... In other words, bona fide change of position should of itself be a good defence in such cases as these.”

- In this context Mrs G does have a change of position defence and would suffer an injustice if called upon to repay the money.
- The money was spent, apart from the amount spent on the car, sometime after the last correspondence with Teachers’ Pensions so it was reasonable to think that the matter had been resolved. The car was purchased in anticipation of the pension coming into payment.
- Mrs G should benefit from the doctrine of laches. Teachers’ Pensions’ delay in investigating the matter is wholly unreasonable. Two chaser emails in almost four years is unacceptable, and there were no attempts to call LCC or any updates provided to Mrs G. The copies of the emails supplied by Teachers’ Pensions to LCC do not contain the metadata and therefore are not reliable.
- There were further delays after Mrs G was made aware of the overpayment:
- Teachers’ Pensions advised Mrs G’s legal representative to liaise with DfE in July 2017 but were then referred back to Teachers’ Pensions.
- Despite chaser emails, it took Teachers’ Pensions’ legal representatives until 10 November 2017 to provide a response. The response was unsatisfactory and did not address the queries raised. It was essentially a debt collection letter.
- Teachers’ Pensions and its legal representatives failed to engage with any of the legal arguments and repeatedly sent debt collection letters leading to the referral to TPO.
- Teachers’ Pensions delayed providing audio recordings of the telephone calls and initially only provided six of them. Even now it has failed to provide them all. These failures unfairly hinder the investigation.

- These delays have caused Mrs G and her family great prejudice. She does not have the means to raise the money as she is retired. At 72 years old, even if she was to return to work there would be limited opportunities. It has also caused great distress since she was informed of the overpayment and Mrs G worries that she may pass a debt to her children via her estate.
- Mrs G's husband, aged 72, has been unable to retire due to concerns over the overpayment and the fear that Mrs G may be ordered to repay such a large sum.
- Mrs G has been unable to help her children with money when they have needed it, or make gifts, out of fear of the overpayment, contributing to her distress.
- Mrs G has incurred legal costs of £5,525.40 since 2017, money she would otherwise not have spent had the overpayment not occurred and Teachers' Pensions properly investigated the situation in 2013.
- Should Mrs G be directed to make repayment, it should be on an instalment basis, and she should be given the opportunity to repay over a long period of time. Mrs G should not be bankrupted or made homeless by this situation.

43. Mrs G provided evidence of how the overpayment was spent:-

- A gift affidavit showing that on 14 March 2016, she gifted her son \$20,000 in respect of a house purchase.
- Receipt for vehicle costing £25,846.84, dated August 2013.
- Invoice for new boiler costing £5,600, dated December 2014.
- Invoices for new kitchen costing £18,317, dated February 2015.
- Several flights to America, a cruise, and a family holiday.

44. On 23 November 2021, Teachers' Pensions informed my Office that all telephone calls between it and Mrs G in 2013 had been disclosed and recordings provided.

### **Summary of further submissions from Mrs G's representative**

45. Mrs G's representative has said, in summary:-

- Mrs G made a significant number of telephone calls to Teachers' Pensions to check that the sums calculated were correct and chased it on multiple occasions, leading to the call on 15 July 2013:
- "Our client still felt there may be a mistake, and went out of her way to chase up TP herself on multiple occasions, leading to 15 July 2013, where she was told that TP was awaiting a reply from her employer, Lancashire County Council ("LCC"), but she was given a number herself to ring "direct just for peace of mind". Our client then proactively sought clarification from LCC's HR department and returned to TP to confirm her understanding of the situation on 24 June 2013. She

had therefore solely instigated the investigation undertaken by TP and was told she would be contacted back within 8 working days if there were any issues with her pension entitlement. At that date, our client had been reassured without fail that she had been contributing to two pension schemes, The Teachers' Pension Scheme and the NHS Pension Scheme. In TP's own words, "they had checked and rechecked and their calculations were correct."

- Mrs G did speak with LCC but cannot remember exactly when. She had been told that Teachers' Pensions would contact LCC and inform her if there were any issues. Given this, it was appropriate for her to allow Teachers' Pensions to make its enquiries rather than repeating the same initial conversations with LCC with no success.
- Mrs G heard nothing from Teachers' Pensions before her pension was put into payment in September 2013 and so reasonably believed that the pension was correct and that there was no doubt. It was only in February 2017 that the dispute was raised again. The delay was unreasonable and entirely the fault of Teachers' Pensions.
- Mrs G genuinely believed that there was no error, a reasonable position to hold as in July 2013 she was told that that she would be contacted within 8 working days and there was no further communication on the issue until February 2017. Common sense suggests that Teachers' Pensions, the body in charge of the Scheme, would be in contact sooner, and prior to the pension being put in payment in September 2013, if there was any risk of a mistake.
- If Mrs G had known that the pension was being overpaid she would not have accepted the money or spent it as she knew she would be required to repay it eventually. This is demonstrated by her attempts to check the calculation. It would make no sense for her to spend the money having made those attempts to check the situation if she had any suspicion that the figures were incorrect.
- The situation is very traumatic for Mrs G and she is concerned that the matter may become a problem for her family. Had she received less money she would have spent less. At this advanced stage of her life, the stress and financial risks of being pursued for money is traumatic and tragic given that she had actively sought and received reassurance that the pension was correct.
- The lack of contact from Teachers' Pensions justified her belief that the pension was correct. The amounts involved are not relevant, but the behaviour of the parties is. Mrs G had acted honestly and in good faith and went beyond what might be expected of a layperson in the context of a possible overpayment. Mrs G was told in no uncertain terms on multiple occasions that the pension was correct and that the matter would be investigated prior to being put into payment in September 2013.

- By not requesting Mrs G's telephone calls with senior Teachers' Pensions representatives made in 2017, the Ombudsman is prejudicing Mrs G's complaint. Mrs G cannot recall all of the content of the calls, but the fact that they have been withheld is highly suspect.
- Mrs G recalls one individual said that they had been reprimanded for not handling the matter sooner and was upset that she was being blamed. Mrs G also spoke to the head of Teachers' Pensions in or around June 2017 who said that Teachers' Pensions had failed her and that she should seek restitution through the Ombudsman.
- The telephone recordings have not been consistently provided by Teachers' Pensions and the significant calls are those with consequential outcomes based on the authority of the person in question. As the 2017 call is more recent, it also seems that there must be a reason for the failure to disclose those calls which must be rectified to properly determine the case. To not request these telephone recordings would mean that the decision was reached without all the necessary information and that this would be detrimental to Mrs G as the failure to disclose has not been justified. This is more significant given the prejudice caused against an individual trying to defend themselves in the context of a huge power and resource disparity.
- The matter has been costly to Mrs G's family as her husband has been forced to delay his retirement until it is resolved. Mrs G maintains that she acted honestly and in good faith throughout.
- The June and July 2013 telephone calls to Teachers' Pensions should not be viewed in isolation. The earlier telephone calls fully convinced Mrs G that she was entitled to the higher amount.
- The reference to the earlier pension estimates showing the correct length of service and pension entitlement during the 2013 telephone calls shows that Mrs G was acting with unceasing good faith and only accepted the higher figures after confirmation from Teachers' Pensions. Mrs G is a layman relying on the information provided by a dedicated pension organisation and it was correct that she should be able to rely on what she was being told after the substantial number of calls.
- Mrs G's career in the NHS and as an educator means that this was not a simple duplication of payment. If it was a simple mistake either or both parties would have identified it promptly. If Teachers' Pensions confusion at the outset can be justified, then Mrs G's belief that she had earned that pension entitlement "after her discussions with TP and LCC" was a natural conclusion for her to reach.
- Any inconsistencies about Mrs G's account of her contact with LCC are based on an honest uncertainty about her pension. Teacher's Pension was responsible for

investigating and confirming the correct position. Teachers' Pensions clearly failed in its responsibilities and Mrs G is being punished for this negligence.

- The car purchase was prior to the pension being put into payment, but was made after the point at which Mrs G was satisfied that the pension was correct, as confirmed by Teachers' Pensions and its failure to contact her after 8 working days if the pension was incorrect. Mrs G was in any event anticipating a substantial lump sum and had she been told the correct pension she would have purchased a vehicle of a lesser value. The suggestion that the purchase was not in good faith contradicts her actions and other findings in this case.
- Regarding estoppel, a decision on this can only be reached once all of the telephone calls have been listened to. They are yet to be received. Additionally, Mrs G:
  - "was told on 24 June 2013 that she would be contacted within 8 days **if** there were any issues with the calculation, yet still reached out again herself to check on 15 July 2013. You must hear the further calls between our client and TP in order to decide on this point, and any pre-emptive decision is based on a deficient awareness of the facts of this case." [original emphasis]
  - Mrs G did not request confirmation of the situation in writing, and she took Teachers' Pensions verbal confirmation as reliable, particularly as she had contacted it repeatedly to verify the calculation. It is not fair to place the burden on Mrs G given Teachers' Pensions' existence is entirely to provide pension services and that she thought that she had taken the necessary steps of bringing the issue to Teachers' Pensions' attention and discharged her duty in doing so. Teachers' Pensions then convinced her that the figures were accurate. It was Teachers' Pensions' mistake and not Mrs G's, and so to not uphold the complaint would be inequitable.
  - Given the clear distress and inconvenience caused by Teachers' Pensions inaction and very extensive delay, £3,000 is not adequate and would leave Mrs G owing more than 30 times that amount. The distress and inconvenience award should be more in line with the figure claimed given Teachers' Pensions conduct and handling of the matter, including appointing debt collectors despite her unimpeachable engagement with the process.

## Conclusions

46. In general, money paid in error can be recovered, even if the party responsible for the error has been careless. The trustees or managers of a pension scheme can only pay the benefits specified in the scheme rules or regulations. However, there are circumstances where the recipient may not be required to repay some or all of the overpayment; those circumstances are where a defence against recovery applies.

47. Both parties agree that Mrs G's pension was overpaid. The question is whether Mrs G has any defence from recovery and whether Teachers' Pensions' offer of £1,000 for the non financial injustice suffered is sufficient.

48. The most common defence against recovery of an overpayment is referred to as "change of position". Lord Goff stated the principle of change of position in *Lipman Gorman*<sup>1</sup> as follows:

"At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full."

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

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

50. To make out a change of position defence it has been established that certain conditions must be satisfied. Broadly the applicant must on the balance of probabilities show that because of the overpayment they detrimentally changed their position. The money must have been spent on something the applicant would not otherwise have bought; and the expenditure was irreversible. The applicant must also not be disqualified from relying on the defence: in particular he or she must show that they acted in good faith. If these elements are satisfied, I may direct that some or all of the overpayment be kept by the applicant.

51. In relation to the issue of whether an individual is acting in good faith, it is important to appreciate that, bad faith is not synonymous with dishonesty.<sup>2</sup> It can simply mean that, if the recipient knew or had grounds for believing that a payment had been made in error, but could not be sure, the defence would not be open to him or her. This includes cases where there is a degree of sharp practice and also where the person might suspect that there was something amiss and could have taken simple steps to ascertain the correct position but did not do so.<sup>3</sup> In other words the recipient cannot turn a "Nelsonian" blind eye.

52. Given the facts of the applicant's case and the most recent arguments submitted by the applicant's legal representatives it may be helpful to set out the "Nelsonian knowledge" test in more detail. In *Niru Battery Manufacturing Co and another v*

---

<sup>1</sup> *Lipman Gorman v Karpnale Ltd* [1991] 2 AC 548

<sup>2</sup> *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2002] EWHC at [135]

<sup>3</sup> *Niru Battery Manufacturing v Milestone Trading* [2002] EWHC 142(Comm) and *Webber v Department for Education (Teachers' Pensions)* [2012] EWHC 4225. Both these cases were cited in the second *Webber v Department for Education* case. The comments by Moore-Bick in *Niru Battery* on the issue of dishonesty at first instance were approved by the Court of Appeal.

Milestone Trading Ltd and others [2002] EWHC 1425, at paragraph 135, the test was expressed as follows:

“...in cases where the payee has grounds for believing that the payment may have been made by mistake, but cannot be sure. In such cases good faith may well dictate that an enquiry be made of the payer. The nature and extent of the enquiry called for will, of course depend on the circumstances of the case, but I do not think that a person who has, or thinks he has, good reason to believe that the payment was made away without first making enquiries of the person from whom he received it.”

53. In the second *Webber v Teachers Pensions* case<sup>4</sup>, Nugee J as he then was (now Lord Justice Nugee), confirmed (applying the *Niru Battery* test) in a pensions context, that:

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

54. There are other defences to the recovery of an overpayment; for example, estoppel and contract. These arise less often in pension cases but will be considered if the circumstances of the case suggest that this is appropriate.

55. Before I address the defences outlined above, I will consider the applicability of the Limitation Act 1980 (**the Act**). The Act can prevent the recovery of an overpayment made more than six years before the claimant, in this case Teachers' Pensions, took formal action to recover it. The first overpayments occurred following Mrs G's retirement in September 2013. As Teachers' Pensions had already been notified of the error by Mrs G, and so had knowledge that an overpayment was likely to be occurring, it has six years from September 2013 to seek recovery of the overpayment.

56. In the case of *Webber v Teachers' Pensions*, the judge concluded that the point at which the formal action to recover the overpayment occurs is when the claimant, Teachers' Pensions, submits its formal response to the complaint to TPO's Office. TPO's Office received Teachers' Pensions' formal response to the complaint on 3 December 2018. As a result, its claim for repayment was made within six years of the first overpayment, and the Act does not provide Mrs G with a defence from recovery.

57. Turning to a possible change of position defence, Mrs G has argued that the overpayments she received were spent on various specific items and holidays. For a

---

<sup>4</sup> *Webber v Department for Education* [2014] EWHC 4240 (Ch) at paragraph [62]

change of position argument to be successful, it must be shown that the money was spent in good faith on something that would not otherwise have been bought, and that the expenditure was irreversible and to her detriment.

58. Mrs G has vehemently argued that she acted in good faith by contacting Teachers' Pensions and notifying it of her belief that the pension was miscalculated. I accept that Mrs G acted honestly and appropriately when contacting Teachers' Pensions. At that stage she did everything she could reasonably be expected to do, contacting LCC and Teachers' Pensions, to correct the situation.
59. However, while Mrs G acted reasonably prior to the overpayments being made, the necessary question to address is whether, at the point that the money was spent, she knew or appreciated that she may not have been entitled to it and still took the risk.
60. I have listened to the relevant telephone calls and there are some key points which I think are important to note:-
  - Mrs G was aware that the service she was being awarded overlapped with her NHS Pension Service, from which she was already receiving a full pension.
  - Mrs G understood the complication caused by the concurrent availability of membership of both Schemes due to her specialist employment.
  - In the years prior to 2013, Mrs G's Teachers' Pensions estimates had shown the correct length of service and pension entitlement. She had not doubted the correctness of those statements at the time.
  - In the final telephone call, Teachers' Pension had not finished its investigation of the issue and was still waiting to hear from LCC.
61. Given these points, I find that Mrs G should not have relied upon Teachers' Pensions' subsequent lack of contact as an indication that the pension being paid to her was correct. I do not consider that the responses received to her enquiries were sufficient and adequate for her to proceed on the basis that she was entitled to the money. If it had been a small inconsistency then an assumption that the situation was resolved without further contact might have been reasonable, but in this case, Mrs G was incorrectly awarded some 27 years' service in duplicate. I would have expected Mrs G to seek some written confirmation of this before spending such significant sums.
62. I acknowledge that Mrs G's career and pension accrual was complicated and unusual, but she knew the details of her pension as she was able to provide the background to the situation to Teachers' Pensions and there was no uncertainty in her explanation of the situation. While I accept Teachers' Pensions ought to have been able to identify the nuances of her situation more readily, her circumstances relate to a small minority of its members, and I would not expect every Teachers' Pensions agent to know of this unusual scenario. Ultimately, the necessary investigation to determine the correct position was instigated, but at no point during



the discussions do I consider that Mrs G was persuaded that the figures provided were correct.

63. The argument has been made that Mrs G was persuaded by Teachers' Pensions' initial responses to her enquiries, made prior to the telephone call on 24 June 2013, that the situation was correct and that she was entitled to the larger amount. However, I do not accept that. If this was the case, she would not have needed to make the later calls. It is clear from the telephone calls on 24 June and 15 July 2013, that Mrs G was not convinced that the position was correct and she had, by that time, spoken to LCC's HR department which reinforced her understanding that she was not entitled to the larger pension.
64. There are also inconsistencies in Mrs G's account of her contact with LCC and what it told her. In a letter dated 20 July 2021, from Mrs G's representative, it is confirmed that Mrs G contacted LCC:

"...after she received the first letter from Teachers' Pensions and they informed her that they did not hold records dating back to 1969 but it looked as though our client had paid into two pension pots from 1971 onwards..."

65. However, this account contradicts what she said in the telephone call with Teachers' Pensions on 24 June 2013:

"I've just rung HR about it and they said yes you started paying into the Teachers' Pension on 1 October 2006."

66. This tells me that LCC had been clear about the period for which Mrs G had made contributions to the Scheme. If LCC had told her that she had been paying into two pension pots from 1971 onwards, as is suggested in the 20 July 2021 letter, I would have expected her to state this in the telephone call to Teachers' Pensions in 2013, particularly as it contradicted her understanding of the situation at the time.
67. There has also been the suggestion that Mrs G contacted LCC after the 15 July 2013 telephone call to Teachers' Pensions when it provided her with a telephone number for LCC. It would be feasible in such a call that LCC provided incorrect information about her contributions that implied that she was entitled to a pension from the Scheme. However, referring to her representative's correspondence dated 20 July 2021, the only reference to contacting LCC is the statement that she telephoned LCC "after she received the first letter from Teachers' Pensions." There is no suggestion of a later telephone call to LCC.
68. I consider it is also informative that Mrs G's representative has said:
- "...she was told that TP would liaise with LCC and return to her if there were any potential issues at all, and so it was appropriate for her to leave it to TP to discuss directly rather than continue trying to help herself and ending up repeating the same initial conversations with different members of staff to no avail, as was the case with TP."

69. This implies that Mrs G did not seek further clarification from LCC after the telephone call on 15 July 2013. From the evidence I have been provided with, I conclude that there was only one telephone call made to LCC in 2013, the call referred to in paragraph 65 above. I find that there was no reassurance from LCC that the overstated pension quoted by Teachers' Pensions was correct.
70. I acknowledge the argument that Mrs G took the lack of communication from Teachers' Pensions following the 15 July 2013 call as confirmation that the pension was correct. There is no doubt that Teachers' Pensions ought to have been in contact with Mrs G to confirm the correct position or that it remained under investigation. However, there was nothing in the telephone calls between Teachers' Pensions and Mrs G to indicate that no contact should be interpreted as the situation being correct. Mrs G was told that she would be contacted within eight working days, and she chased Teachers' Pensions when this did not occur on 15 July 2013.
71. During the telephone call of 15 July 2013 Mrs G was told that a letter hadn't been issued to her yet. I find that Mrs G ought to have continued to expect some form of communication after the telephone call of 15 July 2013 to explain whether she was entitled to the benefits being quoted. Indeed, given the stark difference in her understanding of the situation and Teachers' Pensions', I would have expected Mrs G to seek an explanation of why she was now entitled to so much more than she had anticipated and had been quoted in the previous years. Mrs G's representative has said that common sense would indicate that Teachers' Pensions would be in contact in the period before the lump sum was paid if the calculation was wrong and in the absence of this, Mrs G concluded it was correct. However, Mrs G was told to expect written confirmation and in the absence of this, I consider the reasonable next step would be to chase Teachers' Pensions to query the lack of correspondence on the issue, not assume everything was correct. The nature and extent of the enquiries made were not adequate to confirm her entitlement to the pension in the circumstances of the case.
72. Mrs G's representative has also said that she received reassurance that she was being paid the correct amount, but I have seen no evidence of this reassurance once Teachers' Pensions began investigating the issue.
73. In these circumstances, where Mrs G knew or still had grounds for believing that an overpayment would need to be repaid, a fact she acknowledged when speaking to Teachers' Pensions, and she had no positive confirmation from Teachers' Pensions that the quoted pension was correct. I find that it was not reasonable for Mrs G to spend what she understood to be an overpayment.
74. I understand the argument that had Mrs G known this was an overpayment and in the knowledge that it may have to be repaid, she would not have spent it. However, Mrs G chose to spend the money without any explanation as to why she was entitled to money that she had no previous expectation of and in the knowledge that it was being investigated without any apparent resolution to that investigation. In the circumstances therefore Mrs G is not able to rely on the defence of good faith.

75. In addition to change of position, I have also considered the applicability of estoppel and contract. Estoppel is a legal principle which provides that if, by statement or action, one person causes another to believe that a particular set of facts or circumstances is true, they should not be allowed to draw back from the statement or action if it would be unjust or unconscionable for them to do so. The requirements for an estoppel defence are similar to those for a change of position defence. However, the claimant must be able to demonstrate that they relied to their detriment either:
- on a clear and unequivocal statement (representation) on which it was reasonable for her to rely; or
  - on a mutual assumption of facts or law (convention).
76. While there was a representation in the form of the retirement benefit statement and the initial telephone conversations, given Mrs G's immediate understanding that this was not reliable and the fact that Teachers' Pensions did not finalise its investigation before Mrs G spent the money, it cannot be said that there was an unequivocal statement on which it was reasonable for her to rely or that it was spent on a mutual assumption of facts or law, so, no estoppel defence is available to Mrs G.
77. Additionally, Mrs G was not told that she would be contacted within 8 working days only if there was an error. Therefore the absence of contact from Teachers' Pension cannot be interpreted as a representation that the pension was correct.
78. With regard to contract, I do not find that there were the necessary elements of a contract; that is, offer, acceptance, consideration and an intention to enter into legal relations. In particular, there is no indication that Teachers' Pensions intended to enter into legal relations outside of Mrs G's entitlement under the Scheme.
79. Mrs G has also argued that she should be relieved of the requirement to repay the overpayment because of the doctrine of laches. Laches is an equitable defence which can be invoked where an individual has been prejudiced by a failure of a party to move forward with the legal enforcement of a right. In this case, Mrs G argues that by failing to investigate the matter that she had brought to Teachers' Pensions in 2013 until 2017, it had unreasonably delayed the recovery of the overpayment and in the process prejudiced her ability to repay it.
80. While a defence on the basis of laches might be available in a case where an equitable remedy is being sought and there is no available limitation defence, in this case, Teachers Pensions is making a restitutionary claim for unjust enrichment. In these circumstances, where the Act provides a suitable limitation period, the doctrine of laches will not be applicable. As I have already concluded, the Act does not provide Mrs G with a defence from recovery.
81. I have also considered whether a claim in negligence should succeed. Teachers' Pensions was clearly in breach of its duty of care in negligently allowing Mrs G's records to be amended in February 2013, to show her service as pensionable, putting the pension into payment without first clarifying the position and in taking almost four

years to properly investigate the issue Mrs G had raised. To succeed in a claim for negligent misstatement however it is also necessary, among other things, for the person to whom the information was provided to have reasonably relied on the representations and thereby suffered loss (the “but for” test must be satisfied).

82. However, it is clear from the last phone call between Mrs G and Teachers’ Pensions that the matter was still under investigation and that it anticipated writing to her to confirm the situation. Given the way that the call ended, I am of the view that it was reasonable to expect Teachers’ Pensions to contact her to confirm the outcome of its investigation but instead of waiting on this and ensuring the situation was correct, or chasing the matter again, Mrs G acted on the assumption that the pension payments were correct. In these circumstances, a claim for negligence would not be successful because, on the basis of the final conversation, it was not reasonable for Mrs G to rely on the original representations that she was entitled to the money.
83. In the absence of an applicable defence from recovery, Teachers’ Pensions is entitled to seek recovery of the overpayment.
84. While Mrs G does not have a defence from recovery, the events complained about amount to maladministration and will no doubt have caused Mrs G an exceptional level of distress and inconvenience. Becoming aware of the amount of overpayment and the prospect of repaying it would have been a considerable shock. This is severely compounded by the fact that Teachers’ Pensions was given a very clear understanding that the situation was wrong and repeatedly failed to take appropriate steps. From what I can see, it took Teachers’ Pensions two years before they undertook to chase LCC, and then a further year after that. It is unfathomable how this was somehow left unresolved for so long with little attention seemingly being paid to the significance of the information provided by Mrs G.
85. Given the amount of overpayment that was allowed to accrue, the long-term impact this will have on Mrs G and her family and the repeated administrative failure to chase LCC or update Mrs G, an exceptional distress and inconvenience award of £3,000 is appropriate. Mrs G should be offered the choice of receiving this directly or having it put towards reducing the overpayment.
86. I note the DfE refused to comment on the distress and inconvenience caused to Mrs G in the Stage Two IDRPs response and instead referred Mrs G back to Teachers’ Pensions. Addressing distress and inconvenience is a legitimate consideration in the IDRPs, and to just refer Mrs G back to Teachers’ Pensions is a failure on the part of the DfE to properly undertake its role as the Stage Two adjudicator. There is no reason for the DfE not to comment on distress and inconvenience or recommend that a compensation payment be made.
87. Mrs G engaged a solicitor during her complaint and has incurred significant costs as a result. While I am sympathetic to Mrs G’s decision to do this, as this was a significant sum she was being asked to repay and it is understandable that she would seek legal advice, I do not normally award costs in cases such as this. It is relevant

that Mrs G was advised of the availability of the free service provided by The Pensions Advisory Service in the Stage One IDRPs response prior to seeking legal advice. In these circumstances I make no award for the legal costs incurred.

88. Mrs G's representative has argued that Teachers' Pensions has not disclosed all of the telephone calls between it and Mrs G. They refer to telephone calls made in 2017 with senior individuals at Teachers' Pensions, including the Head of Teachers' Pensions, indicating that in those conversations it accepted responsibility and invited Mrs G to contact my Office to seek restitution.
89. I have not made further enquiries about any telephone calls from 2017 because they have no bearing on any of the legal defences from recovery and accordingly I do not need to hear them to ensure fair process. What is significant is what was discussed in 2013. The telephone calls from 2013 provide a complete narrative of what was said, and Teachers' Pensions has confirmed that there are no other telephone calls from 2013.
90. Section 149(4) of the Pension Schemes Act 1993, allows me to make such enquiries as I consider fit. I am satisfied that I have sufficient evidence of the communication between Teachers' Pensions and Mrs G to determine the complaint.
91. As a final observation, the amount of overpayment accrued over a relatively short period of time is considerable. Ordinarily I would expect a repayment plan to be at least as long as the time period that the overpayment accrued. In this instance I would expect Teachers' Pensions to be generous in the length of time it allows for repayment to be made, especially given its role in allowing the overpayment to accrue. I would also expect Mrs G to engage with Teachers' Pensions to agree an affordable repayment plan by completing the income and expenditure form.
92. Mrs G's complaint is upheld in part. Teachers' Pensions repeatedly failed to take the necessary steps to investigate the information Mrs G had provided.

### **Directions**

93. In recognition of the exceptional distress and inconvenience caused, within 28 days of the date of this Determination, Teachers' Pensions shall pay Mrs G £3,000, or if she agrees, reduce the overpayment by that amount.

**Anthony Arter**

Pensions Ombudsman  
4 February 2022