

Ombudsman's Determination

Applicant: Mrs H

Scheme: Teachers' Pension Scheme (**TPS**)

Respondent: Teachers' Pensions

Outcome

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

Complaint summary

2. Mrs H has complained that Teachers' Pensions is seeking to recover the sum of £31,959.18 which it says has been overpaid to her. She asserts that she would not have given up her job if she had been given the facts about her annual salaries.

Background information, including submissions from the parties

3. Mrs H's employment was terminated by agreement in August 2014. Under the terms of a settlement agreement, she received a lump sum of £14,660. Mrs H also received a retirement lump sum of £64,521.07 and an annual pension of £21,507.03 (£1,792.25 gross per month), based on an average salary of £62,606.43.
4. The relevant provisions are contained in The Teachers' Pensions Regulations 2010 (SI2010/990) (as amended) (the **2010 Regulations**).
5. On 3 October 2017, Teachers' Pensions wrote to Mrs H informing her that an overpayment of her retirement benefits amounting to £31,959.18 had occurred. It said Mrs H's former employer had informed it of a change to her salary which had affected the calculation of her retirement benefits. Teachers' Pensions provided details of the change to Mrs H's salary. It said Mrs H's best average salary was £45,985.77; instead of £62,624.03. This was based on her salary in the year 2006/07 being:

01/04/2006 to 31/08/2006 £36,168.00

01/09/2006 to 31/03/2007 £37,041.00

Teachers' Pensions said the information it had originally used was:

01/04/2006 to 31/08/2006 £75,174.00

01/09/2006 to 31/03/2007 £76,608.00

6. Teachers' Pensions said the overpayment consisted of £17,634.11 lump sum and £14,325.07 (net) annual pension. It provided a breakdown of the overpayment by tax year. Teachers' Pensions said it was extremely sorry but it was obliged to recover all overpayments paid from public funds; whatever the reason for its occurrence. It asked Mrs H to pay the £31,959.18 by card, BACS transfer or cheque. She was provided with a telephone number to call if she had any queries.
7. Teachers' Pensions also provided Mrs H with a revised statement of benefits. This quoted an annual pension of £16,246.06 (£1,353.84 per month) and a lump sum of £48,738.20.
8. On 8 October 2017, Mrs H wrote to Teachers' Pensions informing it that she intended to make a formal complaint. She said she did not believe that the pension she had accepted in 2014 was the result of an error. Mrs H said she had been induced to accept an offer of termination of employment on the basis of a compromise payment and a satisfactory pension. She said she would not have accepted termination of her employment on the basis of the pension Teachers' Pensions had quoted. Mrs H said she would not have been able to manage on the quoted pension and would have chosen to go back to work, which would have allowed her to continue earning and enhance her pension.
9. Teachers' Pensions sent Mrs H a reminder regarding payment of the overpayment on 12 October 2017. She was provided with a telephone number to call if she was having difficulty making the payment or would like to discuss it further. Mrs H responded that she was awaiting a response to her letter of 8 October 2017. Teachers' Pensions issued its response to Mrs H's letter on 31 October 2017. It said:-
 - The administration of the TPS was a partnership between itself and employers. The records which it maintained were based upon information provided by employers. The calculation of an individual's retirement benefits was based upon their total reckonable service and final average salary.
 - Under the TPS regulations, an employer was required to provide an annual return of service and salary details for each employee at the end of each financial year. The information was received electronically and uploaded to its database. It provided Mrs H with an extract from the annual return from her former employer for 2006/07.
 - Since 2004, it had provided annual estimates of retirement benefits in order that individuals could check their details. The incorrect salary rate provided in 2006/07 was reflected in the estimates received by Mrs H subsequently. The estimate provided in October 2006 showed an average salary of £39,366.62. Estimates

provided from March 2008 onwards showed average salaries of £76,006.90, £54,995.09 and £62,312.47. Since Mrs H's actual salary was much lower than the quoted averages, it would have been prudent for her to have checked the increase. The estimates were produced as part of a bulk exercise and not checked on an individual basis.

- It was not always aware of errors or omissions in employer returns and therefore requested that individuals ensured that the details it held were correct. If the details were not correct, individuals were asked to contact the relevant employer.
 - In 2016, Mrs H's former employer informed Teachers Pensions that it had provided incorrect salary details for 2006/07. The employer had confirmed that it was checking all employees for that year and would provide corrected information if necessary. Mrs H's details had been included in the second tranche of details provided by the employer.
 - It was obliged to seek recovery of any money incorrectly paid out of public funds for whatever reason. If she would find it difficult to repay the overpayment or would like to discuss a repayment plan, Mrs H should contact its Finance Team.
10. Teachers' Pensions said its letter should be considered its final response but Mrs H could take her complaint further with the Department for Education (**DfE**).
 11. On 28 November 2017, Mrs H informed Teachers' Pensions that she was taking legal advice as to her next steps. Having not heard from Mrs H, Teachers' Pensions wrote to her, on 15 January 2018, asking for an update as to how she intended to proceed. Mrs H informed Teachers' Pensions she had submitted a claim to her insurers. She said she would inform Teachers' Pensions if her insurers accepted her claim and, if not, she would revert to her lawyer. On 20 February 2018, Mrs H informed Teachers' Pensions that her insurer had declined to accept her claim.
 12. On 19 April 2018, Teachers' Pensions wrote to Mrs H saying it proposed to recover the outstanding overpayment by deducting £532.66 from her monthly pension for 59 months and a final deduction of £532.24. It proposed to start deductions on 30 June 2018 and finish on 30 May 2023. Teachers' Pensions asked Mrs H to contact it if she wished to discuss an alternative repayment plan or to discuss the matter further.
 13. Mrs H wrote to Teachers' Pensions on 25 April 2018. She explained that Teachers' Pensions' letter of 3 October 2017 had arrived at a difficult time for her because her husband had been involved in a serious road traffic accident. Mrs H said she had noticed that the average salary and service history on Teachers' Pensions' website looked incorrect in 2014. She said she had taken steps to ensure the pension estimate and subsequent offer were correct; including checking her salary slips and P60s, telephoning Teachers' Pensions, and checking each line of the service history. Mrs H said she had not been provided with salary returns by Teachers' Pensions for her to be able to check these. She said she had subsequently been provided with salary information which showed that Teachers' Pensions could have provided this when she contacted it in 2014.

14. With regard to detrimental reliance on the information she had been provided with, Mrs H said:-
- She had given up a lucrative job based upon the benefits estimate and subsequent pension offer.
 - After two years of receiving her pension, she and her husband had decided to extend their mortgage so that they could remain in their current house on the pension income.
 - She was not in a position to move house because of her husband's recovery period and mortgage termination penalties.
 - The cut in her pension had forced her to use savings for regular monthly outgoings at the rate of £400 per month.
 - She had incurred legal fees.
 - She had never planned to use savings to pay regular bills. This was causing her a great deal of stress and affecting her husband's recovery.
 - Any overpayment between September 2014 and October 2017 had been spent. Overpaid monthly income was still income and income was spent each month.
 - The error was due to Teachers' Pensions' negligence and it should bear the responsibility for this.
15. On 10 May 2018, Mrs H wrote to Teachers' Pensions in response to its letter of 19 April 2018. She said she did not accept its proposal to reduce her pension by £532.66. She said this would render her homeless because she was already unable to meet her monthly costs from her reduced income. Mrs H proposed to return the amount she had left from her lump sum, less her legal fees incurred so far and any legal fees incurred in validating a proposed contract. She calculated that this would mean a payment of £15,522.11 on the basis that she had £17,634.11 remaining from her lump sum, had incurred £1,056 in legal fees and would incur a further £1,056. Mrs H said her proposal was subject to a contract agreeing a full and final settlement of all matters outstanding, with no recourse to further action by either party.
16. Teachers' Pensions responded to Mrs H on 14 May 2018. It acknowledged that the situation was unwelcome and it expressed sympathy for Mrs H's difficult personal circumstances. Teachers' Pensions suggested Mrs H discuss her circumstances with its Finance Team and enclosed an income and expenditure form for her to complete.
17. Teachers' Pensions acknowledged that Mrs H had contacted it prior to her retirement. It said she had identified an error in her service record which had been corrected in response to an update from her employer. Teachers' Pensions acknowledged that, in a telephone call on 23 May 2014¹, Mrs H had advised its staff member that she had

¹ Teachers' Pensions provided a recording of the call. This is summarised in the Appendix.

concerns about her average salary being too high. It said no figures had been discussed. Teachers' Pensions acknowledged that its staff member could have questioned Mrs H further, instead of explaining that average salary can be higher than current salary because of inflationary increases. It said, in light of the difference between Mrs H's actual salary and the average salary quoted, she had had the opportunity to question whether such a big difference could be due to inflationary increases. Teachers' Pensions said it was regrettable that its staff member did not seek further clarification from Mrs H and it apologised for this.

18. Teachers' Pensions said the appropriate time for Mrs H to question the position was when she received her benefit statement dated 6 March 2008. This showed that her pension had almost doubled when her service had only increased by one year. Teachers' Pensions said any query should have been directed to Mrs H's employer, as instructed on the statement. It said this would have meant the employer could have investigated and corrected the error sooner than it did. Teachers' Pensions referred to two other telephone calls from Mrs H; in 2010 and 2011. It said she had advised of gaps in her service record but had not queried the average salary.
19. Teachers' Pensions reiterated its view that the error was the result of incorrect salary information provided by the employer and that it was obliged to seek recovery. It explained that Mrs H could raise a complaint with the DfE within six months of the date of its letter.
20. Mrs H responded on 20 May 2018. She noted Teachers' Pensions' comment that it was regrettable that its staff member did not seek further clarification from Mrs H. She suggested that it was admitting that there had been negligence on its part. Mrs H referred to her offer of 10 May 2018. She said she awaited Teachers' Pensions' response and expected no change to be made to her pension payments in the meantime.
21. Teachers' Pensions sent a further repayment reminder to Mrs H on 28 June 2018.
22. On 12 July 2018, Teachers' Pensions wrote to Mrs H. It apologised for the delay in replying. Teachers' Pensions said it could not accept Mrs H's offer of £15,522.11 in full and final settlement of the matter. It acknowledged that the overpayment was not an insignificant amount to repay and said it did not wish to put anyone in a position of hardship. It explained that it had discretion to offer a repayment plan of up to 36 months without the need to see financial evidence; otherwise it was obliged to issue an income and expenditure form to determine affordable repayment amounts. Teachers' Pensions enclosed a further form and reiterated Mrs H's option to complain to the DfE within six months of its letter of 14 May 2018.
23. On 24 July 2018, Mrs H wrote to Teachers' Pensions saying the six month period should start to run from the date of its letter of 12 July 2018. On the same day, she wrote to the non-executive chairman of Capita plc setting out details of her dispute with Teachers' Pensions, including her proposed solution. She said she considered

that Teachers' Pensions should take financial responsibility for its negligence and she asked him to look into the matter.

24. On 7 August 2018, Teachers' Pensions wrote to Mrs H agreeing that the six months for an appeal could run from 12 July 2018.
25. On the same day, the Head of Teachers' Pensions wrote to Mrs H in response to her letter to the non-executive chairman of Capita plc. He explained that, under Regulation 131 of the 2010 Regulations, employers were required to provide annual returns of salary and service details for each teacher they employed. He explained that employers were also required to have the annual returns independently audited and to provide an audit certificate. He noted that it appeared that the audit had not identified the error in Mrs H's salary. The Head of Teachers' Pensions explained that it did check annual returns from employers and a large number of errors were automatically detected and corrected. He explained that these were mostly typographical issues or errors and omissions. The error in Mrs H's salary was exceptional and could not be detected by Teachers' Pensions' checks.
26. The Head of Teachers' Pensions said it did not automatically provide a full member print to retirees, but information relevant to the calculation of the benefits was provided; such as, average salary and pensionable salary. He said it was open to the member to request further information if they had any concerns. The Head of Teachers' Pensions reiterated the point that annual benefit statements issued after March 2008 had shown significantly higher average salaries. He said it was reasonable to conclude that Mrs H had had an opportunity to check the increases.
27. The Head of Teachers' Pensions said the TPS was a statutory scheme and a member's entitlement had to be calculated in accordance with the statutory regulations. He said, when the error had been identified, Mrs H's benefits had to be recalculated and this inevitably resulted in an overpayment. He acknowledged that being informed of this would have been disappointing, but reiterated that Teachers' Pensions was required to seek recovery. He referred to guidance issued by HM Treasury and enclosed a copy for Mrs H.
28. With regard to the telephone call Mrs H had made to Teachers' Pensions prior to her retirement, the Head of Teachers' Pensions said it was unfortunate that her average salary was not explored further at that point. He did not accept that Teachers' Pensions had been negligent and said it would expect queries regarding service and salary to be directed to the employer. He said information provided by Teachers' Pensions was given on the understanding that the employer had reported Mrs H's salaries correctly.
29. The Head of Teachers' Pensions concluded by saying he appreciated that the overpayment Mrs H was being asked to repay was large, but Teachers' Pensions had no authority to agree to reduce or waive the overpayment. He suggested that Mrs H contact the Finance Team and complete an income and expenditure form. He said, if

hardship could be demonstrated, Teachers' Pensions could and would refer Mrs H's case to the DfE for consideration.

30. On 18 September 2018, Mrs H submitted a complaint to the DfE. The DfE issued its decision on 15 October 2018. It did not uphold Mrs H's complaint. The DfE explained that, if she was not satisfied with its decision, she could apply to the Pensions Ombudsman. Following further correspondence from Mrs H, the DfE confirmed that her next step should be to approach the Pensions Ombudsman.
31. Mrs H applied to the Pensions Ombudsman on 19 November 2018. The Pensions Ombudsman's Office (**TPO's Office**) received Teachers' Pensions' response to Mrs H's complaint on 18 February 2019.

Mrs H's position

32. Mrs H submits:-

- She retired from teaching on the basis of an offer of a pension from Teachers' Pensions. She gave up a well-paid job on the promise of this pension offer. She would not have given up work however difficult her relationship with the school had become and she would have gone to an Employment Tribunal if it had come to that.
- She had suffered an injury at work and subsequent stress-induced myocarditis. She was recovering from these events. She was deemed fully recovered from her cardiomyopathy. She was able to walk unaided but was awaiting a simple arthroscopy to her knee. She could have returned to work in the following term.
- She had intended to work for three more years because her husband had found that his work was reducing. Her daughter was still living at home and was about to commence a two-year course at a local college. She was still financially dependent.
- During the three years for which the higher pension was paid, she took out a fixed-interest mortgage on the basis of her pension income.
- She thought her settlement payment and pension lump sum would allow her to support her daughter, whilst the pension would cover her share of the mortgage and living costs.
- Out of the blue, Teachers' Pensions wrote to her in October 2017 informing her the pension had been miscalculated. It cut her monthly pension payment by £498.50 and demanded £31,959.18 be paid immediately.
- She asked Teachers' Pensions to send her a complete history of her pension transactions. She was sent a record of the salaries held by Teachers' Pensions. This included a salary figure for one year which was over £20,000 more than she had ever earned.

- Teachers' Pensions has said that her employer had given it the wrong salary figure, but this is not how the problem arose.
- When, in 2014, Teachers' Pensions offered her a pension estimate, it was more than she was expecting. She had not expected to be able to retire at that point in her career and was expecting to keep on working.
- Every communication from Teachers' Pensions is loaded with disclaimers which force responsibility for checking records onto the pensioner. None of the holders of her salary records were prepared to make the records visible to her. She tried by all means available to her to make sure her pension would be correct.
- On Teachers' Pensions' advice, she contacted the employing authority to ask it to check her salary figures and she was assured that her employment and salary record was correct. She supplied the employing school with payslips which proved that its records were correct. She located all of her P60s and confirmed with the school that her pay records were correct. The school found no errors. She found errors on Teachers' Pensions' website and corrected these, but the website does not offer a view of salary information. She pointed this out to Teachers' Pensions and asked for its help, but it did nothing.
- Teachers' Pensions has referred to a general problem with the employing authority's programming. She has not been made aware of this, but it might explain why the authority was unable to find the problem when she contacted it. She queries why it took Teachers' Pensions 18 months to speak to the authority to find out what had gone wrong.
- She noticed that the average salary used in the pension offer from Teachers' Pension still looked high; it was more than she had ever been paid. She telephoned Teachers' Pensions and said the average salary was "more than I have ever earned". She explained that her investigations with the school and employing authority had yielded no errors at their end. She asked Teachers' Pensions to find out what was wrong and provided her actual salary figure for the current year. She was told the figures were "adjusted for inflation" and not to worry.
- Her call is recorded on the contact history which Teachers' Pensions sent to her and it has expressed regret that it took no action. All Teachers' Pensions had to do was tell her the three salary figures on which it had based its calculations, but it failed to do so. She is now being made to suffer because of its negligence.
- Before she called Teachers' Pensions, she had used the online pension calculator and entered a salary of £43,496. This generated an annual pension of £14,270 and a lump sum of £42,809 for retirement at age 59. The pension estimate from Teachers' Pensions showed an average salary of £62,606, an annual pension of £20,389 and a lump sum of £61,166. She shared this information with the

Teachers' Pensions operator and expressed deep concern. A diligent company would have reacted to such a large discrepancy.

- If Teachers' Pensions had sent her a log of the salary figures it held for her, she would have been able to find the error. The employing authority would not provide her with salary information and referred her to the school. The employing authority and the school found no errors. Teachers' Pensions was the only agency which could have avoided this situation, but it did not do so. She was under intense pressure to accept an offer from her employer and Teachers' Pensions was her only source of help, but it fobbed her off during her telephone call.
- She received a letter from Teachers' Pensions, in 2006, thanking her for an enquiry relating to her earnings. It provided her with a Teacher Record Print which included salary information which was not available on the website. This enabled her to find incorrect data in 2003 and 2004, which was subsequently corrected by the employing authority; as evidenced by Teachers' Pensions' 2017 Teacher Record Print. This shows that she engaged with the problem and she finds Teachers' Pensions' suggestion of inaction on her part to be offensive.
- Teachers' Pensions has referred to the average of the best three consecutive years of revalued salaries in the last 10 years of pensionable employment. She is not a pensions specialist and has no idea what "revalued" means. Without Teachers' Pensions' help, it is not possible for a layperson to work out their pension.
- She incurred £1,056 in legal fees. She was advised that she has a strong case for estoppel and that Teachers' Pensions negligence has caused her material loss. She was advised that she was unlikely to succeed if she went to court and her solicitor came up with a compromise.
- She had not spent all of the pension lump sum and she offered to repay this, less her legal fees.
- Teachers' Pensions should take responsibility for its negligence. It should compensate the employing authority by paying the rest of the overpayment itself.
- She is now in receipt of a corrected pension, which is based on a salary figure she does not recognise. She has no confidence that Teachers' Pensions has calculated her pension correctly but she cannot afford to get the figures independently checked.
- She has found the matter extremely stressful and has been referred for cognitive behavioural therapy. She also experienced breathing difficulties which are stress induced and have required specialist treatment.

- She has calculated her total loss as follows²:-

Salary as a teacher	£43,566.98
Current TPS pension	£16,246.06
Annual difference in income	£27,320.92
Three year cumulative loss	£81,962.76
Solicitor's fees	£1,056.00
Loss of savings £400 x 14	£5,600.00
Overpayment	£31,959.18
Total loss	£120,601.94

33. Mrs H has provided some details of her re-mortgage. The mortgage offer letter is dated 24 January 2017 and is for the sum of £185,406 to be repaid over 14 years. The monthly mortgage payments were £1,256.88 from April 2017 to May 2018 and then increased to £1,280.14. In March 2018, the early repayment charge was £1,750.29. Mrs H has explained that the charge applied if she redeemed the mortgage within the first two years. She redeemed the mortgage in 2019 and moved house in October 2019.
34. Mrs H was asked to provide some additional information about the timing of her husband's accident, their joint income and whether she still had a mortgage commitment following her house move. She declined to do so, having taken the view that her losses could be calculated from the evidence she had already provided.

Teachers' Pensions' Position

35. Teachers' Pensions submits:-

- It received incorrect salary information from Mrs H's employer. The effect of the revised information led to a change in the best average salary from £62,624.03 to £45,985.77. The average salary is the higher of: (i) the salary in the last 365 days of pensionable employment; or (ii) the average of the best three consecutive years of revalued salaries in the last 10 years of pensionable employment.
- It understands that the error was caused by a general problem with the employing authority's computing system at the time.
- It was informed by Mrs H's employer that incorrect salary details had been provided in the 2006/07 annual return in January 2016. At this point, it was not told which members had been affected. Mrs H was included in the second tranche

² Taken from "Calculation of [Mrs H's] Financial Losses Arising from Error by Teachers' Pensions" submitted by Mrs H.

of employee details provided in December 2016. It then commenced the process of recalculating members' retirement benefits.

- Mrs H has said that she noticed that the pension estimate she received in 2014 was more than she was expecting and that this prompted her to call its helpline on 23 May 2014. Its position with regard to the contents of the call are as set out in its letter of 14 May 2018 (paragraph 17 above).
- Estimates of benefits have been issued to Mrs H since 2005. It is of the view that there was an opportunity for her to query her pension when the March 2008 estimate showed a significantly higher average salary than previous estimates. In addition, the pension value had almost doubled from that shown in the estimate dated 19 October 2006. It has provided screen prints of the estimates showing the information they contained.
- It has the authority to recover overpayments of pension under the 2010 Regulations. In particular, Regulation 114 states:

“114 Cessation, etc of benefits where no entitlement

(1) This regulation applies where after paying a benefit the Secretary of State determines that there was no entitlement to the benefit or there is no longer an entitlement to the benefit.

(2) The Secretary of State may –

(a) cease to pay the benefit;

(b) withhold the whole or any part of the benefit;

(c) in the case of a payment made when there was no entitlement to the benefit, recover any such payment.”

- The TPS is a defined benefit pension scheme, which means that a member's entitlement to retirement benefits must be calculated in accordance with the statutory regulations. When it was advised of the amended salary information, Mrs H's record had to be adjusted. This resulted in a lower average salary and lower retirement benefits. Mrs H's benefits had been overpaid as a result of the incorrect salary information and it must seek to recover the overpayment in line with HM Treasury guidance.
- The administration of the TPS is a partnership between itself, employers and employees. Its records are based on information provided by employers as required by the 2010 Regulations. Salary information is received electronically and uploaded to its database for each member. Recently, this has been done via a secure online portal. Each year, service and salary information for around half a million teachers is updated.

- Employers are required to have their records independently audited each year and to provide an audit certificate. The independent audit did not identify the error in Mrs H's case.
- It also undertakes a series of checks on annual service return data received from employers. A large number of errors are automatically detected and these are corrected. The error relating to Mrs H's salary could not be detected automatically because it does not hold employment details for teachers.
- Since 2004, it has provided estimates of retirement benefits based on the service and salary information provided by employers so that members can check their details. Since 2010, members have been able to generate estimates themselves via a secure TPS account. The latter are not checked for accuracy on an individual basis.
- With regard to the use of disclaimers, it is not always aware of errors or omissions in the service returns it receives from employers. The estimates of retirement benefits are provided for illustration purposes and members are asked to ensure that the details it holds are correct. Members are asked to contact the relevant employer with regard to any discrepancies.
- It sympathises with Mrs H's situation, but responsibility for the error lies with the employing authority. It has to rely on the information provided by employers and is entitled to calculate retirement benefits based on the details it holds.
- Benefits from the TPS are paid from public funds and it is obliged to recover any overpayment. It has no authority to reduce or waive any overpayment and cannot accept Mrs H's proposed repayment.
- Recovery of the overpayment is not time-barred under the Limitation Act 1980. Under Section 32, the six year limitation period can be postponed where there has been a mistake. It starts to run from the date on which it discovered the mistake or could, with reasonable diligence, have discovered it.
- With regard to the defence of "change of position", the onus would be on Mrs H to show that it would be unfair to require her to repay the overpayment. It cites *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 in which Lord Goff of Chieveley said:

"At present I do not want to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things. I fear that the mistaken assumption that mere expenditure of money may be regarded as amounting to a change of position for present purposes has led in the past to opposition by some to

recognition of a defence which in fact is likely to be available only on comparatively rare occasions.”

- With regard to the defence of estoppel, HM Treasury guidance makes the point that: “a mistaken payment will not normally of itself constitute a representation that the payee can keep [the overpayment]”. There must normally be some further indication of the recipient’s title, rather than just the receipt of the payment.

Adjudicator’s Opinion

36. Mrs H’s complaint was considered by one of our Adjudicators who concluded that no further action was required by Teachers’ Pensions. The Adjudicator’s findings are summarised below:-

- Teachers’ Pensions, on behalf of the TPS, was seeking to recover an overpayment of retirement benefits which had arisen because it had been provided with incorrect salary information by Mrs H’s former employer.
- The Adjudicator acknowledged that Mrs H felt that Teachers’ Pensions was responsible for the error which had led to the overpayment and should bear the liability for reimbursing the TPS. However, the reason for the error did not change the fact that Mrs H had received the sum of £31,959.18 over and above her strict entitlement under the TPS regulations. She would be required to repay this sum unless she was able to establish a legal defence against recovery.
- The most common defence against recovery of an overpayment was referred to as “change of position”; that is, the recipient had changed their position such that it would be unjust to require them to repay the overpayment, either in whole or in part.
- Teacher’ Pensions had referred to a statement by Lord Goff in *Lipkin Gorman*. 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, did not support the view that the defence is purely discretionary³. Earlier in his judgment, Lord Goff had said:

“the recovery of money in restitution is not, as a general rule, a matter of discretion for the court ... where recovery is denied, it is denied on the basis of legal principle.”
- To make out a change of position defence, certain conditions had to be satisfied. Briefly, the recipient of the overpayment had to be able to show that:-
 - Their circumstances had changed detrimentally and irreversibly;

³ See Chapter 27.1 Goff v Jones The Law of Unjust Enrichment for a detailed review of the case law

- The change in circumstances had been caused by the receipt of the overpayment; and
 - They were not disqualified from relying on the defence; in particular, that they had acted in good faith.
- If these conditions were satisfied the Ombudsman might direct that some or all of the overpayment may not be recovered.
 - With regard to acting in good faith, a change of position defence was not available to someone who acted in bad faith when changing their position. The Adjudicator said she wished to make it clear that bad faith, in this context, was not synonymous with dishonesty. It could simply mean that, if the recipient had good reason to think that a payment had been made in error, the defence would not be open to them. Whilst this did include cases where there had been sharp practice, it could also include cases where the recipient might suspect that there was something amiss and could have taken simple steps to ascertain the correct position but did not do so. In other words, the recipient of a payment made in error could not turn a “Nelsonian” blind eye. Bad faith did not, however, include acting negligently; so a careless recipient might still be able to invoke a change of position defence⁴.
 - It was clear, from her telephone conversation with Teachers’ Pensions, that Mrs H had some concerns about the pensionable salary used to calculate her retirement benefits. She had pointed out that the pensionable salary used by the online calculator was more than she had ever earned. Mrs H had said that she was earning £43,000 and the pensionable salary was £62,000. She was told that the calculations used an average salary and that previous salaries would be index-linked. In the Adjudicator’s view, Mrs H had taken reasonable steps to ascertain the correct position. She had not turned a blind eye to the discrepancy in the salary she was earning at the time of her retirement and the average salary being used to calculate her benefits.
 - Teachers’ Pensions had pointed out that estimates of retirement benefits had been provided for Mrs H since 2005. It took the view that Mrs H should have queried why the March 2008 estimate showed a significantly higher average salary than previous estimates. In addition, it pointed out that the pension value had almost doubled from that shown in the estimate dated 19 October 2006. It would, of course, be prudent for members to read their benefit statements in detail in order to ensure that their records are correct. However, this was not always the case and, in 2008, Mrs H was still some way away from her expected retirement. It was unsurprising that she did not, at that time, take steps to ensure that Teachers’ Pensions’ records were correct. In the Adjudicator’s view, this did not

⁴ *Niru Battery Manufacturing Co v Milestone Trading* [2002] EWHC 142 (Comm) and *Webber v Department for Education (Teachers’ Pensions)* [2012] EWHC 4225

mean that Mrs H had not acted in good faith when she received the overpaid pension and lump sum.

- It remained to consider whether Mrs H had been able to satisfy the remaining conditions for a change of position defence; that is, whether her circumstances had changed detrimentally and irreversibly as a result of the overpayment.
- The most obvious example of a detrimental change of circumstances was the expenditure of money. However, not all expenditure would count for the purposes of a change of position defence. For example, as a general rule, paying off a debt would not be a detrimental change of circumstances because a debt would always have to be repaid at some point. There was no absolute requirement that the monies had been spent on extraordinary items, such as the purchase of a car. The requirement was for there to be a causal link between the overpayment and the expenditure. It was, therefore, possible for the defence to succeed where the overpayment comprised a series of payments and had been used to fund a better lifestyle. The expenditure had, however, to be irreversible. Where the monies had been spent on items with a re-sale value and a reasonable person could sell the item without disproportionate expense or difficulty, the defence would only succeed to the extent that the re-sale value was less than the initial outlay.
- Mrs H had said she would not have left her employment when she did had she been informed of the correct amount of pension. Mrs H's employment had ended by way of a settlement agreement. The settlement agreement had been drawn up following negotiations between Mrs H, her union representative and the school. The union had described the terms as the best which could be secured. Under the terms of the settlement agreement Mrs H had received £14,660. Mrs H had said she would have been willing to go to an Employment Tribunal if necessary.
- The fact that Mrs H had made reference to an Employment Tribunal was indicative of a breakdown in her relationship with her employer. It seemed unlikely, on the balance of probabilities, that Mrs H would have remained in her employment at that time; regardless of the amount of pension and lump sum which she was expecting from the TPS.
- Mrs H had re-mortgaged her house in January 2017 for a period of 14 years; paying between £1,256 and £1,280 per month. At the time of re-mortgaging, Mrs H's gross monthly pension from the TPS had been £1,792.25. The gross monthly pension should have been £1,353.84; a difference of £438.41 per month. Mrs H had explained that she and her husband had decided to extend their mortgage so that they could remain in their (then) current house.
- Mrs H had explained that she did not move house following notification of the overpayment because an early repayment charge of £1,750.29 applied in the first two years of the mortgage and, at the time, her husband was recovering from a serious accident. Mrs H had moved house in October 2019.

- Although Mrs H had made reference to the decision to re-mortgage being influenced by her pension income, the decision was likely to have been based on her and her husband's joint income. Mrs H had said, herself, that she had envisaged that the pension would cover *her share* of the mortgage and living costs. The Adjudicator had acknowledged that the difference in monthly pension of £438 was significant. However, the onus was on Mrs H to establish a detrimental change of position and, thus far, she had not provided sufficient evidence to show that she would not have re-mortgaged but for the overpayment. Given the fact that the mortgage repayments represented a considerable percentage of Mrs H's (incorrect) TPS monthly pension, it was likely that she and her husband had income from elsewhere. Their joint income would have to be taken into account in assessing the decision to re-mortgage.
- Mrs H had also said that she had intended to support her daughter through college using her settlement and retirement lump sum.
- In May 2018, Mrs H had said she had £17,634.11 left. This suggested that Mrs H had spent £46,886.91, which was roughly the same as the lump sum she should have received. On that basis, there was insufficient evidence to find that Mrs H would have taken any different action with regard to supporting her daughter but for the overpayment.
- Mrs H had explained that she had been using her savings to pay for regular monthly outgoings at the rate of £400 per month. The Adjudicator said she could accept that Mrs H had not intended to use her savings in this way. However, she had not provided sufficient evidence to show that this was as a consequence of the overpayment and not as a result of her husband's accident.
- In the Adjudicator's opinion, Mrs H had not established a change of position defence to the recovery of the overpayment.
- There were other defences to the recovery of an overpayment; for example, estoppel and contract. These arose less often in pension cases but would be considered if the circumstances of the case suggested that this is appropriate.
- Mrs H had said that she had been advised that she had a strong case for an estoppel defence.
- Estoppel was a legal principle which provided that if, by statement or action, a person caused another person to believe that a particular set of facts or circumstances were true, then they should not be allowed to draw back from those statements or actions, if it would be unjust or unconscionable to do so. The requirements for estoppel were similar to the change of position defence. However, the person had also to demonstrate that they had relied to their detriment either:
 - on a clear and unequivocal statement (representation); or

- on a mutual assumption of facts or law (convention).
- In an overpayment case, the effect of an estoppel would be that the payer would be held to comply with the incorrect payment. The payer would be estopped from seeking to recover the overpayment. Succeeding with an estoppel argument presented a high hurdle for an individual to surmount. The Courts had spoken of the most important element as being able to show that it would be unconscionable (that is, extremely or shockingly unfair) to go back on the statement.
- In Mrs H's case, the Adjudicator said she had not been able to identify the kind of clear and unequivocal statement required for estoppel by representation. The overpayment did not, in and of itself, constitute a representation. As Mrs H had acknowledged, figures provided by Teachers' Pensions came with notices to the effect that they were based upon information provided by employers which was assumed to be correct. Teachers' Pensions were careful to point out that, should either salary or service details change, the pension and lump sum figures were likely to change also.
- In addition, for the reasons given above, Mrs H had not shown that she had relied to her detriment on the incorrect benefit payments. Finally, the Adjudicator said she doubted whether it would be considered unconscionable for Mrs H to be required to repay the overpaid benefits. An argument based on estoppel by convention would fail for the same reasons.
- The Adjudicator also said that she had not been able to identify the necessary elements for an enforceable contract to exist between Teachers' Pensions and Mrs H; that is, offer, acceptance, consideration and an intention to enter into legal relations. In particular, she had not identified consideration on Mrs H's part. In contract law, consideration is something of value given in exchange for the promise within the contract. Nor could she see that there had been any intention on the part of Teachers' Pensions to enter into a legal relationship with Mrs H beyond her entitlement under the TPS Regulations.
- Finally, because Teachers' Pensions had initially sought to recover the overpayment by means of repayment, the Adjudicator had considered whether the Limitation Act 1980 (the **Limitation Act**) applied. The Limitation Act provided timescales by which an action had to have commenced where there had been a breach of the law.
- Action to recover an overpayment of pension benefits by repayment was considered to be a restitutionary claim. Essentially, Teachers' Pensions was seeking a remedy to an "unjust enrichment" to Mrs H by asking her to reimburse the TPS. These claims were historically based on forms of action found in contract law and so the Limitation Act could apply. Section 5 of the Limitation Act required a claim to be brought within six years of the cause of action (overpayment). With regard to the overpaid lump sum, Teachers' Pensions would have six years starting in 2014 in which to bring its claim. With regard to the overpaid pension,

the start date would be the date of each monthly payment. The Limitation Act also provided for the six year period to be postponed in certain circumstances.

- The Courts⁵ had decided that the cut-off date for the purposes of the Limitation Act in cases before the Pensions Ombudsman was the date on which TPO's Office received a response to a complaint. TPO's Office had received Teachers' Pensions' response to Mrs H's complaint on 18 February 2019. This was well within the six-year limitation period. Teachers' Pensions was not prevented by limitation from recovering the whole of the overpayment by means of repayment.
- The Adjudicator noted that Teachers' Pensions had subsequently proposed to recover the overpayment by reducing Mrs H's future pension payments. In other words, it was proposing to recover the overpayment by means of equitable set-off.
- The legal principle behind equitable set-off was that, where there had been an overpayment in a statutory pension scheme, two cross-claims arose out of the same transaction. There was a statutory debt incurred by the scheme manager in respect of the member's benefits and a claim by the scheme manager against the member for the overpayment. Subject to any defences against recovery, it was inequitable that the member could insist on their full entitlement under the scheme without allowing the claim for the overpayment to be satisfied. In effect, the member was treated as having received some of their pension early and, for that reason, should not be paid the same pension twice. Equitable set-off was not subject to the Limitation Act.
- Having concluded that Mrs H had not established a defence against the recovery of the overpayment, the Adjudicator considered whether there had been any maladministration on Teachers' Pensions' part. She said she was aware that Mrs H took the view that Teachers' Pensions had been responsible for the overpayment having occurred.
- Notifying Mrs H that she had been overpaid was not, in and of itself, maladministration. Once it was aware that the salary it had been notified of was incorrect, Teachers' Pensions had been required to inform Mrs H about the overpayment. Teachers' Pensions' letter had clearly come at a difficult time for Mrs H because of her husband's accident, but it was not to know this.
- Mrs H did not accept that it was incorrect salary information from her former employer which had been the source of the error leading to the overpayment. However, Teachers' Pensions relied upon employers to provide it with this information in order that it could calculate members' benefits. The 2010 Regulations required employers to record certain prescribed information about employees' service and salary⁶. Employers were also required to "make such reports and returns to the Secretary of State as the Secretary of State may require for the purpose of the Secretary of State's functions under these Regulations". In

⁵ *Webber v Department for Education and another* [2016] EWHC 2519 (Ch)

⁶ Regulation 131

reality, the reports and returns were sent to Teachers' Pensions for it to carry out those functions on behalf of the Secretary of State.

- Teachers' Pensions had acknowledged that it might have explored Mrs H's salary more during her telephone call on 23 May 2014. The Adjudicator noted that the Pensions Ombudsman had previously said⁷ that, where a member had queried the accuracy of an estimate, Teachers' Pensions needed to do more to verify the accuracy of the information used in its calculations. The Ombudsman had said this did not mean that Teachers' Pensions was required to contact the employer itself; although he had not considered this to be unreasonable. He had said it would be sufficient for Teachers' Pensions to direct the member to their employer for any queries regarding salary and service.
- Mrs H had said that, on Teachers' Pensions' advice, she had made enquiries with her employing authority and had been assured that her employment and salary record was correct. It was not clear, therefore, that Teachers' Pensions would have been any more successful in uncovering the employing authority's error at an earlier date.
- When Teachers' Pensions first contacted Mrs H, it had asked her to repay the full amount of £31,959.18 by card, BACS transfer or cheque. It had not given her the option of a repayment plan. The Adjudicator noted that Teachers' Pensions had rectified this by referring to the option of a repayment plan in its letter to Mrs H dated 31 October 2017; four weeks later. It would have been preferable for Teachers' Pensions to have offered Mrs H the option of a repayment plan in its letter notifying her of the overpayment; particularly in view of the size of the overpayment. However, in the Adjudicator's view, this omission on Teachers' Pensions part had not resulted in any injustice to Mrs H.

37. Mrs H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs H has provided further comments which are summarised in paragraph 38 below. I have considered Mrs H's comments, together with the rest of the evidence. However, I agree with the Adjudicator's Opinion.

Mrs H's further comments

38. Mrs H submits:-

- If she had been given the facts about her annual salaries, she would not have given up her job and would have stayed in teaching for three more years.
- She did not tally this up as a £120,000 loss; she just pointed out that she would have been earning and, therefore, not subject to this repayment.
- She has never made any demands; merely offered a solution at the time based upon legal advice.

⁷ PO-19769

- She had never thought that the law would leave no protection for an upstanding citizen of long service against the careless dealings of large corporations.
- She disagrees with any assumption that she never intended to return to work despite contrary evidence in her telephone conversation with Teachers' Pensions.
- She did not know that money in savings (her pension lump sum) would disqualify her because she would be considered able to repay the overpayment.
- She was given to understand that her case was about losses incurred. She did incur losses as a result of basing a decision on incorrect information from Teachers' Pensions.
- She could easily have picked out the error in her salaries if Teachers' Pensions had provided her with a printout. The situation could have been avoided.
- She is an independent person living in 2021 and she should not have to ask her husband for assistance when they could have planned differently if they had been given the correct information. She did not know, when she began her case, that every financial item pertaining to her and her husband's life would be required.
- At no point had she been involved in or threatened with an Employment Tribunal. Her employer had caused the problem and her "Outstanding" status as a teacher was never in question. Her employer would have had a problem if she had returned; not her, because she had done nothing wrong. She had had pressure put on her to make a decision either way. Her employer was hoping that she would not sue it for an industrial injury, which she had never threatened to do. It was for this reason that it offered a good severance deal. Pensions can take months to prepare, so she would have been out of cash by that time. Even if she had gone to an Employment Tribunal, she could have continued working as a teacher. At no point was her case about her competency, so she would have won. Her relationship with her employer was strained, but this would have blown over when it realised that she had no intention of undertaking litigation for industrial injury.
- Having taken a cut in her pension income of £483 per month, she was faced with a further reduction of £500 per month for five years in order to repay the overpayment. This would leave her with a pension income of around £800 per month, which is significant.
- Her husband works on contracts and does not have an income when he cannot work. He has had to draw down some pension because he is unfit to work.
- Her husband received no insurance compensation for his injuries. He has no memory of his accident and was unable to plead his case, so no compensation was awarded. His injuries were not covered by his insurance policy; nor did it cover expenses for relatives to visit him in hospital 60 miles from home, physiotherapy or care at home.

- She disagrees that she had spent £46,886.91. This is not a factual representation of her character. She had merely said that she had been forced to live off her earnings at the rate of £400 per month.
- She does not disagree that she would have supported her daughter whether she had been overpaid or not, but she would have retired on a higher pension because she would have worked for three more years and would not have to repay £500 per month to the TPS.
- She did receive a clear and unequivocal statement; that is, a pension statement which she was assured, on three occasions, was correct.
- Her complaint has always been about Teachers' Pensions' negligence in 2014, which she tried to correct before making her decision to leave her job.
- Her telephone conversation with Teachers' Pension took place before her scan, in June 2014, when she was told that she had made a full recovery. She was just airing her worries.
- She is of the opinion that Teachers' Pensions should offer her some compensation for the time, worry and effort which her case has required from her. A simple piece of paper printed from its data in 2014 would have set the situation onto the right track.

39. Mrs H has submitted evidence for a joint account, over the period from February 2018 to December 2019, showing that the account balance reduced from £11,509.31 to £434.70.

Ombudsman's decision

40. There are essentially two elements to Mrs H's case: her complaint that Teachers' Pensions was negligent, in 2014, in failing to provide her with correct information and the means to check the information; and whether she has any defence to the recovery of the overpayment.
41. Teachers' Pensions provided Mrs H with information about her potential retirement benefits based upon salary and service data submitted to it by her employing authority. The salary information was incorrect. In particular, Mrs H's salary for the year 2006/07 had been significantly overstated. This was an error by the employing authority; not Teachers' Pensions. Mrs H has not complained about the employing authority, so I shall only consider the complaint in respect of Teachers Pensions.
42. Mrs H argues that, if Teachers' Pensions had provided her with details of the salary data it had on record for her, she would have been able to detect the error. It is Teachers' Pensions' usual approach to direct members to their employers if there is any potential discrepancy in either the salary or service data it holds. It makes the point that it does not employ teachers directly and has no access to the employers'

payroll systems. Teachers' Pensions will update its records if it receives confirmation from an employer that there has been an error.

43. I have previously found that Teachers' Pensions should take steps to check salary data if a member raises a concern with it. However, I do not find that Teachers' Pensions need contact an employer itself, provided that the member is directed to the employer. The crucial point is that someone should clarify matters with the employing authority. Mrs H has acknowledged that she was directed to her employing authority and, indeed, she did take steps to clarify matters with both her employer and the employing authority. She has said that she was told neither could detect any error.
44. With the benefit of hindsight, had Teachers' Pensions provided Mrs H with a printout of its records, she might have been able to spot the 2006/07 error in 2014. However, I find that it was appropriate for Teachers' Pensions to direct Mrs H to the employing authority in the first instance. Without confirmation from Mrs H's employing authority that there was an error in its salary records, Teachers' Pensions would not have been in a position to update its own records. Since the employing authority appears to have been unaware of its error at that point, it informed Mrs H that it had found no error and, consequently, did not forward the required amendment to Teachers' Pensions. I do not find that Teachers' Pensions' approach in 2014 amounts to maladministration on its part.
45. Whether I am called upon to consider negligent misstatement or a potential legal defence to the recovery of an overpayment, I need to determine whether the individual has taken some detrimental action they would not otherwise have done; either but for receiving incorrect information or but for receiving an incorrect payment.
46. I can understand Mrs H's concern that she has been asked to provide information about her and her husband's financial arrangements. However, I am required to make a decision on the basis of evidence and the information requested of Mrs H is necessary for me to be able to do this.
47. Mrs H has said she would not have given up her job had she been provided with the correct figures in 2014. The correct annual pension was £16,246.06 (£1,353.84 per month) and the correct lump sum was £48,738.20; whereas Mrs H was paid an annual pension of £21,507.03 (£1,792.25 gross per month) and a lump sum of £64,521.07.
48. It is never easy to determine what someone might have done if provided with different information. Of course, if there had been no error, Mrs H would not have seen the higher figures and would have been making her decision on the basis of the lower figures only. In other words, it is necessary to be careful to avoid applying the benefit of hindsight.
49. Generally speaking, the greater the percentage difference between the overstated figures and the correct figures, the more likely it is that the individual would have acted differently. In Mrs H's case, for example, the correct annual pension is roughly 75% of the amount initially put into payment for her. However, I am conscious that the

circumstances of Mrs H's employment ending are not straightforward. Her employment ended under the terms of a settlement agreement which had been negotiated between Mrs H's union, acting on her behalf, and her employer. The result of the negotiations was that Mrs H received a settlement of £14,660. This was described by the union as the best it could secure. I note also that Mrs H had not been in good health immediately before her employment ended; albeit she had been told she had made a full recovery from her cardiomyopathy. She says she was able to walk unaided but was awaiting a simple arthroscopy on her knee.

50. Mrs H is now quite adamant that she would have remained in her job. She says she had not been "threatened" with the suggestion of an Employment Tribunal and, even if she had gone to an Employment Tribunal, she could have continued to teach. Mrs H suggests that her employer was concerned that she might initiate a personal injury claim against it and that it was for this reason that it offered her a "good severance deal". Nevertheless, Mrs H is of the view that, had she remained in her job, any strain in her relationship with her employer would have "blown over".
51. It is a finely balanced judgment, but I have concluded that it is more likely than not that Mrs H's employment would have ceased in August 2014, even if she had been given the lower retirement benefit figures. Understandably, Mrs H takes a different view, but I note that she was clearly willing to give up a salary of £43,566.98 to take a considerably lower pension. In the absence of any knowledge of the higher figures, Mrs H would have been making a decision on the basis that she would give up three years' worth of salary, amounting to roughly £130,698, for an annual pension of £16,246.06 over the same three years, plus her lump sum and settlement. In total, this amounts to roughly £112,136; a difference of £18,562 or £6,187 per annum. This amounts to a decrease in income of roughly 14%. In the circumstances, when her relationship with her employer was clearly in difficulties and her health was troubling her, I find that it is likely, on the balance of probabilities, that Mrs H would have opted to retire.
52. I acknowledge Mrs H's point that this is the 21st Century and women are not beholden to their spouses. Nevertheless, it is still the case that many, if not most, couples plan their finances jointly. I note that the January 2017 mortgage offer was made to Mrs H and her husband jointly. It is, therefore, the case that Mr H's financial situation has a bearing on determining what financial decisions Mrs H is likely to have made and whether the overpayment changed any of these.
53. Mrs H has been reluctant to provide any information about her husband's accident. She has made the point that his work is contractual and he does not get paid when he cannot work. On that basis, I take it that the accident happened some time between the date of the mortgage offer and Teachers' Pensions' letter of 3 October 2017, which Mrs H had said came at a difficult time for her because of her husband's accident. The decision to re-mortgage would have been made prior to Mr H's accident and is likely to have been based upon their joint income. In the absence of any evidence that they would have been unable to meet the mortgage payments from

their joint income had Mrs H been in receipt of the lower pension, I am unable to conclude that they would not have re-mortgaged but for the overpayment.

54. While I can accept that it was never Mrs H's intention to use her savings for everyday expenditure, this is not a consequence of the overpayment. She has explained that her husband is unable to earn an income and that his accident was not covered by any insurance policy. She has also explained that it was her intention to work for a further three years; that is until 2017. It is likely that she would have been retired at or around the time of the accident regardless of the overpayment. Mr and Mrs H would have had to have found a way of replacing his lost income regardless of the overpayment. I acknowledge Mrs H's point that she could have earned additional pension and lump sum over the three years. However, she would not have received the £14,660 settlement payment, which is more than she might have received by way of additional pension lump sum.
55. With regard to Mrs H's support for her daughter, she acknowledges that she would have done this regardless of the overpayment. She has explained that she had in mind that she would use her pension lump sum and her settlement. Had Mrs H been paid the correct amounts, the lump sums would have amounted to £63,398.20. Mrs H actually received £79,181.07. A difference of £15,782.87. In May 2018, Mrs H had said she had £17,634.11 left from her lump sums. My Adjudicator said this suggested that Mrs H had spent £46,886.91, which was roughly the same as the pension lump sum she should have received. Mrs H appears to object to this conclusion, but it is a simple mathematical fact and nothing more. It merely serves to illustrate the conclusion that Mrs H's plans to support her daughter are unlikely to have been changed by the overpayment.
56. Mrs H has explained that she had been given to understand that her case was about losses incurred. I have explained that the crux of the matter is whether Mrs H took any detrimental action she would not otherwise have taken. The overpayment itself and the requirement to reimburse the TPS do not represent a loss to Mrs H because these are funds she was never entitled to and cannot, therefore, be said to have lost.
57. I note Mrs H's reference to a clear and unequivocal statement. I take her to mean that she is of the view that she should be allowed a defence to recovery based upon estoppel by representation. However, she, herself, acknowledges that information provided by Teachers' Pensions comes with the caveat that the figures are based on information provided by the employer and will change if this information changes. I do not find that there was a sufficiently clear and unequivocal statement to establish estoppel.
58. I find, therefore, that Mrs H has not established a legal defence against the recovery of the overpayment and Teachers' Pensions may seek recovery of the full amount.
59. Teachers' Pensions initially proposed to recover the overpayment by means of repayment. It later proposed to recover by means of equitable set-off. My Adjudicator explained that equitable set-off operates in a similar way to equitable recoupment.

Equitable recoupment however, is a principle which applies to trust-based schemes with trustees and the TPS is a unfunded statutory scheme with no trustees and no trust, so recoupment is not available to Teachers' Pensions.

60. My Adjudicator explained that, where there has been an overpayment in a statutory scheme, it can be said that there are two cross-claims between the member and the manager of the scheme which can be offset. Specifically, Mrs H's pension entitlement is a statutory debt owed to her by the TPS and is liable to be offset against the overpayment, which is a debt owed to the TPS by Mrs H. Therefore, subject to any defences to the claim which Mrs H might have been able to establish, it would be inequitable that she could insist on her full entitlement under the TPS without allowing the claim for the overpayment to be satisfied. It follows that Teachers' Pensions can rely on equitable set-off as the basis for recovery⁸.
61. Whichever path is taken, Teachers' Pensions needs to be mindful that the rate of recovery should not cause Mr and Mrs H undue financial hardship. It is for this reason that Teachers' Pensions has provided Mrs H with an income and expenditure form for her to complete. I suggest that she now completes the form and agrees a suitable recovery plan with Teachers' Pensions and, if necessary, the DfE.
62. Mrs H has suggested that Teachers' Pensions should offer her some compensation for the time, worry and effort which her case has required from her. I have not found any maladministration on Teachers' Pensions' part and, therefore, such a payment is not called for. As I have explained, the error which was the source of the overpayment was not made by Teachers' Pensions.
63. Therefore, I do not uphold Mrs H's complaint against Teachers' Pensions.

Anthony Arter
Pensions Ombudsman

11 October 2021

⁸ See Appendix for my view on the question of Section 91(6) Pensions Act 1995 and the Pensions Ombudsman as a competent court.

Appendix

Telephone conversation 23 May 2014

64. Mrs H spoke to 'Vanessa'.

Mrs H said she wanted to clarify details of her pension because she was going through a process with her employer which might end with ill health retirement or she might decide to retire.

Mrs H explained that she had been trying to use the online calculator. She said the calculator put in a final salary figure but it was not her final salary. Mrs H said her salary was £43,000. Vanessa said the calculator used an average salary. Mrs H said the calculator required a final salary which was £43,000 not £62,000.

Vanessa explained how an average salary was calculated. She said Mrs H should use the figure they provided because this would be correct. She said the salaries used to calculate the average were index-linked, which is why they were different to Mrs H's salary figure. Mrs H said she had asked the question before and this had not been explained.

The rest of the conversation concerned ill health retirement, enhancement and phased retirement. Mrs H explained that she had had a heart attack and was due to be reviewed by her doctors. She said she did not know if she would be told that she could return to work or that she had to retire. Mrs H explained that she was due to have a capability meeting with her employer and she wanted the information about her pension options for this meeting.

The Pensions Ombudsman as a Competent Court

65. Section 91(6) Pensions Act 1995 broadly provides that if a member disputes the amount of the recoupment/set-off of an overpayment of retirement benefits, then the scheme manager cannot recoup/set-off the overpaid benefits unless it has an order from a competent court.
66. In the case of *Burgess & Ors v BIC UK Limited* [2018] EWHC 785 (Ch), it was suggested obiter dictum (an opinion or remark which is not binding) by Mr Justice Arnold that a Determination by me did not satisfy the requirements of section 91(6) Pensions Act 1995 because the Pensions Ombudsman is not a competent court. We were not a party to those proceedings and Mr Justice Arnold did not have the benefit of hearing full arguments on the issue. In any event, the comments by Mr Justice Arnold in the *BIC* appeal were judicial dicta (remarks on a point not directly before the court/essential to its decision), and I am not bound to follow them. It is my view, for the reasons explained below, that a Determination by me, to the effect that a scheme manager may recoup/set-off an amount, does satisfy the requirements of section 91(6) Pensions Act 1995. In particular, the words:

“Where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court.”

67. Following a Determination by me there is no “dispute as to its amount”. The dispute is brought to an end further to section 151(3) Pension Schemes Act 1993 (subject to any appeal on a point of law).
68. Additionally, schedule 1, part 1, paragraph 35(e) of the Tribunals and Inquiries Act 1992 confirms that the Pensions Ombudsman is a tribunal in respect of its functions. *Peach Grey & Co. v Sommers* [1995] I.C.R. 549 confirms that a tribunal is an inferior court. Rule 52.1(c) of the Civil Procedure Rules states that a lower court includes the person from whose decision an appeal is brought [to the High Court], which includes the Pensions Ombudsman. Section 91(6) Pensions Act 1995 also includes arbitration awards. Tribunals, including the Pensions Ombudsman, therefore clearly fall within the definition of a competent court.
69. A distinction needs to be drawn between the recognition and enforcement of my Determinations; as with judgments more generally. When I have decided that a scheme manager is entitled to exercise its right of recoupment, I am exercising my powers under section 151(2) Pension Schemes Act 1993 to direct the scheme manager to take such steps as specified in my Determination. Therefore, subject to any appeal, my Determination and direction[s] will be final and binding on the parties. This is made clear by section 151(3) Pension Schemes Act 1993. My Determination must then be recognised by (amongst other things) the County Court. Although obiter dictum, Mr Justice Arnold suggested that the County Court would have power to make a declaration duplicating a direction already made by me; section 151(3) Pension Schemes Act 1993 is not referred to by the judge. In my opinion, the County Court would not have power to entertain the substance of a claim which was in essence res judicata (already decided by a court/tribunal).
70. By contrast, a Determination by me may be enforced as if it were a judgment or order of the County Court; section 151(5)(a) Pension Schemes Act 1993. What this means is that enforcement orders such as charging orders, attachment of earnings orders and injunctions can be obtained following a Determination in the same way as they can be following a judgment of the County Court. In the case of the right to set-off, it is difficult to see why enforcement measures would be necessary or relevant, given that it is in essence a self-help remedy.