

Ombudsman's Determination

Applicant	Mrs R
Scheme	Teachers' Pension Scheme (the Scheme)
Respondents	Teachers' Pensions (TP) West Sussex County Council (the Council)

Outcome

1. Mrs R's complaint is upheld and to put matters right the Council shall pay contributions and interest to the Scheme for the period 1 September 2008 to 5 December 2011. The Council shall also pay Mrs R £500 for the significant distress and inconvenience which she has suffered in bringing this matter to a conclusion.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs R has complained that the Council have not acted on a decision made by the Department for Education **(DfE)** about her pensionable service.

Background information, including submissions from the parties

4. Mrs R was a member of the Scheme in 2003.
5. In 2005, Mrs R was employed as a teacher by the Council on a part time basis. As part-time employment was not deemed to be pensionable service, she ceased being a member of the Scheme.
6. As of September 2005, she was employed on a temporary contract.
7. In January 2007, the Teachers' Pensions Regulations 1997 **(the Regulations)** were amended to include the rule that anyone who entered part time employment from this date would automatically be enrolled in the Scheme. Existing part-time employees were not enrolled in the Scheme unless they elected to do so, or, if there was a change in employment.
8. On 1 September 2008, a new school came into existence following a merger between the school Mrs R worked at and another school in the local area. Mrs R remained

with the same employer but signed a new contract where her employment was on a permanent basis.

9. In April 2010, the Council wrote to Mrs R about her employment which started on 1 September 2008. It stated in the letter that the merger had brought about a change in contract rendering her employment pensionable. It explained that contributions had not been deducted and sought to enrol Mrs R into the Scheme and backdate her membership. TP provided an opt out form for Mrs R to sign should she wish to avoid paying backdated contributions.
10. Mrs R signed the opt out form and returned it to TP, but, she did not date it.
11. In May 2011, Mrs R elected to re-join the Scheme. This was accepted by TP with effect from 1 June 2011. Mrs R requested for her Scheme membership to be based on a normal pension age of 60 rather than 65. Her rationale was that had she re-joined within five years of leaving, she would have automatically been enrolled into the part of the Scheme of which she was previously a member; this had a normal retirement date of 60. Mrs R said that contributions should have been collected in 2008 when there was a change in her contract.
12. TP responded in June 2011, under stage one of the Internal Disputes Resolution Procedure (**IDRP**). It said that as the opt out form was undated, it was invalid and Mrs R's employment from 1 September 2008 was pensionable. It said pension contribution and interest were due on Mrs R's employment. The letter also said that Mrs R could appeal to DfE should she disagree with the decision.
13. Several exchanges of correspondence took place between the parties after this point. In January 2013, TP wrote to Mrs R saying that as the Council did not consider that there had been a material change to her contract; her part-time employment would not be treated as pensionable until 1 June 2011.
14. In August 2013, Mrs R wrote to DfE saying that TP's 2011 decision had not been adhered to.
15. In a letter dated 5 September 2013, DfE accepted her appeal on the basis that there was a material change to Mrs R's employment in September 2008 which should have allowed her part-time employment to be regarded as pensionable. Mrs R's case was therefore referred back to TP for the collection of arrears of contributions plus interest.
16. On 22 April 2016, DfE provided its further comments to this Office. It said that in practice, the Scheme relied upon employers in the first instance to identify where there had been a change in contract. However, DfE also reserved the right to determine all questions arising under the 1997 regulations, and could not see any contradiction in expecting employers to make this decision while reserving the right to supplant this where it was satisfied there had been an incorrect decision.

17. The Council has disputed that there was a material change to Mrs R's employment. Therefore, they have said that her part time employment with them from 1 September 2008 was not automatically eligible to be treated as pensionable under the Scheme. They also maintain that DfE's decision has financial implications for them.

Adjudicator's Opinion

18. Mrs R's complaint was considered by one of our Adjudicators who concluded that Mrs R's pensionable service restarted on 1 September 2008, and accordingly, contributions should be paid from this date. The Adjudicator's findings are summarised briefly below:-
- DfE considered that from 1 September 2008, Mrs R was eligible for pensionable service as there was a material change to her contract.
 - The Regulations, as amended at 1 July 2007, set out that a person in part-time employment before this date would not be in pensionable employment unless they no longer remained in the same employment, or should they elect to join the Scheme.
 - Paragraph 6 of The Regulations states that an election has effect from the first day of the month after that in which the notice was given. However, paragraph 7 of The Regulations provides for an election to join the Scheme to have effect from a date earlier to that which is referred to in paragraph 6, if the Secretary of State so specifies.
 - DfE's decision, on behalf of the Secretary of State, of 5 September 2013, stated that there was a material change to Mrs R's employment which should have allowed Mrs R's part-time employment to be regarded as pensionable from 1 September 2008. Therefore, the Council should pay contributions, plus interest, to the Scheme on behalf of Mrs R from 1 September 2008.
 - The Council should also pay Mrs R £500 for the significant distress and inconvenience caused to her due to the matter having taken a considerable length of time to resolve.
19. TP accepted the Adjudicator's Opinion. The Council did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Council provided its further comments, which do not change the outcome. Mrs R provided her further comments. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mrs R and the Council for completeness.

Ombudsman's decision

20. The Council has said that following the Adjudicator's Opinion, it understood that the DfE has the final say on what defines a contract of employment. However, it could not understand why the Council was liable for financial interest and a compensation payment to Mrs R when employers were expected to determine this in the absence of a definition on what constitutes a change of contract. It said that it had administered the Scheme in good faith and could not have anticipated that its decision would be overruled.
21. As explained by the DfE in its letter of 22 April 2016, employers are expected to determine when a change of contract occurs in the first instance, hence, it may be amended by DfE in a subsequent decision. I do not consider this position unreasonable.
22. DfE has made a decision that Mrs R's pensionable service began on 1 September 2008 and that contributions plus interest are due from this date to 5 December 2011. Such a decision on the part of DfE is within the scope of the Regulations.
23. The Council contends that time delays in progressing the matter at DfE, TP and this Office have extended the period in which interest would be applied.
24. The interest period is as stated above, which concerns a period before the case was brought here. Therefore, I do not consider that the time taken by this Office would have a material impact on the interest that the Council has to pay.
25. Mrs R has said that the Council should be responsible for the payments of interest on her outstanding contributions, as well as the contributions which it owes, because of the delays it caused.
26. DfE has said that the Council is responsible for the debt that is owed to the Scheme: this includes the employer and employee underpaid contributions plus interest. Whilst Mrs R would like the Council to pay for the interest on her share of contributions, the Regulations, specifically Regulation C18 (1A), suggests that the employer should collect the underpaid employee contributions plus interest from the member. I understand that this is a matter for the Council and Mrs R to settle between themselves.
27. Therefore, I uphold Mrs R's complaint.

Directions

28. The Council shall pay contributions to the Scheme on behalf of Mrs R for the period 1 September 2008 to 5 December 2011.

29. The Council shall pay Mrs R £500 compensation for the significant distress and inconvenience which she has experienced for the delays in bringing this matter to a conclusion.

Anthony Arter

Pensions Ombudsman
22 March 2017