

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	Mr Ian Hargreaves
Scheme	Teachers' Pension Scheme (the Scheme)
Respondent(s)	Anglia Ruskin University (the University) Teachers' Pensions The Department for Education (the DfE)

Subject

Mr Hargreaves' complaint is that he was incorrectly informed by his employer that he had been automatically entered into the Scheme in April 2008. They then deducted pension contributions from his pay between April 2008 and July 2012 when it was discovered that he had not actually been entered into the Scheme, having opted-out previously, and thus did not accrue any pension entitlement for that period. Mr Hargreaves asks to be compensated for the loss of pension benefits he says he has suffered.

The Pensions Ombudsman's determination and short reasons

The complaint should be upheld against the University as they incorrectly informed Mr Hargreaves that he had been automatically entered into the Scheme. Mr Hargreaves was entitled to believe that he was a member of the Scheme based on the information that he was given and the deduction of contributions from his pay. The complaint should also be upheld against the DfE as they did not properly consider the matter when making a decision on whether to grant Mr Hargreaves retrospective admission to the Scheme.

DETAILED DETERMINATION

Material Facts

1. Mr Hargreaves has been employed as an hourly-paid lecturer (**HPL**) at the University since January 1996. He did not join the Scheme then. For HPL roles a contract is issued each semester and employees are paid for the hours that they were contracted to lecture. HPL roles can be pensionable but, at that time, such an employee needed to make an election to join the Scheme.
2. On 1 February 2003 Mr Hargreaves was given a one year full-time employment contract. As a full-time employee he would automatically have been entered into the Scheme, unless he completed an opt-out form. An opt-out form was signed on 1 May 2003 with an effective date of 1 February 2003. The notes provided with the opt-out form said that if an opted-out individual wished to re-join the Scheme then they should contact Teachers' Pensions for details and an election form. A Teachers' Pension reference number was created for Mr Hargreaves in order to set up a record for him and to process the opt-out form.
3. Mr Hargreaves returned to working as an HPL in February 2004.
4. In April 2008 he accepted a "fractional" post as a lecturer working 0.5 of the full-time equivalent (**the Salaried Post**). Mr Hargreaves says that he then decided to join the Scheme.
5. A letter of 15 April 2008 from the University said that they were pleased to provide a formal offer of employment to Mr Hargreaves. There was also a paragraph that said:

"General information about the Teachers' Pension Scheme is also enclosed. You will automatically become a member of the pension scheme but you may, if you wish, opt out by completing and returning the enclosed opt out form. Further information about Teachers' pension can be found at www.teacherspension.co.uk".
6. Mr Hargreaves was also provided with a booklet, called "Your Guide to the Teachers' Pensions Scheme" dated October 2007. Under the section titled "Joining the TPS" the relevant text said:

"Employment from 1 January 2007

You automatically become a member of the scheme if you are:

- + employed full-time or part-time;
- + between the ages of 18 and 75;
- + whether or not you have retired;
- ...

Part time employment where the contract started before 1 January 2007

For your service to be treated as pensionable you must have made a part time election. If you have not made an election and you change your contract or have a break in service after 1 January 2007 your future service will automatically be pensionable unless you opt out of the TPS.

Opting Out

You do not have to stay in the TPS. You can opt out of the scheme at any time in order to make your own pension arrangements...Application forms are available on the TP website. If you have opted out you can re-enter the scheme.

! If you have already opted out of the TPS you can opt back in."

7. Pension contributions were deducted from Mr Hargreaves' pay from the start of his Salaried Post service on 14 April 2008.
8. On 26 June 2008 the University completed and sent an online "TR6" form, "Notification of Teacher Appointment", via the Teachers' Pensions Online system. This gave Mr Hargreaves' teachers reference number, his other personal details and his date of appointment as 14 April 2008. The page provided to my office says at the top "Following record has been added to TR6".
9. In October 2009 Mr Hargreaves completed another opt-out form for a one semester HPL contract, which ran concurrently to the Salaried Post and started on 21 September 2009. After submitting this no pension contributions were paid from the HPL earnings but contributions continued to be taken in relation to the Salaried Post.
10. This opt-out form was completed on 6 October 2009 and the University gave the date from which it was to be effective as 21 September 2009 (the date of appointment for that HPL role). The form gave its purpose as being for those who decide they do not wish to be a member of the Scheme. It said that no further teaching employment would be pensionable, from the effective date of the election,

until the election was revoked. The form also said that Teachers' Pensions would write to the member with the effective date of the opt-out.

11. A letter of 9 December 2009 from Teachers' Pensions to Mr Hargreaves said that they had received his election to opt-out of the Scheme. It was a standard letter with four possible reasons for the election not being accepted. The one marked with a cross was:

“You have previously elected to Opt Out of the TPS (and your employer should not be deducting contributions)”.

12. Mr Hargreaves says that he first became aware of the problem with his Scheme membership in April or May 2012 when he was considering joining a voluntary redundancy scheme being run by the University. When he queried with Teachers' Pensions what effect redundancy would have on his pension he was told that they had no record of his enrolment in the Scheme. He then raised a query with his employer.
13. In an e-mail of 9 May 2012 the human resource section for the University told Mr Hargreaves they had been informed by Teachers' Pensions that Teachers' Pensions did have a record of his membership of the Scheme but that they recorded him as being opted-out from 1 February 2003. The University said that when Mr Hargreaves had started the Salaried Post in 2008 he did not complete an opt-out form and so was put into the Scheme by them. The deductions from his salary were however made in error by the University and Teachers' Pensions did not have any service and salary details for this role as Mr Hargreaves had not completed an election to re-join the Scheme. They also said that Mr Hargreaves had two options – he could take a refund of the contributions that he had paid or he could complete an opt-in form and pay the outstanding contributions on his HPL earnings only, as he had already paid the contributions due for his Salaried Post.
14. Mr Hargreaves responded the same day to say that he had never been provided with an election form for joining the Scheme and that he was informed he would be automatically made a member. While he had completed an opt-out form for his HPL contract in 2009 he had not done so for the Salaried Post. Contributions were being taken from his pay and as far as he was concerned he was a member of the Scheme from 2008.

15. In a further response of 15 May 2012 the University said that Teachers' Pensions did not allow for individuals to be opted-in to the Scheme for one role and opted-out for another. As he had opted-out in 2003 he needed to complete an opt-in form in 2008. The checks that they now carried out on the Teachers' Pensions website to check if lecturers were opted-in to the Scheme had not been implemented at that time. They apologised for the error in his employment offer letter. They asked Mr Hargreaves to now complete an opt-in form, should he wish to join the Scheme, and said that he had outstanding contributions relating to his HPL contract amounting to a total of £207.95. They also said that he had already paid £4,364.92 from the Salaried Post.
16. Mr Hargreaves responded on 21 May 2012 to say that he wished to pay the outstanding contributions. Arrangements were then made to deduct these from his May, June and July salary payments. The University then wrote to Teachers' Pensions to ask for retrospective membership for Mr Hargreaves.
17. On 28 May 2012 a letter from Teachers' Pensions to the University said that they could only accept contributions from 1 May 2012 onwards. Contributions paid prior to that date should be refunded. In order to have considered retrospective election contributions should have been deducted for the whole of the period, but as contributions were not deducted for the period 21 September 2009 to 30 April 2012 the earliest date that they could accept the election from was 1 May. (It is now clear that actually a retrospective claim could have been considered, although by the DfE and not Teachers' Pensions, and I comment on this in more detail below.)
18. On 17 July 2012 the University again wrote to Mr Hargreaves. They said that Teachers' Pensions would not accept a retrospective election to join the scheme as he had not paid contributions between September 2009 and April 2012 for his HPL roles. He could appeal the decision or take a refund of his contributions from April 2008 from both roles. The University subsequently sent an appeal letter to Teachers' Pensions on 18 July 2012.
19. Teachers' Pensions responded to the appeal on 26 July 2012 to say that they did not uphold it. It was correct that a refund of contributions be paid to Mr Hargreaves. Their view was that the error in deducting contributions lay with the University. They added that the University might want to consider purchasing additional pension on behalf of Mr Hargreaves (it was later clarified in January 2013 by Teachers' Pensions that this was not possible, because it could only be done while an active member of the Scheme). A later direct appeal from Mr Hargreaves to Teachers'

Pensions was also rejected for similar reasons under stage one of the dispute process.

20. Mr Hargreaves left the employment of the University on 31 August 2012 under a voluntary severance scheme.
21. On 17 October 2012 the University wrote to Mr Hargreaves and said that in addition to his refunded employee contributions they were also willing to pay him, as a gesture of goodwill, an additional £980 to cover the tax and national insurance deductions. The contributions figure was now given as £4,904.37.
22. On 28 May 2013 the union representative for Mr Hargreaves wrote to the University to say that he intended to appeal the decision from Teachers' Pensions again. However they also wished to ask the University if they were willing to make an offer to Mr Hargreaves in respect of his "ongoing financial loss". The University intimated in a response of the same day that they would be willing to explore, "without prejudice", a payment to partially recompense him.
23. On 27 June 2013 the University wrote back to the union representative to say that, further to a meeting the previous week, they had now obtained figures for one-half of Mr Hargreaves' loss (this they had worked out themselves). They said the loss was for the period between 1 April 2008 (which actually should have been 14 April) and 31 August 2012 and came, initially, to £22,593. This was based on 1,095 days of service and an average final salary of £34,924 giving an annual pension of £1,746. According to actuarial tables that they used, the number of years the pension was potentially payable for was 12.94 years, giving the figure of £22,593. This figure included the refund of contributions of £4,904.37. Shortly thereafter the offer was revised, to take into account a life expectancy figure of 13 years, to £22,698 and explained as being roughly half of the expected loss, as it was felt that the University was not solely to blame for the problems that occurred.
24. The second stage dispute response to Mr Hargreaves' appeal was from the DfE on 18 September 2013. They said that the University had not provided any details of a second appointment on 21 September 2009 on their annual returns. It appeared therefore that there was something amiss in the University's understanding of its responsibilities as an employer under the Scheme. They said that despite believing that he had been entered into the Scheme on 14 April 2008 he had opted-out in 2009. Even if it was assumed that this was only in relation to the HPL role it did not explain why he did not query the position when he was sent the letter of 9

December 2009. If the matter had been brought to the attention of Teachers' Pensions at that point then subject to documentary evidence being produced a retrospective opt-in from 14 April 2008 could have been considered. If granted this would have applied to all of his employment, i.e. both the HPL and Salaried roles. Their view was that Teachers' Pensions could not have been aware that contributions were being deducted from only some of his earnings. The DfE were satisfied that Teachers' Pensions had applied the regulations correctly and so the appeal was turned down.

Rules

25. Until 31 December 2006 part-time teachers and lecturers were required to elect for their service to be treated as pensionable. At the time Mr Hargreaves started employment in 1996 Regulation B2 of the Teachers' Superannuation (Consolidation) Regulations 1988 laid down this requirement and it continued under the Teachers' Pension Regulations 1997 under regulation B1 (4) and (6).
26. On 6 April 1988 the 1988 Regulations were amended to include provision for a member to opt out of and back into the Scheme under Regulation B5 and B6.
27. With effect from 1 January 2007 the 1997 regulations were amended such that a new part-time post commencing on or after that date automatically counted for pension purposes in the same way as full-time employment, thus requiring a teacher to have an opting-out election in place if they did not wish to be a member of the Scheme. However this was not the case for existing part-time employees and Regulation B1 (4) says:

“(4) A person who was in part-time employment on the 31st December 2006 is not, for so long as he remains in the same employment, in pensionable employment unless he has at some time made an election for the purposes of this paragraph...”
28. Regulations B5 (2) and B6 (1) of the 1997 Regulations say:

“Election for employment not to be pensionable

B5. (1) A person who-

 - (a) is in pensionable employment, or
 - (b) is not in pensionable employment but expects to enter an employment which would otherwise be pensionable employment,

may, at any time, by giving written notice to the Secretary of State, make an election under this regulation.

(2) As from the date from which the election has effect—

(a) where paragraph 1(a) applies, the person ceases to be in pensionable employment for all purposes of these Regulations, and

(b) in any case, subject to Regulation B6, no subsequent employment of his is pensionable employment.

...

Resumption of pensionable status

B6. (1) A person who has made an election under regulation B5, who has since been in employment which would otherwise have been pensionable employment and who—

(a) is in such employment, or

(b) is not in, but expects to enter, such employment,

may at any time, by giving written notice to the Secretary of State, make an election under this regulation.

(2) As from the date on which the election has effect, subject to regulations B1(2) and (4) and B5, any employment on and after that date is pensionable employment if it is such employment by virtue of regulations B1 to B4.

(3) Where paragraph 1(a) applies, an election under this regulation—

(a) if the notice was given within 3 months after the start of any period of employment which would otherwise have been pensionable, has effect as from the first day of that employment, and

(b) in any other case, has effect from the first day of the month after that in which the notice was given.

(4) Where paragraph 1(b) applies, the election has effect as from the day before that on which the person first enters any employment which would otherwise be pensionable.”

29. Regulation 10 of the 2010 Regulations say:

“10 Election for employment to be pensionable

(1) A person mentioned in paragraph (2) may make an election under this regulation by giving written notice to the Secretary of State.

(2) The persons are-

(a) a person in, or about to enter, employment in a capacity mentioned in Schedule 2 who has previously made an election under regulation 9 (election for employment not to be pensionable);

(b) a person in, or about to enter, employment in a capacity mentioned in Part 2 or 3 of Schedule 2;

(c) a person in part-time employment which is not pensionable by virtue of regulation 7(6);

(d) a person in part- or full-time employment which is not pensionable by virtue of regulation 7(8).

(3) An election has effect from the first day of the month after the month in which the notice is given.

(4) But where the election is made by a person mentioned in paragraph (2)(a) or (b) who gives notice before or within 3 months after the start of employment in a capacity mentioned in Schedule 2, the election has effect from the first day of that employment.”

30. Regulation H7 of the 1997 Regulations says (the same wording exists under Regulation 133 of the 2010 Regulations):

“H7 Extension of time

The Secretary of State may in any particular case extend, or treat as having been extended, the time within which anything is required or authorised to be done under these Regulations.”

Summary of Mr Hargreaves’ position

31. He was told on accepting the Salaried Post that he would be automatically entered into the Scheme. He had no idea and was not told that his earlier election to opt-out of the Scheme would have any relevance to him joining the Scheme. There was no reason to believe that the information and documents he was given in April 2008

- were incorrect. He had effectively agreed to join the Scheme by not completing the opt-out form provided and it was his intention to join the Scheme at that time.
32. It was not his responsibility to study any changes to the Scheme's regulations in 2007 when taking up the post. The University had admitted that this was an error on their part and have since changed their system in relation to HPL lecturers.
 33. The University knew that he had opted-out of the Scheme in 2003 as he had completed that form at their request. He had been in continuous employment between 1996 and 2008 and they had not deducted contributions since 2003. They thus must have known he was opted-out. He adds that his severance payment was based on his entire service from 1996 to 2012, proving his service was continuous.
 34. He assumed that the opt-out form that arrived with his September 2009 HPL contract was solely for that employment. There was no reason to suspect otherwise as the deductions from the Salaried Post continued along with the University's own contributions. Also the University seemed to be sure that he could opt-out of one teaching role while remaining a member of the Scheme for another. He could not therefore be aware of any error. He does not agree with the stance of Teachers' Pensions that it would have been prudent for him to contact them in 2008 when contribution deductions were made from his salary, as this is what he was told would happen by his employer and what he wanted to happen.
 35. If the issue had been brought to his attention, by either respondent, or the University had acted correctly and stopped deducting his contributions, he would have queried the matter and the situation would have been corrected. Teachers' Pensions also could have queried with him or the University why they were receiving these contributions and again the situation could have been resolved. They received a yearly audit from the University in which he was included, this fact being confirmed in a meeting with their HR services on 20 June 2013.
 36. He would have made contributions via his HPL role as well if he had been made aware that he needed to. (Under the Regulations governing the Scheme either all roles are treated as pensionable or none are pensionable).
 37. In 2007 the Regulations were changed and so the offer made by the University to automatically enrol him in the Scheme could not take place. He did not understand all the rules and regulations surrounding the Scheme. Also he did not read all the documents and booklets that he was sent and he did not research any changes that

had occurred between opting-out in 2003 and taking on the Salaried Post in 2008. He believed that the documents and information that the University gave him, such as the letter telling him of being automatically entered, were correct.

38. Teachers' Pensions had also changed their position on the matter between May and July 2012 initially accepting further contributions from him, thus accepting him into the Scheme, and then later rejecting them. He had not been informed that it was possible to buy added years.
39. He does not recall receiving the letter of 9 December 2009. He also cannot recall whether he responded to this letter. At that time his work situation was very stressful and busy due to his area being short staffed. He took on some extra HPL hours to cover a missing member of staff. There would have been little time to deal with the letter but he believes that he would have either called or emailed the University's HR team to confirm that he was entered in the Scheme. He has no evidence of this request and no longer has access to any emails from that time.
40. His view is that the letter of 9 December 2009 did not alert him to the problem with his membership or, if it did, then the University informed him that he was entered in the Scheme as they clearly thought that it was possible to opt-out from one employment but not another. The information in this letter conflicted with the previous information that he had been automatically admitted. It now appears that Teachers' Pensions were unaware of his contributions from his Salaried Post at that time but he would not have known that.
41. In relation to the 2009 opt-out form he did not understand that it would opt him out of the Scheme completely. This situation had occurred a year earlier where he had been paid extra HPL hours for such a role in 2008 without having contributions deducted, whilst concurrently having deductions made from the Salaried Post. (Mr Hargreaves has provided my office with payslips from that time that show no deductions from his 2008 HPL role but deductions from the Salaried Post. He says that he was not asked to complete an opt-out form at that time.) He does not know why the University did not automatically deduct contributions for the 2008 HPL role as they should have done but this would have lead him to believe that it was possible to do the same in 2009, i.e. take contributions from one role and not the other.
42. In response to the suggestion that documentary evidence was not provided of his desire to join the Scheme he says that both the University's appeal and his appeals to both Teachers' Pensions and the DfE and the earlier email exchanges were evidence

of his request to reconsider his entry into the Scheme. He found the DfE comment that there was no such evidence bewildering.

43. All the parties had made errors in the process but he was the only one that was being affected by being asked to accept a large loss. He does not agree that he was equally responsible with the University. And the fact that Teachers' Pensions took no responsibility for their part meant he had to take a greater share of the loss. The offer from the University was, they said, for half of the calculated loss. But he had paid contributions of £4,904 and the University had contributed £10,651. So actually they were only accepting a loss of £7,143, whereas he was accepting a loss of £22,698.
44. Mr Hargreaves says he has no preference for retrospective admission over a cash settlement. He was however happy with the total figure calculated by the University in relation to direct compensation (£45,396). He would also accept that this amount may need to be adjusted to the service level as set out by DfE and amended accordingly. However he does not believe that his HPL role of 2008 has been taken into account thus far in any workings.

Summary of Teachers' Pensions' position

45. The Scheme was a statutory scheme and they are bound by the regulations that apply. Regulation B6 of the Teachers' Pension Scheme Regulations 1997 says that a person who has opted-out of the TPS may at any time, by giving written notice, make an election to re-join. This provision still exists under regulation 9 of the 2010 regulations. It was Regulations B5 (2) and B6 (1) of the 1997 Regulations (as amended from 1 January 2007) that apply to this case and meant that Mr Hargreaves had not become a member of the Scheme.
46. The explanatory notes given with the opt-out form say that such an election has effect from the first day of the month after that in which notice is given, unless notice was given within three months of the start of any period of employment which would otherwise have been pensionable, when it would have effect from the first day of employment. There is provision for the election to have effect from an earlier date where the employment in the intervening period could have been pensionable and all contributions have been collected contemporaneously.
47. The form given to Mr Hargreaves in 2003 had a section that said by completing it the member confirmed that they had read the accompanying notes and were aware that

all future service would not be reckonable under the Scheme unless the member later decided to opt back into the Scheme. As Mr Hargreaves knew that he had opted-out of the Scheme it would have been prudent for him to contact Teachers' Pensions when the University started to deduct contributions in 2008. The change to the Regulations would not have affected this situation.

48. It was apparent that the University misunderstood the change to the Scheme's Regulations on 1 January 2007 and incorrectly deducted contributions from Mr Hargreaves' earnings. It was not clear why they did not apply the same misunderstanding to the HPL role, with such roles being pensionable since 1 May 1995. It was because contributions were not deducted from all of Mr Hargreaves' earnings at the appropriate time that it was not possible for him to make a retrospective election to opt-in from April 2008. Although contributions had been made from most of his earnings (i.e. from the Salaried Post) in the absence of a valid election to opt-in his service from 14 April 2008 was correctly recorded as opted-out and remains non-pensionable. Therefore as contributions were deducted in error, of which Teachers' Pensions were unaware, they needed to be refunded.
49. It was clear Mr Hargreaves opted-out of the Scheme in 2003 as he did not wish to be a member. It was also clear that believing that he had been entered into the Scheme again in April 2008 he tried to opt-out again in 2009. It was not clear why Mr Hargreaves, after receiving the Teachers' Pensions letter of 9 December 2009, did not contact the University to say that Teachers' Pensions considered him as already being opted-out of the Scheme. Had the issue been brought to their attention or Teachers' Pensions at that point options for addressing the matter would have been available including, subject to documentary evidence being produced, considering a retrospective opt-in. Members could not opt-out of individual strands of employment however and so either all his service or none would have been pensionable.
50. Mr Hargreaves has not at any time been sent any annual benefit statements because he has no entitlement to retirement benefits from the Scheme.
51. Regardless of any assumptions Mr Hargreaves made about the situation the fact is that he opted-out from 1 February 2003 and did not subsequently opt back in until May 2012. A teacher can opt out of the Scheme at any time, even if they are not currently in pensionable teaching service. Mr Hargreaves now has 61 days of reckonable service in the Scheme from 1 May 2012 with no reckonable service before then. As he left service on 31 August 2012 he had not accrued sufficient

service to qualify for retirement benefits and is only entitled to a repayment of contributions for that period, as being over retirement age he would not be entitled to a transfer value alternative. They add that a repayment is different from a refund, which happens contributions that are deducted in error are returned.

52. Teachers' Pensions could not have been aware that contributions were being deducted from some of Mr Hargreaves' earnings. They have not recorded contributions for individual teachers since 1990, with the agreement of the National Audit Office, as there is no direct link between contributions received and the benefits paid out by the Scheme.
53. Deducting the correct contributions, remitting these to Teachers' Pensions, and providing accurate salary and service details on annual returns were the responsibility of employers. It would appear that there was something amiss in the University's understanding of its responsibilities as an accepted employer in the Scheme and in providing accurate service and salary details on their annual returns. They had failed to take account of the 2003 election to opt-out of the Scheme and also failed to provide details of the HPL role on their annual returns. They should have known that an opt-in form was needed in order to resume contributions. Mr Hargreaves' records did not show continuous employment from 2003 but they did have some details of service from April 2006. Teachers' Pension was not an employer and is reliant on accurate information from employers. They are happy that they had correctly recorded the service details that they had been given, i.e. as opted-out service.
54. Regarding starter procedures the correct process is for an employer to submit form TR6 for each new appointment. On receipt of this form an Appointment Statement is automatically produced and sent to the employer. This provides, among other items, significant dates with regard to the teacher's position in the Scheme such as opting-out, making a part-time election or opting back in. The onus is then on the employer to deduct (or not deduct) contributions in accordance with the Teachers' status in the Scheme. But the fact that contributions are deducted alone cannot place someone in the Scheme. Once an opt-out is noted all future service details received by them is automatically recorded as opted-out.
55. At the time Mr Hargreaves opted out of the Scheme in 2003 the University had not advised of his appointment on form TR6. They had no knowledge of his employment at that time. They received no further communications until December 2009.

56. They do not have a record of receiving a TR6 form in 2008, but they are only required to keep copies of these for three years and so would not hold any from 2008. This form is used by employers to advise Teachers' Pensions of a new appointment to an establishment and to request information about the new employee, such as their service history and position in relation to Scheme membership. Its purpose is not to notify them of entry into the Scheme. An Appointment Statement would have been automatically issued by their system in mid-2008, but again they have not retained a copy of this. In Mr Hargreaves' case it would have shown that he had opted-out of the Scheme with effect from 1 February 2003.
57. With regard to the subject of incorrect information being given by them to the University about the possibility of retrospective admission they have a note of a telephone call from 26 April 2012 during which Mr Hargreaves was told to speak to his employer about the matter. After reviewing the call the question of retrospection only related to the University confirming that contributions had been deducted from salary. They received another call on 9 May 2012. They had no details of any HPL roles and the fact that he had not paid contributions on these roles was not mentioned. The conversations related only to service for which they held details, retrospection was therefore possible on receipt of confirmation that contributions had been deducted. The University's letter was received on 25 May 2012 and this explained that contributions had not been paid timeously. They therefore responded on 28 May to say retrospective admission was not possible. They did not therefore provide any incorrect information about the possibility of paying contributions on the HPL earnings (in effect Teachers' Pensions are saying that the response that they initially gave was correct based on the information that they were given at that time – and once they were given the full picture they changed their response).
58. A retrospective part-time election has never been the point at issue in Mr Hargreaves' case; the problem is solely about contributions being deducted in error following an opt-out. If Mr Hargreaves had opted back in when he was appointed to the Salaried Post his service would have been pensionable without the need for a part-time election.
59. The October 2007 booklet contained the statement "If you have opted out of the TPS you can opt back in". Knowing he had previously opted out of the Scheme, this should have prompted Mr Hargreaves to ask whether this had any effect on his new employment.

60. My office wrote to Teachers' Pensions and asked whether it would be possible to admit Mr Hargreaves to the Scheme retrospectively if a complaint were to be upheld against the University only. In response they said that they were bound by the provisions of the Teachers' Pensions Regulations and therefore would not be able to amend his record to retrospectively place him in the Scheme.

Summary of the University's position

61. Mr Hargreaves was employed as a full-time lecturer between 1 February 2003 and 31 January 2004 before returning to HPL roles. He took up the Salaried Post on 14 April 2008. He was automatically entered into the Scheme as they were not alerted by their own systems or by Mr Hargreaves himself that he had previously opted-out. They would have asked him to complete the relevant documentation if he had informed them of this. He should have completed the (then) form 261 to become a member as set out in the booklet "Your guide to the Teachers' Pension Scheme" provided to him. That information was also available via the website link given to him.
62. At that time the University's starter process did not include checking with Teachers' Pensions to see whether there had been a previous election to opt-out. Employees would let them know if they had previously opted-out of the Scheme.
63. As Mr Hargreaves did not complete an opt-out form in 2008 they commenced deductions from his salary. A form TR6 was also completed and sent to Teachers' Pensions in June 2008. During the period of Mr Hargreaves' employment both he and the University assumed that he was a member of the Scheme and both employee and employer contributions were paid. In relation to annual returns sent to Teachers' Pensions there were returns including Mr Hargreaves' details sent in 2007/08, 2008/09, 2009/10 and 2010/11. They believe that from 2007/08 there was a requirement to send returns for all eligible staff regardless of whether they had opted-out of the scheme or not.
64. They were unable to confirm whether they received an Appointment Statement and there was not copy of it on Mr Hargreaves' file where they would expect to find it. part of their starter process is to keep a copy of this on the file and note receipt on an internal checklist attached to the file. The appropriate box has not been ticked to indicate receipt, but unfortunately it also appears that this was not followed up at the time (a copy of this checklist has not actually been provided to my office).

65. In 2009 Mr Hargreaves was sent an additional HPL contract to undertake some additional work via one of the University's faculty offices who issued a contract to him. As part of their standard procedure an opt-out form was also provided. They should have picked up at that time that a member cannot be a member of the Scheme for one role and not another. No contributions were taken from this role.
66. In respect of the 9 December 2009 letter to Mr Hargreaves they had not been made aware of this correspondence by either party. Had they been informed it might have triggered an alert that all was not right.
67. When it was discovered that there was a problem they had been given the impression by Teachers' Pensions in 2012 that Mr Hargreaves could make a retrospective election to re-join the Scheme and pay any missing contributions. They were subsequently told that this was not the case and that a refund had to be paid. Mr Hargreaves asked the University to postpone refunding his contributions pending his appeal and so they still hold his personal contributions. The contributions paid by the University are still held by Teachers' Pensions.
68. Teachers' Pensions also suggested purchasing additional pension for Mr Hargreaves. The University wrote to them regarding this matter. Later it became clear that this needed to be done while he was still in employment and so this was not possible as he had left their employment by then.
69. This was not a case where there was simply one party at fault and there should be some shared responsibility. An offer was made to Mr Hargreaves, as well as a proposal to discuss a slightly improved offer, which he declined. It remains their view that this was an exceptional case and it was anticipated that Teachers' Pensions would allow a retrospective election on appeal, but they did not. In response to the DfE's comments that evidence of the desire to join the Scheme was not provided this was evidenced in their two letters of 24 May 2012 and 18 July 2012 as well as Mr Hargreaves' own appeals. In relation to not refunding the member's contributions this decision was taken after a request from Mr Hargreaves himself to keep a hold of them for the time being.
70. They disagreed with comments from the Scheme's representatives that the University regularly had administration problems. This had not been raised with them previously and they had only had one other complaint, which was different in nature to Mr Hargreaves's complaint.

71. In relation to the offer previously made this was based on 1,095 days of pensionable service at an average final salary of £34,924. They used the calculator from the Teachers' Pensions Online site to get to an annual pension of £1,746 a year. There was no lump sum in addition as all service was post January 2007. They then used life expectancy figures from the Scheme's annual accounts of 25.1 years to come to the total figure and divided this by two as they felt there was a shared responsibility.
72. After viewing the response from the DfE they now agree with the assessment of service put forward by them. This would change the calculation of annual benefits had Mr Hargreaves' service been pensionable. Any calculation of loss would therefore need to be amended.

Summary of the DfE's position

73. The DfE say that it was they who had the delegated powers, from the Secretary of State, to decide whether a retrospective election could be accepted outside of the normal three month period. They also said that there was actually no provision within the Scheme's regulations requiring contributions to be collected contemporaneously in order for a retrospective election to be accepted. Where however past contributions had been collected contemporaneously it was accepted by the DfE that admission could be allowed, other things being equal.
74. The reasons they have given for not exercising discretion are:
- Discretion may only be considered in exceptional cases where it was clear that the teacher had been misinformed and acted in good faith.
 - Mr Hargreaves "selected against" the Scheme in 2003 when opting-out. He should have known from that time that he was opted-out and could not contribute.
 - On the opt-out form of 2003 Mr Hargreaves was told that his future service would not be pensionable. Knowing the correct procedure he did not query the position when the University started deducting contributions in 2008 without his having gone through the same process to opt back in.
 - The University gave Mr Hargreaves a copy of the Scheme booklet in April 2008 and this would have included information on how an opted-out member should proceed if he wished to rejoin the Scheme

- The position was underlined in the letter of 9 December 2009, which was not queried.
 - Discretion should not be exercised for administrative ease or to rectify an employer's administration error.
 - There was no adequate explanation from the University as to why they deducted contributions from 2008 when they knew Mr Hargreaves was opted-out from 2003. They said that the University had either failed to submit a form TR6 (they appear to have overlooked the evidence that it had been submitted) or failed to act on the Appointment Statement that would have been provided in response.
75. The DfE said, in one submission, that despite the incorrect actions from the University, if they had provided documentary evidence of Mr Hargreaves' desire to rejoin the Scheme discretion could have been exercised to allow this.
76. They add that Mr Hargreaves would have been credited with 2 years and 71 days' reckonable service in the Scheme, and not the amount quoted by the University when working out compensation.
77. In relation to refunds of contributions these are made by the employer who then takes credit for both their and the teacher's share of the contributions when making their next monthly remittance of contributions to Teachers' Pensions.

Conclusions

78. I have considered whether the letter from Teachers' Pensions of 9 December 2009 should have alerted Mr Hargreaves to the problem with his membership, which in turn would affect whether his application to my office is within the time limits for accepting an application. In my view the letter, if he received it, was not enough to alert him to the problem. The preceding opt-out form was completed by both Mr Hargreaves and the University. It did say that the form would opt him out of all future employment. However the University clearly thought that it was possible to opt-out in relation to one role only (in this case the HPL role) and so it was not unreasonable for Mr Hargreaves to come to the same view. Moreover he had previously been opted-out of an HPL role in 2008 (albeit without being asked for a form) when contributions continued from the Salaried Post. The same situation in effect happened in late 2009 – contributions were taken from one role and not the other. So matters were proceeding exactly as Mr Hargreaves might reasonably have expected them to, with no reason to raise a query. It was a standard letter, and the

answer was presumably aimed at people in consecutive employments who had opted out once, and were now opting out again. The phrase “and your employer should not be deducting contributions” was meant to refer to the employment that the purported opt-out related to and Mr Hargreaves could reasonably have read it as that.

79. The University suggests that the booklet provided to Mr Hargreaves in 2008 would have alerted him to the problem. I do not think that the wording of that booklet clearly covered his situation. If he fell under the “new employment from 1 January 2007 category” then his employment would be automatically pensionable. If he fell under the “Part time employment where the contract started before 1 January 2007” category, which seems more appropriate given the continuous nature of his employment, then my reading of this would also again suggest that his service would be automatically pensionable (unless he opted out, which he did not) since there was a change in his contract after 1 January 2007 when he took up the Salaried Post – that was clearly a change in contract that took place after 1 January 2007.
80. The respondents also point to the “Opting Out” section. This does say that a member that has already opted-out can opt back in. But there is no wording in the booklet that refers to the need to complete a “form 261”, or any other form, as was said by the University. It does not say, or make clear, that a member who had previously opted-out could not be automatically placed into the Scheme in accordance with the prior paragraphs and *must* complete an election to join. But that is the correct position under the Regulations governing the Scheme. So the booklet also did not describe the position that Mr Hargreaves was in.
81. Teachers’ Pensions and the DfE say that Mr Hargreaves should have been aware of a problem from the earlier opt-out form he completed in 2003. This did say that he would need to contact Teachers’ Pensions and obtain an election form should he wish to re-join at a later date. But I consider that between the offer letter from his employer and the Scheme booklet, which spelled out changes in the Regulations from 2007 in relation to admittance, he was entitled to believe that the more recent information superseded the older.
82. The University misunderstood the effect of the change in regulations. They thought that Mr Hargreaves could be automatically admitted to the Scheme when he could not, due to the opt-out form. They say that Teachers’ Pensions could have picked this up when they submitted the TR6 form in 2008. The University have a copy of the

submission sent, which has confirmation of the record being added to the then online system. I am happy to accept that this notification was sent to Teachers' Pensions, who no longer hold records going back that far.

83. Initially it was said that Teachers' Pensions could have picked up the problem at this stage but the University now accepts that the purpose of this form is not notification of entry to the Scheme but of a new teaching appointment. An Appointment Statement should have been generated which would have highlighted that Mr Hargreaves was opted-out. Neither party is able to produce a copy of such a statement. If pressed I would conclude that it was sent to the University as an established system was in place and it was more likely than not that it worked and a response was sent. The University say their own records suggest that the Statement was not received. But even if that were so I would have expected them to follow the matter up, which they did not.
84. In my judgment the fault lies mainly with the University. Mr Hargreaves was entitled to believe that he was a member of the Scheme. Even though he may not have been sent annual statements by Teachers' Pensions he had a letter confirming his entry and asking that he complete an opt-out form if he did not want to be a member (indeed as he had *not* previously been a member of the Scheme he likely would have been unaware that annual statements were typically sent). In light of the wording that he needed to complete an opt-out form I see no reason for him to have raised the issue of his earlier opt-out form from 2003 with his employer. And when contributions started to be deducted there was no obvious reason to believe that anything was wrong. (In passing I would add that there is also some doubt in my mind about whether the University already knew of Mr Hargreaves' previous opt-out. The employer section of the 2003 opt-out form was completed by the same member of staff that has been responding to my office. And also the TR6 form had entered on it the Teachers' Pensions reference for Mr Hargreaves. That was given to him in 2003 after he completed the opt-out and since there has been no other correspondence between then and April 2008 it is hard to know how the University became aware of this reference number except other than by way of the opt-out correspondence. But anyway they did not alert him to a problem and continued to deduct contributions to 2012).
85. In relation to the complaint against Teachers' Pensions I do not consider that any of their actions amounted to maladministration and they have largely correctly

interpreted the Regulations. There was a small issue in that they told my office that retrospective admission was not possible, when in fact it was with the agreement of the DfE, but nothing much turns on this in the end. They also thought for quite some time that retrospective access was only possible where contemporaneous collection of contributions had taken place – but now concede that there was no such requirement within the Scheme’s Regulations. Therefore I do not uphold the complaint against them. I accept that the deduction and payment of pension contributions would not have triggered any kind of alert from them as these are not apportioned to individual members. And I accept that the fact that they said, in response to the 2009 opt-out form, that contributions should not be deducted from Mr Hargreaves’ pay did not mean that they were aware that contributions were actually being by the University or that they should have run any further enquiries at that point.

86. I note that there was a suggestion that after the matter came to light that there was incorrect information given by Teachers’ Pensions to the other parties in relation to retrospective admission to the Scheme. It appears that they did initially say that retrospective admission was possible if contemporaneous contributions had been made. But at that point they only appear to have been aware of one of Mr Hargreaves’ employments rather than both. Once they became aware that there were two employments they immediately set the matter straight by saying that contributions needed to have been paid under all roles as all employments were pensionable or none. I am satisfied that this was just a misunderstanding between the parties.
87. Mr Hargreaves could and would have been admitted to the Scheme if the University had correctly assessed that he could not be automatically entered into the Scheme and brought to his attention the need for an election form to be completed. He should therefore be compensated by the University for the loss of pension benefits. The difficulty here is that it could still be possible for him to be admitted to the Scheme – and so whether he is compensated directly or via payments from the Scheme will depend on the decision from the DfE.

The DfE’s decision

88. The letter of 18 September 2013 from the DfE is not clear that exercising discretion to allow retrospective admission was considered at that point in time. It simply said that if the matter had been brought to their attention earlier in 2009 then

retrospective admission could have been considered. It was only when my office asked that they said that exercising discretion had actually been considered at the time.

89. Some of the reasons given by DfE might not appear unreasonable in themselves, but I am not satisfied that they did in fact approach the matter at the time with an open mind. For example, they say that Mr Hargreaves had “selected against” the Scheme in 2003. But I do not see that as relevant to a decision on whether he should have been allowed backdated membership from 2008 when he could have joined and he thought he had been automatically entered by his employer - especially given that most of the contributions that would have been due had been paid by Mr Hargreaves and the University. I am not quite sure what DfE mean by “selected against” in context. It is a term with special meaning in insurance – but I do not think they are using it in that sense. If they just mean that he had chosen not to join, then since he was perfectly entitled to change his mind, the initial choice is irrelevant.
90. Also the DfE have not taken into account that for some time the Scheme’s representatives themselves thought that backdating was only possible where there had been contemporaneous collection of contributions. But that was not actually a requirement under the Regulations.
91. In relation to their view that it needed to be clear that Mr Hargreaves had been misinformed and acted in good faith, I have found that he would not have taken the 2009 letter as meaning that something was seriously amiss, and I am satisfied that he was acting in good faith.
92. They also said that Mr Hargreaves, having opted-out in 2003, should have known that he would need to go through a similar process in order to opt back in. But he received a letter from his employer saying that the only action he needed to take was if he did not wish to join the Scheme. In addition the Scheme’s Regulations had changed in that many employees would not be automatically enrolled into the Scheme and I do not consider that the member’s booklet covered Mr Hargreaves’ position exactly. I accept that the booklet cannot cover every situation, but as I have said, it did not cover Mr Hargreaves’ position and (even without the letter from his employer) it would have led him to think that he would be automatically entered into the Scheme having changed his contract after 1 January 2007.
93. The DfE referred also to documentary evidence of his wish to rejoin the Scheme not being provided. It is not clear exactly what evidence the DfE wished to receive. The

basis of the various appeals was clearly to be allowed retrospective access to the Scheme. Possibly they mean that an opt-in form was required. There would be no such form from 2008 as Mr Hargreaves was told he needed to do nothing unless he decided that he did not wish to join the Scheme. And once the problem was discovered in May 2012 the relevant form was sent to Mr Hargreaves to complete. The issue was simply whether this could be accepted to take effect without the three month limit applying. There could not be any earlier evidence, although the fact that Mr Hargreaves was happy with deductions being made from his salary (along with not completing an opt-out form) is arguably evidence enough that he wished to be a member of the Scheme.

94. I therefore consider that the decision making process by the DfE was flawed and uphold the complaint against them. To the extent that they have already considered whether Mr Hargreaves should be granted retrospective access, they did so not in the context of the findings in this determination. I shall therefore direct them to reconsider.

Redress

95. Mr Hargreaves should be put, as close as possible, in the position that he would have been in without the maladministration that I have found. Since retrospective admission is still possible, subject to a decision from the DfE, I make directions for that remedy in the first instance.
96. It will not be known, until the DfE reconsider their decision, whether Mr Hargreaves can now be retrospectively admitted into the Scheme. And since I am upholding the complaint against the University the directions that I make will of course be dependent on that, as yet unknown, decision.
97. If the DfE decides against retrospective admission Mr Hargreaves will need to be compensated directly for his loss. His personal contributions are still held by the University, except for those contributions that relate to service after 1 May 2012 (the date from which an election was accepted by Teachers' Pensions) – there will be no need for those to be repaid to him as he will receive compensation for the benefits he should have had in respect of them. In turn Teachers' Pensions still hold the employer contributions paid by the University – and I assume that they will be repaid.
98. A pragmatic solution to compensation will be for the University to recalculate the benefits that Mr Hargreaves would have accrued at his date of leaving on 31 August

2012 on the revised service referred to by the DfE (which I understand that all the parties are in agreement with) but to also include the HPL role that Mr Hargreaves undertook in 2008. The University will then use the same methodology as that they employed before, which Mr Hargreaves has told my office that he is happy with, but this time without halving the final resulting amount.

Directions

99. Within 28 days of the date of this Determination, the DfE are to consider exercising discretion to allow Mr Hargreaves membership of the Scheme from the date of the start of the Salaried Post 2008 in relation to all of his employment with the University. They are to do so taking into account that if matters had proceeded as they should have, he could have made an active decision to join at that point and that I have found that he has acted in good faith throughout.
100. In the event that the DfE decide in Mr Hargreaves' favour, and Mr Hargreaves pays the necessary further contributions on demand then:
 - The University is to take all steps that the DfE and/or Teachers' Pensions require in order to ensure that his membership is effective.
 - Within 21 days of receiving the outstanding contributions Teachers' Pensions shall write to Mr Hargreaves with details of his entitlement under the Scheme and ask him to select his benefit options, if any.
 - Once Mr Hargreaves has responded with his options Teachers' Pensions will, within 21 days, commence payments to him with interest on any past instalments of pension or cash sum. The interest referred to above shall be calculated at the base rate for the time being quoted by the reference banks.
 - Within 21 days of being told by Teachers' Pensions how much interest has been added the University shall pay that sum to Teachers' Pensions.
101. In the event that the DfE does not decide in Mr Hargreaves' favour then:
 - Within 28 days of the date of this Determination the University are to calculate a lump sum compensation payment in line with paragraph 98.
 - Within 14 days of performing the calculation the University will make the compensation payment to Mr Hargreaves with interest from Mr Hargreaves' normal retirement date. The interest shall be calculated at the base rate for the time being quoted by the reference banks.

- 102. In either event, within 28 days of the date of this Determination the University will pay Mr Hargreaves £350 in respect of the distress and inconvenience caused.
- 103. In the event of any difficulty or dispute in carrying out these directions, any party may revert to me for further directions.

Tony King
Pensions Ombudsman

11 December 2014