

## Ombudsman's Determination

Applicant	Mr E
Scheme	Teachers' Pension Scheme ( <b>the Scheme</b> )
Respondents	Teachers' Pensions ( <b>TP</b> ) Islington Borough Council ( <b>the Council</b> )

### Complaint Summary

Mr E is unhappy that TP is claiming his pension has been overpaid, and is seeking the return of these overpaid funds. He says he had no reason to doubt that the figures provided to him at retirement were correct, and would not have retired at that point had he known the correct position.

### Summary of the Ombudsman's Determination and reasons

The complaint is partly upheld against TP and the Council. I do not find that Mr E has any defences available to the recovery of the overpaid funds.

TP shall however pay Mr E £1,000 in recognition of the serious distress and inconvenience caused to him by its error.

Also, the Council shall pay Mr E £500 in recognition of the significant distress and inconvenience caused to him by its failure to respond to his complaint.

## Detailed Determination

### Material facts

1. Mr E worked as a Headteacher at a school.
2. In the early part of 2014, Mr E began making enquiries in relation to retiring later that year. Between April and July 2014, there were various exchanges between Mr E and TP regarding the benefit estimates he had received, in which, among other things, he sought to clarify the value of his final benefits.
3. TP received Mr E's application for age retirement benefits on 10 April 2014.
4. On 23 April 2014, Mr E sent the following query to TP:

"Please kindly explain the significant difference for estimated benefits for 2013 up and 2014 down. There is a reduction in pension estimates down to £46,014.66 and lump sum down to £138,043.98, from higher 2013 figures.

Please as an estimate can you let me know the true picture when LB Islington have sent their return to the agency, as I retire August 2014. Am I able to have a copy of their figures for employment if appropriate to check? Thank you.

There will be a further additional salary payment in due course, prior to retirement [sic] Will this be factored into pension..."

5. On 7 May 2014, TP replied saying:

"Thank you for your secure message.

I should begin by explaining that the average salary used in the calculation of your benefits is the better of

The last 365 days, or  
The best 1095 days out of the last ten years.

Your records shows [sic] your annual salary rose from £94105 to £113072 per annum on 1 April 2012, and then reduced to £97072 per annum on 1 April 2013.

Clearly the higher salary figures would be used when the last 364 days was the best option, and when this is no longer the case, and the best 1095 days out of the last ten years are used, the average salary figure will obviously be less.

The annual returns appear to be submitted in July of each following year, however your details for the period 1.04.2013 [sic] to 31.08.2014 have been updated with the information your employer has provided on your benefits application."

6. On 28 July 2014, TP wrote to the Payroll team at the Council regarding Mr E's application. It said:

"Above member has completed an application form for retirement benefits. Before calculations can be made please can you explain the reason in fluctuation in salary below?"

7. In this communication, it cited the salary figures supplied for the period between April 2007 and August 2014.

8. Communications provided by the Council suggest that it initially considered Mr E's salary between 2012 and 2013 had changed due to an allowance for retention or a discretionary payment he had received. On 15 August 2014, TP wrote to Mr E saying:

"I am pleased to confirm that your pension benefits have been calculated and made ready for payment. Full details are provided on the statement enclosed with this letter. These have been calculated using the service and salary information supplied to us by your employer."

9. In the enclosed statement of benefits (**the 2014 statement**), the following details were recorded:

Average salary	£104,774.49
Pensionable Service	35 years 334 days
Payable date	01/09/14
Salary of Reference	£113,072.00
Annual pension	£47,037.28
Lump sum	£141,111.86

10. Shortly afterwards, Mr E wrote to TP's 'Contact Us' service saying:

"Thank you [named TP representative] and your team for my final letter, received today, confirming pension. [Mr E].

An excellent service."

11. On 27 August 2014, the Council provided corrected service and salary data to TP by email.

12. Mr E left pensionable employment on 31 August 2014 and his benefits came into payment on 1 September 2014.

13. On 14 March 2018, TP wrote to Mr E saying:

"I am writing to inform you that, unfortunately, an overpayment of your retirement benefits amounting to £13,337.17 has occurred. Since your original benefits were calculated your former employer has notified Teachers'

Pensions of changes which have affected the calculation of your retirement benefits. The effects of the changes are as follows:

A change to your best average salary from £104,774.49 to £99,094.04.

...

#### Original Service and Salary Information

Start date	End Date	Annual Salary Rate
01/09/2007	31/03/2008	£73638
01/09/2008	31/03/2009	£79895
01/04/2009	31/08/2009	£79895
01/09/2009	31/03/2010	£81611
01/04/2010	31/08/2010	£88356
01/04/2012	31/03/2013	£113072

#### Amended Service and Salary Information

01/02/2008	31/03/2008	£85578
01/09/2008	30/11/2008	£83962
01/04/2009	31/08/2009	£83140
01/09/2009	31/03/2010	£84889
01/04/2010	31/08/2010	£88389
01/04/2012	31/08/2012	£94072

...

The best average salary being used in this award is £99,094.04 with a total pensionable service of 35 years and 334 days. This produced a pension of £44,487.12 and a lump sum of £133,461.35.

Please find enclosed a Statement of Retirement Benefits showing full details of the revised benefits, which have resulted in this overpayment of pension and lump sum, amounting to £5686.66 net and £7650.51 respectively.

The overpayment will be deducted from your pension at £606.25 for 21 months commencing 25/06/2018 followed by a final deduction of £605.92 on 25/03/2020...Should you prefer for your pension to remain unaffected, please ensure that we receive full payment no later than 13/06/2018 using one of the options on the attached invoice."

14. Mr E says he received the above letter on 15 May 2018 and believes it was mistakenly dated March rather than May.
15. On 24 May 2018, Mr E asked for further clarification on the circumstances surrounding the overpayment.

16. On 14 September 2018, TP explained that the figures it issued in 2014 were correct when based on the information supplied by Mr E's employer. It said it was the employer's responsibility to supply up to date, accurate information to the Scheme, and it was required to revise its calculation should any of these details change.
17. In reply to a query made by Mr E, TP wrote to Mr E on 3 December 2018 explaining the following:-
  - His original award was processed using service and salary information provided by his employer.
  - His employer then submitted form TR28 on 27 August 2014 to TP providing amended salary details. His award was subsequently revised.
  - As requested, no deductions had been taken off his pension in respect of the overpayment.
18. On 15 January 2019, Mr E wrote to the Department for Education (**DFE**) to formally raise a complaint under the Scheme's Internal Dispute Resolution Procedure (**IDRP**). He said:-
  - Prior to retiring on 31 August 2014, he was in communication with TP and the payroll department at the Council. He relied upon salary information provided by the Council to calculate his pension, as well as the information that followed, when considering whether he could afford to retire.
  - These estimates/provisional figures became confirmed figures and were signed off by all three parties as being correct.
  - Four years later he had been informed by TP that the original salary figure had been corrected. He had no detailed knowledge of how/when this had happened until TP's letter of 3 December 2018, which referred to form TR28.
  - As he had reasonably relied upon the information first provided by the Council to TP, he had terminated his employment in 2014 and put his pension into payment. He required the level of pension stated and believed this would sustain him for the rest of his life. This decision was permanent and so he took due care and diligence in checking his finances carefully. He relied upon the information provided by the Council and TP to make this decision.
  - His pension was overpaid because of incorrect figures provided by the Council to TP, and due to TP's failure to report this change after 27 August 2014 when he was still in employment.
  - Further, there appeared to be a "confidentiality issue" in that he was not informed about communications after 15 August 2014 between TP and the Council regarding his pension.

19. On 16 January 2019, Mr E sent a letter raising the same concerns to the Council. He added that he wished for it to “make me whole for any monies recovered by Teachers’ Pension Scheme and compensate me for any reduced future pension in relation to the salary error caused by the authority.” This letter, and those to the Council which followed, was addressed to the Head of Human Resources at 222 Upper Street, N1 1XR.
20. On 23 January 2019, TP replied saying it would respond to the complaint first and the matter could then be considered by DFE under the IDRP. It said:-
- The Scheme was a defined benefit pension arrangement whereby a member’s entitlement must be calculated in accordance with the statutory regulations. TP calculated retirement benefits based on the information provided by employers. It was required to ensure members received their proper legal entitlement under the regulations and any changes notified to TP could result in a recalculation of retirement benefits.
  - Mr E had said he should have been informed in 2014 of TP’s query and the Council’s response. It was part of TP’s standard process to review the details it held and contact employers where necessary. Given the number of retirement applications it processed, it was not always possible to contact members about potential discrepancies, although it would notify individuals of any confirmed omissions or errors in their salary history. Its records showed that, on 28 July 2014, it emailed the payroll department at the Council as it had noticed a large fluctuation in his salary between 1 April 2012 to 31 March 2013. The Council then provided revised service and salary information.
  - It acknowledged that the overpayment accrued over several years and the delay experienced was not typical of the service it routinely provided.
  - TP had the authority to recover overpayments of pension under various provisions in the Teachers’ Pensions Regulations 2010 (**the Regulations**). Regulation 114 stated:

“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.”

- TP must recover the overpayment of public funds in accordance with HM Treasury's "Managing Public Money" guidance (**MPM Guidance**). The overpayment was not time-barred under the Limitation Act 1980 (**the Limitation Act**), because the limitation period was postponed where there had been a mistake. A party seeking the recovery of an overpayment could seek "relief from the consequences of a mistake" as per section 32 of the Limitation Act, so that the period of limitation was deemed not to run from the normal starting point when the overpayment was made, but instead from the date TP discovered the mistake, or could, with reasonable diligence, have discovered it.
- A recent court ruling in the case of Burgess & Ors v BIC UK Limited confirmed that where an overpayment was being recovered out of future pension payments, the recovery was not subject to a six-year time limit.
- With regard to a change of position defence, the paying authority would have to look to the facts of the case and the onus was on the recipient to show that it would be unfair to repay the money. This defence was difficult to demonstrate. Further, the fact that a person changed their position due to an administrative error was not necessarily a defence against recovering the overpayment or reducing the member's pension.
- Allied to the change of position defence was 'estoppel,' where a recipient changed their position due to being misled. MPM Guidance made the point that "...a mistaken payment will not normally of itself constitute a representation that the payee can keep it..." There must normally be some further indication of the recipient's title.
- The defence of good consideration would not be applicable in this case as no payment or consideration had been received by TP from the recipient as the paying authority.
- In respect to financial hardship and the mental welfare of the individual, claims for financial hardship would be considered along with any financial questionnaire and reasonable evidence submitted.
- It wished to apologise if this matter had caused Mr E distress and inconvenience and it regretted the circumstances leading to the overpayment. Depending on Mr E's circumstances, a repayment plan could be considered over a similar period to that in which the overpayment occurred. It had enclosed a copy of its 'statement of income and expenditure' form for completion,
- In acknowledgement of the situation, it wished to offer Mr E £500. Subject to Mr E's agreement, this would be offset against the overpayment leaving a balance to repay of £12,837.17. If he remained dissatisfied, he could refer the matter to DFE.

21. On 5 February 2019, Mr E wrote to DFE. He said he did not consider that TP had fully addressed the points he had raised and asked why it had taken TP four years to write to him. He also said that according to his P60, his pension was always in the region

of £44,000 rather than £47,000, so the £5,686.66 pension repayment was not owed in the first place.

22. Mr E chased the Council on 5 and 7 February 2019, saying he wished to raise a complaint in accordance with the Council's IDRP. On the latter date, he also said he wished to make a subject access request. He chased the Council again on 21 February 2019 and 8 March 2019.

23. On 14 March 2019, DFE responded to Mr E. It said:-

- Following Mr E's retirement, the Council provided TP with revised service data, which required TP to undertake a revision of his pension benefit entitlement. The root of this error lay with the Council and TP had compounded the situation by their delay in applying the revised service information and identifying the ongoing overpayment situation. Consequently, Mr E considered that the Council and TP should bear responsibility for the resultant overpayment.
- TP had accepted that it provided poor service and made an offer in respect of this. Treasury guidance contained within the MPM Guidance made clear that the recipient of an overpayment should be asked for the return of the overpaid monies, regardless of who was responsible for the overpayment. Therefore, it could not waive the overpayment simply because it was the result of another party's error. However, it would expect TP to be reasonable in agreeing a repayment schedule given that Mr E had acted in good faith.
- As the Regulations had been applied correctly, Mr E's appeal must be declined.

24. In March 2020, TP provided my Office a year by year breakdown of the pension overpayment:

Tax year	Net overpayment
2014/15	£914,34
2015/16	£1,678.26
2016/17	£1,679.16
2017/18	£1,414.90

25. As part of our investigation, the Council was approached for its comment in regard to Mr E's claim that none of the letters which he sent to it, following being notified of the overpayment error, had been responded to. Although the Council responded to my Office's initial request for information following our acceptance of Mr E's complaint, it has not responded to subsequent requests for information, so its position on this point remains unclear.



### **Summary of Mr E's position**

26. He relied upon the information provided to him in 2014 regarding his pension entitlement. This reliance was reasonable as he believed that all the work had been prudently and correctly completed. TP's letter of 15 August 2014 confirmed his pension.
27. No further communication was received until May 2018, four years after he took his pension and since TP was alerted to the amended salary information provided by the Council. He was not told about this change at the time, despite the fact he was still in employment.
28. If he had been made aware of the change, he could have queried the salary amount at the time. His original file had not been provided by the Council so there was no way for him to independently check TP's information, hence, he disputed the amended figures.
29. There had been shared, joint, endemic maladministration in this matter, with one party not sharing evidence under the Freedom of Information Act 2000 (**FIA 2000**), and the other causing an unacceptable time delay of four years. He wished for the complaint to be fully upheld against TP and the Council.
30. Had he known of the change in his pension entitlement in 2014, he would not have retired then. He only retired after having calculated the amount of money he wanted as his pension.
31. There were associated matters he wished to refer to in respect of TP's conduct, such as a lack of due care, administrative errors, and no specific case officer to correspond with. Any points of clarification were not dealt with in a timely way.
32. Importantly, the final letter sent to him confirming his pension of 14 August 2014 included his "confirmation of acceptance" where he thanked TP for confirming his pension and said that he was pleased with the process to date. With this clear confirmation, he retired with no questions.
33. In May 2018, he received a concerning letter alerting him to an overpayment. On the final page of the letter, an immediate repayment plan was suggested, or the option to pay the whole amount as a lump sum. This was shocking.
34. In this letter, there was no indication as to when TP had the amended data. It finally told him this in a letter dated 3 December 2018. TP had been aware of the amendment since 27 August 2014. It was unbelievable that TP had this information before his retirement and did not inform him. The extent of the delay had led to the alleged overpayment now being so large.
35. He would have thought that prior to his pension and lump sum being paid, there was a robust code of practice in place, checking and auditing these final sums by senior officers.

36. Further, the letter did not refer to any form of complaints procedure, was incorrectly dated, and its tone demonstrated a lack of care. It took four months to respond to his initial letter of clarification. TP has still not answered all of his questions.
37. In TP's pursuit of collecting public money, it had failed in its duty of care. Offering an apology at a late stage was "a step in the right direction" but this was not an ordinary delay; it was a delay of four years.
38. In terms of the medical impact this matter had on him, in a doctor's appointment in March 2019, he had described the anxiety and distress he had been caused. He was advised to make a self-referral for onward services.
39. The Council has offered no formal apology and had no understanding of the distress caused by this matter. He has repeatedly tried to engage with it to no avail.
40. Further, the Council has not apologised for, or acknowledged, its failure to respond to all of the letters he had sent to it, which he had done by registered mail. This failure to respond to him went against the spirit of the FIA 2000, and constituted serious maladministration. The Council had a duty in law to respond.
41. The Council had been slow and negligent in processing his pension application, had made errors and did not inform him in August 2014 of amended figures. He was aware of some dialogue between TP and the Council in terms of chasing matters up, but the emails it had referred to did not give the full picture. There were a range of important questions, clarifications, estimates and delays which took place before TP's letter of 15 August 2014 confirming his entitlement. At this point, matters were closed and there was nothing to query.
42. There was no need to query the 2014 statement as it was "in the right direction" in terms of existing estimates. Also, he expected the Human Resources Department at the Council to know what they were doing and carry out any final checking.
43. The Adams Equity Theory concerned the balance an employee puts into their work (input) and the resultant return (output). In the context of the situation he found himself in currently (input), TP and the Council had behaved shamefully (output). This had impacted the wellbeing of him and his family.
44. The Council had shared minimal information with The Pensions Ombudsman's Office (**TPO's Office**).
45. The overpayment should be paid by the Council because of its maladministration.
46. He has four children of adult age, three of whom are self-employed. Their work, in the current climate, is not as secure as usual, and he would intend to provide support should any of them encounter financial difficulty.
47. In terms of how the overpaid monies had been spent, in 2014, £2,125.70 was spent on a "family support trip" to the USA following the death of his cousin's husband. This

trip was planned for Autumn 2014 but deferred to April 2015 due to his daughter being ill.

48. In July 2015, £2,748 was spent on heating, boilers, and radiators. In September 2015, he spent £3,184.80 on a special heater.
49. In March/April 2016, he purchased a shed for his garden/allotment, costing £881.00. In April 2016, he and his wife celebrated their wedding anniversary in the USA, costing £7,787.00. In November 2016, he spent £1,490 on a flight to a family member's wedding in New York.
50. In January 2018, he gifted £15,000 to his daughter and son to help with the purchase of a property. In total, over the years, £33,216.80 had been spent.
51. Should he be required to repay the overpaid funds, he wished to claim financial hardship. Although there was "good housekeeping at home" and he balanced his income and expenditure each month, there were always peaks and dips. For instance, he currently had an overdraft which was slowly being reduced and he owed money to a credit card provider.
52. Paying unexpected monies each month to TP would put him into debt, cause worry and be difficult, particularly in the current world climate.
53. In respect to whether he questioned the salary figure stated to him by TP in May 2014, this was the first of several communications during this "transition period" from May to July 2014. Nothing was confirmed until the 2014 statement and TP were very careful not to do so, emphasising that what had been issued thus far were "illustrations only" and that "written confirmation...will be issued closer to the time. Also, different case handlers at TP addressed these queries, rather than there being the one appointed case handler."
54. If public money was owed, the financial costs should be shared fairly between the three parties. To bring these matters to an immediate close, so he could focus on personal matters, he would be willing to make an immediate, upfront payment of £4,445.73, as a gesture of goodwill. The Council should increase their payment to £4,445.72 for their "endemic maladministration, associated matters and for failing to act under freedom of information as an employer."
55. TP should also make a payment of £4,445.72 for its serious maladministration and in respect to associated matters. It had delayed matters by four years which was further complicated by a timeline of poorly written letters.
56. Should he still be required to repay the full amount, he wished for a reasonable timescale to be negotiated and financial hardship to be taken into account. The pending debt payment matter had lasted four years and a further two years had now passed given that his complaint presently remained ongoing. He would be able to make monthly payments of £165 over a six-year period.

57. At present, there were unexpected medical costs for him to pay in respect to his wife's surgery, which he wished to be considered under financial hardship and with sensitivity and reasonableness.
58. He wished for any repayment plan to be deferred until April 2021 in order for him to have time to care for his wife after surgery and sort out the medical costs incurred. He also wished for TP to formally record that it would make no further claims (after these sums had been agreed and paid) on his current pension and lump sum, so the case could finally be closed.

### **Summary of TP's position**

59. The administration of the Scheme is a partnership between employers, their employees and TP. The records that TP, as the central administrator, maintains are based on the information provided by employers as required by statutory regulations.
60. The service and salary details of more than half a million teachers are updated each year. TP requires employers to have their records independently audited each year and that an audit certificate is produced.
61. While every line of service cannot be individually checked, TP undertakes a series of checks on annual service return data received from employers. Its validation checks enable a large volume of errors to be detected and corrected automatically, however, in some cases it is necessary to contact the employer to verify the information provided.
62. Mr E completed an application for age retirement benefits which it received on 10 April 2014. As part of its routine pre-retirement checks, it reviewed Mr E's service and salary history and identified that his salary rate for the period 1 April 2012 to 31 March 2013 was significantly higher than all other salary rates. In view of this, it emailed the Council requesting an explanation for the apparent fluctuation, to ensure the information was correct. It did this on 28 July 2014.
63. TP calculates retirement benefits in payable date order and on 15 August 2014, it issued notification of Mr E's retirement benefits. These benefits were calculated and paid using an average salary of £104,774.49, which was based on the salary details that had previously been provided to TP by the Council.
64. It subsequently received revised salary details from the Council and Mr E's award was recalculated. TP recognised that there was a delay between receiving notification of Mr E's adjusted salary rates and adjusting his retirement benefits. It had apologised and offered an award of £500 in recognition of this.
65. It has the authority to recover overpayments of pension under various provisions contained in the Regulations, including Regulation 114(c).
66. It was mindful that due to the long delay, the pension overpayment accrued over several years. Clearly, the amount of lump sum overpaid was unaffected by the delay but it recognised the distress, anxiety and inconvenience caused by the adjustment to

Mr E's benefits and the request for repayment. In line with MPM Guidance, it must seek recovery of any overpayment of public funds.

67. It had explained to Mr E that it could consider a repayment plan over a similar timescale to which the overpayment accrued, and that it would like to discuss the options available with him. Mr E had mentioned financial hardship in his application form to TPO's Office, however TP could not consider this aspect of his complaint until he had completed a statement of income and expenditure.
68. Mr E has expressed dissatisfaction that a dedicated TP officer was not assigned to his case. Due to the very high volume of members in the Scheme, it operated a segregation of duties, for instance, complaints and appeals were undertaken independently of the team that calculated retirement benefits.
69. The principle for recovering overpayments is set out in the MPM Guidance, which provides for taking into account any defences against recovery and if necessary, recovering the overpayment by deduction from the member's future pension benefits. This is supported by section 91(6)(b) of the Pensions Act 1995.
70. It recognised the distress this situation was causing to Mr E. It acknowledged it has a duty to act responsibly and would seek a resolution that considered Mr E's circumstances.
71. It regretted the situation and wished to apologise to Mr E for the impact this situation had on him. Retirement benefits under the Scheme are paid from public funds and TP is duty bound to recover all overpayments in line with MPM Guidance. It could not agree to reduce the amount it is required to recover and has no authority to waive the overpayment.
72. There are specific challenges for a third-party administrator; it relied upon the correct information being supplied by employers. It has been acknowledged by the Ombudsman that the root cause of this matter resulted from the Council providing revised service and salary information, and TP had acknowledged the delay in revising Mr E's retirement benefits, which was reflected in its offer of £500, which it believes to be a reasonable award in the circumstances. TP wished to understand the rationale for the Ombudsman considering that TP's maladministration warranted a higher award.

### **Summary of the Council's position**

73. Mr E had said that all parties had checked his entitlement for benefits. This is not the case. As Mr E's employer, it provides service and salary data information at the request of TP, to enable it to provide an accurate assessment of benefits due.
74. It accepted that it supplied TP with the incorrect salary data for Mr E in 2012/13, which was then used to calculate his estimated benefits, due for payment following the receipt of his retirement application.

75. From its investigations, this was based on a system error which incorrectly output Mr E's salary data on the Teachers' Annual Return submission in 2012/13. TP had noted fluctuations in salary data it had provided before calculating his benefits and asked for clarification: "Before calculations can be made please can you explain the reason in fluctuation in [sic] salary below."
76. At this point it was alerted to the data being incorrect according to its payroll records. The correct service and salary were provided by email to TP on 27 August 2014.
77. Data is supplied at the time, then changes to salaries take place in retrospect months – salary data is often updated. As the correct salary data was requested and supplied to TP, it closed the member's query.
78. Mr E had stated that he was not aware of any correspondence between the Council and TP at the time. It had enclosed email evidence confirming Mr E was in touch with TP, which was awaiting confirmation of salary data (which it provided on 27 August 2014).
79. It appeared that Mr E was provided with benefit calculations based on the erroneous salary data. These salaries were clearly not accurate or reflective of his earnings; Mr E did not query the calculations.
80. It was of course apologetic and understood Mr E's complaint but to the best of its knowledge, it rectified the mistake prior to benefits being paid.

## **Conclusions**

81. TP is seeking to recover the overpayment from Mr E by reducing his future pension benefits. TP has referred to section 91 Pensions Act 1995 which regulates, amongst other things, set-off in respect of occupational pension schemes.
82. Although not expressly framed as such by TP, given the reference to section 91 Pensions Act 1995, I consider that TP is relying on equitable set-off as the legal basis for recovering the overpayments.
83. Equitable set-off operates in a similar way to equitable recoupment. Equitable recoupment, however, is a principle that applies to trustees and the Scheme is a statutory unfunded scheme with no trustees and no trust, so recoupment is not available to TP.
84. 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, Mr E's pension entitlement is a statutory debt owed to him by TP and is liable to be offset against the overpayment, which is a debt owed to TP by Mr E. Therefore, subject to any defences to the claim which Mr E may have, it is inequitable that he can insist on his full entitlement under the scheme without

allowing the claim for the overpayment to be satisfied<sup>1</sup>. It follows that TP can rely on equitable set-off as the basis for recovery.

85. I therefore agree with TP that section 91 Pensions Act 1995, will apply. TP has referred specifically to section 91(6)(b) Pensions Act 1995. Broadly, this provides that TP cannot recover the overpayment where there is a dispute as to the amount or terms. Such a dispute exists here as shown by Mr E's complaint. TP have not taken any steps to reduce Mr E's pension and therefore have not acted in breach of section 91(6)(b) Pensions Act 1995.
86. As Mr E is disputing the recovery of the overpaid funds, I will now consider whether Mr E has any defences to recovery of the overpayment.
87. The first defence usually considered in overpayment cases is the Limitation Act. In the case of *Burgess & Ors v BIC UK Limited* [2018] EWHC 785 (Ch), Mr Justice Arnold held that equitable recoupment was not a restitutionary claim for unjust enrichment (unlike the case of *Webber v Department for Education* [2016] EWHC 2519 (Ch)). Rather it was an equitable self-help remedy which did not involve any claim for repayment of the monies paid in the past but an adjustment of accounts in the future. As such, equitable recoupment is not subject to a six-year limitation period under section 5 of the Limitation Act. As another equitable self-help remedy, the same analysis applies to equitable set-off. In any event, all of the overpayments to Mr E were made within six years of his complaint to this office, so he cannot rely upon the limitation period under section 5 as a defence.
88. I will now consider the other defences potentially available to Mr E against the recovery of the overpayment. The most common defence against recovery of an overpayment is referred to as "change of position"; that is, the applicant has changed their position such that it would be unjust to require him to repay the overpayment either in whole or in part. To make out a change of position defence, certain conditions must be satisfied. Broadly, the applicant must, on the balance of probabilities, show that because of the overpayment, which they received in good faith, they detrimentally changed their position. The money must have been spent on something the applicant would not otherwise have bought; and the expenditure was irreversible. If these elements are satisfied, it is open to me to direct that some or all of the overpayment be kept by the applicant.
89. There are other defences to the recovery of an overpayment, for example, estoppel and contract. These arise less often in pension cases but will be considered if the circumstances of the case suggest that this is appropriate.
90. As mentioned, good faith is intrinsic to the defence of change of position. I will firstly assess whether Mr E acted in good faith when receiving the overpaid funds, or whether he might have known, or ought to have known, that there was an error.

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<sup>1</sup> *Geldof v Simon Carves Ltd* [2010] EWCA Civ 667 at [20] to [43]

91. Mr E made a number of enquiries in relation to what his final benefits would be prior to the 2014 statement. In April 2014, Mr E queried a “significant difference” in the benefits estimated for 2013 and 2014. TP replied on 7 May 2014, explaining how the ‘average salary’ used in the calculation of his benefits was determined and said that his annual salary rose from £94,105 to £113,072 per annum on 1 April 2012, reducing to £97,072 per annum on 1 April 2013. However, from the Amended Service and Salary Information supplied by the Council, it is apparent that Mr E had not earned £113,072 at any point in the years leading up to his retirement. From the communications TP has provided from this time, it does not appear that Mr E queried this point.
92. In the 2014 statement, the ‘Salary of Reference’ used was £113,072, which is the same figure as the salary stated by TP in its email of 7 May 2014. I consider that, at this point, it would reasonably be apparent to one in knowledge of these two facts that TP had based its final calculation of Mr E’s benefits on the belief that his salary for the period April 2012 to 2013 was £113,072. As Mr E would have known that his salary was not in this region, I consider that he ought reasonably to have made enquiries on this point either in May or August 2014.
93. Whilst I note Mr E’s comments on this point in respect to there being several communications with TP up to August 2014, the good faith requirement does not only concern instances where the individual might have known of the error, but also where they ought reasonably to have known of the error or could have discovered it by making reasonable enquiries. As Mr E had the requisite knowledge to understand and question the salary figure intrinsic to the calculation of his benefits, I do not find that the requirement of good faith has been met here. Accordingly, the defence of change of position is not available to him.
94. Mr E has also said that he relied upon the figures presented to him in the 2014 statement. He is possibly seeking to rely on the defence of estoppel. There are three requirements that need to be satisfied in order to establish estoppel by representation: (1) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act; (2) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise; and (3) after the act has been taken, the claimant being able to show that he/she will suffer detriment if the defendant is not held to the representation or promise.
95. However, for the same reasons as those given to address change of position, I do not consider that Mr E’s reliance on the figures presented in the 2014 statement was reasonable, as he had the requisite knowledge to understand that these were based on erroneous information. Similarly, because of the knowledge Mr E had, it cannot be argued that there was a common assumption between the parties that Mr E would receive the level of benefit he was wrongly receiving, which would have been necessary to establish a defence of estoppel by convention. I do not find that Mr E has a valid estoppel defence.



96. Mr E has highlighted that he considered the 2014 statement to be final confirmation of his pension entitlement, and that he replied to this with his “confirmation of acceptance”. I believe that Mr E is seeking to argue that a contract has arisen between him and TP for the benefits stated within this letter.
97. Broadly, a valid contract requires offer, acceptance, consideration, and the intention to enter into legal relations. Although it is questionable whether the other elements are present, I consider that TP did not have an intention to enter into legal relations in addition to those which already existed due to Mr E’s membership of the Scheme, nor was it reasonable for Mr E to believe that it had such an intention. The 2014 statement set out what (it was understood) Mr E was entitled to from the Scheme, it did not create new rights and obligations. Therefore, I find that no contract entitling Mr E to the higher (incorrect) benefits was created.
98. Mr E has said that he would have delayed retiring had he been provided with the correct information on his retirement figures at the outset. I have not seen any evidence as to why Mr E wanted the specific pension he was paid in 2014, and I am not persuaded that the lesser adjusted amount he was notified of in 2018, an adjustment which is not significant, would have affected his overall choice to retire in 2014.
99. It follows that the overpayment is recoverable. The starting position should be that the recovery period is at least as long as the period over which the overpayment occurred. TP should also consider Mr E’s claim of financial hardship when agreeing any repayment plan and I note that TP has said that this will be considered along with any financial questionnaire and reasonable evidence submitted to it. Mr E has outlined recent medical costs which he has asked to be considered as part of his financial hardship claim. I understand he can submit details of this as part of any reasonable evidence he submits to TP for his financial hardship claim.
100. Mr E has also asked that any repayment plan be deferred. This is a matter for TP to agree with Mr E.
101. In addition to Mr E’s complaint about the recovery of the overpayment, he has also complained about aspects of the Scheme’s administration.
102. Mr E has complained that he had no specific case officer to correspond with at TP, both when he was making enquiries in 2014 regarding his final benefits and from 2018 when the error came to light, suggesting that this would have resulted in a more straightforward process. While I understand Mr E’s viewpoint, how TP chooses to carry out these processes is a decision for it to make, and I cannot find that any identifiable maladministration was specifically caused to Mr E by such a process.
103. TP has acknowledged the delay between receiving notification of Mr E’s adjusted salary rates and adjusting his retirement benefits. It recognises the impact this had in respect to compounding the error and has offered £500 in recognition of this. I consider that an award of £1,000 would be more appropriate given that TP had the information it needed at the time Mr E retired in 2014 to know that it would inevitably

be making an overpayment. Despite this, it proceeded to overpay Mr E for four years. So to specifically address TP's request for my rationale on this point (see paragraph 72 above), although the Council initially provided TP the incorrect information, importantly, it rectified this by providing the correct information to TP prior to Mr E's benefits coming into payment. It is TP's failure to act on this information, and subsequent continued failure to realise the error for a period of four years, that has caused Mr E's current situation, Therefore, TP has caused Mr E a serious level of distress and inconvenience.

104. Separately, Mr E is unhappy that the Council failed to respond to his letters regarding the overpayment. The Council has not responded to my Office in respect of this, despite numerous requests, which is disappointing. Mr E has provided a certificate of posting for various dates, including for 17 January 2019, which would have been when he first wrote to the Council. While it is difficult to make a finding on this point without further detail, I have been able to establish that the Building Number and Post Code on these certificates is consistent with the address on his letters to the Council, which is the correct address. Hence, I consider that these letters were received by the Council. Mr E has specifically referred to the Council's failure to respond to him and this being a breach of the FIA, however, such a finding would be a matter for the Information Commissioner's Office. Nonetheless, Mr E was making reasonable enquiries regarding the error, and the Council's failure to respond meant that Mr E was not able to obtain the clarity he was seeking in relation to a matter he was already finding difficult. This would have caused Mr E significant distress and inconvenience, for which it would be appropriate for the Council to make an award.

105. In conclusion, I uphold Mr E's complaint in part.

### **Directions**

106. Within 28 days of the date of this Determination, TP shall:

- (i) pay Mr E £1,000 in recognition of the serious distress and inconvenience caused to him by its error. It shall offer Mr E the option of having this amount off-set against the amount owed or paid to him directly as a lump sum;
- (ii) give Mr E a reasonable opportunity to present it with further information, evidencing his claim for financial hardship; and
- (iii) then, if necessary, recalculate the amount owed and enter into a mutually acceptable payment plan with Mr E, taking into account any evidence presented by Mr E in accordance with (ii) above.

107. Within 28 days of the date of this Determination, the Council shall pay Mr E £500 for the significant distress and inconvenience it has caused by its failure to respond to him.

PO-29198

**Anthony Arter**

Pensions Ombudsman  
30 November 2020

## Appendix 1

### Relevant extracts of section 91 Pensions Act 1995:

“(5) In the case of a person (“the person in question”) who is entitled to a pension under an occupational pension scheme, or has a right to a future pension under such a scheme, subsection (1)<sup>[1]</sup> does not apply to any of the following, or any agreement to effect any of the following-

...

(f) subject to subsection (6), a charge or lien on, or set-off against, the person in question’s entitlement, or right, for the purpose of discharging some monetary obligation due from the person in question to the scheme arising out of a payment made in error in respect of the pension.

(6) Where a charge, lien or set-off is exercisable by virtue of subsection (5)(d), (e) or (f)

—

(a) its amount must not exceed the amount of the monetary obligation in question or (if less) the value (determined in the prescribed manner) of the person in question’s entitlement or accrued right, and

(b) the person in question must be given a certificate showing the amount of the charge, lien or set-off and its effect on his benefits under the scheme,

and 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 or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff.”

<sup>[1]</sup> subsection (1) states that no set-off can be exercised against a person’s entitlement under an occupational pension scheme