PO-3471

Ombudsman’s Determination

Applicant	Mrs K
Scheme	Teachers' Pension Scheme (**TPS**)
Respondents	Department for Education (**DfE**), Teachers' Pensions (**TP**)

Complaint summary

1. Mrs K has complained that the method by which TP has calculated her retirement benefits has resulted in a pension and lump sum lower than she had planned and was expecting.

Summary of the Ombudsman's Determination and reasons

2. The complaint is upheld against DfE and TP because Mrs K was given misleading information when she asked about the calculation of her pension which she relied on to her detriment. Mrs K was also misinformed about the reason for the change in the calculations which led to a delay in finalising her complaint.

Detailed Determination

Material facts

3. Mrs K left her employment as a Head Teacher in December 2008. Her final salary at the time was £65,708. Mrs K deferred taking her pension and intended instead to take her pension from TPS in August 2012, when she reached age 60.

4. In January 2009, Mrs K took a two term teaching job as maternity cover. Before taking the maternity cover position Mrs K says she checked the rules to ensure there would be no impact on her pension.

5. In September 2009, Mrs K resumed her career with her original employer as a Head Teacher at an annual salary of £70,000.

6. In February/March 2010, Mrs K exchanged emails with TP to clarify the rules relating to Average Salary and how they would apply to her. Mrs K said that she understood that the average salary used is the better of the average of the best three consecutive years of revalued salaries in the last ten years or in the last 12 months of employment before the date of retirement. Mrs K explained the background to her salary increases and her intention to leave pensionable service in August 2010. Mrs K asked TP to confirm that her pension would be based on her final year's salary of around £70,000.

7. On 8 February 2010, TP replied and said that under Regulation E31(11) of the Teachers' Pensions Regulations 1997 (**TPR 1997**), any increase which is more than 10% above the standard increase cannot be used in the calculation of retirement benefits unless the employer pays an additional contribution to the scheme equivalent to the actuarial equivalent of the increased benefits. TP also said that it could not determine whether Regulation E31(11) applied until a formal application was made and full details of salary and service up to the last day of pensionable employment were received.

8. Mrs K replied on 14 March 2010, and said that it was extremely important that she understood the meaning of the rules for her retirement planning. She asked if the 10% rule would be applied if the member had changed institute or changed grade.

9. On 22 March 2010, TP wrote to Mrs K and repeated the message that it could not determine whether Regulation E31(11) applied until a formal application had been made. TP also said:

> "Under the current Regulations the 10% rule will apply to a change of institute or grade, but this applies only to your last employer. We would not apply the restriction to a change of institute or grade if the job you applied for was National [sic] Advertised."

10. Mrs K left her position in August 2010, on a final year's salary of £70,000 and on which she says she expected her retirement benefits to be based.

11. On 16 August 2012, Mrs K received notification from TP that her retirement benefits would be based on the revalued average of her salary in the three years prior to her two term maternity cover resulting in a final salary of £69,297.

12. On 26 August 2012, Mrs K raised a First Stage Appeal under the Internal Dispute Resolution Procedure (**IDRP**) and appealed the decision to use the three year average final salary. Mrs K said that this decision negated the information she had been given previously and upon which she had based her retirement planning. She had also discovered from her calls to TP that the Regulations governing the TPS had been changed from 2 September 2010, so that the exclusions applying to the 10% rule had been removed. Mrs K asked TP to explain why TP had not told her of the change at the time she was planning her retirement in February/ March 2010, as TP would have been aware of the pending changes.

13. Mrs K said the use of the three year average final salary had resulted in a significant reduction in her pension benefits. Her revalued final year salary would have been around £75,000 and the pension would have been approximately £1,900 a year more and the tax free lump sum would have been approximately £5,600 more.

14. TP replied on 4 October 2012, and said that the TPS is bound by the Regulations that apply and referred to the restriction in Regulation 39 of the Teachers' Pension Regulations 2010 (**TPR 2010**), which provides that where the increase in a person's average annual rate of salary in any of the final 3 years of a member's average salary is greater than 10% of a fixed amount the increase is restricted to 10% of the fixed amount. The fixed amount in 2010 was set at £5,000 and had since increased to £5,400.

15. TP also said that it did not agree that its correspondence in February/March 2010, gave any assurance that the 10% rule would not apply and it could never give such a categorical assurance. TP were not responsible for changes to the Regulations and these were the responsibility of DfE. TP, as the administrators, were not aware of the new arrangements at the time and could not give advice on potential changes to the Regulations prior to them coming into force.

16. On 9 November 2012, Mrs K raised an appeal under the Second Stage IDRP and complained that she had not been informed of the change to the restricted salary provision from 1 September 2010.

17. On 19 December 2012, DfE issued its decision in relation to the Second Stage IDRP. DfE confirmed that the calculation of Mrs K's pension had been carried out in accordance with TPR 2010 and the new Regulation 39, which became effective for all calculations where the payable date is on or after 2 September 2010. DfE confirmed that the Regulation did not provide any discretion over the calculation method to be used.

18. DfE also said that in accordance with section 9 (5) of the Superannuation Act 1972, it had consulted with all interested parties prior to the provisions coming into force. A

letter dated 29 January 2010, was sent to many and various bodies including Mrs K's employer. The letter said, in relation to the then draft Regulation 38:

> "This replaces the arrangements contained in Regulation E31(11) to (14) of TPR 1997. There is no 'standard increase' and the provision (contained in Part G of TPR 1997) for employees to pay the capitalised value of the difference in benefits has been withdrawn. It remains the case only that cases that will invoke a possible restriction will be ones where the best average salary is the final 365 days of service. The salary will be restricted if - regardless of the reason - 'year on year' there is an increase of more than 10% or £35,000 (index-linked)."

19. DfE also said that following the laying of the Regulations before Parliament on 1 April 2010, a further document summarising all of the consolidated Regulations was posted to the TP website on 24 May 2010. This was held in the "Announcements" Section of the previous TP website, which was replaced on 15 March 2012. The link was also available in the "news" section of the new TP website.

20. DfE commented on Mrs K's view that TP should have informed her of the changes and said TP's role is to provide information about the TPS but not to provide financial advice. It also would not have been appropriate for TP to comment on the proposed changes that were going through Parliament or to suggest that it would be advisable to take benefits from the TPS.

21. Following the issue of the Stage Two IDRP decision Mrs K continued to correspond with DfE regarding her case and the principles of fairness, consistency and certainty, which she said had not been addressed in its letter of 19 December 2012, and particularly the way the changes had been communicated compared to the further changes proposed for 2015, and communicated in 2012.

22. DfE replied on 29 January 2013, and acknowledged that these principles had not been addressed in its reply. It recognised that Mrs K felt disadvantaged by the changes but it had no power to dis-apply the restricted provision where a member takes a lower paid post and then returns to another post at the rate of salary they would have received if they had not taken the lower paid post. The DfE also maintained that the communication undertaken in relation to the 2010 consolidation was proportionate to the changes that were made. Although there were material changes in three areas the 2010 Regulations were largely a restructuring and tidying up of previous amendments.

23. Mrs K continued to argue her position and said, in a letter to DfE dated 18 March 2013, that she believed that the DfE had significantly contributed to the problem by:

- instigating unfair rule changes which were applied retrospectively;
- the new rules were introduced with inadequate notice;
- the DfE prevented TP from notifying members of these changes; and

- the rules breached Section 2(3) of the Superannuation Act 1972, which prevents any rule amendment which reduces the accrued rights of members unless the persons consulted have agreed to the inclusion of that provision.

24. Mrs K contacted the Pensions Advisory Service before bringing her complaint to our service.

25. During the course of this investigation DfE introduced a new argument that the calculation of average salary would be the same under TPR 1997 and TPR 2010.

Summary of Mrs K's position

26. Mrs K says that she believes the DfE and TP are guilty of maladministration and this has resulted in her receiving a lower pension than one she would otherwise be entitled to receive.

27. Mrs K reasonably assumed that under TPR 1997, she had a pension entitlement calculated on her final year's salary. This was not based on one piece of information or correspondence, but many information sources from TP over a four year period, from 2008 to 2012. During three years of dispute neither the DfE nor TP contradicted this understanding.

28. Mrs K says she had conscientiously and diligently investigated the rules relevant to her situation in order to plan her pension and on two occasions, firstly in 2009, and secondly in 2010, and had made decisions based on that information. If the information had been otherwise, she could easily have taken alternative action (and would have done so), averting any possibility of her pension being restricted. That teachers in the independent sector had salary increases arising from promotions restricted (as claimed by the DfE) in contrast to teachers in the maintained sector, was not in any scheme documentation, was not known by employers or the unions, and was given no publicity, she had every reason to assume that her treatment would be the same as teachers in the maintained sector in similar circumstances. She was astonished and distraught when she was advised, days before she took her retirement benefits on her sixtieth birthday, that they would be greatly reduced, by which time it was too late for her to do anything to mitigate the significant loss of her pension entitlement.

29. This case falls into the Pensions Ombudsman's category, as detailed on its website, of 'misleading or incorrect information being provided' in which 'it was reasonable for someone to have relied on the inaccurate information' out of which a 'loss has been suffered as a result', and 'the scheme was to blame for the error'. In which case, 'if the complaint is upheld, the Pension Ombudsman may direct the scheme to make payments to compensate for any financial loss that has arisen as a result of the person relying on the inaccurate information'. She 'would have acted differently with the correct information' (i.e. have made the eight months maternity cover non-pensionable, or continued her headship for a further two years to the age of 60). She

reasonably assumed that she would not be restricted under TPR 1997, and therefore, would have a pension entitlement based on her final year's salary. This is a separate argument from whether or not, from a legal perspective, her pension should have been restricted under TPR 1997.

30. In addition, Mrs K says that the Superannuation Act 1972, section 12(4), states that if a pensioner or deferred pensioner will be put in a worse position by amendments, the amending Regulations must give him or her the opportunity to elect for the revised Regulations not to apply to him or her. The right is also contained within Regulation 137 of the 2010 Regulations and says:

> "(1) Where –
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> (a) Apart from this Regulation, any provision of these Regulations which re-enacts with any modification any provision revoked by these Regulations would place any person to whom a protected benefit is or may become payable (P) in a worse position than P would have been in if that modification had not been made, and
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> (b) P so elects, by giving written notice to the Secretary of State before 1 December 2010,
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> (c) Then, subject to paragraph (3) these Regulations have effect, in relation to P, and to that benefit as if these Regulations had re-enacted the revoked provision without modification.
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> (2) A protected benefit is one which is being paid, or may become payable, to, or in respect of, a person who was employed in qualifying employment but ceased to be employed, or died, before 1 September 2010."

31. The Regulation applicable to Mrs K's case, when she was in service, was Regulation E31(11), which granted an exemption to the three year average being used if the salary increase was due to a change of institute. The TPR 2010, which came into force after she had left service on 31 August 2010, and had become a deferred pensioner, amended these Regulations with the consequence that she was in a significantly worse position with reduced pension benefits. The DfE/TPS are guilty of maladministration in failing both, to inform her of the changes to the Regulations, and also of her entitlement under Regulation 137 to elect that such changes should not apply.

32. DfE/TPS were particularly guilty of maladministration in her case in neglecting to inform her of her rights or entitlements, as they were aware of the detailed specifics of her situation, having even informed her that Regulation E31(11) applied in her circumstances just days before changing the rules. In February 2010, she had written to TPS with a detailed account of her circumstances, including that which related to salaries and employers and that she would become a deferred pensioner. On 22 March 2010, TP confirmed that Regulation E31(11) applied to her and that there would be no restriction in her circumstances or her final salary for pension purposes. This was only two days before the Regulations were made and less than 10 days before they were laid before Parliament.

33. At the least, TP should have written to her immediately after the Regulations were laid before Parliament and certain to come into force, to notify her of the new situation, and that the information given days before was out of date. By not notifying her of the possibility of pending legislation, or advising her that new legislation had come into force, or her right to elect that it need not apply to her, even though they knew the relevance of this information to her circumstances, DfE/TPS failed to fulfil their duty of care to her.

34. DfE has only in July 2015, some three years after the dispute was first raised, introduced a new argument that the calculation of average salary would be the same under TPR 1997 and TPR 2010. This is in contradiction with what DfE and TP have previously said and what was said in March 2010, when Mrs K was planning her retirement, namely that they would not apply the restriction to a change of institute or grade.

35. Mrs K says that in TPR 1997, the purpose of clause E31(13)(b)(i) in relation to the maintained sector, and E31(13)(d)(ii) in relation to the independent sector, was the same, to exclude salary increases arising from legitimate promotions from the standard increase and therefore any restrictions, and although, of necessity, different wording was needed for the two different sectors, the objective was to achieve the same outcome.

36. E31(13)(d)(i) states the standard increase is any increase other than a discretionary increase of salary. E31(13)(b) defines a discretionary increase as ‘the person's promotion such that his salary is based on a different pay spine’. Therefore, E31(13)(d)(i) uses the national pay scale to define what is excluded from the standard increase.

37. The wording in the E31(13)(d)(ii) has of necessity to be different. This is a legacy of national pay scales; teachers in the maintained sector have clearly defined ‘pay spines’ applicable to all schools. This is not so in the independent sector but the purpose of E31(13)(d)(ii) is to seek to achieve the same objective, although this requires more detailed wording because of the variable situation. It would not be the purpose of the legislation that two teachers in identical circumstances in a contributory scheme receive different benefits.

38. The above was based on the advice of a lawyer with considerable experience of TP Regulations, including TPR 1997 and TPR 2010, and overriding pension legislation - such as the Superannuation Act 1972 - particularly with regard to the public sector. He had advised Mrs K of her right to make an election under TPR 1997 Regulation 137. No-one else had mentioned it; not the DfE, TP, TPAS, or indeed the Pensions Ombudsman Service. He acts in an advisory capacity to the unions.

39. Mrs K also says that she tried diligently to understand her benefits and carried out detailed research, including looking at the scheme documentation and the Average Salary Fact Sheet, to understand the impact of taking an eight months temporary supply teaching post in 2009, and her decision to make this pensionable.

40. She had initiated correspondence with TP in February/March 2010. She gave detailed information of her circumstances, including that she was from the independent sector, when she asked for clarification on the specific rules in relation to them, and its impact on her decision not to continue her headship.

41. The benefit statements and/My Pension Online (June 2010-July 2012), all continued to show that her pension benefits were based on her final year's salary (and that TPR1997 remained the relevant Regulations) – even after 2011 when (according to DfE) TP had received all her salary records and knew that she had left service. She relied on the information provided, both in writing and through the online portal, and had no opportunity to mitigate her position.

42. Mrs K and her representative have also asked that the respondents should meet the legal costs that have been incurred. Although, they have spent considerable time and energy on researching and pursuing the issues surrounding the complaint they have used external legal advice for help in compiling their claim for maladministration. They have tried to keep these costs to a minimum but these are around £1,000 plus VAT.

Summary of Department for Education's position

43. Mrs K's representative has argued that DfE failed to notify Mrs K of the opportunity for her to elect under Regulation 137 of TPR 2010, to protect her existing pension rights so that she would not be subject to Regulation 39. DfE must firstly confirm that it continues to be satisfied that it has complied with the requirements of the Superannuation Act 1972 with regard to Regulation 39 of TPR 2010. It is satisfied that it has complied with the Regulation as it engaged in consultations with member representatives and other interested parties before the measure was introduced.

44. Information about the proposed change was placed on TP's website. It should also be borne in mind that Regulation 39 could potentially apply to all active and deferred members of the TPS, amounting to about 1.2 million people. It would have been quite impractical to contact them all individually on what was a relatively minor technical adjustment to a well-established Scheme provision.

45. Neither DfE nor TP knows whether Regulation 39 applies in a particular case until a retirement application is actually received and processed. It would, therefore, have

been quite impossible to advise Mrs K, or any other member of the TPS, that they would definitely be affected by Regulation 39 and may, therefore, wish to consider an election under Regulation 137. In Mrs K's case, as a deferred member, it was still quite conceivable that she could have returned to teaching before reaching pension age, in which case the situation would have changed completely.

46. Whether Regulation 39 is a worsening provision as Mrs K contends, is in any event, very much open to question when it is looked at in the round. In fact DfE considers it to be an improvement as compared with the previous provision. Under Regulation 39 salary increases are restricted to the greater of £5,000 plus inflation or 10%.

47. Under the previous arrangements, salary increases of £5,000 for those on salaries under £50,000 p.a. were routinely restricted. Regulation 39 is, therefore, an improvement. A classroom teacher, for example, who received a £5,000 increase from £30,000 to £35,000, in a year where the standard salary increase was a fairly typical 3.5%, would have their salary restricted to £34,050 (£30,000 + 13.5%) under the previous Regulation, but would not be affected under Regulation 39.

48. It is quite clear from this example that teachers on lower salaries are less likely to be affected by Regulation 39 when compared to their counterparts prior to TPR 2010 whose salaries were restricted under the previous arrangements. Member and employer representatives were well aware of the potentially beneficial effects of this refinement for their lower paid members/employees.

49. DfE does not accept that Regulation 39 necessarily falls within Section 12(4) of the Superannuation Act 1972. Indeed in the case of the great majority of teachers, i.e. those on lower pay scales, Regulation 39 can be an improvement. In DfE's view it follows, therefore, that because fewer members' salaries would be restricted as a result of Regulation 39 this should not be construed as a worsening provision.

50. Mrs K received a salary increase in excess of 10% in her final employment and this would be subject to restriction. The DfE has looked at the calculation of average salary under both TPR 1997 and TPR 2010 and concluded that this would be the same in either case. Thus the application of TPR 2010 did not put Mrs K in a worse position and there was no obligation on DfE or TP to make Mrs K aware of Regulation 137.

51. DfE does not consider that it or TP has any liability to Mrs K as the information relevant to her pension benefits was provided correctly. Furthermore, neither DfE nor TP should be liable for any compensation to Mrs K for the cost of legal advice that she has taken.

Summary of TP's position

52. TP rejects the complaint made by Mrs K that the final salaries used in the calculation of her retirement benefits should not have been restricted. Under the statutory regulations members become entitled to retirement benefits on satisfying the conditions applicable to each type of retirement, i.e. Age, Ill health, Premature and Actuarially-adjusted retirement (AAB). However, members only become entitled to payment of retirement benefits on completion of a written application.

53. One of the conditions for obtaining 'Age' retirement benefits is that the member must have reached their normal pension age, which in Mrs K's case was 60. Mrs K made a written application for payment of her 'Age' retirement benefits on 19 August 2012, her 60th birthday, having left pensionable employment on 31 August 2010. As such, on receipt of the written application Mrs K became entitled to payment of Age retirement benefits from 19 August 2012.

54. Prior to this, while Mrs K may have had a legitimate expectation to receive retirement benefits on reaching the age of 60, Mrs K was clearly not yet entitled to Age retirement benefits.

55. Given that Mrs K was entitled to Age retirement benefits payable from 19 August 2012, the calculation of these benefits was made in accordance with TPR 2010, which came into force on 1 September 2010, and the restriction on salaries in Regulation 39 came into effect on 2 September 2010, before Mrs K became entitled to Age retirement benefits.

56. TPR 2010 says that the better of two calculations will be used to determine the final average salary used in the calculation of retirement benefits. These are: the contributable salary in the final 365 days of pensionable employment (Method A), and the average of the best three years of revalued salaries in the 10 years before retirement (Method B). Regulation 39 says that in the case of the Method A calculation, salaries must be restricted if the year on year increase in salary in any of the final 3 years is greater than either 10% or a particular 'fixed amount', whichever of these increases is the greater. The 'fixed amount' is increased each year in line with inflation, and in the year in question it was £5,400.

57. In Mrs K's case her salary increased from an average of £49,281.87 in the penultimate year to £70,000 in her final year and so the increase was restricted to £5,400. Her final salary, for the purpose of the Method A calculation only, was, therefore, restricted to £54,681.87. The Method B calculation was £69,297.35 and so this average salary figure was used to calculate Mrs K's retirement benefits.

58. In conclusion, TP maintains that the calculation of Mrs K's retirement benefits, including the restriction of her salary as described, was carried out fully in accordance with the statutory requirements and expects the Ombudsman to find as such.

Conclusions

59. This case is concerned with the calculation of Mrs K's benefits. Mrs K was aware of the potential for the calculation of her pensionable salary to be averaged over a three year period and she was concerned over the lower salary she had received when she took a maternity cover post in 2009. I have no doubt that Mrs K did research the scheme documentation including the Average Salary Factsheet and online facility as well as contacting TP to try and establish the position.

60. The response Mrs K received from TP in March 2010, was not definitive as it said that TP could not determine whether Regulation E31 (11) applied until a formal application for retirement was made. The response did, however, go on to say "We would not apply the restriction to a change of institute or grade if the job you applied for was National [sic] Advertised." Mrs K took this to mean that her final pensionable salary would not be averaged over a three year period but would be based on her last year's salary.

61. Mrs K had moved from one institution to another and the new position had been nationally advertised, so based on her research and the above comment Mrs K relied on the statement. It was, therefore, quite a shock when Mrs K was informed, just before her retirement date, in August 2012, that her pensionable salary would be averaged over a three year period. Mrs K queried the position and was told that this was as a result of a change to Regulation 39 brought about by TPR 2010, from 1 September 2010.

62. Mrs K then entered into protracted correspondence with TP and DfE going through both stages of the IDRP process before bringing her complaint to our service. The complaint centred on the change in the Regulations, particularly Regulation 39 of TPR 2010, and whether any prior notice should have been given to her of the change; and more importantly whether she should have been informed of the possibility of revoking any change which would be to her disadvantage. Mrs K and her representative also obtained legal advice to assist their argument that the consultation process had not been carried out correctly and that insufficient information was provided to members of the change.

63. DfE in its replies set out the actions it took to comply with the Superannuation Act 1972, and that it had consulted with the representative bodies over the changes. DfE also said that looking at the change to Regulation 39 in the round it considered this an improvement particularly for members earning below £50,000.

64. My view, as set out in an initial preliminary decision, was that Mrs K had been disadvantaged by the change to Regulation 39 of TPR 2010, and that DfE and TP had failed to draw the modification to Mrs K's attention. Mrs K should also have been informed of the right not to have the modification apply to her.

65. It was only after the issue of the preliminary decision that the DfE and TP brought forward the argument that the calculation of Mrs K's final pensionable salary under either TPR 1997 or TPR 2010 would be the same.

66. The introduction of this alternative argument at such a late stage indicates to me that DfE and TP themselves were not certain of the Regulations, or the changes that were made in TPR 2010. But TP is the administrator and the first port of call for members when they have a query. Mrs K looked to it as the expert and the statement she received in March 2010 re-enforced the information she had gleaned from the Average Salary Factsheet. I therefore find that Mrs K did rely on the information she was provided with to her detriment. Although, DfE and TP may argue that the statement was not definitive, I find that this is only in respect of the calculation of the pension benefits that would be provided which would not be known until a formal application for retirement was made. The statement itself was specific that a change of grade or institution would not be restricted if the job had been nationally advertised.

67. There was no further indication that things had changed in either the benefit statements that Mrs K continued to receive, or via the online portal. Therefore, Mrs K had no opportunity to realise that the information she had relied on was incorrect or to take action to mitigate the position.

68. The argument that the calculation of pensionable salary under both TPR 1997 and 2010 would be the same has been challenged by Mrs K and her advisers. Mrs K has also questioned the rationale for treating those in the independent sector differently to the maintained sector and has contacted various advisers and unions for their views. The view expressed by the advisers and unions is different to that now expressed by DfE and TP; they say that the intent behind TPR 1997 and TPR 2010 was to treat those in the independent and maintained sectors exactly the same.

69. It is not for me to determine the intent behind the legislation and I suspect that Mrs K's position is unusual and possibly unique in that she moved from her post as a head teacher to a temporary teaching post and subsequently returned to her former position as head teacher. She then retired within a short period of time. As I have found that Mrs K relied on the information she received to her detriment I now have to consider what she would have done if she had received the correct information that her final salary would be restricted.

70. Mrs K has shown that she was under no compulsion to leave her post in 2010 and her employer has said that they would have been happy for her to continue her headship until her retirement in 2012. I am, therefore, satisfied that if Mrs K had received the correct information in 2010, on the balance of probabilities, she would have remained in employment for a further two years so that the averaging of her final year's salary would have worked its way out. She would also have accrued two further years of pay and pensionable service. I am mindful that Mrs K has had the benefit of not working during those two years and I think it would be inappropriate to award her a compensation payment for the loss of earnings in respect of that period.

71. However, I find that Mrs K should be credited with an additional two years of pensionable service set at the same level of annual salary that she received in her last year as Head Teacher with her last employer, as that will offset the additional pension she was expecting by deferring her pension and for her final salary to be revalued. But as Mrs K would have been required to pay contributions to TPS in order to qualify for those two additional years of pensionable service I think it is only right that this is taken into account when calculating any arrears of pension due to her. Mrs K would have been a higher rate tax payer and therefore TP should calculate the net pension contributions due after allowing for tax relief during those two years and deduct this amount from any arrears of pension due.

72. I am also aware that the protracted nature of this complaint, and introduction of a new argument in 2015, would have been extremely distressing for Mrs K and for which she should be compensated. Therefore, I direct that DfE and TP should, within 28 days of the finalisation of this determination, each pay Mrs K £1,000 for the distress and inconvenience she has suffered.

73. Mrs K has also asked for an award in relation to the legal costs she has incurred in pursuing this complaint. I do not normally make an award for legal costs unless I consider the subject matter to be complicated. In this instance the issue before me was complicated by the misleading information that Mrs K received that the averaging of her final salary had been brought about by a change introduced by TPR 2010. This led Mrs K and her representative down a different path concerning the possibility of revoking the change via Regulation 137. This information may not have come to light without legal intervention and thus Mrs K incurred unnecessary legal expenses which should be reimbursed. Therefore, I direct that Mrs K's legal costs up to £1,200 inclusive of VAT should be paid by DfE and TP.

74. I therefore make the following directions.

Directions

75. I direct that within 28 days:

    (1) TP and DfE are to each pay Mrs K £1,000 for the distress and inconvenience she has suffered.

    (2) TP and DfE are to each pay Mrs K £600, inclusive of VAT, for the legal costs she has incurred.

    (3) TP are to calculate and advise Mrs K of the pension benefits that she would have received if she had remained in employment for a further two years and been credited with two additional years of pensionable service. TP should also calculate and advise Mrs K of the net pension contributions (after allowing for 40% tax relief) that she should have paid during this further two years of pensionable service. The net pension contributions should be deducted from any arrears of pension and lump sum due to Mrs K.

(4) Within a further 28 days TP are to pay the arrears of pension and lump sum due to Mrs K from the date of her retirement to the current date and with simple interest added for each payment at the base rate for the time being quoted by the reference banks from the date each payment should have been made to the date of payment of the arrears.

Anthony Arter

Pensions Ombudsman
3 May 2016