

## Ombudsman's Determination

<b>Applicant</b>	Langley Park School for Girls (the <b>School</b> )
<b>Scheme</b>	Teachers' Pension Scheme (the <b>Scheme</b> )
<b>Respondents</b>	(1) Department for Education (2) Teachers' Pensions

### Complaint summary

The School has complained that the Department for Education and Teachers' Pensions have incorrectly demanded contributions which they say are owed to the Scheme in respect of Ms Rosemarie Stephens for the period 1 September 2002 to 31 March 2012. The School says that they are not liable to pay any employer contributions and interest in respect of Ms Stephens for this period.

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

The complaint is not upheld against the Department for Education and Teachers' Pensions. Ms Stephens made an election for her part-time employment to be treated as pensionable and has not made another election for her part-time employment not to be treated as pensionable employment. It follows that, in accordance with the regulations governing the Scheme, Ms Stephens was in pensionable employment during the period 1 September 2002 to 31 March 2012 (and she has not retrospectively elected to opt-out of the Scheme), so contributions are due in respect of her membership, together with interest calculated in accordance with the regulations governing the Scheme.

## Detailed Determination

### Relevant regulations

1. Regulations B1(4) and B1(6) of the Teachers' Pensions Regulations 1997 (the **1997 Regulations**) say:

"(4) A person who is in part-time employment is not in pensionable employment unless he has at some time made an election for the purposes of this paragraph.

...

(6) An election for the purpose of this regulation may be made at any time by giving written notice to the Secretary of State and, unless paragraph (7) applies, has effect from the first day of the month after that in which the notice was given."

2. Regulation B5 of the 1997 Regulations - entitled "Election for employment not to be pensionable" - says:

"(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.

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

(a) if the notice is given within 3 months after the start of the person's pensionable employment, has effect as from the first day of his pensionable 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 such employment as is there mentioned."

3. Regulation G7 of the 1997 Regulations - entitled "Payment by employers to Secretary of State" - says:

"(1) The employer of a person in pensionable employment is to pay to the Secretary of State, within 7 days after the end of each month-

(a) all amounts due from the person that are deductible from his salary under regulation C18(1),  
(b) the contributions payable under regulation G5, and  
(c) the contributions payable in pursuance of an election under regulation G6, in respect of his contributable salary for that month.

(2) The former employer of a person in pensionable employment who has made an election under regulation G6(3) (referred to in regulations C2(1)(b) and G6 as "employer A") is to pay to the Secretary of State within 7 days after the end of each month the contributions in pursuance of the election.

(3) For the purposes of paragraph (1)-

(a) all salaries are to be treated as being payable monthly in arrears, and  
(b) any arrears payable by reason of a retrospective increase in contributable salary are to be treated as having become payable in the month in which they were paid.

(4) If the full amount of any payment required by paragraph (1) or (2) is not received by the Secretary of State within 7 days after the end of the month, interest is payable by the employer or the former employer on the amount outstanding at 12% per annum, compounded with monthly rests, from the 8th day to the date of payment; but the Secretary of State may in any particular case waive the payment of interest."

4. Regulation 9 of the Teachers' Pensions Regulations 2010 (the **2010 Regulations**) - entitled "Election for employment not to be pensionable" - says:

"(1) A person may make an election under this regulation in respect of a particular pensionable employment by giving written notice to the employer.

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

(3) But -

(a) if the notice is given 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; and

(b) if the notice is given within 3 months after the date on which arrangements made by the employer under section 3(2) (automatic enrolment) or section 5(2) (automatic re-enrolment) of PA 2008 have effect in respect of that employment, the election has effect from that date.

(4) An election ceases to have effect from the earliest of -

(a) the date on which an election under regulation 10 (election for employment to be pensionable) has effect; and

(b) the date on which arrangements made by the employer under section 3(2) (automatic enrolment) or section 5(2) (automatic re-enrolment) of PA 2008 have effect in respect of the employment; and

(c) a subsequent fair deal transfer date in relation to service in the employment."

5. Regulation 28 of the 2010 Regulations - entitled "Deduction by employers of contributions, etc from salary, payment in default and interest" - says:

“(1) The employer of a person in pensionable employment must deduct from that person's salary each month the contributions and instalments mentioned in paragraph (3).

...

(3) The contributions and instalments are-

(a) the contributions payable under regulation 18 (teachers' ordinary contributions);

...

6. Regulation 30 of the 2010 Regulations - entitled “Payment by employers to Secretary of State” - says:

“(1) The employer of a person in pensionable employment is to pay to the Secretary of State, after the end of each month-

(a) the contributions payable under regulation 27,

(b) the amounts due from that person that are required to be deducted from that person's salary under regulation 28 (whether or not such amounts were deducted), and

(c) the contributions payable in pursuance of an election under regulation G6 of TPR 1997 (which continues to have effect by virtue of paragraph 6 of Schedule 13) , and

(d) an administration charge of such percentage as is notified from time to time by the Secretary of State

in respect of that person's contributable salary for that month.

...

(3) For the purposes of paragraph (1)-

(a) all salaries are to be treated as being payable monthly in arrears, and

(b) any arrears payable by reason of a retrospective increase in contributable salary are to be treated as having become payable in the month in which they were paid.

(4) Any payment required by paragraph (1) or (2) must be received by the Secretary of State within 7 days after the end of the month in question and if the full amount of any such payment is not so received-

(a) interest is payable by the employer or the former employer on the amount outstanding at the standard rate from the 8th day after the end of the month in question to the date of payment, but the Secretary of State may in any particular case waive the payment of the whole or any part of such interest, and

(b) if the Secretary of State makes a written demand, the employer or former employer must pay to the Secretary of State such further sum, not exceeding £100, as the Secretary of State may specify in the demand.

(5) But paragraph (4)(a) is subject to Part 4 of Schedule 13 where the date by which payment must be received is before 1st December 2010.

(6) The payment referred to in paragraph (4)(b) must be made within 14 days after the date of the demand.”.

## Material facts

7. Ms Rosemarie Stephens (**Ms Stephens**) was employed at Croydon College in 2001. The relevant Local Education Authority in respect of that employer was London Borough of Bromley (**LB Bromley**).
8. During her employment with Croydon College Ms Stephens elected - under regulation B1(6) of the 1997 Regulations - for her part-time employment to be "pensionable employment" under the Scheme (for the purposes of the 1997 Regulations) from 1 February 2001.
9. On 16 July 2002, Ms Stephens completed an application form for a role as a sociology teacher at the School. In the application form she was asked "Do you contribute to the Teachers' Superannuation Scheme or other Superannuation Scheme?" to which she selected "No".
10. On the same day Ms Stephens also completed a 'New employee personal details' form. In answer to the question "Have you made a valid election that your part time/supply service should be treated as pensionable?" Ms Stephens selected "Not at present, please forward Leaflet 476 (which includes Form 477 "Election for Part Time Employment to be treated as Pensionable")".
11. I understand that the School did not send the 'New employee personal details' form to Teachers' Pensions at that time. However, Teachers' Pensions and the School's view as to whether a Form TR6 - 'Notification of Teacher Appointment' - was sent to Teachers' Pensions in respect of Ms Stephens (either on her appointment or subsequently) differs.
12. On 1 September 2002, Ms Stephens commenced part-time employment with the School. At that time the relevant Local Education Authority in respect of that employer was also LB Bromley.
13. Over the next nine and a half years no employee contributions were deducted from Ms Stephens' pay and the School made no employer contributions to the Scheme in respect of Ms Stephens.
14. The School became an academy in 2011. Ms Stephens completed a new election form (required for the new status of the School) on 1 August 2011. In that form Ms Stephens said - in question one - that she had not made a valid election that her part time/supply service should be treated as pensionable (although she had first ticked "Yes", she had subsequently crossed it out and chosen "No"). However, in question two she indicated that she believed that she was a member of the Scheme (in the form she elected to "remain in the pension scheme"), although the question referred to "full-time employment", which was not the position in Ms Stephens' case.
15. The School's Finance Manager emailed Ms Stephens on 30 January 2012, in respect of her completion of the form. She said; "I am a bit confused as you have ticked that you wish to be/remain in the pension, but you are not in it?".

16. Ms Stephens went to see the School's Finance Manager in person on 1 February 2012. During that visit Ms Stephens said that she had 'ticked' the wrong box on the form as she knew she was not in the Scheme, but that she had got confused because she had been receiving estimates of retirement benefits from them. (Several statements from witnesses have been provided in support of the School's assertion that Ms Stephens said this.)
17. After Ms Stephens had spoken to the Finance Manager the School contacted Teachers' Pensions to ascertain why estimates of retirement benefits were being issued to Ms Stephens which indicated that her employment with them was being treated as pensionable. At that time, Teachers' Pensions say that the School confirmed that pension contributions had not been deducted from Ms Stephens' salary or made by the School since she commenced employment with the School on 1 September 2002.
18. The School started to deduct the correct pension contributions from Ms Stephens' salary from 1 April 2012. It follows that the period in which contributions were not made to the Scheme by either Ms Stephens or the School was 1 September 2002 to 31 March 2012 (the **Relevant Period**).
19. On 27 June 2013, Teachers' Pensions invoiced the School for the arrears of pension contributions and interest that had accrued during the Relevant Period (Teachers' Pensions had by that time, they say, ascertained that Ms Stephens had not elected to opt out of the Scheme at any point subsequent to 1 February 2001.).
20. Teachers' Pensions say that they were willing to accept the evidence from the School's appointment forms (described previously) "as documentary evidence of Ms Stephens' wish to opt out of the TPS [i.e. the Scheme] on appointment [i.e. 1 September 2002]", but that they would only accept it on the basis that Ms Stephens would confirm it was her intention to opt out at that time. So - at some point after 1 February 2012 - Ms Stephens was asked to complete a (retrospective) election form and provide a statement confirming that she had no intention of remaining in the Scheme from 1 September 2002. However, Ms Stephens declined to complete the form and provide the statement. Instead she said that she did not intend to opt out of the Scheme on appointment with the School on 1 September 2002 and that she does not want to make a retrospective opt-out election now.
21. Teachers' Pensions' position is set out in full later in this document, however, their central argument is that as Ms Stephens did not submit a valid opt-out of pensionable employment on her appointment with the School her subsequent employment with them should have been treated as pensionable and so the School should have made contributions on her behalf during the Relevant Period (and so should now pay these, with interest, to the Scheme). The School's position is also set out in full later in this document but, in short, they are disputing that they have an obligation to pay contributions - and interest - in respect of Ms Stephens.

**Summary of the School's position**

22. The claim for historical contributions made against the School by Teachers' Pensions is "wholly misplaced".
23. When Ms Stephens began her employment with the School in 2002, the School sought and received written confirmation from Ms Stephens that she had not made an election for the purpose of the Regulations.
24. Neither Teachers' Pensions nor Ms Stephens alerted the School to the fact that Ms Stephens had made an election during her employment at Croydon College. Indeed, Ms Stephens actively or recklessly misled the School.
25. Ms Stephens was not a member of the Scheme during the Relevant Period because an integral element of membership of such a scheme is that contributions are made. In the absence of such contributions by Ms Stephens over the course of the Relevant Period, and by her failing to make any representations during that period that she was a member, the School reasonably relied upon the conduct of Ms Stephens in concluding that she was not a member of the Scheme.
26. Whilst the content of Form TR6 and the guidelines that the Department for Education provided within their letter of 4 June 2014, have been noted, the content of those documents does not take precedence to the simple and established legal principle identified above. That is, the integral element of membership of a pension scheme is that contributions are made.
27. In any event, a member print downloaded by the School from Teachers' Pensions' website for Ms Stephens shows the School's reference (305/5412) to demonstrate the School to be Ms Stephens' employer from 1 September 2002. This appears to demonstrate that Teachers' Pensions was aware of Ms Stephens' change of employer from that date. It is therefore expected that Teachers' Pensions was provided with a Form TR6, otherwise we do not know how else it would have been aware of the change. In any event, it is clear that Teachers' Pensions was aware of the change of Ms Stephens' employer to the School.
28. In light of the above arguments I should find that Teachers' Pensions and the Department for Education have erred in their findings (and the sums sought from the School by Teachers' Pensions and Ms Stephens are therefore not payable) and that either or both of Teachers' Pensions and the Department for Education should reimburse the School's substantive reasonable costs in defending the claim.
29. In their response to my Preliminary Decision in this complaint, dated 12 August 2015, the School also submitted the following arguments:
  - Given that Teachers' Pensions were satisfied that it was Ms Stephens' intention to opt-out of the Scheme in 2002, Teachers' Pensions must exercise its powers in light of all information available to it. As such, it is irrelevant what position Ms Stephens holds now.

- In the alternative, the School asserts that any liability imposed on it is only as a consequence of Teachers' Pensions' maladministration. This is on the basis that Teachers' Pensions failed to keep proper account of the Scheme. As such, the School asserts that Teachers' Pensions should have been carrying out routine checks into the finances of the Scheme (following the Ombudsman's comments in Ripley (L00534)). Teachers' Pensions' failure to check that contributions were being paid amounts to maladministration; even if Teachers' Pensions does not have to hold records of individual member contributions, they should have been aware that the School and/or LB Bromley were underpaying as a whole. If the Scheme was being underpaid, Teachers' Pensions failed in their duty to the beneficiaries of the Scheme to collect in the appropriate funds. Moreover, Teachers' Pensions' failure to seek payments in a timely manner similarly amounts to maladministration. Teachers' Pensions' failure to keep proper account of the Scheme meant that the matter came to light much later than it should have done. As a result, any loss caused to Ms Stephens is Teachers' Pensions' responsibility and liability should not be imposed on the School, who at all times acted in good faith.
- In the alternative, the School argue that Ms Stephens made a valid election to opt out of the Scheme. As such, the School bears no liability. The two written statements made by Ms Stephens when she joined the School in 2002 indicated that she was not making contributions. Given that these actions were a positive step made by Ms Stephens to inform the School of her intention not to be in the Scheme, the School's position is that this was sufficient enough to make a valid opting-out election. In addition, given the intention behind the 1997 Regulations and the 2010 Regulations, the School assert that Ms Stephens' election to her employer who acted upon it in good faith would be sufficient enough to be a valid opt-out. Further, the change of reference from 'Secretary of State' to 'employer' in the 2010 Regulations (this is presumably a reference to regulation 9 of the 2010 Regulations) shows that the change in the 2010 Regulations serves to validate any previous election made to the employer.
- Given that both Ms Stephens and Teachers' Pensions considered that Ms Stephens was not a member of the Scheme, Ms Stephens never expected to receive any benefits from the Scheme. Therefore, it would be unjust to impose any obligation on the School to pay such benefit now. With respect to estoppel by representation, the School clearly relied on the information that Ms Stephens provided to them in the application form and new personal details form. As a result of that reliance, the School did not consider Ms Stephens to be a participating member of the Scheme and consequently did not make provisions for such membership. The School submit that it relied on that representation to its detriment. With respect to estoppel by convention, Ms Stephens clearly believed that she was not a member of the Scheme. This is evidenced by her repeated actions in filling out the forms requested by the School and also by the fact that Ms Stephens failed to query why no employee contributions were being deducted



from her pay upon receipt of her payslips each month from the School. As such, the School should be entitled to rely upon Ms Stephens' actions.

- In the alternative, the School submit that the application form and the employee details form constitute an extrinsic contract (as per *South-West Trains v Wightman* [1998] PLR 113). In *HR Trustees v German* [2009] EWHC 2785 (Ch) the judge held that an extrinsic contract may override contrary provisions in a trust deed where "the extrinsic contract amounts to consent on the part of the beneficiaries". The School submit that Ms Stephens did in fact consent to opting out of the Scheme (by filling in the application form and employee details form). Given Ms Stephens' conversation with the Finance Manager on 2 February 2012, it is clear that she believed she had in fact opted out of the Scheme, and as such consented to being treated as such. It follows that Ms Stephens is precluded from recovering the pension deficit.
- If the Ombudsman finds that the School is liable for the deficit to the Scheme in relation to Ms Stephens' employment, liability should be reduced on limitation grounds. The School asserts that the principles applied in *Webber v Department for Education* [2014] EWHC 4240 (Ch) (**Webber**) should also apply here, with the effect that Teachers' Pensions are time-barred from recovering all underpayments claimed more that relate to the period prior to March 2008.
- Further, the School assert that - if the Ombudsman finds that the School is liable for the deficit to the Scheme in relation to Ms Stephens' employment - Teachers' Pensions should waive their right to charge interest on the outstanding unpaid contributions. In the circumstances Teachers' Pensions has failed to provide evidence that it adequately considered whether interest should be payable. Further, given that the alleged deficit has arisen in circumstances where the School is not at fault, the School considers that imposing interest is unjust. In any event, the School asserts that 12% compound interest is extremely high and unnecessarily punitive.

### **Summary of the Department for Education and Teachers' Pensions' position**

30. The Department for Education have said, in their letter to my office dated 7 August 2014, that the Teachers' Pensions' response, subsequently sent to my office and dated 19 August 2014, would encompass their views. This summary therefore sets out the position of both the Department for Education and Teachers' Pensions.
31. In 2002, the School was a foundation school and at that time such establishments came within the remit of the Local Authority for pension purposes. Therefore, at that time, LB Bromley would have dealt with the pension provision for all the teachers employed by the School. The School became an academy on 1 August 2011. From that date the School dealt with all administrative matters concerning the Scheme themselves.

32. Teachers' Pensions are not the direct employer of teachers and rely on employers to correctly administer the Scheme on their behalf. This should include ensuring that pension contributions are deducted for pensionable part-time employment. Even if the individual had not highlighted the fact that a part-time election had been made, confirmation could have been obtained from the teacher or direct from Teachers' Pensions at any time. When an individual takes up a new teaching appointment, the employer is instructed to send an appointment notification to Teachers' Pensions (i.e. Form TR6). An appointment statement is then issued by Teachers' Pensions to the employer containing confirmation of the date of a part-time election (if applicable).
33. The employer is also responsible for ensuring that information about the Scheme is given to individuals including the procedure for opting out of the Scheme and it is the employer's responsibility to ensure that contributions continue to be deducted up to the date notified as being the opt out date.
34. According to Teachers' Pensions' records, there is no evidence of a completed election form ever having been received by Teachers' Pensions and no notification of the acceptance of an opt-out election has ever been issued by Teachers' Pensions to Ms Stephens or her employer.
35. The School have previously provided Teachers' Pensions with a copy of the form which Ms Stephens completed on 16 July 2002, stating that she had not made a valid part-time election. In May 2014, the School's representatives provided a copy of pages 1 and 4 of Ms Stephens' "application for teaching appointment", also signed by her on 16 July 2002. In answer to the question, "do you contribute to the Teachers' Superannuation Scheme or other Superannuation Scheme?", Ms Stephens said "no". Ms Stephens has not explained why she made such statements, however, there is a possibility that the term "superannuation" may have confused her as this word had been replaced by Teachers' Pensions some time earlier with the word "pension".
36. All the forms referred to are the School's own forms. The matter of whether Ms Stephens' teaching employment with them was pensionable under the Scheme is something that should have been dealt with by LB Bromley. However, despite this, the information provided by Ms Stephens was incorrect, something which LB Bromley should have confirmed with Teachers' Pensions at that time. LB Bromley should have asked for evidence of a part-time election and asked for evidence of an opt-out election from Teachers' Pensions before accepting the statements from Ms Stephens.
37. Teachers' Pensions do not record individual member contributions (as agreed by the National Audit Office) as retirement benefits are calculated on the total reckonable service and final average salary. Employers are required to arrange for their contributions to be independently audited to ensure the contributions deducted from salaries match their records from payroll. The certification of pension contributions is then passed to Teachers' Pensions as confirmation that the contributions are an accurate reflection of the amounts deducted from salaries. Teachers' Pensions were

therefore entirely unaware of the fact of whether or not pension contributions were being deducted from Ms Stephens' pensionable employment with the School. The first Teachers' Pensions were aware of a possible discrepancy with Ms Stephens' pensionable employment was on 1 February 2012, when the School contacted Teachers' Pensions to ascertain why estimates of retirement benefits were being issued to Ms Stephens indicating that her employment with them was being treated as pensionable. At that time, the School confirmed that pension contributions had not been deducted from 1 September 2002.

38. Once it was confirmed that Ms Stephens was in pensionable part-time teaching employment and had not elected to opt-out of the Scheme, Teachers' Pensions invoiced the School for the arrears of pension contributions and interest that were due from 1 September 2002 to 31 March 2012, on 27 June 2013. It was accepted that the School had correctly deducted the appropriate pension contributions from Ms Stephens' salary from 1 April 2012.
39. The evidence from the School's appointment forms could be accepted as documentary evidence of Ms Stephens' wish to opt-out of the Scheme on appointment, but this could only be on the basis that this was her intention at that time. As proof of this, Ms Stephens was requested to complete an election form and provide a confirmatory statement that she had no intention of remaining in the Scheme from 1 September 2002. However, Ms Stephens has indicated that she did not intend to opt-out of the Scheme on appointment with the School and does not want to make a retrospective opt-out election now. Teachers' Pensions cannot accept a retrospective opting-out election without Ms Stephens' agreement and therefore, under the circumstances, the arrears of pension contributions and interest are still due.
40. So, in summary, in the absence of an opt-out election, Ms Stephens' employment in the Relevant Period should have been treated as pensionable with the deduction of appropriate pension contributions by LB Bromley (and, from 1 August 2011, the School). As contributions were not paid - by either employer or employee in the Relevant Period - arrears are due from 1 September 2002 in respect of the whole period. Teachers' Pensions are not able to assist the School in avoiding the payment of the arrears by accepting a backdated opting-out election without Ms Stephens' agreement (which she has not provided).

## **Conclusions**

### *Liability to pay contributions - the position in the regulations governing the Scheme*

41. Ms Stephens elected for her part-time employment to be pensionable from 1 February 2001, whilst she was working at Croydon College. The validity of this election is not in dispute.
42. Teachers' Pensions submit that an election for part-time employment to be pensionable applies "to all valid part-time employment undertaken after that date".

They submit that such election “cannot be revoked” and that “a break in service or change of employer does not invalidate such election”. Instead, Teachers’ Pensions say that if a teacher does not wish their employment to be pensionable they have to take positive action; that is to “make an election under regulation B5 [of the 1997 Regulations]”.

43. I consider that the Teachers’ Pensions’ submission is correct. Pursuant to regulation B1(4) of the 1997 Regulations, a person who is in part-time employment must elect for their employment to be treated as pensionable employment under the Scheme - it does not happen automatically. As set out previously, Ms Stephens made a valid election for her part-time employment to be pensionable employment from 1 February 2001, whilst she was working at Croydon College. Regulation B5(1) says that a person in pensionable employment “may, at any time, by giving written notice to the Secretary of State” make an election for their employment not to be treated as pensionable employment. So once a person has elected for their part-time employment to be pensionable employment under the Scheme, they have to make a further election if they wish to opt-out of pensionable employment. It follows that a person’s status as being in pensionable employment will not simply lapse by the passage of time or by them changing employment (with respect to the latter, so long as their new employer is eligible to participate in the Scheme).
44. In accordance with the 1997 Regulations, Ms Stephens would have had to have made an election in writing to the Secretary of State (whose authority was delegated to Teachers’ Pensions) upon joining the School in order for her employment with the School to have been treated as not being pensionable employment under the Scheme.
45. It is clear from the submissions - and not in dispute - that Ms Stephens did not send an election to Teachers’ Pensions at or around the time she joined the School, or subsequently, to record that she wished to opt-out of pensionable service.
46. However, the School has submitted that they had no way of knowing on joining that Ms Stephens had previously made an election to be in pensionable employment in the Scheme in 2001 and, therefore, that they also had no way of knowing that she had not subsequently made an election to opt out. Further, the School has submitted that Ms Stephens’ conduct - in not querying why deductions were not being made to her salary in the Relevant Period - was “an opt-out on her part” under regulation B5(1) of the 1997 Regulations.
47. Given what Ms Stephens said to the Finance Manager on 1 February 2012, and, further, the fact that no deductions had actually been made to her monthly pay (it would have been clear from her pay slips that none were made), I find, on the balance of probabilities, that Ms Stephens did not think that she was a member of the Scheme in the Relevant Period. Further, I do not think that any of the information provided to the School prior to Ms Stephens’ and during the Relevant Period suggested, on the balance of probabilities, that Ms Stephens was a member of the

Scheme and, therefore, suggested to the School that she was in pensionable employment for the purposes of the regulations governing the Scheme.

48. However, Ms Stephens' impression of her status in respect of the Scheme and the School's lack of knowledge of her election do not alter the position in the 1997 Regulations and the 2010 Regulations.
49. As stated previously, in accordance with regulation B5(1) of the 1997 Regulations, Ms Stephens had to take positive steps to make an election for her part-time employment not to be pensionable employment. She clearly did not do this. It follows that - on a strict interpretation of the regulations - the election she made in 2001 whilst working for Croydon College remains in place. Her transfer of employment to the School could not render that election redundant, nor could her failure to query why deductions were not being made to her salary in the Relevant Period (Incidentally, although the position in the 2010 Regulations is slightly different, regulation 9(1) of the 2010 Regulations also says that Ms Stephens had to take positive steps to make an election for her part-time employment not to be pensionable employment.).
50. As such, in the Relevant Period the School should, pursuant to regulation G7 of the 1997 Regulations and, subsequently, regulation 28 of the 2010 Regulations, have made deductions from Ms Stephens' monthly salary and, also, paid contributions in respect of her to the Scheme.
51. The School has submitted, in section 16.6 of their representative's letter to my office of 9 July 2014, that the "member print" downloaded by the School from Teachers' Pensions' website demonstrates that Teachers' Pensions were aware that Ms Stephens was working at the School from 1 September 2002. As such, they submit that it is "expected that the TP [Teachers' Pensions] was provided with a Form TR6" (a Form TR6 is a notification of a person starting employment with a school). My investigator asked Teachers' Pensions to respond to this point. Teachers' Pensions responded on 5 June 2015. They provided a screen print of Ms Stephens' record which they say demonstrates that the period of service was added to her record on 25 October 2004.
52. It therefore demonstrates that Ms Stephens' record was updated in 2004 to show that she had joined the School from 1 September 2002. Teachers' Pensions have said that it is highly likely that the information was updated upon their receipt of an annual return in 2004, which contained Ms Stephens' service record since 1 September 2002 (but that there is no way of now knowing with any certainty what prompted that update, as the source of the information is not recorded). In the absence of evidence of a Form TR6 being completed and sent by the School - and in the absence of evidence of an 'Appointment Statement' being sent by Teachers' Pensions (in response to a completed Form TR6) - I find, on the balance of probabilities, that the School did not send Teachers' Pensions a Form TR6 on Ms Stephens' appointment on 1 September 2002, or subsequently. I am therefore inclined to accept Teachers' Pensions' submission that the service information shown in their records in respect of

Ms Stephens came from an annual return. It follows that, in the absence of any information sent to Teachers' Pensions to indicate that Ms Stephens wished to opt out of the Scheme upon starting employment with the School and in the absence of the completion of a Form TR6 (and, subsequently, an 'Appointment Statement'), Teachers' Pensions' records would have suggested to them that from commencing employment with the School on 1 September 2002, employee contributions were being made by Ms Stephens and employer contributions were being made on her behalf by the School.

53. In any event, the completion of a Form TR6 by the School would only alert Teachers' Pensions to the fact that Ms Stephens had started to work there. As such, receipt of a Form TR6 would do nothing to change Teachers' Pensions' view that contributions were being made by the School in respect of Ms Stephens. It follows that the relevance of a Form TR6 here is limited to the 'Appointment Statement' that Teachers' Pensions would have issued on receipt of a Form TR6. The 'Appointment Statement' would have recorded - in the 'Special Notices' section - Ms Stephens' election for her part time employment to be treated as pensionable, so it would have alerted the School to the fact that they should have been making contributions in respect of Ms Stephens. However, I have found that, on the balance of probabilities, a Form TR6 was not sent to Teachers' Pensions by the School in respect of Ms Stephens. It follows that the question as to whether an 'Appointment Statement' should have been issued by Teachers' Pensions is not a relevant one in the circumstances.
54. Given the position in the regulations governing the Scheme set out previously, I find that - in accordance with those regulations - the School is liable to pay the outstanding arrears of contributions.

*Failure to keep proper account of the Scheme*

55. In Mr Ripley's case the Pensions Ombudsman said that he found it "disconcerting" that Teachers' Pensions do not carry out checks on the contributions they receive from employers (although he declined to provide any further comments on Teachers' Pensions' role in the particular circumstances of that case). Whilst it might seem logical that Teachers' Pensions should be aware of the contributions being made to them by the employers in the Scheme, the regulations that govern the Scheme do not provide that they have an obligation to do so. The obligation to make contributions in respect of a person (and to deduct contributions from that person) and subsequently pay them on to the "Secretary of State" (i.e. Teachers' Pensions) falls on the relevant employer. In these circumstances, the School's obligation to pay contributions to Teachers' Pensions is set out in regulation G7 of the 1997 Regulations and regulation 30 of the 2010 Regulations. Given that the School has a duty to deduct/make contributions and pay these to Teachers' Pensions and there is no subsequent obligation for Teachers' Pensions to ensure that the contributions paid to them are correct, It follows that, in my view, Teachers' Pensions' failure to monitor contributions received in this case was not maladministration.

*Estoppel*

56. The School have also submitted that estoppel by representation and/or estoppel by convention precludes Teachers' Pensions from recovering the unpaid contributions.
57. To succeed with a defence of estoppel by representation, a person needs to establish an unambiguous representation on which he or she relied in good faith to their detriment. As cited by the School in their response to my Preliminary Decision, these requirements were elaborated in the case of *Steria v Hutchison* [2006] 64 PBLR. In that case Neuberger LJ said as follows:
- “When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could also satisfy the three classic requirements. They are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it.”
58. The representation made on which the School asserts it has relied was Ms Stephens' completion of the application form and new personal details form in 2002. The estoppel defence, therefore, is made by the School as “claimant” and with Ms Stephens as “defendant”. However, the School assert that Teachers' Pensions should be estopped from recovery of the alleged underpayments. As I have already discussed, Teachers' Pensions must administer the Scheme in accordance with the regulations that govern it. These provide that a person must take positive action to opt for their subsequent employment not to be treated as pensionable employment for the purposes of the Scheme. It is for the member to make that election, so in the absence of them being provided with any evidence to the contrary, Teachers' Pensions are entitled to rely on the information they hold as to the relevant person's status. As such, there was no representation or promise made by Teachers' Pensions to the School on which the School subsequently acted. It follows that the School cannot succeed with a defence of estoppel by representation.
59. An estoppel by convention may apply where the parties to an arrangement have “...put a particular interpretation on the terms of it, on the faith of which each of them - to the knowledge of the other - acts and conducts their mutual affairs - they are bound by their interpretation.” (*Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84).
60. In parallel to what I have considered above in respect of estoppel by representation, the mutual understanding between Ms Stephens and the School in the Relevant Period was that she was not a member of the Scheme. To the contrary, Teachers' Pensions' view (in the Relevant Period) was that Ms Stephens was a member of the

Scheme (and thus she was making contributions and employer contributions were being made in respect of her by the School), as their records indicated that she had elected for her employment to be treated as pensionable employment and she had not opted out of the Scheme. It follows that there was no mutual understanding between Teachers' Pensions and the School and, thus, the School cannot succeed with a defence of estoppel by convention.

61. Whilst an estoppel has not arisen between the School and Teachers' Pensions, that is not to say that an estoppel has not arisen between the School and Ms Stephens. If an estoppel has arisen, this could change the outcome in this complaint entirely. For example, if it could be demonstrated that Ms Stephens should be estopped from refusing to complete a retrospective opt-out election, then any claims for unpaid contributions would fall away. However, the limits on my jurisdiction provide that I am unable to consider a complaint or dispute brought by a scheme employer about an 'actual or potential beneficiary' of a scheme (as defined in the Pension Schemes Act 1993). It follows that I am unable to consider whether an estoppel operates between the School and Ms Stephens. This appears to be a highly relevant question in the present circumstances, but it is one that must be considered in another forum.

*Extrinsic contract*

62. In *IMG Pension Plan HR Trustees Ltd v German and another* [2009] EWHC 2785 (Ch) Arnold J found that the only circumstance where an extrinsic contract could override the provisions of the trust deed was where it also amounted to an informed consent by the members that the strict terms of the deed should not be adhered to. It is on this basis that the School asserts that in completing the application form and new employee personal details form, Ms Stephens consented to opting-out of the Scheme. As such, the School argue that the application form and new employee personal details form together amount to an extrinsic contract and therefore the provisions of the regulations governing the Scheme (with respect to opting-out of pensionable employment) should not be adhered to.
63. To ascertain whether an extrinsic contract has formed I must consider whether the necessary elements required to form a legally binding contract are present. In my view there is no intention to create legal relations in these circumstances and, thus, an extrinsic contract has not formed. In *Barbudev v Eurocom Cable Management Bulgaria EOOD and others* [2012] EWCA Civ 548, Atkins LJ said that in ascertaining whether the parties intended to create legal relations "the court has to consider the objective conduct of the parties as a whole" (rather than their subjective states of mind). The application form and the new employee personal details form both required Ms Stephens to confirm her status with respect to her membership of the Scheme; in such way both documents were essentially responses to a request for information. Neither document was expressed to be binding. As such, neither document (or, in addition, both documents taken together) could reasonably be interpreted as being intended to create legal relations between the School and Ms Stephens.



64. Further, an extrinsic contract has not formed because there was no consideration.

*Limitation*

65. The School asserts that the demands for payment of employer contributions in respect of the period prior to March 2008 should, following the decision in Webber, be time barred.

66. The Limitation Act 1980 provides timescales by which an action must have commenced where a breach of the law has occurred. Ordinary breaches of contract are actionable for six years after the cause of action accrued as are actions to recover sums recoverable by statute. Section 32(1) of the Limitation Act 1980, entitled "Postponement of limitation period in case of fraud, concealment or mistake" states that:

"(1) ..., where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) ...

(b) ... or

(c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it."

67. Under section 32(1)(c), the limitation period is extended in the case of an action arising as a result of a mistake. If Teachers' Pensions had issued proceedings in court it would have been able to argue that its time limit for issuing proceedings against the School started to run from the date when it could, with reasonable diligence, have discovered the mistake (i.e. when it could, with reasonable diligence, have discovered that contributions were not being made).

68. Teachers' Pensions first became aware of the unpaid outstanding contributions when the School contacted them in February/March 2012. At that time Teachers' Pensions undertook further investigations and subsequently discovered the extent of the underpayments. To extend the six years Teachers' Pensions rely on the fact that the School is responsible for ensuring that contributions continued to be made up to the date notified as being the opt-out date. I am satisfied that evidence shows that the School failed to ascertain that contributions should have been made in respect of Ms Stephens and that, as such, they failed to ensure that contributions continued to be made up to the opt-out date.

69. I consider that "reasonable diligence" extended as far as the requirement for the School to ascertain Ms Stephens' status within the Scheme and to ensure that contributions were made up to the date notified as being the opt-out date. It does not require exceptional measures to be taken. So I do not find that the School is protected from recovery by the Limitation Act 1980.

70. In Webber the Court found that, with reasonable diligence, the overpayment would have been discovered in the tax year 2002/03. It therefore followed that the limitation period started running as soon as Teachers' Pensions started making overpayments (which would have been some time in the 2002/03 tax year). The effect was that Teachers' Pensions could not recover overpayments made more than 6 years before the relevant date when the limitation period is to be regarded as having stopped (i.e. the cut-off date). In the present case I have found that "reasonable diligence" extended as far as the requirement for the School to ascertain Ms Stephens' status within the Scheme and to ensure that contributions were made up to the date notified as being the opt-out date. It follows that, in the present case, the limitation period started running when the School informed Teachers' Pensions that pension contributions had not been deducted in respect of Ms Stephens. This was in February/March 2012. As a consequence, the 'cut-off date' in this case would be February/March 2018.

*Interest*

71. In their invoice of 27 June 2013, Teachers' Pensions set out the arrears that they believe to be payable by the School. This included an interest figure of £13,657.79.
72. In accordance with regulation G7(4) of the 1997 Regulations, Ms Stephens' employer is liable for the interest that has accrued in accordance with that provision. In accordance with that provision Teachers' Pensions is obliged to request that the School pay interest on the amount of contributions that were unpaid from 1 September 2002 to 31 October 2010, at the rate prescribed in regulation G7(4) of the 1997 Regulations. Payment of such amount may be waived but only at the discretion of the Secretary of State (delegated to Teachers' Pensions). In respect of the contributions unpaid in respect of the period 1 November 2010 to 31 March 2012, interest is payable on these in accordance with regulation 30 of the 2010 Regulations. The amount of interest payable in respect of this period should be calculated in accordance with regulation 30(4) of the 2010 Regulations. Again, payment of interest in this period may be waived but only at the discretion of the Secretary of State (delegated to Teachers' Pensions).
73. It follows that, in accordance with the regulations, interest has accrued on the outstanding contributions and such interest is payable by the School unless the Secretary of State exercises discretion to waive payment of it. However, having considered Teachers' Pensions' invoice of 27 June 2013, they have not made it clear precisely how interest has been calculated. I therefore, suggest that - if the School should wish to see a more detailed breakdown of how that figure was calculated - Teachers' Pensions should provide it.
74. I do not uphold the School's complaint.

**PO-5653**

**Anthony Arter**

Pensions Ombudsman  
9 September 2015