

## Ombudsman's Determination

<b>Applicant</b>	Miss Andra Johnston
<b>Scheme</b>	Teachers' Pension Scheme (the <b>Scheme</b> )
<b>Respondent</b>	Teachers' Pensions

### Complaint Summary

Miss Johnston has complained that Teachers' Pensions are seeking to recover an overpayment from her. Miss Johnston says that Teachers' Pensions are unable to recover the overpayment on grounds of limitation and, also, because she has changed her position. Miss Johnston also says that Teachers' Pensions do not have authority to make deductions from her pension in payment to recover the overpayment.

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

The complaint is not upheld against Teachers' Pensions. Teachers' Pensions have a right to recover the overpaid pension from Miss Johnston's pension in payment. Further, Miss Johnston cannot rely on the defence of change of position and the Limitation Act 1980 does not prevent recovery of the overpayment of pension by Teachers' Pensions.

## Detailed Determination

### Relevant Scheme regulations and other statutory authorities

1. The Teachers' Pensions Regulations 1997 (the **Regulations**) provide that in certain circumstances a member in receipt of a retirement pension from the Scheme will have it abated if they return to teaching employment (Regulation E14). The member's pension may be suspended at any point in a tax year if the combined income from their re-employment and Scheme pension exceeds the salary they would have received if they had not retired (known as the salary of reference).
2. Regulation H3(4) states:

"Without prejudice to paragraph (2) a person who has become entitled to payment of a teacher's pension and who takes up employment such as is described in regulation E14(1) shall-

  - (a) within 14 days of taking up such employment notify the Secretary of State giving details of the salary in the employment; and
  - (b) within 14 days of any change in salary notify the Secretary of State."
3. Regulation 114 of the Teachers' Pensions Regulations 2010 says:

114 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.
4. 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.”

## Material Facts

5. Miss Johnston completed an application form to receive “premature retirement” benefits in September 1998.
6. She took her benefits on 1 September 1998. Teachers’ Pensions sent a statement of award to Miss Johnston on 15 October 1998.
7. Miss Johnston returned to teaching employment, in a part-time teaching role with the London Borough of Waltham Forest (**LB Waltham Forest**), from 1 September 2000. (It appears that this role continued until 31 December 2006.)
8. In November 2000 Miss Johnston’s employer notified Teachers’ Pensions about her re-employment from 1 September 2000. Teachers’ Pensions sent Miss Johnston a Certificate of Re-employment (which had been introduced in November 1998) on 7 November 2000. The cover letter said:

“Please contact our Pensioner Call Centre..., if your circumstances change during the tax year and a new Certificate of Re-Employment will be issued. If your re-employment continues into the next tax year you should also contact us again, in April of that tax year and a new Certificate of Re-Employment will be issued.

It is important that you return the Certificate via your employer as soon as possible. Please note, failure to do so could result in an overpayment of pension which you would have to repay in any event.”
9. Miss Johnston completed the Certificate of Re-employment on 4 December 2000. It was then completed by LB Waltham Forest and returned to Teachers’ Pensions on 25 January 2001, with service details from 1 September 2000 to 31 March 2001. At this time Miss Johnston elected for her further employment after premature retirement to be treated as pensionable.

10. Miss Johnston was informed by Teachers' Pensions on 13 March 2001 that her pension had been affected by her re-employment. This resulted in an overpayment of £1,512.47 (net).
11. Teachers' Pensions sent Miss Johnston a letter on 26 March 2001 which said that her pension would not be restored until 6 April 2001 and that the payment she was due to receive on 8 April 2001 would be reduced because no pension was payable between 9 March 2001 and 5 April 2001. The letter also said:

“If your re-employment is continuing into the new tax year or you become re-employed again, then please contact our Pensioner Call Centre...and a new Certificate of Re-Employment will be issued. Please note, failure to do so may result in the unnecessary suspension of, or an overpayment of your annual pension(s)\*, which you will have to repay promptly.”

Teachers' Pensions say that aside from a phone call of 30 March 2001 in which Miss Johnston said that she disagreed with the overpayment figures, they had no further correspondence with her. She received an increase in salary on at least one occasion each tax year but failed to notify Teachers' Pensions via any further Certificates of Re-employment (or other means), nor did she question why her pension had not been assessed each year.

12. Miss Johnston applied for further retirement benefits in respect of her post-premature retirement pensionable employment (from 1 September 2000 to 31 December 2006). The award of benefits in respect of this employment was calculated by Teachers' Pensions on 14 March 2007. Teachers' Pensions have said that the processes they adopted to calculate pension awards is separate from abatement calculations (abatement calculations requiring notification by Certificate of Re-employment each year), so in the absence of receipt of Certificates of Re-employment an abatement assessment was not undertaken at that time.
13. In May 2011 Teachers' Pensions launched a project to ascertain the instances where pensioners had returned to work but their pension had not been assessed for possible abatement. Teachers' Pensions wrote to Miss Johnston on 12 August 2011 to check whether the service and salary information held on their record to 31 December 2006 was accurate.

14. Teachers' Pensions say that they received a response from Miss Johnston disagreeing with the service record. They then contacted LB Waltham Forest on two occasions asking them to clarify Miss Johnston's service to 31 December 2006, but have not yet received a response from them.
15. Teachers' Pensions wrote to Miss Johnston on 21 December 2012 saying that, as abatement had not taken place at the appropriate time, an overpayment of pension of £5,798.71 had occurred. They wrote again on 21 March 2013 confirming the separate periods of overpayment - this confirmed a total net overpayment to recover of £8,513.48.
16. Miss Johnston has argued that recovery of the overpayment by Teachers' Pensions is barred by operation of the Limitation Act 1980. Teachers' Pensions argue that Miss Johnston is not protected from recovery on grounds of limitation and that it follows that they must seek recovery of the overpayment.
17. Teachers' Pensions have said that to date no repayments have been made and no assessment has been made of Miss Johnston's ability to repay the overpayment. As such, the total amount of £8,513.48 remains outstanding.

### **Summary of Miss Johnston's position**

18. She was not made aware that she had to submit Certificates of Re-employment in each year of her re-employment post premature retirement.
19. Regulation 114 of the Teachers' Pensions Regulations 2010 says that overpayments of pension can be recovered by the Secretary of State, but not via direct reductions from a pension. It follows that the course of action suggested by Teachers' Pensions - to recover the overpaid pension by making monthly deductions from Miss Johnston's pension - is unlawful.
20. Teachers' Pensions should be barred from recovery of the overpayments by operation of the Limitation Act 1980. Teachers' Pensions were aware in early 2001 of Miss Johnston's teaching employment in a permanent role and yet did not detect overpayments from that year. This shows a lack of due diligence. The limitation period should therefore start from 2001 - rather than when the overpayments were discovered - so the claim for recovery of the overpayment is out of time.

21. If she was forced to repay the money she would be put in a worse position than if she had never received the money in the first place. This is because making deductions from her modest income would place her into severe financial difficulties. She accepted the monies in good faith and therefore can successfully argue a change of position defence.

### **Summary of Teachers' Pensions' position**

22. Miss Johnston should have been aware from all the information that was issued to her at the time of her retirement in 1998 and in 2000, 2001 and 2011, that her re-employment was subject to the abatement provisions of the Scheme. She should also have been aware of the need for an annual assessment to be undertaken and of the level of earnings that would affect her pension.
23. However, Miss Johnston did not keep Teachers' Pensions informed of her re-employment and there is no record that the Certificates of Re-employment issued in 2001 were ever returned. Consequently, Teachers' Pensions did not receive confirmation from Miss Johnston at the time of her re-employment for the appropriate years, so the position could not be reassessed until 2011.
24. Teachers' Pensions submit that operation of the Limitation Act 1980 does not bar recovery of the overpayments as, in setting up a separate abatement system (utilising the Certificate of Re-employment), they have demonstrated the "reasonable diligence" required by section 32 of the Limitation Act 1980. The operation of the Limitation Act 1980 does not, therefore, preclude recovery in this case.
25. Finally, Teachers' Pensions also submit that the change of position defence advanced by Miss Johnston does not apply. The change of position defence will not apply as Miss Johnston cannot show that she changed her position by spending the monies in good faith in reliance on a mistake. The fact that Miss Johnston did not notify Teachers' Pensions of her re-employment, as she was required to do, calls into question whether the money was received in good faith. Moreover, the Certificate of Re-employment issued to Miss Johnston on 13 March 2001 shows a salary of reference for 2001/02 as £27,850.77. She also received various other pieces of information advising her of the effect of re-employment on her pension.

Therefore Miss Johnston should have restricted her subsequent earnings as advised and then her pension would not have been abated.

## **Conclusions**

### **Introduction**

26. Teachers' Pensions must administer the Scheme in accordance with the Regulations. As Miss Johnston's pension should have been abated but was not, they are, at least in principle, entitled to seek recovery of the overpaid amount. There may be defences to recovery and these would only apply if Miss Johnston received the overpayments in the reasonable belief they were hers to spend. Miss Johnston does not dispute that she has received an overpayment of pension. However, she challenges Teachers' Pensions' right of recovery.
27. Her case, in essence, is that she was never told by Teachers' Pensions about her responsibilities in respect of the completion of a Certificate of Re-employment on an annual basis and so she was not aware of what was required of her. She also says that Teachers' Pensions should have known of her situation earlier and that they are not entitled to recover the full amount of the overpayment in any event in light of the provisions of the Limitation Act 1980 and, further, that she has changed her position to the extent that it would be unconscionable for Teachers' Pensions to pursue recovery.

### **Recovery via deductions from pension**

28. Miss Johnston says that the operation of the Teachers' Pensions Regulations 2010 provide that Teachers' Pensions cannot deduct the overpayments directly from her pension. Specifically, she has said that regulation 114 of the Teachers' Pensions Regulations 2010 does not provide that overpaid pension can be recovered from her pension currently in payment.
29. Miss Johnston's view is incorrect. Regulation 114 applies in this case as Teachers' Pensions (acting with delegated authority of the Secretary of State) determined - in 2011 - that they had paid Miss Johnston benefits to which she was not entitled. Regulation 114(2)(b) provides that Teachers' Pensions can, to recover a benefit that was paid to which the recipient was not entitled, "withhold the whole or any part of the benefit". This means that Teachers' Pensions can withhold part of Miss

Johnston's benefits in order to recover the overpayment. Such "benefits", include her pension in payment. It follows that regulation 114 gives Teachers' Pensions an entitlement to seek recovery of the overpaid pension by making deductions to Miss Johnston's pension in payment.

30. In any event, even if regulation 114 didn't apply Teachers' Pensions have a right to recover the overpayments from Miss Johnston from her pension in payment. This is because the benefits paid to her are more generous than her actual entitlement under the regulations governing the scheme, so Teachers' Pensions can "recoup" them. Recoupment is a long-established principle of equity, which allows trustees and their administrators to recover overpayments from recipients by making deductions from future payments made to them (so long as the rate of recovery is not unduly harsh so as to be considered inequitable).

#### **Obligation to complete Certificates of Re-employment**

31. In my view, Teachers' Pensions provided Miss Johnston with information which highlighted her obligation to complete a Certificate of Re-employment for each tax year she was re-employed.
32. Having read Teachers' Pensions' letters of 7 November 2000 and 26 March 2001 (key sections set out previously) - which both said clearly that Miss Johnston needed to inform Teachers' Pensions if her re-employment continued into the next tax year (even if there was no change in the re-employment from the previous tax year) - Miss Johnston ought reasonably to have been aware of her obligation to notify Teachers' Pensions of her re-employment by completing a Certificate of Re-employment on an annual basis during her re-employment post premature retirement. Consequently, I consider it reasonable to expect Miss Johnston to have completed Certificates of Re-employment in the subsequent years of her re-employment.

#### **Limitation defence**

33. As set out previously, Miss Johnston also says that Teachers' Pensions should be prevented from recovering the overpayment as a consequence of the operation of the provisions of the Limitation Act 1980.
34. The Limitation Act 1980 governs time limits for bringing different types of claims in the courts and the basic time limit is six years from the date when the cause of



action accrued. However, under section 32(1)(c) of the Act, the limitation period is extended in the case of an action arising as a result of a mistake.

35. Teachers' Pensions first informed Miss Johnston of the overpayments in their letter to her dated 21 December 2012 after they had conducted further investigations into her periods of re-employment in 2011. On the basis of the information they received from her employer, Teachers' Pensions undertook a full assessment of her earnings from her periods of re-employment and determined that it had mistakenly made pension payments to Miss Johnston in excess of her entitlement. To extend the six years, Teachers' Pensions rely on the fact that they had provided Miss Johnston with information as to her responsibilities and the onus was on her to bring her circumstances to their attention.
36. I consider that "reasonable diligence" extended as far as having the requirement for Miss Johnston to inform Teachers' Pensions of her re-employment by completing Certificates of Re-employment on an annual basis during a period of re-employment after premature retirement and an assumption that Miss Johnston would do so. It does not require exceptional measures to be taken. As Miss Johnston failed to notify Teachers' Pensions of her re-employment by completing Certificates of Re-employment, it follows that she does not have a limitation defence.
37. I have taken into account that in March 2001 Teachers' Pensions knew that if Miss Johnston continued in employment in the next tax year she might well exceed the earnings limit. They responded to that knowledge by writing to her and warning her of the specific consequence. That, on its own, was a reasonable endeavour.

### **Change of position**

38. Miss Johnston has also argued that she received the overpayments in good faith and that recovery of them would cause her hardship, therefore she should be protected from recovery on the basis that she has changed her position.
39. For Miss Johnston to successfully argue that she has changed her position I need to find that she received the overpaid pension in good faith, relied on the level of overpaid pension when making the relevant financial decision(s) and that she has changed her lifestyle accordingly in a manner that is irreversible.

40. The change of position defence does not apply in Miss Johnston's circumstances because she ought reasonably to have been aware of the overpayment. This was because - as set out previously - she ought reasonably to have been aware of her obligation to complete Certificates of Re-employment in each tax year during her period of re-employment and, as such, she ought reasonably to have been aware that her failure to do so could result in an overpayment of pension. It follows that any overpayment she received she should not have received, because she should have provided the necessary information to stop it being paid.
41. Further, the fact that recovery of the overpayment would put Miss Johnston in a worse position than she would have been had she not been overpaid in the first place does not mean that she can successfully argue a change of position defence. To successfully argue the defence I would have to find that Miss Johnston relied on the level of overpaid pension to make financial decision(s) which changed her lifestyle in a manner that was irreversible. There is no evidence of that.

### **Summary of conclusions**

42. For the reasons set out above, I do not uphold Miss Johnston's complaint.
43. My expectation is that Teachers' Pensions and Miss Johnston will now enter into sensible discussions about how the money should be repaid. I note from the submissions that Miss Johnston has said that she does not have the money to repay the overpaid pension. As Miss Johnston alleges hardship, such discussions may include consideration of a completion of a means questionnaire by Miss Johnston (if this has not already been done).

**Tony King**

Pensions Ombudsman  
10 March 2015