

## Ombudsman's Determination

<b>Applicant</b>	Mrs Terry Whyton
<b>Scheme</b>	Teachers' Pension Scheme (the <b>Scheme</b> )
<b>Respondent</b>	Teachers' Pensions

### Complaint summary

Mrs Whyton has complained that Teachers' Pensions have asked that she repay an overpayment of pension. She says that Teachers' Pensions should waive the overpayment and that they should compensate her for the distress and inconvenience their seeking repayment of the overpayment has caused her.

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

The complaint is not upheld against Teachers' Pensions because there is insufficient evidence to show that, on the balance of probabilities, Mrs Whyton complied with her obligation to inform the Paymaster General's Office when she returned to teaching employment after premature retirement. Further, Mrs Whyton does not have the benefit of a limitation defence. It follows that Teachers' Pensions are entitled to recover the overpaid pension. However, to date Teachers' Pensions have sought recovery of the overpaid pension in an unreasonable manner and must, therefore, compensate Mrs Whyton for the distress and inconvenience this has caused her.

## Detailed Determination

### Jurisdiction

1. The Paymaster General's Office (**PGO**) has ceased to exist and therefore cannot be a respondent in this complaint. Nevertheless, although the complaint essentially concerns the PGO's conduct, the overpayment relates to the years 1996 onwards (so a time when Teachers' Pensions were administering the Scheme) and recovery is being sought by Teachers' Pensions. It follows that Teachers' Pensions are the correct respondent in this complaint.

### Relevant legislation

2. The Teachers' Superannuation (Consolidation) Regulations 1998 (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).
3. Further, regulation H3 of the Regulations says:

“(1) The employer of a person in pensionable employment is to record for each financial year –

  - (a) the rate of the person's salary;
  - (b) the amount of his contributable salary,
  - (c) any money value forming part of his contributable salary by virtue of regulation C1(1)(b) (accommodation and related services),
  - (d) the contributions deducted under regulation C16(1),
  - (e) the period during which he was in pensionable employment, and
  - (f) the dates of any absence on sick leave or maternity leave, and the amount of salary paid during it.

(2) Employers are, within such reasonable time as he may require, to make to the Secretary of State such reports and returns, and to give him such information about persons who are or have been in pensionable employment, as he may reasonably require for the purposes of his functions under these Regulations; and such persons, and their personal representatives, are to give him such information and to produce such documents as he may reasonably require for those purposes.”
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. Mrs Whyton retired from full-time teaching in 1991 at age 50. I understand that her pension came into payment with effect from 31 August 1991.
6. The form that Mrs Whyton signed to apply to receive her premature retirement benefits included a declaration. It said that, in signing the declaration, she undertook to inform the PGO if she was re-employed at any time during her retirement.
7. Prior to her retirement Mrs Whyton also received an estimate of her benefits from the County of Avon (**Avon**). The letter was dated 1 May 1991. This letter pointed out that Mrs Whyton would be paid further benefits based on one “Compensatory Added Year” of service “under the Authority’s existing scheme” (i.e. so expressed to be payable by Avon under a separate scheme, The County of Avon Teachers Premature Retirement Scheme (the **Avon Scheme**)). The appendix to the letter also said:

“In the event that a teacher accepts re-employment in teaching service of any type or full-time employment subject to the Teachers Superannuation Scheme, whether it be with this Authority, or any other Authority or in the private sector, then s/he must notify this office and the Paymaster General’s Office in writing, within 28 days of entering such employment.

Upon receipt of such notification I [the County Treasurer] will notify the teacher, in writing, of their earnings limit and the possible effect on pension payments bearing in mind that any information issued by the Department of Education and Science (DES) and / or the Paymaster General’s Office will take no account of this Authority’s pension.

Obviously, failure to notify this Authority or the Paymaster General’s Office promptly could result in an overpayment of pension and the need to take recovery action.”

8. Shortly after her retirement Mrs Whyton received a letter (reference TP101) from the PGO dated 25 October 1991, notifying her of her quarterly earnings margin (which, if exceeded, could affect her pension). The letter also said:

“If your total gross earnings exceed the quarterly earnings margin your pension for the quarter concerned will be reduced by the amount of the excess. **YOU**

**SHOULD WRITE TO THIS OFFICE GIVING DETAILS AS SOON AS YOU KNOW THAT YOUR QUARTERLY EARNINGS MARGIN WILL BE EXCEEDED...**

If you become employed in full-time teaching (this excludes relief service which is treated as part-time service) it may be necessary to suspend or reduce your Teacher's pension and you should report full particulars of the employment to this Office immediately, please...

Further information on the effects of re-employment is given in the enclosed form 192 Pen."

9. Enclosed with the letter from the PGO was a copy of Leaflet 192 (March 1991 edition), which said, at section 1:

"...you must not be in receipt of a teacher's pension and a teacher's salary both paid at the same time out of public funds at the same time if the 2 together exceed what you could have earned as a teacher had you not retired."

10. It also said, at section 3.1:

"Salary of reference

Your salary of reference is the highest salary rate you have received during your last 3 years of teaching service or the highest annual rate payable during the 3 years immediately before you became entitled to payment of your pension, whichever is the greater. This is the salary rate used by Paymaster General's Office to determine how much you can earn without affecting your pension. The salary of reference is index linked each year at the same percentage rate as your pension so that your potential earnings from re-employment can increase without affecting, or further affecting, your pension."

11. And it said, at section 6.1:

"What to do if you become re-employed

If you intend taking up an appointment after you retire, or if you have already done so, you should inform Paymaster General's Office at once, even if you think the re-employment is not of a type likely to affect your pension. You should let Paymaster General's Office have as much information about the post as you can ie the name and address of your employer and the school if the re-employment is in teaching service; the date your re-employment begins and the salary rates, if known; whether the service is full or part time and the likely duration; whether or not contributions will be payable to the teachers' superannuation scheme; what kind of contract it is eg short term, supply, etc and the proportion of any part time service to full time service.

If you were granted compensation by your former employer you should inform them of your re-employment because the possible effects on your premature retirement compensation..."

12. Mrs Whyton says that she informed the PGO of her re-employment in September 1991 and provided the information requested in an undated pre-March 1991 edition of Leaflet 192, which she has provided. This says as follows:

“1. WHAT DO I HAVE TO DO IF I BECOME RE-EMPLOYED?

a. Full details of all re-employment should be notified immediately to the Paymaster General’s Office...supplying the following details:-

1. name and address of your employer;
  2. name and address of school, if teaching;
  3. date your employment commenced or is expected to commence;
  4. duration (if known);
  5. actual rate of salary or wages;
  6. nature of the employment (and whether full-time or part-time);
  7. whether contributions are payable under the teachers’ superannuation regulations;
  8. number of days worked each week if the employment is regular;
  9. the proportion of days work, whole or part-time.
- b. If you are in receipt of benefits under the premature retirement compensation arrangements you should also notify your compensating authority immediately of any re-employment.

FAILURE TO NOTIFY PROMPTLY MAY RESULT IN OVERPAYMENT OF PENSION AND THE NEED TO TAKE RECOVERY ACTION.

...

5. WHAT IS MY SALARY OF REFERENCE?

Your salary of reference is the highest annual rate of salary, adjusted in line with cost of living increases, you received during the last 3 years of reckonable service prior to retirement.”

13. Mrs Whyton says, therefore, that PGO’s letter dated 25 October 1991, was a response to her having provided the information requested by them in the version of Leaflet 192 that she held at the time (presumably, the information set out in section 1 above).
14. Mrs Whyton received a letter from Avon on 9 February 1994. This letter told Mrs Whyton that she had exceeded her allowable earnings for the quarter 31 August 1993 to 30 November 1993, by £72.14 (gross). The letter said that the overpayment would be recovered by making deductions to Mrs Whyton’s pension of £18.63 per month starting “from March 1993” (this must have been an error, as presumably it should have referred to March 1994).

15. Mrs Whyton says that the letter from Avon of 9 February 1994, shows that she was overpaid pension from the Scheme and so demonstrates that Avon and the PGO were aware of her re-employment post-1991. Teachers' Pensions, however, say that the letter could refer to the completely separate pension that was paid by Avon, first referred to in Avon's letter to Mrs Whyton of 1 May 1991 (i.e. the Avon Scheme).
16. On 7 February 1995, Avon sent Mrs Whyton a letter saying that the amount she could earn per pension year before her pension would be affected is £14,805.95. (The letter suggests this refers to the period 1 May 1994 to 30 April 1995.) The letter refers to Mrs Whyton's "letter regarding re-employment" and so it seems highly likely that it was a response to that letter.
17. Later in 1995 the Teachers' Pensions Agency (later, Teachers' Pensions) took over responsibility for payment of teachers' pensions from the PGO. It then became necessary for pensioners re-employed in teaching posts to advise the Teachers' Pensions Agency of their re-employment.
18. In 1998 the Department for Education changed the way in which pensions were to be abated when a pensioner returned to teaching. These changes were required by the coming into force of new regulations governing the Scheme. As a consequence of these regulations, Teachers' Pensions introduced the requirement that members in premature retirement who returned to employment should complete Certificates of Re-employment. These were to be submitted by a member at the start of each tax year of re-employment.
19. Teachers' Pensions did not send Mrs Whyton a Certificate of Re-employment in 1998, or subsequently inform her of the requirement to complete one at the start of each tax year of re-employment. Teachers' Pensions have said that they did not do this because they had had no previous notification of Mrs Whyton's re-employment (and, as such, they took the view that in light of the time that had elapsed without Mrs Whyton returning to teaching employment it was unlikely that she would return to work in teaching employment so it was not necessary to do so).
20. Teachers' Pensions have said that they changed systems in 2004 and that their current records show that annual returns (which cover all eligible teachers) had been received from Avon's successor authority, South Gloucestershire Council, including Mrs Whyton prior to that time (in respect of her post-1995 service).
21. In August 2011, Teachers' Pensions instigated a project to ascertain the instances where it appeared that pensioners had returned to work but had not had their pensions assessed for possible abatement.
22. Teachers' Pensions notified Mrs Whyton of her service and salary details in their letter of 17 August 2011. Mrs Whyton replied on 5 September 2011. In that letter she signed a declaration stating that she believed the service and salary information provided by Teachers' Pensions was accurate.

23. Teachers' Pensions performed calculations on the basis of the information signed-off by Mrs Whyton. These revealed that Mrs Whyton's pension should have been abated for several years between 1996 and 2006. It did not include any period prior to 30 September 1996, as the exercise Teachers' Pensions were undertaking only required them to invoice payments that occurred since 1 October 1996.
24. Teachers' Pensions sent Mrs Whyton an invoice on 28 December 2012. The invoice advised her of the overpayments, setting out what had been overpaid in each year.

### **Summary of Mrs Whyton's position**

25. She informed the PGO of her re-employment in September 1991. The PGO's letter of 25 October 1991, was a response to her informing them of her re-employment. She did not retain a copy of her letter informing PGO, or recall precisely what she said in the letter - but she says that the "template" for the letter was the undated pre-March 1991 edition of Leaflet 192 that she held. She, therefore, submits that she gave details of the work she would be undertaking from 1 October 1991, and her personal details.
26. She should not be subject to the post-1998 regime as she was never informed of the need to submit information annually. She was informed of her duties by the PGO's Leaflet 192 (March 1991 edition), which did not make explicit a requirement to submit information annually. The procedure was that she needed to inform the PGO of her initial re-employment, which she did in September 1991.
27. Avon's letter of 9 February 1994, demonstrates that the pension scheme authorities were aware of her return to teaching employment - it showed that she had submitted information about her earnings and that she had been assessed as exceeding her allowable earnings for the quarter (and that it followed that she would have to repay an overpayment). This shows, therefore, that she had done everything that was required of her.
28. She was told on premature retirement in 1991 that if she took up part-time employment she could not earn with her pension more than she would have earned if she had not retired (or else her pension would be abated). She used "what she would have earned had she not retired" - accounting also for annual salary enhancements, cost of living rises and merit rises - as her "salary of reference" in producing her own calculations as to what she could earn before her pension would need to be abated. However, Teachers' Pensions subsequently provided her with a different, index-linked method of how to calculate "salary of reference", which has been used in calculating the overpayment. She maintains that had she known that her salary exceeded the salary of reference in the period where the overpayment accrued she would have adjusted her salary accordingly to avoid abatement of her pension.
29. Even if a finding is made that the overpayment is recoverable, she is not obliged to repay it in any event due because she has a limitation defence. (She has cited the decision in the Scottish case of David T Morrison & Co Ltd v ICL Plastics Ltd.)

30. In failing to monitor her part-time earnings Teachers' Pensions contributed to the loss that she has now suffered. It follows that her liability to Teachers' Pensions should be reduced by a significant proportion in recognition of Teachers' Pensions contributory negligence.
31. She has suffered considerable distress and inconvenience as a consequence of being asked to pay back the overpaid pension. The news from Teachers' Pensions came completely out of the blue and more than six years into her full retirement from teaching; a time that she thought she could simply enjoy. Further, Teachers' Pensions have begun to make deductions before her dispute about the overpaid pension is resolved and also, in 2013, said they were going to reduce her pension by approximately a third without first issuing her with a means questionnaire.

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

32. Avon's letter of 9 February 1994, does not necessarily demonstrate that the PGO was aware of Mrs Whyton's return to teaching employment. Avon were paying Mrs Whyton a pension from a separate scheme (i.e. the Avon Scheme) and it is that pension that is referred to in their letter. The deduction referred to in the letter of 9 February 1994, must have come from the Avon Scheme as Avon would not have been authorised to make a deduction from Mrs Whyton's pension in payment from the Scheme and, further, the records do not indicate that any such deduction was made from the pension payable by the Scheme (to the contrary, they demonstrate that no deduction was made from the Scheme in the 1993/94 year).
33. The PGO's letter of 25 October 1991, indicates that Mrs Whyton had been in contact with them shortly after her premature retirement in 1991. However, there is no evidence to suggest that Mrs Whyton contacted the PGO again to confirm continuing re-employment or to request new earnings limits beyond November 1992; both of which she should have done if her re-employment continued. Further, the letter from the PGO advises that Mrs Whyton should tell the PGO if her quarterly earnings margin (set out in that letter) was ever exceeded. Again, there is no record that such notification took place. Teachers' Pensions have not received any information from either Mrs Whyton, her employer, or the PGO, for the period 1 September 1991 to 31 August 1995.
34. If Mrs Whyton did not contact the PGO again, that is after the PGO's letter of 25 October 1991, to inform them of her re-employment, then the PGO would have regarded her employment not to have continued and, therefore, would not have passed her details to the Teachers' Pensions Agency when they took over the administration of the Scheme on 1 April 1995.
35. An amendment was made to the Teachers' Pensions Regulations to abolish the quarterly earnings margin from 1 May 1994. So from that time Mrs Whyton's re-employment would have been assessed using an annual earnings margin. The PGO

would have taken steps to inform all pensioners, whom they were aware as being in re-employment, of this change in the calculation of their potential earnings margin. If Mrs Whyton did not receive such information from the PGO (which seems to be the case), the assumption must be that this was because they were of the opinion that Mrs Whyton's re-employment had not progressed beyond November 1992.

36. Mrs Whyton was informed of the need to contact Teachers' Pensions if she was re-employed in Teachers' Pensions' pensioner newsletter that was sent out with their P60's for the year (starting 1 April 1995).
37. In respect of Mrs Whyton's complaint about what she was told on how to calculate her "salary of reference", Teachers' Pensions say (in their letter to my office of 20 January 2015) that Mrs Whyton thought she could earn up to what she would have earned had she not taken partial retirement - including annual increases that she may subsequently have received - which was incorrect. She should have been aware of the correct basis of calculation from reading Leaflet 192 (March 1991 edition), which was sent to her by the PGO with their letter of 25 October 1991.
38. At some point prior to 2004 (they cannot confirm precisely when), Teachers' Pensions were sent annual returns in respect of Mrs Whyton's re-employment post-1995, by the successor local authority to Avon, South Gloucestershire Council. However, Mrs Whyton's salary and service information was only confirmed by her in 2011, so she cannot successfully argue a limitation defence. Teachers' Pensions put a system in place to identify potential abatement cases, exercising the reasonable diligence required under section 32 of the Limitation Act 1980. This was based, prior to 1998, on their receipt of information from the PGO (and, from 1995, Teachers' Pensions Agency), and post-1998 on Certificates of Re-employment submitted by re-employed pensioners. Teachers' Pensions were entitled to believe that the information, or in this case, the lack of information provided by the PGO was a true reflection of the situation. Teachers' Pensions maintains, therefore, that they were not aware that Mrs Whyton had been re-employed for the purposes of abatement until the exercise into under-reporting was carried out in 2011, and, as such, Teachers' Pensions are entitled to recover the overpayment. It follows that their receipt of annual returns prior to 2011, does not alter this position.

## **Conclusions**

### **Introduction**

39. Teachers' Pensions must administer the Scheme in accordance with the regulations that govern it. If a 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 Mrs Whyton received the overpayments in the reasonable belief they were hers to spend. Mrs Whyton does not dispute that she has

received an overpayment of pension. However, she challenges Teachers' Pensions' right of recovery.

40. Mrs Whyton's case, in essence, is that she informed the PGO of her re-employment in 1991, and, therefore, she complied with her obligations. At that time there was no obligation on the pensioner to inform the PGO of re-employment on an annual basis, so Mrs Whyton says that she complied with the obligation that applied to her at the relevant time and so she did not need to inform the PGO (or, when it was replaced from 1995, the Teachers' Pensions Agency, and then Teachers' Pensions) about her re-employment. Teachers' Pensions' say, to the contrary, that there is no evidence that Mrs Whyton informed the PGO of her re-employment.

### **Informing the PGO**

41. The requirements that Mrs Whyton must meet on re-employment after premature retirement are set out in the Regulations and specifically in regulation H3(2) (set out at paragraph 3 above). By way of reminder, it says as follows:

“(2) Employers are, within such reasonable time as he may require, to make to the Secretary of State such reports and returns, and to give him such information about persons who are or have been in pensionable employment, as he may reasonably require for the purposes of his functions under these Regulations; and such persons, and their personal representatives, are to give him such information and to produce such documents as he may reasonably require for those purposes.”

42. For the purposes of the Regulations the PGO acted with authority delegated from the “Secretary of State”. The question to consider is, therefore, whether Mrs Whyton complied with her obligations under regulation H3(2).
43. Mrs Whyton says that her receipt of the PGO's letter of 25 October 1991, demonstrates that she informed the PGO of her return to teaching employment post-premature retirement. The letter sets out the precise quarterly earnings threshold that Mrs Whyton must not exceed in the period specified (or else her pension from the Scheme might need to be suspended or reduced). I do not think this information would have been provided by the PGO as a matter of course. It is highly likely that the PGO's letter of 25 October 1991, was issued in response to Mrs Whyton having told them that she may return to work (at the very least), or that she had, in fact, returned to work. It follows that I am satisfied that, on the balance of probabilities, Mrs Whyton informed the PGO of her potential or actual return to teaching in September 1991.
44. I am unable, however, to reach the conclusion that, on the balance of probabilities, the PGO's letter of 25 October 1991, shows that Mrs Whyton informed the PGO of the specifics of her re-employment and, as such, that it shows that she complied with her obligations under regulation H3(2) of the Regulations. Regulation H3(2) says that Mrs Whyton needed to give the PGO “such information” or “produce such documents” to enable the PGO to ascertain whether an overpayment had occurred - so it requires her

to do something beyond simply informing the PGO of her re-employment (i.e. as Mrs Whyton had said she did in September 1991), should she be asked for information by the PGO. The PGO's letter of 25 October 1991, is the PGO's request for information from Mrs Whyton for the purposes of regulation H3(2) of the Regulations. The fact that the letter is dated 25 October 1991, but refers to the period ending 30 October 1991 suggested to Mrs Whyton that she needed to get in touch with the PGO if she knew that her quarterly earnings margin had been exceeded in that period. The PGO could not have known, when they sent the letter on 25 October 1991, whether Mrs Whyton had exceeded the quarterly earnings limit in a period that had yet to lapse. So it follows that the letter makes it clear to Mrs Whyton that she must take active steps to inform them if she had exceeded the limit. There is no evidence to suggest, on the balance of probabilities, that Mrs Whyton provided any further evidence upon receipt of the letter dated 25 October 1991. It follows that I find, on the balance of probabilities, that Mrs Whyton failed to do what was required of her under regulation H3(2), and that she failed to provide the information set out in section 6.1 of Leaflet 192 (March 1991 edition)), following her receipt of the PGO's letter of 25 October 1991.

45. Mrs Whyton also says that the letter from Avon of 9 February 1994, shows that the PGO were aware of her return to teaching employment, as it showed that she had submitted information about her earnings and that she had been assessed as exceeding her allowable earnings for the quarter (and that it followed that she would have to repay an overpayment). Teachers' Pensions say, to the contrary, that Avon's letter of 9 February 1994, does not demonstrate that the PGO was aware of her return to teaching employment.
46. The letter to Mrs Whyton from the PGO dated 25 October 1991, seems to suggest, at paragraph 2, that any overpayment that accrued in any scheme providing an enhanced pension - here, the Avon Scheme - might be recovered by a pension payable from the Scheme (rather than from the Avon Scheme). Further, the text below the table on the final page of Teachers' Pensions letter to Mrs Whyton of 28 December 2012, says: "Please note – the amount of pension(s) paid includes any...discretionary enhancement pensions you may be receiving. If you have received any of these additional pension payments we will be advising the relevant employer of the impact of your re-employment on these payments." Although the letter of 28 December 2012, does not deal with pre-1 October 1996 overpayments, it supports the notion that any overpayment accrued in the Avon Scheme would be recovered by a reduction in the pension payable from the Scheme. So these two documents could be construed to say that the PGO must have been aware of Mrs Whyton's return to teaching employment in 1994, as the deduction from her pension from the Avon Scheme in 1994 demonstrates that action to recover overpaid pension had already been applied to her pension from the Scheme.

47. However, there are also a number of pieces of evidence that suggest that this interpretation of how recovery of overpayments was sought is inaccurate. Firstly, the letter from Avon dated 9 February 1994, suggests that the deductions proposed will be made by Avon and thus, presumably, from the pension payable under the Avon Scheme. Further, Mrs Whyton has said - in a telephone conversation with one of my staff - that she did not think her pension from the Scheme had been abated in that period (and, so, no recovery of overpayments had taken place). In addition, Teachers' Pensions have provided a copy of a P60 and a statement of Mrs Whyton's pension award (from 1991), which suggests that Mrs Whyton's pension from the Scheme was paid in full in the 1993/1994 tax year.
48. Having considered the evidence in the round, I am unable to find, on the balance of probabilities, that the letter from Avon of 9 February 1994, demonstrates that Mrs Whyton provided information to the PGO in respect of her earnings in re-employment at any time after the PGO's request for information in their letter of 25 October 1991. Instead, it seems likely that the overpayment identified in 1994 was noted by Avon and related to an overpayment of pension paid by the Avon Scheme; there is no evidence to suggest that the overpayment in the Avon Scheme was only recorded after an overpayment had been reported in the Scheme. Had that been the case, abatement would have been applied to Mrs Whyton's pension from the Scheme - but both her recollection and the records inherited by Teachers' Pensions suggest that this did not happen.
49. Given the conclusions set out above, I find that, on the balance of probabilities, Mrs Whyton failed to do what was required of her under regulation H3(2), and that she failed to provide the information set out in section 6.1 of Leaflet 192 (March 1991 edition), upon receipt of the PGO's letter of 25 October 1991.

### **Salary of reference**

50. It appears that Mrs Whyton calculated her "salary of reference" to be the salary she could have earned had she continued teaching, allowing for periodic adjustments (e.g. salary increases, merit reviews, etc).
51. The version of Leaflet 192 that Mrs Whyton held prior to receiving the PGO's letter of 25 October 1991, explains that her salary of reference is "the highest rate of salary, adjusted in line with cost of living increases, you received during the last 3 years of reckonable service prior to retirement". Leaflet 192 (March 1991 edition), was sent to Mrs Whyton with the PGO's letter of 25 October 1991. This explained that Mrs Whyton's salary of reference should be calculated on the same basis as set out in the leaflet she held, but that it should be increased each year in a different way; it was to be increased in line with increases to her pension.
52. It seems that Mrs Whyton's method of calculation was, therefore, incompatible with both the pre-March 1991 version of Leaflet 192 that she held and Leaflet 192 (March 1991 edition).

53. Although I am sure that Mrs Whyton made efforts to keep her salary in her part-time employment below what she construed to be her “salary of reference”, there is no way of verifying what she may have been told at the time of her premature retirement. As such, I cannot find that the PGO (or anyone else) told her to calculate her “salary of reference” in a manner that was incorrect and that she relied on that information when calculating her “salary of reference” on an annual basis in the years that followed. Mrs Whyton did, however, receive Leaflet 192 (March 1991 edition). If she had been told something different before that time (for example, in the pre-March 1991 version of Leaflet 192 that she held) then on reading Leaflet 192 (March 1991 edition) Mrs Whyton ought reasonably to have raised a query with Avon or the PGO, or changed her approach to that set out in the leaflet.
54. It follows that Teachers’ Pensions cannot be held responsible for Mrs Whyton applying the incorrect method of calculating her “salary of reference”.

### **Limitation defence**

55. In some circumstances the recovery of an overpayment can be time-barred by statute. 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. If Teachers’ Pensions had issued proceedings in court it would have been able to argue that its time limit for issuing proceedings against Mrs Whyton started to run from the date when it could, with reasonable diligence, have discovered the mistake.
56. Teachers’ Pensions say that they discovered the mistake when they instigated a project in August 2011, to ascertain the instances where it appeared that pensioners had returned to work but had not had their pensions assessed for possible abatement, at which point they contacted Mrs Whyton to ask her to confirm the service and salary information that they held. Mrs Whyton has said that Teachers’ Pensions should have discovered the mistake earlier, as it had been confirmed to her that South Gloucestershire Council had provided Teachers’ Pensions with annual returns which - had they considered them - would have shown Teachers’ Pensions that Mrs Whyton may have been overpaid.
57. I consider that “reasonable diligence” extended as far as having the requirement for Mrs Whyton to inform the PGO of her re-employment and an assumption that Mrs Whyton would do so. It does not require exceptional measures to be taken. So I do not find that Mrs Whyton is protected from recovery by the Limitation Act 1980.
58. Mrs Whyton has also cited the Supreme Court’s decision in *David T Morrison & Co Ltd v ICL Plastics Ltd* [2014] UKSC 48. She has submitted that applying the decision in that case to the present circumstances would mean that as Teachers’ Pensions did not exercise due diligence, their claim (for recovery) lapsed after six years. In that case the Supreme Court considered limitation under the Prescription and Limitation

(Scotland) Act 1973. Given the location of the parties in this case the Prescription and Limitation (Scotland) Act 1973 will not apply to them. The legislation that applies in these circumstances is the Limitation Act 1980, which I have already considered.

### **Contributory negligence**

59. Given my finding above in respect of a limitation defence, it is my view that Teachers' Pensions - in not discovering the overpayment before 2011 - did not act negligently and that Teachers' Pensions have not caused or contributed to the overpayment of pension for which Mrs Whyton is seeking compensation.

### **Distress and inconvenience**

60. Although the overpayments are recoverable under the regulations governing the Scheme, Teachers' Pensions have not dealt with recovery in a manner that I consider reasonable. It appears that they arrived at a monthly repayment figure (which constituted a significant proportion of Mrs Whyton's monthly pension) without having consulted Mrs Whyton and whilst it was known to them that the matter was in dispute. Information provided by Mrs Whyton shows that they have made deductions of £50 from her pension from 20 December 2013, to the present date. Teachers' Pensions are aware that they should not be making deductions from Mrs Whyton's pension whilst the question of the legitimacy of their recovery of that overpayment is in dispute. The manner in which repayment has been pursued has, therefore, clearly been unreasonable and has undoubtedly been a source of distress and inconvenience for Mrs Whyton. It follows that Teachers' Pensions should compensate Mrs Whyton for this.

### **Summary of conclusions**

61. For the reasons set out above, I do not uphold Mrs Whyton's complaint. My expectation is that Teachers' Pensions and Mrs Whyton will now enter into sensible discussions about how the money should be repaid.

### **Directions**

62. Within 28 days of this Determination Teachers' Pensions must pay Mrs Whyton £500 in recognition of the distress and inconvenience that the manner in which they have pursued repayment of the overpaid pension has caused her.

**Anthony Arter**

Pensions Ombudsman  
21 July 2015