

Ombudsman's Determination

Applicant	Mr N
Scheme	Teachers' Pension Scheme (the Scheme)
Respondents	Department for Education (DoE) Teachers' Pensions

Complaint summary

1. Mr N's complaint against Teachers' Pensions and DoE is that after two years of receiving a pension, they said that his retirement benefits had been calculated incorrectly. He adds:
 - a. This followed repeated written confirmation of his pension benefits from Teachers' Pensions during which they confirmed their final and definitive figures and gave assurances to him and provided the financial basis on which to change his position.
 - b. With no discussion of the issue, Teachers' Pensions immediately reduced his pension in 2013 by around £5,000 per annum. They requested immediate repayment in full in 2013 which severely surprised, stressed and shocked him. They did not say or discuss anything with him.

Summary of the Ombudsman's determination and reasons

2. The complaint should not be upheld against DoE because they were not involved in the calculation of Mr N's pension. However, the complaint against Teachers' Pensions should be upheld, but only to the extent of significant non-financial injustice he has suffered.

Detailed Determination

Relevant regulations

3. The Teachers' Pensions Regulations 2010 (as amended) (the **2010 Regulations**), provide that the better of two calculations will be the final average salary used to calculate retirement benefits. The two calculations are: (Method A) the contributable salary in the final 365 days of pensionable employment; and (Method B) the average of the best three years of revalued salaries in the 10 years before retirement.
4. In addition, under regulation 39, in the case of the calculation in (Method A), salaries must be restricted if the year on year increase in salary in any of the final three years is greater than either 10% or a particular 'fixed amount', whichever of these increases is the greater.

Material facts

5. Mr N was an acting head teacher, a job he had been doing since 1 September 2010. Prior to this he was a deputy head teacher.
6. On 22 May 2011, Mr N applied for retirement – he was 61 years old. He started to receive his benefits from the Scheme as from 1 September 2011.
7. In August 2013, Teachers' Pensions wrote to Mr N informing him that there had been an overpayment of his retirement benefits. The overpayment, which amounted to £36,616.02, had resulted because the salary used to calculate his retirement benefits should have been restricted. Teachers' Pensions explained that the restriction of salary is in accordance with regulation 39 of the 2010 Regulations; the best average salary had changed from £97,603.83 to £86,621.50; the amount of pension he could commute changed from £9,601.03 to £8,250.73; and the overpayment of pension and lump sum amounted to £7,152.87 and £29,463.15, respectively. They said that they are obliged to recover all overpayments incorrectly paid from public funds.
8. Mr N responded to Teachers' Pensions saying that the original benefits paid to him formed the financial basis of his current and future life. Over the next 10 years his income will be reduced by around £100,000. His initial decision to take an increased lump sum was dependent upon having a required monthly pension income and these arrangements were now destroyed.
9. Teachers' Pensions apologised to Mr N for the way they had handled his case and offered him £150 as an ex-gratia payment.
10. Mr N made a complaint, via his MP, to Teachers' Pensions about aspects of his case and the recovery of the overpayment which had caused him financial strain and considerable stress. The Minister of State for Schools responded to Mr N's MP confirming that the overpayment must be repaid.

11. In February 2014, DoE wrote to Mr N apologising for the distress and inconvenience that they had caused him, firstly by the delay in identifying the issue and for the Teachers' Pensions handling of his complaint. Their explanation is set out below:
- a. The salary restrictions during the final average salary period, is to ensure that members do not receive benefits greatly disproportionate to the contributions paid. The regulations were amended from 1 April 2010 to make the restriction compulsory in all cases where a member's salary increased by £5,000 or 10%, whichever is the greater. Prior to this the 2007 provision allowed for "standard increases" to be ignored and for discretion to be used in some cases. However, this meant that in an increasing number of instances, where individuals received very large salary increases in their final year of service, the Scheme was not receiving the higher contributions associated with that salary, but individuals received the higher pension payment – this is clearly unsustainable.
 - b. In his case, the restriction should have been applied because the salary increase he had in his final year (i.e. £20,478) was in excess of £5,000. There is no caveat within the regulations to deal with how the rise was awarded – all rises are subject to the restriction.
 - c. They have a duty under the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, to ensure that each member of the Scheme has information which may affect them or their rights under the Scheme. These regulations specify the methods to be used in achieving this including posting on a website. They, in conjunction with Teachers' Pensions, meet this duty through such regular communications on the Teachers' Pensions' website and in addition provide regular updates to employers and other interested parties.
 - d. Teachers' Pensions' records show that he utilised the on-line application tool to apply for retirement benefits. On 20 May 2011, he logged on to Teachers' Pensions' secure website and the system produced a benefits statement based on the most recent salary data provided by his employer, which was £77,127.55. The benefit statement contained a caveat stating: "*important note: the salary used to calculate your retirement benefit may be restricted if your salary is increased by more than 10% in any of the last 3 years before retirement or £5000, whichever is higher*".
 - e. When he applied for his pension on-line on 22 May 2011, as part of the process, he would have had to tick a box to indicate that he had read the supporting notes. These notes state: "*the salary used to calculate your retirement benefits may be restricted if your salary is increased by more than £5000 or 10% whichever is greater*". The word "may" is used in this context because there are a number of calculations carried out in order to determine the final salary for pension purposes.

12. In response to DoE, Mr N gave the following response:
 - a. The changes which the 2010 legislation brought in allowed an approach to school governors for a “top-up” within 6 months. Their delay in notifying him that his benefits were incorrect has denied him the opportunity to approach the governors within 6 months of retirement.
 - b. Teachers’ Pensions website states that salary restrictions “may” apply. This must also mean that they “may not” apply. He truly believed that discretion had been applied and, if it had not been applied, then he was prepared to appeal the position. This was not called for as the restriction had not been applied.
13. Teachers’ Pensions are currently deducting £5,000 a year from Mr N’s pension to recoup the overpayment.

Summary of Mr N’s position

14. Teachers’ Pensions is a department of DoE, for which DoE determine the policies and procedures. DoE delegates the administration of Teachers’ Pensions activities to a company, such as Capita, who bid to do the administration. DoE may choose to delegate the administrative work, but they cannot delegate accountability or fiducial responsibility.
15. The documentation on Teachers’ Pensions’ website uses the expression that pensions with increases in the last three years “MAY BE RESTRICTED”. Regulation 39 does not include the word “MUST”. May be restricted implies the use of discretion and judgment which he incorrectly thought had been applied in his case.
16. He received the 2010/11 benefit statement shortly after 31 March 2011. This statement was a year out of date in terms of pension estimates because it was based on service up to 31 March 2010 and his salary at that time. Therefore, the figures on this statement were just indicative and not a basis for any retirement decision.
17. He did not request a quotation from Teachers’ Pensions before he decided to retire because they do not issue written quotations. Verbal contact with them was difficult; they referred him to the pension calculator on their website. However, he did obtain a quotation from the Teachers’ Pensions’ website. He knew that once DoE entered his correct salary, the calculator would provide retirement figures as expected. It was round early July 2011 that he found that DoE had entered the correct salary and it was then that he obtained a retirement quotation.
18. He knew that his final salary could be affected or “may be restricted”. He categorically denies that he knew that his benefits would definitely be affected by the salary restrictions.

19. He has suffered:
- a. a reduction of £5,000 p.a. for life;
 - b. a loss of a lump sum of £29,000;
 - c. a loss of a chance to revisit his decision at retirement regarding the conversion of his pension to a lump sum;
 - d. a loss of opportunity to make representation to the school governors to make good the loss to his pension due to the restriction being applied retrospectively as there was only a sixth month window following retirement for such representations;
 - e. a loss of subsequent work opportunities to make good the shortfall – he was pursuing becoming an OFSTED inspector;
 - f. a loss of other opportunities for work which were reduced because of the delay in notifying him meant that he was out of touch with the most recent developments;
 - g. a loss of a stress reduced retirement; and
 - h. an increased financial exposure and outgoings resulting directly from a change of position when he got married in July 2012.
20. His main claim for compensation refers to the loss of income and involvement particularly from 2011 to 2013 and the consequent disengagement with the professional level of work, skill and information required of a top class school leader/inspector. He earned around £12,000 gross during the first three months of his retirement. As late as June 2012, he was sought out by an outstanding school to inspect a department earning around £1,000 for three days work. He continued to be an Educational Consultant, but subsequent offers were declined or not sought. He had partially completed an application to become an OFSTED inspector but did not require the extra income at that time.
21. His change of position is irreversible and impossible to plan for. Teachers' Pensions have put him in an impossible position and do not seem to care.

Summary of Teachers' Pensions' position

22. The previous statutory provisions for restricting final salaries, which had been in place since 1998, were not amenable to computerisation and so were administered entirely clerically. This was because the calculation for restricting salaries had to take account of the 'standard increase' in salary in each establishment in the three years prior to leaving pensionable service.
23. Mr N has referred to the fact that he could have reverted to his previous role of deputy head teacher from acting head teacher, instead of retiring. His salary in his final year was £97,590, while his last salary as a deputy head teacher in his penultimate years was £78,439. They do not know what his salary would have been if

he had stayed on for an extra year, but the final salary of £97,590, restricted for pension purposes to £86,298.11 under Method A, would almost certainly have been replaced by a lower figure.

24. Regarding future income, they accept that his employers could have purchased additional pension if the salary restriction had been applied at the right time. The fact that most employers choose not to purchase additional pension is a statement of fact, based on the cost of this option and no doubt the limits on their finances.
25. It may have been possible for him to re-apply for his old post after retirement given it was still vacant.
26. Various benefit statements indicated how his benefits may have been affected by the salary restriction provisions. Furthermore, there was information on the Teachers' Pensions' website about the application of salary restriction. Therefore, they maintain that he was aware that his pension would be affected by the increase in salary in his role as acting head teacher.

Summary of DoE's position

27. Their position is set out in previous correspondence with Mr N.
28. Teachers' Pensions acted within the terms of the regulations governing the Scheme, and whilst they regret the situation that has arisen, Teachers' Pensions are required to recover the overpayment. This can be repaid over a period of time as agreed between Mr N and Teachers' Pensions.

Conclusions

29. The overpayment of Mr N was due to the fact that when calculating his final average salary they should have applied a restriction to his final year's salary. DoE was not involved in the calculation of his pension benefits from the Scheme. Teachers' Pensions are the administrators and DoE are the managers of the Scheme. Mr N says that DoE are accountable and have a fiducial responsibility for any work carried out on their behalf. There is nothing on the websites for Teachers' Pensions or DoE to suggest that the former is a department of the latter as Mr N suggests. Therefore, I cannot agree that DoE are responsible for the error in the calculation of his pension benefits. As I am unable to find maladministration on the part of DoE I do not uphold the complaint against them.
30. I will now consider the complaint against Teachers' Pensions. Providing incorrect benefits is maladministration, but what I need to consider is whether Mr N has suffered an injustice as a consequence.
31. Teachers' Pensions must administer the Scheme in accordance with the 2010 Regulations. I accept that the Teachers' Pensions' website says that a salary restriction may be applied, but, as DoE explained in their letter of February 2014 to Mr N, the reason for this was because there are a number of calculations to

determine the final salary figure. Nevertheless, the Scheme is governed by the 2010 Regulations and they will prevail in the event of a dispute. I would agree that regulation 39 does not include the word “must”, but equally it does not include the word “may”. The wording of regulation 39 suggests that a salary restriction will be applied if the year on year increase in salary in any of the final three years is greater than either 10%, or a particular ‘fixed amount’, whichever of these increases is the greater.

32. As Teachers’ Pensions should have applied a restriction to Mr N’s final year’s salary when calculating his pension in 2011 but did 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 he received the overpayments in the reasonable belief that they were his to spend. Mr N does not dispute that he has received an overpayment in his retirement benefits.
33. Mr N’s case, in essence, is that he believed that discretion had been applied and his final year’s salary would not be restricted. He also says that Teachers’ Pensions should not recover the overpayment because he has changed his position and it is irreversible.
34. Mr N has argued that besides a reduction in his annual pension and lump sum, he has lost the opportunity: to revisit his decision with regard to the conversion of part of his pension to a lump sum; to make representation to the school governors to make good the loss of his pension; and for future employment. In addition, he has suffered significant stress as a result and increased financial exposure.
35. For Mr N to successfully argue that he has changed his position, I need to find that he received the overpaid benefits in good faith, relied on them when making the relevant financial decision(s) and that he has changed his lifestyle accordingly in a manner that is irreversible.
36. Mr N says that the Teachers’ Pensions’ website states that a salary restriction may be applied, but that could mean that it may not be applied. While I agree that Teachers’ Pensions’ website does not definitively state that a salary restriction would be applied, it does draw the member’s attention to the fact that it could be applied. As his salary had increased considerably in the last year before he retired, due to the fact that he had stepped up from the role of a deputy head teacher to an acting head teacher, he ought reasonably to have known that his final salary could have been affected. If he was unsure of this, he could have clarified the position with Teachers’ Pensions but he did not.
37. Mr N applied for retirement in May 2011. DoE say that around that time he had obtained a benefit statement from the Teachers’ Pensions’ website, which showed benefits based on a salary of £77,127.55. However, he says that he waited until July 2011, when he knew that DoE had entered the correct salary, and obtained a quotation then. In my view, if his decision to retire was contingent on the level of

benefits he would receive on retirement, he would have obtained a quotation before and not after applying to retire.

38. I do not doubt that Mr N had the option to make representation to the school governors, if he had known earlier that the level of his retirement benefits was lower than he had expected. However, there is nothing to suggest that the governors would have granted him additional benefits had he applied to them.
39. Mr N says that he earned £12,000 in the first three months of his retirement; £1,000 for three days work in June 2012; and had partially completed an application to become an OFSTED inspector, but did not require the extra income at that time. I accept that since he retired Mr N has undertaken some work. However, there is nothing to suggest that he would not have undertaken this work even if his pension had remained unreduced. In addition, the fact that he has done some work means that there were opportunities for work which he took. He has not provided any details of work opportunities that were lost. .
40. I accept that his marriage in July 2012 may have resulted in certain financial commitments, which would have been affected by the reduction in his pension. However, there is nothing to suggest that he would not have gone ahead with the marriage if he had known beforehand that his retirement benefits were going to be reduced.
41. For the reasons given above, I do not consider that a change of position defence applies to Mr N. However, I recognise that he has suffered significant non-financial loss in the form of distress and inconvenience and uphold the complaint to that extent. I have directed an appropriate award for compensation against Teachers' Pensions below.

Directions

42. I direct that within 28 days of the date of this determination, Teachers' Pensions shall pay direct to Mr N £750 for the significant non-financial loss he has suffered.

Anthony Arter

Pensions Ombudsman
14 September 2016