

Ombudsman's Determination

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| Applicant | The Estate of the late Mrs S (the Estate) |
| Scheme | Teachers' Pension Scheme (the Scheme) |
| Respondents | St Paul's Catholic Junior School (the School) Liverpool City Council (the Council) Teachers' Pensions (TP) |

Complaint summary

The complaint against the School, the Council and TP is brought by the late Mrs S' husband (**Mr S**) on behalf of the Estate and concerns Mrs S being given a benefit statement prior to her death stating that an in-service death grant of £114,830.70 would be payable. However, after Mrs S passed away an out of service death grant of only £18,703.62 was paid. The complaint also concerns the School's actions at the point where Mrs S exhausted her sick pay and left pensionable service.

Summary of the Ombudsman's preliminary decision and reasons

The complaint is upheld against the Council on the basis that it provided erroneous information to TP. This led to Mrs S's receiving a benefit statement that incorrectly stated she was entitled to an in-service death grant. This, in turn, dissuaded her from applying for ill health retirement benefits before she passed away.

Detailed Determination

Material facts

1. Regulation 65 of The Teachers' Pensions Regulations 2010 (**the Scheme Regulations**), provides that total incapacity benefits will be paid to members on early retirement if the required conditions set out in that Regulation are met. Regulation 118 of the Scheme Regulations also provides for members' benefits to be commuted into a lump sum on the grounds of serious ill health where a member's life expectancy is less than one year. A written application for these benefits must be made in writing to TP.

2. Further, Regulation 7(2)(b) of the Scheme Regulations provides that a member is not in pensionable employment once he or she receives less than half rate sick pay, and Regulation 83 states that an in-service death grant is only payable if the member died either within active service or within 12 months of leaving pensionable employment. The relevant provisions of the Scheme Regulations in full can be found in the Appendix.
3. The Scheme Regulations provide that, where a teacher is employed by the governing body of a school maintained by a local authority, that local authority is, for the purposes of the Scheme Regulations, treated as the employer of that teacher. Therefore, for the purposes of this complaint, Mrs S' employer was the Council.
4. Mrs S was an active member of the Scheme during her employment as a part time teacher at the School, and had previously suffered from a melanoma. On 5 January 2010, she began a period of sick leave due to health complications arising from a reoccurrence of the melanoma for which she was received full rate sick pay.
5. On 11 May 2010, Mrs S' sick pay was reduced to half rate.
6. In August 2010, Mrs S was assessed by Dr Kennedy, an Occupational Health Physician from the Council's Occupational Health Unit. Dr Kennedy submitted his first report on 23 August 2010, and said:

"Her current sickness absence has been complicated recently by the development of reduced renal function and as a result she had recently been started on peritoneal dialysis. At the moment this is taking place every night of the week and lasts for approximately eight hours.

[Mrs S] is under the care of a variety of specialist doctors and nurses and is kept under regular review for her various ongoing medical problems.

Today we had a detailed discussion about events leading up to the present situation and her thoughts on her future work. She is understandably very keen to return to work as soon as she is well enough to do so."
7. On 3 September 2010, Mrs S was again referred to Dr Kennedy who issued further reports stating that Mrs S' condition had generally improved following dialysis treatment, and she was keen to return to work. Dr Kennedy suggested that she discuss a phased return to work with the School.
8. On 18 September 2010, Mrs S began her return to work on a phased basis. However, her health quickly deteriorated, and she returned to full rate sick pay on 20 October 2010.
9. On 10 December 2010, Mrs S again saw Dr Kennedy, who issued a further report stating that Mrs S had been diagnosed with a sliding hiatus hernia in addition to her other long-term problems. Dr Kennedy also said that Mrs S had been suffering from an infection, but he was hoping that when this cleared Mrs S might be able to return to work in the new year.

10. On 24 March 2011, Mrs S' sick pay was reduced to half rate.
11. In July 2011, Mrs S was referred to Dr Kennedy a final time. In his final report, Dr Kennedy said that Mrs S' health had deteriorated further due to the removal of five nodes and required a stay of eight weeks in hospital in February to April, but again stated that Mrs S was keen to return to work.
12. On 16 October 2011, Mrs S exhausted her entitlement to half rate sick pay. Mrs S met with the Headteacher of the School and came to an agreement that, instead of her employment being terminated, she would remain on the School's payroll as an unpaid employee. This was agreed by the School's Governing Body. Mrs S remained in contact with the School via a School Governor who was a close friend of Mrs S, as well as being in contact with her Union. As a consequence of Mrs S remaining on the School's payroll, the Council continued to record Mrs S' employment status to TP as employed.
13. In March 2012, TP sent Mrs S a benefit statement. TP no longer holds a copy of the benefit statement; however its records show that it would have stated that Mrs S was entitled to an in-service death grant of £114,361.47.
14. In February 2013, Mrs S received another estimate of her retirement benefits from TP based on her service up to 31 March 2012. The copy submitted by Mr S states:

"According to our records you have not made a valid death grant nomination or any nomination you may have made previously has been revoked.

In Service Death Grant: £114,830.17

Please note that the amount of death grant paid in relation to an out of service member is different to that above. The in-Service Death Grant is an amount equal to three times the average salary used to calculate your pension benefits. The Out of Service Death Grant is an amount equal to the retirement lump sum."
15. In March 2013, Mrs S informed the School that her illness was terminal. The School says it immediately started the process of applying for ill health retirement. Mr S says that Mrs S declined the opportunity to take ill health retirement benefits as she "felt that she could benefit myself and the children in the long term by preserving her death in service benefits".
16. On 10 July 2013, Mrs S passed away. TP subsequently wrote to Mr S stating that, contrary to what had been stated in the benefit statement that Mrs S had received in February 2013, a death grant of £18,703.62 would be payable along with a spouse's pension of £2,972.79 per year together with a long-term children's pension of the same amount.
17. On 23 August 2013, Mr S wrote to TP complaining that Mrs S had been told her family would be entitled to a higher in-service death grant figure, and as a result she opted not to apply for ill health retirement in case this would affect her family's entitlement to an in-service death grant.

18. On 23 September 2013, TP responded to Mr S and explained that Mrs S ceased to be in pensionable employment when she exhausted her sick pay on 16 October 2011. As the Council continued to record that Mrs S was in pensionable service a statement showing an entitlement to an in-service death grant of £114,830.70 was erroneously sent to Mrs S. It was not until TP received a revised update on 2 August 2013 that it became apparent that Mrs S' pensionable service ended much earlier. TP said:

"The statutory regulations state that for a person to be in pensionable employment they must be employed as a teacher or a lecturer and, where they are on sick leave, entitled to receive at least half of their salary. If a person is on sick leave but not receiving a salary, they cease to be in pensionable employment. This is the position [Mrs S] was in when she died".

and

"There is a provision in the [Scheme Regulations] to pay an in-service death grant where a person leaves pensionable employment because of ill health, does not claim ill health retirement, and died within one year. [Mrs S] was employed on a part time basis by Liverpool City Council. Subsequent to receiving the application for death benefits from [Mr S], TP obtained information from [the Council] which indicated that [Mrs S] had been on paid sick leave from 1 April 2010 to 16 October 2011, at which point her half rate sick pay was exhausted. The service information we previously held showed that [Mrs S] was in pensionable employment up to 31 March 2012. It was only after we received the revised information from Liverpool City Council that it became apparent that [Mrs S] had ceased to be in pensionable employment on 17 October 2011 when she went on nil pay. Based on this new information, [Mrs S] died more than one year after leaving pensionable employment, therefore an out of service death grant was payable."

19. On 11 June 2014, Mr S' sister, Mrs N wrote to the Council on his behalf, complaining that the Council had provided incorrect information to TP regarding the late Mrs S' pensionable status.
20. In August 2014, the Council wrote to TP for further information regarding Mrs S' pensionable service. TP responded to the Council on 11 August 2014 and said:

"According to our records when [Mrs S] obtained her statement of benefits the following information was held on our records:

01/04/2011 to 31/03/2012 – 306 days excluded

This information indicated that [Mrs S] was in service at that time.

If her service record had shown 17/10/2011 to 31/03/2012 -166 days excluded. This information would still indicate that she was in service.

The correct information shown below would have indicated on the statement of benefits that [Mrs S] was out of service

17/10/2011 to 16/10/2012 - 80 days excluded – showing a withdrawal indicator”

21. On 22 August 2014, the Council responded to TP arguing that the guidance issued on its website does not state that a members’ status should be marked as withdrawn in the circumstance that they are on unpaid sick leave. TP responded to the Council on 5 September 2014 and reiterated that Mrs S’ pensionable employment ended on 17 October 2011, and it was only after it had received a revised update from the Council that this became apparent. TP did not answer the Council’s queries regarding potential contradictions in its employer guidance.
22. In September 2014, the Council brought the matter to the Department of Education (DoE). It stated that it had never recorded an employee as withdrawn if they were still on its payroll, as this would specify that the employee had left the authority completely, which Mrs S had not.
23. The Department of Education responded to the Council in October 2014. Its position was consistent with that of TP’s.
24. On 5 February 2016, the Council responded to the letter of complaint Mrs N sent on 11 June 2014. In summary, the Council said that it provided TP with the relevant information in line with the employer guidance that was available at the time.
25. As the complaint was yet to be resolved by corresponding with both the Council and TP, Mr S brought the complaint to this office on behalf of the Estate.

Summary of TP’s position

26. Regulation 7 provides that where a member is on sick leave and entitled to at least half rate sick pay that member remains in pensionable employment. It follows that if the member is not entitled to at least half rate sick pay he or she is not in pensionable employment. The way in which sick leave is treated has been a long-standing feature of the Scheme. As such, from 17 October 2011 Mrs S was no longer in pensionable employment, although there was still a contractual relationship between Mrs S and the Council.
27. TP receives all service and salary information from employers, but it does not hold details of each individual member’s contributions. Therefore, when Mrs S’ pensionable employment ended on 16 October 2011, TP had no way of knowing that Mrs S had left pensionable service.
28. The employer guidance available on TP’s website in 2011 says that one of the key responsibilities of an employer is to provide the leaver with a copy of the “Leaving Pensionable Employment” factsheet. The employer guidance also states:

“Absence due to sickness is pensionable, provided the teacher is receiving at least half pay. Conversely, periods of sick leave where the teacher is receiving less than half pay (e.g. nil pay) are not pensionable. If the teacher is in receipt of at least half pay, the teacher should be recorded as if they were still working at their pre-sickness level. Please note however that employer and employee contributions

should be deducted from the actual amount paid. Any unpaid leave should be recorded as “days excluded”. For irregular part-time teachers, you will need to determine the amount of part-time salary to be recorded for the period of sickness absence, as well as the full-time equivalent salary.

A teacher who has left pensionable employment remains covered for the in-service death grant for 12 months after the end of that pensionable employment where they have ceased pensionable employment due to incapacity and the teacher has not taken retirement benefits.

If the teacher remains in a contractual relationship with you, even though they are no longer in pensionable employment because the salary is less than half pay, they will still be considered for the two tier “in-service” ill-health benefit so long as they remain in a contractual relationship with you.”

29. TP’s website also provides a training module for its employers. The ‘Leaving Pensionable Service’ module explains that it is necessary to complete and return a TR8 form when a teacher leaves pensionable service. TP says that the Council should have submitted the TR8 form as soon as Mrs S exhausted her sick pay and left pensionable employment.
30. The benefit statement Mrs S received on 12 February 2013 was accurate insofar as it took into account all the service information TP had received up to 31 March 2012. However, because TP had not received the TR8 form, the benefit statement did not reflect the fact that Mrs S had not been in pensionable employment since 17 October 2011. This resulted in Mrs S receiving a quote for an in-service death grant. If Mrs S had died within a year of leaving pensionable employment an in-service death grant would have been payable.
31. Whilst it is accepted that Mrs S left pensionable employment because of her incapacity, Mrs S died more than a year after she left pensionable employment. Therefore, the Scheme Regulations do not allow for an in-service death grant to be paid.
32. The benefit statement does not distinguish the difference between an in-service and out of service death grant. It was up to Mrs S, her advisers and the Council to clarify what the in-service death grant figure meant. TP did not receive such an enquiry.
33. The death grant of £18,703.62 that was paid is equivalent to the retirement lump sum at normal retirement age. At some point, Mrs S ought to have received advice from the Council about the option of taking ill health retirement benefits, with the possibility of commuting these into a lump sum. This would have provided a significantly higher level of benefits for Mrs S and her beneficiaries.
34. TP has given the following figures to illustrate what ill health benefits Mrs S would have been entitled to:-

- If Mrs S made a successful claim for ill health retirement benefits in March 2013, she would have been entitled to a pension of £6,100.16 with a lump sum of £18,670.17. If she would have qualified for ill health enhancement, she would have been entitled to a further pension of £4,610.79 and a lump sum of £14,111.92.
- If a member is in receipt of any pension and dies within five years of retirement, a supplementary death grant is payable. The amount is the difference between five times the pension and the amount of pension actually paid up to the date of death.
- If, in March 2013, Mrs S had opted to commute her benefits into a single lump sum payment, she would have received a tax-free payment of £101,064.70.

Submissions from DoE

35. Regardless of any arrangement under which the late Mrs S was 'kept on the books' in the hope of her return to health and employment, she was not in receipt of any salary or sick pay after 16 October 2011, and so was not in pensionable employment after that date.
36. The arrangement Mrs S entered with the School was extremely unusual. TP could not be expected to know the circumstances of her continuing unpaid employment with the School.
37. The 'Employers Guide' is written for the vast majority of employers who deal correctly with teachers' sickness absences. The "ad hoc" arrangement entered into in Mrs S' case resulted in a failure to report her true status to TP, leading to its records being incorrect which in turn led to Mrs S receiving an in-service death grant figure.
38. The intention of the Scheme Regulations is that the appropriate level of ill health retirement benefits are paid to a teacher who is too ill to continue in employment. The Scheme Regulations were not designed to prevent members from claiming retirement benefits due to them in the hope that their dependents will receiving a more advantageous death benefits when the member passes away.

Summary of the Council's position

39. Mrs S suffered from long term illness causing her absence from work. The reports from Dr Kennedy advised that Mrs S remained keen to return to work.
40. Although Mrs S' paid sick leave ended on 16 October 2011, her position was not terminated, in the hope that she would make a full recovery and eventually return to work. This decision was made by the governing body of the School and not the Council.
41. TP says that it provided an incorrect benefit statement to Mrs S based on inaccurate information reported by the Council. However, it is the Council's position that the TP

website and guidance notes should have been specific, definitive and clearly set out for both employers and employees at that time.

42. The Council maintains that it followed the published employer guidance and reported the details of long term sickness on the Annual Service Return (**ASR**) of pension, which was the method that has been corroborated as being in line with relevant guidance available at that time by neighbouring authorities, who have also confirmed that they were processing their long-term sickness notifications in the same manner.
43. The computerised ASR that TP distributes to employers does not allow the employer to record “days excluded” for a part time employee such as Mrs S.
44. The information on the TP website at the time the Council was recording Mrs S’ employment status offers the following advice for recording teachers’ sick leave:
- “1. You’ll need to record it as if the teacher is still working at their pre-sickness levels but remember sick leave is not pensionable if they’re receiving less than half pay
 2. Deduct employer and employee contributions from the actual amount paid. Record any unpaid leave as ‘days excluded’ on the annual return”.
45. The ‘days excluded’ column allows an employer to report the number of days that a teacher was unpaid, but TP’s on-line template for returning ASRs does not allow the recording of days excluded if a teacher received a part time salary. Accordingly, the Council submitted the following information in its ASRs to TP:

| Full/Part time | Start date | End date | Withdrawal | Days Excluded | Full time salary | Part time salary paid |
|----------------|------------|------------|------------|---------------|------------------|-----------------------|
| P | 01/04/2011 | 31/03/2012 | | 0 | £36,789 | £5,995 |
| P | 01/04/2012 | 31/03/2013 | | 365 | £36,789 | £0 |

46. TP contend that the ASRs should have shown:

| Full/Part time | Start date | End date | Withdrawal | Days Excluded | Full time salary | Part time salary paid |
|----------------|------------|------------|------------|---------------|------------------|-----------------------|
| P | 01/04/2011 | 16/10/2011 | | 0 | £36,789 | £5,995 |
| P | 17/10/2011 | 31/03/2012 | W | 166 | £36,789 | £0 |

47. TP's guidance for recording a teachers' pensionable service as withdrawn is:

"Enter W if the teacher has left or a break in service occurs. The only exception is where the withdrawal confirmation is not to be made for a teacher in relief service unless that teacher is leaving the employer. If not applicable leave blank."

The Council has never recorded an employee as withdrawn if they are still on its payroll, as the withdrawal indicator specifies that an employee has left the authority.

48. The Council sought clarification from TP as it appeared to be publishing contradictory guidance for the completing of the ASR. TP's response of 5 September did not address any of the points that the Council raised concerning contradictory guidance for completing ASRs when a teacher is on a period of unpaid sick leave.

49. The Council notes that TP's guidance and employer instructions have now been updated and a more comprehensive TP website has been introduced and current advice from the TP website states:

"Sick leave is pensionable, provided the member is receiving at least half pay. Once the member is receiving less than half pay they are classed as not being in pensionable service, contributions should not be deducted and the service reports as days excluded. Statutory pay is not to be included as pensionable earnings for member on sick leave".

50. Furthermore, advice from TP now instructs employers to issue a TR8 form immediately after a teacher falls out of pensionable service and issue a new starter TR6 form when they return to employment. The Council says this was not the practice that was used by it or neighbouring Councils at the time in question.

51. The Council contacted TP in 2017 enquiring how it should record a teacher's pensionable status whilst on long term sick leave and on less than half rate sick pay. The reply from TP, dated 24 May 2017, does not state that employers are to submit a TR8 for indicating the teacher has left the Scheme. TP said:

"Just to confirm that when a member who is on sick leave and goes to below half pay the period recorded as full days out. If the member is off long-term sick, service details should still be submitted on the annual return/monthly data collection with the annual salary rate which they would have been on had they continued to work but the whole period must still be recorded as "days out" and this includes Saturdays, Sundays and Bank Holidays".

52. The Scheme Regulations have now been amended to allow the Estate of a teacher to claim death in service benefits up to two years after the death of a teacher, as opposed to one year.

53. Overall, the Council says it provided TP with relevant information in line with the available employer's guidance at the time and this information should therefore have

proved sufficient for TP to produce an accurate estimate of benefits in relation to the position of Mrs S in 2013.

Summary of the School's position

54. Mrs S met with the headteacher and requested to remain employed by the School despite the fact that she would no longer be in receipt of a salary due to her extended leave of absence. The School says Mrs S believed that by remaining employed by the School, it would provide a focus to hopefully assist her recovery. This received the full agreement of the School's governing body.
55. During her unpaid sick leave, a link between the School and Mrs S was maintained through a School governor who was a close friend of Mrs S and her colleagues. She was also in consultation with the National Union of Teachers.
56. The School is unable to provide evidence that it provided Mrs S with guidance regarding ill health retirement. However, the updates the School received from Mrs S were that it was always her intention to return to employment when her condition improved. Therefore, no application or guidance regarding ill health retirement was issued to Mrs S between October 2011 and March 2013.
57. The School became aware that Mrs S' condition was terminal in March 2013. The School says it wanted to ascertain whether her family would be better off if she died in service or if she should resign. The School was advised by its HR department to make an application for ill health retirement.
58. However, the process of applying for ill health retirement is the decision of the teacher. The employer cannot make the application on behalf of the employee or direct the employee to complete the application. It is the School's understanding that it was Mrs S' intention to die in service following the benefit statements she received from TP, and therefore she did not pursue a claim for ill health retirement. The School confirmed that it did not seek to commute Mrs S' pension into a lump sum upon learning that her condition was terminal.
59. The School provided the Council with the relevant information regarding Mrs S' ongoing sickness, for the Council to pass on to TP.

Summary of the Estate's position

60. Mrs S' death was hastened by the decreased function of her kidneys, the ongoing capacity for dialysis reducing and a bleed stemming from a tumour. Mrs S also had type 1 diabetes. However, there was still hope for new treatment up until her death.
61. Mrs S and Mr S did not wish to have a conversation regarding Mrs S' life expectancy so did not seek a prognosis.
62. Mr S says that the benefit statements Mrs S received in 2012 and 2013 stated that she was in pensionable service. Mr S said he had lengthy discussions with Mrs S at the time about her pension. Mr S says he wanted Mrs S to consider accessing her

pension due to her condition, to improve the quality of the remaining months of Mrs S' life. However, Mr S says that she relied upon the benefit statements and declined to apply for an early pension as she felt that she could better benefit Mr S and her children in the long term by preserving her in service death grant of £114,830.70.

63. Mr S confirms that he has no recollection of any discussion Mrs S had with the School regarding ill-health retirement. From memory, he says the only discussion Mrs S had concerning ill health retirement was with her dialysis nurse. However, Mr S says that Mrs S was aware that it was possible to apply for ill health retirement but chose to rely on the statements she received from TP, believing this would be the best outcome for her family.

Conclusions

64. Mrs S exhausted her entitlement to paid sick leave on 16 October 2011. Thereafter, she was not in pensionable employment under the Scheme Regulations. Yet in the approximate 18 months between this date and March 2013, when she made the School aware that her condition was terminal, no application for ill health retirement was made. The reason behind this appears to be based on Mrs S' desire to return to employment in the eventuality that her condition improved. It is noted that at no point before March 2013 did the School provide any guidance to Mrs S about the possibility of applying for ill health retirement if her condition did not improve to a point where she could return to employment. Therefore, what needs to be considered first is whether the School failed in its duty of care to Mrs S.
65. The question of whether and to what extent an employer has a duty to provide certain information about a pension scheme to its employees has been considered by the House of Lords in *Scally v Southern Health & Social Service Board* [1991] IRLR 522 (**the Scally case**). The House of Lords found that, in a limited set of circumstances, a duty to inform an employee about a contractual right could be implied into a contract of employment. These circumstances are: the terms of the contract have not been negotiated with the individual employee; a particular term of the contract makes a valuable right available which is contingent upon the individual taking some action; and the employee cannot reasonably be expected to know of the term unless it is drawn to their attention. In the Scally case, the employees had a right to purchase additional pensionable service but were required to exercise that right within a certain period of time. This was not brought to their attention in time for them to exercise the right.
66. Mrs S' contract of employment would not have been negotiated with her individually and she was required to take some action to claim her ill health retirement benefits. It remains, therefore, for me to consider whether she could have reasonably been expected to know that she could apply for ill health retirement benefits and what these benefits would be.
67. The process of applying for ill health retirement was readily available on the TP website. It is reasonable to assume that Mrs S would have come across this

information at some point during her paid and unpaid sick leave. But more importantly, Mr S has said he discussed with Mrs S the possibility of taking her pension early, and that she was aware that she could opt for taking ill health retirement, so Mrs S was mindful that claiming this benefit was a contractual right. Therefore, I do not find that there was a Scally type duty on the School to inform Mrs S of her right to apply for ill health retirement.

68. I now turn to the extent to which Mrs S relied on the benefit statements she received in 2012 and 2013 stating that she was entitled to an in-service death grant. It was unfortunately only after her death that it became apparent to Mr S that Mrs S was not entitled to this benefit. TP has informed this office that, if Mrs S had made a successful claim for ill health retirement benefits in March 2013, she would have been entitled to a pension of £6,100.17 with a lump sum of £18,670.17. If she had qualified for ill health enhancement, she would have been entitled to a further pension of £4,610.79 and a lump sum of £14,111.92. Mrs S was of course not aware of her potential ill health retirement benefits as she did not make any claim for ill health retirement, due to her belief that her family would be entitled to an in-service death grant of £114,830.17. TP has informed this office that, if Mrs S had commuted her ill health retirement benefits she would have received a lump sum of £101,064.70.
69. Mrs S received two benefit statements showing that her surviving family would be entitled to an in-service death grant. The first, received in March 2012, showed that an in-service death grant of £114,361.47 would be payable. The second statement, received in February 2013 showed that Mrs was entitled to a similar in-service death grant of £114,830.17. From Mrs S' perspective, she was still employed by the School at this point in time so I consider that she would reasonably have assumed that the reference to her being "in service" was correct. Further, the figures provided in the two benefit statements are relatively similar, so I have no reason to question that Mrs S relied on the two benefit statements in good faith.
70. The dispute between the Council and TP centres on how Mrs S' employment status should have been recorded on the cessation of her sick pay from 17 October 2011. Firstly, the Council has submitted an email from TP in May 2017 which says that the period in which a member's pay falls below half salary should be recorded as days excluded, which the Council says conflicts with TP's previous position that a TR8 form should be submitted on the cessation of a member's pensionable service. However, this email is not relevant to this complaint, as it was submitted after the events that are relevant to this complaint. My finding concerns whether the Council ought to have known that it was incorrectly recording that Mrs S was in pensionable service from 17 October 2013. Therefore, I have not considered the May 2017 email.
71. Irrespective of any arrangement under which Mrs S was still contractually employed by the School in the hope that her health would improve to a condition in which she could return to work, her salary was reduced to less than half pay after 16 October 2011, so she ceased to be in pensionable employment after this date.

72. The Council has argued that this was not made clear by the available employer guidance, and specifically that the guidance stated that it must “Deduct employer and employee contributions from the actual amount paid. Record any unpaid leave as ‘days excluded’ on the annual return”. However, Mrs S was unpaid from 17 October 2011, yet the ASR the Council submitted to TP shows that between 1 April 2011 and 31 March 2012 the Council did not record any days excluded from the date her half rate sick pay ended, and indicated that she was receiving part time pay of £5,995 until 31 March 2012. Therefore, even though the Council says it believed it was following the available employer guidance, it had still done so incorrectly.
73. The Council has also contended that TP’s online template for completing an ASR does not allow the recording of days withdrawn for teachers in receipt of half time pay, yet it still recorded that Mrs S had 365 days excluded between 1 April 2012 and 31 March 2013. Furthermore, the Council’s own submission of employer guidance states that employment is not pensionable if a teacher is in receipt of less than half rate sick pay, but it appears that the Council has assumed that this is analogous with unpaid leave.
74. Separately, the evidence submitted by TP shows that in 2011 the guidance from its website was clear in stating that, once a teacher’s sick pay falls below half rate, that teacher ceases to be in pensionable service. TP’s website provided a training module which shows that a TR8 form is to be submitted to TP as soon as a teacher leaves pensionable service, so, I find that the guidance available to the Council was sufficiently clear in explaining that the Council should have submitted a TR8 form to TP to show that Mrs S had left pensionable service on 17 October 2011. The Council’s failure to do so resulted in Mrs S receiving a benefits statement in 2012 and 2013 which incorrectly stated that she would be entitled to an in-service death grant.
75. I am led to the conclusion that the Council should have been aware that the method by which it was recording Mrs S’ pensionable service to TP might not have been correct. It was open for the Council to query this with TP at the time and to ask TP for clarification as to how an ASR should be completed in respect of a part time employee, and in doing so it should have become aware that Mrs S’ pensionable service ended on 17 October 2017, but it did not make any such enquiries. By failing to make the necessary enquiries to ensure that it was properly informed I consider that the Council acted negligently, resulting in TP providing Mrs S with an incorrect benefit statement.
76. Mr S has referred to a conversation he had with his wife before she passed away, specifically that she did not want to apply for ill health retirement benefits. But crucially, when Mrs S made the School aware that her condition was terminal in March 2013, she chose not to pursue a claim for ill health retirement as the death grant of £114,830.70, to which she mistakenly believed she was entitled, would have been more beneficial to her surviving family than the benefits that would have been payable in respect of ill-health retirement. Had Mrs S been aware of the correct position, knowing that her family were only eligible for an out of service death grant of £18,703.62, on the balance of probabilities, I find that Mrs S would have opted to

pursue a claim for ill health retirement and in doing so would have been informed of the option of commuting her benefits into one lump sum.

77. Given that Mrs S was suffering from a terminal illness and sadly passed away four months after making the School aware of that fact, I am satisfied that, had Mrs S made an application to receive ill-health benefits under the Scheme, her application would have been successful.
78. Mrs S was fully aware that her illness was terminal in March 2013, so as a matter of course, the subject of commuting her benefits would have arisen whilst enquiring about her benefit options. It seems to me that Mrs S' decision not to apply for ill-health benefits, on the basis that she thought that she was entitled to a substantial death in service lump sum payment, was made with a view to maximising the financial benefits that her family would receive from the Scheme. I consider that Mrs S would have chosen to commute her ill-health benefits to have improved the financial outcome for her family. As a result of relying on TP's benefit statement, which had been issued by TP in reliance on the incorrect information provided by the School, Mrs S has lost out on the ill-health benefits to which she would have been entitled under the Scheme had she applied for them.
79. Therefore, I uphold the complaint against the Council on the basis that it was negligent in failing to clarify with TP how the Council should have recorded Mrs S' unpaid sick leave, despite the ambiguity in the guidance in respect of Mrs S' unusual situation. As a result, of the Council's negligence, it provided incorrect information to TP with the consequence that TP then, provided an incorrect benefit statement to Mrs S, which in turn Mrs S relied upon to her detriment.
80. I note that the Estate has already received an out of service death grant, which must be taken into account when calculating the total financial loss incurred.

Directions

81. Within 28 days of the date of this determination:
 - (a) the Council and TP shall determine the amount of the maximum benefits that would have been payable to and/or in respect of Mrs S, had she applied for ill-health retirement benefits in March 2013, when the School became aware that Mrs S was terminally ill. The Council and TP are to provide all reasonable assistance necessary to one another in order to fulfil this requirement;
 - (b) Within a further 21 days, the Council shall pay the Estate a sum equal to the difference between: i) the amount that was paid by the Scheme as an out of service death grant in respect of Mrs S' death; and ii) the total amount determined by the Council and TP under sub-paragraph (a) above; and
 - (c) The Council shall add simple interest to the amount payable under sub-paragraph (b) above, from the date the commuted lump sum became payable,

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using the base rate for the time being quoted by the reference banks and calculated up to the date of settlement.

Anthony Arter

Pensions Ombudsman

19 December 2018

Appendix

The Teachers' Pensions Regulations 2010

7 Employment not pensionable: general

(2) An employment is not pensionable employment unless the person (P) in that employment is entitled to be paid—

(a) P's salary in full, or

(b) where P is on sick leave or on adoption, maternity, parental, shared parental or paternity leave, not less than half P's salary, or

(c) statutory adoption, maternity or paternity pay or statutory shared parental pay.

65 Total incapacity benefits

(1) This regulation applies where—

(a) an ill-health pension becomes payable to a person (P) because P satisfies Conditions 1, 2 and 3 set out in paragraph 3 of Schedule 7 (Case C: ill-health retirement), and

(b) P satisfies Conditions A and B.

(2) P satisfies Condition A if P's ability to carry out any work is impaired by more than 90% and is likely to be impaired by more than 90% permanently.

(3) P satisfies Condition B if immediately before satisfying Condition A—

(a) P was in pensionable employment,

(b) P was paying contributions under regulation C9 of TPR 1997 or regulation 19 (election to pay contributions by a person serving in a reserve force), or

(c) P was taking a period of non-pensionable sick leave, a period of non-pensionable family leave or a career break which, in every case, followed on immediately after a period of pensionable employment.

83 Death grant: death in service

(1) A death grant may be paid on the death of a person (D) in any of the following circumstances—

(a) D dies in pensionable employment;

(b) D dies during a period in respect of which D is paying contributions under regulation C9 of TPR 1997 or regulation 19 (election to pay contributions by a person serving in a reserve force);

(c) D ceases to be in pensionable employment because D is incapacitated and dies within 12 months after the cessation of the pensionable employment without returning to employment in a capacity mentioned in Schedule 2;

(d) the period in respect of which D is paying contributions under regulation 19 ends because D is incapacitated, and D dies within 12 months after the end of that period without returning to employment in a capacity mentioned in Schedule 2;

(e) D dies while on non-pensionable family leave which immediately follows a period of pensionable employment.

Commutation: serious ill health

(1) Where a person (P) has a life expectancy of less than a year at the time when—

(a) a retirement pension which is paid because Case A applies to P's reckonable service, or

(b) an ill-health pension

becomes payable to P, the Secretary of State may, on the application of P, commute the pension and any phased retirement pension, additional pension or total incapacity pension paid with the pension by paying a lump sum specified in paragraph (2).

(4) An application must

(a) be in writing,

(b) be made at the same time as the person makes an application under regulation 107 (payment of benefits on application to Secretary of State),

(c) be accompanied by all the medical evidence necessary for the Secretary of State to determine that P is entitled to the commutation.