

Ombudsman's Determination

Applicant	Mr G
Scheme	Teachers' Pension Scheme (TPS)
Respondent	Teachers' Pensions (TP)

Complaint Summary

1. Mr G's complaint concerns an overpayment of pension benefits, amounting to £44,388.42 (net), which TP is seeking to recover using the repayment method.¹
2. Mr G argued that had TP put a system in place for domestic members, prior to 2014, similar to the one it had for overseas members of the TPS to inform TP of changes to their personal circumstances, such as a remarriage, TP would have known about the overpayment sooner. Because TP did not, he argued he had a limitation defence under section 32(1) of the Limitation Act 1980 (**the Limitation Act**).

Summary of the Ombudsman's Determination and reasons

3. The complaint is only partially upheld because:-
 - 3.1. Mr G has not established that he has a legal defence against the recovery of the overpayment on grounds of unjust enrichment and/or Regulation 114 of The Teachers' Pensions Regulations 2010 (**the 2010 Regulations**).² In particular, he has not demonstrated that he has a defence to recovery under the Limitation Act, change of position or estoppel. So, the overpayment is recoverable by TP. TP shall recover the overpayments at the rate specified in paragraph 93 of this Determination.
 - 3.2. TP's maladministration, in the manner in which it dealt with this case, caused Mr G to suffer significant distress and inconvenience for which he shall receive an award.

¹ Meaning the overpayment is repaid directly to the scheme, rather than being deducted from any future instalments of pension (which would not be available in this case, as Mr G's spouse's pension from the TPS has now come to an end).

² Regulation 114 of the 2010 Regulations is set out in Appendix 1.

Detailed Determination

Material facts

4. Mr G is being represented by his brother Dr G. Dr G also represented Mr G in his appeals against TP's decision to recover the overpayment from Mr G. Although Mr G is being represented by Dr G, in this Determination, any submissions made by Dr G on behalf of Mr G will be stated as having been made by Mr G.

Background

5. As with many pension schemes, TPS provides for a spouse's pension to be payable on the death of a member. However, historically, that pension came to an end in certain circumstances – notably the remarriage of the spouse. In this case, the relevant regulations at the time of Mr G's first wife's death were the Teachers Pensions Regulations 1997 (SI1997/2001) (**the 1997 Regulations**) (as amended).³ Regulation E30 of the 1997 Regulations provided:

“E30 Commencement and duration of long-term family pensions

(3) Unless the Secretary of State determines otherwise in the particular case, and subject always to regulation E1(3)(c) and (d) (guaranteed minimum pension for surviving spouse), an adult pension is not payable during or after any marriage or period of cohabitation outside marriage.”

6. Clearly, in order to bring the spouse's pension to an end in appropriate circumstances, TP needs to know if a spouse has remarried or entered into a “period of cohabitation outside marriage.” As it is not information that TP itself holds, TP relies on members in receipt of a spouse's pension to notify them of remarriage or cohabitation. To the extent that information is received sometime after, say, remarriage, there is a risk of the spouse's pension having been paid for longer than it should have been, and an overpayment of pension then occurring. The way in which TP sought that information goes to the heart of this complaint.
7. From October 1996, TP sent Teacher's Pensions Adult Declaration (**TPAD**) forms to overseas members of the TPS who were in receipt of a spouse's pension, for them to complete and return to TP, to confirm their continued entitlement to a spouse's pension. The TPAD said:-

“A widow(er)'s pension entitlement ceases if he or she remarries or lives with another person as husband and wife. In this event the pensioner must inform us immediately to prevent any overpayment occurring.”

³ The 1997 Regulations were later revoked by the 2010 Regulations (see Regulation 138(3) of the 2010 Regulations and Schedule 12 to the 2010 Regulations) from 1 September 2010. There are however saving provisions under the 2010 Regulations in Schedule 13 Part 2, so that anything done or having effect as if done under or for the purposes of a provision of the 1997 Regulations has effect, if it could be done under or for the purposes of the corresponding provision of the 2010 Regulations as if done for the purposes of that corresponding provision.

8. If a TPAD form was not returned, the spouse's pension would be suspended until such time as the continued right to receive the pension could be confirmed.
9. However, for members living in the UK a TPAD was not sent to spouses in receipt of a pension, although from 2014, TP put in place a similar process (explained in paragraph 11 below). Instead, a pack of documents was sent to the spouse when they first became entitled to a pension. This included Leaflet 450. This leaflet provided information about the duration of benefits, such as "Spouse's pension payable for life unless spouse re-marries or cohabits" or "Your pension will normally continue for life unless you re-marry or co-habit as man and wife."⁴
10. Prior to 2014, TP also sent annual newsletters to domestic members of the TPS, which included a reminder of the responsibility to notify TP of a change in circumstances such as a remarriage. The annual newsletters did not say that a pension would cease on remarriage.
11. In 2014, TP adopted an additional process for domestic members to notify TP of changes to their personal circumstances. From 2014, domestic members in receipt of a dependant's pension had to complete a Dependant's Declaration Form (the **Declaration**), informing TP of any changes to their personal circumstances. The Declaration stated:

"If an adult dependant remarries/co-habits or enters into a civil partnership they must inform us with full details immediately. An adult dependant's pension entitlement ceases if he or she remarries or lives with another person as husband and wife. In this event, the pensioner must inform us immediately to prevent any overpayment occurring."

The specific facts relating to Mr G

12. Mr G's first wife was a member of the TPS. She died on 11 December 1999. Following her death Mr G became entitled to a spouse's pension from the TPS. He was awarded a short-term spouse's pension totalling £11,286.75 for the first three months and subsequently, an annual pension of £3,713.05.
13. On 8 August 2005, Mr G remarried. Mr G's second wife died in 2012.
14. On 6 October 2016, TP sent Mr G a Declaration. On 13 October 2016, Mr G telephoned TP to inform it of his re-marriage.
15. On 6 December 2016, TP wrote to Mr G and said in summary:-
 - 15.1. His entitlement to payment of a widower's pension ceased in the event of remarriage, if he entered into a civil partnership or lived with a person as a spouse or a civil partner.

⁴ TP has provided evidence to The Pensions Ombudsman that Mr G was sent a copy of Leaflet 450 following the death of his first wife.

- 15.2. However, the payment of his widower's pension continued after his remarriage and resulted in him receiving an overpayment of benefits amounting to £44,388.42 net.
- 15.3. TP was obliged to seek recovery of any money incorrectly paid out of public funds, irrespective of why the overpayment had occurred. It would be grateful if Mr G would arrange repayment of the overpaid amount as soon as possible.
16. Between 10 December 2016 and 5 June 2017, there were further exchanges between Mr G and TP concerning:-
 - 16.1. Documentation Mr G would have received at the time he became entitled to his widower's pension.
 - 16.2. In Mr G's view, TP not having any "proper" formal systems in place to monitor his marital status and entitlement to his widower's pension.
 - 16.3. The effect the Limitation Act had on TP's ability to recover the overpayment from Mr G.
 - 16.4. TP's procedure for informing members in receipt of a widower's pension that their pension would cease if they remarried and that they needed to notify TP if they had remarried.
 - 16.5. Documentation Mr G would have received prior and subsequent to his remarriage that would have informed him that his widower's pension would cease if he remarried.
17. On 15 September 2017, Mr G wrote to TP and said in summary:-
 - 17.1. He had repeatedly explained that the Limitation Act as a whole required, in his case, a prudentially based reasonable diligence system, which was well defined by UK legal precedent, to have been put in place by TP by 2005, or within six years of that date which would have been 2011.
 - 17.2. He had previously demonstrated that TP did not have such a reasonable diligence system as required by the Limitation Act, prior to February 2014. The reasonable diligence system was not applied to his case until late 2016.
 - 17.3. All mistakes in this matter had been made by TP. TP knew that any attempt to make a legal repayment claim against him would fail due to TP's non-compliance with the Limitation Act.
 - 17.4. The correspondence between he and TP had been going around in circles, he was convinced his position was the legally correct position on the matter.
 - 17.5. He asked TP to accept his assertion and to stop harassing or making financial claims against him.

18. Mr G also queried why TP had not mentioned The Pensions Ombudsman (**TPO**) in its previous correspondence.
19. Between 10 October 2017 and 8 October 2018, there were further exchanges between TP and Mr G regarding:-
 - 19.1. Previous correspondence between TP and Mr G concerning reasonable diligence and the effect the Limitation Act had on Mr G's case.
 - 19.2. TPO's previous decisions where reasonable diligence had been addressed.
 - 19.3. The process TP used to identify recipients of a widower's pension who had remarried.
 - 19.4. The TPS' complaint process and how Mr G could refer his complaint to TPO.
20. On 5 February 2019, Mr G complained through the TPS' Internal Dispute Resolution Procedure (**IDRP**). He critiqued the previous Pensions Ombudsman's (**the previous PO**) determinations in two previous overpayment cases and also said in summary:-
 - 20.1. He had not realised that under the TPS Regulations he had to inform TP of his remarriage, and that thereafter his widower's pension would cease. This type of discontinuance clause in the event of a widow or widower remarrying was very unusual in late 20th century group pension scheme rules and still was.
 - 20.2. Sections 5 and 32 of the Limitation Act were relevant to his case.⁵ TP's claim for the overpayment dated back to 2005. Under section 5 of the Limitation Act that is when the six-year period of limitation started. If TP had not discovered the overpayment by 2011, it was barred thereafter from reclaiming the overpayment from him.
 - 20.3. TP argued that as the overpayment was allegedly due to a mistake, under section 32 of the Limitation Act, the six-year limitation period would not have started until 2016, when TP became aware that he had remarried.
 - 20.4. For section 32 to apply, TP had to demonstrate and prove that from 2005 until 2011, it had the necessary administrative approach and methodology in place to fully conform to the established legal concept and practice of reasonable diligence in its management of the TPS. Particularly, its widow's and widower's pension payment arrangements.
 - 20.5. There is no definition of reasonable diligence in the Limitation Act. However, there was no shortage of precedent backed definitions available to cover the necessary standard required, and it was quite a high bar.⁶

⁵ These sections of the Limitation Act are detailed in the Appendix 2.

⁶ Mr G provided a detailed summary of what he believed due diligence entailed, and what he expected TP's due diligence in relation to the TPS to have been.

- 20.6. He disagreed with TPO's previous determinations concerning due diligence. Reasonable steps could not be a substitute for reasonable diligence under the Limitation Act.⁷
- 20.7. The implementation of the Declaration was a reasonable diligence system. TP's previous process was not. The implementation of the Declaration was not an extension of reasonable steps, it was completely different in its fundamentals and execution. It was a revolutionary change in procedure.
- 20.8. The fact that the recipient of a widower's pension was expected to contact TP on their own initiative or volition, and that TP had no other way of finding out about a member's remarriage if they did not initiate this, disqualified reasonable steps from being an example of reasonable diligence, under the Limitation Act.
- 20.9. Clearly by February 2014, problems with reasonable steps had reached such a level that TP changed all its procedures to comply with one form of over-riding legislation. This was the reasonable diligence requirement prescribed in section 32 of the Limitation Act.
- 20.10. What was apparent was that by "sleight of legal hand" reasonable steps became reasonable diligence by the previous PO, even though the two legal concepts were mutually exclusive in the context of his case.
- 20.11. Consequently, sections 5 and 32 of the Limitation Act, when applied to his case, did not permit TP to claim money from him.
21. On 1 March 2019, the Department for Education (**DfE**) replied to Mr G's complaint. It said in summary:-
 - 21.1. Its responsibility was to ensure that the Teachers' Pensions Regulations had been applied correctly.
 - 21.2. It appreciated that Mr G considered TP had not been sufficiently diligent in checking the ongoing relationship status of partner pensioners prior to issuing the Declaration. For this reason, he considered he had a limitation defence against the recovery of all or part of his overpayment debt.
 - 21.3. However, when Mr G applied for a widower's pension, it was clear in the guidance that accompanied the application form that the spousal pension would be payable for life unless the spouse remarried or cohabited. This guidance also provided a contact address for TP. Similarly, TP issued annual newsletters to pension recipients that included a prompt to contact TP in the event of a change in their circumstances, such as remarriage.
 - 21.4. It disagreed with Mr G's assessment that this process lacked sufficient diligence. The recipients of a spouse's pension were the people best placed

⁷ PO-11441

to be aware of any change in their relationship circumstances. Having been informed of the conditions under which they received the benefits and regularly reminded of the need to inform TP of any changes in their circumstances, it was reasonable to expect recipients of a spouse's pension to inform TP of any change. The introduction of the Declaration process was an improvement, it did not invalidate the previous process.

- 21.5. It turned down Mr G's appeal as it was satisfied that TP had applied the Teachers Pensions Regulations correctly.
22. Between 8 March 2019 and 19 November 2019, there were further exchanges between Mr G, the DfE and TP concerning why the Declaration was introduced in 2014. During this period, some of Mr G's correspondence was treated as a freedom of information (**FOI**) request, and TP replied to those requests accordingly.⁸
23. On 23 January 2020, TPO received TP's formal response to Mr G's complaint.

Summary of Mr G's position

24. Mr G provided copies of the information he had received from the DfE through his FOI request. He provided detailed comments concerning why he believed TPO's previous Determinations concerning reasonable diligence and reasonable steps were incorrect.⁹ He also said in summary:-
 - 24.1. He had not realised that his pension would cease on remarriage, or that he needed to notify TP of his change in circumstances at the time, so his pension continued to be paid.
 - 24.2. He disputed TP's ability to recover the overpayments on the basis that he has a limitation defence under section 32(1) of the Limitation Act. He contended that if TP had acted with reasonable diligence, or had a reasonable diligence provision in place, it would have discovered the overpayments many years before. So, its claim to recover the overpayments was out of time.
 - 24.3. Reasonable diligence involved a reasonable prudent person or organisation having in place proper operating processes that are able to, and will, identify member mistakes (or, at worst, fraud) in pension payments due to the contravention of scheme rules. TPO had, in past Determinations, wrongly concluded that issuing the initial Leaflet 450 and annual newsletters in which pensioners were reminded to notify TP of their remarriage, was sufficient to amount to carrying out reasonable diligence.
 - 24.4. TPO has applied the wrong test by looking at whether TP acted reasonably by relying on members to voluntarily update TP. Members are not under a

⁸ Included in the information TP sent to Mr G during this period was details of the number of overpayments pensioners had received up to 2014.

⁹ Mr G referred to the previous PO's Determinations of PO-11441 and PO-11429.

general obligation to notify TP of a change in circumstances and relying on them to do so did not amount to reasonable diligence.

- 24.5. If TP had proper operating procedures in place to identify remarriage overpayments, and had acted with reasonable diligence to identify the overpayments by applying the same TPAD process to domestic members, as it had done for many years for overseas members, it would have identified the overpayments to him.
- 24.6. Neither Leaflet 450 nor the annual newsletters contained any Declaration documentation or wording, covering continued qualification for adult pension recipients. These documents only disseminated information.
- 24.7. There was no ability for TP to monitor whether adult pension recipients had read or were persuaded by the contents of those documents to take recommended causes of action. Even reading those documents was voluntary. Those documents were unsuitable and had no relevance in relation to the reasonable diligence definition, and the compliance of TP's practical processes when checking Regulation E30 compliance under section 32 of the Limitation Act.
- 24.8. It was compulsory for domestic members to act on receipt of the Declaration, (which was designed to identify any mistakes, concealment or fraud), or face the consequences in the form of pension discontinuance and/or financial overpayment recovery action. This is what made the Declaration process compliant with Regulation E30 and with section 32 of the Limitation Act.
- 24.9. TP should have been alerted before 2014, that its procedures in place at the time for identifying overpayments were inadequate, by the number of overpayments it had identified in the years before.
- 24.10. TP had implemented the TPAD many years ago and it is still in use today. The TPAD was specifically sent to all overseas members, but there was no equivalent declaration for domestic members. This caused a problem for TP's compliance with section 32 of the Limitation Act.
- 24.11. TP only launched the Declaration in February 2014. The Declaration was an adaptation of the TPAD.¹⁰ TP clearly had the capability to adapt the TPAD for domestic members, and, given the straightforward and easy to apply nature of the process, it could have been implemented since 1997, to comply with the reasonable diligence requirement under section 32 of the Limitation Act. For reasons unknown, TP deliberately decided not to do so.
- 24.12. Between 8 August 2005 and 13 October 2016, TP did not provide him with Regulation E30 reasonable diligence compliance for his processing. It was

¹⁰ Mr G provided copies of the TPAD and the Declaration to TPO.

clear that once he had received the Declaration, he immediately made contact with TP. So, 13 October 2016, was reasonable diligence in action.

24.13. Section 32 of the Limitation Act specifically rules out a respondent drawing matters out, so that the discovery date, and consequent limitation period commencement, could be held back to a potentially more advantageous date. Essentially, section 32 of the Limitation Act seeks out the earliest date that discovery of the relevant mistake could have been made in his case.

24.14. In his case, the earliest date that the Declaration or TPAD, with very minor adaption, could have been available was 1997. So, TP had the necessary reasonable diligence process available to it, and could have sent a suitable Declaration to him, at any time after his remarriage on 8 August 2005. It was entirely TP's voluntary decision not to do so.

24.15. His period of limitation, under section 32 of the Limitation Act, started from 8 August 2005. This was the causal date under section 5 of the Limitation Act. TP was unable to bring any claim against him in this matter due to TP's discovery date of 13 October 2016, not being within the correct limitation period.

Summary of TP's position

25. As part of its submissions, TP provided details of the number of overpayments it had discovered between 2004 and 2014 from remarriage/cohabitation cases.¹¹ It also said in summary:-

25.1. Entitlement to pension is determined according to the regulations as they were at the time the member was last in pensionable service. The relevant regulation was Regulation E30 of the 1997 Regulations.

25.2. After notification of his first wife's death, TP wrote to Mr G and included Leaflet 450 with the correspondence it had sent him at the time.

25.3. Newsletters were issued annually to remind pensioners that they must inform TP of a change in their circumstances. Mr G continued to receive newsletters every year since 2000, all containing similar information. The 2007 and 2008 newsletters stated: **"Failure to notify Teachers' Pensions of such changes may result in an overpayment of pension which must be recovered."** The 2009 newsletter also stated: **"Any overpayment of pension as a result of you failing to notify TP of such changes will be recovered."** (original emphasis).

25.4. Newsletters were issued every year thereafter. At the top of each newsletter there was wording that said, "Please ensure that this important information is

¹¹ A table showing this information is detailed in Appendix 3. TP explained that the figures in the table were compiled in-year for each year during the period and have not been retrospectively adjusted based on later discovery of remarriage cases. The figures reflect both UK and overseas cases, albeit the figures predominantly reflect the UK position, given the larger population of domestic pensioners and beneficiaries.

kept in a safe place and is read with your P60 and Pay Advice to hand.”¹² It was reasonable to expect that a person would read important information.

- 25.5. TP also provides information on its website which states that such a pension is only payable if the beneficiary does not remarry, form a Civil Partnership or co-habit.
- 25.6. This was TP’s procedure. Without notification from the pensioner, it had no way of knowing of a change in a pensioner’s personal circumstances. It had taken reasonable steps to notify Mr G that there was a requirement for him to notify TP of a change in his circumstances. However, it was reliant upon him to inform TP. It could not have known about his remarriage unless he had informed it.
- 25.7. Mr G is a retired Bursar and was also a member of the TPS. In a letter to Mr G dated 22 April 1995, there is a paragraph which stated, “Please notify the Agency of any change in your marital status after you retire as this may alter your family benefit entitlement.” Mr G would have received copies of newsletters in relation to his own pension, as well as his widower’s pension.
- 25.8. Consequently, Mr G was informed of the requirement to inform TP of changes to his marital status and other matters. He had written to TP on 14 August 2007, notifying TP of his change of address. He had sent a further letter to TP dated 28 July 2010, notifying TP of his change of tax code. He had quoted the TP reference number in relation to his widower’s pension on both letters.
- 25.9. The process of using the TPAD for overseas pensioners and beneficiaries to verify ongoing entitlement was instituted by TP’s predecessor as payroll provider, Paymaster (1836) Ltd, and inherited by TP on taking over administration of the TPS on 1 October 1996.
- 25.10. As a result, unlike for the relevant domestic pensioners and spouses, there was no up-front cost to TP, or by extension, the DfE, to design and roll-out a declarations process for overseas pensioners and beneficiaries.
- 25.11. Because of this, and the fact that the number of overseas members is significantly smaller than the number of domestic members, there was minimal cost for TP to continue to run the TPAD process. It was also a proportionate means of addressing a heightened risk¹³ of late or no notification of a change in circumstances for overseas members.

¹² Sometimes similar wording was used.

¹³ TP explained that the heightened risk was essentially for two reasons. These were: (i) there was a higher risk of TP being notified late or not at all of change of circumstances or pensioners who had moved abroad; and (ii) TP could mitigate such risk for UK members as TP could match its information with UK government and public sector databases as a further means of identifying whether a UK pensioner had died.

- 25.12. TP would have needed to design and create a new declaration process to target domestic remarriage cases. This would not have been a light undertaking due to a number of factors. A cost/benefit analysis was required to assess the overpayment risk here against the cost and effort of building and running a new solution including the cost of bulk mailings of declarations and reminders. Consideration would have been given about how long it would have taken for the solution to yield benefits, in terms of the cost saving to the scheme outweighing the project cost.
- 25.13. Prior to 2010, the position would not have justified such a solution outweighing its costs and, consequently, falling into reasonable diligence. This was because Leaflet 450 provided information about the duration of benefits, and annual newsletters reminded pensioners of their responsibility to notify TP of changes in their circumstances. This was also a continuation of a procedure that was inherited from Paymaster (1836) Ltd when TP took over administration of the TPS.
- 25.14. The overpayment cases for the years 2004 to 2009 were both modest and consistent in respect of: the volume of remarriage overpayment cases; the total value of overpayments; and the average value of overpayments.
- 25.15. There were no spikes in volumes or values in these years that would have suddenly increased the profile of remarriage overpayments as a material risk, and so, formed a clear evidential basis to drive a significant change in processes and controls.
- 25.16. From 2010 to 2014, there was a marked increase and then a plateauing (at a higher level) of both the aggregate and average values of remarriage overpayments relative to the period 2004 to 2009. This increase in the profile of remarriage overpayments specifically, combined with potential remarriage debts accumulating over several months or years, would lead to an increased reliance on repayment plans for recovery, and a heightened risk of scheme write-offs.
- 25.17. So, fresh consideration, was given to the cost/benefit analysis. At this point, the balance changed, and it was concluded by TP, and agreed by the DfE, that the potential savings of implementing the Declaration would now outweigh the effort and cost of initiating the new process.
- 25.18. As the average value of remarriage overpayments had been increasing, there was greater benefit to identifying potential overpayments early. This, in turn, reduced the amount of time for the new process to yield benefits, compared with the existing approach.
- 25.19. The Declaration was introduced as an enhancement to the existing requirement for spouses to notify TP of their changed marital status, reinforced with annual newsletters. The Declaration was never a replacement of the existing requirement for a spouse to keep TP informed of their change

of circumstances. The new process was simply a proportionate measure to enhance the mitigation of this risk for the TPS.

- 25.20. The introduction of the Declaration was phased in and adjusted to take account of feedback from those who first received a Declaration. So, Mr G did not receive a declaration until 2016. The Declaration is to enhance the capture of information relating to marital circumstances. Prior to this, Mr G had already been informed, multiple times, that he must keep TP informed of a change in circumstances.
- 25.21. Mr G ceased to be eligible to receive a widower's pension in respect of his first wife, when he re-married on 8 August 2005. Mr G's telephone call of 13 October 2016 was the first time that he had informed TP about his remarriage and the first time that, with reasonable diligence, TP could have known about his remarriage.
- 25.22. Due to this late notification of the change to his circumstances, he had received pension payments to which he was not entitled, and an overpayment had occurred. TP had six years from the date became aware of Mr G's remarriage in which to take any necessary actions, including the commencement of legal action, to recover the overpayment.
- 25.23. The date of discovery in this case was 13 October 2016, when Mr G informed TP of his date of re-marriage in a telephone call. So, TP was seeking recovery of the full overpayment of £44,388.42 net.
- 25.24. TP administers the TPS in accordance with the 1997 Regulations and the principles of Managing Public Money (**the Treasury Guidelines**). It must seek recovery of an overpayment of benefits. Consideration would be given to any defence against recovery which the recipient of the overpayment may make. TP offered a period of recovery over the same length of time that the overpayment occurred (134 months) and offered to discuss other alternatives if this was not affordable.
- 25.25. Mr G sought a defence against recovery of the overpayment on the basis that section 5 of the Limitations Act applies. However, section 32 of the Limitation Act provides postponement of the limitation period in a case of fraud, concealment or mistake.
- 25.26. While Mr G may not have intended to deceive or conceal information from TP, pension payments were mistakenly made to him because he made a mistake by not informing TP of the change in his personal circumstances.
- 25.27. Mr G stated he did not realise that he did not receive the widower's pension for life. TP has supplied evidence of the information provided about the duration of the pension and the multiple times that he was informed that he should notify TP of a change in circumstances. He was also informed in relation to his personal pension from TP that he should notify TP of any

change in his marital status after his retirement as it may alter his family benefit entitlement. Mr G ought to have read the information provided and the onus was on him to inform TP of changes. Mr G did inform TP of some changes but not his change in marital status.

- 25.28. Mr G's view is that TP did not apply reasonable diligence because it did not discover/find out that he was remarried until it had asked him to complete a Declaration. His view is that the process prior to the introduction of the Declaration in 2014 was inadequate because it relied upon the honesty of individuals to notify TP of a change in circumstances.
- 25.29. A person who has a change in circumstances is under a general obligation to notify various bodies, not just TP, of a relevant change in their circumstances such as their marital status. It is known that there could be consequences if a person fails to supply notification. For example, a person who does not inform His Majesty's Revenue and Customs (**HMRC**) of relevant changes could face a tax bill. Alternatively, they may have an entitlement to married person's tax relief which would not be applied if HMRC was not informed. In Mr G's case, he was informed on several occasions that he should inform TP of any change in his marital status.
- 25.30. TP disagreed with Mr G's opinion on reasonable diligence or that its process before the introduction of the Declaration did not meet the requirements of reasonable diligence. The introduction of Declarations was in addition to the requirement for individuals to notify TP of a change in circumstances. It did not replace the requirement. If an individual had a change in circumstances part way through the annual Declaration cycle, TP still expected them to notify it of the change. However, if they did not notify TP, there was now a requirement for them to complete the Declaration.
- 25.31. While there is no definition of reasonable diligence in the Limitation Act, this had already been considered in other cases by TPO involving TP. There was no legal requirement for TP to issue Declarations, but it was introduced because some individuals did not inform TP of a change in circumstances, which led to some large overpayments.

Preliminary Decision

26. I issued my Preliminary Decision (**the Decision**) on this complaint on 7 March 2024. In response to the Decision, Mr G made some further submissions. These have been summarised below, in paragraphs 27 to 41.

Mr G's further submissions

27. He was not arguing a change of position, estoppel or contract defence. His whole position was based on TP's long-term inability to comply with the reasonable diligence conditions under section 32 of the Limitation Act.

28. He considered that the remarriage restriction in Rule E30 of the 1997 Regulations was not well known or understood by the members of the TPS during the period over which the overpayments arose. This type of restriction was not commonly included in most UK occupational pension schemes.
29. The remarriage restriction in Rule E30 was not drawn effectively to his attention after the death of his first wife in December 1999 and it was, in his view, another 16 years (October 2016) before he was advised of this for the first time by TP.
30. It was not reasonable to expect members to read and understand the 1997 Regulations. The other information sources potentially available, vaguely mentioned the remarriage restriction in a limited and unclear form only. These were the Leaflet 450 and the annual newsletters sent out in the 2000s.
31. He was not explicitly told, when he completed the documentation to apply for a widower's pension in 2000, about the remarriage restriction. Leaflet 450 only provided an outline of the position. All Leaflet 450 did was include one short statement to cover the remarriage restriction in E30: "Spouses pension payable for life unless spouse remarries or co-habits."
32. He contended that the main purpose of the annual newsletters sent to domestic pensioner members each year related to delivering the P60 and important information about it, so that they did not get into any problems with their tax returns to HMRC.
33. Other matters covered in the annual newsletters were secondary and more casual with limited coverage even for important topics. The annual newsletters were also not adequate to draw the remarriage restriction to members' attention.
34. Members were unlikely to be aware of the effect of the remarriage restriction under Rule E30 as a result of Leaflet 450. So, the annual newsletters were not, as TP contends, reminding them of the existence of the rule. It was also reasonable for him to throw away the newsletters without paying too much attention to their contents other than the P60. There was no legal requirement on him to read the letters or respond to them.
35. He acknowledged that the annual newsletters sent between the period of the overpayments did include a section entitled "Changes We Need to Know About" and that this included change of address, and notification of death. He also acknowledged that the newsletters stated that members should notify TP if they remarried or entered into a civil partnership with another person as husband and wife. Failure to notify TP of such changes may result in an overpayment. However, the newsletters made no reference to the widower's pension ceasing to be paid on re-marriage or any actual recovery measures and repercussions. So, it was far from a comprehensive and detailed explanation of the subject and well short of necessary reasonable diligence standards.
36. Given the failures by TP in drawing the existence of the remarriage restriction to his attention, and the need to notify TP of such remarriage, he disputed TP's ability to

recover the overpayments. He believed he had a limitation defence under section 32(1) of the Limitation Act. He contended that, had TP acted with reasonable diligence, in designing and implementing an administrative system to alert members to the existence of the remarriage rule and the need to notify TP of remarriage or cohabitation, TP would have discovered the overpayments many years before. TP could have achieved this by introducing an analogous system to the TPAD system used for overseas members.

37. Had TP combined an improved version of the TPAD with its already developed and paid for annual newsletter infrastructure for domestic members, this could have been done very comprehensively and relatively cheaply as early as 2000, and years before he re-married. It would have kept costs to a minimum because it would have been part of the already pre-committed newsletter production and distribution cost each year. It would have been addressed to every TP member at their home, with specific and personalised documentary instructions included to make sure that a complete and comprehensive document was returned to TP on an annual basis that was E30 compliant. TP's failure to do so meant that its claim to recover the overpayments was out of time.
38. The Declaration was not an addition to, or even a replacement for, the failed newsletter-based process from the reasonable diligence perspective. It was a completely new approach for domestic members and filled a void.
39. In the Decision, the PO said it did not follow that TP's failure to put in place a similar TPAD system for domestic members necessarily amounted to a failure to exercise reasonable diligence. That was if, to put in place such a system, involved the administrator taking exceptional measures which they could not have been expected to take. The test was how a person carrying on a business of the relevant kind would act, if he had adequate but not unlimited staff and resources, and was motivated by reasonable but not excessive sense of urgency.
40. He did not accept that in terms of cost/benefit analysis, it was not cost effective to introduce the Declaration until much later and after 2010. The introduction of the Declaration at a much earlier date would not have involved TP taking any "exceptional measures" for the purpose of the reasonable diligence test under the Limitation Act. There was no evidence that the administrator of the TPS (**the Administrator**) did not have the necessary staff and resources to put in place the Declaration before 2016, or that this would have involved the Administrator taking exceptional measures. The Administrator showed no desire to know about the overpayment issue or investigate the issue until much later.
41. The PO had not produced any analysis, or realistic and informed evidence, he said, to confirm that "exceptional or excessive measures", however defined, were necessary to implement the Declaration before 2014.

Conclusions

42. The starting point of a complaint concerning an overpayment is that administrators of public sector pension schemes have a duty to pay the correct benefits and should exercise reasonable care and skill to achieve this by adopting procedures to ensure that there are no under or overpayments, or, if this is not possible, that they are kept to a minimum. The concept of 'reasonableness' is important in this regard (as we shall see when we turn to the concept of 'reasonable diligence' below), and allows some element of proportionality as to the systems required to ensure that the correct benefits are paid. If failures are identified in the systems, a good administrator would put in place steps to address these failures. If overpayments are made, the administrator should generally take steps to recover the overpayment under the powers available to them, subject to any legal defences to recovery.¹⁴
43. At the time Mr G began to receive his pension from the TPS, Regulation E30 of the 1997 Regulations (see paragraph 5 above) provided that a widower's pension was not payable during or after any remarriage; unless the Secretary of State determined otherwise in the particular case. As it stands, Mr G has been paid more widower's pension than he was strictly entitled to under the 1997 Regulations. The starting point is that Mr G will generally be required to repay the overpayment unless he is able to rely on one of the legal defences against recovery or on any of the other grounds set out in the Treasury Guidelines (such as hardship).

Legal defences against the recovery of overpayment

The Limitation Act

44. Broadly, an action to recover overpayments made by mistake, on the grounds of unjust enrichment, must be brought within six years of the date the cause of action accrued.¹⁵ A similar six-year recovery period would also apply if TP sought to argue that the overpayments are recoverable by virtue of a statutory power of recovery under Regulation 114 of the 2010 Regulations.¹⁶
45. The cause of action will generally accrue on the date the overpayment was made and the cut-off date (**Cut-Off Date**), when the 'clock stops running' for limitation purposes, will be the date that TP acknowledges that it will defend the applicant's complaint.¹⁷
46. However, the normal six-year limitation period does not begin to run in cases of mistake until the plaintiff has discovered or could, with reasonable diligence, have discovered it.¹⁸
47. Mr G has argued that TP did not act with reasonable diligence and, if it had, TP could have discovered the overpayments many years earlier. In that case, it would follow

¹⁴ Recovery by 'setting off' the overpayment against future payments of pension is not available in this case as there is no ongoing pension to set off the overpayments against.

¹⁵ Section 5 of the Limitation Act.

¹⁶ Section 9 of the Limitation Act.

¹⁷ *Webber v Department of Education* [2016] 102 PBLR (024).

¹⁸ Section 32(1) of the Limitation Act.

that the bulk of the overpayments would now not be recoverable. Assuming that the Cut-off Date is 23 January 2020 (the date that TPO received TP's formal response to Mr G's complaint), despite most of the overpayments predating January 2014, this potentially means that only the overpayments made from January 2014 to January 2016 would be recoverable.

48. TP asserted that it was not and could not reasonably have been aware that Mr G had remarried until he had informed it of such in 2016. It argued this because, under the Limitation Act, TP would normally have six years from the date of each erroneous payment in which to bring a claim for repayment. However, Section 32 of the Limitation Act provides for the limitation period to be postponed in cases of fraud, concealment or, as in Mr G' case, mistake. In such circumstances, the limitation period begins to run from the date on which the mistake was discovered or could, with "reasonable diligence", have been discovered.

49. There is case law which has considered what is meant by "reasonable diligence" for the purposes of section 32(1) of the Limitation Act. If TP wants to rely on section 32(1), it must show that it could not have discovered the relevant fraud, concealment or mistake earlier than it did, without taking exceptional measures that it could not reasonably have been expected to take. In *Paragon Finance v DB Thakerar & Co (A firm)* [1999] 1 All ER 400 at 418, Millett LJ (as he then was) said:

"The question is not whether the plaintiffs should have discovered the fraud sooner: but whether they could with reasonable diligence have done so. The burden of proof is upon them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take...the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and was motivated by reasonable but not excessive sense of urgency."

50. In *Law Society v Sephton* [2004] EWCA Civ 1627 [2005] QB 1013, Neuberger LJ (with whom on this issue Kay LJ and Carnwarth LJ agreed) said that Millett LJ's construction of section 32(1) showed that there must be an assumption that the claimant desires to discover whether or not there had been a fraud committed against him. Not to make such an assumption would rob the word "could" in the section of much of its significance. Moreover:

"the concept of "reasonable diligence" carries with it "the notion of a desire to know, and indeed, to investigate."

51. It is undoubtedly good administrative practice for schemes to ask members at regular intervals to confirm matters such as their existence or their marital status where pensions cease on remarriage. There is necessarily going to be a risk that, if an administrator is relying on the member to notify them of a change of circumstances, they may not realise that they need to do so or read any initial announcement or reminder that they needed to do so. There is nothing in the 1997 Regulations, unlike

the position in relation to abatement, placing a legal obligation on members to notify TP of remarriage. If overpayments are made, there may be loss to the public purse as the overpayments may not be recoverable due to availability of legal defences to recovery or otherwise.

52. Prior to 2014, TP had the TPAD process in place under which overseas members were asked to provide various confirmations at regular intervals (including that they had not remarried), to assist TP in identifying overpayments made to overseas resident members. If members did not reply, their benefits were suspended and if members gave false information, this could amount to fraud.
53. However, it does not follow, as Mr G has argued, that TP's failure to put in place a similar TPAD system for domestic members necessarily amounted to a failure to exercise reasonable diligence, if to put in place such a system would have involved the administrator taking:

“exceptional measures which they could not reasonably have been expected to take...the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and was motivated by reasonable but not excessive sense of urgency.”
54. Certainly, in my view, as a starting point it would be reasonable for the trustee or administrator of a pension scheme to differentiate between the circumstances of overseas and domestic spouses – considering, as just one example, the different number of spouses in either geographic category.
55. TP should have taken measures or put in place systems to identify the overpayments assuming it had reasonable but not unlimited staff and resources to do so. However, the case law also, as noted above, confirms that:

“the concept of “reasonable diligence” carries with it “the notion of a desire to know, and indeed, to investigate.”
56. I consider, there was a clear ‘desire to know’ on the part of TP whether payments were still due to individuals (and I struggle to see how it can be argued that was not the case).
57. TP has argued that it has previously been determined that issuing annual newsletters was a proportionate and reasonable approach for it to take, in relation to making members aware of the need for them to contact TP to inform it of changes to their personal circumstances. Certainly, in considering what amounts to ‘reasonable’ diligence, I can understand why TP might consider and balance the costs required to bring in a similar process to TPAD for domestic spouses (recognising, as the case law does, the role of proportionality that comes from having “adequate but not unlimited staff and resources and ... motivated by reasonable but not excessive sense of urgency...”) against the ‘rewards’ of putting in place a more complex and costly system. Furthermore, in deciding whether the due diligence carried out is ‘excessive’, one might also have regard to the impact on beneficiaries and the

prospect of them having their pension suspended if they failed to reply to the TPAD or, once instituted, the Declaration. Imposing such a system may in itself lead to complaints,¹⁹ and so a balance may have to be struck on the best approach to take in the specific circumstances.

58. TP explained that the reason it reviewed its procedures in 2014 was that it had identified a number of overpayment cases where remarriage or cohabitation was not identified. The implementation of the Declaration removed any evidential issue in future cases about whether the member was aware of this. Following the adaptation of its procedure, TP wrote to members to whom this rule applied to check whether any had remarried or co-habited. This is the reason why Mr G and a number of additional overpayment cases were identified.
59. On the one hand, it might be argued, as Mr G contended, that by relying only on Leaflet 450 and the annual newsletters as a means of ensuring that TP was notified of remarriage or cohabitation, TP was not acting with reasonable diligence.
60. However, on the other hand, it is common practice for occupational pension schemes to use newsletters to keep in touch with pensioners and to provide them with information about the scheme and their benefits. Indeed, I would expect individuals to read communications that relate to important arrangements such as their pensions. Likewise, if individuals are asked to notify the trustees or administrators about a change in circumstances, and this is prominently and regularly brought to their attention, it is reasonable to expect them to do so. In the absence of evidence demonstrating that the system was not working (which TP had by 2014), it was, in my view, reasonable to rely on the newsletters (combined with Leaflet 450 sent when the spouse first became entitled to the pension) and to proceed on the expectation that members will read them.
61. TP undoubtedly has a duty to put in place administrative systems to ensure that the correct benefits are paid. Relying on members (or personal representatives) to notify TP of remarriage, re-employment or death was, with the benefit of hindsight, not achieving the level of response required. It has now been established that there were a higher number of overpayments which remained unidentified as a result of TP's failure to take more pro-active steps to identify the overpayments before 2014.
62. That said, TP has also provided evidence that the number and amount of remarriage/co-habitation cases identified prior to the implementation of the Declaration were not that high in the context of the total membership of the TPS. There was also no notable increase in the number and value of the remarriage overpayments identified, prior to the implementation of the Declaration, until 2010-2014. This was the period immediately before the implementation of the Declaration for domestic spouses, and to my mind, shows an organisation properly considering

¹⁹ Indeed, one need only look at recent press coverage of the impact of the Declaration to understand why there could have been a reluctance to institute more intrusive investigations: see, for example, the Guardian from 10 February 2024: [‘Humiliating’ pension process upsets partners of retired UK teachers who have died | Pensions | The Guardian](#).

whether a process remains 'reasonable' as time passes. Other trustees and administrators should also, from time to time, assess whether their administrative processes remain suitable for the task in hand. A system for due diligence may be reasonable at one point in time, having regard to all the circumstances at that moment but, as those circumstances change, can later become 'unreasonable'. I consider that TP's change in process reflected this – and the move to the Declaration does not mean in and of itself that the previous due diligence methods could not still amount to reasonable diligence for the purpose of the Limitation Act, at an earlier point in time.

63. As a result, it is arguable that putting in place the same systems which were in place for overseas members to identify the overpayments, at a much earlier date, would have involved TP taking exceptional measures, which it could not be reasonably expected to take, having regard to the processes which would have needed to be changed to implement the changes. Accordingly, on existing case authority, in the absence of evidence of a more significant and earlier uptick in the number of overpayment cases where members had remarried or co-habited or other failures in the system, I consider that the steps taken by TP did amount to reasonable diligence.
64. I agree with Mr G that the wording of both Leaflet 450 and the annual newsletters could have been clearer. However, I consider that they were sufficient, if read, to alert members to the fact that if they remarry or co-habit, they need to tell TP of this fact. I consider that it is reasonable to expect pension scheme members to read Leaflet 450 and the annual newsletters sent to them about their benefits, even if there is no legal obligation for them to do so.
65. I find that, in Mr G's case, in the period up to 2014 (plus a reasonable time to then contact members), TP was acting with reasonable diligence by relying on the annual newsletters. I see no reason to depart from my predecessor's view on this issue.
66. I find that TP is not restricted by the Limitation Act in seeking to recover the overpayments of Mr G's widower's pension. I will now consider if any other legal defence is available to him.

Other defences to recovery

67. As part of his submissions, Mr G said that he is not arguing a change of position, estoppel or contract defence. I consider however, that for completeness I should still address these potential defences as I would generally do in other overpayment cases, to establish if Mr G has an alternative defence to recovery of all or part of the overpayments, given that he disputes the overpayments are recoverable.

Change of position

68. The most common defence against recovery of an overpayment is referred to as "change of position"; that is, the recipient has changed their position such that it would be unjust or inequitable to require them to repay the overpayment, either in whole or in part. To make out a change of position defence certain conditions must be

satisfied. Briefly, the recipient must be able to show, on the balance of probabilities, that:-

- 68.1. Their circumstances have changed detrimentally and irreversibly;
 - 68.2. The change of circumstances was caused by receipt of the overpayment; and
 - 68.3. They are not disqualified from relying on the defence.
69. With regard to the last point, a change of position defence is not open to someone who acts in 'bad faith' when changing their position. I wish to make it clear, however, that bad faith is not synonymous with dishonesty. It can simply mean that, if the recipient knew or had grounds for believing that the payment had been made in error, but could not be sure, the defence would not be open to them. This includes cases where someone might suspect that there was something amiss and could have taken simple steps to ascertain the correct position but did not do so. In other words, the recipient of a payment made in error cannot turn a blind eye to any doubts they might have. This is commonly referred to as having "Nelsonian Knowledge."
70. Bad faith does not, however, include acting negligently, so a careless recipient might still be able to invoke a change of position defence. If Mr G was merely careless or negligent but did not have actual knowledge of the possibility of there being an overpayment, which he failed to query, he would still be acting in good faith. In making a judgment as to Mr G's knowledge of the circumstances in which his widower's pension should cease, it is not a question of deciding what he should have known; rather, it is a question of what he did know.
71. To uphold a change of position defence, Mr G needs to satisfy me that he acted in good faith in continuing to accept his widower's pension after his remarriage. It is for him to show, on the balance of probabilities, that he was unaware that his widower's pension should have ceased or that he was unaware that he needed to check the position with TP (but then failed to do so). I recognise that only Mr G can know what his knowledge of the conditions for payment of his pension was at the relevant time. Mr G is, however, providing evidence of what he read (or did not read) many years ago and his memory of events that long ago may not be reliable. I also do have evidence that Mr G was sent newsletters for the period from 2005 to 2016 on multiple occasions after he remarried. I have to come to a decision, on the balance of probabilities, based on the available relevant evidence. It is, in essence, a judgment call and, in most of the cases I see, it is a finely balanced judgment.
72. In Mr G's case, the information about the conditions for payment of a widower's pension was included in Leaflet 450 which Mr G was sent subsequent to him notifying TP of his first wife's death. I accept that individuals might not read all of the information they are sent at what is usually a very stressful time. I consider that Mr G may not have remembered what was in a leaflet that he read in 2000, when he remarried in 2005.

73. With regard to the annual newsletters, the picture is less certain. In the 2005 newsletter; that is, the one issued around the time of Mr G's marriage, the request to notify TP was the second item on the front page just below the notification about the pensions increase for that year. However, in subsequent years the request for notification was located on the second page.
74. Mr G's position is that the original Leaflet 450 was not sufficient to put him on notice about the need to notify TP about his remarriage and not once in the 11 years from 2005 to 2016 did he read any of the newsletters sent to him each year with his P60. He also asserts that it was reasonable for him to throw away the newsletters without reading them, given the primary purpose of the newsletters was to enclose the P60 – although it is not always put forward as a consistent argument, as his representative, somewhat equivocally, argued that Mr G "... binned the Newsletters without paying too much or indeed any attention to them each year...", which suggests that Mr G may well have considered them to some extent. However, if it really was the case that he paid "no" attention to them, then, despite the fact that it might be said to be careless of him to have failed to read these documents, he would satisfy the good faith condition for a change of position defence.
75. I acknowledge that, when he read, and was asked to complete, the Declaration in 2016, Mr G promptly and fully disclosed his remarriage. I am sure that, had he been asked to complete a Declaration in 2005, he would have done so with the same measure of honesty. However, on the balance of probabilities, I find that Mr G did read one or more of the annual newsletters sent to him between 2005 and 2016 referring to the fact that he needed to notify TP of remarriage. I do not find it credible that Mr G disposed of all of these newsletters relating to his pension without reading any of them. I also acknowledge that the newsletters did not go into the detail of the consequences of remarriage, but they made it clear that this was something which Mr G should notify TP about. If, as I find on the balance of probabilities, he did read one or more of the newsletters sent to him between 2005 and 2016, this would have put him on notice that his widower's pension might be affected by his remarriage and that he should have taken steps to clarify the position with TP. The fact that he did not notify TP of his remarriage between 2005 and 2016 means that a change of position defence is not now available to him.
76. There are other defences to the recovery of an overpayment; for example, estoppel and contract.

Estoppel

77. Estoppel is a legal principle which provides that, if a party causes another party, either by statement or action, to believe that a particular set of facts or circumstances is true, they should not be allowed to draw back from the statement or action if it would be unjust or unconscionable for them to do so. The requirements for an estoppel defence are similar to those for a change of position. Generally, a claimant must be able to demonstrate that they relied to their detriment either:

77.1. on a clear and unequivocal statement (representation); or

77.2. on a mutual assumption of facts or the law (convention).

77.3. And that it was reasonable for them to have done so.

78. In the case of *Steria v Hutchinson* [2006] 64 PBLR, Neuberger LJ said:

“When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could also satisfy the three classic requirements. They are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it.”

79. With regard to estoppel by convention, in *Commissioner for Her Majesty's Revenue and Customs v Bencdollar Limited and Others* [2009] EWHC 1310 (Ch), the judge said:

“... the principles applicable to the assertion of an estoppel by convention arising out of non-contractual dealings ... are as follows:

i) It is not enough that the common assumptions upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.

ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.”

80. Setting aside for the moment the question of good faith, in Mr G's case, I have not identified a clear and unequivocal statement on the part of TP or reliance on a

common assumption to the effect that his widower's pension would continue after he remarried. In fact, all of the statements issued by TP said the opposite. Nor do I see that there was any assumption to this effect expressly shared between TP and Mr G. I do not find that Mr G can rely on an estoppel defence (either estoppel by representation or convention) to the recovery of the overpayment.

Contract

81. With regard to contract, I do not find that the necessary elements to form a contract exist in Mr G's case. These elements are: offer, acceptance, consideration and the intention to create legal relations. In particular, I find that the latter two elements are missing. Contract law is based upon the principle of reciprocity and consideration, in this context, is something of value, however small, given in exchange for the promise made under the contract. I do not see that Mr G gave any consideration in the circumstances. Nor is there any evidence that TP intended to enter into legal relations with Mr G beyond his strict entitlement under the Teachers Pensions Regulations. In any event, a contract based on mistake is unlikely to be enforceable.
82. In the absence of any legal defence against the recovery of the £44,388.42, TP is entitled to recover it.

Maladministration

83. I have also considered whether Mr G has sustained any non-financial injustice as a consequence of maladministration on the part of TP.
84. I have no doubt that being informed of the overpayment would have come as an unpleasant shock to Mr G. However, TP was obliged to take steps to rectify the situation as soon as it became aware that Mr G was no longer entitled to the pension. Notifying Mr G of the overpayment does not, in and of itself, amount to maladministration. Having been notified of Mr G's change of circumstances, TP acted reasonably promptly to amend its records and notify him of the overpayment.
85. As a matter of law, TP is able to recover the balance of the overpayment under the principles of unjust enrichment (a private law right) and also under Regulation 114 of the 2010 Regulations, which gives TP a discretion to recover overpayments. TP's discretion under Regulation 114 extends to both the amount to be recovered, if any, and the period of recovery.
86. It is not however correct, as implied by TP in its submissions, that the Treasury Guidelines always require an overpayment, once discovered, to be pursued. Annex 4.11 (Overpayments) of the Treasury Guidelines states:

“In principle public sector organisations should always pursue recovery of overpayments, irrespective of how they came to be made. In practice, however, there will be both practical and legal limits to how cases should be handled. So each case should be dealt with on its merits.”

87. The above quotation cannot be looked at in isolation. The Treasury Guidelines also consider the factors a public authority should have regard to in deciding whether to pursue recovery of an overpayment.²⁰
88. I expect TP to genuinely consider whether a member has any potential defence to the right of recovery (and hardship issues) as part of any assessment of whether it is appropriate to seek to pursue the member for the overpayment as part of the IDR. TP's starting point appears to be that the overpayment is always recoverable albeit that it will consider defences if specifically raised by the member. In proceeding on the basis that it was legally required to recover the overpayment come what may (without exploring all potential available defences during the IDR), TP did not, in my view, properly consider whether the overpayment should be recovered.
89. Under Regulation 114 of the 2010 Regulations, TP has a discretion about whether to seek to recover and it cannot fetter that discretion. I do not consider TP genuinely exercised that discretion having regard to all relevant factors which must include all potentially available defences (not just a limitation defence). The availability of all these potential defences (not just limitation) needs to be explored during the IDR with a view to seeing if that matter can be resolved and should not be left to the final IDR stage before the Ombudsman. I find that the error on the part of TP, to follow a proper decision-making process, is sufficiently serious to justify a finding of maladministration.
90. However, given my findings on the non-availability of the defences of limitation, change of position, estoppel and contract, I do not consider that anything would be achieved by referring the case back to TP to consider again whether the overpayment should be recovered. The only real remaining issue to determine is the appropriate period of recovery.

The recovery period

91. I would generally expect the period of recovery not to be less than the period over which the overpayment built up. There may be circumstances where a shorter period is appropriate for example, where the applicant has invested a lump sum or paid it into a bank account. In some cases, it may be appropriate, depending on the member's financial circumstances, for the period of recovery to be longer.
92. Despite being asked, Mr G has not provided any information concerning the monthly repayment he would be able to afford should I not uphold his complaint. This was on the basis that, in his view, he had not received an overpayment of pension.
93. Accordingly, I consider that the period of recovery shall be the same as the period over which the overpayment had accrued, that is 11 years and 2 months.

²⁰ These considerations have been summarised in Appendix 4.

Non-financial injustice

94. I have power to make reasonable awards for non-financial injustice (distress and inconvenience) arising as a consequence of maladministration. It remains for me to consider whether Mr G has sustained non-financial injustice as a consequence of the maladministration on the part of TP.
95. Having considered the individual circumstances of Mr G's complaint, I find that TP's maladministration has caused him significant distress and inconvenience, for which he shall receive an award.

Determination

96. I determine that the overpayments of £44,388.42 are recoverable as a matter of law and Mr G does not have a limitation defence, a defence of change of position, estoppel or contract to the recovery of the overpayments.

Directions

97. TP may commence recovery of the overpayment of £44,388.42 from Mr G at a rate of £331.26 per month.
98. Within 28 days of the date of this Determination, TP shall pay Mr G £500 in respect of the significant distress and inconvenience he has sustained, as a consequence of the maladministration on the part of TP.

Dominic Harris

Pensions Ombudsman

26 June 2024

Appendix 1

99. Regulation 114 of the Teachers Pensions Regulations 2010

“Cessation, etc. of benefits where no entitlement

114. – (1) This regulation applies where after paying a benefit the Secretary of State determines that there was no entitlement to the benefit or there is no longer an entitlement to the benefit.

(2) The Secretary of State may-

(a) cease to pay the benefit;

(b) withhold the whole or any part of the benefit;

(c) in the case of a payment made when there was no entitlement to the benefit recover any such payment.”

Appendix 2

100. Relevant Sections of the Limitation Act 1980

“5 Time limit for actions founded on simple contract

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

...

32 Postponement of limitation period in case of fraud, concealment or mistake.

(1) Subject to subsection (3) below, where in the case of any action for which a period of limitation is prescribed by the Act, either-

- (a) the action is based upon the fraud of the defendant; or
- (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; 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...”

Appendix 3

101. Table showing details of the amount of overpayments TP identified between 2004 and 2014 in relation to remarriage/cohabitation cases.

Year	Volume of Cases invoiced	Total Value of overpayments	Average overpayment value
2004	102	£133,620	£1,310
2005	116	£119,138	£1,027
2006	100	£151,561	£1,516
2007	89	£66,043	£742
2008	117	£207,159	£1,771
2009	109	£131,166	£1,203
2010	122	£212,843	£1,745
2011	99	£315,497	£3,187
2012	76	£221,752	£2,918
2013	122	£290,638	£2,382
2014	166	£743,001	£4,476

Appendix 4

102. A summary of the relevant sections of Annex 4.11 of the HM Treasury Guidance on Managing Public Money.

“A4.112. When deciding on appropriate action, taking legal advice, organisations should consider:

- the type of overpayment
- whether the recipient accepted the money in good or bad faith
- the cost-effectiveness of recovery action (either in house or using external companies). Advice that a particular course of action appears to offer good value may not be conclusive since it may not take account of the wider public interest
- any relevant personal circumstances of the payee, including defences against recovery
- the length of time since the payment in question was made; and
- the need to deal equitably with overpayments to a group of people in similar circumstances.

...”

The Managing Public Money Guidance then goes onto consider the question of whether the individual has acted in good faith and various other defences to recovery of the overpayment including:

102.1. the length of time since the overpayment was made

102.2. change of position

102.3. estoppel

102.4. good consideration (this is effectively this is the same as a contractual defence)

102.5. hardship.

103. In relation to hardship the Managing Public Money guidance says:

“Public sector organisations may waive recovery of overpayments where it is demonstrated that recovery would cause hardship. But hardship should not be confused with inconvenience. Where the recipient has no entitlement, repayment does not in itself amount to hardship, especially if the overpayment was discovered quickly. Acceptable pleas of hardship should be supported by reasonable evidence that the recovery action proposed by the paying organisation would be detrimental to the welfare of the debtor or the debtor's

family. Hardship is not necessarily limited to financial hardship; public sector organisations may waive recovery of overpayments where recovery would be detrimental to the mental welfare of the debtor or the debtor's family. Again, such hardship must be demonstrated by evidence.”

In relation to good faith Managing Public Money says:

“A4.11.5. The decision on how far recovery of an overpayment should be pursued in a particular case will be influenced by whether the recipient has acted in good or bad faith:

- where recipients of overpayments have acted in good faith, e.g. genuinely believing that the payment was right, they may be able to use this as a defence (though good faith alone is not a sufficient defence);
- where recipients of overpayments have acted in bad faith, recovery of the full amount overpaid should always be sought.

A4.11.6. Recipients may be inferred to have acted in bad faith if they have wilfully suppressed material facts or otherwise failed to give timely, accurate and complete information affecting the amount payable. Other cases, e.g. those involving recipients' carelessness, may require judgement. And some cases may involve such obvious error, e.g. where an amount stated is very different from that paid, that no recipient could reasonably claim to have acted in good faith.

A4.11.7. In forming a judgement about whether payments have been received in good faith, due allowance should be made for:

- the complexity of some entitlements, e.g. to pay or benefits
- how far the payment depended on changes in the recipient's circumstances of which he or she was obliged to tell the payer
- the extent to which generic information was readily available to help recipients understand what was likely to be due.”