

Ombudsman's Determination

Applicant	Dr O
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Dr O's complaint and no further action is required by NHS BSA

Complaint summary

2. Dr O has complained that following her re-employment, NHS BSA has refunded the pension contributions made by her employer, Nottingham University Hospitals Trust (**the Trust**), to the Trust. She contends that NHS BSA should instead have deducted the equivalent of the minimum legal contributions that the Trust would have made, if she had joined a Stakeholder pension scheme, and paid that amount to her.
3. Dr O has also complained that tax relief was not provided on the employee contributions that NHS BSA refunded to her.

Background information, including submissions from the parties

4. Page 7 of 'A Guide to NHS Pension Scheme' (**the Scheme Guide**) states:-

"Stakeholder Pensions operate in a very similar way to Personal Pensions, see page 5...Stakeholder Pensions are not normally recommended to anyone who is able to join a good occupational pension like the Scheme. But if you are prevented from joining the Scheme because you are already receiving Scheme benefits and are aged 50 or over, a NHS employer must offer you one of the designated NHS Stakeholder Pensions."
5. Page 5 of the Scheme Guide states:-

"...Your employer will normally only pay the minimum contributions required by law".
6. In 1990 Dr O left NHS employment. She started receiving ill health retirement benefits from the Scheme in 1993.

7. In June 2006, Dr O was re-employed by the Trust and re-joined the Scheme. Both Dr O and the Trust made contributions into the Scheme.
8. On 25 September 2006, NHS BSA wrote to the Trust saying that it had been informed that Dr O, who became entitled to a pension under the Scheme on 1 March 1993, had been re-employed by the Trust.
9. On 1 October 2007, NHS BSA wrote to the Trust, again stating it understood that Dr O had been re-employed by the Trust after her retirement from the Scheme. NHS BSA asked the Trust to complete and return an enclosed certificate, in order that it could assess if Dr O's pension was affected by this. The Trust returned the completed certificate to NHS BSA on the same day.
10. In 2014, after Dr O elected to draw her retirement benefits for her service after 2006, NHS BSA recognised that Dr O had not been eligible to re-join the Scheme in 2006, because she was aged over 50 at the time. Instead, she should have been offered membership of a Stakeholder pension scheme provided by her employer. Consequently, NHS BSA refunded the contributions that Dr O had made to the Scheme since 2006, less income tax (**the refund of employee contributions**).
11. NHS BSA also returned the employer contributions made to the Scheme on behalf of Dr O to the Trust.
12. Dr O was unhappy that she did not receive the employer contributions that had been refunded to the Trust and complained under the Scheme's Internal Dispute Resolution Procedure (**IDRP**). In summary Dr O said:-
 - NHS BSA had not paid her the contributions that the Trust should have made during the relevant period of employment, as if she had joined the Stakeholder pension scheme.
 - Tax relief should have been applied to the refund of employee contributions.
13. In response NHS BSA said:-
 - The employer contributions have been returned to the Trust as these contributions had been paid in error.
 - Dr O's employee contributions were deducted from her salary, before tax was deducted, in order to provide tax relief.
 - The refund of employee contributions was made when it was found that Dr O had not qualified to re-join the Scheme in 2006 after being re-employed by the Trust.
 - As she was not considered to be a member during that re-employment, the refund of employee contributions had to be treated as taxable income, in accordance with HMRC regulations.
 - NHS BSA had no discretion to exempt this taxable income from being subject to taxation.

- Dr O's complaint was not upheld.

14. In May 2019, HMRC wrote to Dr O in response to an enquiry she had made about the refund of employee contributions. In summary, the letter stated that:-

- Dr O considered that the refund of employee contributions should be treated as a pension lump sum with a 25% tax free element.
- Dr O was not a member of a registered pension scheme in respect of her re-employment when joining the Trust in 2006.
- As the refund of employee contributions was not considered to be from a registered pension scheme under Part 4 of the Finance Act 2004, it did not qualify for tax free treatment.

Dr O's position

15. Dr O said:-

- The Scheme Guide states that Stakeholder Pensions operate in a similar way to personal pensions and indicates that an NHS employer would only pay the minimum contributions allowed by law. There are no qualifications applied to this information.
- The Scheme Guide does not state that there is "no legal requirement" for the Trust to contribute to a Stakeholder Pension.
- The Trust missed the opportunity to provide her with information that should have been provided regarding the designated Stakeholder Pension Scheme for employees who were denied access to the Scheme. Consequently, she has relied on the Scheme Guide.
- She would like to receive a payment equal to the minimum legal contributions that the Trust should have made to a Stakeholder Pension.

NHS BSA's position

16. NHS BSA said:-

- According to the Scheme Guide, an NHS employer had to provide a Stakeholder Pension to employees who did not have access to the Scheme.
- NHS BSA does not have access to the arrangements made by the Trust with regard to the provision of a Stakeholder Pension and whether it would make employer contributions.
- Dr O has not provided any evidence that the Trust would make contributions to a Stakeholder Pension.

- NHS BSA is not aware of any legislative requirement for an employer to make contributions to a Stakeholder pension scheme.
- The Scheme Guide does not confirm that an NHS employer will contribute to a Stakeholder Pension Scheme but does state that it must pay contributions for members of the Scheme.
- NHS BSA no longer holds the Trust's employer contributions, which have been returned. So, Dr O should contact the Trust regarding the refund.

Adjudicator's Opinion

17. Dr O's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS BSA. The Adjudicator's findings are summarised below:-
 - NHS BSA's mistake in allowing Dr O to incorrectly re-join the Scheme was determined on 6 October 2017 by the Pensions Ombudsman under complaint reference PO-7554 (**the previous Determination**). That complaint against NHS BSA was upheld because Dr O had been negligently readmitted to the Scheme by NHS BSA. The complaint against the Trust was not upheld. It was determined that instead of being readmitted to the Scheme Dr O ought to have been directed towards the Stakeholder scheme alternative. The previous Determination directed that NHS BSA should write to Standard Life and establish the value of Dr O's employee contributions had they been invested in its lifestyle fund via a stakeholder pension plan, up to the date they were refunded to her. On receipt of the response NHS BSA was directed to compare the value of the refunded contributions, plus interest, to the value supplied by Standard Life and if Dr O has suffered a loss, pay this to her net of her marginal rate of tax.
 - The Scheme Guide states that a NHS employer must offer a designated Stakeholder pension plan to any employee aged over 50 and already receiving Scheme benefits, which includes Dr O. So, Dr O's complaint regarding legal entitlement to a Stakeholder pension should be addressed to the Trust rather than NHS BSA. It was not NHS BSA's role to carry out administration relating to an external Stakeholder pension arrangement that the Trust should have in place or make the payment that Dr O has claimed.
 - When NHS BSA recognised that Dr O had not qualified to re-join the Scheme in 2006, following her re-employment by the Trust, it correctly refunded the employee contributions Dr O had made to the Scheme. The refund of employee contributions had to be treated as taxable income in order to comply with HMRC regulations, and not as a pension lump sum.
18. Dr O did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr O provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Dr O.

Summary of Dr O's additional comments

19. In the previous Determination, NHS BSA was directed to use Standard Life to calculate her award as if she had been offered and had contributed to the Trust's designated Stakeholder pension plan. So, the refund of employee contributions and this award became a pension lump sum and HMRC should be advised accordingly so that tax relief may be applied.
20. NHS BSA correctly deducted tax from the refund of employee contributions in 2014 and provided a letter to be forwarded to HMRC, which summarised her annual contributions and noted the fact that they had been refunded. However, NHS BSA has not provided a further letter following the previous Determination in 2017, which would have enabled her to claim tax relief on the refund of employee contributions as a pension lump sum.
21. In the previous Determination, the Pensions Ombudsman said the following with regard to the Trust's role in her incorrectly re-joining the Scheme:-

“...there is nothing to suggest that it was made aware that Dr O had a pension in payment at the time she re-joined...I do not believe it is reasonable to say there was an obligation for Dr O to inform...the Trust, of her existing pension.

Although there were later occasions when the Trust could have become aware of the situation and Dr O's ineligibility, at the point when she re-joined, I am not satisfied that it had sufficient information to identify her ineligibility. In any event, as I have found NHS BSA materially responsible for wrongdoing, I make no additional findings concerning the Trust.”
22. NHS BSA has contributed to her not receiving an invitation to join a designated Stakeholder pension plan by failing to provide sufficient information for the Trust to be aware of her ineligibility to re-join the Scheme.
23. NHS BSA has not explained why the Trust was not required to contribute at least the minimum required by law, to a designated Stakeholder pension scheme, as would have been the case, if NHS BSA had prevented her from re-joining the Scheme in 2006. She had expected the minimum employer contributions to be included in the calculations that Standard Life provided to NHS BSA following the previous Determination.
24. NHS BSA says she has not provided any evidence that the Trust would have contributed to a designated Stakeholder pension plan, but this is because she was never given the opportunity to join a Stakeholder arrangement. NHS BSA has not provided evidence that the Trust would not have contributed to a Stakeholder pension.

Ombudsman's decision

25. Dr O complains that the refund of her employee contributions to the Scheme should have been treated as a pension lump sum following my previous Determination, and that NHS BSA has not provided a letter in recognition of this. Dr O says that such a letter would allow her to claim tax relief.
26. In the previous Determination I found that:

“Dr O is retiring now, so taking everything into consideration, the award seeks to mirror, as closely as possible, what could have been available to her but for NHS BSA’s negligence...to mirror the appropriate award practically, in my view, the appropriate remedy is a lump sum.”
27. My previous Determination directed that this lump sum should be paid net of Dr O’s marginal rate of tax. The issue of whether that award together with the refund of employee contributions constituted a pension lump sum that attracted tax relief is a matter for HMRC to decide. Consequently, I do not agree that Dr O may rely on my previous Determination in concluding that she was automatically entitled to receive tax relief on the refund of employee contributions or the related award.
28. Dr O has complained that because of NHS BSA’s error she was not able to join the Trust’s designated Stakeholder pension plan. Dr O has also complained that NHS BSA has not explained why the Trust was not required to contribute at least the equivalent of the minimum employer contributions that would, as required by law, have been paid to a Stakeholder pension scheme. It is for the Trust to make arrangements regarding the provision of a Stakeholder pension scheme and to communicate with its employees in relation to eligibility to join and the payment of employer contributions to any such arrangement. NHS BSA cannot be held responsible for any failings in this respect.
29. NHS BSA correctly identified that Dr O was not entitled to re-join the Scheme in 2006 and therefore employer and employee contributions had wrongly been paid to the Scheme. I find that NHS BSA correctly refunded the contributions to the source from which they were received.
30. I do not uphold Dr O’s complaint.

Anthony Arter

Pensions Ombudsman
16 September 2020