

Ombudsman's Determination

Applicant	Ms N
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS BSA (NHS BSA) University Hospitals Birmingham NHS Foundation Trust (UHB)

Outcome

Mrs N's complaint is partly upheld and to put matters right UHB shall pay Mrs N simple interest calculated at the base rate for the time being quoted by the Bank of England on the contributions made erroneously into the Added Years contract and which were returned to her net of Income Tax and National Insurance. UHB shall also pay Mrs N the sum of £500 in recognition of the distress and inconvenience she has experienced in pursuit of her complaint.

Complaint summary

1. Mrs N's complaint is that, after she re-joined the Scheme in August 2013, she was permitted to resume contributions to her previous Added Years contract in error. Mrs N says that, had she been properly advised, she would not have made these contributions, and instead would have invested the money elsewhere.
2. Mrs N also says she suffered a measure of distress and inconvenience in her attempts to discover what had gone wrong and to have matters put right.

Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. Mrs N joined the Scheme in 1995 and commenced an Added Years contract in August 2009. She left service with the NHS in 2010.
5. On 1 August 2013, Mrs N returned to service with NHS and re-joined the Scheme.
6. When Mrs N returned to NHS employment in 2013 she asked her employer, NHS Birmingham CrossCity Clinical Commissioning Group (**NHS BC CCG**) if she could

continue to pay additional contributions into her Added Years contract as she had been doing previously. Her employer confirmed that she could do so.

7. In December 2016, Mrs N discovered that no additional Added Years deductions had been made from her salary. She raised a query with her employer, who responded to say it would arrange a calculation of the sum required to cover the cost of Mrs N's missed Added Years contributions backdated to August 2013.
8. NHS BC CCG subsequently wrote to Mrs N with details of the amount she would need to repay if she wanted to continue with the full Added Years contract. Mrs N accepted the figures quoted, made payment for the arrears, and resumed monthly contributions to her Added Years contract.
9. In March 2019, Mrs N asked NHS Birmingham and Solihull Clinical Commissioning Group (**NHS BSOL CCG**), with which NHS BC CCG had now merged, to calculate her pension with a view to retiring on her 60th birthday on 14 August 2019.
10. The request was passed to the Finance Department of UHB, the Trust to which her employer now belonged. UHB contacted the NHS BSA, the Scheme's Administrator, for information on Mrs N's member contributions and any additional contributions she had made.
11. On 2 April 2019, NHS BSA emailed UHB to explain that, as Mrs N's break in service was longer than one year, the Added Years contract had been closed. NHS BSA confirmed it had sent UHB an email about the closure in 2013 and enclosed a copy. NHS BSA confirmed that, as the Added Years facility had ceased, the only option available was to return all contributions made to the Added Years contract since August 2013. Alternatively, Mrs N could take out an Additional Pension contract and apply all the money that had been paid into the Added Years contract in error to that contract.
12. On 3 April 2019, UHB emailed Mrs N and explained that:-
 - It had been unaware of the email sent by NHS BSA when Mrs N returned to service in 2013. If it had been aware, it would not have arranged to calculate her Added Years contributions and back-date them to 2013.
 - It would have to refund her contributions and would take the necessary action so that they could be added to her April or May salary.
 - It apologised to Mrs N for this situation.
13. On 4 April 2019, Mrs N complained to UHB and said:-
 - On returning to work for the NHS in 2013, she had asked if she could resume paying into her Added Years contract, and this request had been granted.
 - However, in 2016, on requesting a retirement estimate, she discovered

that contributions for the Added Years contract had not been deducted.

- As a result of her subsequent enquiry, UHB had calculated the monthly cost of paying both current contributions and the additional amount to cover the missed Added Years contributions, backdated to August 2013.
- She had then paid a lump sum in respect of the missed Added Years contributions and had resumed monthly contributions to her Added Years contract.
- In 2019 she was informed that these additional Added Years contributions could not be included in her pension calculation as she had not been entitled to resume the Added Years contract in 2013.
- She had been incorrectly informed that she was entitled to resume the Added Years contract.
- UHB missed the 2013 email from NHS BSA which confirmed that she was not entitled to resume Added Years contributions.
- She was “deeply unhappy” with the situation and had she known the correct position she would have considered investing these contributions into another scheme, or would have saved into a building society where she could have earned interest.
- She wanted the matter resolved by having the Added Years contributions reflected in her pension.

14. On 9 April 2019, UHB responded by email as follows:-

- UHB was not the Scheme Administrator when Mrs N resumed service in August 2013.
- However, it had checked the historical records and had found a copy of the email sent by NHS BSA in 2013 that confirmed her Added Years contract was closed, and no further contributions could be made as Mrs N’s break in service was greater than a year.
- As the Added Years contract was between Mrs N and NHS Pensions, it could not comment on what communication, if any, had taken place between the parties regarding the closing of her Added Years contract.
- However, on application, Mrs N would have signed an application form to indicate that she had read and understood the “Increasing Your Benefits” booklet.
- Page 12 of that booklet stated:-
 - “If before your chosen end age, you:-

- Leave the Scheme for any reason, or
- We agree you can stop your additional contributions, or
- Have breaks in your membership, or
- Your payments stop for any other reason,

You will get only the added years or unreduced lump sum you have paid for at that stage.”

- It was reasonable to conclude that, since Mrs N had signed to say she had read and understood the contents of the booklet, she was aware that a break in membership would mean that she would no longer contribute towards an Added Years contract on her return from any break.
 - It acknowledged that Mrs N may not recall the contents of a document that she had read and signed years previously.
 - NHS BSA had confirmed the Added Years contract was cancelled and that it would not accept any arrears.
 - The only option available was to refund all the Added Years contributions that Mrs N had made since commencing service in 2013.
15. On 11 April 2019, Mrs N emailed UHB and said that she still wanted the contributions she had made to be included in her pension calculation and she did not want any refund of contributions until she had taken legal advice.
16. Mrs N then made a formal complaint to NHS BSA about the matter, raising the concerns outlined in her email of 4 April 2019.
17. On 7 June 2019, NHS BSA issued its Internal Dispute Resolution Procedure (**IDRP**) Stage One letter and stated:-
- Employers were bound by the Employer Charter to provide Scheme members with information about the Scheme, their individual benefits and other basic information.
 - An employer should establish relevant information about any member joining their service, including their eligibility to continue paying Additional Voluntary Contributions (**AVCs**) or Added Years.
 - It had informed Mrs N’s employer when she returned to service in 2013 that her Added Years contract had been terminated and she was no longer eligible to contribute to any Added Years contract.
 - It had informed her employer, but it was not also its normal process to inform members about such matters. Further, it would not be aware that the employer had not informed Mrs N of the cancellation of her Added Years contract and the fact that she could not resume contributions.

- Mrs N had confirmed that she had read and understood the “Increasing Your Benefits” booklet which explained that a break in membership in excess of one year would mean she could only receive credit for the Added Years she had paid for before the break in service and could not resume contributions.
- It had provided Mrs N with sufficient information at the outset for her to be aware of the Regulations applicable to resuming Added Years following a break in employment.
- Mrs N should direct her complaint about not being informed she could not resume her Added Years contract, to UHB, as the employer was responsible for this issue.
- Regarding the employer’s calculation, and collection, of backdated contributions for the Added Years contract, this was also the employer’s responsibility and Mrs N should direct her complaint to UHB.
- Mrs N should also direct her complaint about financial loss to UHB, as it was her employer who deducted the contributions directly from her wages.
- It had offered her the opportunity to purchase Additional Pension so that any loss could be mitigated. This option remained open to her.

18. On 4 July 2019, Mrs N wrote to NHS BSA to say she did not accept the outcome of the IDRPs Stage One, and said:-

- She was explicitly informed that she could resume the Added Years contract.
- She continued to maintain that she had made a financial loss which NHS BSA should make good.
- Further, she said that NHS BSA should compensate her for the distress and inconvenience she had suffered.
- In respect of the offer to purchase Additional Pension, she had informed her employer that she did not want to take any action in respect of the monies she had paid into the Added Years contract, nor accept a refund, until she had sought legal advice.
- She did not understand what was meant by purchasing Additional Pension.
- She asked for the complaint to be considered under IDRPs Stage Two.

19. On 16 September 2019, NHS BSA issued its IDRPs Stage Two letter and stated:-

- The purchase of Added Years must be assessed in line with the Scheme Regulations. Regulation L4(2), which it quoted in the letter, stipulated that the contract could not be resumed because more than a year had elapsed between leaving service in 2010 and returning in 2013.

- Mrs N's employer was responsible for updating her records and it had sent UHB an email in November 2013 asking it not to deduct any contributions in respect of the previous Added Years contract, and to refund any contributions that had been made in error.
- If the employer does collect contributions in error, NHS BSA expects the employer to rectify matters because the employer is responsible for deducting income tax before refunding contributions.
- It had not agreed to the resumption of Added Years contributions or the backdating of contributions to 2013. It was not possible to resume the Added Years contract.
- It did not agree that Mrs N had made an actual financial loss, stating that she had suffered a loss of expectation. This was based on the effect on her pension of contributions which had been incorrectly deducted and the delay in correcting the position.
- It could not pay Mrs N a benefit to which she had no entitlement. Allowing the purchase of further Added Years would be to disregard the Scheme Regulations, and would place Mrs N in a better position than other Scheme members who took a break and did not have contributions deducted in error following a return after a break in excess of 12 months.
- It believed an appropriate response would be to return Mrs N, as near as possible, to the position she would have been in, but for the error. Additional Pension was the direct replacement for the Added Years contract. It would permit Mrs N to use the contributions to buy Additional Pension instead of returning the contributions to her. It contended this would address Mrs N's concern about investing the money in an alternative scheme had she known it was not possible to resume contributions to the Added Years contract.
- It provided further information about Additional Pension and a calculation showing what Mrs N's contributions would purchase on top of her standard benefits.

20. The opportunity to buy Additional Pension remained open to Mrs N after her retirement in August 2019, as confirmed in NHS BSA's letter of 22 October 2019, which it sent following the IDRPs Stage two letter.

21. Mrs N's position:-

- She was misled by her employer's pension department as she was informed that she was eligible to restart contributions to her Added Years contract.
- In 2013 she was given incorrect advice by her employer saying that she could

resume contributions to her Added Years contract.

- In 2016, when it discovered no contributions had been collected, her employer and NHS BSA calculated the cost of resuming the Added Years contract and gave her the total cost of these contribution arrears, which she subsequently paid.
- She had suffered a financial loss because of the misinformation. Had she been correctly informed, she would have invested in other saving schemes and would have seen growth on her investment. Alternatively, she would have saved in a building society account, on which she would have received interest.
- She confirmed that the total contributions she had paid to the Added Years contract in error, had been returned to her net of income tax and National Insurance.
- She was very disappointed and had suffered distress and inconvenience in her efforts to have matters put right, for which she sought some compensation.

Adjudicator's Opinion

22. Mrs N's complaint was considered by one of our Adjudicators who concluded that, while NHS BSA was not at fault, UHB should have ensured that Mrs N was entitled to contribute to an Added Years contract before informing her that she could do so. The Adjudicator's findings are summarised below:-

- UHB collected both backdated and new ongoing monthly Added Years contributions, totalling more than £22,000, before realising that Mrs N was not eligible to make such contributions.
- However, while Mrs N would have had the use of this money but for UHB's errors, the Adjudicator did not consider she was entitled to interest on the contributions that were refunded to her. There was no guarantee that Mrs N would have received growth on any investments she might have made and interest rates had been so low that Mrs N's money would not have kept pace with inflation had she saved it in an interest-bearing account.
- Mrs N was not entitled to resume contributions to the Added Years contract and interest could not be paid on a sum of money that was accrued in error.
- It was reasonable to expect people to mitigate their losses, and Mrs N had been given the opportunity to use the accrued contributions to buy Additional Pension, but she had rejected this idea. The Adjudicator did not recommend that Mrs N's request for interest to be paid be upheld.

- For the significant distress and inconvenience that Mrs N had suffered, the Adjudicator recommended UHB pay the sum of £500.

23. UHB accepted the Adjudicator's Opinion and paid £500 to Mrs N. However, Mrs N did not accept the Adjudicator's findings, so the complaint was passed to me to consider. Mrs N provided her further comments in support of her contention that she should receive compensation for the lost opportunity to save or invest elsewhere. While I agree with the Adjudicator's Opinion in the main, I consider an award of interest is merited. I note the additional points raised by Mrs N, which are set out below:-

- She regularly reviewed her finances and had she not paid into the Added Years contract she would have instead made investments elsewhere. She provided a list of accounts to demonstrate her longstanding savings habit, including:-
 - Stocks and shares ISA;
 - Investment ISA;
 - Cash ISA;
 - Pension Share Investments;
 - Shares
- She believed she could have earned in excess of 3% per annum on cash savings and maintained that she had made a financial loss.
- She disagreed that NHS BSA was not responsible for the error, contending that it was equally responsible for the error.
- She did not agree that £500 was sufficient to compensate her for the financial losses she had incurred and the extent of her distress and inconvenience in having to pursue the matter for more than two years after her retirement.

Ombudsman's decision

24. Having been informed that she was ineligible to make contributions to her previous Added Years contract, Mrs N wanted to continue with the contract and to contribute so as to increase her pension and her lump sum. NHS BSA and UHB have explained why this is not possible. Mrs N did not accept the explanation, and does not accept the outcome.

25. Once it became clear that Mrs N was not eligible to recommence her Added Years contract she was offered the opportunity to use the accrued contributions to pay for Additional Pension, but chose not to do so. Additional Pension was the nearest method for putting her in the position she would have been in, had she been able to contribute to an Added Years contract. I can see from the evidence that Mrs N did not understand what Additional Pension was, but there was sufficient literature for her to

reach an informed decision, and she was given a calculation of the effects of Additional Pension on her overall benefits.

26. Having decided not to opt for this method of increasing her benefits, which would have met with her objectives, her contributions were returned to her without payment of interest. Mrs N contends that she would have saved this money in addition to her regular savings,
27. I note Mrs N was already saving and given that she did make the additional contributions, I accept that it is more likely than not, had she been informed at the outset that she could not resume the Added Years contract, that she would have saved an additional £22,000 over the years between 2016 when she resumed payments, and 2019 when she retired.
28. It is not possible in retrospect to say with any certainty how much if any would have been invested for a return and how much would have been saved in a deposit account, nor what rate of interest could have been obtained. Interest rates have been at a historic low and investment returns have been volatile, with no guarantee of a positive return in the interval between 2016 and 2019. However, having reviewed this issue, I consider the fairest outcome would be to award simple interest on the net contributions calculated at the base rate for the time being quoted by the Bank of England.
29. I note Mrs N's contention that she was subjected to much greater distress and inconvenience than that which meets the level of "significant". It is very difficult to reach a conclusion about how much distress a person suffers and the extent to which the inconvenience they experience may cause stress to them. Payments in respect of distress and inconvenience are not designed to punish a respondent; instead it can cover expenses such as telephone calls and postage, as well as acknowledging that something has gone wrong, which should be put right. Taking into consideration that the error was corrected when it was discovered, and that Mrs N was given the opportunity to use an alternative vehicle to increase her pension benefits but refused to do so, I consider the sum of £500 that she has already been paid is an adequate award for the distress and inconvenience she has suffered.
30. I have considered whether NHS BSA should pay towards the £500 that UHB has already paid, but the evidence indicates NHS BSA was not at fault, having told UHB at the outset Mrs N was not eligible to contribute to an Added Years contract. It then had to rely on the employer to act on the email when helping Mrs N to achieve her pension objectives. I have concluded that NHS BSA is not required to take any further action.
31. I have the power to award interest under Section 151(2) of the Pensions Schemes Act 1993. Section 151(2) is a general power enabling me to make any direction I think fit and that can include the payment of interest.
32. The prescribed rate of interest is set out in Regulation 6 of The Personal and Occupational Pension Schemes (Pension Ombudsman) Regulations 1996 (No 2475),

which define it to be “the base rate for the time being quoted by the reference banks” and there is no discretion about the rate applying. Further, although the Regulations are silent on the point, it is considered that it is implicit that the interest basis applying is simple.

33. I find that the base rate for the time being quoted by the Bank of England and not the higher rate of interest of 3% per annum as sought by Mrs N should be applied to the net contributions she paid in error to the Added Years contract. I uphold Mrs N’s complaint in part.

Directions

34. Within 28 days of the date of this Determination, UHB shall calculate simple interest at the base rate for the time being quoted by the Bank of England on the sum represented by the total net contributions returned to Mrs N and pay this amount to her.

Anthony Arter

Pensions Ombudsman
15 February 2022