

## Ombudsman's Determination

Applicant	Mr S
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondent	NHS Business Services Authority ( <b>NHS BSA</b> )

## Outcome

1. I do not uphold Mr S' complaint and no further action is required by NHS BSA.

## Complaint summary

2. Mr S has complained that he was given incorrect information by NHS BSA, which did not allow him to weigh up his options and make an informed decision about opting out of or staying in the Scheme. He said he was told he had to stay in the Scheme and continue paying contributions until he reached age 55, despite reaching full pensionable service at age 49.

## 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. Mr S is a member of the Scheme and he has Mental Health Officer (**MHO**) status. This means under the Scheme Rules he could pay into the Scheme for 30 years instead of 40 to achieve full pensionable service, as the years are doubled after 20 years.
5. In March 2015, Mr S made enquiries about his MHO status in relation to his pension benefits. On 26 March 2015, NHS BSA responded by email and stated:

“Each year of MHO membership over 20 years doubles towards pension benefits, as you have correctly stated. However, in order to claim unreduced pension at age 55 you need to be a contributing member of the NHS Pension Scheme. If you defer your benefits, opt out and do not make further contributions you will not be able to claim your benefits until age 60. Your pension would also be based on the (sic) your pay prior to opting out.

It may be possible to step down to a lower paid post and protect your pay, if you are in a post earning at least 10% less than the one you left for over 12 months.

Full details of how to apply and more information regarding MHO status is available at the website below.”

6. In June 2018, Mr S wrote to his employer. He asked whether the additional contributions he was continuing to make would allow him to accrue further pensionable service, beyond the full 40 years’ he had accrued through his MHO status.
7. On 2 July 2018, the employer responded. It said:

“At 55 you can only have 40 years’ pensionable service even if you have accumulated more than this with your MHO doubling.

You have to pay into the scheme until you retire whether it is at 55 or if you continue after 55 if you have not drawn your pension.

It is possible to have 45 years’ service if you continued to work and pay into the scheme to age 58. If you retire at 55 and then come back to work between the ages of 55 and 60 your gross earnings plus your gross pension cannot be more than what your gross pre-retirement pay was. If it is, part of your pension could be abated (your pension could be reduced).”
8. In 2019, Mr S raised concerns with his employer, who communicated with NHS BSA on his behalf. He argued that he had not been properly advised about his options for opting out of the Scheme. His understanding had been that he had no option but to opt out after achieving 40 years’ service, at age 49. He felt he had unnecessarily been paying into the Scheme, for no additional benefits.
9. On 31 July 2019, the employer wrote to Mr S to tell him it considered he had been incorrectly advised in the 2016 email as he was not told he had options for opting out.
10. In August 2019, Mr S raised a complaint with NHS BSA. He argued that he had been told that it would not be possible to opt out of the Scheme. He had since found information online suggesting it was possible for him to have opted out. As he believed he had been given incorrect information, he asked NHS BSA to consider backdating his opt out to age 49 and his contributions since then refunded. NHS BSA confirmed that this would not be possible.
11. On 11 December 2019, NHS BSA wrote to Mr S under Stage One of the Internal Dispute Resolution Procedure (**IDRP**). It said if Mr S chose to opt out of the Scheme and did not re-join before his retirement, his pension age would revert back to 60. It said he would be able to claim his benefits at age 55, but these would be reduced due to being taken early.

12. NHS BSA also said that if a member with MHO status wished to claim unreduced benefits at age 55, they would need to have achieved 20 years' qualifying MHO membership. In addition, they would need to be in pensionable employment as a MHO on the day before they retired. If the member was not paying into the Scheme on the day before they retired, they would be unable to claim unreduced benefits. It also confirmed it was unable to accept a backdated request to opt out of the Scheme.
13. NHS BSA said for a member of the Scheme to be eligible for a refund of contributions, they cannot have more than two years' membership in the Scheme. As Mr S had more than the minimum Scheme requirement for entitlement to benefits, he was unable to claim a refund of contributions.
14. Mr S was not happy with the response from NHS BSA and asked for his complaint to be considered under Stage Two of the IDRP.
15. On 16 March 2020, NHS BSA wrote to Mr S under Stage Two. It said regulation R3 of the Scheme Regulations 1995 (as amended) (See Appendix 1), states that members with MHO status cannot have more than 40 years' calendar membership at age 55 and 45 calendar years in total. It said any membership in excess of these totals is restricted to these amounts.
16. NHS BSA said Mr S achieved 20 calendar years' MHO membership on 8 November 2005 and from 9 November 2005 he started to accrue doubled years. This meant that when he reached his normal retirement age (**NRA**) of 55, his membership would be restricted to 40 years' maximum service. NHS BSA said the contributions Mr S had continued to pay since reaching maximum service had provided for:
  - an increase in the actual value of his Scheme benefits based on the increase in his pensionable pay;
  - continued death-in-service cover, which was greater than the cover provided to deferred members; and
  - increased ill-health cover.
17. With regard to opting out of the Scheme, NHS BSA said Mr S could opt out with effect from the beginning of the next pay period after his application to opt out had been received by his NHS employer. It said once he had opted out of the Scheme, he would not accrue any further benefits and cover for death and ill-health would be reduced. In addition, it said his benefits would be deferred for payment at age 60, rather than age 55.
18. NHS BSA confirmed what Mr S had been told at Stage One of the IDRP with regard to a refund of contributions. It said as he had over two years' membership of the Scheme, he did not qualify for a refund.

### **NHS BSA's position**

- The Scheme Regulations meant it could not return any pension contributions to Mr S as he had more than two years' membership of the Scheme. Also, the Scheme Regulations did not allow Mr S to opt out retrospectively.
- There has been growth in Mr S' pension and lump sum due to the increase in his pensionable pay. If he had opted out of the Scheme, the only increase to Mr S' benefits would have been the Consumer Price Index (**CPI**) link, which is applicable for all deferred members. In addition, Mr S has received greater ill-health and death cover benefits as an active member, compared to that of a deferred member.
- Mr S' continued membership of the Scheme meant there would be no actuarial reduction to his benefits if he retires before he reaches age 60. Active membership of the Scheme and the continuation of MHO status, means Mr S has an NRA age of 55. If he had opted out of the Scheme at age 49 and not re-joined, he would have an NRA of 60.
- The Scheme Regulation B4 (5) (see Appendix 2), states a member must give notice to re-join the Scheme and they shall re-join on the first day of the first pay period after the notice is received, or a later date. The regulation does not allow for a member to give notice that they wished to re-join at an earlier date.
- If a member has a break in pensionable membership of five years or more, they would not be able to have MHO status upon return to active membership of the Scheme.

### **Adjudicator's Opinion**

19. Mr 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:-

- The information Mr S received from NHS BSA with regard to continuing to pay contributions into the Scheme was accurate and not misleading. To retain his MHO status, he had to remain a contributing member of the Scheme and if he had opted out he could have lost this status and his NRA would have deferred to 60 from 55.
- NHS BSA provided Mr S with options regarding how to protect his pay in a lower paid post and directed him to a website for further information.
- Mr S has not suffered a financial loss as there has been growth in his pension and lump sum benefits due to the increase in his pensionable pay since he attained 40 years' pensionable service.

- The Scheme Regulations do not allow Mr S to retrospectively opt out of the Scheme. The Regulations would have been available to Mr S upon request.
20. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments which do not change the outcome. In summary, he said:-
- It is an established fact that he was given incorrect information about opting out of the Scheme and was not given all the options available to him.
  - The information he was provided with was not full and did not allow him to consider his available options.
  - He could have stayed in his current job and opted out of the Scheme, as long as he opted back in before a maximum of five years had elapsed.
  - Saying there are no rules for members to receive backdated payments is not an adequate response by NHS BSA. As he has been a member of the Scheme for over two years is not an acceptable reason to be unable to challenge the system.
21. I note the additional points raised by Mr S, but I agree with the Adjudicator's Opinion.

### **Ombudsman's decision**

22. The information Mr S received from NHS BSA, in the email of March 2015, was accurate. Mr S was told that if he wished to claim unreduced pension benefits at age 55, he needed to be a contributing member of the Scheme. He was also told that if he deferred his benefits, opted out and did not make further contributions he would not be able to claim his benefits until age 60. Both of these statements correctly reflect the Regulations that govern the Scheme.
23. The email from NHS BSA also directed Mr S to an available website for more information about MHO status. The Scheme Regulations would also have been available to Mr S upon his request, which would have provided further details to enable him to make an informed decision about whether or not to opt out of the Scheme.
24. Mr S is not able to opt out of the Scheme retrospectively. The Regulations applicable to Mr S' situation (see Appendix 2) are prescriptive and do not allow discretion to be exercised. Section (1) of Regulation B4 explains that if a member no longer wishes to participate in the Scheme, they can opt out by giving notice in writing at any time to their employer. The member would then be treated as having left the Scheme on the date the notice takes effect. So, there is no provision for Mr S to tell his employer now that he wished to opt out of the Scheme at an earlier date.
25. I find that, under the Scheme Regulations, Mr S is not able to claim a refund of contributions as he has more than two years' membership of the Scheme.

26. Mr S has argued that he has lost out financially, due to making what he considers to be additional contributions to the Scheme. I understand why Mr S takes this view however, consideration should also be given to the fact that the contributions that he has continued to make have resulted in growth in his pension and lump sum benefits and he has benefitted from the security of higher ill-health and death cover benefits. If he had not remained an active member of the Scheme, his benefits when he retired would have been based on his salary when he opted out with increases linked to CPI. I do not agree that Mr S has suffered a financial loss as a result of remaining in the Scheme.
27. I do not uphold Mr S' complaint.

**Anthony Arter**

Pensions Ombudsman  
29 July 2022

## Appendix 1

### R3 Mental health officers

(1) Subject to paragraph (2), this regulation applies to a member who at the coming into force of these Regulations—

(a) is in pensionable employment under this Section of the scheme as a mental health officer, or

(b) has accrued rights to benefits under this Section of the scheme arising out of a previous period in which he was engaged in such employment and at no time since the last occasion on which he was so engaged has he had a break in pensionable employment for any one period of 5 years or more.

(2) Subject to paragraph (3), this regulation shall cease to apply if the member has a break in pensionable employment for any one period of 5 years or more ending after the coming into force of these Regulations.

(3) Paragraph (2) shall be without prejudice to the operation of paragraph (5)(a) in relation to any period prior to this regulation ceasing to apply.

(4) For the purposes of paragraphs (1) and (2), “pensionable employment” includes employment that qualified the member for benefit under a health service scheme.

(5) Subject to paragraphs (6) and (7), where this regulation applies—

a) if the member has in excess of 20 years' pensionable service as a mental health officer, regulation E1 (normal retirement pension) will apply as if the reference, in paragraph (1) of that regulation, to age 60, were a reference to age 55, but only if the member was in pensionable employment as a mental health officer immediately before leaving; and

(b) each complete year of pensionable service as a mental health officer in excess of 20 years will count as 2 years' pensionable service.

(6) For the purposes of calculating the 20 year period referred to in paragraph (5)—

(a) there shall, in the case of a member who has reached age 50, be taken into account any period before he became a mental health officer in which he was employed on the staff of a hospital used wholly or partly for the treatment of persons suffering from mental disorder and in which he devoted the whole or substantially the whole of his time to the treatment and care of such persons, unless it would be more favourable to the member (or, if the member has died, to the persons entitled to benefits in respect of the member) to disregard any such period;

(b) pensionable service does not include additional service bought under regulation Q1 (right to buy additional service).

(7) Paragraph (5) does not apply—

(a) for the purpose of calculating, under regulations E2 or E2A and H3, H4 and H5 (child allowance), the pensionable service the member could have completed if he had stayed in pensionable employment until a particular age;

(b) for the purpose of calculating a minimum widow's, widower's, surviving civil partner's or surviving scheme partner's pension based on the member's pensionable service after 5th April 1978 under regulation G6(2) (member marries after leaving pensionable employment); or

(c) for the purpose of calculating a member's benefits where it would be more favourable to the member or other person entitled to the benefits not to apply that paragraph and to calculate the member's benefits by reference to the member's final year's pensionable pay when the member leaves pensionable employment, completes 45 years' pensionable service (calculated without regard to paragraph (5)(b)), reaches age 65 or dies, whichever occurs first.

(8) Where, by virtue of paragraph (7)(c), paragraph (5) does not apply, the amount of any contributions that should have been paid by the member under regulation D1 (contributions by members), but which were not deducted from the member's earnings, will be deducted from the lump sum payable on the member's retirement or death.

(9) If a member who has in excess of 20 years pensionable service for the purposes of paragraph (5) leaves NHS employment before reaching age 55 because of redundancy, but without becoming entitled to a pension under regulation E3 (early retirement pension on grounds of redundancy) or regulation E3A (early retirement pension (termination of employment by employing authority)), and was in pensionable employment as a mental health officer immediately before leaving, regulation L1 (preserved pension) will apply as if the references in that regulation, to age 60, were to age 55.



## Appendix 2

### B4 Opting-out of this Section of the scheme

(1) A person who does not wish to, or who no longer wishes to, participate in this Section of the scheme may opt-out of this Section of the scheme at any time by giving notice in writing to his employing authority and such person will be treated as having left pensionable employment on the date the notice takes effect.

(2) A notice referred to in paragraph (1) shall take effect—

(a) from the first day of the pay period immediately following its receipt by the employing authority; or

(b) where a later date is specified in the notice, from the first day of the pay period following the pay period in which the specified date falls.

(3) A person who opts out of this Section of the scheme under paragraph (1) within one month of the date of commencing NHS employment shall be treated as never having been included in this Section of the scheme in respect of that opt out and, if applicable, any contributions made by, or on behalf of, that person for the period before the opt out took effect must be refunded.

(4) A notice under paragraph (1) shall cease to have effect on the day immediately preceding, as the case may be, the person's—

(a) automatic enrolment date; or

(b) automatic re-enrolment date: this does not apply where the notice was given within the 12 months immediately preceding that date.

(5) Subject to paragraph (6), a person who has opted-out of this Section of the scheme in accordance with paragraph (1) may, if eligible to do so, join or rejoin this Section of the scheme by giving notice in writing to the employing authority and on so doing will be included in this Section of the scheme on the first day of the first pay period after the notice is received or such later date (which must be the first day of a pay period) as is specified in the notice.