

Ombudsman's Determination

Applicant	Mr N
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHS BSA)

Outcome

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

Complaint summary

2. Mr N complained about the incorrect information he received from NHS BSA on 13 September 2019. Specifically, he said that NHS BSA misinformed him about taking his pension as a trivial commutation lump sum and that he could claim a refund of contributions for the deferred 2008 Section benefits he held in the Scheme.
3. Mr N said that the £250 he had been offered by NHS BSA was inadequate compensation considering the loss of expectation he had experienced.

Background information, including submissions from the parties

4. The Scheme is governed by Regulations (**the Scheme Regulations**). The Regulations applicable to Mr N's complaint are the National Health Service Pension Scheme Regulations 1995 (**the 1995 Regulations**), and the National Health Service Pension Scheme Regulations 2015 (**the 2015 Regulations**).
5. Regulation T7 of the 1995 Regulations states the following:

“(4) A member's pension that includes a guaranteed minimum pension cannot be treated as trivial until the member reaches State pension age”.
6. Regulation 72 of the 2015 Regulations states the following:

“A member is qualified for retirement benefits under this scheme if –

 - (a) The member has at least 2 years' qualifying service; or
 - (b) A transfer payment otherwise than from another occupational pension scheme has been accepted in relation to the member.”

7. Regulation 40 of the 2015 Regulations stipulates that if a member has qualified for retirement benefits under Regulation 72, they are not entitled to a refund of contributions under the Scheme (set out in Appendix 1).
8. The legislation relevant in Mr N's case is the Occupational Pension Schemes (Schemes that were Contracted out) (No.2) Regulations 2015 (**the 2015 Legislation**), and the Finance Act 2004 (**the 2004 Act**). These governing legislative provisions provide statutory requirements that need to be satisfied in order for a member to be eligible for trivial commutation.
9. Regulation 25 of the 2015 Legislation stipulates that a pension scheme may provide a trivial commutation lump sum instead of a pension if a Guaranteed Minimum Pension (**GMP**) has become payable to the member (set out in Appendix 2).
10. Schedule 29 of the 2004 Act stipulates that a trivial commutation payment must extinguish all of the member's entitlement in the relevant scheme (set out in Appendix 3).
11. On 6 June 1983, Mr N joined the 1995 Section of the Scheme (**the 1995 Section**).
12. On 30 April 1988, Mr N left pensionable service in the Scheme and became a deferred member.
13. On 1 November 2009, Mr N joined the 2008 Section of the Scheme (**the 2008 Section**). He left pensionable service shortly after on 31 December 2009 and again became a deferred member of the Scheme.
14. Mr N was contracted out of the State Earnings Related Pension Scheme (**SERPS**) during the period he had accrued service in the Scheme between 6 June 1993 and 5 April 1997. This meant that, alongside his other benefits, he would accrue a GMP which would become payable to him at his GMP age of 65.
15. On 13 September 2019, Mr N telephoned NHS BSA to enquire about his position in the Scheme. The call handler he spoke to informed him that he could claim his deferred retirement benefits from the 1995 Section as a single taxable lump sum, which was otherwise known as a trivial commutation lump sum. The call handler also said that Mr N could claim a refund of contributions in respect of his deferred 2008 Section benefits.
16. On the same day, NHS BSA issued a copy of the 1995/2008 Scheme guide (**the Scheme guide**), a trivial commutation fact sheet (**the Factsheet**), a deferred benefit claim form (**the Claim Form**), and a refund application form (**the Refund Claim Form**) to Mr N.
17. Pages 2 and 3 of the Factsheet detailed the circumstances when NHS BSA was unable to provide a trivial commutation lump sum. In relation to a male member under age 65, the Factsheet specified that:

“A member who retires before age 65 and has entitlement to a GMP cannot elect to trivially commute their pension benefits.”

18. Page 3 of the Refund Claim Form stated the following:

“You can have a refund of your contributions if:

- your total membership in the NHS Pension Scheme is less than two years. The two years includes any qualifying membership. Qualifying membership includes:
- any previously refunded membership where the break does not exceed one month before your current membership started
- the total of any membership you have in the 1995 Section, the 2008 Section and the 2015 Scheme”

19. On 24 July 2020, Mr N completed and returned the Claim Form to NHS BSA, thereby submitting his application for the payment of his retirement benefits from the 1995 Section as a trivial commutation lump sum.

20. On 30 July 2020, NHS BSA emailed Mr N confirming that it had noted his request for trivial commutation, however he would need to confirm the date on which he wished to have his 1995 Section retirement benefits put into payment.

21. As Mr N had not responded, NHS BSA sent him the same email on 18 August, 3 September, and 19 September 2020.

22. On 28 September 2020, Mr N responded to NHS BSA and confirmed that he wished to take his 1995 Section retirement benefits as a trivial commutation lump sum with effect from 21 July 2020.

23. On 27 October 2020, NHS BSA wrote to Mr N to explain that his application for trivial commutation had been rejected as he had GMP rights under the Scheme.

24. On 13 April 2021, Mr N raised a complaint under the Scheme’s Internal Dispute Resolution Procedure (**IDRP**). He stated that he was disappointed his application for a trivial commutation lump sum had been rejected considering the information he had received on 13 September 2019.

25. On 8 June 2021, NHS BSA issued its stage one IDRP response. It said:-

- It accepted that incorrect information was provided to Mr N by its call handler on 13 September 2019 and upheld this part of his complaint.
- It acknowledged that after the initial misinformation was provided, four opportunities were missed to inform Mr N that he was ineligible for trivial commutation and a refund of contributions.
- It understood why Mr N wanted to claim a trivial commutation lump sum. Although, it allowed members with a small pension to exchange their retirement benefits for a trivial commutation payment, there were requirements that needed

to be satisfied in order to be eligible for this option. In Mr N's case, as he was under age 65 and had a GMP in respect of his service between 1983 and 1988 he was ineligible for trivial commutation.

- Mr N had more than two years qualifying service, when he stopped paying contributions to the Scheme, so his retirement benefits were deferred for payment at age 60. He was therefore not eligible for a refund of contributions.

26. On 5 August 2021, Mr N requested that his complaint be reconsidered under stage two of the IDRPs, as he was dissatisfied with NHS BSA's stage one response. He made the argument that he had suffered a loss of expectation and asked NHS BSA to compensate him for this loss.

27. On 14 October 2021, NHS BSA issued its stage two IDRPs response. It said the following:-

- It was upholding Mr N's complaint in relation to the misinformation it provided on 13 September 2019. However, Mr N was provided with a copy of the Scheme guide, the Refund Claim Form and the Factsheet on the same day. These documents contained the correct information that Mr R was not eligible for trivial commutation or a refund of contributions. Even though Mr N made further enquiries after receiving these documents, it was unable to find any enquiry relating to the information contained in the Scheme guide, the Refund Claim Form, or the Factsheet.
- It was unfortunate that on 13 September 2019, Mr N was incorrectly informed that he could claim a refund of contributions in relation to his deferred 2008 Section benefits. However, page 3 of the Refund Claim Form explained that he would only be eligible for a refund of contributions if his total qualifying service was less than two years. As Mr N had previously received information about his pensionable service in the Scheme, it was reasonable to suggest that he may have been aware that his combined service from the 1995 Section and 2008 Section exceeded two years.
- It acknowledged that Mr N wanted to claim his 1995 Section retirement benefits as a trivial commutation lump sum. However, the Factsheet contained information about the eligibility criteria that had to be met for a trivial commutation lump sum payment to be made. One of the required criteria was in respect of a GMP. If a member had GMP rights under the Scheme, a trivial commutation payment could not be made before GMP age.
- It did not agree that Mr N had suffered a loss of expectation as he was not provided an estimate for a trivial commutation payment. However, it agreed that Mr N had suffered some distress and inconvenience and offered an ex-gratia payment of £250.

28. Mr N lodged his complaint with The Pensions Ombudsman on 9 November 2021.

29. Mr N's position:-

- He should receive a higher award for the loss of expectation he has suffered because he was misinformed that he could claim a trivial commutation lump sum on four separate occasions.

30. NHS BSA's position:-

- From 6 April 2010 changes were introduced to equalise the State Pension Age between females and males, which amended the State Pension Age gradually from 60 to age 65 for females born after 6 April 1951. The GMP age however, remained unchanged, this being 60 for females and 65 for males.
- Male members who retire before age 65 and are entitled to a GMP are not eligible for trivial commutation. As Mr N had service within the Scheme during the GMP period (6 April 1978 to 5 April 1997) and was under his GMP age, he was ineligible for trivially commuted retirement benefits.
- It cannot provide Mr N with a refund of contributions in respect of his deferred 2008 Section benefits nor is it able to provide a trivial commutation lump sum for his 1995 Section retirement benefits.
- Mr N has not claimed that he has suffered a financial loss. Its offer of £250 ex-gratia was fair given the distress and inconvenience Mr N suffered, particularly as no financial loss has occurred.

Adjudicator's Opinion

31. Mr N'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 in paragraphs 32 to 40 below.
32. There was no disagreement that NHS BSA incorrectly informed Mr N on 13 September 2019 that trivial commutation could be considered in his case and that he could claim a refund of contributions. The outstanding dispute was regarding how NHS BSA had tried to put matters right. Mr N contended that the £250 offered to him by NHS BSA was inadequate compensation for the loss of expectation he had experienced.
33. The provision of incorrect information in Mr N's case amounted to maladministration. When maladministration has been identified, the Ombudsman can make two kinds of awards, one for financial loss and one for non-financial loss. In Mr N's case, it was not disputed that he was misinformed about his pension options. However, he had not suffered a financial loss. Mr N was only entitled to receive correctly calculated benefits in accordance with the relevant legislation and the applicable Scheme Regulations.

34. Having reviewed the relevant legislation and the 1995 Regulations, the Adjudicator was satisfied that Mr N did not meet the necessary requirements to qualify for trivial commutation. This was because Mr N was contracted out of SERPS and a GMP was payable to him from the Scheme. NHS BSA was obligated to provide a pension to Mr N at least equal to the value of his GMP which would become payable at his GMP age of 65.
35. GMP within the Scheme increased each year based on the Consumer Price Index (**CPI**), which meant that the value of Mr N's pension would not be known before his GMP age. This made it impossible for NHS BSA to satisfy itself that it had extinguished all liability under the Scheme in relation to Mr N before he had reached age 65. Considering that, Mr N had not yet reached age 65, he clearly had not satisfied the conditions outlined in the relevant legislation and the applicable Scheme Regulations, and therefore was not currently entitled to trivial commutation.
36. The 2015 Regulations made it clear that as Mr N's qualifying service from June 1983 to April 1988 and from November 2009 to December 2009 amounted to more than two years, he was not entitled to a refund of contributions.
37. Nonetheless, Mr N could still be entitled to an award for non-financial loss for the loss of expectation he had experienced. When considering making an award for non-financial loss, the Ombudsman would consider whether the distress and inconvenience, which was classed as non-financial injustice, was significant. The amount of the award starts at £500. However, if the distress and inconvenience was nominal, no award would be made.
38. The Adjudicator noted that, although on 13 September 2019, Mr N was incorrectly provided with the option of trivial commutation and a refund of contributions over the telephone. NHS BSA sent documents to him on the same day which contained the correct information. Therefore, it was her opinion that Mr N's expectations for these options should have been limited from the outset. Mr N was provided with the Factsheet which clearly conveyed that the option to trivially commute a pension was subject to various conditions by which it could be determined that a member was not in fact eligible. So, from the very beginning, Mr N was informed of the necessary criteria for eligibility for a trivial commutation lump sum. Mr N was also provided with the Refund Claim Form which explicitly stated that a member could only claim a refund of contributions if their qualifying service in the Scheme amounted to less than two years.
39. Mr N asserted that he was misinformed about trivial commutation on four separate occasions. However, the Adjudicator disagreed. She explained that the available information suggested that Mr N was only misinformed on 13 September 2019. The generic emails NHS BSA sent to him between July and September 2020 only acknowledged his ongoing trivial commutation application. NHS BSA accepted that the correct information could have been provided to Mr N in these instances and it was accepted that this could have been handled differently. However, in view of the fact that NHS BSA had provided Mr N with the Factsheet, the Adjudicator was

satisfied that sufficient information had been made available to him, for him to have independently identified that he was ineligible for trivial commutation.

40. The Adjudicator concluded that, she did not doubt that receiving incorrect information would have been disappointing for Mr N, but in her view, the distress and inconvenience this caused would have been nominal. Therefore, she was not persuaded that the maladministration in this case warranted a higher award for non-financial injustice than the £250 offered by NHS BSA.
41. Mr N did not accept the Adjudicator's Opinion and asked the Adjudicator to reconsider. He provided the following comments:
 - He has ADHD, Borderline Personality Disorder and Psychosis. He also has difficulty with reading and comprehension. In his view, this has prevented him from being able to explain that NHS BSA misinformed him about taking his pension as a trivial commutation lump sum.
 - In spite of his disabilities, NHS BSA has treated him in the same way as every other member of the Scheme which is in breach of the Equality Act 2010 (**the Equality Act**).
 - NHS BSA misinformed him about being eligible for a trivial commutation lump sum on four occasions and as NHS BSA was the pension provider, he had no reason to doubt the information provided to him.
42. The Adjudicator took Mr N's comments into consideration but concluded that these did not change the outcome outlined in her Opinion. However, for the sake of completeness, she wrote to NHS BSA and requested it provide a response to Mr N's comments. Specifically, she asked NHS BSA if it was aware of Mr N's health conditions and if reasonable adjustments were made to accommodate him.
43. NHS BSA responded to the Adjudicator. It said the following:
 - It was not aware that Mr N was disabled, although it accepts that in hindsight, there was some information available that may have suggested that he was.
 - The call notes available on Mr N's record indicated that he gave his sister the authority to discuss his pension with NHS BSA. It was not uncommon for Scheme members to request that someone speak on their behalf, so this would not have immediately alerted it to the fact that Mr N had a disability.
 - Mr N had mentioned that he had ADHD, and although it accepts that ADHD could be considered a disability for some people, it was not incumbent on NHS BSA to have assumed this to be the case for Mr N.
 - If it had known that Mr N was disabled, it would have considered what reasonable adjustment could be made.
44. Subsequently, Mr N's complaint was passed to me to consider.

45. I note the additional points raised by Mr N, but they do not change the outcome, I agree with the Adjudicator's Opinion.

Ombudsman's decision

46. Mr N complained that NHS BSA provided him with incorrect and misleading information regarding his eligibility for a trivially commuted lump sum. Mr N also contended that in spite of his disabilities, NHS BSA has treated him in the same manner as every other member of the Scheme and therefore has discriminated against him which is a breach of the Equality Act.
47. It is not clear from Mr N's comments, what precisely he is alleging as a breach of the Equality Act. I note that Disability is defined in Section 6 of the Equality Act as any physical or mental ability which had a substantial and long-term adverse effect on a person's ability to carry out normal day to day activities (set out in Appendix 4). Mr N has described his conditions as "ADHD, Borderline Personality disorder and Psychosis." I think it is reasonable to proceed on the basis that these conditions do broadly amount to a disability although I make no formal finding on this matter and take this position only to assess Mr N's case and his response to the Adjudicator's Opinion.
48. Under section 13 of the Equality Act, NHS BSA would discriminate against Mr N if it treated him less favourably than it treats other Scheme members without a disability.
49. NHS BSA has said that it was unaware that Mr N had a disability, although it accepts that in hindsight, there was some information available that might have suggested that he did. I find that, although NHS BSA was unaware of Mr N's disability, there is no indication that he was treated any less favourably by NHS BSA in comparison to any other member. NHS BSA provided Mr N with the Scheme Guide, the Factsheet, the Claim Form, and the Refund Claim form on 13 September 2019 and therefore was completely transparent with him about the pension options to which he was entitled. Following this, Mr N was able to access NHS BSA's complaint procedures and his complaint was handled in line with NHS BSA ordinary processes.
50. Under section 29 of the Equality Act, NHS BSA had a duty to make "reasonable adjustments" in cases where a member had a disability. Reasonable adjustments would include, for example, acceleration where appropriate, or corresponding with a Scheme member by post if they were unable to access email.
51. Considering that NHS BSA was not aware that Mr N had a disability, I cannot fault it for not making reasonable adjustments. Nevertheless, having carefully reviewed the provided information, I have seen nothing to indicate that Mr N has been put at a substantial disadvantage by NHS BSA's ordinary processes.
52. Mr N is seemingly under the impression that reasonable adjustment includes more favourable treatment. So, I find it important to highlight, that reasonable adjustment does not extend to reaching a different and more favourable decision in a case such

as this, where a member is not entitled to a particular pension option based on the applicable Scheme Regulations and the relevant legislative provisions.

53. NHS BSA is required to act in accordance with the relevant legislation and the applicable Scheme Regulations which explicitly state that Mr N will only qualify for trivial commutation once he has reached his GMP age of 65. Any deviation from these regulations in favour of Mr N would not only be impractical but would also constitute preferential treatment which directly undermines the principles of the Equality Act. Consequently, I find that NHS BSA has no discretion to currently pay Mr N's pension benefits as a trivial commutation lump sum.
54. It was unfortunate that Mr N had his expectations raised and was provided with incorrect information which led him to believe he could commute his pension benefits and receive a lump sum. But I concur with the Adjudicator that Mr N was only misinformed on one occasion, on 13 September 2019, and that this was swiftly corrected. There is no evidence to suggest that Mr N was provided with incorrect information on four separate occasions.
55. In any event, Mr N has not lost entitlement to his pension benefits from the Scheme. It is simply that he is not permitted to receive them in the manner he would like. Also, Mr N still has the option to transfer his pension from the Scheme to another provider should he wish to do so.
56. So, although I empathise with Mr N's position there are no grounds on which I can uphold his complaint.

Anthony Arter CBE

Deputy Pensions Ombudsman

20 March 2024

Appendix 1

The National Health Service Pension Scheme Regulations 2015

Eligibility for refund

40-- (1) Contributions made by a member (M) must be repaid to M if—

- (a) the 1993 Act condition applies; or
- (b) the short service condition applies.

(2) The “1993 Act condition” is that—

- (a) Chapter 5 of Part 4 of the 1993 Act(1) applies to M; and
- (b) the repayment is made in accordance with that Chapter.

(3) The short service condition applies if—

- (a) M does not qualify for benefits under regulation 72;
- (b) M is not a pensioner member;
- (c) M ceases to be an active member;
- (d) the 1993 Act condition does not apply to M; and
- (e) M makes a claim in writing to the scheme manager for the repayment.

Appendix 2

The Occupational Pension Schemes (Schemes that were Contracted-Out) Regulations 2015

Regulation 25 – Payment of a lump sum instead of a pension

(1) The scheme may provide for the payment of a lump sum instead of a pension that the scheme is required to provide in accordance with Section 13 or 17 of the 1993 Act if—

a) a guaranteed minimum pension has become payable (but see also paragraph (3)); and

(3) The condition in paragraph (1)(a) does not apply in cases where—

a) the scheme is being wound up or an earner retires before pensionable age;

b) a premium under Section 55(2) of the 1993 Act (contributions equivalent premium) has been paid or treated as paid or the scheme has made the provision mentioned in Section 16(2) and (3) of the 1993 Act; and

c) the conditions in paragraph (4) are met..

(4) The conditions are—

a) the aggregate amount of the benefits that have accrued to the earner at the date of winding-up or, as the case may be, of the earner's retirement, increased—

(i) in accordance with Section 16(2) and (3) of the 1993 Act; or

(ii) in a case where Section 16(2) and (3) applies, to the amount that would have been payable at pensionable age,

is to be treated as the amount of benefits currently payable to the earner under the scheme;

Appendix 3

Paragraph 7(1)(a) to (e) Schedule 29 of the Finance Act 2004

Conditions that must be met for a payment to be a trivial commutation lump sum

The six conditions that a lump sum payment must meet to be a trivial commutation lump sum for payments made on or after 16 September 2016 are as follows:

- the member has not been paid a trivial commutation lump sum previously (from any registered pension scheme), except any earlier payment within the commutation period*,
- the lump sum is paid in respect of a defined benefits arrangement or an in-payment money purchase in-house scheme pension, or both,
- on the nominated date, the value of the member's pension rights do not exceed the commutation limit of £30,000,
- the lump sum is paid when the member has available lifetime allowance,
- **the lump sum extinguishes the member's entitlement to defined benefits and in payment money-purchase in-house scheme pensions under the registered pension scheme making the payment, and**
- the lump sum is paid when the member has reached the age of 55 or meets the ill-health condition (see PTM062100) or has a protected pension age (see PTM062210).

*The commutation period is the period beginning with the day on which a trivial commutation lump sum is first paid to the member and ending 12 months after that day. The nominated date is the day within the period of three months ending with the first day of the commutation period nominated by the member (or, if no date is nominated, is the first day of the commutation period).

Appendix 4

The Equality Act 2010

Section 6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Section 13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

...

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

Section 29 Provision of services, etc.

(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

...

(7) A duty to make reasonable adjustments applies to—

(a) a service-provider (and see also section 55(7));

(b) a person who exercises a public function that is not the provision of a service to the public or a section of the public.