

Ombudsman's Determination

Applicant	Dr Rolf Major
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHSBSA)

Complaint Summary

1. Dr Major has complained that NHSBSA has refused to allow him to rejoin the 1995 Section of the Scheme.

Summary of the Ombudsman's Determination and reasons

2. The complaint should not be upheld because NHSBSA can only act in accordance with the regulations governing the Scheme. These do not allow Dr Major to rejoin the 1995 Section of the Scheme.

Detailed Determination

Scheme Regulations

3. Dr Major was a member of the Scheme from 1987 and was in the 1995 Section. The relevant regulations applicable to his complaint are in The National Health Service Pension Scheme Regulations 1995 (as amended) (**the 1995 Regulations**), and the National Health Service Pension Scheme Regulations 2008 (as amended) (**the 2008 Regulations**). The regulations that deal with the eligibility criteria for joining, leaving and rejoining the Scheme are in the Appendix to this Determination.

Material facts

4. In July 2012, Dr Major informed NHSBSA that he had appointed an independent financial advisor (**IFA**) to act on his behalf.
5. On the advice of the IFA, Dr Major opted out of the Scheme in February 2013. NHSBSA issued a statement of entitlement to the IFA on 29 April 2013 which included a guaranteed cash equivalent transfer value. The completed forms (with Dr Major's confirmation) were returned to NHSBSA. On 31 May 2013 (after obtaining approval from HM Revenue & Customs), it made a payment of £901,348.27 to a self-invested personal pension (**SIPP**) in Dr Major's name.
6. In July 2013, Dr Major was informed by the police that the IFA did not have authorisation by the Financial Conduct Authority to give pension advice and had acted fraudulently. (The IFA was subsequently convicted and imprisoned for fraud against Dr Major and two others.)
7. Dr Major sought legal advice and his solicitor wrote to NHSBSA in September 2013. He requested that Dr Major be re-admitted into the 1995 Section of the Scheme as the circumstances surrounding his transfer out were unfortunate, exceptional and merited a different solution. He referred to the pension mis-selling events in the late 1990s where those who had been badly advised were re-instated into their original scheme.
8. NHSBSA responded to Dr Major's representative on 26 September 2013. It said the circumstances surrounding the advice given to Dr Major did not fall within Regulation B5 of the 1995 Regulations. The measures imposed for those affected by pension mis-selling were time limited to advice given between April 1988 and June 1994.
9. NHSBSA confirmed that although Dr Major remained in employment, he had no remaining pension entitlement in the Scheme because he transferred it to another registered pension provider. It said Regulation B2(1)(q) prohibited Dr Major from rejoining the 1995 Section of the Scheme but that he was eligible to rejoin the 2008 Section of the Scheme. It confirmed that if Dr Major rejoined the 2008 Section of the Scheme, he could apply to transfer his benefits from his SIPP into the Scheme.

10. Dr Major's representative responded to NHSBSA and disagreed with its conclusion that Dr Major's pension had not been mis-sold. He said that Dr Major's circumstances satisfy the requirements of Regulation B5(1)(c).
11. An exchange of correspondence followed and NHSBSA sent a substantive response to Dr Major on 15 January 2014. NHSBSA said legal advisers had concluded, by reference to the wording of Regulation B5 and supplementary materials, that Dr Major did not fall within the class of persons covered by Regulation B5(1). It said this regulation was only intended to apply to those who had already been subject to mis-selling. NHSBSA said in any event, Regulation B5 is expressly made subject to the eligibility criteria for joining the 1995 Section which is contained in Regulation B4(5). A person can only elect to join the 1995 Section if he or she is eligible to do so. Further, NHSBSA said Dr Major was not eligible to rejoin the 1995 Section of the Scheme by virtue of Regulation B2(1)(q) which did not allow this. NHSBSA informed Dr Major that proposed amendments to the 2008 Regulations would make him eligible to rejoin the 2008 Section if he wished to do so.
12. Dr Major complained under the Scheme's internal dispute resolution procedure and NHSBSA issued its Stages 1 and 2 decisions on 2 November 2015 and 2 December 2015 respectively. Dr Major's complaint was not upheld for the reasons given in its letter of 15 January 2014. It said that there was no discretion or flexibility in the regulations governing the Scheme, to allow him to rejoin the 1995 Section where the eligibility criteria are not fulfilled.
13. For completeness, it should be noted that Dr Major rejoined the 2008 Section of the Scheme and is now a contributing member. He transferred in his pension benefits from the SIPP into the Scheme and NHSBSA received a transfer value payment of £874,559.41 in September 2014. Dr Major was awarded a practitioner remuneration credit of £2,719,401.15 and 24 years 304 days qualifying membership.

Summary of Dr Major's position

14. Dr Major says he has suffered a loss of approximately £272,125 as a result of the fraudulent actions of the IFA. This figure was provided to him by the Financial Services Compensation Scheme in December 2015. It was calculated based on the value of his lost Scheme benefits (from the 1995 Section), and value of his benefits from the 2008 Section as at 19 February 2015.
15. Dr Major says he wants to be put back in the position he was in before his pension was transferred. He says he has suffered injustice and there has to be some discretion in an exceptional case "rather than hid[ing] behind regulations".
16. Dr Major says the Pensions Ombudsman is his last hope of getting back into the 1995 Section of the Scheme. He says he has tried every other avenue and simply cannot face the prospect of being forced to work another five years to receive his pension when he was "conned into opting out of the Scheme by a fraudster who is

now serving time in prison". (The normal pension age in the 1995 Section of the Scheme is 60 but this increases to 65 in the 2008 Section of the Scheme.)

Summary of NHSBSA's position

17. NHSBSA say Dr Major is not eligible to rejoin the 1995 Section of the Scheme and there is no discretion available which would allow such entry. Its letter of 15 January 2014 constitutes the legal advice it received and NHSBSA says it is relying on the arguments put forward in this letter.
18. NHSBSA considers that the Regulations have been correctly applied in Dr Major's case. It says "the rules of the...Scheme are laid down in regulations agreed by Parliament, and...there is no discretion or flexibility within the regulations to allow a member to rejoin the 1995 Section where the eligibility criteria is not fulfilled".

Conclusions

19. Dr Major's complaint to this service is against NHSBSA, the Scheme administrator and not against the IFA. My task is to assess whether there has been maladministration by NHSBSA in its administration of Dr Major's pension which has caused him injustice.
20. It cannot be said that there was maladministration by NHSBSA for processing Dr Major's request to transfer out of the Scheme. NHSBSA cannot advise members and can only carry out their instructions in line with the rules and regulations governing the Scheme. It was not party to any dealings with Dr Major and his then IFA, and cannot be held responsible for any subsequent decisions taken by Dr Major.
21. I will now consider whether there has been maladministration by NHSBSA in its interpretation of the regulations concerning Dr Major's eligibility to rejoin the 1995 Section of the Scheme.
22. Regulation B1 of the 1995 Regulations is the starting point for considering eligibility to join the 1995 Section of the Scheme. However, it is subject to the restrictions contained in Regulation B2, so there is no absolute right to be a member of the 1995 Section. Regulation B2(1)(q) says a person will not be able (eligible) to join the section if the following four events have occurred:
 - if that person entered pensionable employment before 1st April 2008;
 - gave notice to opt out of the Scheme under Regulation B4;
 - is not entitled to a preserved (deferred) pension; and
 - either received a repayment of contributions or exercised the right to a transfer payment.
23. From the facts, there can be no dispute that Dr Major opted out of the Scheme and transferred his benefits. Once the transfer payment was made to the SIPP, Dr Major had no further entitlement, such as a deferred pension, from the Scheme. Whilst

Regulation B4(5) allows someone to rejoin the 1995 Section, it is also conditional on that person being eligible and not restricted under Regulation B2.

24. Although I sympathise with Dr Major, I do not agree that he is able to rejoin the 1995 Section under Regulation B5(2). This is because of the restrictions contained in Regulation B2, as amended on 1 April 2008.
25. NHSBSA have to follow the provisions of the regulations governing the Scheme and there is no flexibility in the 1995 or 2008 Regulations which would allow Dr Major to rejoin the 1995 Section.
26. I do not find that there has been maladministration by NHSBSA so I do not uphold Dr Major's complaint.

Anthony Arter

Pensions Ombudsman
9 March 2016

Appendix

Regulation B1 (the 1995 Regulations)

“Membership of this Section of the scheme

(1) Subject to regulation B2 (restrictions on membership) and B3 (restriction on further participation in the scheme), the following persons are eligible to join this Section of the scheme-

(a) officers; and

(b) medical and dental practitioners and specialist trainees in general practice.

(2) Subject to paragraph (3), each eligible person will be included in this Section of the scheme-

(a) automatically on commencing NHS employment;

(b) where the person has previously opted out of this Section of the scheme, on the date determined under paragraph (5) of regulation B4 where that paragraph applies: this is subject to regulation B4(6)…”

Regulation B2(1)(q) (the 1995 Regulations)

“Restrictions on membership

(1) A person may not join this Section of the scheme if-

(q) that person is a person who-

(i) enters pensionable employment before 1st April 2008,

(ii) has given notice in respect of that employment (and all other such employments with an employing authority) that that person does not wish to, or no longer wishes to, participate in the Scheme in accordance with paragraph (1) or (1A) of regulation B4,

(iii) is not entitled to a preserved pension in accordance with regulation L1, and

(iv) has, in respect of that pensionable employment, either received a repayment of contributions under regulation L2 or exercised the right to a transfer payment under Part M.”

Regulation B4 (the 1995 Regulations)

“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...

(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.

(6) A person who has opted out may not become a member of this Section of the scheme during any period of absence from work for any reason.”

Regulation B5 (the 1995 Regulations)

“Opting into this Section of the scheme: mis-sold pensions

(1) This regulation shall apply to a person who, during any period-

- (a) was eligible to be an active member of this Section of the scheme;
- (b) opted out of this Section of the scheme under regulation B4(1) and made contributions to a personal pension scheme; and
- (c) has suffered loss as the result of a contravention which is actionable under section 62 of the Financial Services Act 1986 or section 150 of the Financial Services and Markets Act 2000.

(2) Where, at any time, a person to whom this regulation applies elects to join or rejoin this Section of the scheme under regulation B4(5), there shall, if the Secretary of State so determines, be counted as pensionable service in respect of that person a period equal to the aggregate of-

- (a) his additional period of pensionable service as approved by the Secretary of State for the purposes of regulation N3A(2)(i); and
- (b) his "transferred-out service", if any, within the meaning of regulation N3A(5),

provided there has been paid to the Secretary of State in respect of that person a transfer payment calculated in accordance with regulation N3A.

...

(4) In this regulation-

"active member" means a person who is in pensionable employment under this Section of the scheme; and

"personal pension scheme" has the meaning given by section 1 of the Pension Schemes Act 1993 and includes-

- (i) a retirement annuity contract approved under Chapter III of Part XIV of the Income and Corporation Taxes Act 1988;
- (ii) a personal pension scheme approved under Chapter IV of Part XIV of the Income and Corporation Taxes Act 1988;
- (iii) a retirement benefits scheme approved under section 591(2)(g) of the Income and Corporation Taxes Act 1988.
- (iv) a scheme referred to in (i), (ii) or (iii) that obtained relevant approval under the Income and Corporation Taxes Act 1988 before 6th April 2006 and on that date became a registered scheme for the purpose of the 2004 Act;
- (v) a scheme established on, or after, 6th April 2006 as a registered scheme for the purpose of the 2004 Act and which the Secretary of State agrees to recognise as a transferring scheme for the purposes of regulations M and N.

Regulation 2.B.1(5)(j) (the 2008 Regulations)

"Eligibility: general

(5) The "other Section conditions" are that-

(j) the person-

- (i) has given notice for the purposes of regulation B4 of the 1995 Regulations (opting-out of the scheme) and as a result of that notice all of that person's NHS employments ceased to be pensionable employment for the purposes of those Regulations,
- (ii) is not entitled to a pension (including a deferred pension) under those Regulations, and
- (iii) has, in respect of the NHS employments referred to in (i), either received a repayment of contributions or exercised the right to a transfer payment under Part M of those Regulations..."