

Ombudsman's Determination

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| Applicant | Mr M |
| Scheme | NHS Pension Scheme (the Scheme) |
| Respondents | Gateshead NHS Foundation (the Trust) NHS Business Services Authority (NHS BSA) |

Outcome

1. Mr M's complaint is partly upheld, but there is a part of the complaint I do not agree with. To put matters right, for the part that is upheld, NHS BSA shall pay Mr M compensation of £1,200 for the significant distress and inconvenience caused to him.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr M has complained that NHS BSA refused to allow him to re-join the 2008 Section of the Scheme. Mr M says that had NHS BSA informed him correctly of his eligibility status from the outset, he would have made alternative provisions for his retirement.
4. Mr M further complains about the delays caused by NHS BSA in issuing him with a final response to his complaint.

Background information, including submissions from the parties

5. Mr M was a member of the Scheme (1995 Section) during various employments from 19 July 1975 to 15 November 1989. Upon leaving the Scheme his accrued retirement benefits were preserved for payment at age 60.
6. In August 2011, before Mr M reached 60, NHS BSA provided him with a notification of his pension entitlement and sent him an application form (AW8P) including a copy of Booklet R, which provides guidance to members on how to complete the form AW8P and take benefits. At that point Mr M was resident in the USA. He did not make a claim for his retirement benefits.
7. On 4 September 2011, Mr M reached age 60 and his preserved benefits within the 1995 Section became payable from that date.

8. In October 2013 at the age of 62, Mr M joined the Trust. He says that he and his wife visited the Trust's Pension Officer to discuss his eligibility, who with full knowledge of his previous NHS employment and after consulting the Scheme guidelines, informed him he was eligible. His contract of employment said:

"You will be eligible for membership of the NHS Pension Scheme, the provisions of which are set out in the NHS Pension Scheme Regulations 1995 (as amended)."
9. On 9 October 2013, the Trust started to deduct Scheme contributions which were accepted by the Scheme. The Trust say that it enrolled Mr M without requiring him to complete a pension questionnaire. This form is required to enable it as an NHS employer to determine eligibility to the Scheme. Although it intended to obtain the form subsequently, unfortunately it was never done. The joiner file was sent to NHS BSA and accepted so the Trust was unaware of the eligibility problem at that stage.
10. Mr M subsequently met with the Trust's Pension Officer to discuss purchasing an additional pension. He says he was told he could purchase up to three years of added pension. On 13 November 2013, Mr M completed the forms required to purchase an additional pension of £5,000 per year by making a single lump sum payment of £84,000. The Trust sent them to NHS central administration and says it would have expected NHS BSA to have assessed Mr M's eligibility at that point.
11. On 6 January 2014, NHS BSA wrote to Mr M saying that his application for an additional pension had been accepted.
12. On 28 March 2014, NHS BSA created a note on Mr M's file saying that he should not have been accepted as a member. A NHS BSA internal memo shows that the case was also flagged for discussion within NHS BSA, as part of a more general review ongoing at the time.
13. On 30 October 2014 the Trust informed Mr M that he was ineligible for membership. The Trust explained that NHS BSA had that day advised it that Mr N was regarded as a re-employed pensioner, despite not having claimed his deferred benefits. The Pension Officer explained that in his view, the Scheme guidance was not very clear. His interpretation was that Mr N was no longer a member of the 1995 section, therefore the 2008 Section regulations should apply meaning that, as he was still under the normal retirement age of 65 for the 2008 Section, he still had eligibility to that section of the Scheme. He went on to explain that since employers do not have access to a member's pension record on commencement it relies on NHS BSA to instruct them after submitting the relevant enrolment forms, that someone cannot be in the Scheme, which it failed to do on this occasion.
14. A file note created by NHS BSA on 30 October 2014 records the advice given to the Trust, It notes the record dated 28 March 14 which states, 'if this is correct member and employer should of [sic] been informed in March of the case'.

15. On 14 November 2014, NHS BSA informed Mr M directly that due to having benefits in the 1995 Section that were already payable, he was ineligible to contribute to the 2008 Section. On the same day the Scheme record was amended to remove the incorrect accruals.
16. On 3 December 2014 the Trust had a meeting with Mr M to discuss the issue, after which it sent him a link to V.13 of the Scheme guidance dated November 2014. It said it had been recently updated with additional text mentioning unclaimed pension when assessing eligibility.
17. On 14 December 2014, Mr M complained through the Scheme's internal dispute resolution procedure (**IDRP**). He said that his ineligibility to re-join the Scheme was overlooked when he first enrolled in the 2008 Section. He felt that NHS BSA should apply discretion to allow him to continue his membership within the 2008 Section.
18. The stage 1 IDRP decision was sent by NHS BSA on 18 February 2015. NHS BSA did not uphold his complaint. NHS BSA confirmed that it made a mistake in allowing Mr M to join the 2008 Section in October 2013 but Mr M was not eligible to re-join the Scheme within the 2008 Section or purchase additional pension benefits.
19. The dispute officer addressed Mr M's request that NHS BSA should apply discretion to enable his 2008 Section membership to stand. The dispute officer explained that under the Scheme Regulations there are no provisions other than to pay the benefits to which members are entitled to and confirmed that it is not possible for Mr M to resume membership of the 2008 Section.
20. On 4 March 2015 Mr M appealed this decision. He requested to be allowed to continue in the 2008 Section and if that was not possible then NHS BSA should compensate him in full for the financial loss that he will suffer as a result. He claimed his financial loss as repayment of tax to HMRC for tax years 2013/14 and 2014/15, plus any tax penalties incurred, lack of investment opportunity for pension contributions in the relevant tax year calculated by reference to the FTESE WMA balanced fund benchmark – a rise of 7.9% from 1 November 2013 to 25 February 2015 - or past year buy back and accountant's bills.
21. The stage 2 IDRP decision was sent on 16 October 2015. The decision maker said Mr M was not eligible to be a member of the 2008 Section because he became entitled to payment of his deferred 1995 Section benefits before the date he returned to NHS employment. NHS BSA explained that the Scheme does not have the discretionary power to allow Mr M to remain a member of the 2008 Section of the Scheme.
22. The decision maker addressed Mr M's complaint that his employer enrolled him into the 2008 Section. The decision maker explained that Mr M's employer is responsible for assessing eligibility before entering an employee into the Scheme. NHS BSA agreed that the incorrectly deducted pension contributions should not have been accepted by NHS BSA.

23. The decision maker further said that Mr M should have received 'A guide to the NHS Pension Scheme' from his employer at the time of taking employment. On the basis that the employer complied with its disclosure obligations, the decision maker considered whether Mr M could reasonably have known he was not eligible to re-join the Scheme and concluded that he would. The decision maker referred to a flowchart shown on page 4 of the Scheme Guide in print at the time, which asks the reader if they have received a pension and refers them to the bottom of the page which confirms this includes unclaimed deferred benefits if a member has reached their normal retirement age. On the basis of this the decision maker thought Mr M had the necessary information to be aware of the correct position and question his eligibility.
24. The decision maker confirmed that the question about his eligibility arose 'some time before you were told' and apologised.
25. NHS BSA upheld Mr M's complaint finding that: -
- He was admitted to the 2008 Section by his employer where there was no eligibility.
 - NHS BSA accepted contributions from 9 October 2013 and did not inform him of the correct position until 14 November 2014.
 - On 13 November 2013, NHS Pensions also accepted his application to purchase additional pension, again where there was no eligibility.
 - The length of time taken to provide a full response in respect of the dispute was excessive.
26. NHS BSA confirmed it had instructed his employer to return to him the incorrectly deducted pension contributions and said that NHS BSA would pay interest. With regard to the delays and the distress and inconvenience he had suffered, NHS BSA has offered him £500 in compensation.
27. In his complaint to the office Mr M said he had not received any interest payment. He produced internal file notes suggesting that NHS BSA identified his ineligibility on 28 March 2014 but took seven months to tell him, the disclosure being prompted by his request for a benefit illustration. He complained that the IDR process took over ten months to complete, that NHS BSA were pre-emptive in deleting his employment record on 14 November 2014, because he was still involved in an appeal process and contributing, also that the stage 2 IDR decision was received 120 working days after the statutory deadline. He considered it was disingenuous to suggest he ought to know more about the Regulations than the Trust's Pension Officer and NHS BSA itself. He says he did question his eligibility and was told by the Pensions Officer that he was eligible. He says he went through the Scheme guidance in depth with the Trust's Pension Officer before and after being told he was ineligible. He asserted that the Trust's Pension Officer told him that the Scheme's web guidance changed around November 2014. He says his wife phoned the NHS Pensions telephone advisory

service on 3 March 2015, and was told again that he was eligible for the 2008 Section and it took until 28 August 2015, for NHS BSA to quote in detail the provision of the Regulation it relied upon to deny eligibility.

28. On 20 June 2017 the Trust confirmed that Mr M has received a refund of all contributions he had made.

Adjudicator's Opinion

29. Mr M's complaint was considered by one of our Adjudicators who concluded that further action was required by NHS BSA. The Adjudicator's findings are summarised briefly below:
- NHS BSA relied on Regulation B3 (2) and 2.B2 (2) of the NHS Pension Scheme Regulations 1995 (see Appendix 1). Mr M's pension was payable from 4 September 2011, his 60th birthday, and he did not return to employment until 9 October 2013, so he was not eligible to re-join the Scheme within the 2008 Section.
 - Mr M contends that had he been given the correct information from the outset, he would not have joined the Scheme and would have contributed to an alternative pension arrangement. The Adjudicator was satisfied that as Mr M had sought to purchase an additional pension it was evidence that had he known he could not have joined the Scheme he would have found an alternative tax efficient vehicle. However she was not persuaded that Mr M had suffered any direct loss as a result of being misled.
 - The Adjudicator on reviewing the evidence agreed that the application of the Regulations to individuals in his situation was not a common and well understood issue at the time and saw no evidence that the Scheme guide provided sufficient clarity. Having looked at the V5 of the Scheme Guide valid as at January 2011, she found that it contained no relevant guidance on the question of whether a person in Mr M's situation is eligible to join the 2008 section and as such Mr M could not have known that he was a 'pensioner member' for the purposes of the Regulations.
 - The Adjudicator was of the opinion that although the Trust made the initial mistake, the actual error was caused by NHS BSA. NHS BSA made at least two errors by not realising when reviewing Mr M's application that he could not have joined the 2008 Section and by accepting the £84,000 from Mr M to purchase additional pension.
 - Because there was more than one incidence of maladministration, the Adjudicator was satisfied that NHS BSA caused Mr M significant distress and inconvenience. In her opinion in this justified an award of £1,200.

30. Mr M did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr M provided his further comments which do not change the outcome.

Ombudsman's decision

31. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the submissions which Mr M has made since that Opinion for completeness.
32. Mr M asserts that the tax rules only allow an individual to back purchase pension for three years, which meant that after receiving his returned contributions in January 2016 he was only able to purchase an alternative pension for 3 back years. He says he is therefore unable to purchase additional pension for the year 2011/2012. I agree that the tax rules to which he refers create only a three year window for retrospective tax planning but I do not agree that this has caused him a loss. Although he did not actually receive his refund until January 2016, he was told about the error in November 2014. That in my view is the date at which NHSBSA ceased to be responsible for any losses because Mr M could have made his alternative pension decisions at that time. Instead he asked his employer to continue to deduct contributions while he appealed his eligibility. The refund which he received was greater than it needed to be and came later than it would have done because of Mr M's preference. Any tax consequences incurred during the 2014/15 tax year cannot be said to flow from the misinformation provided to him because it had been corrected in time for him to make alternative arrangements for that year. In any event he has produced no evidence that he has insufficient unused tax allowances to set against the contributions which have been refunded.
33. Therefore, I partly uphold Mr M's complaint.

Directions

34. NHS BSA, shall, unless the same has already been paid, pay Mr M interest on any contributions refunded to him, at the rate used by the Scheme for the calculation of interest on late paid contributions.
35. NHS BSA, shall, within 21 days of this Determination, pay Mr M £1,200 compensation for the significant distress and inconvenience caused as a consequence of the maladministration identified above.

Karen Johnston

Deputy Pensions Ombudsman
18 July 2017