

Ombudsman's Determination

Applicant	Mr S
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHSBSA)

Outcome

1. Mr S' complaint against NHSBSA 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), NHSBSA should pay Mr S £1,000 for the significant distress and inconvenience caused by its maladministration.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr S has complained that:
 - NHSBSA made an unauthorised reduction to the membership credited to him in 2009, following his transfer from the Teachers' Pension Scheme (**TPS**);
 - NHSBSA's electronic records for him are inaccurate and change his membership to show that he is not a member of the 1995 Section of the Scheme, despite many assurances the problem has not been rectified and is still ongoing; and
 - he has received extremely poor service from NHSBSA and his health has suffered significantly due to the stress and anxiety NHSBSA has caused since he first raised the issue in August 2015.

Background information, including submissions from the parties

4. Mr S was previously a member of the Scheme from July 1990 to January 1998. In December 1998, he transferred his benefits from the Scheme to the TPS.
5. On 7 July 2008, Mr S returned to NHS employment and was automatically enrolled into the 2008 Section of the Scheme as a new joiner.
6. In 2009, Mr S says he discovered by reading the pensions handbook that as a previous member who had transferred out, he had the option to rejoin the 1995

Section of the Scheme, on the condition that he transferred his service back into the Scheme. Mr S asserts that this was confirmed to him by NHSBSA at the time and that this is what subsequently happened.

7. In a letter dated 16 March 2009, NHSBSA estimated that the transfer value from TPS would buy membership of 21 years 63 days in the 2008 Section of the Scheme. In a letter dated 13 August 2009, it confirmed that Mr S had been credited with membership 21 years 24 days.
8. Following the transfer of Mr S' TPS benefits into the Scheme, his membership was moved from the 2008 Section to the 1995 Section. The Scheme provides that where a member joined between 1 April 2008 and 30 September 2008, and had previously transferred their earlier membership of the Scheme, they were entitled to rejoin the 1995 Section of the Scheme. Mr S' transfer credit, which had been calculated on the basis that he was a member of the 2008 Section, was not revisited when he was moved to the 1995 Section.

9. The transfer estimate from March 2009 included the following information:

“If you leave the NHS Scheme after the transfer you may be able to preserve your benefits in the NHS Scheme or apply to transfer them to another pension arrangement...”

Mr S asserts that this confirms once his service from the TPS had been transferred into the 2008 Section, it could then be transferred to another pension arrangement; “which would of course include the subsequent transfer from the 2008Section” of the Scheme.

10. Between 2010 and 2014, Mr S received annual statements from NHSBSA which showed that he was a member of the 1995 Section and that he had 21 years 24 days transferred in service from the TPS.
11. Following an electronic update of his pension records by his employer in August 2015, NHSBSA's internal software defaulted Mr S' membership to the 2008 Section of the Scheme. Mr S made a formal complaint on 27 August 2015. He raised concerns about a number of matters including why his pension records had been accessed and changed to delete his membership. He subsequently contacted NHSBSA on a number of occasions but did not receive a substantive response.
12. NHSBSA eventually responded to Mr S' complaint on 9 November 2015. It explained that the default in its computer system reclassified his membership as it did not take his exception into account. NHSBSA said it was a known error and that it was likely to occur again before the software is updated. In confirming his membership of the Scheme, NHSBSA informed Mr S that whilst reviewing his case, it had established that the transfer from TPS had been incorrectly calculated on the basis that he was a member of the 2008 Section. It informed Mr S that the confirmation provided to him on 13 August 2009, was incorrect and his records had been amended to show the

correct transfer credit of 18 years 38 days. This was the same length of service that he had in the TPS.

13. Mr S complained under the Scheme's internal dispute resolution procedure (**IDRP**). The stage one decision informed him that the incorrect factors had been applied when his transfer was calculated and that the correct transfer credit is 18 years 38 days.
14. Mr S appealed under IDRP stage two. He made a lengthy submission to NHSBSA raising several areas which had given him cause for concern. His main complaint was, however, that there had been an unauthorised modification of his transferred in service credit.
15. Mr S said that he rejoined the 2008 Section of the Scheme in July 2008, and that it was only after he transferred in his service from the TPS, that he then transferred to the 1995 Section. This had been confirmed to him on number of occasions.
16. The stage two IDRP decision was issued on 10 March 2016, and sought to address Mr S' complaints and the additional comments made concerning NHSBSA's failure to respond to his numerous emails and keep its promises. Among other things, the stage two decision maker explained the applicable regulations at length. (These have been included in the Appendix to this Determination). It was concluded that as Mr S should have been enrolled in the 1995 Section, his transfer in credit was incorrectly calculated on the basis of him being a member of the 2008 Section. The letter that had been issued to him on 13 August 2009, confirming the membership credit of 21 years 24 days, is not a legally binding document. The regulations governing the Scheme, which were laid down in Parliament, supersede anything contained in an estimate or in that letter. As Mr S is a member of the 1995 Section, he is unable to hold a membership credit in the 2008 Section.
17. In relation to the software issue, the decision maker informed Mr S that work was underway so that a permanent software change is implemented to prevent Mr S' electronic record from reverting to show him as a member of the 2008 Section. As at the date of that letter, the timeline provided for the software update was July 2016.
18. NHSBSA's stage two IDRP decision concluded that there had been a number of mistakes in the processing of his case and that Mr S' records had not been maintained with integrity. In the circumstances, it offered Mr S a compensatory payment of £500, in recognition of the distress and inconvenience caused to him.
19. Mr S remained dissatisfied with the outcome of his IDRP complaint so he brought his complaint to us in January 2016. He asserted that as a result of the change to his membership credit, he stands to lose approximately £2,000 a year from his projected pension and £6,000 from his lump sum. In addition, his projected pension had been counted as equity during his divorce for the purposes of a clean break agreement. Mr S said his retirement planning since 2008 had been based on the original pension

valuation and that he is now not able to afford to purchase three years additional pension. He has also suffered significant anxiety, stress and distress.

20. NHSBSA provided its formal response to Mr S' complaint in April 2016, and relied on the same points that had been made in the stage two IDRP decision. Additionally, NHSBSA explained that as the TPS and the 1995 Section of the Scheme have almost identical provisions, the resulting membership credit is a "day for day" transfer. The calculation method prescribed by the regulations had been used to determine that the 18 years 38 days credited to Mr S was correct. The higher membership credit of 21 years 24 days was calculated incorrectly because it was based on membership in the 2008 Section. The increase in membership, compared to the 1995 Section is the result of the different provisions of the TPS and the 2008 Section. These include the differing retirement ages, accrual rates and entitlement to an automatic lump sum. Therefore, it is a misunderstanding on the part of Mr S that there was a transfer of his membership from the 2008 Section to the 1995 Section. NHSBSA said there was an opportunity for Mr S to move to the 2008 Section which would mean the membership credit would be 21 years 24 days. It was offering this to Mr S on an exceptional basis as under a previous Choice Exercise, he had declined to move to the 2008 Section.
21. Whilst Mr S' complaint was being investigated by us, in September 2016, he received a Total Rewards Statement (**TRS**) of his benefits up to 31 March 2016. Mr S said that to his dismay, the statement showed the complete loss of all his membership credit from the TPS, and it showed his membership in the 2008 Section from July 2008 and transferring into the new 2015 Scheme from 1 April 2015. Mr S asserted that this information was incorrect because it should have shown a membership credit of 21 years 24 days from the TPS; membership in the 2008 Section from July 2008, which was then transferred to the 1995 Section in 2009; and protection to remain in the 1995 Section until 1 December 2018, when he will then transfer to the 2015 Scheme.
22. Mr S raised these further issues with NHSBSA but also expressed his "complete dismay and despair" to us about what had happened. He said he had felt powerless to get any redress, even after complaining to the Information Commissioner's Office (**ICO**); he hoped The Pensions Ombudsman would be able to force NHSBSA to correct all the inaccurate data it held for him.
23. Further information was sought from NHSBSA regarding the additional issues raised by Mr S; requesting an update on the implementation of the software and seeking clarification on the corrective steps that had been taken to ensure that Mr S' record was accurate.
24. NHSBSA responded on 1 December 2016, and its response is summarised as follows.
 - In relation to the TRS issued on 20 September 2016, NHSBSA said Mr S had made contact on 24 August 2016, and enquired why he was unable to view his annual pension benefit online. He was informed that the software had not been

amended to correctly record his membership in the 1995 Section, so in the circumstances, he could request a manual statement.

- Mr S then requested a manual estimate, together with sight of the incorrect TRS. Both were issued in the same communication on 20 September 2016, and NHSBSA says the manual statement was correct and clearly showed that his benefits are held in the 1995 Section and that he will move to the 2015 Scheme at the end of his tapered protection period in December 2018.
- In relation to the correction of the computer software, NHSBSA accepts that there have been delays to this. It said it has explained to Mr S that each amendment received from his employer or update to his record resets his pension records, incorrectly entering him into the 2008 Section. NHSBSA asserts that Mr S is fully aware of this and is also fully aware that he has a manual marker on his record that ensures any calculations of his pension benefits are manual and will be performed by an experienced administrator. Mr S had previously been told that the software would be fixed during summer 2016. This has not happened due to conflicting priorities. NHSBSA has deferred the amendment to a later date and hopes the situation will be rectified by the second quarter of 2017. NHSBSA however accepts that this is “far from ideal and is frustrating” for Mr S.
- NHSBSA’s position in relation to the membership credit remains the same. In accordance with Regulation B1, Mr S’ eligibility to join the 1995 Section commenced on his first day of rejoining NHS employment (on 7 July 2008). He therefore has no entitlement to a transfer into the 2008 Section, or membership credit in the 1995 Section calculated using the 2008 Section calculation method. Mr S’ membership credit was calculated in line with the regulations governing the Scheme and the Public Sector Club Memorandum.
- In relation to the corrective steps that have been taken to ensure that Mr S’ records are accurate, NHSBSA confirmed that it appreciates that Mr S has suffered distress and inconvenience. He has been offered a personal contact who is a senior pensions administrator to assist with any queries he may have regarding his pension benefits before the changes are made to the computer system. It has also offered him a compensatory payment of £500 for the distress, inconvenience and anxiety caused by the problems he has encountered.

Adjudicator’s Opinion

25. Mr S’ complaint was considered by one of our Adjudicators who concluded that no further action was required by NHSBSA. The Adjudicator’s findings are summarised briefly below.

Reduction of membership credit

- The regulations governing the Scheme set out who is entitled to join the Scheme and the relevant Section. On 7 July 2008, Mr S was eligible to join the 1995 Section. Consequently, he was then incorrectly enrolled into the 2008 Section at that time. This was maladministration by NHSBSA.
- As Mr S had not been enrolled in the correct section, when he transferred his service from the TPS in 2009, as the regulations permitted him to do, the calculation of the membership credit was based on the 2008 Section. This appeared correct as it was not then known that Mr S was eligible to be a member of the 1995 Section. The Adjudicator did not agree with Mr S that there was then a second transfer from the 2008 Section to the 1995 Section, which had been based on the first transfer in, from the TPS.
- When Mr S' eligibility to be in 1995 Section was discovered by NHSBSA, it was correct that Mr S' record was corrected to put him in the 1995 Section, but his membership credit was not recalculated using the applicable method for the 1995 Section. This was maladministration because it is not possible for Mr S to be in the 1995 Section whilst having a membership credit calculated on the basis of the 2008 Section.
- Mr S was effectively provided with incorrect information, over a number of years, confirming that his membership credit from the TPS was 21 years 24 days. Although this amounts to maladministration, the provision of incorrect information does not create an entitlement to those incorrect benefits. In this case, Mr S is not entitled to a higher service credit in the 1995 Section of the Scheme.
- The correction of Mr S' Scheme membership did not amount to maladministration and Mr S will not suffer an actual loss when he draws his pension benefits. This is because he will receive the benefits he is entitled to receive in accordance with the regulations of the Scheme. In any event, despite the apparently lower membership credit, Mr S' membership in the 1995 Section is likely to be more beneficial to him in the long term. This is due to the factors including the higher accrual rate, lower retirement age and entitlement to an automatic lump sum.

Inaccurate computer record

- The ongoing issues with NHSBSA's record of Mr S' membership was known by Mr S and accepted by NHSBSA. It is also apparent that NHSBSA has not been able to rectify the issue due to the delayed implementation of the computer upgrade.
- NHSBSA has taken steps to rectify the issue but the software update is not expected until the end of the second quarter of 2017. As both parties are aware that every update reverts Mr S' membership back to the 2008 Section, the precautionary steps taken by NHSBSA, in the form of the manual marker and the personal contact, are reasonable.

- The Adjudicator did not conclude that NHSBSA was allowing incorrect information to be on Mr S' record. Further, although it is regrettable that Mr S' scheme membership changes on NHSBSA's electronic record, it is not as a result of maladministration by NHSBSA.

Distress and inconvenience

- The ongoing and evolving nature of Mr S' complaints, and the service that he received from NHSBSA caused him non-financial injustice, namely, significant distress and inconvenience.
 - NHSBSA offered Mr S £500 compensation in its stage two IDR decision. The Adjudicator found this to be reasonable in the circumstances.
 - Therefore, the Adjudicator concluded that although there was maladministration by NHSBSA which caused non-financial injustice, the redress offered is reasonable. Consequently, the Adjudicator considered that Mr S' complaint should not be upheld.
26. 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. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr S for completeness.
27. Mr S' reasons for disagreeing with the findings of the Opinion can be summarised as follows.
- There has been no legal basis put forward by NHSBSA to justify its actions in relation to the amendment of his service in the Scheme. He does not accept that regulation B1 of the 1995 Section supports NHSBSA's actions. When he joined the Scheme in July 2008, it was regulation 2B1 that was in force and this provided that new members joining after 1 April 2008, would be automatically enrolled into the 2008 Section. Therefore, regulation 2B1 proves that when he joined in 2008, he was first automatically enrolled in the 2008 Section, even though he was eligible to subsequently apply for membership in the 1995 Section.
 - Neither regulations B1 or 2B1 refer to any guidance concerning applications to rejoin the 1995 Section after April 2008, or to transfers in either section. Consequently, these sections cannot support the actions of NHSBSA.
 - He has given a clear and consistent account of events which has been supported by two teams of staff at NHSBSA. His account clearly contradicts the recent assertion of NHSBSA, which stemmed from only one individual there and have been accepted by the Adjudicator.
 - The findings in the Opinion have simply accepted NHSBSA's version of events on all aspects without regard to the clear evidence he provided, which showed NHSBSA was in breach of pension guidelines and data protection legislation.

- Despite the ICO's determination against NHSBSA, the Adjudicator contradicted his legal right to access his personal data and infringed Principle 4 ("Personal data shall be accurate and, where necessary, kept up to date") and Principle 6 ("Personal data shall be processed in accordance with the rights of data subjects under this Act"). The Adjudicator mitigated NHSBSA's responsibility and failed to direct a specific timeframe for correcting his data.
- NHSBSA should be required to immediately restore his access to the TRS; make a firm commitment to correcting his data with an imminent timeframe; and reframe from applying any software process to his data that it is aware will corrupt it.
- The conduct of NHSBSA was not criticised by the Adjudicator. This is despite its repeated failure to respond to his requests for confirmation of the regulations that apply, and the misrepresentation by the IDRP stage two decision maker about her previous involvement with his complaint.
- In view of its numerous failings, NHSBSA's offer of compensation should be reviewed.

Ombudsman's decision

28. A main element of Mr S' complaint is that he has not been provided with the legal basis for NHSBSA's decision to change his transfer service credit. He does not agree that regulation B1 gives it the legal basis to recalculate his transfer credit and reduce it.
29. The basis for Mr S' disagreement appears to be that he was first and correctly, a member of the 2008 Section of the Scheme when he joined in July 2008. In essence, Mr S has considered himself as a new member who is joining the Scheme for the first time. As I do not find this to be the case, I am unable to agree with his extensive submissions that flow from this position.
30. Mr S' entitlement to rejoin the 1995 Section of the Scheme was by virtue of his initial prior membership in the Scheme, and this fact cannot be considered in isolation. It is this prior membership, coupled with the date of Mr S' return to the Scheme and his previous transfer, out that meant he was eligible to join the 1995 Section. His eligibility was not dependant on him transferring any subsequent service back into the Scheme. It is therefore correct that regulation B1 is the applicable regulation.
31. I do not agree with Mr S' assertions that he has not been previously informed of applicable regulations which form the basis of NHSBSA's action. The stage two IDRP decision dated 10 March 2016 explained, among other things, why regulation B1 was applicable to Mr S, how regulation N1 applied in relation to his transfer into the Scheme and how that transfer had to be calculated in accordance with regulation N2 and the Public Sector Transfer Club Memorandum.

32. On review of these provisions, I am satisfied that the regulations have been correctly interpreted and applied in relation to Mr S' membership in the Scheme.
33. The regulations do not support Mr S' position that he was a member of 2008 Section, with a transfer credit calculated on the basis of the 2008 Section, who then transferred to the 1995 Section, whilst maintaining the previous transfer in calculation basis. Mr S cannot choose which regulations or sections of the Scheme apply to him in order to produce the most favourable outcome whilst seeking to reject other provisions because they do not.
34. I will now consider Mr S' assertions in relation to the inaccuracy of his data and possible breaches of the Data Protection Act 1998.
35. Firstly, it must be noted that it is not my role to act as arbiter on matters which are properly within the remit of another organisation. While I do not dispute that there may have been findings by the ICO, I am not bound by those findings.
36. Mr S would like NHSBSA to reinstate his access to the TRS. NHSBSA is not legally obliged to provide a TRS online facility for members of the Scheme, its existence will however benefit members. There is a known fault with NHSBSA's underlying software which affects Mr S' record. As this has not been remedied to date, I find that this amounts to continuing maladministration by NHSBSA. However, the issues identified with the software have been addressed with the alternatives to the online access that have been provided to Mr S. These measures are reasonable, and will ensure that the information provided to him is correct. This will reduce the likelihood of Mr S being caused further distress and inconvenience as a result of incorrect information. Guidance to organisations from the ICO suggests that where the accuracy of information is challenged, it is good practice to mark it as being in dispute. However, there is no legal obligation for organisations to do so.
37. As to possible breaches by NHSBSA, Mr S can make a referral to the ICO if he believes that NHSBSA has further infringed his rights. It is ultimately open to him to seek redress through the courts if he believes that there has been non-compliance by NHSBSA with the ICO's findings.
38. I appreciate that Mr S would like a definitive timeframe for correction of his electronic records. However, I am unable to dictate or influence internal organisational changes as these are outside of my remit. Consequently, I cannot make a direction compelling NHSBSA to implement the necessary timeframe within a specific time. This does not negate the fact that I appreciate that this matter has been ongoing for some time. I will echo the Adjudicator's findings that NHSBSA should seek to resolve this matter as soon as it is able to do so, and should keep Mr S updated accordingly.
39. Mr S has noted his dissatisfaction with the role of the stage two IDRP decision maker. There is no reason for me to conclude that the involvement of this individual, who is a Technical Consultant, was intended to personally deprive Mr S of his benefits.

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40. In relation to the compensation offered by NHSBSA, I do not consider that it is sufficient. The level of service provided to Mr S before the error was identified compounded NHSBSA's maladministration. I consider that this matter has caused Mr S significant distress and inconvenience, and warrants a higher amount than NHSBSA's offer. I make the relevant direction below.
41. Therefore, I uphold Mr S's complaint in part. I do not uphold his complaint about the unauthorised reduction to his membership credit.

Directions

42. Within 28 days of the date of this Determination, NHSBSA shall pay Mr S £1,000 for the significant distress and inconvenience caused by its maladministration.

Anthony Arter

Pensions Ombudsman
28 February 2017

Appendix

The NHS Pension Scheme Regulations 1995, SI 1995/300

B1 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;

N1 Member's right to transfer accrued rights to benefits to this Section of the scheme

(1) Within 12 months after joining this Section of the scheme, a member in pensionable employment may, in writing, request the Secretary of State to accept a transfer payment in respect of the member's rights under another occupational pension scheme, a personal pension scheme, or a buy-out policy but not in respect of rights under a free-standing AVC scheme-

...

(4) If the Secretary of State accepts the transfer payment, the member will be credited with an additional period of pensionable service as described in whichever of regulations N2 (transfers made under the Public Sector Transfer Arrangements), N3 (transfers that are not made under the Public Sector Transfer Arrangements) and N3A (transfers in respect of members to whom regulation B5 applies who elect to join or rejoin this Section of the scheme) is applicable.

N2 Transfers made under the Public Sector Transfer Arrangements

(1) Subject to paragraph (2), if the transfer is from another occupational pension scheme that participates in the Public Sector Transfer Arrangements, the additional period of pensionable service to be credited to the member in respect of the transfer payment will be equal to the period that, if used to calculate a cash equivalent under regulation M3 (amount of member's cash equivalent), would produce an amount equal to the amount of the transfer payment.