

Ombudsman's Determination

Applicant	Mr H
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Mr H's complaint and no further action is required by NHS BSA
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr H complains that NHS BSA has committed a series of errors in relation to his benefits under the Scheme. He believes that the combination of these errors has resulted in him suffering a financial loss.

Background information, including submissions from the parties

4. This case has a long and complex history. As such, only the salient points have been referred to below.
5. Mr H first became a member of the Scheme in 1975 and began paying contributions at that time. In particular, he is a member of the 1995 section of the Scheme, which is governed by The National Health Service Pension Scheme Regulations 1995 (**the Regulations**).
6. In November 2001, Mr H purchased an Added Years contract (see Appendix A), in order to increase his benefits under the Scheme. At this time, NHS BSA calculated that he was due to accrue 32 years 220 days Scheme membership by Normal Pension Age (**NPA**). Under the Regulations, he was allowed to accrue a maximum of 40 years Scheme membership by NPA. As a result, he could potentially purchase over seven years of additional Scheme membership under an Added Years contract. However, wider legislation at the time meant pension contributions were restricted to 15% of salary. Mr H was already paying 6% of his salary towards his benefits, and so he could only contribute an additional 9%. He agreed to do this, and the additional contributions bought him 6 years and 29 days of Scheme membership under his Added Years contract.

7. In September 2011, Mr H enquired about how much unused contribution allowance he had, as he wished to maximise his pension as much as possible. He also requested a statement from NHS BSA, and at this point he saw there was no record of contributions for his years of employment between 1975 to 1979 (**the Missing Years**).
8. Mr H raised this with NHS BSA, and he was informed that his contributions had been retained for the Missing Years but they were not eligible for investment in the Scheme. As such, the Missing Years were not included in his Scheme membership.
9. NHS BSA explained that Mr H had temporarily left the Scheme around 1979 and his period of employment up until that time did not qualify him for deferred benefits. As such, his contributions for the Missing Years could not remain within the Scheme and a refund would have been due.
10. NHS BSA added that, at the time in 1979 when Mr H ceased his Scheme membership, his benefits would have been administered in accordance with the 1961 NHS Pension Scheme Regulations. In particular, section 8(1) of the 1961 regulations stated that a Scheme member became entitled to deferred benefits if he had completed ten years' service (see Appendix B). In the event that a member was not eligible for deferred benefits, a refund would have been offered in accordance with paragraph 35(4) (ibid).
11. NHS BSA stated that consideration would also have been taken of the Pensions Miscellaneous Offices) (Preservation of Benefits) Order 1977. However, under section 5 of this Order, a member of a scheme still had to have accrued at least five years membership before they were eligible to become a deferred member of a pension scheme (Appendix C). Due to the passage of time, NHS BSA cannot evidence that Mr H was offered a refund of contributions. However, it stated that he would have been, as that was standard practice at the time.
12. Mr H argued that he was never offered a refund of contributions and raised a complaint. There followed a lengthy dispute about this particular issue. On 6 April 2012, whilst discussions were still ongoing about whether Mr H had received a refund of contributions for the Missing Years, the Lifetime Allowance was reduced from £1.8 million to £1.5 million.
13. On 14 September 2012, in an attempt to resolve the complaint, NHS BSA exercised discretion to allow the majority of the Missing Years to be included in Mr H's Scheme membership. It should be noted that it was not agreed that the remaining Missing Years would be included in Mr H's Scheme membership until a slightly later date. However, for the purposes of this Determination, it is not necessary to explain why as ultimately this had no impact.
14. When the Missing Years were added to Mr H's Scheme membership, the total service Mr H would now accrue is 36 years and 8 days Scheme membership by NPA. This meant he should only have purchased an Added Years contract for just under four

years. If he had done so, his additional contributions would have been lower and therefore he had overpaid into the Scheme.

15. On 17 October 2013, NHS BSA informed Mr H there was now an overpayment. There was then further correspondence, and Mr H has emphasised that dealing with these issues began to have a significant impact on him around this time. He has explained that he has a number of high level commitments and responsibilities in addition to the ordinary duties of his role, and it was difficult for him to complete these whilst trying to resolve the issues with his pension. In particular, he has said he was unable to complete an application for a research grant in time, as a result of the additional stress this matter caused and the time required to deal with it.
16. In January 2014, NHS BSA provided Mr H with a number of options by which it was prepared to re-work his pension. In particular, it suggested it could re-work the Missing Years such that they were condensed and Mr H could purchase more Added Years using part of the overpayment. This would allow him to achieve the maximum of 40 years by NPA. NHS BSA then suggested the remaining overpayment could be used to purchase as much Additional Pension (**AP**) (see Appendix A) as possible. NHS BSA said it would backdate the purchase to 2008 and allow Mr H to buy AP at the lower rate which was in place then. The overpayment totalled circa £34,000, and this would buy Mr H over £2,600 of AP if the 2008 rate was used.
17. In February 2014, Mr H confirmed he would opt out of the Scheme in order to take advantage of the option described above, and apply for Fixed Protection for his benefits. He did not consider the matter resolved, but he needed to take action before April 2014 as he did not want to lose the opportunity to protect the benefits he had accrued.
18. On 6 April 2014, the Lifetime Allowance was reduced to £1.25 million. However, as Mr H had applied for Fixed Protection beforehand, his benefits are protected from any Lifetime Allowance excess tax charges up to £1.5million, and this will remain the case providing he does not contribute towards his benefits any further.
19. On 9 April 2014, NHS BSA wrote to Mr H to confirm that contribution arrears had accrued whilst redress in relation to the overpayment was being discussed. Mr H complained that no-one had made him aware this was happening, and NHS BSA apologised.
20. Mr H remained unhappy with how NHS BSA had dealt with the whole matter. He also felt that his benefits under the Scheme were still worth less than they could have been. In addition, he complained of the stress he had suffered over the extensive period of time the matter had been going on, as well as the financial costs. For example, he highlighted that he had needed to speak to an Independent Financial Advisor about this matter on several occasions, and provided invoices to evidence the charges he had incurred.

21. In response to his further complaint, NHS BSA agreed to reimburse Mr H for the costs he had incurred totalling £1,662. In addition to this, it also offered him £2,000 for distress and inconvenience caused.
22. Mr H remained unhappy. He escalated the matter to our Office and summarised his complaint broadly under the bullet points below:-
 - NHS BSA failed to offer a refund of contributions for the Missing Years when he temporarily left the Scheme in 1979.
 - NHS BSA failed to link the Missing Years to his Scheme membership when he re-joined the Scheme.
 - NHS BSA failed to include the Missing Years in its calculations when he purchased his Added Years contract in 2001.
 - Once he spotted the Missing Years had not been included in his Scheme membership, it took NHS BSA a year to resolve this and agree to include them.
 - NHS BSA did not inform him of the impact in adding the Missing Years to his Scheme membership.
 - It took NHS BSA another year to agree a way in which his pension should be re-worked, after the overpayment was discovered. Even then, it did not inform him that arrears were accruing whilst discussions were ongoing.
23. Mr H has also stated that he would have purchased his remaining AP allowance, had this matter been resolved before the Lifetime Allowance was reduced in April 2012. He has evidenced that he would have had sufficient funds to purchase more AP such that he would have had £5,000 of AP in total, before April 2012. He adds that, if he purchases it now, he will lose his Fixed Protection and incur additional tax charges.
24. NHS BSA has confirmed that, before April 2012, Mr H did not have sufficient unused contribution allowance remaining to purchase AP. However, it states that he would have done, had he not been overpaying into the Scheme.
25. NHS BSA has stated that it will allow Mr H to purchase further AP, and it will again backdate this purchase to 2008. However, it has said it will not indemnify him against any tax charges he incurs as a direct result.

Adjudicator's Opinion

26. Mr H'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 briefly below:-
 - The legislation in place at the time indicates Mr H was never entitled to have the Missing Years included in his Scheme membership.
Therefore, even if NHS BSA failed to offer him a refund of contributions

in 1979, Mr H would not have had a right to include the Missing Years in his Scheme membership.

- In any event, regardless of his right, NHS BSA has included the Missing Years in Mr H's Scheme membership. Whilst this has subsequently led to an overpayment of contributions, NHS BSA has also allowed Mr H to accrue 40 years membership and use the remaining overpaid contributions to purchase AP at a preferential rate.
- The only benefit Mr H's pension does not have is the remaining AP allowance. However, Mr H did not have sufficient unused contribution allowance in 2011, when he would have needed to purchase this. The only way Mr H would have had sufficient unused contribution allowance in 2011 would have been if the overpayment had not been allowed to accrue. However, if the overpayment had not accrued, Mr H would not have the Added Years and AP that the overpayments have bought him.

27. Mr H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr H provided his further comments, which included the following points:

- The Adjudicator's Opinion did not comment on a number of issues that had arisen throughout the course of the complaint. In particular, the Adjudicator did not comment on the likelihood that Mr H was sent a letter in 1979 offering him a refund of contributions.
- Mr H is concerned that NHS BSA has only been able to provide extracts of the 1961 and 1977 legislation that it is relying on.
- Mr H was entitled to have the Missing Years included in his Scheme membership because the work he did from 1979 until he re-joined the Scheme was relevant to his NHS role.
- Even if Mr H did not have an automatic right for the Missing Years to be linked, the fact that NHS BSA has also retrospectively included them is evidence that it was permissible for it to do so.
- Mr H would have purchased further AP in the Scheme before April 2012, if he had been provided with the opportunity.
- Mr H believes his pension pot has less value than it would have done, but for NHS BSA's errors. He states that he has not been provided with any calculations evidencing what his pension pot would have been worth had the overpayment not occurred, against what it is worth now.

28. Mr H's further comments do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr H for completeness.

Ombudsman's decision

29. Mr H has put forward a number of arguments as to why he feels the Missing Years ought to have been included in his Scheme membership. However, I do not need to address these fully, because the Missing Years have now been included in his Scheme membership.
30. The principle question is whether Mr H's pension from the Scheme will be better or worse as a result of the overpayment which accrued.
31. Mr H cannot, of course, have both the benefits he has purchased with the overpayment, and the benefits he could only have purchased had the overpayment never occurred. As it is, NHS BSA has allowed the Missing Years to be included and so Mr H's pension includes benefits purchased with the overpayment. I believe this is the better outcome for him.
32. This is because the overpayment was used to purchase over half the total allowance of AP available to Scheme members. Crucially, NHS BSA also allowed the overpayment to be applied such that Mr H has the maximum Added Years benefit.
33. Broadly, as things stand, Mr H's pension income will be based on a percentage of his final pensionable pay, multiplied by the number of Scheme membership years he has. Any AP will then be added in addition once this figure has been calculated.
34. As a result, Added Years should provide a greater benefit than AP. If the overpayment had not occurred, Mr H may have had slightly more AP than he does now, but he would have had less years accrued within the Scheme. I believe the combination of benefits Mr H currently has will therefore provide him a higher pension.
35. Notwithstanding the assumptions I have made, my Office is not here to audit pensions and Mr H must evidence loss if he wants me to instruct redress for it. He has not provided any evidence of loss and, for the reasons I have given, I do not believe Mr H has suffered any as a result of the overpayment. On the contrary, I am satisfied that the remedy NHS BSA has offered to Mr H has placed him in a better position than he would have been in had the Missing Years not been included in his Scheme membership and the overpayment never occurred.
36. Mr H wishes to purchase the remaining AP allowance without incurring a tax liability. However, he would have needed to have done this in 2011, and he did not have sufficient unused contribution allowance to do so at the time. NHS BSA has said he would have done had the overpayment not accrued, but then he would not have had the accrued pension benefits that the overpayment has purchased for him.

37. Therefore, I do not uphold Mr H's complaint.
38. I understand NHS BSA's offer, to reimburse Mr H for his costs totalling £1,662, and to pay him an additional £2,000 for the distress and inconvenience he has been caused, is still available. I would suggest Mr H contacts NHS BSA if he wishes to accept this offer.

Anthony Arter

Pensions Ombudsman
18 December 2017

Appendix A

Information on Added Years and Additional Pension

Prior to 1 April 2008, members of the 1995 section of the NHS Pension Scheme who could not reach 40 years of Scheme membership by their Normal Pension Age (age 60) could increase their scheme benefits by buying Added Years.

Added Years is not a feature of more recent NHS pension schemes. Instead, Added Years was largely replaced by Additional Pension on 1 April 2008.

Additional Pension can be bought in units of £250, up to a maximum of £5,000, and is added to the member's annual pension.

Appendix B

Extract of 1961 NHS pension scheme regulations as provided by NHS BSA, section 8:

"Officer's pension and retiring allowance

8. – (1) An officer of an employing authority shall be entitled, on ceasing to be employed by them, to receive from the Minister –

(a) an annual pension, if either –

- (i) he has completed ten years' service and is incapable of discharging efficiently the duties of his employment by reason of permanent ill-health or infirmity of mind or body; or
- (ii) he has attained the age of sixty years and completed ten years' service".

Extract of 1961 NHS pension scheme regulations as provided by NHS BSA, section 35:

"(4) The following persons shall be entitled to receive from the Minister a sum equal to the amount of their contributions –

- (a) an officer who, before becoming entitled to a pension, retiring allowance, injury allowance or short service gratuity, ceases to be employed by an employing authority by reason of his voluntary resignation or his resignation or dismissal in consequence of inefficiency or an offence of a fraudulent character or misconduct, not being such an offence or grave misconduct in connection with the duties of, or otherwise in relation to, his employment and who holds no other employment in which he is an officer; and

- (b) a person (other than a person to whom paragraph (2) of regulation 8 applies who, though not ceasing to be employed, ceases at his own request to be an officer to whom these regulations apply.”

Appendix C

The Pensions (Miscellaneous Offices) (Preservation of Benefits) Order 1977, section 5:

“1) Subject to the following provisions of this Order, an office holder who has completed five years of relevant service but who ceased to hold office before normal pension age may become eligible for a pension under the relevant enactment when he reaches that age.”