

Ombudsman's Determination

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

Outcome

1. I do not uphold Dr S' complaint and no further action is required by NHS Business Services Authority.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Dr S has complained that in December 2014, NHSBSA provided him with incorrect information in relation to his request to transfer out of the Scheme, and failed to use the correct email address when sending him information about the transfer process. As a result, his subsequent application to transfer out of the Scheme in March 2015, has been refused and he will now suffer a financial loss when he draws his pension.

Background information, including submissions from the parties

4. Following the changes in legislation that took effect from 6 April 2015, members of unfunded public sector occupational pension schemes were not allowed to transfer their benefits to a defined contribution or a flexible access pension scheme after this date. However, they could still transfer their benefits to defined benefit schemes.
5. Dr S became a deferred member of the Scheme on 21 May 2009.
6. He wrote to NHSBSA on 27 November 2014, requesting a Cash Equivalent Transfer Value (**CETV**).
7. On 9 December 2014, an email was sent to Dr S informing him that there had been a change to the transfer procedure for overseas transfers and that he would need to download and complete the transfer out guide and application pack. Dr S did not receive this email as it was sent to an incorrect email address.

8. On the same day, another team at NHSBSA sent Dr S an email, to the correct email address informing him that it would take six to twelve weeks to process his request and that the CETV would be issued to his home address. This information was incorrect.
9. As Dr S had not received the CETV, he contacted NHSBSA on 23 February 2015 and asked whether he would be receiving it imminently. NHSBSA responded to Dr S on 27 February 2015. It apologised that he had been given incorrect information and informed him that he would need to complete and return the transfer out guide and application pack.
10. Dr S completed the application pack and NHSBSA received this on 18 March 2015. He indicated that he would like to transfer to an overseas pension scheme but that the receiving scheme was not yet known.
11. NHSBSA responded to Dr S on 20 April 2015. It confirmed that it could not proceed with Dr S' request for a CETV due to the restrictions that had been imposed from 6 April 2015.
12. Dr S complained to NHSBSA on 15 May 2015. The first complaint response was issued on 8 June 2015. NHSBSA said Dr S had been provided with the correct information about the procedure on 9 December 2014. Dr S disputed this and asked for a copy of the email. When he received a copy of this email, he noticed that it had been sent to an incorrect email address. Dr S then attempted to send an email to this incorrect address himself and noted that an error message was instantly generated as the address was not valid.
13. NHSBSA investigated the points Dr S had raised and issued a further response on 19 January 2016. It noted that Dr S had been supplied with incorrect information, that it had used an incorrect email address and that the sender of the email should have been aware of this as the delivery notification error would have appeared instantly. Despite this, NHSBSA said that due to the exceptionally high volume of transfer requests, the CETV could not have been issued before the deadline so his application was rejected. It apologised unreservedly for the errors and confusion regarding his case and gave Dr S details of how to complain under the internal dispute resolution procedure (**IDRP**).
14. Dr S complained under the Scheme's IDRP on 3 March 2016. He said if his application had been processed, he would have transferred to a scheme on the Isle of Man. This would have given him the opportunity to withdraw 30% of his fund tax free from his 55th birthday on 22 July 2015, and then start drawing his pension. This would have then enabled him to "significantly reduce his working hours and life pressures". He noted that he is now unable to draw his pension, unreduced, until he turns 60 and said, under current legislation in the Isle of Man, the lump sum would be taxed.

15. NHSBSA issued its stage one decision on 29 April 2016. It did not uphold Dr S' complaint as it was no longer possible to transfer out to defined contribution schemes.
16. Dr S asked for a stage two decision under the IDRP. NHSBSA issued this on 13 July 2016. After giving full consideration to the circumstances of the case, it accepted that it made mistakes for which it apologised and for the resulting consequences. It offered Dr S £500 compensation for the distress and inconvenience caused to him.
17. Dr S did not accept the compensation and brought his complaint to us. He asserts that the errors that occurred amount to maladministration and NHSBSA's letter of 13 July 2016 confirms that had he been given the correct information, he would have had the opportunity to transfer his pension. He would like financial compensation for the loss he has suffered as a result of the transfer not being completed. He maintains that he has suffered an actual loss because:
 - his lump sum will be taxed on the Isle of Man (where he lives), whereas this would not be the case if he was in the UK so this is a tangible loss of pension;
 - he will now not be able to take an unreduced income from age 55 from the transferred income; and
 - there has been a future loss to his estate as he will not be able to leave his fund to his children, this was important for him as there is no liability for inheritance tax in the Isle of Man.

Adjudicator's Opinion

18. Dr 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.
 - The provision of incorrect information and NHSBSA's failure to action the email delivery notification error amount to maladministration.
 - Although there was maladministration, the redress that Dr S is seeking is now prohibited by law and an Ombudsman would not direct NHSBSA to proceed with the transfer as it would breach the regulations of the Scheme.
 - As Dr S' entitlement to benefits in the Scheme has not been lost and his benefits are protected, it cannot be said that he has suffered an actual loss. His benefits in the Scheme remain secure and will be available to him when he becomes entitled to draw his pension.
 - Dr S has however lost the option to control his pension and access it in a flexible way to suit his current circumstances. This is a loss of expectation, which we consider to be a non-financial loss. Compensation for losses of this type are

modest in nature and are not intended to bridge the gap between what he will receive, and what he expected to receive

- The losses Dr S is claiming are speculative in nature and compensation is not designed to overcome a speculative loss.
- NHSBSA's offer of £500 – which he has refused – is reasonable in the circumstances and is in line with previous awards on the same issue. Consequently, there would not be a further award directed by an Ombudsman.

19. Dr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr 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 Dr S for completeness.

Ombudsman's decision

20. Dr S has raised the following points in response to the Adjudicator's opinion and in support of his position.

- A contract exists between himself and NHSBSA to provide him with a pension and act in accordance with the roles and responsibilities listed in the NHS Pensions Service Charter (**the Charter**) (version 06/2014).
- As an individual member no longer employed within the NHS, he is reliant on direct communication from NHSBSA in order to "receive information about, or take action on [his] NHS Pension". This appears to be an accepted element of the contract that exists between him and NHSBSA as evidenced by email correspondence from August 2015 when he enquired about his normal retirement age.
- His complaint is based on the fact that NHSBSA have breached that contract and acted negligently.
- The incorrect information that was provided to him in the only email he received on 9 December 2014 breaches section 6.2 of the Charter which says it will "undertake formal scheme disclosure communications with Scheme Members if there is a substantive need under scheme rules...".
- NHSBSA's other email of 9 December 2014, which was undelivered and then not rectified is a further breach of section 6.2 of the Charter.
- The delay caused by the lack of care and incorrect information has resulted in him not being able to transfer his pension out of the Scheme before the law changed.
- He is seeking redress to restore him, as close as possible, to the position he would have been in prior to the change in the law, when he would have been able to transfer to a defined contribution scheme.

- He relied on NHSBSA and it failed in its contractual obligation to him.
21. I have noted Dr S' additional comments. For his complaint to be upheld, there has to be maladministration that causes an injustice – whether financial or non-financial.
 22. From the facts of this case, I agree that there was maladministration by NHSBSA. However, this finding does not mean an injustice has occurred.
 23. There is no dispute that Dr S cannot now transfer to an overseas defined contribution scheme, offering flexible access. Dr S believes that this amounts to an actual loss to him in real terms, or put another way, a financial injustice.
 24. I do not agree. Despite the fact that a CETV was not produced and the transfer was not completed, the value of Dr S' deferred pension benefits have not been affected because of NHSBSA's actions and/or omissions. Dr S remains entitled to the deferred pension he was entitled to before he was given the incorrect information.
 25. In view of this, Dr S' recent comments do not change this position.
 26. I agree with the Adjudicator that Dr S has suffered a loss of expectation. This amounts to non-financial injustice. My awards for this are not the same as what would be awarded where there has been an actual financial injustice.
 27. NHSBSA's offer is reasonable in the circumstances and I do not find that a higher amount is warranted. Accordingly, although there was maladministration which caused non-financial injustice, NHSBSA has offered redress which I consider to be reasonable. For the avoidance of doubt, I make no further directions and if Dr S wants to accept NHSBSA's offer, he will need to contact it directly to do so.
 28. Therefore, I do not uphold Dr S' complaint.

Anthony Arter

Pensions Ombudsman
5 January 2017