

Ombudsman's Determination

Applicant	Mr N
Scheme	NHS Pension Scheme (the Scheme)
Respondent	North East Ambulance Service NHS Foundation Trust (NEAS)

Outcome

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

Complaint summary

3. Mr N's complaint is that he was given incorrect information from NEAS at the start of his employment about how his previous service in the Scheme would be treated following his break in employment.

Background information, including submissions from the parties

4. Mr N originally joined the Scheme in December 1985 and left in August 2010, becoming a deferred member of the Scheme. On leaving the Scheme, his pensionable salary was approximately £67,000 per annum.
5. Mr N took up NHS employment again, on a fixed term contract (originally for two years), in May 2011 (approximately eight months after leaving the Scheme) and he was automatically enrolled in the Scheme. Mr N's starting salary was £40,000 per annum.
6. A local induction was held with Mr N's line manager shortly after his employment started. This was followed by a corporate induction in October 2011, where Mr N was provided with a copy of the Scheme booklet. The Scheme booklet is dated September 2011 and page 6 relates to re-joining the Scheme following a break in employment. It says:

"If you rejoin the Scheme with deferred benefits, after a break of 12 months or more, your benefits at retirement will be worked out in whichever of the following two ways gives the highest financial outcome for you:

- Your periods of membership will be added together and your total membership and final year's pensionable pay (or reckonable pay) will be used to work out your benefits ; or
 - The benefits you have earned for each period of membership will be worked out separately, revalued then added together."
7. During the induction with his line manager, Mr N says he raised issues regarding his previous NHS employment and he was referred to the HR manager. Mr N met with the HR manager informally (he has submitted that he approached her desk as it "was less than 5 metres from mine"). As part of this discussion (which included a query relating to his length of employment within the NHS), he raised a query about his pension. The HR manager called an "external pensions expert" and gave the phone to Mr N so he could receive the information first hand. Mr N says that at the time he believed he was talking to someone at NHS Pensions, however, NEAS have said that it was most likely their third party payroll administrator.
 8. Mr N says that as he was not expecting his salary in his second NHS employment to exceed his previous salary, during the call he queried whether he had to do anything to preserve his total pensionable pay from his previous period of service. Mr N asserts that he was informed that if he re-joined the same section of the Scheme after a break, his pension benefits would be worked out in the same way as mentioned in the Scheme booklet, but Mr N says that no mention was made of the need of a 12 month break in service for this to occur. There is no record of this call.
 9. Mr N asserts that he re-joined the Scheme on the basis of the information he received during the phone call and the belief that his original higher pensionable pay would be preserved. He said reference was not made during the conversation to the length of his break in service and he was not directed to any further guidance such as the Scheme's website. He says he did not know that he could contact NHS Pensions directly.
 10. Mr N says that he only discovered in 2014 that the information he says he was given in May 2011 was only correct if he had had a break in service of at least 12 months. As Mr N's break in service was less than 12 months, both periods of membership have been treated as continuous service. Therefore, Mr N's retirement benefits will be based upon his pensionable salary on leaving the Scheme for his current employment, based on the highest of the last three years of pensionable pay.
 11. Mr N raised his complaint with NEAS and NHS Pensions on 8 September 2014. His complaint was that he had been misinformed in May 2011 and the impact of this will significantly reduce his pension income at retirement. He said that if he had been correctly advised in 2011, he would have pursued other options which would have been preferable to him. These included opting out of the Scheme, re-joining a different section of the Scheme or opting out of the Scheme altogether until he had a break of more than 12 months so that his higher salary would still have been one of his last three years of membership.

12. On 5 November 2014, NHS Pensions issued a first stage decision under the Scheme's internal dispute resolution procedure. It did not uphold Mr N's complaint as there was no evidence of any communication between Mr N and it that gave an indication that his earlier period of membership would be preserved, with a break of less than 12 months. NHS Pensions concluded that the regulations governing the Scheme had been correctly applied. Mr N did not pursue a complaint further with NHS Pensions.
13. NEAS issued a decision to Mr N on 10 December 2014, which also did not uphold Mr N's grievance. NEAS concluded that there was no evidence that it was at fault for providing Mr N with inaccurate information. It also said that Mr N would have received a copy of the Scheme booklet on joining and this would have contained details about the Scheme and where to obtain further information. Mr N has not denied receiving the Scheme booklet but has disputed when this was provided – in October 2011 and not when he joined NEAS in May 2011.
14. Following the December 2014 grievance decision, an exchange of correspondence followed between NEAS and Mr N, including a Subject Access Request from Mr N. As NHS Pensions were also running a "Choice" exercise (giving members the option of remaining in their current section of the Scheme or joining the new one), Mr N asked for an extension to submit his appeal so that he could consider his options. Mr N then requested additional information from NEAS in order to substantiate his case.
15. On 1 June 2015, Mr N submitted his appeal to NEAS' grievance decision. The appeal meeting took place on 15 and 22 January 2016. NEAS say that this delay was due to a period of reorganisation and Mr N's request to involve the Chief Executive and two other directors as witnesses.
16. NEAS issued its final appeal decision on 22 February 2016 and, amongst other things, it concluded:
 - the management of Mr N's pension remains his personal responsibility and NEAS or its pensions officer cannot provide advice about how he should manager his pensions under any circumstances;
 - it was entirely appropriate that Mr N was referred to the external pensions officer as she had "significant experience in pensions administration" and there was no reason to believe the advice given would be incorrect;
 - it is unclear how Mr N could have recalled the conversation with the pensions officer, despite the absence of notes, and still be able to quote what he was told;
 - the wording Mr N quoted in his original grievance mirrored the information on the NHS Pensions' website, with the exception of the omission of the words "of 12 months or more";

- Mr N's long term membership in the Scheme would have provided him with numerous documents/correspondence which should have alerted him to details of how to contact NHS Pensions directly; and
 - Mr N's training as an actuary should have given him enough understanding about how to access the appropriate information or "navigate the system to ensure [he] could gain the information [he] needed to make an appropriate decision about [his] pension".
17. NEAS also acknowledged that there had been a delay in arranging Mr N's appeal and apologised for this. However, NEAS noted its flexibility in allowing Mr N an extension to submit his appeal, outside of the 14 day deadline, and in following his request to have certain staff available at the meetings.
18. In Mr N's complaint to this service, he said he would like NEAS to recognise the errors in its management of pensions guidance and staff records and the impact this has had on him. He would also like NEAS to pay into his pension so that he is not worse off had he been given the correct information in May 2011. Mr N says that, in hindsight, he should have waited four months before re-joining the Scheme. He estimates his losses to be, from retirement at age 60, £6,000 in annual pension and a lump sum reduced by £18,000. He is estimating his total losses to be approximately £150,000. Further, he believes that he would have been in a better financial position at age 60 if he had not re-joined the Scheme, despite making contributions of over £20,00 into the Scheme from May 2011 to date.
19. As part of the investigation, the Adjudicator requested further information from NHS Pensions. It confirmed that the regulations governing the Scheme do not allow a member to opt out on a retrospective basis. Accordingly, Mr N's break in service cannot be increased in this way. It also provided a copy of a benefit estimate dated 5 October 1999 that was issued to Mr N's financial advisor. That letter mentioned that further information about the Scheme was contained in various booklets available from the employer and NHS Pensions directly.

Adjudicator's Opinion

20. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by NEAS. The Adjudicator's findings are summarised briefly below.
- The Adjudicator noted that it was accepted by the parties that a conversation took place between Mr N and an officer of NEAS' third party administrator. But, in the absence of any recording of the conversation, it is not possible to definitively confirm the content of the conversation. While NEAS have placed emphasis on Mr N quoting from NHS Pensions' website as to the wording of that conversation (omitting details of the 12 month time frame), the Adjudicator accepted Mr N's

explanation as to why he did this – that Mr N did not have a verbatim recollection of the conversation, only that this matched what he said he was told in May 2011.

- Mr N said that no one asked him about his break in service, but that it also was not clear if he had specifically informed the HR manager or the external pensions officer of the length of his break in service and therefore the Adjudicator was unable to agree that Mr N had been misinformed and hence there was no maladministration on the part of NEAS.
- The information NHS Pensions had provided as part of the investigation was evidence that Mr N had previously received information from NHS Pensions. The Adjudicator also felt that given Mr N's professional experience and the information he had received over time, that he was aware that he could have approached NHS Pensions directly with an enquiry. The Adjudicator also did not think it unreasonable that Mr N would not have known that NHS Pensions had a website which contained information for members about the Scheme.
- Although the Adjudicator's view was the complaint would not be upheld, she did comment on Mr N's alleged losses. Her view was that his losses were merely speculative and not an actual financial loss.

21. Mr N did not agree with the Adjudicator's views and submitted the following, in summary:

- Mr N cannot be sure if he received the information in 1999 via his financial advisor. He contends that, regardless of this, he was not aware until October 2011 that he could contact NHS Pensions directly with pension enquiries. He also disagrees that he ought to have gone on and requested further information from NHS Pensions, following having asked for this from his employer;
- the fact that Mr N spoke to the HR manager regarding his employment dates and that this was amended is proof that HR was aware of his employment gap of eight months;
- Mr N disagrees with the Adjudicator's view that his losses are speculative and insists that he would have made different choices had he been given correct information; and
- Mr N comments further on the recording keeping of NEAS and the use of a third party administrator. He believes that NEAS ought to have referred him to NHS Pensions, rather than the third party administrator and therefore the call would have been recorded. He says "If Payroll services had operated to the same professional standards as NHS Pensions the dispute would not have happened. I do not believe that sub-contracting services absolves NEAS from responsibility for the quality of services provided to staff or patients".

22. As Mr N did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. Mr N 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 N for completeness.

Ombudsman's decision

23. The issue at the heart of this matter is what was said in the conversation between Mr N and the third party administrator in May 2011. Mr N's complaint amounts to a claim for negligent misrepresentation. To find NEAS responsible I would need to be satisfied that they made a clear and unequivocal statement, which was false, upon which Mr N reasonably relied to his financial detriment. The burden of proving that the statement was made and that it was false rest with Mr N, and for the reasons set out below I conclude that he has not discharged that burden.
24. While it is accepted by all parties that a conversation took place, there is no supporting evidence as to what was said. Mr N says it was clear that in 2011 he was seeking to preserve his total pensionable pay from his first spell of NHS employment, but naturally he cannot recall precisely the question which he asked and the precise words in which it was answered. Therefore, I cannot conclude that Mr N was categorically misinformed about the effect of his break in service when he re-joined the Scheme. There is ambiguity in Mr N's recollection as to whether or not the length of his break in service was discussed. . If the person he spoke to was unaware of the length of the break in service, then they would not have known to highlight the 12 month time frame.
25. Additionally I bear in mind that Mr N was provided with a Scheme booklet in October 2011. Granted, this was approximately five months after his employment commenced, but the booklet clearly states that a break in service needs to be of 12 months or more (but less than five years). If there had been any incompleteness in the information which he received over the phone, it was cured at this point. On receiving this booklet, Mr N took no action to contact his employer (or NHS Pensions) about, what he now says, is misinformation he received in May 2011. While it is speculative, if he had done so in October 2011, he may have found that he could have mitigated what he now perceives as his losses.
26. I also note Mr N's comments that prior to 2011, he had not had any information from NHS Pensions that led him to believe that he could contact them directly for information. While he may not have received the 1999 information via his financial advisor, I cannot completely dismiss that information was available from other sources, nor that a quick search would not have brought this to Mr N's attention. Merely choosing not to take advantage of that avenue of communication, does not mean that Mr N was completely unaware that it was available to him.

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27. In relation to Mr N's comments that because HR amended his employment dates this is evidence that HR was aware of his employment gap, I cannot draw this conclusion from the evidence which I have seen and there is no evidence that the person Mr N spoke to on the phone was aware of the length of the gap.
28. In conclusion, I am satisfied that the Scheme booklet provided in October 2011 gave the correct information and have seen no evidence sufficient to persuade me that incorrect information was provided in May 2011.
29. Mr N has also raised issues about the way in which his grievance with NEAS was handled and their processes in relation to record keeping. I note that NEAS have apologised for the delays during the grievance process, but also acknowledge that some of these delays were made in an attempt to assist Mr N. Therefore, I cannot agree that there was any maladministration as a result of these delays, or that Mr N should be financially compensated for any inconvenience this may have caused him.
30. As for NEAS' record keeping, I will limit my comments only to that which relates to this complaint – the recording of the telephone conversation. Mr N has submitted that he approached the HR manager's desk as it was in close proximity to his own. Even though he was directed by his line manager to approach HR for guidance, approaching someone's desk is not the same as setting up a formal meeting with the HR manager. Nor did Mr N make any of his own notes following that meeting or request that the information he received by followed up in writing. I agree that it is reasonable that NEAS did not keep a record of an informal meeting between Mr N and the HR manager.
31. Therefore, I do not uphold the complaint.

Karen Johnston

Deputy Pensions Ombudsman
16 May 2017