

Ombudsman's Determination

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

Outcome

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

Complaint summary

3. Dr E has complained that NHSBSA have incorrectly requested the return of an overpayment of pension which it is claimed is based on the equal distribution of profits between him and his wife. Dr E says the profits were not shared equally between him and his wife and pension contributions were paid on this basis.

Background information, including submissions from the parties

4. Dr E was a partner in a GP practice with his wife as a non-GP partner since 2005. For GPs in a partnership their pensionable pay is made of a share of the profits of their practice.
5. Dr E says the profits in the practice were shared unequally and he and his wife provided details to the Primary Care Trust (**PCT**). Dr E assumed that his pension would reflect this election when he retired in April 2011 but in 2015 he was informed that his pensionable earnings for the 2010/11 year would be reduced by £37,000 leading to an overpayment of pension and a request for a net payment of £6,343.32.
6. Dr E has provided copies of letters that he says were sent to the PCT on 8 April 2005, 18 June 2008 and 6 April 2012. The letters all say that the partnership is based on unequal profit sharing and the latter two letters say that Mrs E will receive £30,000 and £50,000 from the profits with the rest of the profits belonging to Dr E. The PCT has confirmed that the latter two letters were sent to NHS Pensions.
7. Dr E also says that the PCT did not inform him that the way they presented the profit sharing arrangement was incorrect and that they were not following the pension

regulations. Furthermore they did not raise the issue when they took over two further practices in 2008 and 2012. They were only informed about the fraction requirement by the Pensions Agency after Mrs E's retirement.

8. NHSBSA say that under the National Health Service Pension Scheme Regulations 1995 (**the Regulations**) it is the responsibility of the non-GP Partner to ensure that all the correct information is provided to the PCT. Information of the requirements were provided in Newsletters that were sent to all relevant parties including GP surgeries. There is also a section for non-GP Providers on NHS Pensions website including 'FAQs'.
9. NHSBSA say that they requested on numerous occasions confirmation from Dr E and Mrs E that they had lodged elections. Dr E and Mrs E initially confirmed that these changes were notified to their host PCT on their respective certificates of pensionable income and on the estimates of pensionable pay forms. GPs and non GP providers are legally required to complete end of year certificates of pensionable income and at the start of year estimates of forthcoming income. These certificates serve a different purpose to a share allocation election.
10. Despite Dr E and Mrs E having ample opportunity NHS Pensions did not have sight of these letters until recently. However the letters do not provide confirmation of the profit shares as a fraction as the Regulations require. The letters simply state that the partnership will be based on unequal profit sharing.

Adjudicator's Opinion

11. Dr E'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 provisions for determining pensionable earnings for medical practitioners are set out in Schedule 2 of the Regulations. It is clear from these Regulations that the onus is on the Partnership to provide details of the split of earnings. Regulation 5(1) says that the Partnership "must exercise the elections as described in paragraph 4(2) and (3) by giving notice to their host Board."
 - Regulation 5(4) of Schedule 2 then prescribes the format of the notice that must be given. The notice must be signed by all the partners and "must state as a fraction each practitioner's and non-GP provider's share in the partnership profits."
 - Dr E has provided copies of the letters that were sent to the PCT on 8 April 2005, 18 June 2008, and 6 April 2012. The letters all say that the partnership is based on unequal profit sharing but they do not give details of the fraction of profits attributable to each partner.

- Dr E also says that the PCT did not inform him or his wife that the notices were incorrect and did not follow the Regulations. The Adjudicator did **[not]** consider that it was the role of the PCT to inform Dr E that the notices were incorrect, it was rather for Dr E and his wife to ensure that the notices were in the correct format and complied with the Regulations.
 - It is also not within the Pensions Ombudsman's remit to direct NHSBSA to act contrary to the Regulations. This can only be achieved by an act of Parliament.
12. Dr E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr E 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 E for completeness.

Ombudsman's decision

13. Unfortunately, there was a mistake in the Adjudicator's Opinion, it omitted the word **not** (as shown in the penultimate bullet point of point 11 above). This should have read that the Adjudicator "did not consider that it was the role of the PCT to inform Dr E that the notices were incorrect", although this could be inferred from the remainder of the sentence. Dr E has picked up on this point and said that the PCT failed in its employer's 'duty of care' to him. But the PCT was only Dr E's employer for NHS Pension Scheme purposes and in all other respects he was a self-employed GP. Dr E simply contracted his services to the PCT and he was responsible for ensuring that the right notices were provided showing the correct split of profits for him and his wife.
14. Dr E has also raised the issue of the PCT deducting pension contributions from him and his wife on the basis of unequal profit sharing. I understand that the PCT deducts pension contributions on the basis of information provided by the GP and again it would be for Dr E and his wife to ensure that the contributions deducted and notices of estimated profits and split of profits are provided in the correct format. If there has been any overpayment of contributions by Dr E then NHSBSA should arrange for these overpaid contributions to be returned.
15. Finally Dr E has said that the practice did not receive any of the communications listed by NHSBSA, as being issued in 2004 or 2005, in relation to the new GP contract and non-GP Partners. It was a common practice in those days for communications to be distributed via the PCT. Given the length of time that has evolved since the introduction of the new GP contract it is difficult to know in what manner the communications were issued. However, NHSBSA have said that newsletters on the new GP contract were sent to a number of parties including GP surgeries. Therefore, on the balance of probabilities, I would have expected the newsletters to have arrived and, given the importance of the changes, I would have expected Dr E and his wife to have made themselves fully aware of the conditions that applied. Any failure to comply with the Regulations cannot be blamed on the PCT.

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16. Therefore, I do not uphold Dr E's complaint.

Anthony Arter

Pensions Ombudsman

19 April 2017