

## Ombudsman's Determination

Applicant	Mrs E
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondents	NHS Business Services Authority ( <b>NHSBSA</b> )

## Outcome

1. I do not uphold Mrs E's complaint. However, NHSBSA should provide Mrs E with a reconciliation of how they arrive at the sum of £24,000 being due in underpaid pension contributions and explain whether or not this sum includes overpaid pension contributions from Mrs E's other sources of income.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs E has complained that NHSBSA wrote to her in May 2015 and claimed that she should not have paid pension contributions from three sources of income as a non-GP partner and that she and her husband would be treated as having had an equal distribution of profits from one practice. Therefore her pension entitlement would be corrected and the Partnership would be required either to pay the underpaid contributions of approximately £24,000 or these would be offset against her pension benefits. Mrs E says the profits were not shared equally between her and her husband and pension contributions were paid on this basis.

## Background information, including submissions from the parties

4. Mrs E was a non GP partner in a GP practice with her husband as a GP partner since 2005. She was also a non GP partner in two other practices with her husband and paid pension contributions on profits from all three practices. Mrs E assumed that her pension would reflect her earnings from all three practices when she retired in September 2013 but in 2015 she was informed that as a non GP Partner she could only contribute from one source of NHS income, that is, one practice.
5. NHSBSA say that a non GP Partner is treated as a whole time employee and can only be pensionable in one practice. The NHS Pensions website contains

comprehensive information regarding non GP Partners for both employers and employees.

6. Mrs E says the profits in the practice were shared unequally and that these details were provided to the Primary Care Trust (**PCT**). Mrs E has provided copies of letters that she 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. Mrs E also says that the PCT did not inform her that the way they presented the profit sharing arrangement was incorrect and that it was not following the pension regulations. Furthermore it 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 following 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 the NHS Pensions website including 'FAQs'.
9. NHSBSA say that it requested, on numerous occasions, confirmation from Mr and Mrs E that they had lodged elections. Mr 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 Mr 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. Mrs 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.
12. This complaint is almost identical to a complaint made by Dr E (**PO-14682**) regarding the split of profits between him and his wife and NHSBSA's stance that they were equal partners. The complaint was not upheld by the Pensions Ombudsman for the following reasons:-

- The provisions for determining pensionable earnings for medical practitioners and non GP Partners 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 and his wife have 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 says that the PCT did not inform him or his wife that the notices were incorrect and did not follow the Regulations. But it was not the role of the PCT to inform him 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 not within our remit to direct NHSBSA to act contrary to the Regulations. This could only be achieved by an act of Parliament.
- 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. 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.
- 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, the Ombudsman expected the newsletters to have arrived and, given the importance of the changes, he 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.

13. The Adjudicator considered that the Ombudsman would also conclude that it was for Dr E and his wife to ensure that they familiarised themselves with the conditions of membership for non GP Partners and to ensure that Mrs E's pension contributions were deducted from her earnings at only one practice. The fact that Mrs E wrongly informed the PCT of her pensionable earnings at all three practices does not provide a right to a pension in respect of her earnings from all three practices.
14. Mrs E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs E has through her advisers provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs E for completeness.
15. Mrs E has made a number of similar comments to the arguments that her husband put forward in PO-14682, namely that they advised the PCT of the unequal ownership within the Partnership and the PCT completed all the administrative formalities and provided the relevant forms. The PCT should have advised Mrs E and her husband of the correct position and not have proceeded to deduct pension contributions from more than one source of income. Mrs E was dependant on the professional advice provided to her by the PCT and it had a duty of care to provide advice to the standard of a reasonably competent pension adviser/administrator.
16. Furthermore the PCT's failure to provide Mrs E with this advice, and in continuing to take payment from more than one source, meant that Mrs E did not have the opportunity to amalgamate her practices. This would have limited it to one source of income and mitigated any loss incurred. Mrs E has a claim for restitution for sums paid out in full plus interest on the same. NHSBSA has no right to make a profit from Mrs E's pension payments even if, which is denied, this was not the fault of the PCT.

### **Ombudsman's decision**

17. The arguments put forward by Mrs E that the PCT did not inform her that the notices she submitted were incorrect or did not follow the Regulations are the same as those submitted by her husband. It was not the role of the PCT to inform her that the notices were incorrect, it was rather for Mrs E and her husband to ensure that the notices were in the correct format and complied with the Regulations.
18. Mrs E has also claimed she is entitled to a return of the pension contributions she paid on her other sources of income. But as NHSBSA have pointed out, Mrs E's pension benefits are to be based on her and her husband being equal partners in the Partnership. She has, therefore, either to pay the underpaid contributions of approximately £24,000 or these will be offset against her pension benefits. I would have expected NHSBSA to have taken into account any overpaid pension contributions from Mrs E's other sources of income before arriving at the figure of £24,000 and would ask NHSBSA to provide Mrs E with a reconciliation of how they arrived at this figure.

**PO-14683**

19. Therefore, I do not uphold Mrs E's complaint.

**Anthony Arter**

Pensions Ombudsman

5 October 2017