

## Ombudsman's Determination

Applicant	Ms S
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondents	NHS Business Services Authority ( <b>NHS BSA</b> ) Sussex Community NHS Foundation Trust ( <b>Sussex</b> )

## Outcome

1. Ms S' complaint against NHSBSA and Sussex is partly upheld, but there is a part of the complaint I do not agree with. To put matters right for the part that is upheld Sussex should, within 14 days of the date of this Determination, pay Ms S £1,000 for the significant maladministration identified.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Ms S has complained that she was provided with incorrect retirement information, on which she based her decision to claim payment of her accrued pension benefits.
4. Ms S has further complained that, although NHS BSA have agreed to "cancel" her early retirement award, she will need to repay the pension benefits she has already received. Ms S says this will in effect place her in a "disadvantageous position" as she has already spent the majority of the pension benefits and it cannot therefore be considered fair redress.

## Background information, including submissions from the parties

5. On 28 October 2011, as part of a "Pension Choices Exercise", NHS BSA wrote to Ms S with a personalised 'Choices Statement' comparing the benefits available to her in both the 1995 and 2008 sections of the Scheme. Ms S elected to remain a member of the 1995 section. The benefits at age 55 were quoted as:
  - A pension of £9,126 per annum with a lump sum of £27,378Or
  - A reduced pension of £7,333 per annum with a maximum lump sum of £48,889

6. In August 2015, Ms S was informed that her current post as a band 7 Family Nurse, working on a local initiative project was ending. Sussex confirmed Ms S would be redeployed to a band 7 role, but would benefit from protected pay for two years. Both roles also held "Special Class Status" (**SCS**).
7. The relevant regulations regarding SCS can be found in The National Health Service Pension Scheme Regulations 1995, Regulation R2, a copy of which is enclosed in the annex to this document.
8. Members with SCS are eligible to retire at age 55 with no reduction in benefits. However, on 6 March 1995, the 1995 section regulations were changed and SCS was abolished. Consequently, a person joining the Scheme after 6 March 1995 was not eligible to hold SCS, whereas a person who had previously held SCS and who re-joined the Scheme after 6 March 1995, could have their SCS reinstated provided they had not had a break in pensionable service of more than five years.
9. Having been told her current role was coming to an end, Ms S explored other roles outside the NHS, and in September 2015 was successful in being appointed by Spire Health as a band 8b Clinical Ward Manager.
10. Ms S duly resigned from the NHS. Her effective last day of service with the NHS was 31 November 2015. At that time Ms S was less than two years away from being able to claim her benefits unreduced.
11. During her notice period Ms S requested a number of retirement estimates from Sussex, calculated to 30 September 2015, 28 June 2017 (age 55) and 28 June 2022 (age 60).
12. On 8 October 2015, Sussex issued the requested retirement estimates. The figures for 30 September 2015 were broadly similar to the Choices Statement quoting:
  - A pension of £9,061.24 per annum with a lump sum of £27,183.73
  - Or
  - A reduced pension of £7,281.35 per annum with a maximum lump sum of £48,542.36
13. On the basis of this information Ms S says she elected to draw her NHS pension with effect from 29 November 2015, aged 53. She duly completed and signed the relevant "Retirement benefits claim form - (AW8)" on 13 October 2015. Ms S requested payment of the maximum lump sum available.
14. On 28 October 2015, Sussex confirmed receipt of this AW8 and explained that the information would be passed to NHS Pension Scheme administrator (**NHSPS**) who would calculate her final award.

15. On 10 December 2015, NHSPS wrote to Ms S to confirm that payment of her accrued pension benefits had been arranged. There was no confirmation of the final figure or exact payment details included.
16. Ms S checked her bank balance on 17 December 2015, and realised she had been paid a lump sum of £37,857.08, which was significantly less than she was expecting. Ms S queried these figures with NHSPS, who confirmed the correct values had been paid.
17. On 17 February 2016, Sussex wrote to Ms S to explain that an error had been made, as a consequence of which, the 30 September 2015 figures had been overstated. Sussex also explained that to remedy the situation Ms S could repay the money already paid and return to NHS employment thereby “cancelling” her pension application. She was warned to ensure any new role attracted SCS.
18. Ms S did not take up this offer. She replied to Sussex that had she known her correct entitlement then she would not have claimed payment of her pension. She continued to pursue the matter through both her Union, Sussex and the NHS Help Desk. Her complaint was ultimately escalated to NHS BSA and dealt with under the Scheme’s Internal Dispute Resolution Procedure (**IDRP**).
19. The first IDRP response was issued by NHS BSA on 20 May 2016. This explained that the incorrect level of reduction had been applied during the calculation phase, which was only noticed when the AW8 was passed to NHSPS for payment. The implication being the error was caused by Sussex.
20. Failure to apply the necessary reduction for early payment of the pension prior to age 55 led to an inflated value being quoted to Ms S. NHS BSA reiterated the offer made by Sussex whereby Ms S could return the incorrectly paid benefits and cancel her retirement award.
21. As a result of poor working conditions Ms S resigned from her post with Spire Health in July 2016. As her complaint with NHS BSA was ongoing, the NHS Help Desk advised that she re-join the NHS in a role attracting SCS.
22. On 19 September 2016, a stage 2 IDR appeal response was issued. This response provided more clarity on the nature of the error that occurred and explained that Sussex were responsible. NHS BSA explained that during the calculation phase a warning or error message would have appeared on the Pensions Online system which should have prompted Sussex to confirm the calculation basis being used.
23. Not satisfied with the offers made to rectify the situation Ms S brought her complaint to this office.

## Adjudicator's Opinion

24. Ms S' complaint was considered by one of our Adjudicators who concluded that further action was required by both NHS BSA and Sussex. The Adjudicator's findings are summarised briefly below:-

- The basic principle for negligent misstatement (in the absence of any additional legal claim) is that a scheme is not bound to follow incorrect information, e.g. retirement quotes, transfer values or early retirement.
- A member is only entitled to receive the benefits provided for under the scheme rules, i.e. those based on correct information accurately reflecting the scheme rules.
- Ms S was provided with misleading information regarding her pension entitlement by Sussex. As that information was consistent with previous pension figures provided it was not unreasonable that she relied on the incorrect information when deciding to draw payment of her accrued pension benefits in 2015.
- Although the quotes provided by Sussex were not calculated correctly, Ms S is not entitled to the overstated pension benefits. As such, Ms S is currently in receipt of the correct level of benefit, despite those benefits falling short of the amount she was previously advised she would receive.
- Given that Ms S successfully applied for a job at Spire, at a higher level of seniority, with a commensurate remuneration package and that SCS would not have applied had she deferred her NHS pension, the Adjudicator found that it was highly unlikely that Ms S would have acted differently if she had known her correct entitlement.
- The decision to leave NHS employment was Ms S' own, as was her decision to claim payment of her benefits. Despite this decision being based on incorrect information, if Ms S had received the correct information her options would have been limited to: accepting payment or deferring payment. Both options are still available to her as part of NHS BSA's redress offer.
- Ms S has been given the opportunity to repay the retirement benefits she has received to date and effectively "undo" her retirement from the Scheme. Upon repayment she could then choose to defer payment of her benefits or commence payment at the correct level.

25. Ms S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms S provided her further comments, summarised below, which do not change the outcome:-

- Sussex had a duty of care to ensure the information provided to her was true and correct at the time of her request.

- Sussex and NHS BSA both have a duty of care to ensure she is placed back in the position she expected to be in following her retirement.
- If the correct information had been provided Ms S states “categorically” that she would not have taken her pension.
- The financial resolution offered by NHS BSA, and endorsed by the Adjudicator, is too rigid and the process too uncertain to make it a viable option. Also, the general logistics of the reinstatement offer makes it almost impossible to adhere with and does not place her in the position she was before she left the NHS.
- It is an absolute travesty that NHS BSA is not held accountable.
- “Shoemiths’ Commercial Litigation Department” have informed Ms S that she is entitled to a level of payment which would put her back in the position she believed she would be in following her retirement.

26. I agree with the Adjudicator’s Opinion and I will therefore only respond to the key points made by Ms S for completeness.

## **Summary of Respondents Position**

27. NHS BSA agreed with the opinion and accepted that misinformation had been provided to Ms S:

- In this case the responsibility for providing first stage retirement estimates lay with Ms S’ then employer. It is therefore the employer that provided incorrect information.
- Despite not providing the incorrect information NHS BSA has paid Ms S her correct entitlement under the Scheme.
- If Ms S repays the pension lump sum and all monthly pension payments NHS BSA has agreed to cancel her retirement and reinstate her into the Scheme.
- Upon reinstatement, and assuming she is in an NHS role that attracts SCS, Ms S can elect to receive payment of her correct pension benefits.
- If Ms S wishes to pay back the pension benefits she has already received and be reinstated into the Scheme, NHS BSA would require written confirmation from her. Payment would then cease and the award would effectively be cancel. The pension benefits she has received to date would then be considered an overpaid amount and would need to be returned before the matter could progress. Ms S would then have a choice as to whether she took payment of the correct pension benefits or elects to defer her pension for later payment.
- If Ms S chose to claim payment of her reinstated pension benefits then she would have to enrol in the Scheme for a period of at least one calendar month. Ms S

would also be required to take a 24-hour break in her current contract at the end of the calendar month so that pension benefits can be paid.

- If Ms S takes payment and continues in NHS employment she would be subject to abatement until age 60. This would occur if her pension added to her earnings in re-employment exceed those earnings she received prior to claiming her pension.
- Also, if Ms Lees returned within one month of claiming her pension she must not work more than 16-hours a week for a calendar month. If this is exceeded her pension payment would be suspended until such time the requirement is met.

### **Ombudsman's decision**

28. That a problem has occurred is not in doubt as Sussex acknowledge that incorrect information was provided to Ms S (on 8 October 2015) which overstated her accrued pension benefits leading her to expect a higher benefit than was actually the case. This error amounts to maladministration and it stands to reason then that she should be compensated for the loss of expectation this incorrect information would have caused her. However, Ms S is not entitled to the incorrectly stated benefit, and she has been unable to establish that she has suffered loss as a result of placing detrimental reliance on the incorrect information.
29. Ms S does not maintain she left the NHS because of the misstatement. She is frank in acknowledging that there were other drivers for that decision. She says only that she would not have drawn her pension when she did had she known the true position. I accept her evidence that had she known her correct entitlement when she left the NHS she would not have claimed payment of her NHS pension at that time. She can demonstrate that she relied on the statements given to her when deciding to apply for her pension. However I am not satisfied that she can demonstrate she has suffered financial loss as a result. Had Ms S chosen to defer her pension when she left the NHS, she would have lost her SCS, including the right to claim unreduced payment from age 55 in any event She would not have been entitled to an unreduced pension until age 60. In this scenario, the salary from her new post at Spire would then have been Ms S' sole income, at least unless and until the point at which she rejoined the NHS on SCS terms.
30. NHS BSA have offered to reinstate Ms S' pension entitlement upon repayment of any money paid to date, and to then let her defer payment to age 60 or to continue to work in the NHS and claim her SCS pension, if she is now in a qualifying role..Ms S says it is now too late to repay the money but I note she became aware of the mistake on 6 December 2015 and her option to reverse the situation was outlined to her at that point. The solution outlined above was set out in detail on 20 May 2016. It was open to Ms S to reverse her decision to take her pension at either of those points, even without reversing her decision about who to work for, but she did not accept that offer. That action is inconsistent with continuing to claim a right to

deferred status. Ms S had a duty to mitigate her losses and Sussex cannot be held responsible if Ms S spent the money she received rather than setting it aside to pay back.

31. Whilst it may not be her preferred course of action, ultimately, Ms S still has the choice to repay the Scheme benefits and be reinstated in the Scheme to effectively mitigate her perceived loss.
32. My remit where maladministration has been established is to place an applicant in the position they would have been in, as far as possible, had the maladministration not occurred. Except from the distress and inconvenience which the mistake her undoubtedly caused her, Ms S has already been offered the remedy I would ordinarily direct.
33. Turning now to the issue of the distress and inconvenience, the error and the manner in which it came to light placed Ms S in the difficult position of having to reverse her financial planning after an award was in payment and at a time of intense personal stress, but I also take account of the fact that the remedy was explained to her as soon as it became apparent there had been a mistake.
34. I do not uphold the complaint against NHS BSA as the original error was a result of local maladministration within the Sussex Pension Department.
35. Within 21 days of the date of this Determination, Sussex shall pay Ms S £1,000 for the significant maladministration identified above.

**Karen Johnston**

Deputy Pensions Ombudsman  
10 September 2018

**Annex**

**The National Health Service Pension Scheme Regulations 1995**

**Nurses, physiotherapists, midwives and health visitors**

**R2.**—(1) Subject to paragraph (2), this regulation applies to a member -

(a) who, at the coming into force of these Regulations -

(i) is in pensionable employment as a nurse, physiotherapist, midwife or health visitor, or

(ii) has accrued rights to benefits under the scheme arising out of a previous period in which she was engaged in such employment and at no time since the last occasion on which she was so engaged has she had a break in pensionable employment for any one period of 5 years or more,

and

(b) who spends the whole of the last 5 years of her pensionable employment as a nurse, physiotherapist, midwife or health visitor.

(2) This regulation shall cease to apply if the member has a break in pensionable employment for any one period of 5 years or more ending after the coming into force of these Regulations.

(3) Where this regulation applies -

(a) regulation E1 (normal retirement pension) will apply to the member as if the reference, in paragraph (1) of that regulation, to age 60, were a reference to age 55;