

Ombudsman's Determination

Applicant	Mrs E
Scheme	NHS Pension Scheme (the Scheme)
Respondent	Buckinghamshire Healthcare NHS Trust (the Trust)

Outcome

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

Complaint summary

3. Mrs E complains that the Trust failed to inform her at the time she entered into the added years contract that the extra membership which she was purchasing of 3 years 61 days would be insufficient to achieve her aim of 40 years' total pensionable service in the Scheme on reaching age 60 in August 2015.
4. It transpired that her total pensionable service in the Scheme at age 60 including the extra membership purchased was only 38 years 2 days and in order to put matters right, Mrs E would like the Trust to pay her the additional retirement benefits available from the Scheme based on 40 years' pensionable service. She says that the extra contributions due from her in order to purchase the shortfall of 1 year 10 months' pensionable service may be deducted by the Trust from the additional benefits available to her.

Background information, including submissions from the parties

5. On 27 July 2001, Mrs E wrote to Hyder Services (**Hyder**), the Trust's payroll provider at the time, as follows:

"Please find enclosed the three application forms, all signed, as requested...

In our discussions I identified previous NHS employment...for which superannuation was paid but that was reclaimed at the end of this period of employment. I presume that this is the 3 years 61 days shown in your quotation for purchase at half cost...

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I will contact you early next week to talk it through. If I am incorrect and you (sic) quotation you gave me takes me to 40 years' pensionable service by the time I am 60 please continue with this application"

6. Mrs E says that when she telephoned Hyder again the following week it confirmed to her that the contract which she had signed and returned would enable her to attain 40 years' pensionable service in the Scheme by age 60.
7. By signing the application form AB54 (**the Form**), Mrs E had:
 - elected to purchase 3 years 61 days' extra membership in the Scheme via regular additional contributions of 2.51% of her pensionable salary payable from August 2001 until her 60th birthday on 31 August 2015; and
 - declared to NHS Business Service Authority (**NHSBSA**) that she had read the Scheme booklet entitled "Increasing Your Benefits"
8. Mrs E says that she only discovered in November 2014 after requesting a benefit statement showing a breakdown of her total pensionable service including the added years' service purchased to date from Equiniti, the Trust's current payroll and pensions service provider, that she would not achieve 40 years' total pensionable service by age 60.
9. NHSBSA rejected Mrs E's complaint at Stage One of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). In its letter dated 5 July 2015 to Mrs E, NHSBSA concluded that:
 - her prospective pensionable service from when she joined the Scheme on 30 June 1980 to her 60th birthday assuming full time membership throughout and excluding her added years purchase was 35 years 72 days;
 - by adding the 3 years 61 days which she intended to purchase to her maximum potential membership of 35 years 72 days at age 60 would give her a total membership of 38 years 133 days which was clearly less than 40 years;
 - there was no evidence to show that either it or the Trust provided Mrs E with information that could be considered to be incorrect or misleading in any way; and
 - Mrs E had received adequate information in order to calculate her prospective membership in the Scheme herself and therefore had the opportunity to mitigate her perceived financial losses before her retirement
10. Mrs E accepted NHSBSA's recommendation that she should refer this matter to the Trust which also did not uphold her complaint.
11. Mrs E says that:
 - in 2001 she could not calculate the number of added years which she needed to purchase in order to achieve her aim because she had a period of part time service;

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- she therefore relied on Hyder to perform the calculation properly and to provide her with correct information in accordance with her instructions;
- in hindsight, she had foolishly accepted and trusted Hyder's calculations "without asking for evidence";
- the Trust has not submitted any evidence showing what happened after Hyder received her covering letter of 27 July 2001 and the subsequent telephone call between her and Hyder;
- the only tangible evidence available is her July 2001 covering letter and it is clear from this that she only agreed to establish the contract if it would enable her to attain her goal;
- at no time did Hyder inform her that this would not be possible;
- she has consequently received a lump sum and pension from the Scheme lower by £6,104 and £2,034 pa than she expected;
- her solicitor says that the Trust are "estopped" from refusing to calculate the retirement benefits available to her using 40 years' pensionable service and is therefore responsible for paying her the additional benefits from the Scheme;
- if she had been made aware of the requirement by Hyder to purchase more than 3 years 61 days' pensionable service at the outset, she would have done so;
- as both she and her husband were in full time employment at the time, she would have been in a position to pay the additional contributions in order to enhance her future financial stability;
- she is now simply requesting to be put back in the position she would have been in if Hyder had not made the mistakes;
- the Scheme booklet was of no use to her in calculating the number of added years which she needed to purchase to achieve her goal and only showed the cost of purchasing each additional year to be 1.70%;
- the "additional pension facility" (**the Facility**) introduced in 2008 was unsuitable for her to make up the shortfall in added years because she was not in a position financially to make an extra one off lump sum payment shortly before her retirement;
- she had already handed in her notice in order to retire at age 60 and could not consequently pay regular additional contributions for the requisite one year into the Facility;
- following a review of the management services within the Trust, her position was amalgamated with another and offered to an external candidate;

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- the Trust did not wish to make her redundant so she was “offered to continue in her role with pay protection”;
- as her post no longer existed, hypothetical acceptance of the withdrawal of her resignation with only a few weeks of her employment remaining would have been highly doubtful; and
- it was her family’s plan to relocate on her retirement and her home was sold by the end of July 2015

Adjudicator’s Opinion

12. Mrs E’s complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trust. The Adjudicator’s findings are summarised briefly below:-
- Mrs E’s letter of 27 July 2001 clearly suggests that it was her intention to purchase extra added years sufficient to take her pensionable service to 40 years in the Scheme by age 60.
 - There is however no tangible evidence to confirm or deny her statement that she was subsequently told by Hyder that she would definitely accrue 40 years’ pensionable service at age 60 by entering into the added years contract.
 - What is clear is that by signing the Form, Mrs E had elected to only purchase 3 years 61 days’ extra pensionable in the Scheme and that by adding the membership credit which she intended to purchase to her maximum potential membership in the Scheme would give a total membership of less than 40 years at age 60.
 - Adding 3 years 61 days to her potential maximum total pensionable service of 35 years 72 days in the Scheme did not require any great mathematical skill.
 - Mrs E should therefore have known that the number of added years she was purchasing would not fulfil her aim and it was incumbent upon her to ensure that Hyder was notified accordingly so that corrections could be made, if required.
 - On the balance of probabilities, it was consequently unlikely that Hyder would have told Mrs E that she would achieve her goal when the straightforward calculations which it and Mrs E ought reasonably to have made clearly did not support this representation.
 - There were no grounds for an estoppel defence in Mrs E’s case because the statement made by her founding the alleged estoppel was ambiguous rather than unequivocal.
 - It had been open to Mrs E to research the added years option in more detail, seeking independent financial advice, where appropriate, should she have wished to do so, and defer signing the contract until she was completely satisfied that the amount of added years which she was purchasing would fulfil her goal.

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- The Pensions Ombudsman would expect Mrs E to take all reasonable steps to mitigate her financial loss. She cannot claim for a loss which she could have mitigated whether she in fact did so or not.
 - The evidence is clear that in July 2015 NHSBSA had made Mrs E aware that she was not going to achieve 40 years' pensionable service in the Scheme at age 60 and informed her how she could address the shortfall in pensionable service.
 - It had therefore also been open to Mrs E to withdraw her resignation and pay further regular contributions into the Facility or make an additional one off contribution into it in order to achieve her goal. If she did not have sufficient funds at the time to pay a lump sum contribution into the Facility, she could have, on reinstatement to her role, considered borrowing the necessary funds using a short term bank loan which she could have then paid off on receipt of her retirement benefits.
13. Mrs E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs E 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.

Ombudsman's decision

14. In order to establish her claim Mrs E must be able to prove that Hyder confirmed to her that taking out the contract for 3 years and 61 days would provide her with a total membership of 40 years at age 60. That is the clear and unequivocal representation which would need to be proved to lay the foundations of an estoppel argument, and the burden of proving that the statement was made lies with Mrs E. It is not enough that Mrs E came away with an understanding. It is necessary to prove that Hyder made the representation. For Hyder to have made a representation to the effect 'take out this added years contract and you will have 40 years at age 60' would require them to have added up the pensionable service and the added years incorrectly and to make an assumption about Mrs E's working pattern for years to come and not to have warned her that they were making such an assumption. That combination of errors is inherently unlikely; there would need to be some evidence to support the claim that such a statement was in fact made.
15. Unfortunately there is no record of the telephone conversation in which Mrs E tried to obtain clarification of the effect of her added years purchase. I have therefore considered what can and cannot be inferred from the letter which Mrs E wrote seeking clarification of the contract she was entering into. I find it was likely that any conversation resulting from that letter would have covered the issue of plugging the gap in past service, but it is impossible to infer what was and was not discussed about future service with the degree of precision required to prove that Hyder made a particular representation that Mrs E would accrue 40 years by age 60.

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16. I can only reach a view on the evidence available which I consider falls short of establishing an estoppel arising out of any statement made by the Trust.
17. Although I fully sympathise with Mrs E's circumstances, I do not therefore uphold her complaint.

Karen Johnston

Deputy Pensions Ombudsman
8 November 2017