

Ombudsman's Determination

Applicant	Dr I
Scheme	NHS Pension Scheme (the Scheme)
Respondent(s)	NHS Business Services Authority (NHSBSA)

Complaint Summary

1. Dr I has complained that that he was not informed that an actuarial reduction would be applied to the added years' element of his Scheme pension, prior to him applying to take his benefits. He has also complained that he was incorrectly told, in March 2016, that his application could not be withdrawn although he had not yet begun to receive the benefits.

Summary of the Ombudsman's Determination and reasons

2. The complaint should be upheld against NHSBSA because:-
 - NHSBSA provided Dr I with incorrect information and this amounts to maladministration. Because of the maladministration, Dr I will incur a financial loss from age 65.
 - Therefore, NHSBSA should put Dr I back, as closely as is now possible, to the position he would have been in but for the maladministration.

Detailed Determination

Material facts

3. Dr I was a member of the 1995 section of the Scheme and his normal retirement age was 60. In 1999 Dr I began contributing to an added years' arrangement alongside his main Scheme pension. He elected to take the added years' pension at age 65.
4. In anticipation of a reduction in the lifetime allowance from £1.25 million to £1 million from 6 April 2016, Dr I applied to take his Scheme benefits from 3 April 2016. He was aged 61 at the time.

5. In March 2016 Dr I contacted the Scheme, following receipt of retirement quotes, when he noticed that the added years' element of his pension would be reduced as he was taking the benefits early. Dr I asked if he could withdraw his application but was incorrectly told he could not.
6. Dr I retired on 3 April 2016 and began receiving his Scheme benefits.
7. Dissatisfied with the reduction applied to the added years' element of his pension, Dr I complained to NHSBSA and went through stages one and two of its internal disputes resolution procedure (**IDRP**).
8. NHSBSA responded to Dr I in October 2016, at the second and final stage of its IDRP. It explained how the added years' pensions are administered, and why they are subject to a reduction if the benefits are taken earlier than the agreed maturity date, which would have been age 65 for Dr I. NHSBSA also confirmed that Dr I had been given incorrect information regarding the withdrawal of his benefit application when he made enquiries in March 2016, and said:

"...it would have been possible for you to withdraw your application and re-join the NHS Pension Scheme. You would however be required to return any NHS pension benefits paid to you."
9. In response to the IDRP stage two, Dr I wrote to NHSBSA with further points and reiterated that he had only found out about the actuarial reduction shortly before his retirement date as it was not mentioned in any other correspondence. He also said that if he had been correctly informed he would have withdrawn his benefit application and continued in the Scheme until age 65 when the added years' element would have matured. Consequently, he asked what compensation was available for the loss he had incurred by withdrawing the added years' pension early.
10. NHSBSA responded to Dr I in November 2016. It confirmed that the actuarial reduction applied only to the added years' element of his pension. It recognised Dr I was given incorrect information which may have affected his decision to submit a benefit application, and said:

"...it is possible that if you were allowed to retract your application when you first contacted NHS Pensions you may have been in a position to mitigate for the perceived loss."

Therefore, it offered Dr I an ex-gratia payment of £500 for the distress and inconvenience the situation had caused him.
11. Dr I's complaint was investigated by one of our Adjudicators who sent her initial Opinion to Dr I and NHSBSA in June 2017, informing them that, based on the information she had, she did not consider Dr I's complaint should be upheld. This was because:-

12. The main reason that Dr I applied to take his pension in March 2016 was the potential impact of the reduction of the lifetime allowance from £1.25 million to £1 million in April 2016, as he would have been affected by this reduction. So, on the balance of probabilities, Dr I would not have deferred taking his pension benefits, if he had been provided with the correct information.
13. Dr I has been in receipt of his Scheme pension since April 2016 amounting to almost £46,000 per annum, and therefore, by age 65 Dr I would have been in receipt of pension income for four years, consequently, the Adjudicator did not consider he had incurred a financial loss as a result of receiving incorrect information.
14. Following receipt and consideration of Dr I's response (details of which are set out in paragraphs 26-33 below), the Adjudicator revised her Opinion. She considered that Dr I's complaint should now be upheld.
15. Although the Adjudicator appreciated that NHSBSA had said that it is not uncommon for investments to attract penalties if they are stopped before their maturity date, she considered that the main issue was not whether Dr I should have been aware of the potential penalty that could be applied if he withdrew his added years' pension before age 65 but the effect on Dr I's income from April 2016, having been incorrectly informed the previous month, that he could not withdraw his benefit application and the impact on his income from age 65.
16. Had Dr I been correctly informed, by NHSBSA, in March 2016, that he could withdraw his pension application, the Adjudicator considered, on the balance of probabilities, that he would have done so. In addition, Dr I would have continued in his previous NHS employment under his original contract which had a higher pensionable salary. Therefore, NHSBSA's failure to provide Dr I with correct information, amounted to maladministration and, as a result, NHSBSA should put Dr I back in the position he would have been in but for its administrative error.
17. To put Dr I back into the position he would have been in would require Dr I's pension to be unwound and his old employment contract reinstated. Unfortunately, as Dr I's employer was not responsible, for the maladministration that occurred in March 2016, I am unable to direct that Dr I's employer reinstate his original contract with the higher pensionable salary. It is unlikely that the employer would agree to do this as it has re-employed Dr I at a lower contractual rate.
18. NHSBSA can only unwind Dr I's pension if Dr I refunds all of the pension he has received from the Scheme. As Dr I is unwilling to do so, the Adjudicator considered the impact that the incorrect information has had on his income since April 2016 and the impact it will have on his income post age 65.
19. The Adjudicator noted that prior to Dr I's retirement, his annual pensionable income was £132,035.52. Had he not retired in April 2016 but had retired at age 65 (in April 2020), when his added years' pension would have matured, the total pensionable income from his employment for the period would have been £528,142.08.

20. When Dr I returned to employment after his retirement in April 2016, his new gross salary was £103,292.68 (it was actually £104,704.65 but some elements of pay for additional programme activity were removed as these were not pensionable under his old contract). If Dr I continues to receive this salary to age 65 his total gross salary would be £413,170.72. Dr I's annual pension is £45,533.59. The total pension Dr I would receive for the four years is £182,134.36.
21. The total income that Dr I could receive between his retirement in April 2016 and age 65, if he remains in employment under his current contract, is £595,305.08. This figure is £67,163 higher than the pensionable salary that Dr I would have received under his previous employment contract. Therefore, the Adjudicator considered that Dr I had not incurred a financial loss as a result of being re-employed on a lower salary, when combined with his pension payments, following his retirement in April 2016.
22. The Adjudicator considered that, on the balance of probabilities, had Dr I been given the correct information he would have withdrawn his benefit application in March 2016. Therefore, there was a need to consider what impact the maladministration would have on Dr I's income from age 65, when he eventually retired.
23. Dr I has said that his main reason for applying to take his pension benefits in March 2016 was so that he would not have to worry about applying for protection and stopping contributions. So, it is likely that, had Dr I been able to withdraw his pension benefits application he would have done so but would have ceased to make further contributions into the Scheme. Instead, he would have deferred taking his benefits until age 65, to prevent a reduction of his pension.
24. NHSBSA confirmed that, had Dr I withdrawn his pension application and deferred his pension until age 65, without paying further contributions, the added years' element of his pension would not have been subject to an actuarial reduction. Therefore, the pension Dr I would have received at age 65 would have been higher than the one he is currently receives.
25. Consequently, it was the Adjudicator's view that NHSBSA should increase Dr I's pension from age 65 and, that NHSBSA should also pay him £500 for the significant distress and inconvenience he has experienced.

Summary of Dr I's position

26. Dr I says that had he been allowed to withdraw his benefit application in March 2016, he would have continued in his employment under the previous contract and applied for individual protection 2016 (**IP16**). This would have enabled him to protect the value of his pension up to £1.25 million and still make further contributions into the Scheme, paying the appropriate tax for any amount in excess of £1.25 million. His NHS Pension contributions and the added years' contributions would have continued unless he wrote specifically requesting to withdraw from making further pension contributions.

27. Had he deferred his pension to age 65, no actuarial reduction would have applied to the added years' element of his pension and he would have received the full value of the benefits accrued up to April 2016. Combining his pension income and new salary provides him with a figure closer to his pre-retirement income. His new salary is only two thirds of his previous salary. Therefore, the total income he receives, that is his new salary plus the pension income, is similar to the income he received from his pre-retirement salary under his previous contract. If he had continued his previous contract he would have gained considerably more in pension benefit from age 65. Therefore, he believes that NHSBSA should refund the amount that the added years' element of his pension was reduced by, when the actuarial reduction was applied.
28. He did not apply for IP16 prior to applying for payment of his pension benefits as he was drawing his pension before 6 April 2016, so was protected from the reduction of the lifetime allowance.
29. A consequence of NHSBSA's maladministration is the loss of the old contract with its pay structure and benefits. His ability to repay the pension already received is dependent on his employer reinstating his old contract, as his new salary is lower than his previous one. It would only be possible to put him back in the same position he would have been in but for the maladministration which occurred if he were reinstated on his original contract with its advantageous pension provision.
30. Under his old contract he had received payments for additional programmed activities for ten consecutive years. Although they were not guaranteed, it is likely that if he had remained in his old contract he would have continued to receive the same level of additional paid activities. The standard full-time contract is made up of 10 programmed activities. Therefore, he had additional payments amounting to 22.5% of his annual salary. Another consequence of losing the old contract was the fact that he lost the ability to apply for higher clinical excellence award between the ages of 61 and 65.
31. The lack of information from NHSBSA concerning the actuarial reduction and the subsequent misinformation on his ability to withdraw the pension application at a crucial time in March 2016, led to significant financial loss in respect of his long-term pension provision. As he cannot have his old contract reinstated, he believes it would be reasonable to be compensated in respect of the actuarial reduction which has been applied.

Summary of NHSBSA's position

32. NHSBSA say that if Dr I had simply stopped paying contributions into the Scheme his pension would not have become payable until he ceased employment; and the pension derived from the added years' element would not have been subject to an actuarial reduction if it had become payable from age 65 or later.
33. If Dr I were to cease employment prior to age 65, his pension would have been backdated to the day after his employment ended and a reduction would apply to the

added years' pension. It would not have been possible for Dr I to have stopped making contributions into the main pension while continuing to pay contributions into the added years' element.

34. When Dr I entered into the added years' contract the 'increasing your benefits' booklet provided information so that an informed decision could be made regarding buying added years. Page 13 of the booklet stated that if payments stopped or varied before the chosen retirement date benefits may be reduced.
35. NHSBSA does not believe it is unreasonable to suggest that, setting pensions to one side, an investment that is ended prior to its maturing normally attracts penalties. If Dr I was considering retirement before age 65 it would have been reasonable for him to have made further enquiries on how his added years' investment would be affected.
36. The resolution proposed in the Adjudicator's revised Opinion is disproportionate to any maladministration that has occurred. When the reduction factors for early payment were applied to the added years' portion of Dr I's pension it resulted in a reduction of £2,360.71. If this amount was paid from age 65 as an additional pension, Dr I would be in a more beneficial position than if the error had not occurred. Not only would he have gained an extra £67,163 of earnings, he would have an ongoing increase of £2,360.71 to his pension.
37. If the Opinion is acted upon, it appears that Dr I will receive the benefit of the higher earnings in retirement when combined with his pension and will continue to benefit further after age 65 by an increase in his pension.
38. It would not be possible to establish what the value of Dr I's pension would have been at age 65, if the actuarial reduction had not been applied, until Dr I reaches age 65 due to potential cost of living increases that may apply. Therefore, it would need to establish the value of Dr I's pension at age 65 when Dr I reached age 65.
39. NHSBSA would like to reserve the right to consider offering any additional amount payable to Dr I as a one off lump sum payment. The payment would be calculated with guidance from the NHS Pensions' Scheme Actuary with reference to both mortality and potential cost of living increases.
40. To resolve the complaint, NHSBSA is willing to increase the ex-gratia offer to Dr I to £1,000 without the requirement to increase Dr I's pension from age 65.

Conclusions

41. If NHSBSA had correctly informed Dr I that he could withdraw his pension application in March 2016, I find, that on the balance of probabilities, he would have done so. Therefore, he would have remained employed under his old contract and would not have ceased employment until he retired at age 65. Consequently, his pension would not have come into payment earlier than age 65.

42. However, it is not possible for me to make directions for Dr I to be re-employed on his previous employment contract for the reasons given by the Adjudicator (see paragraph 17 above), so, Dr I is likely to remain on his new lower paid one. As a result, Dr I does not believe he is able to repay the pension payments he has received since 2016. I have, therefore, had to consider a practical but fair alternative method of redress to approximate the desired position as closely as possible.
43. I find this to be best achieved by directing the removal of the actuarial reductions to Dr I's pension, as these would in my view have been avoided, had there been no maladministration by NHSBSA. Dr I has been receiving pension payments he would not have received had he withdrawn his application in March 2016, and, he is not being required to formally repay them. However, NHSBSA should continue to make these payments to Dr I as ultimately, he needs these payments to top up the reduced salary he now receives, because of the decision he made, relying on NHSBSA's misstatement, thereby retaining his income level to approximate the one he received previously.
44. Dr I ceased paying contributions in April 2016. The Adjudicator found that he would have done so in any event. He did not challenge that finding, and I agree with the Adjudicator.
45. NHSBSA considers that increasing Dr I's pension from age 65 would put him in a better financial position than he would have been in but for its maladministration because if Dr I continues to work to age 65, between the date he took his pension benefits and age 65 he would receive £67,163 more in income as a result of receiving his pension and a salary. However, this does not take account of the non-pensionable additional payments made for programming activities.
46. Prior to Dr I's retirement, although his pensionable salary in March 2016 was £132,035.52, Dr I's gross salary, taking the additional payments into account, was £164,324.04. This figure is considerably more than the £104,704.65 paid annually under Dr I's new contract, which, together with his pension payment of £45,533.59, provides Dr I with a total annual income of £150,238.24, £14,085.80 less than his previous annual earnings. So, it is my view that Dr I does not gain more than he would otherwise have done by NHSBSA increasing his pension benefit from age 65.
47. Dr I has said that he had received the additional paid activities for ten consecutive years and therefore it was his view that had he remained on his old contract it is likely that he would have continued to receive the. Given that the additional payments were not guaranteed I have decided not to take special account of them in my Directions. I have also not taken special account of Dr I's assertion that he has lost the ability to apply for clinical excellence award between ages 61 and 65 as there is no guarantee that Dr I would have been successful in his application for such.
48. I find that NHSBSA's failure to inform Dr I that he could have withdrawn his pension application in March 2016 amounts to maladministration. Dr I will incur a financial loss

from age 65 because of the maladministration, and NHSBSA should uplift his pension benefit from age 65 to prevent the financial loss.

49. NHSBSA has requested that, should I uphold Dr I's complaint, in my Directions I allow NHSBSA to make an alternative lump sum offer in full and final settlement of Dr I's complaint. The offer to be calculated with guidance from the NHS Pensions' Scheme Actuary, with reference to both mortality and potential cost of living expenses. I am inclined to allow this alternative offer subject to its acceptance by Dr I.

Directions

50. NHSBSA shall:

- either, on Dr I reaching age 65, establish the value of his pension, had he deferred payment of it until then but had stopped making pension contributions into the main and added years' elements of his pension on 3 April 2016; and
- if the revalued pension payment at age 65 is higher than the pension payment Dr I is then currently receiving, NHSBSA shall make the necessary arrangements to ensure that he receives the benefit of the higher, non-actuarially reduced, amount from age 65, for the full duration of the pension, which would include any widow's pension benefit and any additional lump sum that would have been payable but for the reduction; or
- as an alternative full and final settlement of this matter, provided Dr I consents to the offer, within 28 days of the date of this Determination, offer Dr I a one off lump sum payment, the payment to be calculated with guidance from the NHS Pensions' Scheme Actuary with reference to both mortality and potential cost of living increases.

51. Within 28 days of the date of this Determination, pay Dr I £500 in recognition of the significant distress and inconvenience he has suffered.

Anthony Arter

Pensions Ombudsman
23 March 2018