

Ombudsman's Determination

Applicant	Mrs L
Scheme	NHS Pension Scheme
Respondents	NHS Business Services Authority (NHSBSA)

Outcome

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

Complaint summary

3. Mrs L argues that she is being discriminated against by NHSBSA because during her unpaid maternity leave, she has to pay contributions based on full time pay (**full rate contributions**) in order to secure the same yearly benefit as a member on paid maternity leave who only pay contributions based on half pay (**half rate contributions**).
4. Mrs L's complaint also concerns the level of service she received from NHSBSA when responding to her complaint.

Background information, including submissions from the parties

5. In June 2015 Mrs L began employment with Greenbrook Healthcare, and was pregnant during employment. Her statutory maternity leave was due to start on 5 January 2016.
6. In September 2015 Mrs L received a letter from Greenbrook Healthcare regarding her statutory maternity pay, stating:

"As you have not worked continuously for 26 weeks by the qualifying week (the 15th week before the expected week of childbirth) you are not entitled to receive statutory maternity pay or occupational pay."

As Mrs L's maternity leave was unpaid, the Scheme Regulations stated that her pension contributions would be deducted at the same rate of pensionable pay

immediately before her unpaid leave began. This was 9.3% of £40,000, her full rate pay.

7. Mrs L sought the assistance of The Pensions Advisory Service (**TPAS**) for guidance on the matter. In September 2016, after a protracted period of correspondence between Mrs L, TPAS and NHSBSA, Mrs L's TPAS adviser (**the advisor**) complained to NHSBSA on Mrs L's behalf, invoking the Scheme's Internal Dispute Resolution Procedure (**IDRP**). The advisor asked if it was correct that a member who was only receiving half rate pay on maternity leave, and only paying half rate contributions, would not be required to make good the underpayment of contributions to secure the same benefit as a member who paid full rate contributions. The advisor argued that if this was the case, the Scheme Regulations were discriminatory against members who are on unpaid leave as they have to pay contributions at the full rate to secure the same benefit.
8. In October 2016, NHSBSA issued its IDR stage 1 decision. It incorrectly stated that Mrs L started maternity leave on the same day her employment commenced with Greenbrook Healthcare, and therefore should not have been eligible to join the Scheme. NHSBSA went on to apologise for the fact that it had accepted Mrs L's contributions, and she was offered a refund.
9. Shortly after the decision was issued, NHSBSA clarified that Mrs L was an eligible member of the Scheme. It calculated that the total amount of pension arrears Mrs L had to pay over the period she was on unpaid maternity leave was £3,194.33. Mrs L set up a repayment plan with NHSBSA to repay the arrears and remain in the Scheme.
10. In November 2016, the advisor wrote to NHSBSA requesting an IDR stage 2 decision. NHSBSA did not provide an IDR stage 2 decision, but in its response explained:-
 - If a member is on full pay whilst on maternity leave, there should be no difference to their pension contributions.
 - If a member is on unpaid maternity leave, their contributions are based on earnings immediately before their unpaid maternity leave began.
 - Regardless of whether a member opts out the Scheme, pensionable membership will not continue unless contributions are paid.
11. In January 2017, the advisor wrote to NHSBSA again, asking:

“If Mrs L's period of maternity leave had been on full pay for 6 months and half [pay for] 6 [months], on returning to work would she have had to repay the underpaid contributions for the 6 months of half pay? Or is it only during a period on no pay that arrears of pension contributions arise and have to be repaid?”

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12. In March 2017, NHSBSA clarified that no pension arrears would arise if a member who was on maternity leave was paying half rate contributions. Consequently, Mrs L brought her complaint to this office arguing that she was being discriminated against by the Scheme because a member on maternity leave who is receipt of half pay would only have to pay half rate contributions, where her leave is completely unpaid yet she is having to pay full rate contributions to secure the same benefit.
13. In its formal response to this office, NHSBSA said that it has not replied to Mrs L in a timely or consistent manner or explained her position with sufficient clarity, and offered £500 for the poor quality of service it provided.
14. The relevant extracts of the Scheme Regulations and the Equality Act 2010 (**the Act**) are set out in the appendix.

Adjudicator's Opinion

15. Mrs L'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 Adjudicator explained that section 28 of the 2015 Scheme Regulations (**the Regulation**) states that whilst a member is on a leave of absence, their contributions will be based on their actual pay. The Regulation goes on to describe a member's reduced pay whilst on a leave of absence as periods A and B. Period A being where a member's pay is reduced from their full pay, and period B being where their pay is subsequently reduced to zero. Where earnings are reduced to zero in period B, they are treated as if they were reduced to the amount applicable in period A.
 - In Mrs L's case, both periods A and B were unpaid because she did not qualify for statutory maternity pay. Consequently, this meant her contributions were based on her pay immediately before her maternity leave began, which was full rate. Therefore, it was the Adjudicator's opinion that NHSBSA had applied the Regulation correctly.
 - Whilst the Adjudicator appreciated why Mrs L felt so strongly about the matter, he believed that the only reason why Mrs L was having to pay full rate contributions was because her maternity leave was unpaid, and not because of her pregnancy.
 - The Adjudicator did not believe that the comparator Mrs L was using to illustrate how she was being discriminated against was appropriate because she was comparing herself to a member who had qualified for maternity pay, which she did not. In the Adjudicator's view, Mrs L was being treated no differently to another member of the Scheme on an unpaid leave of absence, as a member whose leave was entirely unpaid would also have to pay full rate contributions.

- With regard to non-financial injustice, the Adjudicator felt that the award of £500 offered by NHSBSA was reasonable in recognition of the poor service Mrs L had experienced.
16. Mrs L accepted the £500 offer from NHSBSA, but did not accept the Adjudicator's Opinion regarding discrimination, and the complaint was passed to me to consider. Mrs L 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 L for completeness, which are set out below:-
- Mrs L acknowledged that the Adjudicator had considered whether direct discrimination had occurred, but she did not believe that indirect discrimination had been considered. Mrs L argued that NHSBSA may be applying the same rule to a member on a leave of absence due to sickness, but did not consider that was right as the reason for her leave of absence was pregnancy, which had protected status under the Act.
 - Mrs L says that it was her husband who had paid her full rate contributions whilst she was on maternity leave, in order for her to stay as a member of the Scheme. Mrs L said that she had fallen pregnant a second time and will therefore "will definitely be forced out of the Scheme" as she will not be able to afford the pay full rate contributions again. Therefore, Mrs L argued that she is not being given equal access to her pension.
 - Mrs L is concerned that her complaint is part of a wider area of pensions which the government should consider, as the Scheme Regulations do not take into account the difficulties women have whilst on maternity leave. She says that she has now had two pregnancies, and did not qualify for statutory maternity leave in either. She believes that the Scheme Regulations mean that NHSBSA does not distinguish between those who are on a paid and unpaid leave of absence, meaning that many women are going to be forced to give up on pensions they will need in later life.

Ombudsman's decision

17. I note that Mrs L has raised a number of concerns on why she believes that the Scheme Regulations are discriminatory towards women in her position. However, it is not my role to consider wider matters of Government policy, and I do not have the power to amend the existing Regulations, it is to determine whether NHSBSA have applied the Scheme Regulations correctly and whether they had put Mrs L at a disadvantage because of her pregnancy.
18. Pregnancy is a protected characteristic under the Act. If Mrs L was treated less favourably because of her pregnancy, this would amount to direct discrimination. Whilst I can see why Mrs L feels strongly that she is being treated differently to members of the Scheme who only have to pay half rate contributions to secure the

same benefit as her, I agree with the Adjudicator that the reason why Mrs L is being treated differently to those members who are paying half rate contributions is not because of her pregnancy, but because she does not qualify for paid maternity leave. Mrs L is no worse a position than another member of the Scheme who goes on unpaid leave and is asked to pay full rate contributions. She is therefore not being directly discriminated against because of her pregnancy.

19. Mrs L has argued that indirect discrimination has not been considered. However, Section 19 of the Act, which sets out the provisions for indirect discrimination, does not list pregnancy or maternity as a protected characteristic for the purposes of indirect discrimination. The only protected characteristic relevant to the facts for which I believe Mrs L might be able to bring a claim regarding indirect discrimination is gender.
20. In order to determine whether indirect discrimination has occurred on the grounds of gender, the appropriate pool for comparison needs to be considered. In the case of Mrs L, this is not straightforward. The main argument that Mrs L makes, which is comparing herself to pregnant women who are receiving some pay does not then work as a comparator pool on the basis of gender. If it were members of the Scheme who are on unpaid leave then the gender split in NHS employment is 77% women and 23% men¹, so I accept that it is more likely than not that the Regulation will affect more women than men. However, I do not find that Mrs L is being put at a disadvantage because of her gender.
21. All that is being asked of Mrs L is to pay full rate contributions for the period in question if she wants that period to count towards her pension accrual. The amount she is being asked to pay is a direct result of her: a) salary at the time of going on leave, and b) not meeting the statutory requirements for statutory maternity pay. She is being treated exactly the same as any other member of the Scheme on unpaid leave, irrespective of gender. She is also being treated exactly the same as any other pregnant scheme member who does not meet the criteria for statutory maternity pay.
22. Conversely, if Mrs L was simply credited with this period, she would be in a more advantageous position than other members of the Scheme who would have these contributions deducted from their salary. There is no legal obligation in my view for the Scheme or employer to provide such credit. The Scheme allows for the pregnant scheme member to repay the contributions over a reasonable period of time, once they return to work and full pay, which is a reasonable concession. Therefore, I do not find that Mrs L is being indirectly discriminated against. It is the case that a woman who qualifies for paid maternity leave can accrue a period of service for which she has paid less than the full rate contribution. However, this is a benefit to that person in the same way as paid maternity leave is a benefit. It does not mean that Mrs L has been unfairly disadvantaged.

¹ <http://www.nhsemployers.org/~media/Employers/Publications/Gender%20in%20the%20NHS.pdf>

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23. Mrs L has raised the argument that she is being forced out of the Scheme due to the amount she has to pay in contributions during the period she is on unpaid leave. I realise that it may have been difficult for Mrs L to have paid for her contributions whilst she was not in receipt of a salary from her employer. However, this does not mean that her access to the Scheme has been blocked. Mrs L is simply being asked to pay the contributions she would have done had she not been on unpaid leave in order for the service in question to count. Her membership of the Scheme resumed when she started paying contributions again. I also note Mrs L was able to set up a repayment plan in order to pay for her maternity leave.
24. Therefore, I do not uphold Mrs L's complaint.

Anthony Arter

Pensions Ombudsman
5 January 2018

Appendix

The National Health Service Pension Scheme Regulations 2015

25. The relevant parts of Regulation 28 states:

“Pensionable earnings: break in service

(1) Paragraph (3) applies to a member (M) if-

(a) the absence condition is satisfied; and

(b) the earnings used to calculate M's pensionable earnings under regulation 27 are reduced or cease.

(2) The absence condition is that M is absent from work because of-

(a) illness or injury;

(b) maternity leave;

(c) adoption leave;

(d) paternity leave; or

(e) parental leave or shared parental leave .

(3) Amounts equal to the pensionable earnings that M would have received but for the absence are treated as having been paid to M.

(6) The reduced earnings are the amount to which the earnings used to calculate M's pensionable earnings under regulation 27 are reduced-

(a) for any period while M is within paragraph (2);

(b) for any period (period A) while M is within paragraph (2)(b) to (e) and during a period following that period (period B) whilst M continues to be within that paragraph and M's earnings are reduced to zero.

(7) For the purposes of paragraph (6) (b)-

(a) pay received by a woman on maternity leave in respect of days during which she returns to work for the purpose of keeping in touch with the workplace must be ignored;

(b) earnings reduced to zero in period B are treated as if they were reduced to the amount applicable to period A.”

The Equality Act 2010

26. Section 5 provides the following as protected characteristics:-

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

27. Section 19, indirect discrimination:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and
- (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3)The relevant protected characteristics are-

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- race;

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religion or belief;

sex;

sexual orientation.