

Ombudsman's Determination

Applicant	Dr M
Scheme	NHS Superannuation Scheme (Scotland) (the Scheme)
Respondents	NHS Highland, Scottish Public Pensions Agency (the SPPA)

Outcome

1. I do not uphold Dr M's complaint and no further action is required by NHS Highland or the SPPA.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Dr M has complained because he considers that NHS Highland and the SPPA failed in their duties to inform him of the changes within the Scheme prior to him accepting a job from NHS Highland. Particularly they failed to inform him that if he transferred his deferred benefits in the NHS England & Wales Scheme (**the NHSEW Scheme**) to the Scheme, the transfer would be completed on a Cash Equivalent Transfer Value (**CETV**) basis instead of a like for like basis.

Dr M says that had the appropriate information been provided to him at recruitment he would not have accepted the job from NHS Highland.

Background information, including submissions from the parties

4. Dr M was an active member of the Scheme from 17 May 1981 until he left his employment on 15 October 2000 and became a deferred member. In 2001, Dr M transferred his benefits from the Scheme to the NHSEW Scheme. Dr M commenced work as a consultant in New Zealand in 2006 and he became a deferred member of the NHSEW Scheme. As a result, his benefits were preserved in the 1995 section of the NHSEW Scheme and it amounted to 18 years 318 days.
5. In December 2012, following a successful interview, Dr M accepted a job from NHS Highland. He did not commence his employment with NHS Highland until July 2013 as he remained in New Zealand, after his appointment, to assist with the aftermath of an earthquake.

6. During the period that Dr M was a deferred member of the NHSEW Scheme, there were several changes in both Schemes. In December 2013, Dr M requested his deferred benefits in the 1995 section of the NHSEW Scheme be transferred to the 2008 section of the Scheme. On 19 March 2014, Dr M received a letter from the SPPA informing him that 8 years and 132 days of service from the NHSEW Scheme would be transferred to the Scheme.
7. Following receipt of the above letter, Dr M contacted NHSEW to query the amount of benefits that were transferred. On 15 June 2014, NHSEW informed him that 18 years 318 days of membership had been transferred to the Scheme on 19 February 2014. Because of this letter, Dr M instructed the SPPA to go ahead with the transfer.
8. On 19 January 2015 Dr M received a further letter from the SPPA confirming that the credited transfer amount of 8 years and 132 days was added to his Scheme benefits. It informed him that his transfer had been calculated on a non-club basis and therefore the CETV was used to determine the benefits that were transferred instead of his benefits being transferred on a like for like basis. Dr M said that it was only at that point he was made aware of how his transfer credit was calculated. This resulted in Dr M requesting to rescind his transfer and this was agreed with NHSEW. Consequently, the benefits Dr M accrued prior to him commencing employment with NHS Highland have been preserved in the 1995 section of the NHSEW Scheme.
9. After the above letter, there were further correspondence between Dr M and the SPPA regarding the changes to the Scheme and him not being informed of the changes.
10. Unhappy with the responses he received from the SPPA, in July 2016, Dr M, with the help of the Pensions Advisory Service (**TPAS**) made a complaint through the Scheme's internal dispute resolution procedure (**IDRP**) against the SPPA and NHS Highland.
11. Dr M believed both the SPPA and NHS Highland owed him a duty of care to inform him of the changes to the Scheme Regulations. He considered they owed him a duty of care to disclose the changes in the Scheme which adversely affected the preserved benefits of members returning from a break in service. It was Dr M's view that the SPPA and NHSEW owed that duty reciprocally to members of the partner pension provider. In addition, in his view, the SPPA and NHS Highland had a duty to all prospective employees to identify which, if any, NHS scheme they had benefits in. He considered their failure to inform him of the changes amounted to maladministration.
12. The SPPA did not uphold Dr M's complaint at either stages of the Scheme's IDRP. In the IDRP stage two response dated 1 February 2017, the SPPA said that the legislation applicable to Dr M's complaint was the Occupational Pensions Schemes (Disclosure of Information) Regulations 1996 (**the 1996 Disclosure Regulations**), as this was in force at the time that Dr M accepted the job from NHS Highland. It also

said that Regulation M5 (7) of the NHS Superannuation Scheme (Scotland) Regulations 1995 in respect of transfers out of the Scheme was also applicable.

13. The SPPA said that it fully complied with both the Scheme Regulations and the 1996 Disclosure Regulations. It explained that the Scheme and the NHSEW Scheme are wholly separate schemes and said "... [although] rules are similar and there are concessions in both schemes with regard to the movement of NHS employees between similar UK Health Schemes in respect of like for like transfers... this is not automatic and the member is required to request a transfer or inform SPPA of previous service." It explained that when Dr M transferred his benefits from the Scheme to the NHSEW Scheme, he extinguished all his rights in the Scheme and he also ended any requirement under the 1996 Disclosure Regulations for the SPPA to inform him, as a former member, of any subsequent changes to the Scheme. Dr M was a deferred member of the NHSEW Scheme while he lived and worked in New Zealand. Therefore, the responsibility to inform him of any material alterations in the basic information of the Scheme was the responsibility of NHSEW.
14. The Member's Guide Post April 2008 Section (**the Guide**) which Dr M has confirmed he received from NHS Highland, fulfilled the requirement in the 1996 Disclosure Regulations which was still in force at the time Dr M commenced his NHS employment in July 2013. The Guide does not go into detail in respect of transfers but advises the member to contact the SPPA to discuss their options. From 2014 a more detailed fact sheet has been available on the SPPA website which explains the difference between club and non club transfers.
15. The SPPA explained why Dr M was transferred to the 2015 Scheme and confirmed that Dr M can take his deferred benefits in the NHSEW Scheme from age 60 while continuing to accrue further pensionable service in the 2015 Scheme.
16. Unhappy with the response he received in the IDRP stage two, Dr M referred his complaint to this Office and made the following points:
 - The information in the Guide was misleading. Specifically, it failed to inform him of the use of a CETV rather than a like for like transfer of his previous NHS pension contributions.
 - As a result, his previous contributions of 18 years 318 days were reduced to 8 years 132 days in the new scheme. As someone within ten years of retirement the loss of contributions was unimaginable to him.
 - Because of changes made before he commenced employment, he has now been removed from the final salary section of the NHS Pension Scheme without protection.
 - Had the appropriate information been provided to him at recruitment, he would not have accepted the job with NHS Highland.

17. In response to Dr M's complaint the SPPA reiterated some of the information in its IDRP stage two response but also made the following points:-

- The Scheme Regulations which are published on the SPPA's website provide that had Dr M returned to NHS employment within five years of leaving he would have been eligible to join the 1995 section of the Scheme and transfer any preserved/deferred NHSEW Scheme benefits into the Scheme on a like for like basis. Dr M's break was longer than five years which was why he was required to join the 2008 section and the transfer was on a CETV basis.
- There were seven months between when Dr M was offered the post and when he commenced employment. It was open to him during that time to ask the SPPA or the NHSEW administrators about his individual pension provision.
- The requirement to introduce reformed schemes from April 2015 was contained within the Public Service Pensions Act 2013 (**the 2013 Act**). Although Dr M considers information in the 2013 Act should have been communicated to him sooner, final details of the new CARE schemes and protections were negotiated at a scheme level with scheme regulations introduced shortly before April 2015.
- It appreciates the position Dr M finds himself in, due to the numerous changes of the NHS pension scheme. However, it remains of the opinion that the SPPA were not obliged to inform him of the changes that would affect his deferred NHSEW Scheme benefits as it had no responsibility for those accrued benefits.
- It considers that Dr M was provided with relevant information as a new joiner when he took up employment with NHS Highland. The Guide he received directed him to contact the SPPA if he wished to consider a transfer to the Scheme.

18. In response to Dr M's complaint NHS Highland made the following points:-

- It appears that it did have an obligation to ensure that Dr M was informed of the existence of the Scheme and that he was given details of how to access the SPPA website, where up to date information could be found.
- Dr M has confirmed that he was provided with a copy of the Guide. This was sent to him along with his offer of employment in 2013. NHS Highland does not have an obligation to provide each potential employee with details of their individual potential pension. It is also not NHS Highland's responsibility to disclose the potential effect of the 2013 Act on individual pensions. The Guide advises that contact should be made with the SPPA should transferring of a pension be an option.
- NHS Highland's recruitment procedures would not include speaking with candidates to advise them of their potential pensions. It would not have the details of individual pensions nor would it expect to have this. It would therefore not have known if Dr M had been a previous member of the SPPA or not.

19. In response to the formal responses Dr M made the following points:

- Implicit from the SPPA's statement is that it owed a duty to preserved members of the SPPA Scheme. This required at the very least a duty to all prospective employees to establish in which Scheme the prospective employee had preserved rights. Neither the SPPA nor NHS Highland took any steps to confirm whether he had any preserved NHS pension rights and if he did, in what Scheme. The SPPA has not provided any evidence that it would have provided appropriate information to a member of its own Scheme.
- The essence of his case is that "basic scheme information" should have included some intimation of the use of the "Cash Equivalent Transfer Value" for members returning to the Scheme. This would have applied equally to those with preserved benefits in any of the UK regional NHS Pension Schemes as they are essentially reciprocal.
- Regarding the due diligence, prior to his application and appointment he studied in some depth the published material that was available to him in 2012 and early 2013 but there was no mention of the CETV in any material. It was beyond his imagination that such a devastating change would or could have been made. Since his return to the UK he has not met a single NHS employee who is aware of this change for workers with preserved benefits.
- The responsibility to inform prospective employees lay with the employer and not the employee.

Adjudicator's Opinion

20. The SPPA are the Administrators of the Scheme and its role is to administer the Scheme in accordance with the Regulations that govern it. It is Dr M's view that the SPPA and NHS Highland have failed in their duty to inform him of the changes in the Scheme Regulations that affects the way his past and future benefits in the Scheme will be treated. After considering Dr M's complaint, the Adjudicator did not consider that NHS Highland or the SPPA failed in their duties. This was because Dr M was a deferred member of the NHSEW Scheme. Therefore, neither the SPPA nor NHS Highland would have been aware of his deferred benefits.
21. Point 5 of Schedule 1 of the 1996 Disclosure Legislation states:

"Whether, and if so upon what conditions (if any), a member of the scheme, whose pensionable service has terminated before normal pension age, may re-enter pensionable service."
22. In the Adjudicator's opinion, Dr M was not re-entering the Scheme as he did not have deferred benefits in the Scheme, his deferred benefits were in the NHSEW Scheme. Although the two Schemes provide similar benefits to NHS employees, they are independent of each other. The SPPA is not Dr M's employer. Therefore, as the Scheme Administrators it would not have been aware of the details of prospective

new employees nor would it have been aware that those employees had benefits in an alternative NHS scheme that they may wish to transfer to the Scheme.

23. The Adjudicator considered that it was unreasonable for anyone to expect it to be aware of such information, prior to being informed by the member themselves. Consequently, it was her view that I would not deem that the SPPA had a duty to inform Dr M of the changes in the Scheme Regulations, prior to him accepting the job from NHS Highland.
24. Dr M said that he did not inform NHS Highland that he had preserved benefits in the NHSEW Scheme at his interview nor prior to him commencing employment. This was because he considered it "...was clear from his application that he had many years of NHS Service and it would have been extraordinary for an NHS employee with that length of service not to have existing contributions within the Scheme."
25. In the Adjudicator's opinion, it was not reasonable for Dr M to hold NHS Highland accountable for the assumption he made regarding his membership in the NHSEW Scheme. In her view, NHS Highland fulfilled its duty to Dr M when it offered him a job as it provided him with details of the Scheme when it sent him the Guide. The Guide informed Dr M that if he wished to transfer benefits into the Scheme, he should contact the SPPA.
26. The Scheme Regulations are changed by an Act of Parliament and not by the SPPA. As Dr M's break from NHS employment was over five years he was no longer eligible to join the 1995 section of the Scheme and had to join the 2008 section instead. As the SPPA has previously explained to Dr M, each section of the Scheme is governed by its own Regulations. As a result, Dr M was not entitled to have his benefits transferred from the NHSEW Scheme to the Scheme, on a like for like basis. Dr M's preserved benefits have been reinstated into the 1995 section of the NHSEW Scheme. Therefore, in the Adjudicator's opinion, Dr M suffered a loss of expectation and not an actual financial loss.
27. Dr M has said that he would not have accepted the job from NHS Highland had he been made aware of the changes within the Scheme. However, the Adjudicator was unable to conclude that the deciding factor for Dr M to leave his post in New Zealand and return to NHS employment was solely down to the potential pension benefits he could have gained. In fact, Dr M had said that he always intended to return to NHS employment and, he has continued his employment with NHS Highland, subsequent to finding out about the changes within the Scheme.
28. Although Dr M accepted the job from NHS Highland in December 2012, he remained in his post in New Zealand and did not commence work with NHS Highland until July 2013. In the Adjudicator's opinion, Dr M had sufficient time, prior to starting his job with NHS Highland, to contact the SPPA as per the Guide, to make it aware that he had deferred benefits in the NHSEW Scheme which he wished to transfer. In her view, had Dr M done this, on the balance of probabilities, he would have been informed by the SPPA on what basis his transferred benefits would be calculated.

Therefore, he may have been able to mitigate any potential loss that he feels he will incur in the future as he would have been able to decide if to accept the job from NHS Highland or to stay and continue his employment in New Zealand.

29. As a result, it was the Adjudicator's view that I would not uphold Dr M's complaint against the SPPA or NHS Highland.
30. Dr M did not accept the Adjudicator's opinion as he did not consider the Adjudicator had examined his issues in sufficient detail to justify the conclusion reached. He reiterated that his claim was that:-
 - NHS Highland and SPPA owed him a duty of care.
 - Both NHS Highland and SPPA failed to discharge that duty.
 - He suffered loss of financial security as a consequence.
31. Consequently, Dr M requested that I examine and determine:-
 - Does the NHS Pension Scheme form part of the conditions of service for NHS employees?
 - Was the "Guide to the Scheme" fit for purpose? Was the risk of the CETV to potential employees in his position so great that it required a specific warning? If it did not, why was such a warning added to later versions? What was the thought process that led to later revisions? Who were they intended to protect and why?
 - Are NHS Highland and the SPPA correct that he was not entitled to protection from the 1996 Disclosure Regulations because his preserved benefits were in the NHSEW and not the SPPA, although he was a previous member of the SPPA?
 - Is it likely that this was the intention of those who drafted the legislation?
 - Accepting that neither NHS Highland and SPPA could be expected to be aware of the individual circumstances of each employee at appointment, did NHS Highland and SPPA owe a duty to a class of prospective employees who had preserved benefits and were at particular risk of the CETV following radical changes to the Scheme?
 - Are NHS Highland and SPPA correct that because he was transferring benefits from NHSEW he had an additional duty (over and above a preserved SPPA member) to enquire about the terms as well as the process of transfer. In particular are NHS Highland and the SPPA entitled to rely on this defence after they had failed in their primary duty to establish whether he was a preserved member of the SPPA?

Ombudsman's decision

32. Dr M has asked me to determine a number of points but I find that the crux of his complaint is if the SPPA and NHS Highland owed him a duty of care as a prospective employee and prospective member of the Scheme and whether or not they fulfilled their duty. It is Dr M's assertion that they failed in their duty to inform him that if he transferred his preserved benefits from the NHSEW Scheme to the Scheme, the transfer would be completed on a CETV basis as opposed to a like for like basis. As a result, he considers that they both misrepresented his condition of service.
33. It has been established and agreed that the relevant disclosure legislation that was in place at the time that Dr M accepted the job from NHS Highland was the 1996 Disclosure Regulations. It is Dr M's view that he was re-joining the Scheme as he had preserved benefits in the NHSEW Scheme. However, this is not the case as the two Schemes are not linked, though they provide similar benefits. Therefore, he was not an active or deferred member of the Scheme, he was a prospective member. The said legislation imposed a duty on the SPPA to provide Dr M, as a prospective member of the Scheme, with basic information about the Scheme and details of the basic information was contained in Schedule one.
34. Dr M has confirmed that he received the Guide from NHS Highland following his appointment. Under the heading "**Transferring benefits into the Scheme**" the Guide states:

"If you have been a member of another pension scheme you may wish to consider transferring your benefits into the Scheme to buy additional service. If you wish to explore a transfer please contact the SPPA. We will advise on the course of action that you need to take."

I find that the information in the Guide fulfilled the requirement of the 1996 Disclosure Regulations to provide prospective members, like Dr M, with basic information about the Scheme.

35. I accept that the Guide Dr M received did not inform him that any transfers into the Scheme would be completed on a CETV basis. However, I agree with that Adjudicator that it was open to Dr M, as stated in the Guide, to contact the SPPA and discuss, prior to him commencing his employment, the option of transferring his benefits. Like the Adjudicator, it is also my view that had he done so, on the balance of probabilities, he would have been informed on what basis his preserved benefits in the NHSEW Scheme would have been transferred to the Scheme. Consequently, he would have been able to decide at that point, whether he wished to commence his employment with NHS Highland or whether he wished to decline the job and remain in New Zealand.
36. Dr M considers that the SPPA subsequently updating its website to provide further information about club and non club transfer terms evidences that the information he received was deficient. Although neither the Guide nor the SPPA website specifically

included details of the CETV at the time of Dr M's appointment, he was informed that he should contact the SPPA to discuss any transfers. I consider the additional information which is now available is helpful for members considering transfers in. However that does not mean that the lack of this information in previous literature, constituted a failure of the SPPA's duty to Dr M as a prospective member.

37. As an employer, there is no statutory obligation for NHS Highland to ascertain from prospective employees if they have preserved benefits in any NHS Schemes. It has an obligation to inform prospective employees of the option to join the Scheme and I find that it fulfilled this obligation when it provided Dr M with the Guide.
38. There is no duty, legislative or otherwise, for the SPPA to establish if prospective employees have preserved benefits in another NHS Scheme. I find that doing so would not only be costly for the SPPA it would also be unreasonable to expect them to. It is not their role as Administrators to do so.
39. I appreciate that the NHS Pension Scheme forms part of the conditions of service for NHS employees as eligible employees are automatically enrolled into the Scheme when they commence employment. I note that Dr M has said that he would not have accepted the appointment from NHS Highland if he were informed of the changes to the Scheme, when he was offered the job. However, while it is regrettable that Dr M now finds himself in a situation that he says he would have avoided, had he been informed of the changes to the Scheme, it is my view that the SPPA and NHS Highland cannot be held accountable for that.
40. I appreciate Dr M's frustration with the situation he now finds himself in. Nonetheless, I find no fault is attributable to the SPPA or NHS Highland as it is my view that they both fulfilled their duties to Dr M as a prospective employer and prospective member of the Scheme.
41. Therefore, I do not uphold Dr M's complaint and make no award.

Karen Johnston

Deputy Pensions Ombudsman
20 March 2018