

Ombudsman's Determination

Applicant	Mr R
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHSBSA)

Outcome

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

Complaint summary

3. Mr R has complained that NHSBSA has not calculated his pension benefits correctly because an incorrect reckonable pay figure has been used, and the necessary increases have not been applied as required.

Background information, including submissions from the parties

4. Mr R's complaint has evolved over time and I acknowledge that there were many exchanges of correspondence between the parties. Whilst I have noted all the information provided by the parties, I have only referred to the material facts which have led to my conclusions.
5. In anticipation of his retirement, Mr R contacted NHSBSA in January 2017, and requested specific information in relation to three matters. Although NHSBSA responded, it did not do so to Mr R's satisfaction and Mr R eventually complained formally under the Scheme's internal dispute resolution procedure (**IDRP**). Mr R remained dissatisfied following the conclusion of the IDRP, so he referred his complaint to this Office in June 2017.
6. NHSBSA received Mr R's application for the payment of his Scheme benefits in July 2017, and it notified Mr R of the benefits payable in a Retirement Benefit Statement dated 15 August 2017. Among other things, this statement confirmed that the pay used in the calculation of Mr R's benefits was £47,720.42; his total membership at retirement was 13 years 73 days; the Pensions Increase deemed date was 1 August 2011; and his pension was £11,839.39 before commutation.

7. Mr R wrote to NHSBSA on 20 August 2017, and complained formally about the inaccuracy of the figures used in the calculation of his benefits. Mr R said his reckonable pay should be £49,359.90 and his membership was 13 years 102 days. Mr R said he was unclear about the additional payment that should have been made to him for the 40 months that he worked beyond his retirement age of 65. Accordingly, Mr R asked NHSBSA to provide details of all the calculations used so he could check and understand his pension. Mr R also raised a number of payment administration issues.
8. NHSBSA responded to Mr R on 19 October 2017, it said its Technical Consultancy Team had been asked to check the basis of Mr R's retirement benefits and that a stage one IDRPs decision would be issued soon.
9. On 25 October 2017, NHSBSA issued its stage one IDRPs response. In it, NHSBSA provided an explanation of how Mr R's reckonable pay had been worked out. NHSBSA also gave detailed information about how his retirement benefits had been calculated. These calculations included a late retirement factor applied to enhance his benefits as he had worked past the Scheme's normal retirement age, and the Cost of Living increase.
10. On 3 November 2017, Mr R wrote to NHSBSA and disputed its findings. Among other things, Mr R said NHSBSA had previously confirmed on at least two occasions that his reckonable pay was £49,359.90. So, he rejected the pensionable pay figure used and said he was still not able to confirm the calculations provided. Mr R also informed NHSBSA that he had written to his employer regarding the disputed reckonable pay.
11. NHSBSA issued its second stage IDRPs response on 8 December 2017. It explained that it did not have access to an employer's pensions and payroll systems and that it was not in the position to validate the information provided by an employer. NHSBSA confirmed that it had provided Mr R with benefits statements on 31 January and 5 April 2017, which used a reckonable salary of £49,359.90. NHSBSA explained that reckonable pay is calculated using the best of three consecutive years pay within the last 10 years, and confirmed that the information provided is correct. NHSBSA included the manual calculations used to calculate the benefit statements, the slightly different calculation that was carried out to determine his pension benefits, and a manual calculation showing how the cost of living increases had been applied.
12. Mr R remained dissatisfied following the stage two response from NHSBSA. He asserts that in the 1995/2008 NHS Pension Scheme Guide for Members (**the Guide**), there is no mention of his reckonable salary being reduced, and his contention remains that the NHSBSA has used the wrong figure to calculate his pension. He has highlighted the following extracts from Version 19 of the Guide:

“An annual pension worth 1/60th of reckonable pay per year, and pro rata for any part year, of membership...

The 2008 Section's Normal Pension Age is 65. If you work beyond age 65 your pension will be payable from when you eventually retire and it will be increased because it is being paid later. More details about this are in the late retirement section of this guide on page 32. You must stop work in all your jobs for at least 24 hours to enable all of your retirement benefits to be paid. A 24 hour break is not required if you partially retire and utilise flexible retirement options...

The pension for 'Officers' is based on your Reckonable Pay at retirement. This is the average of the best consecutive three years pensionable pay out of the final ten years prior to retirement...

You will receive a pension based on your reckonable pay. Your reckonable pay is the average of the best three consecutive years' pensionable pay in the last ten. Your pension is 1/60th of your reckonable pay for each year of pensionable membership in this Section. Part years will also count proportionally towards your pension. You will have the choice of taking a retirement lump sum by reducing your annual pension. Your pension is calculated as follows:

reckonable pay x pensionable membership in days x (1/60 x 1/365) = pension

...

If you retire from active membership after age 65, any of your pension earned before age 65 will be increased to take account of the fact that it is being paid later than your Normal Pension Age."

13. Mr R asserts that it is not clear what increase has been applied for the years he worked beyond 65, and that leap years should have been included in the calculation of his membership.
14. In response to a query from this office, NHSBSA confirmed that it had applied the relevant regulations in calculating Mr R's pension entitlement. These have been set out in the Appendix to this Determination.
15. NHSBSA also provided further explanations as follow:-
 - When it calculates a member's pension entitlement under the 2008 section, the initial reckonable pay calculations includes cost of living increase. Once the three consecutive reference years have been identified, the cost of living increases are removed "to avoid double indexation" by NHSBSA's paying agent. NHSBSA said further that if it "provided pension benefits inclusive of the cost of living increases, it would lead to the pension receiving double indexation. This is because the pensions increase deemed date is the day after the three consecutive years."
 - It attempted to demonstrate this in its response of 8 December 2017 by providing a reckonable pay calculation with and without the cost of living increases. "This

showed that irrespective of the way cost of living increases are applied, the resulting pension works out the same.” NHSBSA said as the cost of living factor applied is 1.110, it would explain why Mr R perceived a reduction of 10% to his pension benefits.

- With reference to Mr R’s assertion that his membership should include leap years, NHSBSA confirmed that Regulation 2.A.7 provides for the exclusion of leap years in the calculation of a member’s service.

Adjudicator’s Opinion

16. Mr R’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:-
- From the information and explanations provided by NHSBSA, it is evident that the cost of living increase was applied at the start to the initial reckonable pay amount. Once the best three consecutive years were ascertained, the reckonable pay figure of £47,720.42 was arrived at. Mr R’s pension benefits were then calculated and the factors were applied to the pension benefits. This is in line with the relevant regulations governing Mr R’s benefits in the Scheme.
 - Consequently, Mr R’s benefits in the Scheme had been correctly calculated.
17. Mr R Trust did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Mr R provided his 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 Mr R for completeness.

Ombudsman’s decision

18. Mr R did not accept the Adjudicator’s finding on the basis that he had based his pension calculations on the reckonable pay figure of approximately £49,000, and this amount should have increased, and not decreased.
19. Mr R asserts that NHSBSA has confirmed, in its letter of 25 October 2017, that his reckonable pay should be £52,969.66, and that this should then be multiplied by the cost of living factor of 1.110 which would give £58,796.32. In addition, Mr R says:

“Adding cost of living to my Reckonable pay NHS Pensions appears to have used a divisor in the calculation rather than a multiplier and has arrived at a lower amount than the two Reckonable pay figures it has provided to me though the fact that Cost of living is added to Reckonable pay makes it a nonsense that a lower figure has been arrived at. There is no mention that I can see in any of the NHS Pensions documentation that states a reduction to Reckonable salary is due”

20. As a public sector scheme, the Scheme is governed by the regulations made under an Act of Parliament. These regulations set out what pension is to be paid, and how it is calculated.
21. Regulation 2.A.11 set outs adjustments that must be made to a member's reckonable pay, to take account of inflation for the period in question, where applicable. Regulation 2.D.3 details how increases for late payment, that is where a pension is put into payment after the Scheme's normal retirement date, are to be applied. Regards must also be had to Regulation 2.A.7 which provides how periods of membership should be calculated.
22. Given the complex nature of pension schemes, some scheme administrators provide scheme booklets and other helpful literature detailing the salient points of a particular scheme, as is the case for the Scheme. However, in the event of a conflict between the governing rules/regulations and any member booklet or subsidiary literature, the regulations of the Scheme will always be given primacy. It is therefore my role to ensure the Scheme Regulations have been correctly followed.
23. Mr R was made aware of the primacy of the Regulations in the Guide which says:

“This guide is intended to provide you with a general overview of the benefits provided by the 1995/2008 NHS Pension Scheme. We have taken great care to get the details right at the time of publication but it does not give a complete or legally binding statement of the law and regulations which govern this Scheme. Nothing in this guide can override the Regulations which set out the conditions of entitlement and determine the rate at which benefits are payable. In the event of any conflicting information, the Regulations will prevail. You can find the most up to date version of this guide on our website at: www.nhsbsa.nhs.uk/nhs-pensions. If you are in any doubt about how your benefits are calculated or what you may be entitled to, please contact your local pension administrator or NHS Pensions.”
24. Mr R believes the Guide sets out the “published process” that should be followed when calculating a member's retirement benefits. However, the Guide provides a very general interpretation of how a pension can be calculated, and does not go into any great detail regarding the exact calculation method that is used.
25. Having been provided with a detailed manual calculation showing the methodology used to work out his actual benefits, Mr R does not believe that NHSBSA has correctly applied a cost of living increase in line with the relevant Scheme Regulations. This issue has been further compounded in that he received benefit statements on 31 January 2017 and 5 April 2017, that quoted a different, higher reckonable pay figure on which his future benefits would be calculated.
26. The process of calculating a member's pension can be a complicated one but it is imperative that the regulations are correctly applied. In this case, having considered the relevant regulations, I am satisfied that the inflation proofing element of the

calculation has been implemented correctly. A notional cost of living increase is ascertained when working out the best three-year period, in the last ten years, that results in the highest reckonable pay figure. That notional cost of living or inflation proofing figure is then applied to the member's pension benefits, after they have been calculated.

27. This complaint seems to have arisen as the scheme literature Mr R has relied upon does not go into great depth regarding the specific calculations that will be carried out in practice, in order to determine his final retirement benefits. Although the phrase "Your reckonable pay is the average of the best three consecutive years' pensionable pay in the last ten" is strictly speaking correct, it does not explain the other calculation work needed to actually produce the final pension amount that will be put into payment. However, I am content that the correct methodology has been followed, and the correct reckonable pay figure has been used.
28. In relation to Mr R's membership in the Scheme, it is correct that NHSBSA has not included leap years in the final calculation. This is in line with the relevant regulation.
29. Mr R has also said he would like to be compensated for the amount of time he has spent dealing with this issue. I do not usually direct redress for the time a member spends dealing with their pension and would expect that individuals deal with matters relating to their pension, including a complaint as a matter of course.
30. Therefore, I do not uphold Mr R's complaint.

Karen Johnston

Deputy Pensions Ombudsman
25 July 2018

Appendix

NHS Pension Scheme 2008 Section

2.A.11 Adjustments for inflation in determining reckonable pay under 2.A.10

(1) In determining—

- (a) the pensionable pay for the period of pensionable service referred to in 2.A.10(4),
- (b) the period of 1095 days for which the member's pensionable pay was the highest for the purposes of regulation 2.A.10(6), or
- (c) the pensionable pay for either of the periods of pensionable service referred to in regulation 2.A.10(7), the amount of pensionable pay is adjusted for inflation.

(2) The reference in paragraph (1) to adjusting the amount of pensionable pay for inflation, is a reference to increasing the member's pensionable pay (for a specified period or periods) by an amount equal to the amount by which, at the relevant day, an official pension within the meaning of section 5(1) of the Pensions (Increase) Act 1971 first qualifying for an increase under that Act on the same day as the specified period, or periods, ended, would have been increased (if at all).

(3) In this regulation—

- (a) "specified period" means any single scheme year falling in the period, or periods, referred to in 2.A.10(4), (6) or (7), and
- (b) "the relevant day" has the meaning given in regulation 2.A.10(5).

2.A.7 Calculation of periods of membership or service

(1) References in this Part to any period expressed in days are references to the period in question ignoring 29th February, expressed in days.

(2) For the purposes of this Section of the Scheme, and except where provided otherwise in this Part, periods of service are to be expressed in the first instance in complete days or fractions of a day, and the initial aggregation of periods that require to be aggregated is done in the first instance by reference to periods so expressed.

(3) If, when all periods of service that require to be aggregated have been aggregated, there is any excess part day over the number of whole days, that excess is rounded up to a full day.

(4) If service is referred to as service in years and days—

- (a) the days referred to in paragraph (2), and
- (b) the full days referred to in paragraph (3),

are converted into years and days on the assumption that a year contains 365 days.

(5) If service is referred to as service in years—

(a) the days referred to in paragraph (2), and

(b) the full days referred to in paragraph (3),

are converted into years by dividing the number of days by 365, and using the result to four decimal places.

2.D.3 Late payment of pension with actuarial increase

(1) This regulation applies if a member becomes entitled to immediate payment of pension under regulation 2.D.1 after reaching the age of 65.

(2) So much of the amount of the pension to which the member would otherwise be entitled under that regulation (before any commutation under regulation 2.D.14) as is attributable—

(a) to the member's pensionable service before that age; and

(b) to any contributions paid under regulations 2.C.8, 2.C.10 or 2.C.11 before that age,

is increased.

(3) The amount of the increase must be calculated in accordance with guidance and tables provided by the Scheme actuary to the Secretary of State for the purposes of this regulation.

(4) In preparing that guidance and those tables the Scheme actuary must use such factors as the Scheme actuary considers appropriate, having regard, in particular, to the period after reaching the age of 65 before the member becomes entitled to immediate payment of the pension and the life expectancy of the member.

(5) In the case of a 2008 Section Optant, this regulation is subject to regulation 2.K.21.