

Ombudsman's Determination

Applicant	Dr Y
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHSBSA)

Outcome

1. I do not uphold Dr Y'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. Dr Y has complained about the way in which NHSBSA has implemented a change to "on call" allowances. Dr Y believes this change has caused her pension benefits to be undervalued.

Background information, including submissions from the parties

4. Dr Y was a member of the 2008 Section of the Scheme, and retired on 7 October 2016.
5. During her period of Scheme membership, Dr Y worked for the Basingstoke & North Hampshire Hospital Trust (**BNHH**).
6. As part of her pay package, Dr Y received "on-call" payments for various elements of her work. These payments were originally classed as being pensionable.
7. Between 15 July 2010 and 10 September 2010, NHS Employers and the NHS Staff Council, in consultation with the Department of Health, deliberated on the nature of the current on-call payment protection arrangements.
8. As Dr Y was not employed as a doctor, dentist or senior manager, she was subject to the national pay system for all other NHS staff, Agenda for Change (**AfC**).
9. AfC is essentially a regularly updated pay system that allocates certain posts to set pay bands and, among other things, seeks to "harmonise terms and conditions of service such as annual leave, hours and sick pay, and work done in 'unsocial hours'".

10. Any amendments, updates, revisions or additions to an AfC member's terms and conditions, including pay, were detailed in a series of AfC Circulars issued by NHS Employers. These documents were made widely available on the Scheme's dedicated website.

11. NHS Employers issued Pay Circular (AfC) 1/2010 on 25 January 2010 which stated:

"Pay Circular (AforC) 1/2010

Changes to NHS Terms and Conditions of Service Handbook (amendment 16): on-call, equal opportunities, frequently asked questions and national bodies

To: All NHS employers

Summary

This pay circular informs employers of agreed changes to the NHS Terms and Conditions of Service Handbook. In Section 2 the period of protection of current on-call arrangements is extended...

...

The NHS Staff Council is reviewing on-call allowances. The Council has agreed that employers should continue to use existing local and nationally agreed systems of remuneration of on-call until 31 March 2011.

...

The Staff Council has agreed that employers should continue to use existing local and nationally agreed systems of remuneration of on-call until the national review is finished. Unless agreed otherwise by local partnerships, existing payments under local and nationally agreed arrangements will continue until 31 March 2011 when any new arrangements agreed by the Staff Council would start. This extended protection applies to existing staff and new starters.

...

This is amendment number 16 to the NHS Terms and Conditions of Service Handbook. The Sections attached to this pay circular have been revised and replace the existing sections in the Handbook."

12. A further Pay Circular (AfC) 5/2010 was issued on 2 November 2010 which stated:

"Pay Circular (AforC) 5/2010

Changes to NHS Terms and Conditions of Service Handbook (amendment 20): Section 2: Maintaining round the clock services: on-call: Section 17 and Annex M: mileage allowances and lease cars

To: All NHS employers

...

This pay circular informs employers of the NHS Staff Council's agreements on:

Section 2: Maintaining round the clock services - on-call. This follows the consultation with the NHS on draft principles between 15 July and 10 September 2010...

...

Section 2:- the current national on-call payment protection arrangements end on 31 March 2011. The NHS Staff Council has agreed that after this date the arrangements for staff providing on-call cover must be agreed locally in partnership in line with the definition and principles in the new Annex A3. Employers need to have plans for the conduct of local negotiations and the payment of on-call after the national pay protection ends.

...

The NHS Staff Council has agreed a set of principles to underpin local negotiations to harmonise on-call payments. This follows the review of on-call and the consultation on the draft principles between 15 July and 10 September 2010. Implementation guidance has been agreed to support local partnerships in the conduct of their negotiations.

13. After discussions held between the Department of Health and the NHS Staff Council, the method by which "on-call" arrangements were classed as being pensionable changed with effect from 1 April 2011.
14. As part of this change, "Employer Newsletters" were issued by NHS Employers in December 2010 (TN12/2010) and March 2011 (TN3/2011).
15. Among other things TN12/2010 stated:

"2. Pension Position of On-Call Arrangements for Agenda for Change Staff"

NHS Pensions Understands that with the introduction of the Agenda For Change (AfC), groups of staff could retain their current on-call provisions (both national and local) or undertake the interim regime prescribed under Section 2 of AfC whilst the NHS Staff Council sought to devise new harmonised arrangements.

Employers will be aware that the review has now been concluded and the current arrangements will end on 31 March 2011. The NHS Staff Council has agreed that after this date arrangements for AfC must be agreed locally in partnership. National principles have been developed to underpin local negotiations. The principles are now included as Annex 3 to the NHS terms and conditions of service handbook. Pay Circular AfC 5/2010:

Principle 10 concerns pensions and confirms local partnerships should always seek advice from NHS Pensions on any questions relating to the NHS Pension Scheme and on-call payments.”

16. Employer Newsletter TN12/2010 stated:

“10. Pension Position of On-Call Arrangements for Agenda for Change Staff

In the article contained in the December 2010 newsletter NHS Pensions acknowledged that some employers previously operating “combined” on call arrangements (where the commitment/availability payment and payment for work done are paid together), may have pensioned the whole amount of this payment for both part time and whole-time staff.

Where employers have previously pensioned the whole amount of the payment under this type of arrangement it has been exceptionally agreed in consultation with the Department of Health and NHS Employers that pensions may be protected up to 31 March 2011 only.

From 1 April 2011 employers must comply with the pension position as detailed in the December 2010 newsletter. No further protection will be granted.

Pensions may also be protected up to 31 March 2011 where employers review their on-call arrangements and this results in a reduction in pensionable pay.”

17. On 2 November 2011, BNHH issued its staff with a document announcing the changes to the on-call arrangements. The new on-call rota was then implemented in May 2012. Dr Y argues that despite the supposed implementation date the “trust [BNHH] promised to extend the transitional arrangements until 31 March 2012”.
18. Dr Y was not happy with the implementation of the changes to on-call payments, specially the implementation date, as she felt these payments “were an agreed part” of her terms and conditions and as such could not be amended.
19. Dr Y duly complained to NHSBSA under the Scheme’s internal dispute resolution procedure (**IDRP**).
20. NHSBSA issued its stage one response on 7 February 2017 and stage two on 12 May 2017. Neither response upheld Dr Y’s complaint in regard to on-call payments.
21. Not satisfied with either response, Dr Y brought her complaint to this office.

Adjudicator’s Opinion

22. Dr Y’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:-

- Dr Y was a member of the 2008 Section of the Scheme and her pension was calculated using her 'Reckonable Pay' (**RP**) at retirement. RP is calculated as the average of the best three years consecutive pensionable pay, out of the final ten years prior to retirement.
 - As Dr Y was not employed as a doctor, dentist or senior manager, she was subject to AfC, the national pay system for all other NHS staff. AfC is a regularly updated pay system and any amendments to it are binding on all relevant members.
 - As per TN12/2010 and TN3/2011, the implementation date of the change to on-call payments was effective from 1 April 2011, regardless of how long local negotiations took within each Trust or Authority. NHSBSA had no discretion to amend this date.
 - BNHH, as an employer, was given considerable latitude when implementing the changes to the pensionable nature of on-call allowance payments, with the only specific direction being that any changes should be "...agreed locally in partnership in line with the definition and principles in the new Annex A3", and that "...current national on-call payment protection arrangements end on 31 March 2011". So, any change was to be backdated.
 - No timeframe was prescribed for how long individual Trusts had in which to reach such an agreement, only that protection was extended until 31 March 2011. It was mentioned that local arrangements regarding on-call payments might "persist throughout deliberations" but 31 March 2011, is the stated end date of the previous arrangements.
 - It might have been desirable if BNHH had notified staff earlier of the changes to on-call arrangements. However, BNHH had no authority to augment, extend or change the implementation date, 31 March 2011 implementation date. In fact, BNHH made significant efforts to protect its staff's on-call payments after the 31 March 2011, implementation date.
 - Prior knowledge of the changes would not have changed the outcome as the decision regarding on-call payments had already been taken as early as 25 January 2010, as per Pay Circular (AfC) 1/2010. This was a decision made in tandem by NHS Employers, the NHS Staff Council, Staff Representatives and the Department of Health.
 - Accordingly, the Adjudicator did not consider that Dr Y's complaint should be upheld.
23. Dr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr Y 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 Dr Y for completeness.

Ombudsman's decision

24. The Department of Health, in its capacity as an advice and guidance body, tasked with supporting ministers in leading the nation's health and social care, was ultimately responsible for initiating the changes to on-call arrangements.
25. Following consultation between the Department of Health and the wider NHS, a change in policy was agreed that amended the circumstances in which on-call payments to certain NHS professionals would be classed as being pensionable.
26. Dr Y's assertion is that, at the very least, NHSBSA should have allowed her to protect her salary under the old on-call arrangements until March 2012, as the BNHH only announced the changes to staff on 2 November 2011, and that the new on-call rota was not implemented until May 2012.
27. Dr Y believes NHSBSA has discriminated against her given the limited number of working years remaining for her after the on-call arrangements were amended. She is also unhappy at the poor level of information she received regarding the changes and that the pension contributions she made until May 2012, took into account her on-call earnings under the old arrangement, but will not count towards her pension after 31 March 2011.
28. The change to the pensionable nature of on-call payments is not an amendment to the Scheme as a whole, but does affect the benefits all members can expect to receive. These changes were made in consultation with the relevant bodies responsible for managing the Scheme, and NHSBSA has little or no room to operate in the way Dr Y has suggested, nor can it waive the 31 March 2011 implementation date. I appreciate that BNHH's challenge of the new arrangement and the lengthy discussions that continued for an extended period of time, may have caused Dr Y to believe that the outcome might be different. However, once the change was agreed, it was simply a matter of time until the implementation of the new arrangement was finalised.
29. BNHH continued to debate how the new arrangement might be implemented well after the 31 March 2011 deadline, this was allowed for in TN12/2010 and TN3/2011. Accordingly, until the new arrangement was agreed locally, Dr Y continued to make pension payments on her on-call payments as per the old arrangement. That Dr Y continued to make these payments in respect of her on-call payments is regrettable, however these amounts have been refunded to her in full.
30. The change to the on-call arrangements has been rolled out across the NHS and applies to the vast majority of staff regardless of age or length of service. Consequently, I can see no evidence of discrimination.
31. Finally, Dr Y has suggested she does not agree that the correct RP figure has been used to calculate her pension. This complaint was dealt with at IDRP stage 1 and 2. Dr Y should therefore liaise with NHSBSA and BNHH directly for further clarity on this issue.

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32. There has been no maladministration by NHSBSA which has implemented the changes to on-call payments set by the Department of Health and other relevant bodies.
33. I do not uphold Dr Y's complaint.

Anthony Arter

Pensions Ombudsman
29 August 2018