

Ombudsman's Determination

Applicant	Mrs N
Scheme	NHS (Scotland) Superannuation Scheme (the Scheme)
Respondents	NHS Lanarkshire, Scottish Public Pensions Agency (SPPA)

Outcome

1. I do not uphold Mrs N's complaint and no further action is required by NHS Lanarkshire or SPPA. The overpayment is recoverable, and Mrs N should contact SPPA to reach an agreement to repay the money paid to her over her entitlement.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs N's complaint is that an abatement has been applied to her pension on the basis that she has continued to be employed by the NHS after her retirement from the Scheme, and that an overpayment has occurred as a result. Mrs N claims she is engaged by the NHS as a worker not an employee, therefore abatement should not apply to her benefits, meaning that there would be no overpayment.

Background information, including submissions from the parties

4. From 4 March 1991 until 15 August 2010, when she retired, Mrs N was a member of the Scheme due to her employment as a Clinical Support Worker with NHS Lanarkshire.
5. Between 30 April 2003 and 15 May 2008, and again from 11 July 2008 to present, Mrs N has been employed with Staff Bank (formerly Bank Aide) which is operated by NHS Lanarkshire. Staff Bank operate in a similar manner to an employment agency, but its workers are employed directly by NHS Lanarkshire. The aim being to supply appropriately skilled workers to cover temporary shortages within the workforce. Workers are offered work as and when they are required by NHS Lanarkshire. Staff Bank is under no obligation to offer work, there are no guaranteed hours, and similarly the worker is under no obligation to accept the work offered.
6. In 2010, when Mrs N retired from the Scheme and her Clinical Support Worker role, she was notified by SPPA that continuing employment, or re-employment, with an

NHS Employer, may mean her pension would be subject to abatement if her NHS earnings plus her Scheme pension exceed what her pensionable earnings were before she retired. SPPA requested that, if Mrs N was continuing in NHS employment or was re-employed after her retirement, she notify them. Mrs N left blank the section of her retirement application form regarding continuing NHS employment blank.

7. On 1 March 2015, through an audit undertaken as part of the National Fraud Initiative (**NFI**), SPPA was notified that Mrs N was working for NHS Lanarkshire.
8. On 31 March 2015, SPPA's Payroll department wrote to Mrs N informing her that an overpayment of £12,312.85 had occurred and explained how. The letter said, "Our Finance department will be in touch with regards to the overpayment and the repayment options available to you." Mrs N says she did not receive this letter and her representative has implied that SPPA generated this letter retrospectively.
9. On 13 April 2015, SPPA's Finance department wrote to Mrs N, this included an invoice for the total overpayment of £12,312.85.
10. Mrs N made enquiries with SPPA and then raised a complaint under the Scheme's two stage internal dispute resolution procedure (**IDRP**). Mrs N said that she is not employed by NHS Lanarkshire, but instead is a worker for Staff Bank. She said she does not receive the same benefits that an employee would, and only works on an, as available and when required basis, where there is no obligation for either party to offer work or accept work offered. She said there is a clear distinction in employment law between a worker and an employee. As she is a worker the abatement should not apply to her, and she had not made SPPA aware of her work with Staff Bank for this reason.
11. SPPA did not uphold Mrs N's complaint at either stage of the IDRP. It said that under the Scheme Regulations, NHS employment is any employment or work undertaken for an NHS Employer. NHS Lanarkshire is an NHS Employer and therefore Mrs N qualified for enrolment in the Scheme as a result of her work for Staff Bank. SPPA said that it views a worker and employee in relation to the Scheme Regulations as equally engaged, and therefore equally bound by the Regulations.
12. Mrs N was dissatisfied with the response and brought her complaint to this Office. She has also said that she has never been informed that she is eligible to join the Scheme as a result of her work with Staff Bank.

Adjudicator's Opinion

13. Mrs N's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS Lanarkshire or SPPA. The Adjudicator's findings are summarised below:-

- There is no dispute that Regulation S2(1) of the NHS Superannuation Scheme (Scotland) 2011 Regulations (**the Regulations**) sets out that abatement will be applied to members in receipt of a pension from the Scheme, under the age of 60, if they continue in employment with an NHS employer. Abatement will be applied where NHS earnings plus the Scheme pension exceeds the pensionable earnings prior to retirement.
- Mrs N is a worker, as confirmed by NHS Lanarkshire. Nevertheless, while this may be an established principle in relation to employment under employment law, pension schemes are not employers in respect of paying pension benefits therefore, they are not subject to employment law or employment principles in the same manner as an employer would be. Due to this, it is necessary to look at the Scheme Regulations and whether there is any distinction for the purposes of the Scheme.
- Part B of the Regulations sets out who qualifies for membership of the Scheme. This states that anyone in NHS employment is eligible for membership of the Scheme, subject to further criteria, such as age, which Mrs N met. NHS employment is defined as “Employment with an employing authority”.
- NHS Lanarkshire is an employing authority, both SPPA and NHS Lanarkshire have confirmed that Staff Bank workers are eligible to be members of the Scheme under the Regulations. NHS Lanarkshire says it believes Mrs N being considered a worker to be irrelevant. It says she was offered and accepted work by the employing authority and therefore is employed and receiving pay for the work undertaken whilst in receipt of a Scheme pension and, is therefore, bound by the Scheme Regulations.
- “Employment” is not a defined term within the Regulations and therefore can be given its ordinary dictionary meaning of ‘having paid work’. Mrs N’s Staff Bank role is paid work and therefore, under the Regulations she is classed as in “NHS employment”. The Regulations allow anyone working for, or employed by, an employing authority to join the Scheme.
- Further, Mrs N is in receipt of a pension from the Scheme, so while she is not a member for her Staff Bank role, she is still bound by its Regulations as a pensioner member. As such Mrs N’s role with Staff Bank should be treated as employment with an employing authority under the Regulations and should have been declared to SPPA in order that it could calculate whether abatement should have been applied to Mrs N’s pension since her retirement date.
- Mrs N has claimed that she has never been informed that she was eligible to join the Scheme as a result of her role with Staff Bank. The evidence that has been provided does not support Mrs N’s position and instead suggests that she was aware, or ought reasonably to have been aware, that she could have joined the Scheme. NHS Lanarkshire has provided copies of two forms completed by

Mrs N at the commencement of her Staff Bank role in 2003 and again in 2008. In both forms she has specifically requested not to join the Scheme. In the form for the first period she has ticked a tick box stating, "I do not wish to join the superannuation scheme" while on the second form she has written, "Do Not Superan Bank Salary."

- In addition to this NHS Lanarkshire has provided copies of two opt out forms completed by Mrs N following her auto-enrolment into the Scheme in July 2013 and June 2016. The reason given for opting out on both forms was "Personal financial reasons."
- With this persuasive evidence it is reasonable that Mrs N ought to have been aware that she could join the Scheme, and the Adjudicator would have expected this to have caused her to question whether her role with Staff Bank would constitute employment under the Scheme Regulations. It would have been reasonable for her to make enquiries with NHS Lanarkshire or SPPA.
- The calculation for determining whether abatement should apply and to what extent is set out in the Regulations. It compares the sum of the pension in payment and the pay in the ongoing or new employment, with the pay the member was receiving prior to retirement. Where the sum of the pension and pay in the new role exceeds the previous pay abatement will apply. Pay in the ongoing/new role is defined as, "pensionable pay (or what would have been pensionable pay had the member been in pensionable employment)". Whereas, "previous pay" is defined as pensionable pay in the final 12 months before retirement. Pensionable pay under the Regulations is the pay earned in relation to pensionable employment, which is employment in respect of which the member contributed to the Scheme.
- Mrs N worked in the Staff Bank role in the 12 months before retirement, but this "pay" is not included in the calculation of "previous pay" as she was not a member of the Scheme for the Staff Bank role and therefore it is not "pensionable pay". She was not a member of the Scheme for her Staff Bank role after retirement, so it is not considered "pensionable pay" post retirement either, but her "pay" for the Staff Bank role is used to calculate the abatement under the Regulations regardless. Mrs N claims that this is unfair as, with her pay from the Staff Bank role only being considered in the calculation post retirement, this means she was earning more prior to her retirement in the two roles than she is now able to earn after retirement, before abatement applies. She contends that the pay from the Staff Bank role should be included in both "previous pay" and "pay" so that it is applied fairly, or it should not be included in either so that no abatement would apply.
- The Adjudicator sympathised with Mrs N's position, however SPPA is bound by the Regulations and has no discretion in applying them. The Regulations are

clear that “previous pay” means the pensionable pay in the last 12 months whereas “pay” means pensionable pay or what would have been pensionable pay had the member been in pensionable employment. SPPA has applied the Regulations correctly, and the Ombudsman is not able to override this.

- Mrs N’s pension is subject to abatement and since Mrs N’s pension has not been correctly abated an overpayment has now occurred.
- The most common defence against recovery of an overpayment is referred to as “change of position”, that is that Mrs N has changed her position such that it would be unjust to require her to repay the overpayment either in whole or in part. To make out a change of position defence certain conditions must be satisfied. Broadly, Mrs N must, on the balance of probabilities, show that because of the overpayment, which she received in good faith, she detrimentally changed her position. The money must have been spent on something she would not otherwise have bought and the expenditure was irreversible. If these elements are satisfied the Ombudsman may direct that some or all of the overpayment may be kept.
- Mrs N has provided no evidence or comments to suggest that this defence is applicable. If she supplies information to support a defence such as this, it will be considered. However, the Adjudicator was not convinced that Mrs N would meet the good faith requirement should she present a change of position defence. This is because she ought reasonably to have been aware that she was eligible to join the Scheme, and so should, quite reasonably have made further enquiries about whether abatement would apply (and, had she done so, would have learned of the correct position earlier). This does not mean to say that Mrs N acted in bad faith, simply that she does not satisfy the good faith requirement.
- There are other defences to the recovery of an overpayment; for example, estoppel and contract. These arise less often in pension cases but will be considered if the circumstances of the case suggest that this is appropriate. Estoppel requires there to have been an unambiguous statement made, on which the applicant has relied and then made irreversible decisions and expenditure as a direct result of that unambiguous statement. There is no evidence to suggest that this would apply in Mrs N’s case. Contract requires there to have been a contract in place that led the member to expect a particular benefit, again there is no evidence to suggest that this would apply in Mrs N’s circumstances.
- The final defence available is that offered by the Limitation Act 1980 (the Limitation Act). The recovery of any overpayment is subject to the Limitation Act. The usual time limit for seeking recovery of an overpayment is six years from the date of the incorrect payment (section 5 of the Limitation Act). There is,

however, provision for the six-year period to be extended where the overpayment is the consequence of a mistake.

- However, SPPA is seeking to recover the overpayment from Mrs N by making deductions through her future pension payments. SPPA is therefore seeking to remedy the overpayment by way of recoupment. It is acknowledged that this option was only offered after SPPA had sought repayment of the overpayment as one lump sum which Mrs N had not paid, however recoupment is the most recent method of recovery sought.
- In the recent case of *Burgess & Ors v BIC UK Limited* [2018] EWHC 785 (Ch), Mr Justice Arnold held that equitable recoupment was not a restitutionary claim for unjust enrichment (unlike the case of *Webber v Department for Education* [2016] EWHC 2519 (Ch)). Rather it was an equitable self-help remedy which did not involve any claim for repayment of the monies paid in the past but an adjustment of accounts in the future. As such, equitable recoupment, as in the present case, is not subject to a six-year limitation period under section 5 of the Limitation Act 1980.
- In any case even if SPPA were seeking recovery by repayment rather than recoupment, section 32 of the Limitation Act would apply as the mistake was not discovered or could not “with reasonable diligence” have been discovered earlier than it was. This extends the six-year limitation period and since SPPA has made its claim for recovery within the required timeframe, limitation would not apply.
- Looking at the information supplied to date, SPPA is entitled to recover the overpayment from Mrs N.

14. Mrs N did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Mrs N 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 N for completeness.

Ombudsman’s decision

15. Mrs N has said that she had not joined the Scheme for her Staff Bank role because she did not work many shifts and the pension contributions would have been so minimal it would have had no financial impact. It was Mrs N’s choice whether she joined the Scheme for the Staff Bank role, there was no obligation for her to do so. The evidence available shows that Mrs N was invited to join the Scheme, and opted not to, on more than one occasion, so I have found no maladministration by NHS Lanarkshire or SPPA in this respect.
16. Mrs N has also said that very few members of the Scheme are aware that abatement exists and understand how it is calculated. She says that on her retirement she was

not made aware that the definition of employee differs for the purposes of the Scheme from the legal definition, nor was she provided with documentation explaining how abatement applies or operates.

17. The paperwork that Mrs N was supplied with, and completed, prior to her retirement referred to abatement if continuing with or being re-employed by a Scheme Employer. Mrs N left this section of the paperwork blank. I find that SPPA provided information on abatement, and that this was sufficient to have reasonably made Mrs N aware that abatement could apply to her, or to have caused her to ask SPPA further questions. There is no evidence to suggest that Mrs N asked further questions or sought further guidance from SPPA or NHS Lanarkshire regarding abatement, such as whether it was applicable to her and if so how it would be applied.
18. I expect individuals to take responsibility for their own affairs, in this case SPPA did enough to make Mrs N aware that abatement could apply. It was not aware of her personal circumstances, or that she was carrying out work for Staff Bank, therefore it could not have provided more tailored information unless Mrs N requested this.
19. Mrs N has also again raised a concern that the method used in the abatement calculation where her Staff Bank earnings are not included in the calculation of her “previous pay” but are included in the calculation of her “pay” is unfair. The result of which is that she cannot earn as much after retirement as she was before retirement. The Adjudicator acknowledged this, however SPPA is bound to pay benefits in line with the Regulations. The Regulations are a statutory instrument set out by Parliament and SPPA has no amendment powers or discretion over the applicable part of the Regulations. As such, I find that SPPA has applied the Regulations correctly in this case.
20. I find that SPPA is entitled to recover the overpayment from Mrs N. It is seeking recovery by way of recoupment by making deductions through her future pension payments.
21. Therefore, I do not uphold Mrs N’s complaint.

Anthony Arter

Pensions Ombudsman
14 December 2018