

## Ombudsman's Determination

Applicant	Mrs N
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondent	NHS Business Services Authority ( <b>NHSBSA</b> )

## Outcome

1. Mrs N's complaint is partly upheld and to put matters right NHSBSA shall allow Mrs N to purchase the additional pension of £750 a year in the Scheme at August 2016 prices through contributions in any two future consecutive tax years up to her 65<sup>th</sup> birthday. The contributions may be deducted from any future UK relevant earnings, not necessarily from NHS pensionable employment.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs N complains that NHSBSA incorrectly rejected her application made on 6 August 2016 to purchase an additional pension of £750 pa in the Scheme payable from her State Pension Age.
4. She says that NHSBSA is now refusing to allow her to make a backdated purchase of the additional pension in the 2016/17 tax year at the price quoted in August 2016 of £8,370 despite upholding her complaint at Stage Two of the Scheme's Internal Dispute Resolution Procedure (**IDRP**) in July 2017.

## Background information, including submissions from the parties

5. Mrs N signed the "Additional Pension" application form (**the Form**) on 20 August 2016 which included the following proviso:

"You must give this application to your employer within six weeks of the date of application. Failure to do so may increase the cost of your additional pension..."
6. Her employer received the Form on 16 September 2016 which was one day before the specified deadline and countersigned it on 10 October 2016.

7. NHSBSA received the Form on 21 November 2016 and informed Mrs N that it could not accept her application because “we did not receive your application within the six-week time limit and your recent birthday means the cost of the additional pension has changed”. It also said that if Mrs N still wished to purchase an additional pension, she should submit a new application to her employer.
8. Mrs N was dissatisfied with this response and complained to NHSBSA in January 2017 that it had wrongly rejected her application. She said that her employer admitted in December 2016 that it had failed to process the application on a timely basis and had asked NHSBSA unsuccessfully to reconsider its decision.
9. NHSBSA maintained its position in both its initial reply to her complaint and at Stage One IDRP in February and April 2017 respectively. In its Stage One IDRP decision letter, NHSBSA said that it was unclear why the Form had been date stamped twice, i.e. “16 Sep 2016 Employment Services” and “12 October 2016 Employment Services”. It concluded that as the Form was not signed by her employer until 10 October 2016, it was most likely not received until after the deadline had passed.
10. NHSBSA reversed its decision at Stage Two IDRP in July 2017 after the employer confirmed that the delay in forwarding the completed Form was due to a payroll error. As NHSBSA was now satisfied that her employer had received the Form within the six-week deadline, it instructed its “Added Benefits” team to process her application.
11. Mrs N complained that NHSBSA had not considered the implications of its poor handling of her application and her subsequent complaint. She said that:
  - she had lost the opportunity to make the additional pension purchase during the 2016/17 tax year and had to make “alternative less beneficial pension provision” instead; and
  - the maximum contribution which she could make during the 2017/18 tax year (of £5,340.72) was less than the £8,370 required to purchase the additional pension
12. She also says that:
  - NHSBSA’s rejection of her application in the 2016/17 tax year has upset the balance of risk for her because the returns on her SIPP investment are not “fixed or guaranteed” unlike those for an additional pension in the Scheme;
  - she had reminded NHSBSA of the importance to complete the application during the 2016/17 tax year in her letters of 26 January, 14 February and 24 February 2017;
  - she would have been liable to pay a balancing income tax payment of £1,193.60 for the 2017/18 tax year due to not being allowed to contribute £8,370 into the Scheme to purchase the additional pension but fortunately she was able to mitigate this loss by contributing £6,000 into a SIPP in April 2017;
  - her application was incorrectly rejected by NHSBSA and her complaint should have been resolved without the need of going through the IDRP;

- she has the money to make the purchase if NHSBSA can confirm that it will be recognised by HMRC as a contribution in the 2016/17 tax year;
- she has made a gross contribution of £2,500 during the 2017/18 tax year into the SIPP and can only therefore make a further contribution of £2,717;
- she is currently caring for a very sick husband and does not know when she will be employed again; and
- although she will not be employed during the 2018/19 tax year, she is prepared to purchase the additional pension at August 2016 prices if she returns to employment in the future and has sufficient relevant UK earnings;
- if she does not return to employment, she will accept that she cannot purchase the additional pension in the Scheme; and
- as she does not have a “right to return” to NHS employment, she is not prepared to restrict her job hunting to only NHS vacancies in the future

13. NHSBSA says that:

- it has already apologised to Mrs N for the distress and inconvenience which she had experienced dealing with this matter;
- additional pensions in the Scheme are revalued annually by a “Treasury Order” (**the Order**) which may be negative;
- as additional pensions can reduce in value, it is currently impossible to say whether her SIPP benefits will be less beneficial in the long term; and
- it is reasonable to expect Mrs N to have taken the opportunity to submit a new application to her employer during the 2016/17 tax year once her original application was rejected in November 2016;
- it could not have made its decision to allow Mrs N a backdated purchase of the additional pension without carefully investigating her circumstances first;
- it operates a two staged IDRP in accordance with the Pensions Act 1995 which stipulates that if a member raises a complaint under its provisions, a respondent has 40 working days to reply and at both stages of the IDRP;
- it responded within the prescribed time limits;
- it is not possible to review every letter and prioritise response times based on contents due to the considerable amount of correspondence which it receives daily;
- according to Mrs N’s tax return for the 2016/17 tax year, her “pay from employments” and “allowable expenses” were £7,792 and £125 respectively;
- her maximum contribution during the 2016/17 tax year of £7,667 (i.e. £7,792 less £125) would therefore have been less than the purchase price of her additional pension, i.e. £8,370; and
- to put matters right, it is prepared to allow Mrs N to spread the cost of the additional pension over any future two consecutive tax years up to her 65<sup>th</sup> birthday in September 2028 but only if she is in pensionable NHS employment at the time; and
- if a pension event occurs before the final payment is made, it reserves the right to credit Mrs N with the additional pension and the outstanding amount

can be recovered from the tax free lump sum available to her by exchanging some of her pension for cash

14. It also says that:

“NHS Pensions has tried to be flexible in providing a resolution to the complaint. It cannot however be overlooked that the initial issue was caused by her employer and a failing within their internal processes. It is therefore believed that to be compliant with the NHS Pension Scheme Regulations a purchase of Additional Pension must occur whilst an active member of the Scheme. It would not be possible for NHS Pensions to waive this requirement.”

### **Adjudicator’s Opinion**

15. Mrs N’s complaint was considered by one of our Adjudicators who concluded that further action was required by NHSBSA. The Adjudicator’s findings are summarised briefly below:

- It was clear from the available evidence that NHSBSA had incorrectly rejected Mrs N’s “Additional Pension” application in November 2016. Although the time taken by Mrs N to submit the Form to her employer after signing it on 20 August 2016 could possibly have been shorter, it was done within the permitted six weeks’ time limit and the Form was therefore valid at the time NHSBSA received it on 21 November 2016.
- It was unfortunate that Mrs N’s employer was unable to forward the completed Form to NHSBSA for processing on a timely basis. Her employer could have countersigned the Form and sent it to NHSBSA much earlier than it did.
- Despite the above delays on the part of Mrs N and her employer, there was still sufficient time for her additional pension purchase to have been finalised during the 2016/17 tax year if NHSBSA had (a) not mistakenly rejected her application in November 2016 (b) given priority to its investigation of her complaint, especially when Mrs N had reminded it on three occasions that she needed to make the purchase before the end of the 2016/17 tax year and (c) asked Mrs N’s employer much earlier why the completed Form was not submitted to it on a timely basis which would have avoided having to consider her complaint under IDRP unnecessarily.
- The above shortcomings constitute maladministration on the part of NHSBSA which resulted in Mrs N’s additional pension application not being completed during the 2016/17 tax year.
- Essentially in any one tax year member contributions of up to 100% of their relevant UK earnings that are chargeable to income tax (or £3,600 gross if higher, where the scheme operates on a “Relief in source” basis) attract income tax relief

(subject to the annual allowance which was £40,000 for both the 2016/17 and 2017/18 tax years). Although there are no limits on the maximum amount of employee contributions that can be made under a registered pension scheme, tax relief will not be granted above the annual limit for relief.

- It would appear from the available evidence that Mrs N did not have sufficient relevant UK earnings in either the 2016/17 or 2017/18 tax years to claim tax relief on the whole cost of £8,370 required to purchase an additional pension of £750 pa in the Scheme. Her relevant UK earnings during the 2016/17 and 2017/18 tax years of £7,667 and £5,340.72 were less than the purchase price of her additional pension.
- Furthermore, if someone suspects that he/she may have suffered a loss, he/she has a responsibility to take reasonable steps to mitigate his/her loss. Mrs N cannot claim for a financial loss that she could have mitigated whether she in fact did so or not.
- Fortunately, Mrs N paid £6000 into a SIPP before the end of the 2016/17 tax year enabling her to reduce her income tax liability from £1,193.60 to zero. By doing so, she had mitigated the financial loss which she would have incurred due to being unable to purchase her additional pension of £750 in the Scheme during the 2016/17 tax year.
- It was currently not possible to say whether the benefits available to Mrs N on retirement from the SIPP will be inferior.
- The proposal made by NHSBSA to allow Mrs N to purchase the additional pension of £750 a year at August 2016 prices through contributions in any two future consecutive tax years was an equitable and a pragmatic approach for NHSBSA to follow.
- There was, however, no doubt that the administrative service provided by NHSBSA has been somewhat poor in this case. Although the maladministration identified had not caused Mrs N any injustice in the form of actual financial loss, it was clear that she had suffered considerable distress and inconvenience as a result.
- The complaint should be partly upheld and to put matters right NHSBSA should pay N £500 for the significant non-financial injustice she has suffered.

## **Ombudsman's decision**

16. Both parties have generally accepted the Adjudicator's Opinion and indeed NHSBSA has already paid the £500 compensation suggested by the Adjudicator as a gesture of goodwill to Mrs N in recognition of the significant distress and inconvenience which she has experienced dealing with this dispute. I therefore deal below only with the points which the parties have raised since receiving the Opinion.

17. NHSBSA has confirmed that it is in principle willing to extend the period for purchase of the additional pension in order that Mrs N can fully offset the cost against taxable income.
18. NHSBSA has however also raised a doubt that the cost of purchasing Mrs N's additional pension in the Scheme can be made good out of earnings derived from non-NHS pensionable employment. It points out that under Regulation 58(4) of the 2015 Regulations an additional pension election must not be made at any time when the member is absent from work for any reason.
19. I do not consider that Regulation 58(4) is a bar to accepting Mrs N's further contribution because she made her additional pension election in September 2016 while still a scheme member and still at work. It is that original election which NHSBSA have agreed to honour and which I direct that they should honour so far as Mrs N is in future able to pay for it on the same taxation basis that it was originally applied for. It is not my intention that the Scheme should grant any pension which is not so paid for, but do not consider it is necessary or desirable to direct that any unpaid costs should be met out of a lump sum because of the risk of falling foul of pension recycling rules.
20. I therefore partly uphold Mrs N's complaint and make the appropriate directions below.

## **Directions**

21. NHSBSA shall allow Mrs N to purchase the additional pension of £750 a year at August 2016 prices through contributions in any two future consecutive tax years up to her 65<sup>th</sup> birthday, and in the event that the necessary payments have not been made by the date of her actual retirement shall be entitled to reduce the additional pension pro rata to the payments in fact made. The contributions may be made out of any future UK relevant earnings, and need not necessarily derive from NHS pensionable employment.

**Karen Johnston**

Deputy Pensions Ombudsman  
5 June 2018