

**PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN**

Applicant	Mrs L Guest
Scheme	NHS Pension Scheme
Respondents	NHS Pensions Waltham Forest Primary Care Trust (the “ Trust ”)

Subject

Mrs Guest complains that she agreed redundancy terms believing that Scheme benefits quoted to her were correct, when in fact they were overstated. She says that she would have acted differently if she had been given the correct information.

The Deputy Pensions Ombudsman’s determination and short reasons

The complaint should not be upheld because I am not persuaded that Mrs Guest would have acted differently and because any perceived loss has in any event been nullified now.

DETAILED DETERMINATION

Material Facts

1. Mrs Guest accrued 27 years 8 months reckonable Scheme membership before leaving the Scheme in September 2003. She rejoined on 5 May 2009 when she was Deputy Chief Executive of the Trust. This dispute arises from changes to the Scheme regulations during her period of non-membership, which altered the calculation of benefits on early retirement.
2. On 25 March 2010 NHS Pensions wrote to Mrs Guest informing her that, with effect from 1 April 2008, the Scheme had two sections, the 1995 Section and the 2008 Section, and that those who had previously been members of the 1995 Section and had returned to pensionable employment on or after 1 October 2008 after a break of five years or more were only eligible to join the 2008 Section.
3. This letter referred her to the Scheme Guide and stated

“Please read this booklet carefully as it explains your benefit entitlement from the Scheme either at retirement or if you leave the Scheme before retirement.”
4. Mrs Guest was informed that she was being given a one-off opportunity to transfer the value of her 1995 Section benefits to the 2008 Section, thereby counting all her benefits in the 2008 Section. Alternatively, if she did not transfer,

“These [1995 Section] benefits will normally be paid at age 60 ... The benefits may be paid earlier if the member becomes permanently unable to do any regular work.”
5. Mrs Guest chose not to transfer, and so her 1995 Section benefits remained governed by the Scheme’s 1995 Regulations.
6. On 19 October 2010 Mrs Guest telephoned NHS Pensions to request estimates of her Scheme benefits as at June 2011. According to NHS Pensions, redundancy was not mentioned. NHS Pensions wrote to her on 25 November 2010 enclosing benefits estimates from each Section.
7. Notes accompanying the 1995 Section benefits explained that

“Preserved benefits have a normal payable age of 60. If you chose to have your preserved benefits paid early they will be subject to an

actuarial reduction. The further you are away from age 60 the greater the reduction will be.”

By way of illustration, she was informed that if she took her 1995 Section benefits at 1 June 2011 (when she would be age 56) her reduced pension would be £24,987.75 pa and her lump sum Retiring Allowance would be £80,044.00.

The calculation schedules showed her Total Pensionable Pay as £72,487.85. This was the figure applying when she left service in 2003.

8. Regarding her 2008 Section benefits, Mrs Guest was informed that the actuarially reduced pension would be £2,070 pa. Alternatively she could surrender part of this pension for a Lump Sum Retiring Allowance of up to £8,916.09, which would leave a residual additional pension of £1,337.41 pa. In this calculation, her Reckonable Pay was shown as £96,325.58, i.e. the current amount applying.
9. On 13 January 2011 Mrs Guest received formal notification from the Trust that she was at risk of redundancy. On 1 February 2011 the Trust sent her a letter headed “Formal Notice of Redundancy.” The following is an extract from that letter.

“I write to issue you with formal notice of redundancy in line with the London HR Framework and the London Model Change Management Policy as adopted by [the Trust] on 22 October 2009 as you have not to date secured a post in the new ONEL Transitional Single Management structure. ...

During your notice period you will continue to be considered for any suitable alternative posts ... If no suitable alternative employment has been found, your employment will terminate on the grounds of redundancy and your last day of employment will be 31st July 2011.”

10. Mrs Guest accepts that the Trust had commenced moves to make her compulsorily redundant.
11. On 2 February 2011 the Pensions Department at University Hospitals Birmingham (“UHB”) (to which the Trust’s pension administration service had been outsourced) asked NHS Pensions to calculate Mrs Guest’s entitlement to redundancy benefits as at 31 July 2011.
12. This calculation would normally be obtained on-line by the employer, but at this time the on-line facility did not include members of the 2008 Section. Accordingly, NHS Pensions provided UHB with calculations under the 2008

Section only, explaining “Please use the figures to provide an estimate and any alternative option the member might have e.g. the cash compensation payment from yourselves.”

13. At this point an error occurred. The following explanation was provided later by the Legacy Team at the Department of Health, which assumed responsibility for the outstanding affairs of the Trust when it became defunct on 31 March 2013.

“There was a mistake made in the way the estimate of Mrs Guest’s entitlement was originally calculated under the 1995 scheme and this was compounded by a lack of clarity in the written information that was provided. However, these were not such as to cause any financial loss to Mrs Guest, nor did they affect the options which were open to her.

It appears that the employer based the whole of the original calculation on a pensionable pay figure of £96,425.00. This was her pay at the date of leaving in 2011. The calculation of her 1995 scheme benefits should have been based on her pensionable pay at the date those benefits were preserved in 2003. The correct figure would have been £90,684.59 (i.e. her pensionable pay figure in 2003 of £72,487.85, increased by the indexation factor as at 31 July 2011).

Further, Mrs Guest was provided with a total estimate of her benefits from both schemes rather than a breakdown by scheme. This total sum appears to have matched the amount that she believed she would receive from an unreduced pension from both schemes. If she had been given a detailed breakdown of the figures from each scheme it would have been apparent that the 1995 benefits were actuarially reduced ... it is accepted that this is something that could have been handled better [but] there is no evidence that she was told in writing that her entitlement from both schemes would be unreduced.”

14. NHS Pensions went on to explain that on 9 May 2011 Mrs Guest telephoned the member helpline requesting an estimate of unreduced benefits due to compulsory redundancy. On 21 June 2011 NHS Pensions provided her with generic information about the options that active members of each Scheme Section may have on redundancy. NHS Pensions explained that it adopts this practice, directing the member to the employer for further information (which may include calculations, as explained above), because only employers can determine whether an employee is to be made redundant.
15. At the head of the copy of the letter of 21 June 2011 disclosed to me, Mrs Guest has written “1995 break in service over 5 years so 95 is deferred so inactive. Active scheme is 2008.”

16. Shortly before she left the Scheme, Mrs Guest applied to transfer benefits in from earlier pension arrangements, thereby securing an additional 283 days pensionable entitlement in total in the 2008 Section. These entitlements were not however confirmed to her until after she had left.
17. Mrs Guest's total Scheme pension on leaving, including the additional 283 days, was £31,236.23 pa. This comprised £26,589.07 pa, reduced, under the 1995 Section and £4,647.16, unreduced, under the 2008 Section. Her Lump Sum Retiring Allowance was £83,810.71, reduced, under the 1995 Section.

Summary of Mrs Guest's position

18. Mrs Guest says that, "on accepting redundancy with effect from 31 July 2011", she was led to believe that no part of her NHS pension would be reduced and that (this was before the question of the additional 283 days service arose) her annual pension would be £32,700 and her lump sum would be £88,000.
19. On this basis, she decided to accept redundancy and not continue to seek posts within the NHS. Had she known of the correct, reduced, benefits, she would have sought alternative employment within the NHS.
20. She says that she contacted the NHS helpline in July 2010 to discuss redundancy options and was told that her local employer would supply an estimate for compulsory redundancy. She alleges that the helpline representative confirmed to her that if she was made compulsorily redundant she would receive an unreduced pension. She made notes of the next conversation, in October 2010, but cannot find them now. She says that she phoned again in November 2010 when it was again confirmed to her that her pension would be unreduced on compulsory redundancy.
21. She acknowledges receipt of the 25 November 2010 estimates showing actuarially reduced benefits based on voluntary early retirement at age 56, but explains that "they did not deal with the position on redundancy; at that stage [I] had not decided on redundancy as an option and wanted to know [my] early retirement figures."
22. Finally, Mrs Guest alleges another call to the NHS helpline in December 2010 when "she went through the calculations to check how the lump sum was treated and how the annual pension was treated in the case of compulsory

redundancy”. She says that it was again made clear that she would receive an unreduced pension.

23. After receiving notice that her post was at risk of redundancy, Mrs Guest says that she telephoned UHB in January 2011 and was again told that in circumstances of compulsory redundancy she would receive an unreduced pension. However she was told that only her employer could request an estimate of benefits on this basis, and before this could happen a leaving date needed to be determined. In due course she received an estimate of benefits from UHB showing a pension of £32,700 and a lump sum of £88,000.
24. She says that she did not receive an explanation of these figures, despite requests, and so was acting partly in the dark. After seeing later exchanges of correspondence, she alleges that NHS Pensions had verified the figures to UHB. This lack of explanation also led to her further call to the NHS helpline on 9 May 2011.
25. She also made other allegations regarding the absence generally of clear information regarding the position on redundancy, which she believed caused even the respondents to her complaint to be mistaken about the true facts, thereby giving her wrong or misleading information.
26. Mrs Guest says that, if she had been given correct information at the time she asked for it, she would not have left the NHS. She would have obtained alternative employment within the NHS, thereby accruing further Scheme service and perhaps enabling her to take her 1995 Section benefits (unreduced) at 60.
27. Examples were provided of possible senior posts for which she might have applied. Some of these apparently in the event had not been advertised at the time of her redundancy, and some were fixed term rather than permanent. She did not give further consideration to possible posts outside London because of travelling and childcare concerns, but she would have done so if she had known of her correct, lower, Scheme benefits. Furthermore, some of these posts would be fixed term or interim appointments rather than permanent. For example, the Chief Executive Officer of her local hospital had offered her a post as Interim Director, but this was not suitable because of its level and the interim nature. In April 2011 she had been shortlisted for a PCT managing director post, but “regrettably the interview was held while she was away and the PCT were unable to change the date.”

28. Mrs Guest says she “was well placed to secure a post of the nature outlined as she was a distinguished practitioner in her field, with significant national and local experience”, and went on to mention recent published works. She was in the process of obtaining an MSc in health service commissioning, “a qualification held by only about 60 people within the NHS”, and had been invited to speak at national conferences.
29. She has been legally represented and claimed her costs, which now exceed £15,000. It appears that she consulted solicitors after her complaint was not upheld at Stage 1 of the Scheme’s Internal Dispute Resolution (**IDR**) Procedure on 7 June 2012. She said later that her solicitors had been able to obtain from NHS Pensions which she had been unable to obtain herself.
30. In their appeal letter, her solicitors said

“The responses ... appear to have concentrated on the question whether she was given conflicting advice from NHS Pensions and her local pensions office. A more accurate interpretation is that before she decided to accept redundancy, both NHS Pensions and her employers gave her to understand that, if she took redundancy, no part of her pension would be reduced.. On that basis she accepted redundancy from the NHS ...”

Summary of NHS Pensions’ position

31. NHS Pensions denied liability. It relied particularly on its letters of 25 March and 25 November 2010 which made clear that Mrs Guest’s 1995 Section benefits would be actuarially reduced on payment before age 60 unless she became permanently unable to work because of ill health. No other possible circumstances permitting an unreduced pension, specifically redundancy, were mentioned.
32. NHS Pensions has no record of the alleged calls to its helpline in July and December 2010. It acknowledges the call in October 2010 but says that redundancy was not discussed. Calls to and from its administrative office in Fleetwood were not recorded. In response to the October call, it issued the letter of 25 November 2010 informing her that preserved benefits in the 1995 Section payable before age 60 would be subject to an actuarial reduction.

33. The only estimate of redundancy benefits calculated by NHS Pensions was provided to UHB on 2 March 2011 and correctly quoted only the 2008 Section unreduced benefits payable to Mrs Guest.
34. Her former employer had unfortunately provided her with an incorrect illustration (see paragraph 13). NHS Pensions disagrees that it verified UHB's incorrect calculation. It says it has no record of being asked to do so and adds that, if this had happened, it is likely that the error would have been revealed. She is not entitled to the incorrect, overstated, benefits, so she had suffered no financial loss as such.
35. Brief notes exist relating to her telephone calls on 19 October 2010 and 9 May 2011 (see paragraph 14). These make no mention of her being told that unreduced pensions would be payable from the 1995 and the 2008 Sections.
36. NHS Pensions submitted that Mrs Guest's written comments at the head of the 21 June 2011 letter demonstrated that she did understand that the 1995 Section benefits would remain deferred and would therefore be reduced on redundancy.

Summary of the Trust's position

37. As noted in paragraph 13 above, the Trust admits it made an error but rejects the suggestion that this lead to loss.
38. Additionally the Trust says that Mrs Guest was made compulsorily redundant. The question of her choosing to leave in reliance on wrong or misleading information did not arise. During her notice period no suitable alternative post became available to her.
39. She was given the following options : (a) a redundancy payment, with benefits in both Scheme sections deferred; (b) taking unreduced benefits from the 2008 Section and deferring benefits from the 1995 section; or (c) taking unreduced benefits from the 2008 Section and actuarially reduced benefits from the 1995 Section. These options remain open to her as she has not yet drawn her pension benefits.

Conclusions

40. It is unfortunate that the Trust provided Mrs Guest with retirement figures based on an incorrect pensionable salary. This has served to confuse matters somewhat. I note that she says that she raised questions about the figures which went unanswered.

41. This apart, Mrs Guest has put emphasis on matters that support her case, and less weight on matters that do not. NHS Pensions' letters of 25 March and 25 November 2010 should have given her no cause whatsoever to suspect that she might receive unreduced benefits from the 1995 Section on redundancy. Similarly, she should not reasonably have reached the conclusion she did from reading the general membership literature.
42. There is some dispute over precisely which calls she might have made to NHS Pensions, and when. I note that she does not appear to have notes of these calls and, despite what she recalls now, NHS Pensions says it has records of calls only on 19 October 2010 and 9 May 2011 which make no mention of her being told that unreduced pensions would be payable from the 1995 Section and the 2008 Section.
43. It would have been somewhat dangerous for Mrs Guest to have placed too much weight on what might have been said in a conversation with a helpline representative, who might not have been fully aware of her own individual circumstances. That said, however, NHS Pensions has been unable to trace records of these other alleged calls.
44. Mrs Guest was made compulsorily redundant, so the question of her choosing redundancy as opposed perhaps to remaining in her existing employment does not arise.. She says however that, if she had not been misinformed, she would have sought to remain in the NHS, albeit at a lower level, and defer taking her pension until age 60.
45. Mrs Guest did not in fact obtain fresh employment before her redundancy took effect. She refers to a number of jobs with other employers which, for a variety of reasons, either were not suitable to her, or for which she was unable to apply. Her knowledge of these possible appointments supports her contention that she might have sought fresh employment perhaps as an alternative to taking early retirement benefits. But despite their perceived drawbacks, she nevertheless asks me now to accept that she would have found them suitable, or that she would have been able to apply for them, if she had known the correct amount of her Scheme benefits.
46. Mrs Guest's position appears to be that she would have been content to retire and receive a pension of £32,700 pa and a lump sum of £88,000, and so she weighed these prospective benefits against the financial benefits of possible

alternative employment. Her actual entitlements (including the additional 283 days) were a pension of £31,236.23 pa plus a lump sum of £83,810.71. Despite what she says, I have some difficulty in accepting that the difference between these amounts and the amounts she says she expected to receive would have been sufficient for her to reach a materially different decision about her financial future.

47. She also assessed her alleged loss differently, essentially by looking at what the position would have been if she had deferred taking her full benefits until age 60. I do not believe this is relevant to the opinion I expressed in the previous paragraph.
48. Mrs Guest was a senior person within the NHS, having occupied the position of Deputy Chief Executive and, according to her own account, having the necessary qualifications to consider applying for a directorship. When she left the Trust, her pay exceeded £96,000. A new position at a salary level even approaching that amount would have expunged the value of the perceived benefit shortfalls within a relatively short period of time.
49. Having said that she would not have chosen to retire if she had been aware of her correct, lower, Scheme benefits, I note that (until quite recently at least) Mrs Guest has still taken no benefits at all, nearly three years after she left.
50. A person is under a duty to take reasonable steps to mitigate a loss as soon as he or she becomes aware of it. I am aware that Mrs Guest did in fact subsequently secure a position as Chief Executive elsewhere. She says that her starting salary was £70,000, and it is reasonable for me to conclude therefore that there is, or there soon will be, no residual loss or perceived loss in relation to her Scheme benefits.
51. It remains for me to consider her request for her legal costs. My services are free and are designed to be friendly to unassisted complainants. Consequently I would not normally require legal costs to be reimbursed.
52. It was Mrs Guest's choice to be represented by solicitors. She says that her solicitors were able to obtain from NHS Pensions relevant information which she was unable to obtain herself. This does not adequately reflect the full picture. The two stages of Scheme's IDR Procedure exist hopefully to address and resolve disputes concerning entitlement to benefits. Mrs Guest had already

invoked the IDR Procedure herself, and had received a decision at Stage 1, before she instructed her solicitors to deal with matters from then on.

53. Even after receiving a final decision at stage 2, Mrs Guest could have approached my office herself rather than through her solicitors. She did not attempt to do so. Her complaint is not complex or heavily dependent on obscure legal precedent. As her solicitors explained (see paragraph 30) the crux of her complaint is that, before she decided to accept redundancy, both NHS Pensions and her employers gave her to understand that, if she took redundancy, no part of her pension would be reduced. That is an entirely straightforward proposition and in my opinion Mrs Guest, an experienced and intelligent person, could have pursued it to the conclusion of the IDR Procedure and subsequently referred the matter to me without the need to be legally represented. In view of this her request for reimbursement of her legal costs is declined.
54. In conclusion, I do not uphold Mrs Guest's complaint. She did not choose redundancy in reliance on the incorrect Scheme benefit figures, because she had no choice in the matter. She might reasonably have given more weight to the written information she received from NHS Pensions in 2010 that her 1995 Section benefits could only be taken unreduced before age 60 on grounds of ill health and should, if need be, have requested confirmation in writing that this would not apply in the event of redundancy. I am not persuaded that she did anything which she would not have done anyway if she had been in possession of the true facts. And finally, even if it could be said that she did suffer a loss, in my opinion there is now no residual loss to be considered. Unfortunately she was provided with an incorrect estimate of benefits by the Trust but in the circumstances I shall not direct the payment of compensation for possible resulting disappointment.

Jane Irvine
Deputy Pensions Ombudsman

10 September 2014