

Ombudsman's Determination

Applicant	Mrs E
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHS BSA) Sussex Partnership NHS Foundation Trust (the Trust)

Outcome

1. Mrs E's complaint against NHS BSA and the Trust is partly upheld, but there is a part of the complaint I do not agree with. To put matters right, for the part that is upheld, the Trust shall pay Mrs E £1,000 to recognise the serious distress and inconvenience she has suffered. NHS BSA is not required to take further action.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs E's complaint against NHS BSA and the Trust is about (1) their failure to respond to requests for information about her length of her service, (2) their maladministration of her Added Years contract, and (3) the delay putting her benefits into payment.

Background information, including submissions from the parties

4. In 2003, Mrs E joined the Trust and became a member of the Scheme. In May 2007, she signed an application form to enter into a contract to buy Added Years. There is evidence that Mrs E had two possible elections: (1) Election to buy Added Years amounting to 1 year and 350 days at 9% of pensionable pay - to age 60 (**the First Election**) and (2) Election to buy Added Years amounting to 4 years and 120 days at 9% of pensionable pay - to age 65 (**the Second Election**).
5. In June 2007, NHS BSA received the Second Election. In July 2007, it wrote to the Trust and stated: -

"We have received completed AB54 (ADP) for this member, which you have accepted on a provisional basis. We have amended certain details and the form now reads as follows: Total purchase 4 years 119 days additional service at a cost of 9 % from 01/04/2007 to age 65..."

6. Sometime after that, the Trust incorrectly set up Mrs E's Added Years contract with an end date of March 2012 (age 60), not March 2017 (age 65).
7. Mrs E's 60th birthday fell in April 2012, at which point the Trust stopped making Added Years deductions.
8. In September 2014, the Trust contacted NHS BSA to enquire about the Added Years contract and reinstated deductions.
9. Mrs E received a payslip containing "large and unexplained deductions", specifically: "Add Yrs Full Arrs 6854.08" and "354 Overpayment Offs 5483.20R". She understood that left a balance of £1,371 to pay, but that arrears had otherwise been rectified. She says she contacted the Trust to try and clarify this.
10. In December 2014, she emailed the Trust and said: "I have been trying for some months to obtain information on the pension deductions being made from my salary. Extra deductions have been made for the last few months without any explanation..."
11. On 20 March 2015, she emailed the Trust and said:

"Please, please, please reply to my email. I am having a significant sum deducted from my income each month and I have been given no information on the reason. I am unable to plan my finances and do not know what is happening. I have been trying to obtain this information for over 6 mts [sic]. I need a reply within 7 days from the date of this email. I realize you are short staffed but if a reply is impossible within 7 days then I will have to take further action."
12. On the same day, the Trust responded to Mrs E. It said: -

"I do apologise for the long delay in responding to your emails...

With regards to the extra pension deductions, these are for Added Years...

Unfortunately these were set-up on the system as having the end date of 31/03/2012 (day before your 60th birthday) instead of 31/03/2017 (day before your 65th birthday)...

As this contract should be on-going we started the Added Years payments in your September 2014 pay. On your September 2014 payslip it shows the amount of Added Years payment arrears. We will not be taking any of the arrears from your pay unless you want us too [sic]. There are other options of paying the arrears that I will indicate in a letter that I will be sending you in regards to your Pension Added Years...

I do apologise for not having communicated the situation regarding your added years payments sooner or before we commenced taking them."
13. On 24 March 2015, Mrs E emailed the Trust. She said:

“As I feared the deductions are being done in error. When I agreed to take out added years, the agreement was that to obtain 4 yrs. and 119 days I would pay the additional contribution until I was 60. I subsequently enquired how many extra years I could purchase if continued the payments until 65 but never received confirmation of the time purchased although I understood it was agreed in principle. I was therefore surprised when the added years contributions ceased when I was 60 and on enquiry was told the contributions could not be reinstated as it was no longer possible to purchase additional years. Then suddenly in Sep ‘14 [sic] they were reinstated and I have assumed an additional 4 year period is being purchased but the information you have seems to indicate it is related to the original years purchased. If there is any way of continuing purchasing additional years I would like to do so as my original request was submitted prior to added years being discontinued as an option. But the original period of 4 years and 119 days has been paid for as per original agreement and completed when I was 60. Can you confirm what additional time I am purchasing by making the contributions from 60 to my eventual retirement which may be 65 or later...”

14. On 25 March 2015, the Trust responded. It said:

“I think there must have been some confusion as according to NHS Pensions Agency there has been one contract with no purchase of extra added years. The details of the contract are stated in my previous email. I suggest that you contact NHS Pensions on 0300 3301 346 to get clarification on your added years contract, pension forecast and the years bought so far.”

15. In December 2015, NHS BSA wrote to Mrs E, in response to a query from her, and it confirmed that her Added Years contract would continue until age 65.
16. In September 2016, the Trust contacted NHS BSA with further queries regarding the Added Years contract. NHS BSA confirmed that the terms of the contract were to buy 4 years, 119 days for 9% of salary to age 65. It sent the Trust a copy of the contract.
17. In May 2017 (the month after she turned 65), Mrs E gave the Trust notice of her intention to resign and retire. Due to untaken annual leave, her pensionable service did not end until July 2017.
18. In September 2017, the Trust told NHSBSA that there were £6,539.16 of contributions outstanding.
19. In October 2017, Mrs E contacted the Trust to claim her benefits under the Scheme. It responded and provided links to relevant application forms and a retirement guide.
20. On 15 January 2018, NHS BSA received Mrs E’s benefit application.
21. On 25 January 2018, NHS BSA wrote to Mrs E and stated:

“Thank you for your recent application for retirement benefits... Your employer(s) has advised us that there are outstanding pension contributions of £6539.16 that they did not deduct from your salary...

In order for us to process your application for retirement benefits, we require payment of the above amount before your benefits are paid. Please confirm in writing if you wish the amount to be deducted from your lump sum or whether you would like to forward payment prior to your award being paid...”

22. In February 2018, Mrs E complained to the Trust. The key points were:

- In May 2017, she notified the Trust that she intended to retire/resign but her benefits were yet to be put into payment.
- It was unclear whether the Added Years agreement was to run to age 60 or 65.
- The Trust’s failure to respond promptly to her queries/concerns had prevented her from applying for her benefits sooner, and might result in her benefits being reduced.

23. In June 2018, the Trust provided its response. The key points were:

- Mrs E was not yet in receipt of her pension as there was a delay issuing the application forms as Mrs E’s reason for leaving was “voluntary resignation”. This did not trigger the retirement process. When she left, Mrs E did not wish to claim her benefits as the level of Added Years was in dispute. So, the Trust advised her to contact NHS BSA.
- The Added Years contract was supposed to run to 65, as per the application form, but deductions were stopped incorrectly in March 2012. However, the Trust explained what happened, confirmed the length of the contract and, when deductions were re-instated, said no deductions would be made to settle the arrears without her agreement.
- It was untrue that the Trust had failed to communicate with her about her queries; there was evidence of email contact between them, in which it tried to clarify her concerns.

24. In July 2018, Mrs E responded to the Trust. She said she was disappointed as it did not address her main concerns. The key points were:

- Her version of the contract stated that the Added Years ran to age 60, not 65; the Trust must have been confused about this too, as it cancelled the deductions in 2012, before re-starting them two years later without an explanation.
- As she received no explanation of this, she assumed the Added Years were supposed to run until age 65. Moreover, references to “arrears” and “offset”, on her 2014 payslip, led her to conclude that the Trust had rectified this and paid the arrears.
- Her specific concerns about her retirement being delayed by the Trust’s failure to give her information about Added Years/final salary figures, were not addressed either.

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25. Around the same time, Mrs E asked NHS BSA for estimates of her Added Years to age 60 and 65, and about her options for making up the Added Years arrears.
26. Dissatisfied with the Trust's responses, Mrs E referred her complaint to this Office.
27. In August 2018, NHS BSA outlined three options for Mrs E:
 - Contributions to cease at age 60 and Mrs E is provided with a pro-rated credit for the amount of added years she has purchased to this date. The excess net amount paid after age 60 will be returned to her.
 - Mrs E pays the outstanding contributions for the added years and she will be afforded a pro-rated credit based on her working pattern.
 - NHS BSA adjusts the purchase of added years from age 65 to age 60 and provide Mrs E with a pro-rated credit based on her working pattern.
28. It also provided a breakdown of the relevant figures to assist her decision

Adjudicator's Opinion

29. Mrs E's complaint was considered by one of our Adjudicators, who concluded that no further action was required by NHS BSA but that further action was required by the Trust. The Adjudicator's findings are summarised briefly below: -
 - NHS BSA made no administrative errors. It was entitled under the regulations to rely on information from the Trust. There was insufficient evidence it received the First Election but it did receive the Second Election. It also made reasonable efforts to respond to Mrs E's queries and concerns.
 - The Trust was mainly responsible for the issues Mrs E had experienced, i.e. incorrectly setting up the Added Years contract to age 60, not 65. Two elections were made and it was unclear why. But the Trust accepted the contract should have continued to age 65.
 - Mrs E considered that the Trust should settle the outstanding arrears. The Adjudicator disagreed. He said whilst the Trust was responsible for incorrectly setting/administering the Added Years contract, it would have been possible for Mrs E to claim her benefits "without prejudice" to her complaint. Had she done that, her benefits could have been put into payment around October 2017 (or January 2018 at the latest). Then, she could have continued to dispute the matter. Like all members, Mrs E was only entitled to receive the correct benefits under the Scheme regulations.
 - Mrs E said there should be no Disallowed Days as this matter would not have arisen if (1) her length of service had been recorded correctly, (2) the Trust had responded to her initial queries regarding the Added Years and (3) the Trust had agreed to a face-to-face meeting, to clarify this matter. The Adjudicator considered that periods of work when Mrs E was on unpaid sick leave were "Disallowed Days" under the regulations. Disallowed Days meant periods when members are absent without the permission/prior

arrangement of their employer and have not received pay for that period, e.g. unpaid sickness. The number of days lost through absence is determined and recorded by the NHS employer as Disallowed Days. Because it is not possible to make contributions in respect of unpaid periods of employment, any days so recorded do not count towards pensionable membership. This was a matter of the Scheme regulations; there was insufficient evidence that the Trust acted incorrectly in this regard. Mrs E said, references in the 2014 payslip to “arrears” and “offset” led her to think that the Trust had rectified the Added Years arrears by making an offsetting deduction from her salary. She said the payslip was unclear and therefore it was reasonable for her to assume that the Added Years arrears had been rectified in this way. The Adjudicator considered that if Mrs E found the information to be unclear, it was not reasonable for her to conclude the Trust had rectified the arrears. The starting point was, she was only entitled to receive the correct level of benefits, based on the correct deductions; only if the Trust “clearly and unambiguously” told her that the Added Years deductions had been settled, could it potentially be prevented from arguing that she was not entitled to such benefits (without actually paying the associated deductions). In the Adjudicator’s view, there was never a statement that was that clear.

- However, the Adjudicator thought that the Trust should compensate Mrs E for the “non-financial injustice” she had suffered as a result of this matter. He thought Mrs E had suffered a “serious” level of distress and inconvenience, so the Trust should pay her £1,000. This was because the Trust had made two errors. Firstly, it set up the Added Years contract incorrectly to age 60. Secondly, it failed to provide prompt and accurate information about this. Contributions were cancelled in 2012, and re-instated with no explanation in 2014, and it took too long for Mrs E to receive an explanation and resolution. Had the Trust informed her, in about September 2014, that the error had been made (and what her options were), then she would still have had to settle the arrears, but the matter could have been settled then.
- Mrs E said she started buying a house in May/June 2018 but in the end, she decided to pull out. She said that while she had enough money to buy the house, she would have been left with too little savings. This has caused her to lose a non-refundable £750 lawyer’s fee. Because there had been a delay putting her benefits into payment, she also had to resort to taking out a loan and using credit cards, so she incurred interest and her credit rating had suffered. As a result, she might be unable to obtain a mortgage in future. Finally, she had to draw on ISAs, which she would have preferred not to do.
- The Adjudicator considered these submissions, but maintained Trust was not required to settle the arrears or pay further compensation. NHS BSA informed her, in January 2018, that there were arrears which would have to be paid for (if necessary, by deduction from her lump sum). She ought to have known, she would incur a deduction from the lump sum unless she was able to settle the arrears some other way; but after January 2018, she could not reasonably rely on receiving an unreduced lump sum.

- It was accepted that Mrs E's finances had been unsettled by this matter. But she was made aware of the possibility of a deduction in January 2018. So, it would have been possible for her to have authorised the deduction and continued to dispute the matter. The lump sum would have been reduced, but not the level of pension benefits.
30. NHS BSA and the Trust accepted the Adjudicator's Opinion, but Mrs E did not, so the complaint was passed to me to consider. Mrs E 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 her for completeness.

Ombudsman's decision

31. I have read in full the representations made by Mrs E on 3 December 2012 but do not consider that any of them should cause me to reach a different conclusion from that which was reached by the Adjudicator. I summarise the main points made by Mrs E in her representations and set out my reasons below.
32. Mrs E says she first considered drawing her pension in 2015 but was prevented from doing so by the record of service being incorrect and the confusion about her AVCs. The email correspondence from 2015 plainly shows Mrs E in correspondence about her AVC, but I have seen no evidence that she was prevented from drawing her pension. Specifically, I have seen no evidence that she told the Trust or NHSBSA that intended to make a pension application at any point prior to May 2017.
33. She says she was told she could not draw the main pension without the AVCs. She believes she has been told by NHS BSA that she is unable to draw the pension until the issue with the AVC issue is resolved. She therefore believes justice requires her pension to be backdated. She was unaware of the amount of the arrears until July 2017 when she was informed by NHS Pensions that £6,539 remained outstanding. She cannot reconcile that amount with the September 2014 payslip.
34. It is correct that the AVCs must be put into payment at the same time as the pension and therefore Mrs E needed to come to an arrangement with the scheme about the arrears in order to draw her pension. It is clear that in January 2018 the scheme explained two options which would have enabled Mrs E to draw her pension. I consider that the delay in putting the pension into payment has arisen because Mrs E was unwilling to make an election about how to deal with the arrears. I understand her desire to pursue the Trust for the arrears, but that did not prevent her from resolving the issue with the scheme and having her pension paid.
35. Mrs E says she thought that once she drew her pension it would be the final figure for life. She says that at the time, she was not made aware of the three options set out at paragraph 27. I accept that Mrs E was not given the settlement options at paragraph 27 but as I have said above, she was given two options which would have allowed her to access her pension shortly after she applied for it. I have seen no evidence that Mrs E ever asked a question about what would happen if she paid the missing

contributions as suggested and then pursued a complaint. I can see no evidence of anybody telling her that she could not pay the arrears out of her lump sum and then complain about the Trust to get the same amount back.

36. Mrs E says it is not reasonable to inform her of arrears for the first time 7 years after they have arisen. She questions whether there is a time limit on recovery of money which is owing for that long if the person who owes it is not informed. I do not consider that there was a 7 year delay in telling her about the arrears. They started to accrue in May 2012. The Trust first brought the issue to her attention in 2014. NHSBSA asked her to pay all of the outstanding arrears in January 2018. On those facts, I cannot see any reason why Mrs E should not pay the outstanding AVCs if she continues to want to take the full benefit of the contract.
37. Mrs E says she only began to receive correspondence from the Trust pensions team in January 2018. It is clear from the communications set out in the background information section that Mrs E had communication from the Trust prior to this date. I accept that these may not have clarified all the matters which Mrs E raised, but I consider that by January 2018 she had enough information to get her pension into payment.
38. Mrs E says the Trust led her to believe the bulk of the arrears had been refunded and therefore she considers they should pay. She found the 2014 pay statement 'absolutely clear' apart from the discrepancy of £1371. It only became unclear in 2018 when NHS Pensions informed her of the outstanding arrears. At the time she understood the main bulk of the arrears had been settled by the Trust and she understood the contract was to 65.
39. I do not accept that the 2014 correspondence contained a clear and unequivocal representation that the arrears had been paid. It is wholly unclear to me what it meant. By March 2015, the Trust was telling Mrs E that she definitely had arrears to pay and she was disputing that any should have arisen at all because she believed the contract only ran until she was 60. The contemporaneous correspondence simply does not support Mrs E's submission that the arrears position was clear to her until NHS BSA told her the truth in 2018.
40. Mrs E says she has suffered financial loss because she had to rearrange her finances and put specific plans on hold because of lack of pension payment and uncertainty. She clarified the circumstances leading to her withdrawal from the house purchase, and loss of the £750 fees by saying that the delay in accessing her pension and the consequent lack of income caused her to be unable to secure a large enough mortgage. She was therefore faced with having to use her savings to fund a larger deposit without having access to the lump sum either. She considers that the damage to her credit rating was also caused by the delay in gaining access to her pension. I do not consider that any of these financial losses can properly be said to flow from any maladministration by the Trust. Rather, they flow from Mrs E's decision not to tell the scheme how she wanted to pay the arrears.

41. Mrs E accepted the Adjudicator's Opinion about how the disallowed days calculation should work but has again raised the question of how many days have in fact been disallowed and what that has cost her in pension terms in order to decide whether to pursue this aspect of her complaint. I have considered where this question takes the complaint. I realise the issue added another element of uncertainty to the picture, but I do not consider it can affect the question of whether financial loss was caused by delay. Even if there had been a live dispute about the correct number of disallowed days it did not alter the fact that the pension could have been put into payment and any outstanding complaint about the precise number of days disallowed raised subsequently. I therefore do not propose to deal with it further here.
42. Lastly, Mrs E raises a question of whether she is now being asked to pay the arrears out of taxed income. I cannot see that she is. NHS BSA have restated the offer, that if she wants to, Mrs E can use some of her share of tax free Scheme assets (the lump sum) to pay the arrears. They have also indicated that if she makes her election about how to deal with the arrears, her retirement benefits will be payable with effect from 24 July 2017, which is the day after her pensionable employment came to an end. It remains for Mrs E to make an election from the three options which NHSBSA have now given her and to have her benefits put into payment.
43. In summary, the Trust is not responsible for settling the arrears. Mrs E is only entitled to receive the correct benefits, i.e. those benefits that have been paid for, or will be paid for, via deduction from her salary or lump sum.
44. However, there was maladministration in the way that the Trust set up its records of the contract and the necessary deductions, and it delayed explaining to her how to put the matter right. These delays affected her at a time of intense personal stress and no doubt impacted upon her ability to make decisions as effectively as she might otherwise have done.
45. Therefore, I partly uphold Mrs E's complaint against the Trust and make the direction below in recognition of the serious distress and inconvenience caused to her. I do not uphold the complaint against NHS BSA.

Directions

46. Within 21 days of the date of this Determination, the Trust shall pay Mrs E £1,000 in respect of serious distress and inconvenience.

Karen Johnston

Deputy Pensions Ombudsman
29 March 2019