

Ombudsman's Determination

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| Applicant | Dr E |
| Scheme | NHS Pensions Scheme (the Scheme) |
| Respondent | NHS Business Services Authority (NHS BSA) |

Outcome

1. Dr E's complaint against NHS BSA 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) NHS BSA shall award interest on the refund of contributions, and pay £2,000 to Dr E for the severe distress and inconvenience its error has caused him.

Complaint summary

2. Dr E holds NHS BSA responsible for incorrectly allowing him to re-join the Scheme, which he argues led him to accept a lower paying role, and reduce the level of contributions he had been making to his personal pension arrangements.

Background information, including submissions from the parties

3. On 2 December 1970, Dr E first joined the Scheme. He worked for the NHS on various contracts until October 1984, at which time he left the Scheme and his benefits accrued within the Scheme became deferred.
4. On 25 July 1986, NHS BSA wrote to Dr E to confirm his accrued pension rights would be preserved in the Scheme. This letter also said:

"If you have re-entered the National Health Service superannuation scheme or re-join before age 60 your preserved benefits will be included in the total benefits paid to you when you eventually retire and become entitled to receive them."
5. In August 1989, Dr E returned to work for the NHS and was re-admitted into the Scheme. He left NHS employment again on 4 January 1998, and left the Scheme, at which time his benefits for this period of service were also deferred.

6. On 2 December 1998, Dr E turned 60 and so became eligible to take benefits from the Scheme, in accordance with the NHS Pension Scheme Regulations 1995 (as amended) (**the Regulations**).
7. NHS BSA has said that, upon leaving the Scheme, Dr E would have been sent a 'Leaving the Scheme' booklet and a preservation letter. The Leaving the Scheme booklet said:

"About 13 months after you leave the NHS Scheme you will receive a letter telling you that your benefits have been preserved."

"If you re-join the scheme before age 60 and continue working in the NHS until that age, your preserved benefits and the benefits you earn in your new service will be paid on retirement or on leaving the scheme AT OR AFTER AGE 60"

"IMPORTANT: if you CHOOSE to leave the Scheme but continue to work in the NHS, you will NOT be allowed to re-join the Scheme once you have become entitled to your preserved benefits. This applies whether you are paid early on ill-health grounds or at age 60. You CAN apply to re-join at any time BEFORE you become entitled to benefits."
8. The preservation letter sent to Dr E on 9 February 1999 said, "You will normally be entitled to your preserved benefits when you reach age 60."
9. On 14 November 1999, Dr E wrote to NHS BSA, acknowledging receipt of the preservation letter.
10. In June 2004, Dr E made enquires with the Scottish Public Pensions Agency, about the possibility of transferring his accrued benefits from the equivalent Scottish scheme into the Scheme. He was told this was not possible as he was over the age of 60.
11. On 2 January 2007, Dr E returned to work directly for the NHS and was erroneously re-admitted into the Scheme. Dr E remained in direct NHS employment until 2 April 2008. Dr E paid contributions to the Scheme up to 2 April 2008.
12. On 7 February 2011, NHS BSA contacted Dr E to inform him that it had the wrong date of birth for him on file due to incorrect data received from one of his former NHS employers.
13. In April 2015, NHS BSA told Dr E it had discovered that he should not have been allowed to re-join the Scheme in 2007, so needed to recalculate his benefits.
14. Dr E complained to NHS BSA, arguing that he had suffered financially as a result of NHS BSA's error as he had missed the opportunity to increase his private pension provision by erroneously contributing to the Scheme.
15. Dr E's complaint was upheld in part. NHS BSA amended the payable date of Dr E's benefits to 2 December 1998 (his 60th birthday) and deleted his 2007/08 membership

from his pension records. This resulted in his retirement benefits being reduced, which meant that there had been some degree of overpayment in the benefits that he had received up until that point.

16. Dr E was also entitled to a refund of the contributions that he paid into the Scheme during 2007 and 2008. NHS BSA used the refund of contributions to offset the overpayment of pension that Dr E owed.
17. In April 2015, after deducting the amount owed by Dr E in overpaid pension income, NHS BSA issued a refund of contributions of £3,024.20 to Dr E.
18. NHS BSA also offered an award of £250 to Dr E in respect of the distress and inconvenience it had caused him, which it later increased to £1,000. Dr E did not accept the award.
19. Dr E argues that, had he not been incorrectly re-admitted into the Scheme in 2007, he would have maintained the contribution rate of approximately £2,500 per month into his personal pension arrangements in 2007 and 2008. Dr E provided NHS BSA with his personal pension contribution history as follows:

1 April 2005 to 31 March 2006

Personal pension contributions - £27,285

1 April 2006 to 31 March 2007

Personal pension contributions - £31,409

NHS contributions - £1,243.52

1 April 2007 to 31 March 2008

Personal pension contributions - £17,307

NHS contributions - £4,133.12

1 April 2008 to 31 March 2009

Personal contributions - £37,756 (which included a £15,000 single payment)

1 April 2009 to 31 March 2010

Personal contributions - £3,744.64

1 April 2010 to 31 March 2011

Personal contributions - £6,094.16

20. Dr E asked that his complaint be considered under the Scheme's internal dispute resolution procedure (**IDRP**). On 17 May 2016, NHS BSA issued its stage one IDRP decision. NHS BSA did not agree that Dr E had suffered a financial loss. It observed that Dr E's contributions had fluctuated greatly over the years, and had reduced

significantly from 1 April 2009 onwards, which could not be argued was due to the erroneous membership period in 2007/2008.

21. NHS BSA concluded that the only financial loss was the missed opportunity to invest the monies contributed to the Scheme in the 2007/2008 employment period. As NHS BSA had refunded this (less the overpayment amount to Dr E) it did not find that it owed him anything further.
22. Dr E maintained that because NHS BSA allowed him to re-join the Scheme, he had made the decision to take a lower paying role, and reduce his contributions to his personal pension arrangements, which was to his detriment.
23. On 15 December 2016, NHS BSA issued its stage 2 IDRP decision letter. It partly upheld the complaint, as it acknowledged that it should have recognised sooner that Dr E was not able to re-join the Scheme. However, it did not agree that this error had caused Dr E a financial loss, beyond the missed opportunity to invest the contributions he had erroneously paid in 2007/2008.
24. Dr E has said that he chose to forego a higher paid role through an agency to work directly for the NHS, on the belief that his benefits payable from the Scheme would be based on his NHS salary across 2007 and 2008, which he estimates was around double that of his salary in 1998, the last time he had accrued benefits within the Scheme. Dr E argues that he felt he did not need to contribute as much into his personal arrangements for the 2007/2008 employment period, as he believed he would receive more valuable benefits from the Scheme for this period.
25. Based on the records Dr E shared, NHS BSA estimated that Dr E had earned an average of £132,883 in the three years leading up to the change in job role in 2007. NHS BSA highlighted that Dr E's earnings for the 2007/2008 tax year were £85,000 with additional private income of £19,000.

Adjudicator's Opinion

26. Dr E's complaint was considered by one of our Adjudicators who concluded that, NHS BSA should award interest on the refund of contributions and increase the award for non-financial injustice. The Adjudicator's findings are summarised below:-
 - Dr E was sent information when he left the Scheme in 1998 which confirmed it was not possible to re-join the Scheme after age 60.
 - Dr E was told in 2004 that he could not transfer his benefits from the Scottish equivalent of the Scheme as he was over age 60. This would have further put him on notice that there were age limitations within the Scheme.
 - There was insufficient correlation between his changes to his personal pension contributions and his average monthly contribution to the Scheme, of approximately £415, to successfully argue the erroneous membership had been to Dr E's financial detriment.

- NHS BSA could have recognised the issue sooner, when it verified Dr E's date of birth in 2011.
- NHS BSA should award interest on the wrongly accepted contributions as Dr E was deprived of these for a significant period.
- NHS should pay £2,000 directly to Dr E to recognise the serious distress and inconvenience its error caused him.

27. Dr E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr E provided his 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 E for completeness.

Summary of Dr E's position

28. Dr E does not recall receiving the 'Leaving the Scheme' booklet in 1998.
29. NHS BSA did not tell him until 2015 that he had not in fact been eligible to re-join in 2007. Dr E maintains that, had he known this was not possible, he would have continued to work in a self-employed capacity for longer and maintain higher contributions into his personal pension arrangements.
30. It was always Dr E's intention to maximise his pension contributions in preparation for his retirement. Dr E was in regular contact with a pension adviser, including during the period he was directly employed by the NHS in 2007 and 2008.
31. The fact that he was not allowed to transfer benefits into the Scheme after age 60 did not categorically suggest to Dr E that he would not be allowed to re-join the Scheme after this age.
32. The reduction in his contributions correlates with the period when he believed he was contributing to the Scheme.
33. Had he been advised of the correct position on his eligibility, he would have acted differently and he would be better off in financial terms had this been the case.

Ombudsman's decision

34. Dr E was self-employed for a significant portion of his career and has said that he regularly consulted a financial adviser. I accept that Dr E was mindful of the contributions he was making to pension arrangements over the years. The issue is whether he can demonstrate that he made a decision to take a lower paying job and/or to reduce his pension contributions because of maladministration by NHS BSA. Dr E has argued that in 2007 he took a lower paying role, which he would not have taken had he known he could not re-join the Scheme. He says he believed re-joining the Scheme would improve his final salary benefit. I do not doubt his belief, or that it was driving his decision making to some extent, but he has not put forward any evidence that his belief was caused by incorrect information or other

maladministration by NHS BSA. I appreciate that there came a point where NHS BSA was dealing with Dr E as a Scheme member when he was not entitled to be one, and that was maladministration, but that dealing came after he had already made the decision to become directly employed and cannot have caused him to change his employment.

35. I find that NHS BSA explained the position accurately when Dr E left the Scheme in 1998. Dr E has said that he did not receive the Leaving the Scheme booklet in 1998. However, Dr E did write to NHS BSA to acknowledge receipt of the preservation letter at this time, so I find it more likely than not that he received the Leaving the Scheme booklet. He also received a preservation letter in 1986, when he first left the Scheme. There has been a significant passage of time since these dates and I am satisfied that, on the balance of probabilities, Dr E was given the information that it was not possible to re-join the Scheme after age 60, but has since forgotten the information that he was given.
36. Dr E has said that he regularly consulted a financial adviser. It is reasonable to expect an adviser to familiarise itself with the rules of any pension scheme where the individual is considering joining that scheme. Had the Scheme Rules been consulted, the age limit for eligibility would have become apparent. The Scheme Rules were also available to Dr E if he had chosen to review these himself.
37. I accept that there was a reduction in Dr E's contributions which correlated with the period when he believed that he was contributing to the Scheme and that he could have acted differently if NHS BSA had not erroneously accepted contributions from him. However, I cannot see a pattern from which I can infer that he would probably have maintained contributions at a particular level through 2007/2008 even though his salary had changed. I have already found that the change in salary itself cannot be attributed to anything said or done by NHS BSA. Consequently, I do not find that there has been a financial loss which can be calculated by reference to a particular reduction in contribution. .
38. I find that NHS BSA's acceptance of contributions from Dr E when he was not eligible and the payment of incorrect benefits to him was maladministration. NHS BSA relies upon data supplied by NHS employers, and given the high number of members in the Scheme it is understandable that NHS BSA may not be able to verify details for each member in real time. However, it is also responsible for obtaining and maintaining the data it needs to administer benefits correctly. It should have been able to recognise sooner from Dr E's date of birth that he was not eligible for membership. Dr E was 76 when he was notified of the mistake and was already in receipt of retirement benefits from the Scheme. I find that NHS BSA's substantial delay in discovering its error has caused Dr E severe distress and inconvenience.
39. NHS BSA recognised that Dr E should not have paid into the Scheme in 2007 and 2008, but also learned that it had overpaid Dr E in his retirement benefits. I am satisfied that NHS BSA correctly deducted the overpaid benefits from the refund of contributions due to Dr E. However, as Dr E was deprived of the erroneous

contribution amounts, NHS BSA must award interest on this for the period he did not have access to these.

40. I partly uphold Dr E's complaint.

Directions

41. Within 21 days of the date of this Determination, NHS BSA shall:

- i) award interest to Dr E, at the Bank of England base rate, on the erroneously received contributions to the Scheme, from the date each contribution was made, to the date of the refund of contributions in 2015.
- ii) pay £2,000 to Dr E to recognise the severe distress and inconvenience its error caused him.

Karen Johnston

Deputy Pensions Ombudsman
11 December 2019