

Ombudsman's Determination

Applicant	Mr O
Scheme	NHS Pension Scheme (the Scheme)
Respondent	Surrey and Sussex Healthcare NHS Trust (the Trust)

Outcome

1. I do not uphold Mr N's complaint and no further action is required by the Trust.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr O's complaint concerns the contributions he paid into the Scheme between 24 March 2014 and 30 September 2015.

He believes the contributions were incorrectly deducted and that he is entitled to a refund because:

- a) he paid contributions into the Scheme for less than two years; and
- b) he should not have been automatically enrolled into the Scheme because he was over state pension age (**SPA**), at the time he commenced employment with the Trust.

Background information, including submissions from the parties

4. Mr O became a deferred member of the 1995 Section of the Scheme in 2009, when he left active membership. In 2011, Mr O applied for and started receiving his 1995 Section benefits. His benefits were backdated to May 2009, as that was the date his 1995 Section benefits were payable from.
5. In March 2014, Mr O became an employee of the Trust and started paying pension contributions into the 2008 Section of the Scheme. He was age 67 at the time. In September 2015, Mr O resigned from his role at the Trust.
6. Mr O asserts that, when he was leaving his employment with the Trust, in September 2015, he made enquiries with the Trust's payroll administrator concerning how he could obtain a refund. He said he was informed by the administrator that pension

contributions should not have been deducted from his salary and that he should fill out a form to receive a refund. Mr O says that he completed the form but did not receive a refund.

7. In October 2015, NHSBSA wrote to Mr O and said "As you are a re-employed pensioner and currently in receipt of a pension, you are not entitled to a refund. Your pension entitlement will be reviewed when you reach your normal retirement age to take account of your late Scheme membership."
8. Between November 2015 and December 2015, there was further correspondence between Mr O and the Trust concerning his refund. In December 2015, Mr O complained to the Trust but did not receive a response. This resulted in Mr O referring his complaint to The Pensions Advisory Service (**TPAS**).
9. Between January 2016 and February 2017, there was further correspondence between Mr O, TPAS, and NHSBSA concerning Mr O's eligibility to join the 2008 Section of the Scheme. During the same period, there was also further correspondence between the above parties, concerning Mr O's entitlement to receive a refund of the contributions he had paid into the Scheme between 24 March 2014 and 30 September 2015.
10. On 20 March 2017, NHSBSA wrote to TPAS. It gave a background of Mr O's membership within the Scheme and also said:

"Mr [O] was allowed to rejoin [the Scheme] in the 2008 Section on 24 March 2014. This was due to an easement that enabled members who had retired during the NHS Pension Choice Exercise to return to active membership as members of the 2008 Section after a break of two years or more....

Mr [O's] re-employment ended on 30 September 2015 however, although this period of re-employed service amounted to less than two years, the fact that he was a re-employed pensioner meant that he was ineligible to have a refund of contributions. He therefore has an additional period of pensionable service running from 24 March 2014 until 30 September 2015...

...[Mr O] should ask his former employers to complete and submit a retirement benefits application form in respect of his re-employment. Provided we receive a completed form, we will then be able to put the additional benefits he accrued between 24 March 2014 and 30 September 2015 into payment."

11. Unhappy with NHSBSA's response, in May 2017, Mr O made a complaint to NHSBSA through stage one of the Scheme's internal dispute resolution procedure (**IDRP**).
12. In the IDRP stage one response, dated 27 June 2017, NHSBSA explained that:

“...for a member who is re-employed after claiming their 1995 Section benefits from [the Scheme], they will be eligible to join the 2008 Section of the Scheme, however, they must meet the following criteria:

- a) They are under age 75
- b) Were an active member of the 1995 Section on, or before, 1 April 2008
- c) Became a pensioner member of the 1995 Section on, or before 1st October 2009
- d) Has either
 - Returned to NHS employment since becoming a pensioner member referred to in (c) or
 - Commenced for the first time NHS Employment, and
 - Is not eligible to be an active member of the 1995 Section in respect of the employment referred to in (d).”

13. NHSBSA gave details of Mr O's membership in the Scheme and explained why he was eligible to join the 2008 Section. NHSBSA also explained:

“As your first period of membership, for which you currently receive a pension, and the membership you accrued in the 2008 Section equates to over 2 years, you are not eligible to receive a refund of contributions. You are instead eligible to claim a pension for this membership. Please complete an AW8P and submit this to us to claim your [Scheme] benefits in relation to the 2008 Section.”

14. Dissatisfied with the response he received from NHSBSA, Mr O referred his complaint to us. In his submissions, Mr O provided copies of correspondence between himself, TPAS, the Trust and NHSBSA. In addition, he made the following comments: -

- He believes he is entitled to a refund of the contributions he had paid into the Scheme, between 24 March 2014 and 30 September 2015, and he is disappointed that the refund is being withheld from him.
- He was incorrectly automatically enrolled into the 2008 Section of the Scheme, as he was over SPA at the time.

15. In response to Mr O's complaint, the Trust provided copies of correspondence between it and Mr O as well as internal correspondence which explained why Mr O was not eligible for a refund. The Trust also made the following comments:

- The Scheme Regulations along with the Trust Policy provide that all new staff to the Trust including those who left and returned are put into the appropriate NHS Scheme.
- The Scheme is open for ages 16-75. It's not based on state pension ages.

16. Although Mr O has not raised a complaint against NHSBSA, NHSBSA provided the following information in relation to our investigations: -

- When Mr O originally joined the Scheme in April 2005, he was a member of the 1995 Section but when he re-joined the Scheme in March 2014, he became a member of the 2008 Section.
- When Mr O re-joined the Scheme in March 2014, he was put in a different section of the Scheme to which he was previously. However, he was still in the same Scheme as there was only one Scheme at the time.
- Mr O is in receipt of his pension benefits in respect of his 1995 Section and 2008 section on 16 July 2018. Therefore, he is in receipt of a pension from the benefits he accrued through the contributions he paid between March 2014 and September 2015.
- It is not possible for Mr O to repay the 2008 Section pension and request a refund of his contributions. This is because he was correctly admitted into the Scheme. In addition, Mr O submitted a formal application for payment of his 2008 Section pension in accordance with the Scheme Regulations and, NHSBSA has correctly put his pension into payment.

Adjudicator's Opinion

17. Mr O's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trust. The Adjudicator's findings are summarised below: -

- In 2012, automatic enrolment was introduced. This meant that employers were legally obligated to automatically enrol their eligible employees into their pension scheme unless the employee opted out of joining the scheme. For an employee to be eligible to be automatically enrolled into their employer's pension scheme, amongst other things, they needed to be between the ages of 22 and SPA.
- In this case, Mr O was over SPA at the time that he was automatically enrolled into the Scheme. Consequently, the Adjudicator accepted that there was no legal requirement for him to be automatically enrolled into the Scheme in March 2014.
- The Scheme is a Statutory Scheme and is governed by the relevant Regulations. Regulation 2.B of the 2008 Regulations (**the Regulations**) covers eligibility for membership within the Scheme. When Mr O commenced employment with the Trust in March 2014, he met the criteria in the Regulations, to be a member of the Scheme. Therefore, he was enrolled into the 2008 section of the Scheme, at that time.

- In the Adjudicator's opinion, it was Mr O's intention to join the Scheme when he commenced employment with the Trust. This is because, in correspondence he sent to us, concerning his employment with the Trust, he said "In line with my life long discipline to always put something aside out of my earnings, I opted to join the NHS Pension Scheme of the Hospital."
- Therefore, it was the Adjudicator's view that Mr O was correctly enrolled into the Scheme in accordance with his wishes.
- Mr O was not entitled to a refund of the contributions he paid into the Scheme between March 2014 and September 2015 because he was previously a member of the Scheme from 18 April 2005 to 4 May 2009. Regulation 2.C of the Regulations covers the repayment of contributions. When Mr O re-joined the Scheme in March 2014, he re-joined as a pensioner member. Therefore, although his membership in the Scheme between March 2014 and September 2015 amounted to less than two years, his total membership within the Scheme exceeded two years.
- The Adjudicator did not doubt Mr O's assertion that he was informed in September 2015 by the payroll administrator of the Trust that he was entitled to a refund of the contributions he paid into the Scheme between March 2014 and September 2015. However, regardless of what Mr O was told, the Scheme Regulations superseded any incorrect information he may have been given. But, in any event, since November 2018, Mr O has been in receipt of the additional pension he accrued in the Scheme between 24 March 2014 and September 2015. He has not therefore suffered any loss as a result of not receiving a refund of contributions for that period.

18. Mr O did not accept the Adjudicator's Opinion and in response made the following comments: -

- It is obvious that certain points raised by the "other party" relate to changes made in the Scheme on 6 April 2016, whereas he left the NHS for good in September 2015.
- The Adjudicator's view is different to the view he received from a TPAS advisor.

19. The complaint was passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr O for completeness.

Ombudsman's decision

20. Having considered this complaint, I find that Mr O was correctly enrolled into the Scheme, when he commenced further NHS employment with the Trust, in March 2014, in line with his wishes and in accordance with the Regulations that govern the Scheme. Although Mr O's membership in the Scheme between 24 March 2014 and 30 September 2015 amounted to less than two years, he was not eligible for a refund of the contributions he paid during that period because his membership during that

period added with his previous membership, meant his total membership in the Scheme amounted to more than two years.

21. I find that Mr O's past membership in the Scheme was correctly included, when NHSBSA calculated his length of membership in the Scheme, as this was done in accordance with the Regulations that govern the Scheme.
22. I do not find that there was any maladministration by the Trust, in automatically enrolling Mr O into the Scheme when he commenced further NHS employment in March 2014 although he was over SPA. I say this because, at the time he was automatically enrolled into the Scheme, in March 2014, he had opted in and therefore fulfilled the criteria, prescribed in the Regulations, to be automatically enrolled. Moreover, if he had not wished to be enrolled in the Scheme, I would have expected him to opt out again, as was his right. It is also clear that he has taken the benefit earned by the contributions over the additional period, which is inconsistent with his now asserting that he did not wish to be a member in respect of it.
23. Mr O asserts that certain points raised by the "other party" relate to changes made in the Scheme on 6 April 2016, but he left the NHS for good in 2015. However, I have found no evidence that the incorrect Regulations have been applied to Mr O's benefits.
24. Therefore, I do not uphold Mr N's complaint.

Karen Johnston

Deputy Pensions Ombudsman
9 July 2019