

Ombudsman's Determination

Applicant	Mrs L
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Mrs L's complaint and no further action is required by NHS BSA.

Complaint summary

2. Mrs L is complaining that NHS BSA provided her with incorrect information about her pension benefits. She says that she relied on the incorrect figures to make a decision to retire at age 55. Mrs L would like to be compensated for the loss and distress and inconvenience she has suffered.

Background information, including submissions from the parties

3. Mrs L joined the Scheme in 1979 and worked in a mix of full-time and part-time roles for County Durham & Darlington NHS Foundation Trust (**the Trust**). Mrs L worked in the following concurrent posts:-
 - a) 4 November 1979 to 31 October 2011
 - b) 4 February 2007 to 3 June 2016
 - c) 1 April 2011 to 31 October 2011
 - d) 1 November 2011 to 3 June 2016
4. On 17 May 2011, the Trust notified NHS BSA that Mrs L's pay was being reduced from 1 April 2011. It confirmed that her full-time pensionable pay for the period 1 April 2010 to 31 March 2011 was £43,380.33. However, the Trust did not notify NHS BSA that, as at 31 March 2011, Mrs L was concurrently employed in posts a) and b) above.
5. On 17 June 2011, the Trust e-mailed NHS BSA to request protection of Mrs L's pensionable pay to 31 March 2011 (**2011 protection**) of £43,380.33, due to organisational change, which was subsequently accepted by NHS BSA.

6. The protection of pay is available for members who have had a reduction of pay in certain circumstances, that is, compulsory change of role due to employer re-organisation. The relevant regulation in Mrs L's case is Regulation R9 of the 1995 Scheme Regulations. It states that where protection of pay is agreed, benefits earned up to the date of reduction are preserved using the previous higher level of pay.
7. In February 2012, Mrs L contacted NHS BSA to discuss pay protection and to raise some queries about the level of her contributions. NHS BSA advised her to contact the Trust to claim a refund.
8. In February 2015, the Trust's pension officer requested estimated projections of benefits to age 55. NHS BSA provided these to the pension officer on 16 February 2015. The projections showed the protection of pay at 31 March 2011, and the calculations were based upon:-
 - Membership up to 31 March 2011 linked to protected pensionable pay of £43,380.33;
 - Membership from 1 April 2011 linked to current pensionable pay from 1 April 2011 of £37,794.00;
 - Pension: £19,071.82 a year; and
 - Lump sum Retiring Allowance: £57,215.45 tax free.
9. In February and March 2015, Mrs L contacted NHS BSA three times enquiring about the implications of being re-employed in the NHS after retirement; she also made some general queries with regard to pay protection.
10. In July 2015, the Trust submitted a further application to NHS BSA for a protection of pay as a result of another reduction in Mrs L's pay, for the period of 4 April 2014 to 3 April 2015 (**2015 protection**). NHS BSA subsequently identified that Mrs L had concurrent posts within the 2015 protection.
11. NHS BSA wrote to the Trust requesting the relevant pensionable pay for the period of 4 April 2014 to 3 April 2015. In August 2015, the Trust informed NHS BSA that the combined protected pay to 3 April 2015 was calculated as £35,471.41.
12. On 20 November 2015, Mrs L contacted NHS BSA with a general enquiry about her protection of pay.
13. On 2 March 2016, the Trust submitted Mrs L's retirement benefit application with the retirement date of 3 June 2016.
14. Mrs L retired on 3 June 2016. In processing Mrs L's application, NHS BSA identified that further pay values might be required for 2011 protection.
15. On 22 August 2016, NHS BSA sent Mrs L a revised benefit statement to age 55 and informed her that the February 2015 estimated projection was incorrect. This was due to her 2011 protection being overstated. It said:

“When we were notified by [the Trust] of the period of protection for membership up to 31 March 2011 we did not take into account that you had another concurrent part-time post at that time. To calculate the correct protected pay we should have done a composite pensionable pay calculation. A composite pensionable pay reflects what you would have earned had you worked whole time in the part time posts and then proportioned the whole time equivalent pay depending on the amount of part time hours worked for each post in the pay period...

After several subsequent discussions with your NHS Employer, your pay is now revised for all relevant employments

Service 04/11/1979- 31/03/2011 Revised Pensionable figures supplied by your employer £40,359.25

Pension £18,196.92

Lump sum £54,590.77.”

16. In August 2016, Mrs L complained under the Scheme’s internal dispute resolution procedure (**IDRP**). In her submission, she said that before deciding to retire, she requested an up to date pension forecast and was told by the pension officer at the Trust this was not necessary as “there would be little difference and, if anything the figures would be higher due to the extra year paying into the fund.” She was also unhappy that it had taken NHS BSA more than 30 days from the date of her retirement, on 3 June 2016, to send her correspondence with regard to her pension.
17. On 7 October 2016, NHS BSA responded under stage one of the IDRP and upheld her complaint. It said:

“Where a member is in part time employment, the pay figure on which their benefits are based is the same as for a full time worker of the same grade. In your case the position was further complicated by the fact that you had pay protection to 31 March 2011 to 3 April 2015... Following communications from you and your employers regarding the difference between the figures shown in our February 2015 estimate and your actual award, we received revised pay details from your employer on 8 August 2016. A revised award of benefits was calculated on 22 August 2016 and we wrote to you to explain that the protected pay figure of £43,380.33 that had been used in the calculation of your estimate was too high. I am upholding your complaint as the estimate we calculated on 16 February 2015 was overstated... we should have calculated a composite pay figure for your period of protected pay and must therefore accept my apologies... for the distress and inconvenience caused by our error.”
18. On 6 March 2017, Mrs L appealed. In her submission, her solicitor provided the following comments:

“While this letter upholds Mrs L’s complaint and asks that she accept apologies on behalf of [NHS BSA]... no offer of compensation is made. For the avoidance of doubt, Mrs L made her decision to retire based upon the estimate provided to her dated 16 February 2015. This was made for a retirement date of 3 June 2016... She did not receive any further information as to the level of her pension prior to making the decision to retire. She did not receive any payment until the [delete or “sic”] July 2016. While it is accepted that the provision of an estimate does not guarantee a scheme member will be paid the amounts shown, we contend that the failings identified and apologised for by [NHS BSA] represent a real detriment to Mrs L. She may well have made a different decision about her retirement date had she known the correct figures.”

19. On 25 May 2017, NHS BSA responded under stage two of the IDRP, and did not uphold her complaint. It said:

“Mrs L contacted [NHS BSA] with various enquiries on five occasions between 26 February 2015 and 29 January 2016 [sic] she did not query the statement she had received... Mrs L was advised on 26 February 2015 that where concurrent posts are worked in a given pay period, pensionable pay is an average of the pay earned in both posts.... In my opinion Mrs L would be aware that during the protected pay period (04/04/2014 to 03/04/2015), the proportion of her earnings was around 20% in the higher paid post and around 80% in the lower paid post. I consider it reasonable to suggest therefore, that Mrs L could have identified that the protected pay value shown in our estimate had been overstated at £43,380.33. Thus I believe she had ample opportunity to question the estimated figures prior to her decision to retire and therefore, to mitigate any loss of expectation of benefits. I have also taken into account the percentage difference between the estimated benefit values and the benefits actually paid - which is in the region of 4.5%... whilst I fully recognise Mrs L’s disappointment that her benefits are lower than she might have expected, I do not believe compensation is justified in these circumstances.”

20. In June 2019, NHS BSA issued a revised stage two response and did not uphold Mrs L’s complaint. It added:

“... Revised conclusions are set out at the end of this letter... [NHS BSA’s] initial recording of Mrs L’s protected pay to 31/03/2011 did not account for the pay in both concurrent employments within the protected pay period i.e. it did not account for the lower pay in [post a)]. In my opinion, given that [post a)] and [post b)] were with the same Trust it appears there was an assumption... that the protected pay value the Trust provided related to her earnings in both employments...if [NHS BSA] had obtained the relevant (2010-2011) pay value for [post a] when protection of pay was requested in 2011, any pay value provided would most likely have been incorrect due to the excess contributions that had been collected from Mrs L... this error was not addressed by the Trust until 2012... Mrs L and the Trust were in a position to

be aware that the majority of her earnings in the 2010-2011 year related to the lower rate of pay applicable to her substantive post [post a)]. Both parties were therefore, in a position to identify whether the protected pay value of £43,380.33 was a realistic representation of Mrs L's pensionable pay at the time...Mrs L had already been directed to the Trust with a view to reviewing the contributions collected from her and correct any excess contributions she may have paid...Mrs L was entitled to request provision of a further annual benefit statement from 16 February 2016. She was also at liberty to query the statement provided in February 2015 at any time."

21. In response, Mrs L's representative made the following points:-

- The fact that NHS BSA was unable to start work on calculating Mrs L's benefits until 5 July 2016 amounts to maladministration.
- The stage two IDRPs outcome accepted that NHS BSA had overstated Mrs L's pension benefits and apologised for it, but no offer of compensation was made.
- Mrs L disagrees with issuing a revised stage two outcome because NHS BSA does not have jurisdiction to do so in accordance with the Pensions Act 1995 Section 50.
- There is a lack of telephone call notes, yet NHS BSA made assumptions about what was discussed in those calls with Mrs L.
- Mrs L repeatedly queried her incorrect pension statement on 26 February 2015, and twice on 2 March 2016.
- Mrs L accepts she should not be paid a higher rate of pension than she is entitled to, however she has been disadvantaged and decided to retire based on the incorrect information and should be compensated for it.

22. On 16 October 2019, NHS BSA provided further comments, in summary they were:-

- NHS BSA is not aware of any provision within the Pensions Act 1995 that would prevent a decision maker from issuing a revised stage two IDRPs outcome.
- The conclusions in the revised stage two response are "broadly the same as those reached at stage two in 2017 and there is no material difference to the outcome for Mrs L."
- NHS BSA processed Mrs L's pension benefits in July 2016 based upon known information at the time. It was only when further enquiries commenced in July 2016, when the final calculations were being carried out, that the error was discovered.
- Until 2016, the Trust never specified how the protected pay value provided in 2011 was to be applied. The Trust should have identified from the incorrect

statement that “[NHS BSA] had used the protected pay value as if it were a combination of Mrs L’s pay in her concurrent employments.”

- There were opportunities for the Trust and Mrs L to mitigate any incorrect expectation she may have had regarding her pension entitlement.

Adjudicator’s Opinion

23. Mrs L’s complaint was considered by one of our Adjudicators, who concluded that no further action was required by NHS BSA. The Adjudicator’s findings are summarised below:-

- NHS BSA has agreed that it provided Mrs L with an incorrect benefit statement in February 2015. The Adjudicator noted that NHS BSA apologised for this error.
- Mrs L says that she decided to retire in February 2016 in reliance on the incorrect statement issued in February 2015. However, the Adjudicator noted that the estimated pension statement was sent to the pension officer at the Trust, not directly to Mrs L. It is unclear what conversations took place between the Trust and Mrs L regarding the statement and what guidance, if any, the pension officer gave Mrs L regarding the figures in the statement. Nevertheless, the Adjudicator did not believe that it was reasonable for Mrs L to have relied on the estimated pension statement as it was only an estimate and not guaranteed.
- The complex issue in Mrs L’s complaint arose from her entitlement to protection of pay to her pension benefits on two occasions, in 2011 and in 2015. The protected pay values were subject to her earnings from concurrent part-time employments, each with different rates of pay. The February 2015 statement did not take account of the lower pay in post a). It only showed Mrs L’s pay for post b). In the Adjudicator’s view, the fact that both Mrs L’s posts were with the same Trust, meant the onus was on Mrs L and the pension officer at the Trust to have identified, at the time, that the figure of £43,380.33 was incorrect.
- NHS BSA relies on the information provided by Mrs L’s employer, the Trust, to use in its estimated pension statements. Had the Trust provided the correct information to NHS BSA, NHS BSA would have calculated the composite pay value for her protected pay. The Adjudicator would not expect NHS BSA to have identified that Mrs L had two concurrent posts, as it was not possible for it to have known this from the information the Trust provided between 2011 and 2015. The Trust never informed NHS BSA that Mrs L had two concurrent part-time posts, that is, a) and b).
- So, the Adjudicator’s view was that it was reasonable for NHS BSA to accept that the information was correct. There was nothing that would have prompted NHS BSA to begin making further enquiries. NHS BSA rightly started making further enquiries after Mrs L applied for her pension benefits.

- The Adjudicator understood that the difference between Mrs L's incorrect pension benefits and the correct benefits was around 4.5%. The significance of such an amount is subjective, however in this instance the Adjudicator did not consider that this reduction in the estimate would cause a serious impact on Mrs L's financial affairs. Furthermore, Mrs L had a further chance to request another estimated statement in February 2016, but chose not to do so. It seems that she was heavily influenced by the information from the pension officer at the Trust and not NHS BSA. The Adjudicator has seen no evidence to show that NHS BSA refused to provide another statement, or discouraged her from obtaining one, before she retired in June 2016. In the Adjudicator's view, it would have been prudent for Mrs L to have requested another statement before making an important decision, such as retiring.
- Mrs L asserts that she repeatedly queried the February 2015 statement, however there is no evidence to support this claim. Mrs L also said she had to take up new employment as a result of her reliance on the incorrect information. The Adjudicator noted that Mrs L made general enquiries about pay protection and the implications of being re-employed after her retirement. So, on balance, this would suggest that she was in any case considering taking up a new job following her retirement; this was not as a direct result of her reliance on the incorrect information.
- The Adjudicator saw nothing wrong with the fact that NHS BSA issued a revised stage two response. The Adjudicator had considered both of NHS BSA's stage two decision letters as part of its overall response to Mrs L's complaint.
- Mrs L has accepted that she is not entitled to the higher pension, however she would like to be compensated for the loss of expectation. This is a non-financial injustice rather than financial loss. NHS BSA apologised for the provision of incorrect information. Given the fact that there were opportunities for Mrs L to have mitigated her loss of expectation, the Adjudicator did not believe any further award was warranted in this case.
- The Adjudicator understood that NHS BSA directed Mrs L to approach the Trust regarding this matter, which she believed would be appropriate given the circumstances; her view was that this complaint should not be upheld.

24. Mrs L did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs L 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 points made by Mrs L for completeness.

Ombudsman's decision

25. Mrs L has said that she relied on the incorrect information provided to her in February 2015, which caused her to suffer financial loss. In order to be entitled to redress, Mrs L would have to demonstrate that she reasonably relied on the incorrect information.

26. Mrs L argues that she was not able to identify that the February 2015 estimate was incorrect. This is because she worked shifts and received enhanced payments which meant that she could not be aware of the correct figure for her employment. The pension officer at the Trust did not comment on whether the figures were accurate/correct.
27. Mrs L contends that she was never a party to the exchange of communication between the Trust and NHS BSA and therefore could not have been expected to be responsible for correcting any errors. Mrs L believes that NHS BSA's apology is not sufficient and would like to be compensated.
28. Taking all the available evidence into account, I do not find that Mrs L was given a clear and unambiguous statement upon which it was reasonable for her to rely. It was not reasonable for Mrs L to have relied solely on the incorrect information received to make such a significant decision as retiring, without confirming what her correct pension position was. I do not consider it reasonable for Mrs L to have relied on estimated figures that were not guaranteed and could change.
29. As NHS BSA has highlighted, the estimates produced are based on the information provided by the employer at that time.
30. NHS BSA confirmed that had the Trust provided the correct information to NHS BSA, NHS BSA would have calculated the composite pay value for her protected pay. I would not expect NHS BSA to have identified that Mrs L had two concurrent posts as it was not possible for it to have known this from the information the Trust provided between 2011 and 2015. I have seen no evidence to the contrary.
31. In addition, the Scheme member has a responsibility to make sure that the information provided on their benefit statements is correct, such as the retirement date, date of birth and pensionable pay. I would have expected Mrs L to have queried this information with the Trust to make sure that it was correct.
32. Although, I agree that the provision of the incorrect information amounted to maladministration, I am not persuaded that it caused significant distress and inconvenience. Mrs L was issued with an estimated projection which clearly stated that it was not guaranteed. As a result, I consider the maladministration to be limited. I agree that Mrs L has suffered distress and inconvenience, but I do not consider that it was significant, and an apology was an adequate response.
33. I do not uphold Mrs L's complaint.

Anthony Arter

Pensions Ombudsman
31 January 2020