

Ombudsman's Determination

Applicant	Dr Elizabeth Millar
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Pensions South West Yorkshire Partnership NHS Foundation Trust (the Trust)

Complaint Summary

Dr Millar complains that:

- She was not informed that she should have stopped paying contributions to the Scheme when she completed the maximum permitted pensionable service on 22 July 2009.
- She was denied the opportunity to take her benefits from the Scheme with effect from 22 July 2009, and continue to work for the NHS after a break in service.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against NHS Pensions because it failed to tell Dr Millar and the Trust to stop paying contributions, and accordingly she was denied the opportunity to take her benefits while remaining in work after a break.

Detailed Determination

Material Facts

1. Dr Millar was born on 3 July 1946, and joined the Scheme on 1 October 1971. She was a mental health officer (**MHO**) for most of her NHS service. The NHS Pension Scheme Regulations 1995 (**the Regulations**) contained special provisions for MHO service. Dr Millar's entitlement under the Regulations could be calculated in two different ways, as follows.

First Method

- Her MHO service over 20 years was doubled.
- She could retire at any time after age 55 and take immediate benefits without reduction for early payment.
- The maximum pensionable service before age 55 was 40 years.
- Contributions ceased when she attained the maximum Scheme membership of 45 years and had passed age 60.

Second Method

- There were no restrictions on the amount of pensionable service.
 - Benefits were based on the whole period of service, excluding doubled service.
 - Dr Millar would have had to make up contributions as if they had not stopped on completion of 45 years Scheme membership and passing age 60.
2. The second method was very unlikely to be better than the first, due to the amount of doubled service in the first method. The Regulations provided for reduction of pensions in payment to persons under 60 who returned to NHS employment, regardless of the length of any break in service. Pensions in payment to persons over 60 were not reduced, as long as there was a break in service of more than a month.
 3. Dr Millar attained 45 years membership of the Scheme on 22 July 2009, some of which was part time. Her full time equivalent pensionable service was 38 years 53 days. On 5 August 2009 Dr Millar met with the Trust's pensions manager, who gave her several benefit statements obtained from NHS Pensions' online facility. These contained a paragraph saying:

"Your membership has been restricted for at least one of the following reasons:

- qualifying membership must not exceed 40 years at (1) age 60 (55 for special classes), or (2) 1 April 2008, whichever is the earlier;

- qualifying membership must not exceed 45 years overall.

Contributions must cease once 45 years service has been achieved providing the member is at least age 60. Otherwise, contributions can continue to be paid until the member reaches age 65 or achieves maximum 45 years service. Please contact [NHS Pensions] if you require further advice.”

The benefit statements showed the “total membership at last day of pensionable employment” and the “total calendar length membership at last day of pensionable employment.”

4. Dr Millar says that the Trust’s pensions manager told her that she would never achieve 45 years, and so she could continue her contributions to the Scheme until age 65. The pensions manager cannot recall saying this.

5. On 17 February 2010 Dr Millar sent an email to the Trust’s pensions manager, saying:

“...Can you tell me what the restrictions are on earnings if one comes back to work after 45 years or age 65 – in my case it would be after 65...”

6. The pensions manager replied on 18 February 2010, saying:

“There are no restrictions on the amount you can earn once you have reached age 60 so far as you are concerned, there would be no limit to the amount you could earn or the amount of time you would be able to work. Are you approaching the 45 years service mark because if so you must stop paying contributions as soon as you hit 45 years. If you don’t know when it is I will look it up for you...”

7. Dr Millar replied on 18 February 2010, saying:

“I reach 65 on 3 July 2011 but I think I will have only around 41+ years service by then. I understood that one had to stop paying contributions at 65 or 45 years service, whichever came sooner. My query was really about what would happen if I retire at 65, have the requisite gap, and then came back to work in some capacity, maybe even the same capacity. Are there any restrictions as to how much one can work and/or how much can earn at that point?”

8. The Trust’s pensions manager replied on 18 February 2010, saying:

“Yes, sorry you are right and if that is the case you will have to take your pension from 3 July 2011. So long as you have at least one day’s break in service you can come back in exactly the same capacity as you are now if that is what you want and there are no restrictions whatsoever on what you can earn.”

9. Dr Millar continued to work for the NHS and paid contributions to the Scheme until 3 July 2011, when she reached 65, took her benefits and returned to work after the required break in service. NHS Pensions discovered the mistake and the overpaid contributions were refunded to Dr Millar. NHS Pensions subsequently paid Dr Millar interest on the overpayment, and offered her £250 compensation for distress and inconvenience.

Summary of Dr Millar's position

10. Dr Millar says that she would have taken her Scheme benefits in 2009 under the first calculation method and continued in the same job after a break in service, had she known that she could do so. Dr Millar says that to resolve the matter she should be paid the backdated pension she would have received had she taken it in 2009. Dr Millar also wants compensation for the lost income she could have received by taking the lump sum in 2009 and investing it.

Summary of NHS Pensions' position

11. NHS Pensions agrees that in 2009 it should have told Dr Millar that she had 45 years membership. However, NHS Pensions says that its responsibility should be shared equally with the Trust. It points to that fact that the Trust knew, because it says it told Dr Millar in 2009 by giving her a statement that explained this. NHS Pensions' computer system does not identify maximum membership for Scheme members with part time MHO service, so this has to be calculated manually. NHS employers had been told about this in the Scheme's employer guide, technical newsletters and guidance posted on NHS Pensions' website. In particular, employers had been told not to issue quotations obtained from NHS Pensions' computer system if they showed membership restricted to 45 years. Employers had to request a manual benefit statement from NHS Pensions and the online system put up an on screen warning that this had to be done.
12. NHS Pensions says that as the benefit statements obtained for Dr Millar by the Trust from NHS Pensions' online system showed the 45 year restriction, they should have been referred back to NHS Pensions. NHS Pensions says that employers play a vital part in the administration of the Scheme. The Trust ignored all the guidance provided, and so should share liability for the maladministration.
13. NHS Pensions points to the NHS Pensions Employers' Charter, which requires employers to "provide accurate, timely membership and information about Scheme members...including reconciling data" and "to facilitate all of these activities it is necessary that local administrators regularly keep abreast of Pension Scheme changes which are outlined in the Employers' Newsletters." NHS Pensions says that given these requirements and all the on line information that is available, it is simply factually untrue for the Trust to say that it did not have a complete record of Dr

Millar's service with previous employers, or that it was unreasonable to expect it to know when the 45 year limit had been reached.

14. NHS Pensions says that employers regularly refer such cases to NHS Pensions, which demonstrates that the system is effective and highlights the Trust's negligence.
15. NHS Pensions says that if the Trust is not directed to share the responsibility for the maladministration, it would send out a clear message to all NHS employers that there would be no consequence for any maladministration on their part in the future. This would lead to NHS employers having little incentive to play their important part in the Scheme's administration.

Summary of the Trust's position

16. The Trust accepts that it should have stopped Dr Millar's contributions in 2009. However, the Trust says that it cannot accept any liability arising from Dr Millar's contributions continuing until 2011, because the overpayment was refunded and NHS Pensions should have informed Dr Millar and the Trust when 45 years membership had been attained. The Trust says that it did not have a complete record of Dr Millar's service with previous NHS employers, and so it was unreasonable for NHS Pensions to expect the Trust to know when Dr Millar had reached the 45 year point.
17. The Trust says that the benefit statements provided to Dr Millar by the Trust put her on notice that a 45 year limit applied. The Trust could not provide Dr Millar with financial advice.

Conclusions

18. The benefit statements warned that membership restrictions applied, but Dr Millar appears to have confused calendar years membership with full time equivalent pensionable service. The Trust's pensions manager relied on Dr Millar's estimate of her pensionable service. Dr Millar's email dated 18 February 2010 indicated that she did not know for certain how much pensionable service she had. The pensions manager offered to check, but should have done so anyway, given Dr Millar's MHO status, the restrictions mentioned on the benefit statements and the guidance put out by NHS Pensions.
19. The Trust could not give Dr Millar financial advice, but that did not prevent it obtaining and providing accurate information for Dr Millar about her Scheme membership and benefits. The Trust's failure to do so amounts to maladministration.
20. NHS Pensions was primarily responsible for Dr Millar not being told in 2009 that she could retire, take her benefits from the Scheme and return to work after a short break in service. NHS Pensions' failure to do so constitutes maladministration. It is the Scheme administrator. Its computer system issued benefit statements on demand, when the calculations had to be done manually. NHS Pensions was unable to

identify when Dr Millar's contributions should have stopped. It took steps to limit the risk of mistakes being made, but the responsibility for the administrative shortcomings stayed with NHS Pensions.

21. Dr Millar was not a pensions expert. She was aware that there was a 45 year limit, but did not understand how it applied to her. NHS Pensions' online system may have held much useful information, but the benefit statements it produced were inadequate. When Dr Millar retired in 2011 she took her pension and lump sum and returned to work for the NHS, after the required break in service. I see no good reason to doubt Dr Millar's assertion that in 2009 she would have done the same. Dr Millar is entitled to compensation for the financial injustice she has suffered.
22. NHS Pensions says that it is unable, under the Regulations, to pay benefits other than those to which Dr Millar is entitled. So I have directed payment of a lump sum not as a Scheme benefit, but by NHS Pensions as compensation for the loss of the equivalent amount of benefit caused by maladministration.
23. I have considered whether the Trust should share liability. NHS Pensions ask me to consider joint and several liability. They have also suggested that the liability should be split 50/50. The two are not the same, of course, though NHS Pensions submissions do not altogether acknowledge that. A finding of joint and several liability would leave Dr Millar able to pursue either party for the whole compensation.
24. I have no doubt that I have power either to apportion liability or to find the liability to be joint and several. I have considered whether I should.
25. NHS Pensions' position boils down to an acknowledgement that the responsibility for producing accurate estimates was theirs, but since they knew their systems were not capable of doing so they put in place safeguards, by which they relied on employers not to issue inaccurate estimates and to revert to NHS Pensions in relevant circumstances.
26. I do have some sympathy with NHS Pensions, in that they had tried to patch up the system to deal with people in Dr Millar's circumstances. But looked at that way the Trust's obligation to administer the safeguards was owed to NHS Pensions rather than Dr Millar. Whereas there is nothing that would prevent me from finding maladministration by the Trust in carrying out an obligation owed to NHS Pensions, so causing harm to Dr Millar, it seems to me the situation is subtly different to a case in which each party directly owed a duty or obligation to Dr Millar. (I should be clear that the Trust would unavoidably have had direct obligations to Dr Millar both as employer and in its administration of the Scheme, but that in relation to the particular matter of preventing her from being misinformed by inaccurate estimates, any obligation should be regarded as secondary and arising from an obligation to NHS Pensions.)

27. In short, NHS Pensions was the scheme administrator, and its maladministration caused the problem in the first place. So I have decided that the compensation should be paid by NHS Pensions (and if allowable, charged to the Scheme as an administration expense).
28. The loss suffered by Dr Millar is the pension which would have been paid to her between 22 July 2009 and 2 July 2011. There was no loss of interest on the lump sum, as the lump sum paid to Dr Millar in 2011 (£155,648.88) was a much greater amount than would have been paid in 2009 (£150,968.86).
29. If Dr Millar had taken her benefits in 2009, she would have had to take a one day break in service and then work no more than 16 hours a week for a month. So to return Dr Millar, so far as is possible, to the position she would have been in had the maladministration not occurred, I have allowed for one month's salary at the 2009 level. I have assumed that Dr Millar would not have worked at all in the first month of re-employment, because her usual working day would have exceeded 16 hours.
30. Dr Millar was undoubtedly caused distress and inconvenience. I consider NHS Pensions' offer of £250 to be adequate compensation for this.

Directions

31. I direct that within 28 days of Dr Millar notifying NHS Pensions of her net monthly salary for August 2009, NHS Pensions shall calculate the total of the instalments of pension which would have been paid to Dr Millar, had she taken her benefits on 22 July 2009, from that date to 2 July 2011. NHS Pensions is also to calculate simple interest on the instalments of pension, from the due date to the date of payment, at the base rate for the time being payable by the reference banks. From that sum it may deduct an amount equal to the net salary notified, plus interest at the same rate from August 2009 to the date on which the payment is made. NHS Pensions shall then, forthwith, pay Dr Millar the overall amount so calculated.
32. I further direct NHS Pensions to pay Dr Millar £250 within 28 days of its receipt of this Determination.

Tony King

Pensions Ombudsman
22 May 2015