

Ombudsman's Determination

Applicant	Mrs R
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS BSA

Outcome

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

Complaint summary

2. Mrs R's complaint concerns the decision NHS BSA made in 2017, to cease her widow's pension, after she informed it that she was co-habiting with her partner.

Background information, including submissions from the parties

3. Mrs R's late husband, Mr N, joined the Scheme in January 1996, and he retired on 25 April 2006. When Mr N applied for retirement, he was given a booklet entitled: NHS Pensions – Notes for pensioners and their dependants (**Booklet R**). Section 9.2 of Booklet R said:

- **"9.2 Survivor's pension for spouse or civil partner**

When you die your spouse or civil partner will get a pension as follows:

A spouse or civil partner with no dependent children:	For the first 3 months, a pension the same as yours.
--	--

A spouse or civil partner with dependent children:	For the first 6 months, a pension the same as yours.
---	--

Then a permanent pension:

- **for a widow** half of your pension.
- **For a widower/civil partner** half of your pension for your membership from 6 April 1988."

4. Mr N passed away on 17 December 2007, and Mrs R started receiving a widow's pension.
5. In August 2017, following receipt of a newsletter with her annual benefit statement from NHS BSA, Mrs R informed NHS BSA that she was co-habiting with her partner. On 12 September 2017, NHS BSA responded to Mrs R and said:

“Please confirm the date your new partner moved in with you because your husband received his NHS pension under the 1995 Scheme Regulations and you may no longer be entitled to receive the pension.

Your Survivor pension has been suspended pending your reply to prevent an overpayment of benefits.”
6. Following receipt of this letter, on 9 November 2017, Mrs R, through her legal representative, wrote to NHS BSA. Her legal representative informed NHS BSA that, after reviewing Mrs R's pension documentation, it concluded that despite her co-habiting, she was still entitled to receive a widow's pension.
7. Mrs R's legal representative referred to paragraph 9.2 of Booklet R and said that “...there was nothing in the ...booklet that stated or inferred the Pension would cease if our client was to remarry or co-habit.”
8. Mrs R's legal representative also said that a letter Mr N received entitled: Changes to the NHS Pension Scheme announced on 21 September 2007, informed Mr N that:

“as someone already in receipt of an NHS Pension, these changes do not affect you, or the entitlement of any dependants' you may have. The same rules and benefits will continue to apply to your pension as those described in the booklet Notes for pensioners and their dependants that you were given when you retired.”
9. Consequently, Mrs R's legal representative requested her widow's pension be reinstated.
10. On 15 December 2017, NHS BSA responded to Mrs R and explained that the Scheme Regulations that governed Mr N's pension rights must be followed. It explained that as Mr N had left the Scheme prior to 1 April 2008, the changes made to the Scheme Regulations on that date would not have applied to him.
11. Unhappy with the response received from NHS BSA, on 25 January 2018, Mrs R, through her legal representative, complained to NHS BSA through both stages of the Scheme's internal dispute resolution procedure (**IDRP**).
12. In her complaint, Mrs R explained that she was extremely distressed by NHS BSA's actions in suspending her pension, which is her only source of income. She was also disappointed that NHS BSA had initially accepted that her pension was permanent but that it had subsequently retracted that statement.
13. Mrs R also asserted that Mr N had relied on the representation that her widow's pension would be permanent to his detriment, as he had based his decision to

transfer his other two pension funds into the Scheme, on this information.

Additionally, she and her husband made no further financial provision and as a result of the decision to withdraw the pension, she will suffer detriment as she has no other form of income.

14. Mrs R's complaint was not upheld at either stage of the IDRPs. In the IDRPs stage one decision dated 19 March 2018, NHS BSA explained that Mr N was a member of the Scheme from 15 January 1996 to 20 March 2005 and, that he also transferred in benefits from another provider. It explained that his benefits became deferred when he stopped paying pension contributions and that in 2006, his benefits were put into payment on actuarially reduced Early Payment terms.
15. NHS BSA explained that the Regulations changed in 2008 to allow a widow's pension to be payable for life, irrespective of if the spouse remarried, formed a civil partnership or commenced living with someone as their spouse or civil partner. However, the change was not retrospective. Therefore, surviving spouses of members with a last day of membership prior to 1 April 2008, would still lose their pension if they remarried, formed a civil partnership or co-habited.
16. Mrs R appealed the stage one IDRPs decision. As part of her appeal, her legal representative said Mrs R was relying on the doctrine of Estoppel and said:

“We have considered the Case Law regarding the applicability of the Doctrine of Estoppel to pensions and, in particular, where the representation relied upon is contained in explanatory literature like Booklet R. Those decisions have emphasised the difficulties of successfully bringing an Estoppel Claim based on statements in explanatory literature when the literature acknowledges the Supremacy of the Trust Deed and Rules. We believe those cases can be distinguished from the present case. Booklet R does not acknowledge the Supremacy of the NHS Pension Scheme Rules 1995. Indeed, the Rules are not specifically referred to, or highlighted in the Booklet at all.”
17. Mrs R's legal representative also said, had Mrs R been informed that her widow's pension was not permanent, she would have been able to make alternative financial provision for herself.
18. In the IDRPs stage two decision dated 2 July 2018, NHS BSA explained that the rules of the Scheme are laid down in Regulations agreed by Parliament. Consequently, NHS BSA must ensure that the Regulations are adhered to and that only pension benefits that the member or their dependants are legally entitled to, are paid from the Scheme. NHS BSA provided details of the Regulation that was applicable to Mr N's membership in the Scheme and among other things said:

“Each year every NHS pensioner receives a Pensioner Newsletter which is published in April each year. Mr [N] would have received the 2006 and 2007 editions and then [Mrs R] would have received them from 2008 onwards. Each newsletter clearly states under the heading – **Remarriage, forming a civil**

partnership or living together as husband & wife or civil partners ‘if you receive a NHS survivor’s pension and you decide to re-marry, form a civil partnership or live with another person as husband and wife or civil partners, you must let us know – it will affect your pension.’

19. Therefore, NHS BSA did not accept that Mrs R was not aware that her widow’s pension would cease should she remarry or co-habit with another person as husband and wife or civil partners. As a result, Mrs R’s complaint was not upheld.
20. Dissatisfied with the IDRP decisions, Mrs R referred her complaint to us.
21. In the formal response to this complaint, NHS BSA maintained the view of its IDRP two decision.
22. In response to NHS BSA’s formal response, Mrs R made the following comments:-
 - When her late husband joined the Scheme in 1996, there was no reference to the potential withdrawal of a widow’s pension, in the event of co-habitation or remarriage. It is inconceivable that her late husband would have transferred his other benefits into the Scheme and continue to make pension contributions under such circumstances.
 - When her late husband retired, he only received Booklet R and this informed him that the widow’s pension was permanent.
 - Her late husband may have received the 2007 newsletter but, under the main heading ‘Important Reminders’ sub paragraph ‘Marriage or forming a Civil Partnership after retirement, it informs the pension holder that they need to inform the Scheme of this. The statement is not directed at the deceased member’s spouse.
 - Her late husband would only have received the 2007 newsletter and that did not give any details of what a surviving spouse who is in receipt of benefits, should do if they re-marry or cohabit with someone as their partner.

The Pensions Ombudsman’s Position on The Provision of Incorrect Information

23. Where an applicant brings a complaint based upon having been given incorrect information, the Ombudsman will usually consider two legal concepts: ‘negligent misstatement’ and ‘estoppel’. The Ombudsman will also consider whether there has been ‘maladministration’.
24. The starting point where incorrect information has been provided is that a scheme is not generally bound to follow incorrect information – a member is only entitled to receive the benefits provided for under the scheme rules. For example, if trustees have given inaccurate early retirement quotes, these will not generally be binding.

25. Broadly, the Ombudsman will provide redress following incorrect information if it can be shown that financial loss has flowed from the incorrect information given. For example, the member may have acted differently in the expectation of receiving the higher benefits, such as retiring early.
26. As to estoppel, the Ombudsman will not allow either party to rely on a fact contrary to that which they have previously represented, or contrary to a common assumption that something is accurate, if it would not be fair to do so. This may mean that a respondent will be prevented from arguing that something that they said before was wrong and will, instead, have to give benefits as if what was said were accurate.
27. In addition to, or instead of, financial compensation, the Ombudsman may award some compensation for distress and inconvenience if what was done amounted to maladministration. Maladministration covers various different types of problems or failings in how a scheme is administered or how members are dealt with.

Adjudicator's Opinion

28. Mr R'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: -

Negligent Misstatement

29. A complaint of negligent misstatement must be based upon an inaccurate statement, usually called a 'representation'. That statement is usually made by spoken or written words, but it can also be made by conduct. The representation must be a statement of past or present fact or, in some circumstances, of the law. It must be clear and unequivocal.
30. In this case, it was the Adjudicator's opinion that the following representation was made:
 - Booklet R informed Mrs R and her late husband, Mr N, that in the event of Mr N's death, Mrs R would receive a permanent widow's pension.
31. This was a statement about Mrs R's pension entitlement and it was a statement of existing fact or law.
32. The representation was clear and unequivocal.
 - Booklet R was given to Mr N at the time that he applied for his retirement benefits and it gave him details of the pension he and his spouse were entitled to.

Made by someone who owed a duty of care

33. The representation must have been made by a person who owed a duty of care to the person to whom the representation was made.
34. In this case, the Adjudicator concluded that the representation was made by people who owed a relevant duty to Mrs R and did come within the extent of their duties towards her. This is because although Booklet R was given to Mr N, at the time that he retired, as his spouse, Mrs R was also entitled to benefits from the Scheme, following his death. Therefore, it was the Adjudicator's view that:
 - the representation was made by people who owed the relevant duty to Mrs R because as Mr N's spouse she was entitled to benefits upon his death; and
 - NHS BSA ought to have known that Mrs R would have relied on the information in Booklet R.

Inaccurate statement which could not have been made by somebody exercising reasonable care

35. In order to bring a complaint of negligent misstatement, the representation must be inaccurate and not something that could have been made by somebody who was exercising reasonable care.
36. In this case, the Adjudicator concluded that the representation identified above was inaccurate because it did not inform Mrs R that her widow's pension could or would cease if she remarried. This was because section 9.2 of Booklet R said that the widow's pension was permanent.

Reasonable reliance

37. The representation must have been relied upon by the applicant.
38. In this case, the Adjudicator concluded that although Mrs R says that she did not make alternative financial provision for herself because she relied on the representation that her widow's pension would be permanent, it was not reasonable for her to do so.
39. This was because, although Booklet R had informed Mrs R that her widow's pension was permanent, each year, pensioner members of the Scheme are sent pension newsletters. These newsletters inform the members that they need to contact NHS BSA to inform it of changes to their personal circumstances, as it could affect their benefits.
40. Following Mr N's death in December 2007, Mrs R would have received the newsletter directly, from 2008 onwards, as she had become a pensioner member of the Scheme. The newsletters from 2008 onwards informed Mrs R that she needed to contact NHS BSA if she was in receipt of a widow's pension and had remarried,

formed a civil partnership or co-habited with a new partner, as it would affect her benefits.

41. Therefore, in the Adjudicator's opinion, Mrs R ought to have been aware since 2008, that her widow's pension was not permanent and therefore could have taken steps to mitigate her loss, by making alternative financial provisions for herself.

The complaint of misrepresentation and the argument for estoppel by representation

42. Broadly speaking, 'estoppel by representation' is an argument which can be raised by either side in a dispute. If an applicant is clearly told something by a respondent, it is reasonably foreseeable that they will rely upon what they were told, and if they do in fact rely on it to their detriment, the applicant may be entitled to receive the benefit they were promised.

Clear representation or promise

43. The representation which was made to the applicant must be a clear statement or promise.
44. The Adjudicator concluded that there was a clear representation or promise when Mr N applied for his retirement benefits and was provided with a copy of Booklet R. This is because Booklet R informed Mrs R that, following Mr N's death, she would receive a permanent widow's pension.

Reasonable and foreseeable reliance

45. In the Adjudicator's opinion, it was not foreseeable that Mrs R would rely upon the statement for the following reasons:-
- Mr N joined the Scheme in 1996, and his benefits were governed by Regulation G of the NHS Pensions Scheme Regulations 1995 (as amended). The Regulations state that should a widow marry or co-habit with another partner, no widow's pension would be payable. Relevant sections of the Regulations are in the Appendix.
46. Although Mrs R says she relied on the representation in Booklet R, it was the Adjudicator's view that it was not reasonable for her to do so because:-
- Mr N received Booklet R in 2006, when he commenced claiming his benefits and he passed away in 2007.
 - Every year NHS BSA sends a newsletter to pensioner members of the Scheme. Following Mr N's death in December 2007, Mrs R would have been sent the NHS newsletter, as she had become a pensioner member of the Scheme.

- The newsletters from 2008 onwards informed Mrs R that she needed to contact NHS BSA if she was in receipt of a survivor's pension and had remarried, formed a civil partnership or co-habited with a new partner, as it would affect her benefits.
- Therefore, Mrs R ought to have been aware, since 2008, that her widow's benefits could be affected if she remarried or co-habited with her partner.

Unconscionability, exclusions and limitations

47. It was the Adjudicator's view that NHS BSA going back on its representation would not be unconscionable. This was because the consequence of the estoppel would be to do something contrary to statute or public policy.

Conclusion – is there an estoppel?

48. For the reasons set out above in paragraphs 44 to 48, the Adjudicator concluded that NHS BSA was not estopped from going back on its statement, written in Booklet R, that a widow's pension was permanent.
49. This meant that NHS BSA did not have to continue to pay Mrs R a widow's pension, as she had remarried.

The complaint of maladministration

50. In the Adjudicator's opinion, NHS BSA's action did not amount to maladministration because:

- Booklet R states:
 - This booklet is issued by National Health Service Pensions, who administer the NHS Pension Scheme on behalf of the Secretary of State for Health.
 - The Booklet tells you about the benefits payable on your retirement, gives general information that may be helpful to you and explains the benefits that may be payable on your death.
 - It explains some of the main rules but is not intended to be a full statement of the law which governs the Scheme.

51. Mrs R did not accept the Adjudicator's Opinion and in response made the following comments: -

- Reasonable reliance – her late husband was satisfied and adamant prior to his death that her widow's pension would be paid permanently. He relied on Booklet R but would also have relied too, on the statement in the 2007 newsletter that confirmed that the clause of marriage, cohabitation or civil partnership only applied to the pension holder not to the spouse.

- There is no mention that a surviving spouse would be affected by such a change of circumstances. Therefore, it was reasonable for her and her late husband to conclude that her widow's pension would be paid permanently, regardless of subsequent notifications.
 - She believes that her continuing understanding of a permanent pension was and is reasonable under these circumstances.
 - If reasonable reliance is upheld, she believes her complaints concerning negligent misstatement and maladministration should also be upheld.
 - She believes that the statement in Booklet R which says her widow's pension is permanent is a "Main Rule" and therefore a statement of fact and a defining rule. She maintains that only items not included under "Main Rules" can be considered as items included in the statement "not intended to be a full statement of the law which governs the scheme."
 - She believes NHS BSA's actions amount to maladministration and this has been overlooked by the Adjudicator.
52. As Mrs R did not agree with the Adjudicator's Opinion, the complaint was passed to me to consider. I agree with the Adjudicator's Opinion and will only respond to the key points Mrs R has raised for completeness.

Ombudsman's decision

53. I have read Mrs R's letters of 12 September 2018 and 20 May 2019. I have also read the contents of Booklet R and the 2007 and 2008 newsletters. I note that Booklet R says 'Please tell your dependents about the Booklet and keep it in a safe place'. It clearly describes the spousal benefit as permanent. I agree with Mrs R that the 2007 newsletter does not contain the wording quoted at paragraph 18 above. That wording appeared only in the 2008 newsletter. It is therefore incorrect to say that this wording has appeared in each newsletter since 2006. However, for the reasons below, I do not consider that these points alter the outcome arrived at by the Adjudicator.
54. Mrs R asserts that her late husband, Mr N and herself reasonably relied on the information in Booklet R that her widow's pension would be permanent. Mrs R maintains that it is 'inconceivable' that her late husband would have transferred in his previous pensions if he had known that the spousal benefits could have been affected by cohabitation or remarriage. However, I cannot conclude that Mr N's decision to transfer in his other pensions was affected by the contents of Booklet R because it was issued after his decision was made.
55. I recognise that Booklet R may not have been the only statement to this effect and on the evidence of Booklet R and the 2007 and 2008 newsletters, I find that Mr N would probably have believed the benefit to be permanent. However, I cannot conclude that his decision making process would most likely have been different if he had known

about the effects of remarriage or cohabitation on the dependents' pension. The decision whether to transfer in accruals in another scheme is one which has to be made in light of an entire package of benefits. I have seen no evidence from which I can properly conclude that the effects of Mrs R's subsequent cohabitation or remarriage would have been uppermost in Mr N's mind, at the point when he made the decision to transfer in benefits from another scheme.

56. Mrs R has said that she would have made different financial provision for herself if she had realised the spousal benefit was not permanent, but she has not specified what that provision would have been. While I do not dispute that Mr N may have believed the spousal benefit to be permanent, I do not find it was reasonable for Mrs R to believe this would be the case after Mr N's death.
57. I say this because, the newsletters Mrs R received from 2008 onwards clearly informed her that her benefits would be affected if she remarried or co-habited with her partner. It was receipt of one such leaflet, in August 2017, that prompted her to contact NHS BSA and inform it of a change in her personal circumstances. So, it is my view that Mrs R cannot succeed in her claim that she decided to make no alternative financial provision for herself in reliance on the information in Booklet R, or that it would have been reasonable for her to do so.
58. I find that Mrs R could have contacted NHS BSA prior to August 2017, to query how her widow's pension would be affected if she co-habited with her partner. Had she done so, she would have been able to mitigate her loss, as she could have made alternative arrangements, to offset any loss she would incur as a result of losing her widow's pension.
59. Mrs R considers that the Adjudicator has overlooked the issue of maladministration by the Scheme. The estate of a deceased person cannot suffer distress and inconvenience. Because I could give no remedy for it in any event, I have not enquired further into whether there was maladministration in the way that the Scheme communicated with the late Mr N. I have given separate consideration to the question of whether there was maladministration involved in the Scheme's communications with Mrs R.
60. I would expect any restrictions on a benefit and any duty to notify the scheme of a change in marital circumstances to be drawn expressly to a member's attention at the point when that benefit is granted. That is particularly necessary when the scheme has previously issued information of the type contained in booklet R. Mrs R has not provided a copy of the letter which accompanied the grant of benefit to her. I have made enquiry and unfortunately no copy now exists within the Scheme records either. However, the notes which accompanied the widows benefit claim form do exist and these clearly drew attention to the need for a surviving spouse to notify the scheme if they remarried or cohabited. Mrs N would also have received the newsletter of 2008 drawing attention to the issue. From this evidence I cannot conclude that there was maladministration causing distress and inconvenience in the way that the Scheme communicated with Mrs R.

PO-24316

61. For the reasons stated above in paragraphs 54 to 60, I do not uphold Mrs R's complaint.

Karen Johnston

Deputy Pensions Ombudsman

17 September 2019

Appendix

Relevant extracts from The National Health Service Pension Scheme Regulations 1995 (SI1995/300)

“Regulation G1 Widow’s pension

(1A) Paragraphs (2) to (7) apply if a member’s pensionable employment ceases before 1st April 2008.

(2) Subject to paragraphs (3) to (5)-

(a) no widow’s pension shall be payable in respect of any period during which the widow and a man to whom she is not married are living together as husband and wife;

(b) the widow shall cease to be entitled to a widow’s pension if she remarries;

(c) no widow’s pension shall be payable in respect of any period during which the widow and a woman who is not her civil partner are living together as if they were civil partners; and

(d) the widow shall cease to be entitled to a widow’s pension if she forms a civil partnership.

(2A) Paragraph (2) (c) and (d) shall not apply where the member dies before 5th December 2005.

(3) Nothing in paragraph (2) shall affect any entitlement to a widow’s guaranteed minimum pension under this Section of the scheme.

(4) If the Secretary of State is satisfied that the widow will otherwise suffer severe financial hardship, the Secretary of State may pay a pension to a widow who-

(a) has remarried,

(b) has formed a civil partnership,

(c) is living together as husband and wife with a man to whom the widow is not married,

(d) is living together as if in a civil partnership with a woman who is not the widow’s civil partner.

(5) If the Secretary of State is satisfied that the widow will otherwise suffer hardship, the Secretary of State may pay a pension to a widow who has-

(a) remarried and that later marriage has come to an end,

(b) formed a civil partnership which has come to an end.

- (6) The amount of any pension payable under paragraph (4) or (5) may, at the Secretary of State's discretion, be equal to, or less than, the original widow's pension and the Secretary of State may (subject to any widow's guaranteed minimum pension) vary the amount, or stop paying the pension, at any time."