

## Ombudsman's Determination

Applicant	Mrs R
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondent	NHSBSA

## Outcome

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

## Complaint summary

3. Mrs R's complaint concerns the advice she received from NHSBSA, which influenced her decision to enter part-time employment from full-time employment. She believes she was incorrectly advised that this would not have an impact on her pension benefits and has said that she would not have changed her employment hours had she been provided with correct information. As a result, she would like NHSBSA to amend her pension to what it would have been, had she worked full time.

## Background information, including submissions from the parties

4. Mrs R was a non GP provider in a General Practice (**GP**) Medical Practice, which meant that her earnings were based on a percentage of the Practice's profits. She was in full-time employment until 2014.
5. On 22 January 2014, Mrs R telephoned NHSBSA and asked about the effect on her pension, if she went into part-time employment. Following this, Mrs R decided to reduce her employment hours.
6. On 28 May 2015, Mrs R retired. However, due to her earnings being based on a percentage of the Practice's profits, Mrs R did not receive confirmation of her pension benefits until 3 August 2017, which were a reduced annual pension of £15,424.56 and a lump sum of £102,819.48.
7. On 11 September 2017, Mrs R contacted Primary Care Support England (**PCSE**) to query the pension figures that she had received. She said that prior to 2014, she had worked nine sessions a week, which was equivalent to full-time. She reduced this to

six sessions a week in 2014, on the basis that she had been told that going part-time would not adversely affect her pension, as she would be given a full-time equivalent. Mrs R believed she had pensionable earnings of £73,321.35 for her last year, so she thought her pension would be £109,981, that is £73,321.35 pro-rated for nine sessions a week.

8. On 20 November 2017, PCSE explained that NHSBSA would be the appropriate entity to contact about any concerns with the pension calculation.
9. On 28 November 2017, Mrs R contacted NHSBSA to query her final pension figures. She also emailed NHSBSA the following day, to highlight that she had experienced a financial loss by going part-time, based on the advice from NHSBSA. This was because she had a reduced profit share and lower pensionable earnings. Mrs R noted that based on the NHS Scheme Guide and a pensionable pay factsheet dated May 2017, it appeared as though her pensionable pay ought to have been converted to its whole-time equivalent.
10. On 29 November 2017, NHSBSA responded and explained that non GP providers are considered self-employed contractors, not employees, and are covered by specific regulations<sup>1</sup>. These state that non GP providers are regarded as whole-time regardless of the hours worked and they have to complete a Certificate of Pensionable Profits (**the certificate**) each year to declare their profit. The certificate contains guidance notes which indicate that non GP providers are considered whole-time. There is information on the Scheme's website which states the same thing. However, NHSBSA acknowledged that Mrs R had contacted NHSBSA in 2014 and that she was advised that any reductions in her hours would not affect her pension, and that part-time work was on a pro-rata basis. It apologised for this but pointed out that the certificate's guidance notes should have alerted Mrs R to the fact that non GP providers are considered whole-time.
11. On 20 December 2017, Mrs R instigated the Scheme's internal dispute resolution procedure (**IDRP**). She complained that she had decided to go part-time based on information she received in a telephone call with NHSBSA, to the effect that it would not affect her final salary pension calculation. Had she known that the information she received was incorrect, she would have remained as a full-time employee. Based on Mrs R's calculations, had she worked full time, she would have received £7,548 more in annual pension and £50,450 more in lump sum benefits.
12. On 3 February 2018, NHSBSA issued its IDRP stage one response. It acknowledged that Mrs R was "incorrectly advised that the whole-time equivalent pay would be used to calculate your pension." This was because it did not apply to Practitioner roles such as Mrs R's. It apologised for the error, however, it stated that the correct information was provided in the guidance notes for the 2012/2013 certificate which confirmed the fact that non GP providers are considered whole-time.

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<sup>1</sup> The National Health Service Pension Scheme Regulations 1995 and its subsequent amendments

13. On 9 February 2018, Mrs R escalated her complaint to stage two of the IDRP. She said she was disappointed that her complaint had not been upheld because she had been incorrectly advised that whole-time equivalent pay would be used to calculate her pension.
14. On 3 April 2018, NHSBSA responded under IDRP stage two. It outlined Mrs R's previous employments with the NHS and confirmed the telephone call notes from 22 January 2014, as well as Mrs R's last three years' earnings:

“Est Request, member asking for est age 60 [...] also advised reductions of hours [do] not affect pension as rate of pay not changing. Advised PT is pro rata, advised can retire and go back to work.”

Final year: 28 May 2014 to 27 May 2015 - £61,533.77

Middle year: 28 May 2013 to 27 May 2014 - £73,321.75

Earliest year: 1 May 2013 to 27 May 2013 - £5,341.68 (part year)
15. NHSBSA said it was hard to conclude that what was discussed during the telephone call was incorrect, as the advice provided was correct for NHS employees, but not self-employed non GP providers. NHSBSA noted that at the time of the call, it had recently been provided with information about two periods of pensionable employment for Mrs R that began on 1 May 2013, which overlapped a previous ongoing record. NHSBSA believed this would have contributed to “the provision of generic information about potential [whole-time equivalent] pay.”
16. Taking this into consideration, NHSBSA did not uphold Mrs R's complaint as it did not believe that there had been maladministration. NHSBSA considered it reasonable to expect Mrs R to have read the guidance in relation to her post and ensured she understood the position and the implications of reducing her profit share close to her chosen retirement date. It included a copy of the certificate's guidance notes which state:

“Non GP providers are required to complete the certificate. They are treated as ‘whole time officers’ regardless of the hours they work. Non GP providers are only permitted to pension income from one source and will only complete one certificate each year. As a non GP provider partner in a GP practice, their pensionable pay will be based on their share of profits from the partnership.”
17. On 18 April 2018, Mrs R replied. She said she had informed the call handler of her employment status; and, if he had been unsure of this, that would have been the time to clarify the situation. She disagreed with NHSBSA's points in relation to the overlapping periods of employment - as in November and December 2013, enquiries had been made from the department because there was an employment overlap with another post. Therefore, Mrs R thought NHSBSA was aware that she was a non GP provider and that it was not her fault that the telephone call handler failed to understand this.

18. Additionally, as the accountants prepared the accounts and completed the certificates, Mrs R did not see the guidance notes and so would not have seen the information. In any case, the guidance stated, “this booklet does not seek to offer definitive guidance in any of these areas of legislation and specialised advice should always be sought in the event of any uncertainties.” Mrs R said she had contacted NHSBSA for that advice, and she did not feel that she was obliged to check that it was correct.
19. On 8 May 2018, NHSBSA acknowledged Mrs R’s comments but said they did not change its position.
20. On 3 August 2018, Mrs R complained to this Office. She reiterated the details of her complaint and observed that at no point did NHSBSA provide her copies of any written guidance regarding her decision at the time she sought advice. Yet, this was what NHSBSA was relying upon.
21. Whilst we have been investigating the complaint, NHSBSA provided further information:-
  - Although Mrs R believes the information provided to her in the telephone call of 22 January 2014 was incorrect, NHSBSA considers this to be generic and may have related to other part-time periods of employment that were ‘open’ on its records for Mrs R at the time. The contact notes are brief, do not detail the actual conversation that took place and do not demonstrate that NHSBSA misinformed Mrs R in relation to her non GP provider earnings.
  - Although Mrs R’s certificates were completed by a firm of accountants, Mrs R was required to sign the certificates prior to submission. As she had sight of the certificates, NHSBSA did not see why she would not be aware of, or have access to, the relevant guidance.
  - NHSBSA observed that Mrs R’s calculations seem to imply that she believed the share of profits was proportionate to the sessions she chose to work. It also stated that Mrs R was incorrect to assert that the provisions of the Scheme Regulations relating to part-time employees should apply to her earnings as a non GP provider, and that her pensionable earnings would have a notional whole-time value of £109,981.
  - There is no evidence to confirm that Mrs R’s share of the profits would be higher and that this would result in the pensionable earnings figure she had calculated. Additionally, at no time during Mrs R’s membership did she enjoy a whole-time rate of pay of £109,981 or paid pension contributions commensurate with this level of pay. NHSBSA did not agree that Mrs R could reasonably expect to receive final salary retirement benefits based on this figure.
22. In response, Mrs R provided the following comments:-

- Mrs R believed she had provided a full explanation of her employment status to the representative during the telephone call, so, she did not think the other possible reasons why she was given incorrect information were irrelevant. NHSBSA may have an opinion on what was discussed, but Mrs R knew what had been said. She had asked a specific question based on her employment as a non GP provider and was given specific advice which was incorrect. Furthermore, NHSBSA had already accepted that there had been incorrect information in its email dated 29 November 2017, and in its letter of 15 February 2018.
- Whilst Mrs R signed the certificates, she would not have seen the guidance notes on how to complete the form as this was done by the accountants. She believed the advice she had received and did not think she would need to check this. Mrs R “felt it was reasonable to expect that [she] had been given correct advice.”
- NHSBSA’s assertions about her profit share were incorrect. Mrs R provided calculations that demonstrated that her profit share went from 23.5% to 17% when she decided to go part-time. Having reviewed the correspondence about her profit share, Mrs R recalculated what she thought she would have received, which resulted in £101,355 ( $(£73,321 \div 17) \times 23.5$ ). Mrs R believed her pension and lump sum ought to be calculated based on this figure to put her back into the position that she would have been in, had she not been provided with incorrect information from NHSBSA.

23. After reviewing Mrs R’s comments, NHSBSA provided the following comments:-

- Without a full transcript of the telephone call, it is difficult to draw firm conclusions about what was said or in what context. Nevertheless, NHSBSA thought it reasonable to suggest that Mrs R would have familiarised herself with the position when considering her move to self-employment in 2013, by reading the available guidance.
- Based on the notes provided, the entry for the phone call was labelled as an “estimate request”, which indicates that this is what the call handler thought was the main purpose of the call. This is supported by an estimate that was sent out as a result of the call. Had the primary purpose of the call been about part-time work, NHSBSA would have expected a detailed response to have taken place in relation to the position for non GP providers and the notes would have reflected this.
- NHSBSA had taken into account that it had previously reached different conclusions, but it thought that the limited notes from the telephone call in question were open to interpretation.
- The Scheme had guidance available to Mrs R via its website and the certificate that members were required to sign. Mrs R confirmed that she did not see the accompanying guidance, but NHSBSA did not consider it responsible for her lack of awareness. It thought that Mrs R should have ensured she was making informed decisions in relation to pension matters. If she was unsure of the position

to the extent that she needed to seek advice, NHSBSA considered it reasonable to suggest that she should have read the available guidance.

- As the Practice's annual profits are subject to the Practice's financial performance, they vary. Therefore, Mrs R's annual pensionable earnings are variable and less predictable than earnings in a comparable salaried contract of employment. So, NHSBSA had considered what Mrs R might have expected when she decided to enter part-time employment.
- NHSBSA did not agree with Mrs R's calculations either, as she had based them on £73,321.35, which included the 23.5% share of the profits that Mrs R had enjoyed from 1 April 2013 to 30 April 2014. NHSBSA did not believe her calculations had accounted for this.

24. NHSBSA also provided a copy of the certificates Mrs R would have signed since 2013.

### **Adjudicator's Opinion**

25. Mrs R's complaint was considered by one of our Adjudicators, who concluded that no further action was required by NHSBSA. The Adjudicator's findings are summarised below:-

- In order for there to be a financial loss for which NHSBSA should provide recompense, Mrs R must have been given incorrect information that she reasonably relied on. Mrs R claimed that she had explained her employment situation to the representative she spoke to, but the brief telephone notes indicated that the advice may not have been specific to a non GP provider role. Without further information supporting Mrs R's position, the Adjudicator could not conclude that the information had been tailored to Mrs R's non GP provider role and so could not say that the information was incorrect.
- Additionally, Mrs R was responsible for ensuring the certificate was both correct and signed by her, which would have given her the opportunity to review the guidance notes. Furthermore, it was reasonable to expect Mrs R to familiarise herself with the effects of moving to self-employment, such as the impact on her pension benefits.

26. Mrs R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Both Mrs R and NHSBSA have provided further comments which do not change the outcome but are summarised below. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs R for completeness.

27. Mrs R made the following comments:-

- She did not ask the representative for advice as a 'non GP Provider' as she did not realise she was a non GP Provider. However, she had explained her employment as a Nurse and partner in a GP Practice. As a result, the representative should have known that this meant a non GP Provider.
- She was given incorrect advice, so there should not be any speculation about why it happened. Although she held part-time jobs, she would not have been asking about going part-time for those roles. Therefore, her question could have only been in relation to her non GP Provider role.
- Mrs R did not understand how it could be considered reasonable for her to read guidance notes for completing a form where she would not have understood the figures. This is why she rang NHSBSA to make herself aware of the impact of reducing her hours.

28. NHSBSA in response highlighted the following:-

- If Mrs R was unaware of her non GP Provider status, this meant that "she was not as informed as she could have been when she called [NHSBSA] and she was less able to assess whether her enquiries – and the responses to her enquiries were relevant to her circumstances."
- The telephone notes make no reference to Mrs R's making specific enquiries regarding her role as a Nurse and Partner.
- NHSBSA does not provide advice to members. Nevertheless, Mrs R had a responsibility to ensure that her enquiry was relevant to her post, and to ensure that NHSBSA's representative had interpreted the enquiry correctly. If Mrs R asked questions that were not relevant, the responses would be equally irrelevant. For example, if Mrs R asked about reducing her hours without specific reference to her non GP Provider status, it was likely that the representative would have responded in terms of a salaried employment.

29. After reviewing NHSBSA's response, Mrs R raised further points that are summarised below:-

- Had she been aware of her non GP Provider status and the consequences of going part-time, she would not have needed to call on 22 January 2014. NHSBSA was emphasising how she ought to have known about her pension benefits. However, she believed that the representative on the telephone call had a duty and responsibility to provide accurate information.
- Although there were no notes regarding Mrs R's employment explanation, that did not mean it did not occur. She made "specific reference" to her status as a nurse and partner which was her only full-time job at the time. As a result, the representative should have known that this made her a non GP Provider.

## **Ombudsman's decision**

30. The determination of whether incorrect information was provided to Mrs R, depends on the question that she asked. I have considered Mrs R's comments about how she explained her employment to the representative during the telephone call, and how she only had one full-time employment at the time. However, I am obliged to take into account NHSBSA's remarks as well.
31. I appreciate Mrs R's argument that, as a member of the Scheme with one full-time employment, she could only be asking about that particular role when querying the effect of going part-time. Nevertheless, as noted by NHSBSA, there is no supporting information that confirms that this is what Mrs R asked. Although there is evidence of what the representative's response was, without further information about the question NHSBSA was answering, on the balance of probability, I am unable to conclude that it provided incorrect information.
32. Mrs R claims that had she known about her non GP Provider status and the consequences of going part-time, she would not have needed to contact NHSBSA. I accept it is possible that Mrs R asked about the effect of going part-time in her non GP Provider role, and that the response provided was in relation to that question and therefore wrong. However, although I find that the information available does not enable me to find this to be the case, I consider Mrs R had the opportunity to inform herself of the correct position.
33. I understand that Mrs R did not believe she would have needed to check that the information she had received was correct. However, information concerning her employment and the effect of going part-time was available to Mrs R both prior to the telephone call in January 2014 and prior her decision to enter part-time employment.
34. It is reasonable to expect members of the Scheme to make themselves aware of the potential impact of altering any employment on their pension benefits. Mrs R had attempted to do so before moving from full-time employment to part-time. As such, I see no reason why she could not have done the same when she became self-employed in 2013. Had she read the information available at the time, it would be reasonable to assume, that she would be aware that she would be regarded as a non GP Provider. It follows that she could also have reasonably been aware that non GP Providers were considered whole-time, regardless of the hours worked, which in turn would have an effect on her pension benefits.
35. Therefore, I do not uphold Mrs R's complaint.

**Anthony Arter**

Pensions Ombudsman  
21 May 2019