

Ombudsman's Determination

Applicant	Mr L
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Pensions (as a service provided by NHS Business Services Authority (NHS BSA))

Complaint Summary

Mr L has complained that NHS BSA has failed to identify errors in its calculation of the cost of reinstating his late wife's (**Mrs L**) part-time service in the Scheme. Specifically, Mr L says that information relating to Mrs L's hours worked on which NHS BSA has based its reinstatement offer is incorrect. Mr L also submits that the dates of Mrs L's employment are incorrect.

Mr L also complains that NHS BSA has withheld information from Mrs L's former employer and that it has not gone far enough in its investigation of her hours worked. The consequence of this for Mr L is that if he chooses to accept the offer he will be paid a lower pension and lump sum from the Scheme than would have been the case had the reinstatement offer been formulated on the basis of the correct information.

Mr L has also complained that NHS BSA has incorrectly denied him the opportunity to pay the cost of purchasing the part-time service from the funds held in Mrs L's NHS Money Purchase Additional Voluntary Contribution (**MPAVC**) plan.

Summary of the Ombudsman's Determination and reasons

The complaint is partly upheld against NHS BSA. My reasons are as follows:

- in the circumstances NHS BSA is bound to follow the judgment of the Employment Tribunal and so the applicable start date of Mrs L's employment is 29 November 1976;
- the calculation of the reinstatement offer has been made using the details of hours worked provided to NHS BSA by Mrs L's former employer, which is the correct basis in the circumstances;

- there is insufficient evidence to suggest that NHS BSA has withheld information from Mrs L's former employer relating to her hours worked; and
- in the circumstances, the cost of reinstating Mrs L's part-time service cannot be made directly from the funds in her MPAVC plan.

Detailed Determination

Material facts

1. Mrs L applied to the Employment Tribunal for her part-time employment in the NHS between 29 November 1976 and 31 October 1988, to be pensionable employment. It is unclear from the submissions when the application was made, although the Employment Tribunal case reference suggests that it was made in 1995. The Employment Tribunal found in Mrs L's favour in September 2009. The employment judge's reasons were sent to the parties on 8 October 2009.
2. Broadly, the employment judge found that Mrs L had successfully established the existence of a policy or practice which had the effect of denying her a right to become a member of the Scheme during the period. The employment judge made a finding of fact that Mrs L should be treated as working her contractual hours - 18.5 hours per week - in the period. The judge also made a finding of fact that Mrs L was always eligible to join the Scheme from 29 November 1976 to 31 October 1988. In the closing paragraph the judge said that he expected that Mrs L's case would succeed and that it should be settled between Mrs L and the Scheme.
3. In a further judgment in this matter dated 15 September 2010, a declaration was handed down as follows:

“The Tribunal declares that the Claimant is entitled to retrospective membership of the Respondent's occupational pension scheme from 29 November 1976 to 31 October 1988.”
4. As a consequence of the two judgments in her matter, Mrs L was given the option to be put back in the position she would have been in had she been offered access to the Scheme; so she was offered pensionable employment in the Scheme in respect of the period 29 November 1976 to 31 October 1988. NHS BSA later ascertained that in fact the correct start date for Mrs L's employment was in fact 13 December 1976 (rather than 29 November 1976) - which Mr L disputes. Although it is disputed, for ease of reference I refer to the period 29 November 1976/13 December 1976 to 31 October 1988, in this Preliminary Determination as the **Relevant Period**.
5. NHS BSA's letter of 19 November 2009, told Mrs L that the cost to her to purchase retrospective membership for the period was £5,618.00 (this figure had previously been agreed with Mrs L's former employer's solicitor). The letter invited Mrs L to let NHS BSA know her decision by completing the form attached to the letter.
6. The form attached was entitled 'NHS Pension Scheme - Retrospective membership return form' (the **Retrospective Membership Return Form**). The Retrospective Membership Return Form was signed by Mrs L on 25 November 2009. In it Mrs L elected to purchase all of the membership for the period by lump sum payment. Before signing off the Retrospective Membership Return Form Mrs L was required to confirm that she acknowledged certain things. The first was that she agreed to the terms of the 'Settlement Offer'; which presumably refers to the letter of 19 November

2009, in which the form was enclosed. Mrs L said that she agreed to the Settlement Offer, but only “after COSTING DATA REVISED” (original emphasis). Mrs L also said that ‘I will purchase [retrospective membership] from NHS AVC savings...’.

7. Mrs L sent a letter to NHS BSA on 17 December 2009, asking for further clarification as to how the figure of £5,618.00 had been arrived at. The Retrospective Membership Return Form was not sent back with this response. NHS BSA replied to Mrs L on 22 December 2009. Its letter signposted Mrs L to the “calculation system” on HM Treasury’s website and explained, in broad terms, how the amount was calculated.
8. Mrs L wrote to NHS BSA on 24 December 2009. The letter is difficult to read, but it seems to suggest that Mrs L did not challenge the method of calculation but the “claim period and contractual hours inputs”. Mrs L explained in the postscript to her letter that she hoped to pay the cost to purchase her retrospective membership from her AVC savings in the Scheme (i.e. from the MPAVC plan).
9. On 7 January 2010, NHS BSA replied to Mrs L explaining that the costs were calculated using dates and hours taken from her Staff Appointment Form and various Notification of Staff Change Forms. The hours used were therefore different in different periods, ranging from 36.5 hours per week to 18.5 hours per week. The letter explained that if Mrs L decided to purchase part-time access membership it would be “scaled down” to its full time equivalent length of 6 years 197 days. The letter also said that the costs could only be paid by single lump sum (by cheque), or it could be offset against additional benefits due.
10. Mrs L wrote to NHS BSA on 10 January 2010. In that letter she said that the records sent through to her with respect to her working date and start date were “incomplete records”. She also said that the earnings figures were inaccurate. However, she recorded at the bottom of the letter that she had agreed to purchase all additional pension (but that, amongst other things, she had requested that the matter was referred back to the employer’s solicitor “to resolve accuracy of precise working hours”). It seems that she enclosed within that letter her Retrospective Membership Return Form, completed as set out previously.
11. Mrs L died on 11 January 2010.
12. The note on the Retrospective Membership Return Form suggests that NHS BSA received it on 12 January 2010; NHS BSA’s letter to the Employment Tribunal dated 4 March 2010, suggests that it was faxed to NHS BSA by Mrs L’s neighbour on 12 January 2010.
13. NHS BSA wrote to Mrs L on 13 January 2010, explaining that it was unable to accept the Retrospective Membership Return Form as it had been amended. NHS BSA explained that it had written to Mrs L’s former employer (and its solicitor) to investigate Mrs L’s precise working hours in the period.

14. On 17 February 2010, Mrs L's former employer's solicitor replied to NHS BSA's request for information of 13 January 2010, explaining that no records were held of the actual hours Mrs L worked in the Relevant Period. It also said that "[Mrs L's] actual pay in respect of the period 13 December 1976 to 31 October 1998 [sic] will now be difficult to provide".
15. Given the above, NHS BSA submitted to the Employment Tribunal in their letter of 4 March 2010, that it believed that its original offer was made on the correct information.
16. The matter was subsequently taken-up by Mrs L's son. Mrs L's son invoked stage one of the Scheme's internal dispute resolution procedure (**IDRP**) by letter dated 7 February 2011. In that letter he (essentially) explained that his view was that NHS BSA had failed to implement the ruling of the Employment Tribunal in Mrs L's case.
17. NHS BSA sent its stage one IDRP response to Mrs L's son by letter dated 12 April 2011. The response was rejected by Mrs L's son, who invoked stage two of the IDRP on the basis that the author of the stage one response failed to understand the complaint and respond with full knowledge on the issues raised. A stage two IDRP response was issued on 9 May 2011, which upheld the first stage decision.
18. The death gratuity due to Mr L was paid in 2013. The amount paid did not include the uplift that would have applied had the offer of part-time service been accepted and subsequently purchased. NHS BSA offered to pay any unauthorised payments charge that arose in respect of this payment; presumably it has done so.
19. In 2013, it appears that Mr L produced a number of historic diary entries from Mrs L's work diaries which, he claimed, demonstrated that Mrs L worked additional hours to those that had been set out by NHS BSA. Your Law - lawyers that it appears were retained by NHS BSA at that time - responded to this claim by letter dated 27 November 2013. It found, broadly, that there was insufficient certainty as to what the diary entries meant to enable NHS BSA to conclude that they demonstrated that Mrs L had worked additional hours to those set out in the "contractual documentation" (i.e. Mrs L's Staff Appointment Form and various Notification of Staff Change Forms). In that letter Your Law also set out how its view was that the evidence supported the conclusion that the start date of Mrs L's employment was 13 December 1976, and not 29 November 1976 (as had been found by the Employment Tribunal).
20. In 2013, Mr L also lodged a claim with the Employment Tribunal with respect to the alleged discrepancies described previously. In his submissions he said that NHS BSA misinterpreted the Employment Tribunal's judgment in his wife's case. In particular, it appears that Mr L disputed NHS BSA's interpretation of the start date for Mrs L's employment.
21. Employment Judge Foxwell dismissed the claim, giving reasons on 17 December 2013. In his judgment he explained that the Employment Tribunal did not enforce its

own judgments. He also said that any complaints about NHS BSA's application of the judgment in Mr L's case were outside of his jurisdiction.

22. Mr L made an application to my office in November 2014.

Conclusions

Background

23. One of my Lawyers issued an Opinion in Mr L's complaint on 18 January 2016. He found that all elements of Mr L's complaint should not be upheld. I subsequently reviewed the papers and my view was that one element of Mr L's complaint should be upheld; specifically, that for the purposes of the calculation of her part-time access the date of commencement of Mrs L's employment should be 29 November 1976, not 13 December 1976. Accordingly, I issued a Preliminary Decision, which was sent to the parties under cover of a letter dated 27 July 2016. That Preliminary Decision was accepted by NHS BSA, but Mr L's responses indicate that he did not accept my Preliminary Decision. It follows that I am now determining Mr L's case. My findings, and the reasons for these, are set out below.

Allegations relating to lost documentation

24. Mr L has sent our office a number of pieces of correspondence following the issue of our Lawyer's Opinion. Some of this correspondence relates to the substantive issues in his case, however much of it contains allegations that either, or both, of my office and The Pensions Advisory Service (**TPAS**), has lost key documentation that he has provided.
25. We have sent Mr L a copy of all of the documentation we hold on his file and he has been asked to provide the documentation that he alleges that we have lost. Although, we have received some documentation from Mr L that we did not hold previously, there is no way of telling whether this had been provided to my office or TPAS previously. Mr L claims there are further documents that we have not seen (i.e. that he alleges we or TPAS may have lost), but copies of these have not been provided by him.
26. Mr L has not asked to withdraw his complaint, so I have not considered whether to give him leave to do so (pursuant to rule 4 of The Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995). Given that this action has not been taken, I must now determine Mr L's complaint - on the balance of probabilities - on the basis of the information that has been made available to me.

Calculation of the reinstatement offer: Hours worked by Mrs L in the Relevant Period

27. The central question for consideration in this case is whether NHS BSA's offer of part-time access membership has been calculated correctly. This consists of two specific complaints; one being whether all part-time hours worked by Mrs L in the Relevant Period have been accounted for in the calculation.

28. NHS BSA has submitted, in its stage one IDRP response, that it does not hold details of Mrs L's hours worked and pensionable pay in the Relevant Period; that information has to be provided to it by the relevant employee or the employer(s). The periods of employment used in the calculation of part-time access membership were first set out in NHS BSA's letter to Mrs L of 7 January 2010. That letter says that these periods reflected the information shown in the Staff Appointment Form and various Notification of Staff Change Forms completed in respect of Mrs L across the Relevant Period. Copies of these forms have been provided during the investigation and it is my view that the information shown in these reflects NHS BSA's offer to Mrs L of 7 January 2010 (which has subsequently been reiterated). Further, the information in these forms reflects the "contracted hours" figures set out in Mrs L's former employer's letter to NHS BSA of 17 February 2010.
29. Mr L has provided copies of Mrs L's work diary entries for several months in 1981 and 1984. He says that they demonstrate that NHS BSA must have "lost, mislaid, or destroyed" records relating to Mrs L's employment. As such, he seems to argue that the fact that NHS BSA has been unable to locate them for the purposes of ascertaining Mrs L's hours worked in the Relevant Period demonstrates maladministration on their part.
30. I do not concur with this view as it has not been demonstrated that these records were ever held by NHS BSA. Indeed, it seems far more likely that if records of individual employees' work diaries were in fact held they would have been held by Mrs L's former employer rather than NHS BSA. If NHS BSA had held such records then it seems unlikely, in my view, it would have gone to the lengths of requesting specific details relating to Mrs L's part-time service from her former employer in 2010. In any event, I concur with the view expressed by Your Law, in its letter to Mrs L's son of 27 November 2013, that the information shown in the work diaries does not actually demonstrate that Mrs L worked beyond her contractual hours in the period. It does not demonstrate this as it is not clear whether references to full-time mean the full-time hours as stated in Mrs L's contract or extra, additional hours, nor is it clear whether if extra additional hours were worked one week they were not offset against later weeks where fewer hours may have been worked.
31. It follows that I find that there is no evidence that the work diaries were ever held by NHS BSA and, further, that they cannot be relied upon as demonstrating that, on the balance of probabilities, Mrs L worked beyond her contractual hours in the periods they refer to.
32. As I have referred to above, NHS BSA approached Mrs L's former employer in January 2010, asking it to provide details of Mrs L's hours worked in the Relevant Period. Mrs L's former employer replied, via their solicitors, on 17 February 2010, setting out Mrs L's "contracted hours" in the Relevant Period but providing no further information relating to *actual* hours worked. As also set out above, the periods of "contracted hours" matched those used in NHS BSA's calculations provided in their letter of 7 January 2010 (and subsequently). Given that Mrs L's former employer has

been unable to provide records of her actual hours worked in the Relevant Period, the onus is on Mrs L (and, thus, the applicant) to provide to NHS BSA evidence of the actual hours she worked. Mr L has failed to provide any information to my office which demonstrates that, on the balance of probabilities, Mrs L worked any hours beyond those recorded in NHS BSA's offer (which, as I have set out previously, was based on the information held in Mrs L's Staff Appointment Form and various Notification of Staff Change Forms). While this is quite understandable given the passage of time, it follows that no information has been provided to demonstrate that, on the balance of probabilities, Mrs L worked a greater number of hours than those set out in her Staff Appointment Form and the Notification of Staff Change Forms.

33. It follows that, in the absence of any other evidence to the contrary, my view is that NHS BSA has acted correctly in basing its offer of part-time access membership on the information contained in Mrs L's Staff Appointment Form and Notification of Staff Change Forms.
34. Mr L says that NHS BSA should consult with Mrs L's former co-workers to ascertain her actual hours worked. However, this approach is not proportionate and I have serious doubts, given the passage of time, as to whether it would yield any evidence on which NHS BSA could reasonably rely.

Calculation of the reinstatement offer: Start date of Mrs L's employment

35. As I have referred to previously, the start date of Mrs L's employment (i.e. the start date of the Relevant Period) is also disputed by Mr L. Mr L has submitted that the start date of Mrs L's employment is 29 November 1976, whereas NHS BSA has submitted that it was 13 December 1976.
36. Having read the letter from Your Law dated 27 November 2013, it appears to me that there is clearly compelling evidence available to me to make a finding that, on the balance of probabilities, Mrs L's employment began on 13 December 1976 rather than 29 November 1976.
37. However, the Employment Tribunal made a finding of fact - in the judgment sent to the parties on 8 October 2009 - that the start date of Mrs L's employment was 29 November 1976, and this date was repeated in the declaration made in the subsequent judgment in the Employment Tribunal dated 15 September 2010.
38. There is no evidence available to me to suggest that NHS BSA appealed the judgment of 15 September 2010. That was the correct action for NHS BSA to take in the event that it disputed the start date of Mrs L's employment; it could not unilaterally change it afterwards, even if the evidence did appear to strongly support the later date.
39. It follows that, while it might seem unsatisfactory in light of the compelling evidence that suggests to the contrary, I find that - in the absence of an appeal of the Employment Tribunal's judgment - NHS BSA must apply the Employment Tribunal's

findings. Accordingly, it is bound to use 29 November 1976, as the start date of Mrs L's employment for the purposes of its calculation of part-time access.

Purchasing part-time service from the MPAVC

40. Mr L has also indicated that, on the basis that a settlement offer is made that is satisfactory to him, he would like to pay the extra amount required to fund the part-time access directly from Mrs L's funds in the MPAVC.
41. NHS BSA said, in its letter to Mr L of 6 June 2013, that Mr L could use any death benefits payable to him under Mrs L's MPAVC plan to fund the purchase of part-time access without contravening HM Revenue & Customs (**HMRC**) rules on the recycling of pension commencement lump sums. This is because what is payable to Mr L is not a pension commencement lump sum, but a death benefit. (The fact that the situation may have been different when Mrs L was alive was made clear to Mrs L by NHS BSA in its earlier correspondence with her.)
42. It appears that Mr L wants a direct transfer from the MPAVC to the Scheme of any death benefits due to him in order to fund the purchase of part-time access. NHS BSA has said that this is not an option. I agree with NHSBSA's position. If death benefits have become payable in Mrs L's MPAVC plan they are to be paid to the beneficiary in accordance with the rules applicable to the MPAVC plan. As such, they cannot simply be transferred to a separate scheme (for example, the Scheme), they must be paid to the beneficiary or beneficiaries who then may elect to use them how they please, including purchasing part-time access in the Scheme.

Directions

43. In future dealings between Mr L and NHS BSA relating to the calculation of Mrs L's part-time access (if there are any), the start date of Mrs L's employment is 29 November 1976.

Anthony Arter

Pensions Ombudsman
30 September 2016