

Ombudsman's Determination

Applicant	Dr I
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. Dr I's complaint against NHS BSA is partly upheld, but there is a part of the complaint I do not agree with. To put matters right, for the part that is upheld, NHS BSA shall pay £1,000 in recognition of the serious distress and inconvenience its error has caused him.

Complaint summary

2. Dr I has complained that:-
 - NHS BSA originally confirmed he could purchase 6 years 29 days of Added Years, which he borrowed £56,498.55 to pay for, but NHS BSA has now told him he was only allowed to purchase 1 year 262 days.
 - He is losing the benefit of Added Years he had already purchased.
 - NHS BSA should have known in 2016 that he could not purchase the 6 years 29 days of Added Years.
 - In 2012, he made the decision to leave the 1995 Section of the Scheme (**the 1995 Section**), but this was based on misinformation from NHS BSA.

Background information, including submissions from the parties

3. Dr I is a current NHS employee and is an active member of the Scheme. He was a member of the 2008 Section of the Scheme (**the 2008 Section**), before transitioning to the Career Average Revalued Earnings (**CARE**) Section in 2015.
4. In June 1999, Dr I asked NHS BSA about purchasing Added Years. NHS BSA confirmed he may be able to purchase up to 15 years 348 days.
5. In June 2004, Dr I made a further enquiry about purchasing Added Years. NHS BSA confirmed he may be able to purchase up to 16 years 131 days.

6. On 15 October 2007, Dr I made another enquiry about purchasing Added Years.
7. On 22 October 2007, NHS BSA replied to Dr I and said that he may be able to purchase up to 16 years 132 days Added Years. However, taking into account the restriction that a member could not contribute more than 15% of their pay, the maximum he could purchase was 6 years 29 days. NHS BSA said, if Dr I was interested in purchasing additional benefits, he should contact his employer.
8. Dr I has said he did not get the letter of 22 October 2007 from NHS BSA and that when he asked NHS BSA for a response, it told him it had not received his enquiry. As the facility to purchase Added Years was closed by that time, he was too late to purchase the Added Years.
9. In 2011, Dr I received his Choice Statement from NHS BSA, which provided information to allow him to decide whether to remain in the 1995 Section or move to the 2008 Section. The Choice Statement confirmed that once the member made their decision, it could not be reversed.
10. In 2012, Dr I asked to be moved into the 2008 Section, but as he returned his request after the deadline, NHS BSA told him he could not move from the 1995 Section.
11. In March 2012, Dr I complained to NHS BSA about the refusal to allow him to move from the 1995 Section. As a result of the complaint, NHS BSA changed its stance and allowed Dr I to move to the 2008 Section.
12. In 2016, Dr I told NHS BSA that, in 2007, he had enquired about purchasing Added Years but had not received a response from NHS BSA. After investigating the matter, NHS BSA acknowledged that it had received Dr I's enquiry in 2007. As a result, because Dr I had asked about Added Years while this facility was still in place, NHS BSA agreed to allow him to retrospectively purchase Added Years of 6 years 29 days, on the terms it set out in its letter of 22 October 2007. This was on the basis that he paid the relevant missed contributions equal to 9% of his total pensionable pay from 2008 (**the Arrears**), a sum of £56,498.55.
13. On 18 March 2016, NHS BSA agreed that Dr I could make a part payment towards the Arrears.
14. In April 2016, Dr I paid the first instalment of £28,250.00 towards the Arrears
15. In March 2017, Dr I paid the final instalment of £28,248.55 of the Arrears.
16. On 1 August 2017, NHS BSA told Dr I that, as he had moved to the 2008 Section in 2012, he had only been eligible to purchase Added Years up to 17 May 2012, when he joined the 2008 Scheme. NHS BSA confirmed that he was able to purchase 1 year 262 days and that the overpayment of the Arrears would be repaid in due course.
17. Dr I complained to NHS BSA and explained that he had taken out a loan to pay for the Arrears and wanted NHS BSA to honour the agreement to allow him to purchase 6 years 29 days Added Years.

18. On 27 November 2017, NHS BSA replied to the complaint and said:-

- Exceptionally, Dr I had been allowed to purchase Added Years despite not being in the relevant section of the Scheme to do so. However, Dr I could not now reverse his decision to move from the 1995 Section.
- The refund of the excess Arrears could be used to pay off part of Dr I's borrowing or used to purchase Additional Pension in the Scheme.

19. Dr I replied and said:-

- He would not have moved to the 2008 Section but for the delays in dealing with his Added Years application in 2007.
- He had to re-mortgage his home to be able to pay the Arrears.
- There was a significant difference between failing to mention that the contract was intended to end in 2012 and billing someone £56,498.55 in 2016, four years after the Added Years option should have come to an end.

20. On 9 March 2018, NHS BSA replied under Stage One of the Scheme's Internal Dispute Resolution Procedure (**IDRP**) and said:-

- The decision to move from the 1995 Section to the 2008 Section could not be reversed and there was no discretion in this area.
- If Dr I was interested in purchasing Added Years, it was counterintuitive for him to move across to the 2008 Section in 2012, as any Added Years purchase would be terminated on transfer.
- In 2016, Dr I was given the wrong information about the amount of Added Years he could purchase. Dr I had paid a considerable amount of money on a void Added Years purchase, and it apologised for the distress and inconvenience caused.
- In view of the errors, it was prepared to allow him to purchase Additional Pension on the terms he would have been offered in February 2016, which were more beneficial than currently available.

21. Dr I appealed the Stage One IDRP decision and, on 27 September 2018, NHS BSA replied under Stage Two of the IDRP and said:-

- If Dr I was eager to maximise his pension, then he should have acted following the earlier enquiries about Added Years in 1999 and 2004.
- Dr I had been allowed to make an invalid purchase of Added Years, but he could not now retract his decision to move to the 2008 Section.
- NHS BSA was prepared to allow him to back date the purchase of Additional Pension from 8 May 2012 (the date he moved to the 2008 Section). Based

- Dr I could use £29,196.47, from the excess of the Arrears, to secure an additional annual pension of £2,713.43 for himself, or to secure an increase to his dependant's pension with an increase of £2,416.93 to his pension.

22. As part out our investigation, NHS BSA confirmed:-

- The offer to purchase Additional Pension as at 2012 was on more preferential terms than the cost of purchasing the Additional Pension now.
- If Dr I chose to receive a return of the excess Arrears instead of the Additional Pension, he would receive the net amount. The tax deduction would be based on his earnings in the tax year the return took place.

23. Dr I's position is that he borrowed money to pay the Arrears required to allow the purchase of Added Years from family and friends on the understanding that he would pay them back. He then re-mortgaged his home to raise £46,500, in February 2017, and used the money to pay back his family and friends. He considered that he should be allowed to purchase the full 6 years and 29 days Added Years, in accordance with the terms NHS BSA set out in its letter of 22 October 2007.

Adjudicator's Opinion

24. Dr I's complaint was considered by one of our Adjudicators, who partly upheld the complaint against NHS BSA. The Adjudicator's findings are summarised below:-

- NHS BSA had acknowledged it offered the Added Years contract for the 6 years 29 days in 2016 in error. The Adjudicator considered that this amounted to maladministration.
- Whilst it was reasonable for Dr I to rely on the Added Years contract provided by NHS BSA, he cannot claim an irreversible loss as NHS BSA has offered a refund of the Arrears or the option to purchase Additional Pension on preferential terms.
- Dr I's decision to move to the 2008 was not based on misinformation by NHS BSA, as the incorrect information was not provided until 2016.
- Dr I's choice to move to the 2008 Section should not be reversed, as his decision was not influenced by the misinformation and the move was only processed as a result of the complaint he made at the time.
- The offer made in regard to the Arrears was reasonable.
- NHS BSA should pay an award for serious distress and inconvenience, as Dr I suffered a loss of expectation and needlessly paid a substantial amount for an Added Years contract, for which he was not eligible, based on the incorrect information.

25. Dr I did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr I provided his further comments which do not change the outcome.

26. Dr I said:-

- On 1 April 2015, he transitioned to the CARE Section of the Scheme however, following the McCloud court ruling, which found the transitional arrangements in Public Sector pension schemes to be age discriminatory, it is possible there will be a reversion for all such scheme members.
- He had not been able to purchase Added Years in the 1995 Section, the best means for him to improve his benefits was to move to the 2008 Section, as this offered a better accrual rate albeit hand in hand with a later retirement age. However, had the Added Years option remained open to him, he would not have moved to the 2008 Section.
- Following the decision to move to the 2008 Section, NHS BSA exercised its discretion when allowing him to purchase the Added Years after the deadline. It again exercised discretion when allowing him to purchase Additional Pension under preferential terms from an earlier date. With all the flexibility and discretion that NHS BSA has previously shown, it should now allow him to purchase the full Added Years within the 1995 Section.

27. NHS BSA said:-

- The recent McCloud court ruling is not relevant as any reversal would provide Dr I with membership of the 2008 Section and Added Years can only be purchased by members of the 1995 Section.
- NHS BSA repeatedly highlighted to Dr I that he could purchase Added Years, but no reasonable explanation has been provided for why Dr I did not take up the earlier opportunities, in 1999 and 2004, to purchase Added Years.
- Dr I was incorrect when he stated that NHS BSA had used its discretion to allow him to purchase the 6 years 29 days Added Years, as it cannot provide discretion if there are no supporting Regulations. Under the 2008 Section Regulations, it is permissible for an extension to be provided regarding the Choice decision, but only where it is believed a member may not have been in receipt of all material facts. However, Dr I was aware he could purchase Added Years but did not make the application to purchase in time.

28. I agree with the Adjudicator's Opinion and I do not consider the McCloud judgment has a bearing on this complaint. Therefore, I will only respond to the main points made by Dr I for completeness.

Ombudsman's decision

29. NHS BSA has acknowledged it offered the Added Years contract to Dr I for 6 years and 29 days in error, so, there is no dispute that maladministration has occurred.

30. Generally speaking, in relation to matters of misstatement, the member is only entitled to receive the benefits provided for under the Scheme rules. For financial loss to be claimed as a result of a misstatement there needs to be evidence that there was direct reliance on the misstatement, that it was reasonable to do so and that it resulted in an irreversible loss.
31. Dr I said he assumed that NHS BSA was aware that he had moved to the 2008 Section. He therefore relied on NHS BSA's misstatement that he could purchase the full amount of Added Years and borrowed the funds required to pay the Arrears from his family and friends. He then later re-mortgaged his home to repay the funds that he borrowed.
32. I find that it was reasonable for Dr I to rely on the information NHS BSA gave him regarding the Added Years contract in 2016, and that he placed direct reliance on this information when he decided to make arrangements to meet the substantial cost.
33. NHS BSA has offered a number of remedial options, including a refund of the excess Arrears or the purchase of Additional Pension on preferential terms to those available now. So, while Dr I has paid a significant amount to NHS BSA, I do not find that there has been an irreversible financial loss as a result of the error.
34. I find the redress offers made by NHS BSA to be reasonable. It is now up to Dr I to decide how to mitigate his perceived financial loss. He can either purchase the Additional Pension on the terms available in 2012 or accept a refund of the excess of the Arrears to reduce his mortgage debt.
35. Dr I has said that his main priority was always to maximise his pension benefits by purchasing Added Years. However, he had the opportunity to commence the purchase of Added Years on more than one occasion before 2007. I find his argument is counterintuitive given that he moved from the 1995 Section to the 2008 Section which meant that he could not then purchase Added Years. Also, although Dr I argues that he did not receive the correspondence from NHS BSA in October 2007 concerning the Added Years and was told he was too late to purchase Added Years, I note that he did not raise the issue of purchasing Added Years again with NHS BSA for a number of years.
36. Dr I has argued that his decision to move to the 2008 Section should now be reversed. However, he was given the Choice Statement at the time and advised that the decision could not be reversed. Further, the move to the 2008 Section was only processed as a result of his complaint in 2012 and he did not commence the erroneous Added Years contract until 2016. Therefore, I do not agree there is justification for NHS BSA to now reinstate Dr I's membership in the 1995 Section.
37. I find that Dr I has suffered a loss of expectation as he was led to believe he could purchase 6 years 29 days of Added Years and he borrowed a significant amount to allow him to do so. This will have caused him serious distress and inconvenience, so I partly uphold his complaint.

PO-27320

Directions

38. Within 28 days of the date of this Determination, NHS BSA shall pay £1,000 to Dr I in recognition of the serious distress and inconvenience its error has caused him.

Anthony Arter

Pensions Ombudsman
23 June 2020