

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Ms Myra Phillips
Scheme	NHS Pension Scheme (the Scheme)
Respondent(s)	NHS Pensions

Subject

NHS Pensions are seeking to recover an overpayment of pension from Mrs Phillips, even though Mrs Phillips says she informed them of the changes to her circumstances.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against NHS Pensions because it was Mrs Phillips's obligation to inform NHS Pensions regularly if her circumstances changed.

DETAILED DETERMINATION

Relevant Regulations

NHS Pension Scheme Regulations 1995

S2 Reduction of pension on return to NHS employment

(1) Subject to paragraph (15) [practitioner], this regulation applies to a member-

(a) until the member attains the age of 60; and

(b) who is in receipt of a relevant pension; and

(c) who continues in, or subsequently returns to, NHS employment.

(1A) A relevant pension for the purpose of this regulation is a pension payable,-

(a) in respect of pensionable employment that ceased before 1st April 2008,-

(i) under any or regulations E2 to E3C (pensions on ill health retirement and redundancy),

...

(b) in respect of pensionable employment that ceased on or after 1st April 2008,-

(i) any of regulations E2 to E3

...

(2) A member to whom this regulation applies must-

(a) inform the member's employer, and any other person that the Secretary of State may specify, that the member's pension under this Section of the scheme has become payable, and

(b) if requested to do so, provide any information (or authorise any other person to provide information) about the member's pay from NHS employment to the Secretary of State or to any other person the Secretary of State may specify.

(3) If the relevant pension is one referred to in paragraph (1A)(a) ...

(a) the member's pension will be reduced by the appropriate amount;

(b) the appropriate amount is the difference between the member's previous pay and the aggregate of-

(i) the amount of the member's pension (including in that amount any amount by which that pension has been reduced pursuant to an election under regulation E7 [part payment by lump sum]); and

(ii) the amount of the member's pay from NHS employment for any financial year after the pension becomes payable.

E2 Early retirement pension (ill-health)

(A1) This regulation applies to a member who-

(a) retires from pensionable employment on or after 1st April 2008-

(i) who submitted Form AW33E (or such other form as the Secretary of State accepted) together with supporting medical evidence if not included in the form...

(ii) that form was received by the Secretary of State before 1st April 2008

Material Facts

1. Mrs Phillips retired from the Scheme on 31 December 1996. She retired on grounds of ill-health. NHS Pensions paid her an enhancement of membership of 6 years 243 days.
2. On her application form for ill-health, Mrs Phillips ticked “no” to the question, “Will you be re-employed in the NHS after retirement from this job?”
3. Mrs Phillips received a booklet R when she retired. In this “booklet R notes for pensioners and their dependents”, on page 11 it said under 6.1 General Information that:

“If you retire before age 50 with an ill-health pension and if you start working again before age 50, or carry on working after you have retired, you will be able to rejoin the Scheme. Your NHS pension may be affected by any work you do in the NHS after retirement.” It goes on to explain that a member must inform their employer and contact Paymaster. It ends by saying (in bold) that, “If you do not do these two things you may be paid too much NHS Pension. If this happens you will have to pay money back.”
4. Mrs Phillips contacted Equinti Paymaster (**Paymaster**) in December 1998, and informed them that she had been re-employed by the NHS. She said:

“It is my understanding that the abatement will be applicable if I earn more than I earned in my previous post. As this is not the case, I would therefore seek clarification on this matter.”
5. Paymaster wrote to Mrs Phillips on 12 January 1999 and enclosed a statement showing how much she could earn without affecting her pension. Paymaster said Mrs Phillips may earn £24,047.32 a year without affecting her pension.
6. Paymaster confirmed in writing on 26 January 1999 that the salary of £22,000, she was receiving from her re-employment, would not impact on her pension.
7. On 4 May 1999, Paymaster wrote to Mrs Phillips setting out a new salary limit, because of the increase in cost of living, this annual limit now was £24,816. Paymaster repeated this exercise on 19 May 2000, and set out the new annual limit of £25,089.53.
8. Paymaster wrote to Mrs Phillips on 17 November 2001, and explained that they have changed their processes. They would no longer obtain information from employers but rely on members informing them of any changes to their circumstances. They said:

“In the past we have asked your employer for details of your earnings/fees. As these have been less than your earnings margin, no adjustment of pension has been necessary, We now propose to stop sending regular enquiries to your employer. If at any time you think that your earnings/fees may exceed the amount shown below [£25,089.53] (because of a change in grade or increase in hours etc), you must let us know immediately because your pension could be overpaid. If any overpayment does occur, you will of course have to repay it.”

9. On 1 December 2005, Mrs Phillips informed Paymaster, by enclosing a letter from her employer that her salary scale had increased. Her new annual salary was £31,127. Nothing was heard from Paymaster.
10. On 1 February 2007, Mrs Phillips informed Paymaster that her annual salary increased again to £37,881. Paymaster did not respond to this.
11. NHS Pensions undertook a National Fraud Initiative in 2008. NHS Pensions sent a generic letter to Mrs Phillips which said:

“The results of this recent exercise suggest that you may fall into the category where an abatement or suspension of pension should apply. If this is the case and overpayments have occurred NHSBSA Pensions will take action to ensure a full recovery of the overpaid monies occurs. It is the responsibility of every pensioner member of the NHS Pension Scheme to advise Xafinity Paymaster, payroll provider if they become re-employed within the NHS. This is to enable Paymaster to assess whether or not future pension payments are affected and require abatement...”

Mrs Phillips did not reply to this.

12. As part of the National Fraud Initiative 2008, Paymaster wrote to Mrs Phillips on 8 January 2010, asking her to provide details of her re-employment. They said, “We have been informed that you have returned to work after retirement. We require confirmation of your employment details urgently...” Mrs Phillips completed the enclosed form and returned it to Paymaster. She said her salary was £34,650.08.
13. On 23 February 2010, Paymaster contacted Mrs Phillips informing her that her salary during re-employment from 2000/01 to 2009/10 had been in excess of her earnings limit. Paymaster conducted a reassessment based on information supplied by her employer. The results were that she had been overpaid her pension. The table below sets out the overpayment:

Year	Previous Pay (A)	Current Earnings (B)	Difference (A-B)	Pension Paid	Overpayment (Pension Paid – Difference)
2000/01	£33,604.39	£25,210.05	£8,394.34	£8,512.54	£118.20
2001/02	£34,713.33	£26,066.02	£8,647.31	£8,789.61	£142.30
2002/03	£35,303.46	£27,259.23	£8,044.23	£8,942.47	£898.24
2003/04	£35,903.62	£27,757.00	£8,146.62	£9,094.92	£948.30
2004/05	£36,908.92	£28,859.03	£8,049.89	£9,344.40	£1,294.51
2005/06	£38,053.10	£33,031.01	£5,022.09	£9,634.05	£4,611.96
2006/07	£39,080.53	£34,292.87	£4,787.66	£9,895.93	£5,108.27
2007/08	£40,487.43	£40,764.51	£0 (earning exceeded limit)	£10,251.01	£10,251.01
2008/09	£42,066.44	£43,280.04	£0	£10,652.36	£10,652.36

14. The total overpayment from 2000 to 2009 was £34,025.15 (gross) with Paymaster suspending her pension for 2009/10 as it was projected to exceed limits. On 20 July 2010, Paymaster informed Mrs Phillips that after tax adjustment, the net overpayment to be recovered was £27,007.60.
15. Paymaster wrote to Mrs Phillips on 2 August 2010, that she as had now reached 60, her pension was no longer liable to be abated and therefore she has no earnings limit.
16. Paymaster chased Mrs Phillips on 11 August 2010 and 7 September 2010 for the overpayment to be repaid.
17. Mrs Phillips wrote to Paymaster on 9 September 2010, saying that she proposed to pay £100 a month and that she did inform Paymaster in 2005 and 2007 that her salary had increased. Paymaster did not agree to this proposal, saying the repayment over a 10 year period would be £225 per month. They did not comment on what Mrs Phillips had said regarding informing them in 2005 and 2007.

18. On 27 January 2011, Paymaster wrote to Mrs Phillips informing her that for tax year 2009/2010, they had completed their calculations. The overpayment for this period was £8,919.71 (net). This increased the total overpayment to £38,591.71. In response, Mrs Phillips said on 30 January 2011 that she could not repay more than £100 per month and that she has no confidence in the service provided by Paymaster.
19. Mrs Phillips invoked stage 1 of the Internal Dispute Resolution (**IDR**) procedure. Paymaster responded with the stage 1 decision on 30 March 2011. Paymaster said that because Mrs Phillips was in receipt of an ill-health pension, and she resumed employment, the pension needed to be abated. They invited Mrs Phillips to offer a proposal to repay the overpayment over a ten year period.
20. On 9 August 2011, Paymaster in response to Mrs Phillips' further correspondence confirmed that the net overpayment was £35,927.31. They did not agree that they had acted in maladministration because Mrs Phillips did not inform Paymaster of her change in circumstances. They referred the matter to NHS Pensions regarding the repayment plan proposed by Mrs Phillips of £100 per month – which they say would take 360 months (30 years) to completely repay the overpayment.
21. Mrs Phillips made an application for stage 2 of the IDR procedure to NHS Pensions on 29 December 2012. NHS Pensions considered the matter and concluded that Paymaster had explained the earnings limit to Mrs Phillips and it was her responsibility to notify them if her salary details had changed.

Summary of Mrs Phillips' position

22. Mrs Phillips says that NHS Pensions have not explained why they keep saying that Paymaster were not informed, when she did inform them twice about changes to her circumstances.
23. NHS Pensions reiterated the same argument presented by Paymaster, that she was informed about the earnings limits and failed to inform Paymaster, when she says that she did inform Paymaster.
24. Mrs Phillips says that she did offer to pay £12,000 to NHS Pensions in final settlement, which NHS Pensions have not accepted.

25. Mrs Phillips says that she will be taking her normal retirement benefits and does not consider it fair to repay the overpaid pension over a period of 10 years – after her retirement.

Summary of NHS Pensions position

26. Mrs Phillips was informed of the earnings limit by Paymaster when she returned to employment in 1999.
27. Paymaster informed Mrs Phillips of her earnings limit and told her to contact them if her earnings exceeded the limit. Paymaster would no longer contact Mrs Phillips.
28. With regards to Mrs Phillips' claims that she contacted Paymaster on two occasions, NHS Pensions say that neither they nor Paymaster have any record of the correspondence. They consider it reasonable for Mrs Phillips to have contacted Paymaster, if she did not hear from them. There is no record of Mrs Phillips chasing Paymaster. As Mrs Phillips was made aware of the earnings limit, it was Mrs Phillip's responsibility to contact Paymaster if her salary increased above the limit.

Conclusions

29. Mrs Phillips retired from the NHS on grounds of ill-health. She then resumed employment and informed Paymaster of this. She was informed by Paymaster what her earnings limit would be.
30. From 1999 to 2001, Paymaster enquired directly from Mrs Phillips' employer and explained to her what her earning limit was. Paymaster contacted Mrs Phillips in 2001 explaining that they would no longer undertake reviews and expect Mrs Phillips to inform them of any changes to her circumstances.
31. It is clear that Mrs Phillips knew that she had to inform Paymaster or NHS Pensions if her circumstances changed. Regulation S2(2)(b) states clearly that the member must inform the Secretary of State. As NHS Pensions are acting on behalf of the Secretary of State, then Mrs Phillips needed to keep NHS Pensions informed or Paymaster (NHS Pensions' appointed payment administrator). There is no dispute around this. Neither is there a dispute around Mrs Phillips not knowing her obligations to keep Paymaster updated. Further the principle behind abatement is also not questioned by Mrs Phillips.

32. NHS Pensions and Paymaster want Mrs Phillips to repay the overpaid pension because they say she did not inform them that her pension and earnings exceeded the earnings limit. This led to a pension being paid without it being abated.
33. NHS Pensions say that Mrs Phillips failed to keep Paymaster updated. However Mrs Phillips says she did inform Paymaster in 2005 and 2007 that her salary increased. Paymaster does not have any record of this.
34. Whilst I do not disbelieve Mrs Phillips, I do think that she could have been more proactive in chasing Paymaster after she contacted them in 2005 and 2007. I say this because she was the person who had the most to lose. If her pension was overpaid because it was not abated, then it would be her who had to repay the overpayment.
35. Further, had she contacted Paymaster and chased them because she did not hear from them, it may have alerted Paymaster that her circumstances had changed and they would have acted on the information and abated the pension much sooner.
36. Mrs Phillips was ultimately responsible for keeping Paymaster updated of any changes to her circumstances. Although she informed them in 2005 and 2007, she did not keep Paymaster informed at any other time. And when she did not hear from them in 2005 and 2007 she did not follow this up or ask whether there would be any abatement. Her salary increased annually and there is an argument to be made, that she should have informed Paymaster annually, which would have allowed her pension to be abated. As Mrs Phillips was advised by Paymaster and NHS Pensions of her obligations, there is no maladministration on their part.
37. As such NHS Pensions are entitled to recover the overpayment. They proposed £225 per month over ten years to repay the overpayment, which Mrs Phillips disagreed with. Mrs Phillips says that this repayment plan will place her in a financial disadvantaged position especially as she will need to continue to repay the overpayment after her retirement. I acknowledge this but the overpaid pension needs to be repaid.

38. Therefore only option available is for NHS Pensions to recover the overpayment in a manner which does not cause Mrs Phillips undue financial hardship. This can only be achieved by NHS Pensions or Mrs Phillips asking to complete a means assessment on a regular basis, ideally annually. This should allow both parties to agree on a repayment plan at an affordable level, over a ten year period. NHS Pensions and Mrs Phillips should take on board my suggestion.
39. I do not uphold the complaint.

Jane Irvine
Deputy Pensions Ombudsman

1 August 2014