

Ombudsman's Determination

Applicant	Mrs S
Scheme	NHS Pensions Scheme (NHSPS)
Respondents	NHS Business Services Authority (NHS BSA) Avon & Wiltshire Mental Health Partnership NHS Trust (the Trust)

Outcome

1. Mrs S' complaint against the Trust is partly upheld. To put matters right the Trust shall pay Mrs S £1,000 for the serious distress and inconvenience she has experienced. No further action is required by NHS BSA.

Complaint summary

2. Mrs S has complained that she was misinformed by the Trust and NHS BSA about her reckonable membership in the NHSPS. She feels that NHS BSA should honour the full 40 years of reckonable service, as she was given assurances that she would achieve this and would not have chosen to retire had she been aware of the shortfall.

Background information, including submissions from the parties

3. Mrs S understood that by the time she reached her retirement age of 55 she would have achieved 40 years' membership of the NHSPS by virtue of her status as a Mental Health Officer (**MHO**), with entitlement to doubling of membership. She says her belief was supported by information provided by the Trust and NHS BSA.
4. The NHSPS is governed by regulations, the regulations relevant to Mrs S' case are the National Health Service Pension Scheme Regulations 1995 (**the Regulations**) (see Appendix).
5. Regulation C2(1) defines pensionable service as "service which counts both for the purposes of ascertaining entitlement to benefits under these Regulations and for the purpose of calculating them..."
6. Regulation C2(3) says "The benefits described in these Regulations will be calculated by reference to a maximum of 45 years' pensionable service of which only 40 years

may relate to the period before the member reaches age 60 (age 55 if the member is a special class officer)..."

7. Regulation C3 defines qualifying service as "service which counts for the purpose of ascertaining entitlement to benefits under these Regulations but not for the purpose of calculating them..."
8. Mrs S was a member of the NHSPS, with MHO status, from 19 August 1981 to 19 August 2018. Other than a break between 21 August 1982 to 5 September 1982, her membership had been continuous. She worked whole-time except for the period between 22 April 2002 to 31 July 2017, when she worked part-time.
9. Regulation R3(5) shows that members with MHO status can retire at age 55, having completed 20 years' service, and that every year of pensionable service accrued beyond 20 years would be counted as double.
10. Regulation R5(1) says that "a member's pensionable service in part-time employment will not count at its full length but will be calculated...as its whole-time equivalent".
11. Regulation R5(10) says "A member's pensionable service in respect of part-time employment will count at its full length...for the purposes of regulations C2(3) (limit on pensionable service that counts for benefits) and C3(1) (qualifying service)."
12. Therefore, each full year of whole-time service counts as two years qualifying service and two years (reckonable) pensionable membership. Each full year of part-time service counts as two years qualifying service, but the pensionable membership is two times the hours worked converted to their whole-time equivalent.
13. Under Regulation C2(3), Mrs S, as an MHO, was subject to a restriction of 40 years qualifying membership at age 55. Regulation R5(10) shows the restriction applies from the same date regardless of whether the member works whole-time or part-time.
14. As a result, despite Mrs S having accrued more than 40 years calendar length membership in the NHSPS by the time she retired, her actual membership was lower due to her having worked part-time for some of her career and because her membership was restricted under the provisions of the Regulations.
15. NHS BSA says that since 2014 annual benefit statements are provided for members automatically via their annual Total Reward Statement (**TRS**) wherever possible. Estimated projections of benefits may also be provided by NHS BSA on request in situations such as where the TRS is not available or the calculations are complex. Employers may also access the NHS BSA systems to produce benefit statements for their employees without the need for any involvement by NHS BSA.
16. On 6 October 2015, Mrs S' then employer, North Bristol NHS Trust (**NBT**), produced a projected benefit statement to age 55 for Mrs S. It showed her membership broken down between her various employments and summarised her membership as follows:

Calendar Length Membership	33 years 209 days
Whole Time Equivalent Membership	29 years 279 days
MHO doubled membership	9 years 28 days
Total Pensionable Service	34 years 116 days

In the 'Glossary of Terms' included in the statement it explained that Calendar Length Membership was:

"The actual length of the employment. If you work part time this is scaled down in order to calculate whole time equivalent membership "

Whole Time Equivalent Membership was:

"The amount of membership used to calculate your pension entitlement"

17. Notes on the statement said, "Whilst we have made every effort to ensure that this statement is accurate, you should be aware that this **is an estimated quotation only.**"
18. On 25 July 2016, NBT produced another projected benefit statement to age 55. This showed membership of 34 years 316 days. Pensionable pay was shown as £25,867 and the quoted pension was £11,545.
19. On 3 August 2016, the Trust's pensions department emailed Mrs S to say:

"I have attached two estimates in which I have altered the retirement date so the system would calculate close to 40 years' service...This should give you more accurate figures with which to make your decision."
20. On 5 October 2016, Mrs S accessed her latest TRS. This showed her pensionable membership as 35 years 258 days. Her pay was shown as £25,867 and pension was shown as £11,545. Qualifying membership was shown as 40 years.
21. On 18 October 2016, a membership statement was provided to Mrs S by NHS BSA. This showed her calendar length membership to 31 March 2016 as 34 years 209 days before doubling was applied; her whole time equivalent membership to 31 March 2016 was 30 years 206 days before doubling; and her total pensionable membership was shown as 35 years 60 days after doubling was applied.
22. Mrs S accessed her TRS again on 29 November 2016 and 3 September 2017. These showed her pensionable membership as 35 years 34 days and 35 years 8 days, respectively.

23. On 9 November 2017, the Trust's pensions department emailed Mrs S to say:

“As you have MHO status you are not permitted to have more than 40 years pensionable membership at age 55. This would equate to 40/80th of your pensionable pay, which we would calculate at present to be £40428.00 per annum. This would mean that your standard benefits would, based on these figures, be an annual pension of £20214.00 and a lump sum of £60642.”
24. On 5 December 2017, the Trust queried the calculation of Mrs S' membership with NHS BSA. The Trust said it calculated that she reached 40 years membership at age 55, but it did not specify whether this was pensionable or qualifying membership.
25. NHS BSA issued a projected benefit statement, on 3 January 2018, based on reckonable membership of 34 years 305 days. Pay was shown as £35,475.71 and pension as £15,447. However, the reckonable membership was incorrectly shown as 40 years. NHS BSA says this was a typing error.
26. Notes on the statement said, “Whilst we have made every effort to ensure that this statement is accurate, you should be aware that this is an estimate only.”
27. On 31 January 2018, the Trust telephoned NHS BSA to query the 3 January 2018 projected benefit statement. NHS BSA says its notes of the call do not detail the conversation but do show that the Trust was advised to put the enquiry in writing. NHS BSA says no written enquiry was received.
28. However, evidence provided by the Trust shows that it followed up the telephone conversation by email on the same day. It asked why the calculated pension was not half the salary when the total pension membership was 40 years.
29. On 7 February 2018, the Trust emailed Mrs S to say:

“I think I have mentioned in previous correspondence that I believed you would reach 40 years pensionable service at age 55, this appears to be confirmed in the estimate you have received.

The calculation of your pension is therefore straightforward as it is 40/80 x final salary. If this is indeed £41787 your annual pension would be £20893.50 and a lump sum of £62680.50.”
30. On 14 February 2018, Mrs S accessed her latest TRS. This showed reckonable membership as 35 years 8 days. Pay was shown as £35,482.19 and pension as £15,533. Qualifying membership was shown as 40 years.
31. The Trust submitted Mrs S' retirement benefit application to NHS BSA on 24 May 2018. Her benefits were calculated based on reckonable membership of 35 years 254 days. Pay was £42,469.42 giving a pension of £18,949.80 and cash lump sum of £56,849.39. These benefits were put into payment for Mrs S.
32. An email from the Trust's pensions department to NHS BSA dated 7 February 2018 said “as I have mentioned in previous correspondence” Mrs S would achieve 40

years pensionable service at retirement. The calculation of pension is “therefore straightforward as it is 40/80 x final salary”.

33. The NHS BSA ‘Knowledge Base’ website gives the following information in response to the question “How is Mental Health Officer membership calculated for part time members?”:

“When calculating membership for part time Mental Health Officer members, it is the calendar length of the membership that is used to establish the 20 year qualifying period for early retirement and doubling of years. The appropriate proportion of whole-time membership is used for calculating the member’s extra pension entitlement.

For example, a member who has worked half the standard hours since becoming an MHO 1 January 1980 would have achieved the necessary 20 qualifying years on 31 December 2000. Each year of MHO membership from 1 January 2001 would be doubled and then scaled down to the relevant proportion of full time.

A member with MHO status is restricted to 40 years pensionable membership at age 55 and 45 years overall. Where a member has worked part-time the period is calculated at its actual length for the purpose of calculating pension benefits but at its calendar length when calculating whether they have achieved maximum membership.”

Summary of Mrs S’ position

34. Mrs S says:

- The pension she received is considerably less than expected. She actively sought advice from both the Trust and NHS BSA and the information given was repeatedly wrong. Information that has come to light during the complaint process was not available to her prior to retirement. Had this information been provided to her, she would have made other decisions regarding her actual retirement date to ensure the maximum possible pension.
- She frequently telephoned NHS BSA and sought to log into the “Total Rewards Statement Portal”, but this was unavailable for considerable periods of time. She was advised to verify the estimates given with either NHS BSA or the Trust, which she did.
- On each occasion she telephoned NHS BSA regarding the inaccuracies and inconsistencies she was told that the Total Rewards Statement would not be accurate for an individual with MHO status and she was referred to the Trust’s pension department.
- She had no knowledge of any additional rules relating to the doubling-up provision and part-time staff. She has examined numerous documents and factsheets supplied by NHS BSA and the Trust and has not found any mention relating to the

restriction on the amount of Pensionable Service that can be accrued by an MHO who works part-time.

- She only became aware of a problem when, after retiring and a delay, she received notification of her pension award and knew at that point there was a shortfall. Even then, the Trust reassured her there was an error and that it would liaise on her behalf to resolve the issue.
- It was in November 2018 that the unpublished rules regarding doubling-up provision were explained to her, and how they affected her situation and final pension award. She was never informed that part-time working in the doubling-up years would prevent her from ever achieving the maximum pension. She was only ever told that it would take longer to achieve.

Summary of NHS BSA's position

35. NHS BSA says:

- Despite Mrs S accruing more than 40 years calendar length membership in the NHSPS by the time she retired, her actual membership was lower due to her working part-time for some of her career and because her membership was restricted under the provisions of the Regulations. The restriction means that MHOs are subject to a maximum of 40 years qualifying membership at age 55.
- A member who works part-time accrues qualifying (calendar length) membership at the same rate as a member who works whole-time. They accrue reckonable (pensionable) membership, however, as a proportion of whole-time, according to the number of hours worked. The length of their reckonable membership is always lower than their calendar length membership.
- Both the Trust and Mrs S had a long standing awareness that Mrs S would exceed the maximum permissible membership before age 55 and that her accrual of reckonable membership, doubled years and the associated restriction would be on a pro rata basis.
- Mrs S' expectation appears to have been that she would achieve 40 years reckonable membership at age 55. However, this would only have been possible if she had worked whole-time throughout.
- If NHS BSA were simply to apply the restriction to Mrs S' reckonable membership at age 55, it would be unfairly advantageous to her as she would be credited with membership as if she had always worked whole-time, and paid higher contributions to the NHSPS – which she did not.
- For complex membership situations as in Mrs S' case, NHS BSA would not expect a member or their employer to be able to perform the calculations required to produce accurate retirement benefit values. It is expected that employers will approach NHS BSA where complex membership / benefit assessments are

required as they often need to be completed manually, by persons with the appropriate level of expertise.

- Ultimately, in the years leading to her retirement, it was possible to provide numerous estimated benefit statements for Mrs S via the NHS BSA systems and by manual means, which reflected her reckonable / calendar length membership and benefit entitlement with reasonable accuracy. NHS BSA cannot be held responsible if, separately, the Trust or Mrs S made incorrect assumptions about the membership or benefits she might potentially accrue by her chosen retirement date.
- It is acknowledged that NHS BSA incorrectly stated 40 years reckonable membership in one of the statements. However, this was an isolated incident. Even in this instance, the retirement benefits quoted were based upon the correct reckonable membership value and were consistent with those shown in the numerous other statements produced for Mrs S in recent years.

Summary of the Trust's position

36. The Trust says:

- It agrees that Mrs S was given conflicting information in the months/years leading up to her retirement. It had provided estimated benefits from the NHS BSA website, but noted that they did not look correct; in some instances the pensionable pay appeared incorrect and in other instances the reckonable membership looked incorrect.
- It had emailed NHS BSA on 31 January 2018 to query the most recent manual estimate, provided by NHS BSA, which showed 40 years membership but was not exactly one half of the final pensionable pay, that is 40/80, as it had expected. It never received a response.
- It used the NHS BSA website to refer to employer guides and performed extensive searches of all available documents relating to MHO part-time membership calculations and restrictions to service. Given the information available, it made what it believes to be a reasonable assumption that up to 20 doubled calendar years would be included in the calculation.
- Whilst it quoted benefits based on 40 years membership, it did not say that this was guaranteed.
- NHS BSA provides no mandatory training on administering the NHSPS. New pension officers are reliant on the training and knowledge provided in house, the guides and factsheets available on the NHS BSA website and advice provided by NHS BSA via email and telephone.
- None of the guidance produced by NHS BSA available to members or the Trust makes it clear how part time membership with MHO status and 'doubled years'

affects the calendar length restriction. The estimate generated through the NHS BSA website clearly showed reckonable service of 40 years and whilst isolated would cause Mrs S confusion as to her benefits in retirement.

- Nowhere on the estimate nor the NHS BSA website/communications is it clear that 40 years membership would have been unachievable in this case unless Mrs S had been passed the information by NBT.

37. NBT was asked to comment on the information it held and had passed to Mrs S. It says:

- It is unlikely that Mrs S was told that she would exceed the maximum permissible membership before age 55 and that her accrual of reckonable membership, doubled years and the associated restriction would be on a pro rata basis. This was contained in an internal email between NBT and NHS BSA and queries of this nature would not be shared.
- NBT provided a guide to the NHSPS on joining. As Mrs S worked for a previous Trust and held MHO status the assumption would be that she understood how doubling worked.

Adjudicator's Opinion

38. Mrs S' complaint was considered by one of our Adjudicators who concluded that further action was required by the Trust. The Adjudicator's findings are summarised below:-

- 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.
- The Adjudicator's view was that the statements made did not constitute a representation because they were not statements of past or present fact or law. This was because the evidence showed the illustrations provided to Mrs S made clear that the figures quoted were estimates and were not guaranteed.
- As a result, Mrs S had not suffered a financial loss as she is in receipt of the benefits to which she is entitled under the Regulations. What she had suffered was a loss of expectation. She believed she was entitled to a pension based on 40 years' service, but this turned out not to be the case.
- There is no negligence on the part of NHS BSA as it has applied the Regulations correctly in the benefit statements it produced. While there is a wide variation in the pension figures quoted to Mrs S in the years leading up to her retirement, the pensionable service figure remained fairly constant, and certainly well below 40 years. The one exception was the statement produced on 3 January 2018 which

showed reckonable service as 40 years. However, the pension calculation was based on the correct figure, as both Mrs S and the Trust recognised when they queried the calculation.

- The pension calculation was complex. However, the Trust and Mrs S were made aware on more than one occasion that, because her circumstances were unusual, the automated TRS system could not necessarily be relied upon. They should also have been aware, from the statements produced by NHS BSA, that Mrs S' pension was not based on 40 years pensionable service, but on a lesser figure. However, rather than accept that this was correct, and question the reason why, they both persuaded themselves that it was NHS BSA that had made a mistake.
- The Trust contacted NHS BSA after receipt of the 3 January 2018 statement to clarify why the pension quoted was not based on 40/80th of pay. Following an unsatisfactory telephone conversation with the NHS BSA helpline, the Trust put its enquiry in writing in the email sent to NHS BSA on 31 January 2018. NHS BSA said it did not receive this email.
- But rather than pursue this and chase NHS BSA for a response, it appeared the Trust again convinced itself that the NHS BSA quote was incorrect. On 7 February 2018, it emailed Mrs S to say that it believed she would reach 40 years pensionable service and that the calculation of her pension was straightforward, being 40/80th of her salary.
- Even then, Mrs S obtained a further quotation on 14 February 2018, which showed her reckonable membership as 35 years 8 days, and yet she decided to press ahead with her retirement.
- The Trust had said that there is no clear guidance available on the NHS BSA website relating to MHO part-time membership calculations and restrictions to service. It said that, given the information available, it made what it believed to be a reasonable assumption that up to 20 doubled calendar years would be included in the calculation.
- Although, there may not be one single document that explains exactly how such calculations should be performed, the Adjudicator's view was that the Regulations are clear in that qualifying service is restricted to 40 years at age 55, and that in Mrs S' case her pensionable service would be further restricted by the fact she worked part-time. Given the number of years she worked part-time it would not have been possible for Mrs S to achieve 40 years' pensionable service.
- The Trust also said that it is reliant on advice provided by NHS BSA via email and telephone, and yet it failed to take all reasonable steps to obtain that advice before submitting Mrs S' retirement benefit application.
- The line manager in the Trust's pension department had said she was aware the restriction worked in this way from previous experience. Unfortunately, she was away on maternity leave at the time of Mrs S' retirement. However, this

demonstrated that the knowledge was there, but was not documented or shared with other pension officers who were in the position of having to advise members regarding their benefits.

- The Trust provided incorrect information to Mrs S about her likely pension entitlement on more than one occasion and its failure to establish the correct position and provide Mrs S with accurate advice amounted to maladministration. This would have caused Mrs S serious distress and inconvenience and she should receive an award in recognition of this.

39. Although NHS BSA and the Trust accepted the Adjudicator's Opinion, Mrs S did not; she made the following comments:-

- It remains her view that NHS BSA should honour the full 40 years of reckonable service, as she was given assurances that she would achieve this. She remains of the view that she has incurred a financial loss; it was a reasonable assumption confirmed many times, by both her employer's pension officers and NHS BSA Helpline, that due to the wide variation of estimates, the reduced number of reckonable years membership was incorrect and not to be relied upon.
- The 40 years maximum pension detailed in the January 2018 NHS BSA Pension Statement confirmed to her, and also the Trust, that she had reached, and technically exceeded, the required 40 years.
- The Regulations do not contain the restrictions that were applied to her pension. Regulation R3(5) and Regulation R5(1), state "... that every year of pensionable service accrued beyond 20 years would be counted as double", and that "a member's pensionable service in part-time employment will not count at its full length but will be calculated ... at its whole-time equivalent."
- As an employee of the NHS, it was not her responsibility to ask the 'right questions' relating to rules of which she has no knowledge and no means of finding out. She did not know what the correct question should be. Surely it was the responsibility of NHS BSA to provide her with the relevant information. There are no published guidelines or documents that mention that the 40 years membership is inflated by mental health doubling, or that there is a restriction of only 10 of the doubled years being selected to calculate the reckonable membership.
- If a very large, specialist Mental Health Trust pension department was misinformed and unaware of further restrictions to her pension, how could she be expected to know differently or better. With a total absence of this information contained within the scheme guides, it was impossible to know about the restrictions and not unreasonable to trust the estimates she was given, even though these were wildly variable, or the reckonable membership figures, when these did not seem to match the figures available to her based on her hours and years of service.

- The absence of information relating to her doubling-up date and its significance to her final pension has also resulted in financial loss. As a result, she would like her last year of service (which was 11 days short of the doubling-up date) to be included in her pension calculations. She was never made aware of the significance of the 'Doubling Date' as opposed to the 'Start Date' of pensionable service. Her argument is that had this information been available and/or communicated to her, she would have made different choices relating to her working hours.
- She worked full-time during her last year of service, but this was not counted as one of the 10 best years for doubling-up, because, she later discovered, she retired 11 days before her 'Doubling-up Date', which she was never informed about and was not included in any of the documentation received. If that last year in a senior position had been included, it would have increased her pension. If the importance and significance of the doubling-up date had at any time during her 37 year career been communicated to her, she would have extended her retirement date less than two weeks was all that was needed.
- Her belief, ever since choosing to work part-time during her doubling years, was that her part-time employment would be calculated at full-time equivalent years, doubled, then added to her 20 qualifying years and then capped at 40 only if the result was greater than 40. She was always conscious of the hours she worked to ensure that over her last 17 years she would accrue enough full-time equivalent years by her retirement date to achieve maximum pension of 40/80th.
- It is incorrect that she paid less contributions than someone who worked 30 years whole time with 10 years doubled, due to their ability to opt out of paying contributions once their 40 years maximum contribution had been capped. she continued paying pension contributions throughout her career.
- She finds it unjust and discriminatory that working full time during her first 20 years' service, but then part time during some of her remaining years, due to having a child in later years, resulted in a lower pension than someone who worked part time in the first 20 years, but then full time for 10 years of their remaining service.
- The NHS BSA Pension Statements which she received were full of definitions of calculating years at "full-time equivalent". She was told that it would take longer to achieve 40/80th and she understood she would have to work for longer to gain full-time equivalent years, she was not ever told that it would be impossible to achieve this because of the '10 best (calendar) years' restriction. Even then, NHS BSA were not using true calendar years but an arbitrary 'doubling date' as the start/end date for each year.
- The only definition of "restrictions" that she knew of was the restriction that she could not achieve more than 40/80th. She understood that her 20 years 'Qualifying

Service” plus her 17 ‘doubling years’ (calculated at full-time equivalent and then doubled) would be capped so as not to exceed 40 years pensionable service.

- Despite her repeatedly contacting NHS BSA to question their Statements they continued to deflect her concerns with vague reassurances that the automated calculations were “not fit for purpose for a member with MHO Status” and that it would all sort itself out at her retirement date. NHS BSA also referred her to her employer’s pension department assuring her that it would be able to give a more accurate assessment of her pension. The Trust’s pension department continued to reassure her that she would achieve (and even exceed) her 40/80th cap.
- When, approximately seven months before her retirement, NHS BSA showed on her statement that she had achieved 40 years of service, she felt that its promises of sorting out her pension at retirement were falling into place. Even though her pension and lump sum figures still looked low, she felt that if her 40 years of service was correct, her pension would fall into line. This was again confirmed by the Trust’s pension department.

40. The complaint has now been passed to me to consider. I note the additional points made by Mrs S but I agree with the Adjudicator’s Opinion.

Ombudsman’s decision

41. The basic principle for negligent misstatement (in the absence of any additional legal claim) is that a scheme is not bound to follow incorrect information, for example in retirement quotes, transfer values or early retirement. A member is only entitled to receive the benefits provided for under the scheme rules, in this case those based on correct information accurately reflecting the Regulations.
42. Regulation C2(3) imposes a limit on MHO members’ pensionable service of 45 years in total, with a maximum of 40 years’ pensionable service before reaching age 55.
43. Regulation R5(1) (Part-time employment) requires pensionable service relating to part-time service to be ‘scaled back’ from its “full length” to its “whole-time” equivalent for the purpose of calculating benefits under the scheme.
44. However, Regulation R5(1) is expressed as being subject to Regulation R5(10), under which part time employment counts at its “full length” for the purpose of determining whether a member’s pensionable service has exceeded the limit imposed by Regulation C2(3).
45. “Full length” of a member’s pensionable service is not defined in the Regulations. However, I consider that it means the years and days which elapsed during the relevant period of pensionable service.
46. That interpretation would accord with the corresponding provisions of the NHS (Superannuation) Regulations 1980 (SI 1980/362) (the **1980 Regulations**), which were superseded by the 1995 Regulations. In Regulation 35 of the 1980 Regulations

(calculation of service in part-time employment), paragraph (1) states that, for the purposes of considering whether a member's pensionable service has exceeded any of the limits set out in the 1980 Regulations, or whether a member who is an MHO has completed the necessary pensionable service to qualify for double-counting of their pensionable service, "the service of an officer in part-time employment shall be treated as whole-time service".

47. It seems to me that the term "calendar length", used by NHS BSA in its explanations of Mrs S's benefit calculation, has been used in place of the term "full length", which is used in Regulation R5. Although confusing, the use of the term "calendar length" in place of "full length" does not invalidate NHS BSA's method of considering whether the limit on pensionable service under Regulation C2(3) applied.
48. In Mrs S' case, her pensionable service included the additional pensionable service, which she was entitled to under Regulation R3(5)(b) because of having completed 20 years' pensionable service as an MHO.
49. In accordance with Regulation R5(10), for the purpose of ascertaining whether Mrs S' pensionable service exceeded the limit imposed by Regulation C2(3), the "full length" of her pensionable service was compared with that limit.
50. As the full length of Mrs S' pensionable service (bearing in mind her entitlement to doubling under Regulation R3(5)(b) exceeded the 40 year limit under Regulation C2(3), NHS BSA rightly counted only 40 full length years of Mrs S's pensionable service.
51. In accordance with the requirements of Regulation R5(1), the remaining pension years were then scaled back to their "whole-time equivalent" pensionable service, for the purpose of calculating Mrs S' pension benefits under the scheme.
52. NHS BSA's use of the term "reckonable membership" to describe Mrs S's whole-time equivalent pensionable service appears to be reminiscent of the 1980 Regulations' use of the phrase "reckoning of contributing service", in the same context that "pensionable service" is used in the 1995 Regulations. Again, although this is confusing, I do not consider that it invalidates NHS BSA's calculation of Mrs S's whole-time equivalent pensionable service. I will continue to use the term "pensionable service" for the avoidance of confusion.
53. Mrs S has also complained that she worked full-time during her last year of service, but this was not counted as one of the 10 best years for doubling-up, because she retired 11 days before her 'Doubling-up Date'. She says that, had she known the effect her choices would have on her pension entitlement, she would have made different decisions regarding her working hours.
54. The doubling date was adjusted to take account of a break in membership between 21 August 1982 and 5 September 1982, which therefore does not count as pensionable service. While it may not have been explicitly set out for Mrs S, the effect will have been taken into account in the projected benefit statements she received. I

can appreciate that this, and the effect of her part-time working, is frustrating for Mrs S, now that she has reached retirement, however, it was not for the Trust or NHS BSA to advise her on career choices, and when she should retire, or the potential implications of doing so.

55. I am satisfied that, given Mrs S' service history and MHO status, NHS BSA has correctly applied the Regulations in its calculation of her pensionable service.
56. Mrs S maintains that she has been misled into believing that her pensionable service would be calculated at 40 years.
57. The evidence shows that Mrs S received several projected benefit illustrations, the majority of which clearly showed that her total pensionable service would be less than 40 years. In fact, the only illustration she received which contradicted this was the one issued on 3 January 2018, which incorrectly stated her pensionable membership was 40 years, but in which the estimated pension figure was based on pensionable membership of 34 years 305 days.
58. I acknowledge that the Trust incorrectly led Mrs S to believe she would achieve 40 years pensionable service at age 55, including its email to her sent on 7 February 2018, following receipt of the 3 January 2018 illustration. However, these statements fell short of providing an unequivocal guarantee that her benefits would be based on 40 years. In the 7 February 2018 email, the writer said he "believed" she would reach 40 years pensionable service at age 55 and that this "appeared" to be confirmed in the estimate she had received on 3 January 2018. Yet it was clear from even a cursory examination of the pension figure quoted that this was not the case, as Mrs S has said herself.
59. Mrs S says that she thought the pension figures quoted on 3 January 2018 looked low. Furthermore, the subsequent quotation she received on 14 February 2018 quoted a pension based on 35 years 8 days pensionable membership. Yet, despite this apparent contradiction and doubt, she continued with her application to retire, with the Trust submitting her application to NHS BSA on 24 May 2018. Her ultimate benefits were correctly based on pensionable membership of 35 years 254 days.
60. There should have been sufficient doubt in Mrs S' mind regarding the correct level of service for her to question the discrepancy in the figures and be certain of the correct amounts before deciding to retire, and yet she failed to do so. This did not require her to have any specialist knowledge, published guidelines or documents to ask the 'right questions'.
61. Mrs S has said she is not a pensions expert and it should not be assumed that she should know about the NHSPS and its rules, or how her pension is calculated. I appreciate that Mrs S would not have in-depth knowledge about the Scheme and how her benefits should be calculated, and I would not hold her to that standard. Nonetheless, I believe Mrs S was in a position to judge that it was unreasonable for her to simply assume that the 40 year figure quoted was correct in the face of continued indications to the contrary.

62. Mrs S is unhappy with the amount of pension which she receives from the NHSPS, as it is lower than the pension payment she had expected. However, I note that the final figures put into payment were higher than those shown in all the projected benefit illustrations issued to her, with the exception of one statement issued on 29 November 2016 which was based on a significantly higher earnings figure. I do, however, accept they were somewhat less than the figure she had been led to expect by the Trust.
63. The Trust's failure to clarify the position with NHS BSA and its negligence in failing to ensure the information it gave to Mrs S was correct, amounts to maladministration. However, Mrs S also had a responsibility to make sure that the information provided on the benefit illustrations, on which she was relying, was correct before she took the decision to retire.
64. Mrs S has said that she would have only retired if she could afford to, and that the pension now provided is insufficient. As a result, she would like her benefits to be based on 40 years' pensionable service.
65. Even if I were to find that it was reasonable for Mrs S to rely on the information provided, there is no supporting information demonstrating that the amount Mrs S is receiving was insufficient for her retirement. On the balance of probabilities I do not find that Mrs S would have acted differently had she known the correct position.
66. While I cannot direct that Mrs S should receive a pension based on 40 years' pensionable service, as she has requested, there is no doubt that the Trust's maladministration has added to her distress and inconvenience.
67. I uphold Mrs S' complaint in part.

Directions

68. Within 28 days of the date of this Determination, the Trust shall pay Mrs S £1,000 for the serious distress and inconvenience she has experienced.

Anthony Arter

Pensions Ombudsman
19 January 2021

Appendix

Extract from The National Health Service Pension Scheme Regulations 1995

Meaning of "pensionable service"

C2.—(1) In these Regulations, "pensionable service" is service which counts both for the purpose of ascertaining entitlement to benefits under these Regulations and for the purpose of calculating them and means, subject to paragraph (2), the aggregate of the following—

- (a) any period of pensionable employment in respect of which the member contributes to the scheme under regulation D1 (contributions by members);
- (b) any period that was reckonable under the previous regulations as a period of contributing service for the purpose of those regulations;
- (c) any period of contributing service that is reckonable under regulation 3 of the National Health Service (Superannuation) (War Service etc) Regulations 1977 F1 (reckoning war service as contributing service under the principal regulations);
- (d) any period of pensionable service credited to the member under regulation N1(4) (transfers from other pension arrangements) or as a result of a transfer payment to the scheme under the previous regulations; and
- (e) any period of additional service which the member has purchased under regulation Q1 or under regulations 25 or 26 of the previous regulations.

(2) A member's pensionable service does not include—

- (a) any period of employment in respect of which the Secretary of State has paid contributions to another occupational pension scheme in respect of the member;
- (b) in the case of a member who has become entitled to a pension (including a preserved pension) under the scheme, any period that was taken into account for the purpose of determining whether he was entitled to that pension, or for the purpose of calculating the amount of that pension;
- (c) any period of employment in respect of a temporary additional session; or
- (d) any period in respect of which the Secretary of State has discharged her liability to provide benefits under regulation K7 (state scheme premiums), L2 (refund of contributions) or M1 (transfers and buy-outs).

(3) The benefits described in these Regulations will be calculated by reference to a maximum of 45 years' pensionable service of which only 40 years may relate to the period before the member reaches age 60 (age 55 if the member is a special class officer), and, if the member's pensionable service exceeds these limits, the amount of the excess will be ignored.

(4) Where the member has pensionable service in excess of the limits described in paragraph (3), the Secretary of State shall select the years by reference to which the benefits are to be calculated and the years selected shall be those which produce the most favourable result to the member.

(5) If, when a member leaves pensionable employment or dies, a payment is made in respect of leave not taken—

(a) the member's pensionable employment will be treated, subject to paragraph (3), as continuing for a period equal to the period of leave for which payment is made; and

(b) the payment will be treated as the member's pensionable pay for that period.

(6) In order to calculate the length of a member's pensionable service, all periods of pensionable service will be added and each resulting period of 365 days (disregarding pensionable service on 29th February in a leap year) will be treated as one year.

Meaning of "qualifying service"

C3.—(1) In these Regulations, "qualifying service" is service which counts for the purpose of ascertaining entitlement to benefits under these Regulations but not for the purpose of calculating them and means the aggregate of the following—

(a) pensionable service under these Regulations, except any period of pensionable service credited to the member under regulation N1(4) (transfers from other pension arrangements) or any period of additional service referred to in regulation Q1 (right to buy additional service);

(b) where a transfer payment has been accepted under regulation N1(4) in respect of the member's rights under another occupational pension scheme, a personal pension scheme, or a buy-out policy, the period of employment that qualified the member for those rights; and

(c) any period reckonable as "service" under the previous regulations.

(2) If a member leaves and subsequently returns to pensionable employment, paragraphs (3) and (4) will apply for the purpose of calculating the member's qualifying service.

(3) If the interval between leaving and rejoining pensionable employment does not exceed one month or is due to a trade dispute, the member's pensionable service before and after the break will be treated as continuous for the purpose of calculating the member's qualifying service after the break, (even if the member's pensionable service before and after the break is otherwise treated separately for the purpose of calculating the member's benefits) except that the interval will be excluded.

(4) If a member is entitled to a preserved pension under regulation L1 in respect of the earlier period of pensionable service (whether or not the pension has become payable),

and the periods of pensionable service before and after the break are not treated as continuous under regulation L4, the period of pensionable service to which that pension relates will be treated as qualifying service in relation to the later period.

(5) If a pension becomes payable to a member under regulation R4(6) (members doing more than one job) and the member has elected to take a benefit only in respect of the employment that has ended, the pensionable service in respect of which that benefit is calculated will be treated as qualifying service in relation to the employment in respect of which rights to benefits continue to accrue.

(6) If the member is a whole-time chaplain, any period of employment as a whole-time chaplain before joining the scheme will be treated as qualifying service.

Mental health officers

R3.—(1) Subject to paragraph (2), this regulation applies to a member who at the coming into force of these Regulations—

(a) is in pensionable employment under the scheme as a mental health officer, or

(b) has accrued rights to benefits under the scheme arising out of a previous period in which he was engaged in such employment and at no time since the last occasion on which he was so engaged has he had a break in pensionable employment for any one period of 5 years or more.

(2) Subject to paragraph (3), this regulation shall cease to apply if the member has a break in pensionable employment for any one period of 5 years or more ending after the coming into force of these Regulations.

(3) Paragraph (2) shall be without prejudice to the operation of paragraph (5)(a) in relation to any period prior to this regulation ceasing to apply.

(4) For the purposes of paragraphs (1) and (2), "pensionable employment" includes employment that qualified the member for benefit under a health service scheme.

(5) Subject to paragraphs (6) and (7), where this regulation applies—

(a) if the member has in excess of 20 years' pensionable service as a mental health officer, regulation E1 (normal retirement pension) will apply as if the reference, in paragraph (1) of that regulation, to age 60, were a reference to age 55, but only if the member was in pensionable employment as a mental health officer immediately before leaving; and

(b) each complete year of pensionable service as a mental health officer in excess of 20 years will count as 2 years' pensionable service.

(6) For the purposes of calculating the 20 year period referred to in paragraph (5)—

(a) there shall, in the case of a member who has reached age 50, be taken into account any period before he became a mental health officer in which he was

employed on the staff of a hospital used wholly or partly for the treatment of persons suffering from mental disorder and in which he devoted the whole or substantially the whole of his time to the treatment and care of such persons, unless it would be more favourable to the member (or, if the member has died, to the persons entitled to benefits in respect of the member) to disregard any such period;

(b) pensionable service does not include additional service bought under regulation Q1 (right to buy additional service).

(7) Paragraph (5) does not apply—

(a) for the purpose of calculating, under regulations E2 (early retirement pension on grounds of ill-health) and H3, H4 and H5 (child allowance), the pensionable service the member could have completed if he had stayed in pensionable employment until a particular age;

(b) for the purpose of calculating a minimum widow's or widower's pension based on the member's pensionable service after 5th April 1978 under regulation G6(2) (member marries after leaving pensionable employment); or

(c) for the purpose of calculating a member's benefits where it would be more favourable to the member or other person entitled to the benefits not to apply that paragraph and to calculate the member's benefits by reference to the member's final year's pensionable pay when the member leaves pensionable employment, completes 45 years' pensionable service (calculated without regard to paragraph (5)(b)), reaches age 65 or dies, whichever occurs first.

(8) Where, by virtue of paragraph (7)(c), paragraph (5) does not apply, the amount of any contributions that should have been paid by the member under regulation D1 (contributions by members), but which were not deducted from the member's earnings, will be deducted from the lump sum payable on the member's retirement or death.

(9) If a member who has in excess of 20 years pensionable service for the purposes of paragraph (5) leaves NHS employment before reaching age 55 because of redundancy, but without becoming entitled to a pension under regulation E3 (early retirement pension on grounds of redundancy), and was in pensionable employment as a mental health officer immediately before leaving, regulation L1 (preserved pension) will apply as if the references in that regulation, to age 60, were to age 55.

(10) Subject to paragraph (12), if any member to whom this regulation applies becomes entitled to a preserved pension under regulation L1 on ceasing to be a mental health officer, the pension will be based on the greater of the member's basic service and a period of service calculated as—

$$\frac{\text{basic service}}{\text{potential basic service}} \times \text{potential service}$$

where— “basic service” means the member’s pensionable service, calculated without regard to paragraph (5);

“potential basic service” means the pensionable service the member could have completed if he had stayed in pensionable employment until age 55, calculated without regard to paragraph (5); and

“potential service” means the pensionable service the member could have completed, taking account of paragraph (5), if he had stayed in pensionable employment as a mental health officer until age 55.

(11) Subject to paragraph (12), if a member with at least 2 years’ qualifying service ceases to be a mental health officer while continuing in pensionable employment, the member’s pension in respect of the period before ceasing to be a mental health officer will, if it would be more favourable to him, be of an amount equal to the preserved pension to which the member would have become entitled in accordance with paragraph (10) if he had left pensionable employment on the day he ceased to be a mental health officer.

(12) Paragraphs (10) and (11) do not apply if the member again becomes a mental health officer within 12 months after the date on which he ceased to be a mental health officer.

(13) Subject to regulation Q6(4), if a member elects to pay for additional service or unreduced retirement lump sum by regular additional contributions under regulation Q6 he may elect to make those contributions from his next birthday following the date on which he elected to buy the additional service or unreduced lump sum until his 55th, 60th or 65th birthday, whichever he chooses, and that date will be the chosen date under regulation Q6(3).

(14) In this regulation, “mental health officer” means—

(a) an officer working whole–time on the medical or nursing staff of a hospital used wholly or partly for the treatment of persons suffering from mental disorder, who devotes all, or almost all, of his time to the treatment or care of persons suffering from mental disorder;

(b) any other officer employed in such a hospital who is within a class or description of officers designated by the Secretary of State as mental health officers for this purpose; and

(c) a consultant, senior hospital medical officer or senior hospital dental officer in part–time NHS employment who devotes all, or almost all, his time to the treatment or care of persons suffering from mental disorder and who satisfies the requirements of paragraph (15).

(15) A member satisfies the requirements of this paragraph if he holds a whole–time specialist post and either—

(a) he receives at least 10/11ths of the pensionable pay that he would have received for whole–time NHS employment, or

(b) he was appointed before 1st January 1980 and retains the right, to which he was entitled on 31st December 1979, to be paid at least 9/11ths of the pensionable pay that he would have received for whole-time NHS employment.

(16) The Secretary of State may agree to treat as a mental health officer any member who, by reason of having transferred to part-time pensionable employment, would otherwise have ceased to be a mental health officer providing that person is engaged in work which had it been whole time, would have qualified that member for mental health officer status and there is no break in pensionable employment between the transfer from whole-time to part-time employment.

(17) Where a member is treated as a mental health officer by virtue of paragraph (15) or (16), each year of part-time pensionable service shall, for the purpose of determining whether the member has in excess of 20 years pensionable service for the purposes of paragraph (5) (but for no other purpose), be treated as if it were a year of whole-time pensionable service.

Part-time employment

R5.—(1) Subject to paragraphs (6) and (10), a member's pensionable service in part-time employment will not count at its full length but will be calculated as described in paragraphs (2) or (3), whichever is applicable, as its whole-time equivalent.

(2) If the member's part-time employment is expressed as a specified number of half-days or sessions a week, the whole-time equivalent of the member's pensionable service in respect of that employment will be calculated by multiplying the full length of that service by the following fraction—

$$\frac{\text{member's pensionable pay}}{\text{comparable whole-time earnings}}$$

(3) In any case where paragraph (2) does not apply, the whole-time equivalent of the member's pensionable service in respect of part-time employment will be calculated by multiplying the full length of that service by the following fraction—

$$\frac{\text{member's hours of employment each week}}{\text{hours constituting comparable whole-time employment}}$$

(4) Subject to paragraph (5), for the purpose of calculating a member's final year's pensionable pay in respect of part-time employment, the member's pensionable pay will be the amount that the Secretary of State determines would have been paid in respect of a single comparable whole-time employment.

(5) Paragraph (4) does not apply to the calculation of final year's pensionable pay for the purposes of—

(a) regulations F1(2) and F2(2) (lump sum payable on death in pensionable employment or after pension becomes payable);

(b) regulation S2 (reduction of pension on return to NHS employment).

(6) If a member with pensionable service in part-time employment becomes entitled to a pension under regulation E2 (early retirement pension on grounds of ill health)—

(a) the member's pensionable service in part-time employment will count at its full length for the purpose of calculating whether, and (if so) to what extent, the pensionable service upon which the pension is based should be increased under regulation E2;

(b) the pension will be based on the whole-time equivalent of the period of part-time employment and the increase under regulation E2 will be limited to such amount as bears the same proportion to the amount that would have been paid had the pensionable service not been part-time as the whole time equivalent bears to comparable whole time employment.

(7) If a member in part-time pensionable employment elects to buy additional service as described in regulation Q1 (right to buy additional service), the period of additional service will be calculated in accordance with Table 1 or Table 3 of Schedule 1 (whichever is applicable) and then reduced by multiplying the full length of that additional service by the following fraction—

$$\frac{\text{part – time pensionable employment}}{\text{comparable whole – time pensionable employment}}$$

where— "part-time pensionable employment" means the number of hours, half-days or sessions that the member was required to work under his contract of employment during the period by reference to which "remuneration" was calculated for the purposes of Table 1 of Schedule 1 or regular additional contributions were paid in accordance with regulation Q6 (paying by regular additional contributions); and

"comparable whole-time pensionable employment" means the number of hours, half-days or sessions that would have constituted comparable whole-time pensionable employment during that period.

(8) If a member in part-time pensionable employment elects to buy an unreduced retirement lump sum as described in regulation Q2 (right to buy an unreduced retirement lump sum), the period referred to in Table 2 or Table 4 of Schedule 1 (whichever is applicable) will be reduced in like manner as described in paragraph (7) above.

(9) Paragraphs (7) and (8) above also apply for the purposes of regulation Q7 (part payment for additional service or unreduced retirement lump sum).

(10) A member's pensionable service in respect of part-time employment will count at its full length (and concurrent periods of employment will be treated as a single employment) for the purposes of regulations C2(3) (limit on pensionable service that counts for benefits) and C3(1) (qualifying service).