

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

Applicant	Dr Robert Atenstaedt
Scheme	NHS Pension Scheme (the Scheme)
Respondent(s)	NHS Pensions

Subject

Dr Atenstaedt's complaint against NHS Pensions centres on the rise in cost of the Additional Pension (**AP**) amounts that he is purchasing.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should not be upheld against NHS Pensions as, although they did give incorrect information to him, Dr Atenstaedt was in possession of the correct information before he made his decision to elect for AP. Further the changes made to contributions levels and index-linking of AP amounts were in line with the Scheme's Regulations.

DETAILED DETERMINATION

Material Facts

1. In April 2008 the NHS introduced the facility for members to purchase AP, which is an additional voluntary contribution arrangement and pays an entitlement in addition to their main Scheme benefits.
2. Dr Atenstaedt sent an email to NHS Pensions on 26 August 2009 to ask whether the cost of buying AP would increase in line with inflation.
3. On 21 September 2009 an email from NHS Pensions to Dr Atenstaedt said:

“...The additional pension monthly contribution is fixed for the duration of the contract and will not go up (or down) while the contract is running. So, you will not have to [sic] higher contributions with inflation every year. I hope this answers your query? ...”

4. Dr Atenstaedt made an application in February 2010 to buy an AP amount of £5,000 a year to increase both his and his dependents’ benefits and to be payable at age 60. The total cost came to £96,000 and was to be spread over 20 years at £400 a month. The election form he completed said at the top:

“Please read the booklet entitled *Increasing your benefits* before completing this form”.

There was also a member declaration section near the end of the form which said:

“I confirm that I have read the booklet entitled *Increasing your benefits*, which explains the basic rules for the purchase of an additional pension.”

5. The “Increasing your Benefits” factsheet said:

“How much does AP cost?”

The cost of AP is determined by factors provided by the Scheme Actuary. It can be paid for either by a single lump sum or by instalments...

“Will I pay the same amount every month?”

Usually yes. Purchase by instalments is however subject to review based on advice from the Scheme Actuary, and following review the cost of future instalments of an existing arrangement could be changed. Actuarial reviews of the Scheme take place every four years...”

The above wording is taken from the June 2009 version, but later versions have almost identical wording. Said factsheets also say:

“If the cost of future instalments increases as a result of a review you will have the option to end your purchase. You would then be credited with the proportion of AP that you had paid for...”

AP units purchased are revalued in line with inflation both before and after they come into payment”

6. NHS Pensions wrote to Dr Atenstaedt in March 2010 to confirm his application had been accepted. His costs had been based on the age of 39 and contributions started thereafter.
7. On 13 March 2013 a letter titled “Additional Pension – Price Changes from 1 April 2013” was sent to Dr Atenstaedt. This said that his monthly contributions would rise from £400 a month to £488 a month.
8. Dr Atenstaedt says he first became aware of the issue in April 2013. Upon returning from holiday he found the letter in relation to contributions being increased. He wrote to NHS Pensions pointing to the email of 21 September 2009 and asked that they honour what he felt was a clear commitment to him not to vary his monthly contribution and to keep him on a payment of £400 a month to provide £5,000 a year at age 60, including dependent’s cover.
9. When he did not receive a response he chased up by telephone on 21 May and 28 June 2013. On 1 August 2014 a formal complaint form was completed by Dr Atenstaedt.
10. NHS Pensions responded under stage one of their complaint procedure on 28 August 2013. They said that the information given to him in September 2009 was incorrect and that the Department for Health, their sponsoring department, has powers under the Scheme’s regulations to vary the cost of buying AP on the advice of the Scheme’s Actuary. Said Actuary conducts a review every four years and while the cost of some AP contracts had reduced the price of other contracts was rising in order to contain the costs of the Scheme. They added that the variable cost of payments was confirmed in the “Increasing your benefits” booklet, which he had confirmed that he had read when completing his declaration. They provided an extract of the booklet and said that the booklet had been replaced by the time he signed his application and so they were providing an extract of the last version of the booklet “as your employer may have passed you a copy to read”. The booklet was superseded by the Scheme Guide and by an “Increasing your Benefits factsheet”. They also provided an

extract from the version of the factsheet that was current at the time he signed his application. This said that the cost of AP could change following an actuarial review. They upheld his complaint as incorrect information had been provided and apologised for being slow to respond to recent communications.

11. NHS Pensions also said that while it was unfortunate the costs of purchasing AP had increased he could end the agreement at any time and be credited with the extra pension purchased up to the date the contract terminated. He would also have the option of taking out a new contract under new terms.
12. Dr Atenstaedt replied on 19 September 2013 to ask for a specific explanation of why the costs had been increased by so much when his personal circumstances had remained unchanged. He also wanted confirmation that the amount had been checked in case a mistake had been made. The option to end his current contract and start a new one he said was not a viable option for him.
13. The second stage response of 15 November 2013 from NHS Pensions gave a detailed explanation of how AP contributions are worked out and for the change in costs, along with the original and new pages from the cost tables prepared by the Actuary showing what was due to be paid in Dr Atenstaedt's case. They said that price changes were made immediately in November 2012 for any new applications. But for agreements already in place the change was deferred to April 2013 as required by the Scheme's Regulations. NHS Pensions still did not think that applying the original contribution level for the rest of Dr Atenstaedt's contract term or paying compensation was appropriate and the contributions he had paid before the price change would still provide the appropriate increase to his pension. Also while he had earlier been given incorrect information the published information at the time confirmed that contribution levels were subject to review.
14. They went on to say that the money he had paid up to 31 March 2013 had purchased a basic increase of £1,237.70 a year. Also as his contract was entered into prior to 31 March 2011 the AP he had purchased as at 31 March 2013 would attract pre-payment increases at RPI and in-payment increases in line with CPI. (For those whose contracts started on or after 1 April 2011 it was CPI both pre and post retirement). His AP benefit as at 15 November 2013 was now worth £1,412.67 a year. Dr Atenstaedt could purchase up to a further £3,762.30

(i.e. £5,000 less £1,237.70) of AP if he entered a new contract. NHS Pensions also gave him the option of terminating the agreement with an effective date of 31 March 2013 and, if he did not wish to start a new AP contract, returning any contributions paid after that date as well. Else if he wished to continue with the current contract then his employer was required to collect £488 a month from him with effect from 1 April 2013.

Scheme Regulations

15. The relevant section of the Scheme's Regulations (1995 section) says:

“Q8 Option to pay additional periodical contributions to purchase additional pension

(1) A member who is in pensionable employment may opt to make additional periodical contributions during the contribution option period to increase by a specified amount—

(a) the benefits payable to the member...

...

(4) The annual amount of the periodical contributions payable at the beginning of the contribution option period must not be—

(a) an amount less than the minimum amount; or

(b) an amount other than a multiple of the minimum amount.

(5) In paragraph (4) "the minimum amount" means the amount that would, in accordance with tables prepared for the Secretary of State by the Scheme Actuary for the Scheme year in which the contributions are paid, be the amount of the contributions required to secure an increase in the member's pension of—

(a) £250; or

(b) such other amount as the Secretary of State may for the time being determine assuming that the contributions are made in accordance with the option for the remainder of the option period.

(6) The tables referred to in paragraph (5)—

(a) may specify different amounts for different descriptions of members; and

(b) may be amended during a Scheme year,
 but no such amendment affects the contributions payable under any option during that year, except an option under which contributions begin to be paid after the date on which the amendment takes effect.”

Summary of Dr Atenstaedt’s position

16. His AP contributions have increased by 22% but he was told by NHS Pensions when he took out the contract that they would not increase. This incorrect information influenced his decision to take out and commit to the 20 year AP contract in the first place, rather than invest with an alternative pension provider, and has now put him at a financial disadvantage. He was also told that contributions would not increase verbally by NHS Pensions, in addition to the email he received. This seemed perfectly credible to him as there was also an option to pay a one-off lump sum at the time.
17. In relation to the verbal information he was given he believes that he called NHS Pensions on 26 August 2009 to be told that the contributions required would not be increased. Being of a cautious nature he followed this up by email the same day.
18. The injustice he has suffered is the extra 22% a month that he is paying. Also as he joined the scheme before March 2011, when the change in use from RPI to CPI took place, he is paying a lot more than someone who joined the Scheme after this date and his increase in contributions is higher than those members.
19. While NHS Pensions have upheld his complaint regarding incorrect information they have not offered any financial compensation to him. Also he should have to pay the same amount in contributions as a member who started paying AP contributions later than him as he should not be penalised for the change from RPI to CPI. These individuals were lucky to get in before the more generous provisions were withdrawn. Those in the wider NHS Scheme were not normally penalised when one section is replaced with a less favourable section.
20. If he were to cancel his current contract and start a new one, as has been suggested, then he would no longer receive RPI increases as he was promised but lower CPI increases instead – and this is also why he says starting a new contract is not a viable option. Also he should not have to take inferior benefits as it was NHS Pensions who made the error. Hence if he continued with the

contract he would suffer a considerable financial loss – if the contributions remained at £488 a year he will have incurred an extra cost of approximately £16,000 to buy the level of pension agreed at outset. It will be even worse if there is another future increase. He should either be given the original agreement of £400 a month or £16,000 compensation for the additional cost.

21. One of my investigators wrote to Dr Atenstaedt to ask for evidence to support the promise of RPI linked increases being made to him. In response he said that there was an implied promise as public sector pensions, including AP amounts, were linked to RPI at that stage and there was no expectation the government would change it.
22. My office also asked Dr Atenstaedt for evidence that he had considered alternative options for pension provision. He says that while he did consider investing in a personal pension plan he did not go as far as contacting any providers as the terms of the AP contract as he understood them (he says a “guaranteed pension at age 60 linked to RPI and also a monthly contribution £400 which would decrease in real terms because of inflation”) seemed to be excellent.
23. Dr Atenstaedt also appears to say that stopping the current AP contract and not replacing it with a new one is again not a viable option for him. He says that with pensions planning needed to start early. Because of his current age and expectations for retirement he did need to continue with an AP contract to give him some financial security at age 60. So if he stopped the current contract he would need to start a new one, but this would give him less pension than he was originally promised.
24. He had raised his issues with NHS Pensions in April 2013, which is now over a year ago. But they took a long time to get back to him forcing him to follow the complaints procedure. During this time they have been removing an extra £80 a month from him.
25. NHS Pensions had not said that he was provided with a “factsheet”. They had said that he “may” have been provided with a “booklet” by his employer, which was not in fact the case (the responses from NHS Pensions sometimes refer to the “Increasing your Benefits” item as being a booklet and at other times as being a factsheet – nothing much turns on this though in my view). Initially he said that

he did not recall being sent these items or NHS Pensions referring to them during his telephone call or subsequent email. In relation to the declaration on the form he does not recall noticing this statement but, like most people, he does not usually read small print. Later he told my office that he had “never” received the booklet and that he had “signed the form in error”. More importantly NHS Pensions admit that the booklet had been withdrawn by the time that he signed the declaration and so, in fact, the declaration does not stand. Moreover his view is that something as important as contributions potentially increasing should be stated explicitly on the application form.

Summary of NHS Pensions’ position

26. They do not deny that Dr Atenstaedt was incorrectly informed that the cost of buying AP would not change. The Regulations governing the Scheme however have always included provision to vary the cost if new actuarial advice is received and AP guidance notes, all of which were available to members to view, also referred to this. While they have apologised to Dr Atenstaedt for the error and misunderstanding caused they could not allow continued contributions at the old rate as it is no longer sufficient to purchase the £5,000 AP that he set out to buy.
27. There were a number of factors under which the contribution levels required were assessed. These include the member’s age (last birthday) at election, gender, chosen pension age for AP, their chosen form of payment (lump sum or regular contributions) and whether dependents’ benefits are to be increased as well as the member’s. For those choosing to pay regular contributions the date of election and the contribution period selected were additional considerations. Underlying these variables prices were also underpinned by notional investment returns on the contributions paid, projections of the index-linked value of the AP at retirement and Scheme longevity data. The overall aim being to ensure that the contributions paid are sufficient to meet the cost of paying the AP in retirement.
28. The Scheme Actuary had undertaken a general review of Scheme costs. In relation to AP this took into account the latest longevity data, changes to notional investment returns and the indexation of benefits. The scale of the price change varied according to the terms on which AP was purchased, with some contracts reducing in cost. However where the right to have AP index-linked to

RPI was retained it was for the most part necessary to increase prices in order to contain Scheme costs.

29. In response to the suggestion that the price increase was an injustice they say this was made in line with the Regulations that govern the arrangement and on the advice of the Actuary. It was felt to be reasonable to set a higher contribution rate for those benefitting from some RPI linked increases as this index traditionally increases faster than the CPI.
30. It was also suggested that he should only have to pay contributions in line with someone whose AP was linked to CPI and that Dr Atenstaedt was being penalised for the switch to CPI. But this was not comparing like for like. Contributions were paid at rates that are designed to meet the cost of paying the AP in retirement. And rather than being a penalty the higher contribution rate for those with RPI increases is a reflection of the expectation that it would provide a higher benefit.
31. The contributions Dr Atenstaedt had paid before the price change would still provide the appropriate increase to his pension. For this reason, along with the published information that was available, compensation was not considered appropriate. He also did not have to pay the revised contribution – if he preferred he can stop buying the AP at any time. It was felt that in this case an apology was sufficient. Also he could in effect pay the same contributions as someone with a CPI linked contract by starting a new contract (NHS Pensions have also provided details of what Dr Atenstaedt would need to pay under such a contract, if he were to enter into a new contract with a term of 17 years, which comes to £353.66 a month adding that this would also be reviewed in the future). Their offer to allow termination of the contract from 31 March 2013, and refund later contributions, was also reiterated.

Conclusions

32. It is clear that Dr Atenstaedt was given incorrect information in the email of September 2009 (and possibly he had been given the same incorrect information verbally too prior to this date). But the situation is not so simple that I can uphold his case on that basis. I need to consider whether that specific information has caused him an injustice as well as whether he was in possession

- of the correct information by the time he made his decision to sign up for an AP contract, including the information that was available to him as a whole.
33. The form he was asked to complete specifically asked him to read the “Increasing your Benefits” booklet before he started to complete the form. It also had a declaration that asked him to confirm that he had in fact read it. Dr Atenstaedt has advanced that he had not received the booklet. Also he says that he like most people would not have read the “small print” on the form. Further he believes that the relevant booklet had been withdrawn as said by NHS Pensions (the IDRP stage two response from NHS Pensions said that the “Increasing your Benefits booklet” was superseded by an “Increasing your Benefits factsheet” by the time he completed his form).
 34. I do not think that it is correct to dismiss the two statements as small print. Had Dr Atenstaedt not been in receipt of the booklet (or factsheet) at that time it would seem appropriate in my view that one should have been requested, prior to making what was an important decision. I am not entirely clear how his argument that most people would not read the fine print of the form helps his case or why he thinks it would. Possibly he is trying to point out that he is strictly under no obligation to read the extra information. I would agree with that however if he chose not to do so, and thereby failed to realise that contributions could in fact increase after a review (and indeed make an informed decision), then the blame for this cannot be laid at NHS Pensions’ door.
 35. In my view NHS Pensions has adequately covered their position by putting in two statements in relation to the information available within their claim form. These made it clear that even if an information pack is not received that the member should not complete the form without it. Since Dr Atenstaedt signed a declaration that he did receive the booklet I am afraid that I could not now work on the assumption that he did not in fact receive it. The statements on the form should have prompted him to ask for the booklet if it had genuinely not been received.
 36. A reading of the “Increasing your Benefits” item would have confirmed that the contribution level was subject to review, prior to entering the agreement, and shown that the earlier information received about increases being fixed was

incorrect. So Dr Atenstaedt would and should have known the correct position before making any decision. For this reason I do not uphold his complaint.

37. I also determine that he is being provided with benefits calculated according to the Scheme's rules, and at a rate determined by those rules, which have been applied lawfully.
38. He has referred to changes in the main NHS Scheme not being made retrospectively. This line of argument however does not help him either or invalidate the changes (and he is not actually comparing like for like). The AP scheme by the Regulations governing it can change the contributions due to be paid. In fact the main NHS Scheme can, and has, done the same including for existing members. Similarly the change to indexation of pensions in payment to CPI has applied to the main NHS schemes too, not just to AP amounts. The changes that I suspect he refers to are actually those that apply to new joiners (e.g. such as new employees who joined after the 1995 section of the Scheme closed to most new entrants not being allowed to join that Scheme but existing members being able to retain membership of the 1995 section) but such changes do not set any kind of precedent for the changes to how his AP works.
39. Since Dr Atenstaedt has said on occasion that promises were made to him I have also considered whether he might have a claim for saying that a contract was formed to give him specific terms. But even if he were to claim that there were a contract provided to him on specific terms such a contract would have been ultra vires. The Scheme is governed by legislation and benefits can be paid only in accordance with that legislation. NHS Pensions would have no authority to offer benefits over and above those specific in the Regulations.
40. I have also considered briefly, although strictly I do not need to, whether Dr Atenstaedt could have had a claim for compensation even if the relevant statements had not been on his application form.
41. First of all here I do not think that it is correct to say that he has suffered a loss in the region of £16,000. This is because he has been credited with the additional service for which he has paid, and I so am unable to agree that an actual loss has, in fact, occurred. His claim is really that he expected to be able to pay £400 a month for the remainder of his contract, but that expectation has not been fulfilled. But that is a loss of expectation and not an actual financial loss. Dr

Atenstaedt is not committed to paying an extra £88 a month and can stop his contributions.

42. The second point here is whether he has relied on the misinformation to his financial detriment. In earlier correspondence Dr Atenstaedt said that he might have made different decisions, such as starting to pay into an alternative arrangement. However there is no evidence that he explored this option. In later communications, when asked, he says that due to his circumstances he is committed to paying the AP contributions due to his circumstances. He does not actually suggest that he would have done anything differently. So even in the absence of the relevant statements I do not see that there would have been grounds for any award for financial loss to be made (although I may have considered a payment for the distress and inconvenience caused).
43. He questions also the switch of use from RPI to CPI (although in fact this only appears to affect his AP once it comes into payment). Dr Atenstaedt has not provided anything to show that he was told he would get RPI increases (and the factsheet we have does not specifically refer to any particular index being used) but it is likely that at some earlier point he received literature referring to the use of RPI.
44. The issue regarding quotations and other communications stating that the pension increases will be linked to RPI has been the matter of much debate and review by the courts. The courts have ruled in other similar cases that although the use of RPI may be present in explanatory literature, unless there is a promise or assurance which is clear and unambiguous that RPI will be used in perpetuity then the members may not rely on any such statements. There is no evidence of any such promise here and the Scheme's manager is free (bound in fact) to change the index for future pension increases.
45. Whilst Dr Atenstaedt may have been led to believe that his AP would increase each year by the change in RPI by the wording of any such literature was, I am sure, just a statement of a conventional understanding and belief. At the time RPI was the very widely accepted measure of price inflation and the writer probably did not contemplate the possibility of an alternative.

46. He also complains about the time taken to deal with the matter after he first raised it. NHS Pensions did take in my view a long time to get back to Dr Atenstaedt when he first raised the issue with them. They did, as he says, continue to take contributions from him but the option to stop contributions and take a refund of amounts paid from March 2013 has been open to him for some time and so I do not consider that the delay in responding has caused him any lasting injustice.
47. Dr Atenstaedt still has options open to him. He can continue with the current contract if he wishes. He could also discontinue the contract, take a refund of contributions from March 2013 and make other arrangements outside the NHS' options. Or he could discontinue the contract and start a new one. I cannot help him here and would recommend that he seek appropriate financial advice if he is unclear on what option is likely to be the best for him.
48. However for the reasons given above I do not uphold his complaint.

Jane Irvine
Deputy Pensions Ombudsman

8 October 2014