

Ombudsman's Determination

Applicant	Dr D
Scheme	NHS Pension Scheme (the Scheme)
Respondents	Scheme Manager- NHS Business Services Authority (NHS BSA), Employers - Eastview Surgery (Eastview), , Hightown PCT (Hightown), Litherland PCT (Litherland), and Tower Hill Primary Care and Community Resource Centre (Melling). SSP Health Limited (SSP), Sefton PCT ,

Complaint Summary

1. Dr D has complained that she has been wrongly classified as a locum rather than a Type 2 practitioner that consequently her pension contributions have been calculated on the wrong pensionable earnings, and all of the respondents have delayed rectifying the matter.

The Ombudsman's determination and reasons

2. My decision is that this complaint should not be upheld because there is no evidence that Dr D has suffered financial loss or other significant injustice as a consequence of a breach of law or maladministration. My reasons are as set out in full below.

Background

3. Dr D worked at four different GP surgeries two PCT practices (Hightown and Litherland), one GMS practice and one PMS practice, all in NHS Sefton. Until November 2011, she opted into the Scheme on a voluntary basis, declaring her pensionable income as a locum self-employed GP using forms A and B. On 24 November 2011, the employing authority, Sefton PCT acting through Central Operations Mersey, informed Dr D that they were unable to accept her as a long term locum. They asked her to contact her employers to see if she could make contributions as 'a salaried GP'.
4. From this date, Dr D's employers classed her as a Type 2 practitioner.

5. Dr D would now like to be classed as a Type 2 practitioner throughout the period April 2009 to October 2011, because she says her role had not changed during this period.
6. Dr D says the difference in classification is material to her because it determines whether a fixed 90% of her fee income is pensionable for scheme benefit purposes (the 'locum' basis) or whether up to 100% of it is pensionable (the 'type 2' basis). The Scheme points out that the actual pensionable salary for a fee based type 2 practitioner such as Dr D is not 100% of income, but income after deduction of expenses. For a locum pensionable income is treated as fixed at 90%, but a Type 2 practitioner has to declare an actual pensionable income net of expenses.
7. An Opinion was issued on 31 March 2016, which did not uphold the complaint. Dr D did not accept the views set out in the Opinion and provided further documentary evidence in support of her assertion she had been a Type 2 practitioner from the outset of her arrangements with all four practices. She argues that her career average earnings should be based on 100% Type 2 practitioner pay from April 2009 to October 2011.
8. She accepts that there would be a need for herself and the employers to pay additional contributions to achieve this adjustment of her pensionable pay. The Scheme has indicated that it is willing to reclassify her if she and the employers make the additional contributions. One employer (Eastview) has offered to pay 10% uplift on its contribution amounting to £272.52.
9. Dr D calculates that as a result of being misclassified as a locum over the period in question she is missing £10,374.37 of employer pension contributions and has been prevented from making £1,257.18 additional employee contributions. She has based her figures on the difference between contributions levied on 90% of her fee based earnings and those which would be due on 100% of fee based earnings. NHSBSA assert that it would be unsafe to assume 100% of her fee income as a Type 2 practitioner would be pensionable; pointing out that the actual pensionable pay would depend upon whether any of the income was in fact recoupment of business expenses.
10. Dr D asserts that since April 2009 the GP practices and Sefton PCT should have been estimating her pensionable income in advance using the forms mandated for use with Type 2 practitioners rather than leaving her to initiate contributions using locum forms A and B. They should also have been making deductions based on 100% of her fee income rather than the 90% fixed for locums. It is not disputed that throughout the period in question Dr Harwood was completing forms A and B declaring herself as a locum.

11. Initially Dr D questioned whether all of the employee contributions she had made in respect of income from **Hightown** and **Litherland** practices for the period October 2011 to March 2012 had in fact reached the scheme. Further investigation has revealed a scheme record of receipt of these payments which Dr D has seen and acknowledged. I will therefore not address that issue further here.

The Regulations

12. So far as relevant, under Regulation A2 a type 2 medical practitioner means a GP performer who:
 - 12.1. (i) is employed (whether under a contract of service or for services) by a GMS Practice, a PMS Practice, an APMS contractor, an OOH provider, or a Local Health Board, and
 - 12.2. (ii) in that employment is engaged wholly or mainly in assisting his employer in the discharge of the employer's duties [in the relevant practice].
 - 12.3. A GP performer is defined as a registered medical practitioner, other than a locum practitioner and "locum practitioner" has the meaning given in paragraph 1 of Schedule 2'.
13. Schedule 2 (paragraph 1) states that a locum means a registered medical practitioner... whose name is included in a medical performers list and who is engaged [not through an agent] under a contract for services... to deputise or assist *temporarily (my emphasis)*.
14. Paras 10 and 23(3) of Schedule 2 to the 1995 NHSPS Regulations contain the relevant provisions governing declaration of pensionable pay. Paragraph 10(9) and (10) of Schedule 2 to the 1995 Regulations provide:

Where a type 2 practitioner (other than a locum practitioner) is engaged under a contract of service or for services by an employing authority, that authority shall deduct D1 (employee) contributions from any pensionable earnings it pays to him and pay D2 (employer) contributions.

Paragraph 10(11) and (12) provide that Locum practitioners must pay D1 (employee contributions) to the Board and where contributions are payable under subparagraph (11) in respect of pensionable locum work carried out for an employing authority, that employing authority shall pay [employer contributions] in respect of that work.
15. Paragraph 10(15) provides that it shall be the function of an employing authority to provide the host Board with a record of any:

Pensionable earnings paid by it to a practitioner;

Contributions deducted by it...

Not later than the 7th day of the month following the month in which the earnings were paid.

16. Paragraph 23(3) of Schedule 2 provides that:

In respect of each scheme year, a type 2 medical practitioner and a locum practitioner shall provide each relevant host Board with a certificate that correctly records the totality of their pensionable earnings based on –

The payments they receive from employing authorities for practitioner services

The return that the member has made to Her Majesty's Revenue and Customs in respect of their earnings for that year.

Ombudsman's determination

17. Regulation A2 permits a type 2 practitioner to be employed/salaried or self-employed/fee based, but they may not be a 'locum practitioner'. The issue which Dr D has argued is central to her complaint that she was improperly classed as a locum is whether the assistance she provided was temporary. Dr D has produced a body of evidence from all four practices tending to show that her work pattern was long term and regular, rather than temporary. However, for the reasons set out below, I do not find it necessary to make a finding about whether she was properly classified as locum or type 2 for the purposes of deciding whether to uphold the complaint.
18. Firstly I do not find that Dr D's employers were any more responsible than she was for her being classified as a locum during the period in dispute.
19. NHS BSA explains that since April 2013 the Employing Authority for all types of GPs in England is NHS England. Prior to April 2013, the Employing Authority was the PCT. However they have devolved the local GP pension administration to their regional teams and delegated CCGs. GP Surgeries (and the GPs themselves) are also legally obliged to ensure that all pension contributions are paid on time. Compliance with the Regulations above requires full co-operation between all of these parties.
20. NHS BSA explains that the system in place since 2009/10 requires every GP Surgery to inform the GP's Employing Authority of the estimated pensionable income for all the GPs (excluding freelance locums) prior to the start of the pension year. This is so that pension contributions can be paid on account; i.e. top sliced by the Employing Authority on a monthly basis. If a surgery fails to complete the estimate form the Employing Authority is instructed to collect employee contributions at the top rate of 14.5%.
21. A type 2 medical practitioner must then complete a self-assessment form at year end capturing all their Practitioner pensionable income. This is to ensure that they have declared all their pensionable income and that they have paid contributions at the correct rate 'across the board'

22. Locums on the other hand are legally required to complete specific pension forms if they wish to superannuate their NHS income and make their own contributions.
23. NHS BSA has pointed out that the forms for use by both types of practitioner are available from the practitioner section of its website.
24. It is not in dispute that Dr D was in fact using forms A and B, those mandated for use by locums. She maintains had she known earlier that she was type 2, with the result that she had the 'option' to have more of her fee earnings treated as pensionable pay she would have behaved differently.
25. In my view the rules make individual GPs an integral part of the Scheme administration where declaration of pensionable earnings are concerned and classification of Dr D as a locum or a Type 2 practitioner was not exclusively the responsibility of the respondents. For each of Dr D and the employing practices to comply with the Regulations, they first had to agree what her status was. Dr D says that she returned locum forms during the period of time in contention. I would have thought that if Dr D disputed that she was a locum, she would have questioned why she was completing returns that did not reflect her status.
26. As such, Dr D needs to share some responsibility in completing forms that she now alleges did not correctly represent her status under the Regulations. I can see no basis on which to hold one party more responsible than the other.
27. Secondly, I have seen no evidence which persuades me that Dr D's pensionable pay has been underestimated as a result of the difference in classification. I cannot see any financial loss or other injustice flowing from the classification as a locum. Dr D complains that 90% of her fee income was used to establish her pensionable salary and it should have been 100%. I do not agree. That argument takes no account of the rule that as a type 2 practitioner her pensionable income would be income net of expenses. Dr D's tax returns (relevant pages) from 2011 to 2013 show that she has deducted on average from her total income, 9.8% in expenses. As a proportion of fee income, her business expenses as a locum and Type 2 practitioner appear to have been broadly comparable. In her submissions Dr D has not factored in the expenses that she needs to deduct as a Type 2 practitioner.
28. The complaint against NHS BSA is that it failed to resolve the issue. I am satisfied that it has taken steps to resolve it in so far as it had power. It has disclosed records and made calculations and indicated its willingness to accept rectification of its records on receipt of amended information. I am satisfied that it could do no more unless it was provided with an alternative declaration of pensionable pay agreed by Dr H and an individual employer.

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29. For the reasons above the complaint cannot be upheld.

Karen Johnston

Deputy Pensions Ombudsman
20 October 2016