

Ombudsman's Determination

Applicant	Ms Linda Bennett
Scheme	NHS Pension Scheme (the Scheme)
Respondents	The Department of Health (DH), the NHS Business Services Authority (NHSBSA)

Complaint Summary

1. Ms Bennett has complained that:
 - she should have been advised of the option of a pension transfer from her previous pension arrangement when she started employment with Chester & Halton Community NHS Trust in 2000; and
 - she should have been informed that there was a time limit of 12 months for her to make an application for a transfer on public sector transfer club (**Transfer Club**) terms; and
 - NHSBSA has failed to allow her a transfer calculated on Transfer Club terms.

Summary of the Ombudsman's Determination and reasons

2. The complaint should be upheld against DH because its predecessor (Chester & Halton Community NHS Trust) should, as part of its role in administering the Scheme for its employees, have provided Ms Bennett with information about the time limit.
3. The complaint should not be upheld against NHSBSA because it had no discretion to allow Ms Bennett a transfer on Transfer Club terms outside the time limit. Furthermore, NHSBSA was never Ms Bennett's employer and never took over the liabilities of her former employers. Therefore NHSBSA was not required to provide her with information about the time limit.

Detailed Determination

Material facts

4. Ms Bennett currently has a senior role in the National Health Service (**NHS**). Her employment since 1977 has switched several times between the NHS and local government, and within those organisations she has had a series of different employers.
5. Ms Bennett transferred from Merseyside Borough Council to Cheshire Family Health (part of the NHS) on 1 July 1994. Because of her change of employer Ms Bennett then became a member of the Scheme. The joiner form that she signed confirmed that she had received a starter pack and Scheme booklet. This included a section on transferring benefits, and made clear that any application to transfer had to be made within 12 months of joining the Scheme. At Ms Bennett's request her accrued benefits in the Merseyside Pension Fund (**MPF**), part of the Local Government Pension Scheme, were transferred to the Scheme.
6. In 1998 Ms Bennett left the NHS and became employed by Halton Borough Council in Cheshire. She became a member of the Cheshire Pension Fund (**CPF**), part of the Local Government Pension Scheme. At her request her accrued benefits in the Scheme were subsequently transferred to the CPF.
7. On 15 May 2000 Ms Bennett rejoined the NHS as an employee of Chester & Halton Community NHS Trust (later renamed Halton & St Helens Primary Care Trust). The offer of employment letter that was sent to Ms Bennett contained a paragraph headed "Superannuation" and enclosed various Trust policies and procedure notes, but these did not refer to the option of her making a transfer from a previous pension arrangement to the Scheme. Nor did they refer to the Transfer Club, or the 12 month time limit for requesting a transfer on Transfer Club terms.
8. On 4 September 2008 Ms Bennett became employed by Warrington Primary Care Trust.
9. In 2011 Ms Bennett requested a transfer to the Scheme of the benefits that she had accrued under the CPF.
10. Regulation U1 of the National Health Service Pension Scheme Regulations 1995 (as amended) (**the Regulations**), which govern the Scheme, empowers the Secretary of State to extend any time limit set out in the Regulations. One time limit mentioned in the Regulations is that a transfer-in request is only effective if it is made within 12 months after joining the Scheme. The Secretary of State has delegated this extension power to NHSBSA.
11. A memorandum (**the Memorandum**) issued by the Cabinet Office in 2006 and subsequently revised on several occasions explains that the Transfer Club is a network of public and private sector occupational pension schemes which have

agreed reciprocal transfer arrangements. These provide for more generous service credits to be calculated and provided by the receiving scheme than would arise on a transfer which is not on Transfer Club terms. However, the Memorandum says that “An individual must apply for a Club transfer in writing to the receiving scheme within 12 months of becoming eligible to join, or...re-join the scheme”. Both the Scheme and the Local Government Pension Scheme have joined the Transfer Club.

12. On 31 January 2012 NHSBSA told Ms Bennett that it would agree to her late transfer request, but due to the 12 month limit in the Memorandum “any late application will be dealt with on a non-Transfer Club basis”.
13. Following further correspondence NHSBSA clarified, in a letter of 3 October 2012, that the time limit for Transfer Club transfers was not part of the Regulations, and was therefore a limit which NHSBSA could not extend, even though (at its discretion) a transfer could be made outside the 12 month limit. When Ms Bennett complained that she had not previously been told about the Memorandum, NHSBSA pointed out that she had previously transferred her benefits into and out of the Scheme, saying “You must therefore be aware of the transfer regulations/time limits under Public Sector Transfer Club Regulations and that a transfer of pension rights does not happen automatically.”
14. Ms Bennett’s employment with Warrington Primary Care Trust was transferred under the TUPE regulations to Warrington Clinical Commissioning Group on 1 April 2013.
15. Ms Bennett pursued her complaint under the Scheme’s internal dispute resolution procedure, but her complaint was rejected. She then complained to us. On 15 May 2015 one of our investigators wrote to Ms Bennett to say that, based on his review of the evidence that she had supplied, he considered that her complaint to us would not be upheld; this was because Ms Bennett was no longer entitled to a transfer on Transfer Club terms; she should have been aware from her previous transfers that there was a 12 month time limit for making a transfer on Transfer Club terms, and that limit had clearly been exceeded as she did not make her transfer request until 2011.
16. Ms Bennett then provided further information to us, and we obtained documentation from the MPF and the CPF regarding her previous transfer requests. This confirmed that the transfers from the MPF to the Scheme and from the Scheme to the CPF were both made within 12 months of joining the receiving scheme, and were both calculated on the Transfer Club basis. However, the documentation also showed that the information that was sent to Ms Bennett when she applied for those two transfers did not refer to the Transfer Club or the 12 month limit that applied to it.
17. The DH was later added as a second respondent to the complaint because Warrington Clinical Commissioning Group (Ms Bennett’s current employer) confirmed that, under NHS restructuring, the employer liabilities of NHS Primary Care Trusts were transferred to the DH on 1 April 2013.

18. Ms Bennett's former employers Cheshire Family Health and Halton Borough Council were asked if they could provide copies of any literature issued by them to Ms Bennett regarding her pension scheme transfer options, but were unable to do so.

Summary of Ms Bennett's position

19. When she rejoined the NHS in 2000 she was unaware that there was a 12 month time limit for obtaining a transfer to the Scheme on Transfer Club terms. She was not told about the time limit by her new employer or NHSBSA. If she had known of the time limit she would have requested a transfer within that deadline.
20. It would be unfair to deny her a transfer on Transfer Club terms because it was not her fault that she was unaware of the time limit; her employer had given her inadequate information.

Summary of DH's position

21. Despite being requested to do so, DH has failed to provide a formal response to the complaint. That does not preclude me from making a finding against DH if I consider that to be appropriate.

Summary of NHSBSA's position

22. NHSBSA was the Scheme manager, but it was not Ms Bennett's employer, so it did not have a duty to tell her about the 12 month limit. Therefore it did not breach any disclosure requirements.
23. NHSBSA exercised the discretion that was delegated to it under the Regulations to allow Ms Bennett to have a transfer many years after she had joined the Scheme. However, that did not mean that Transfer Club terms were applicable to the transfer.
24. Information about the 12 month time limit for a transfer on Transfer Club terms was widely available in Scheme literature and on the Scheme website, and Ms Bennett had previously transferred her benefits between public sector pension schemes, so she should already have been aware of the time limit.

Conclusions

Documentation

25. Under the Memorandum it is clear that an application for a transfer-in on Transfer Club terms needs to be made in writing within 12 months of joining the new scheme. The Memorandum does not include any discretion to allow a transfer on Transfer Club terms if the 12 month time limit is exceeded. The Regulations do not refer to the Memorandum, so if discretion is exercised under the Regulations to allow a transfer outside the time limit that transfer would not be on Transfer Club terms. The fact that NHSBSA exercised its discretion in 2012, under the Regulations, to allow Ms Bennett a transfer out of time did not mean that NHSBSA was required or permitted to provide that transfer on Transfer Club terms.

26. When Ms Bennett joined the NHS in 1994, the booklet that she was given at that time made clear that any transfer of benefits to the Scheme had to be made within 12 months of joining the Scheme.
27. However, the employment pack that Chester & Halton Community NHS Trust sent to Ms Bennett in May 2000 when she rejoined the Scheme did not mention her pension scheme transfer options. Therefore she was not warned that if she requested a transfer more than 12 months after joining there would be a discretion whether or not to grant it, and that if it was granted it would not be on a Transfer Club basis. Ms Bennett is of the view that when she rejoined it would have been unreasonable to expect her to recall the transfer restrictions that she had been told about six years previously.

Knowledge

28. In accordance with the Northern Ireland Court of Appeal decision in Lennon v South Eastern Education and Library Board (2015) I am required to consider the implications of the House of Lords' judgment in Scally v Southern Health Board [1992] 1 AC 294. In that case the House of Lords held that the employer has a contractual duty to take reasonable steps to inform employees of a contractual term in order for them to take advantage of it where all the following conditions apply:
- The terms of the contract have not been negotiated with the individual;
 - The particular term in question makes available a valuable right contingent upon the individual taking action to avail himself of it; and
 - The employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention.
29. Applying these three conditions to Ms Bennett's case:
- The Transfer Club terms were not negotiated with Ms Bennett when she joined her NHS employer. They arose under an existing arrangement made between various occupational pension schemes. It could be argued that the Transfer Club terms are not contractual, because they do not arise from her contract of employment with her employer, and were not negotiated between her employer and a representative body; they arise because the Scheme has entered into reciprocal arrangements, as documented in the Memorandum, with other pension schemes, including the Local Government Pension Scheme. However, the Scheme is the occupational pension scheme that is applicable to NHS employees, so I consider that there is a sufficient contractual link.
 - The Transfer Club terms are clearly a valuable right, as they provide for a more generous service credit than a non-Transfer Club transfer would provide. The transfer does not occur automatically as the member of the Scheme

needs to submit a completed application form in order for a transfer to proceed.

- It is arguable whether Ms Bennett could reasonably be expected to be aware of the transfer terms in 2000 unless they were then drawn to her attention.
30. NHSBSA have argued that, as Ms Bennett made transfers between her pension schemes in 1995 and 1999 on Transfer Club terms, she should reasonably have remembered in 2000 that there was a 12 month limit for requesting a transfer on those terms. Ms Bennett does not agree. I have seen the transfer documentation that was issued in 1995 and 1999 and am satisfied that it did not refer to the time limits that apply to Transfer Club transfers. Therefore, I consider that Ms Bennett was not given a reminder in 1995 or 1999 that there was a 12 month time limit.
 31. As the employment pack that Ms Bennett received in 2000 did not refer to the transfer time limits, I need to rule on whether Ms Bennett should reasonably have remembered in 2000 (or 2001) the time limits that she had been told about in 1994.
 32. On balance I find Ms Bennett's views on this point more compelling than those of NHSBSA. The fact that a time limit of 12 months had applied in 1994, when she joined Cheshire Family Health, did not necessarily mean that the same time limit would operate when she joined another part of the NHS in 2000. The Transfer Club terms could have been abandoned or amended in the intervening six years, and it is feasible that different terms could have been introduced for different employers or divisions within the NHS. Although Ms Bennett had a senior position she was not a pensions specialist.
 33. This problem would not have arisen in 2000 if Ms Bennett's NHS employer at that time had drawn her attention to the time limit for making a Transfer Club transfer. It clearly failed to do so. However, that employer no longer exists, so I cannot make an order against it. But I am able to make an order against DH on the basis that it has assumed the responsibilities of former employers in the NHS (including Ms Bennett's former employers) and is thereby liable for their acts and omissions.
 34. Although NHSBSA was the administration manager of the Scheme it was never Ms Bennett's employer. Therefore NHSBSA did not have any express or implied duty to make her aware of the time limits on transfers.
 35. For the reasons set out above I uphold the complaint against DH, but I do not uphold the complaint against NHSBSA. However, my directions need to refer to both parties.

Directions

36. Within 28 days of the date of this determination, NHSBSA shall request Cheshire Pension Fund to provide it with details of the transfer credit calculated on a Transfer Club basis that would have been available to Ms Bennett had she been offered that

facility within the first twelve months of joining the Scheme in her employment with Chester & Halton Community NHS Trust.

37. Once it has received those details, NHSBSA shall promptly contact Ms Bennett to offer her a transfer calculated on that basis.
38. If within 28 days of receiving that offer Ms Bennett informs Cheshire Pension Fund that she wishes to proceed (after which period of 28 days the offer shall lapse if not accepted) the transfer shall be effected by NHSBSA within 14 days of it receiving the transfer payment from Cheshire Pension Fund.
39. If any money is required by the Scheme to meet the difference between (1) the cost of Ms Bennett's benefits resulting from a transfer on a Transfer Club basis, and (2) the cost of her benefits resulting from a transfer on a cash equivalent basis, it shall be paid by DH.

Anthony Arter

Pensions Ombudsman
25 April 2016