

Ombudsman's Determination

Applicant	Dr O
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHS BSA) Nottingham University Hospitals NHS Trust (the Trust)

Outcome

1. Dr O's complaint is upheld and to put matters right NHS BSA should establish any loss she may have suffered had she contributed to a stakeholder plan rather than the Scheme. The Trust is not required to do anything further.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Dr O has complained that she should not have been allowed to re-join the Scheme as she was ineligible.
4. She says that had she been prevented from joining the Scheme she would have made alternative pension arrangements.

Background information, including submissions from the parties

5. Dr O left NHS employment in 1990 and began receiving an ill health pension from the Scheme in 1993.
6. In June 2006, aged 52, Dr O was employed by the Trust and re-joined the Scheme. It is uncertain how her re-employment was communicated to NHS BSA. It may have been through an on-line portal, the payroll system or a paper SS10 form, although the Trust says these have not been used for many years. There is no evidence that the Trust asked whether Dr O was a re-employed pensioner or that she volunteered this information.
7. On 26 June 2006, Dr O contacted NHS Pensions (now NHS BSA, referred to as such throughout) at The Paymaster General's offices and informed it that she had re-entered NHS employment.

8. In September 2006, NHS BSA wrote to the Trust's pay services department, at Queens Medical Centre Campus, and confirmed that Dr O was already in receipt of benefits. It requested a certificate of earnings be completed and returned.
9. In October 2007 NHS BSA wrote again to the Trust's pay services department, this time at Nottingham City Hospital, again asking for a certificate of earnings. The Trust responded and also confirmed Dr O was 'in pension scheme'.
10. In March 2008, Dr O expressed an interest in purchasing Added Years. The Trust acknowledged this in writing stating that it would confirm the possibility of purchasing Added Years.
11. In August 2008, NHS BSA wrote to Dr O to inform her that due to the Scheme's abatement rules her ill health pension would be abated, and she would be required to pay back an overpayment which had accrued. The result of the above events was that NHS Pensions would have known she was working for the NHS and her salary, and that she was in receipt of an NHS Pension. However, no action was taken regarding her ongoing pension contributions and post-2006 membership of the Scheme.
12. On 8 April 2009, the Trust wrote to Dr O providing two estimates of her pension at 60, with and without Added Years purchased. This confirmed that the cost of the Added Years would be 9% of all pensionable pay.
13. On 28 April 2009, Dr O signed the relevant election form to purchase the maximum Added Years of 1 year 204 days at a cost of 9% additional contributions. The contract would be backdated to 15 April 2008.
14. When Dr O came to take benefits in early 2014, NHS BSA identified that she had been ineligible to re-join the Scheme. As a result it refunded the contributions that she had made since 2006 on 26 March 2014, including interest.
15. Dr O raised a complaint about the Trust and NHS BSA's actions through the two stage internal dispute resolution procedure (**IDRP**).
16. The Trust responded on 15 May 2015 and explained that Dr O ought to have received documentation from her previous employer, Booklet R, Notes for Pensioner and their Dependents, which explained the consequences of re-employment. She should have been aware that if she applied after the age of 50 she would not be eligible to re-join the Scheme.
17. NHS BSA provided a stage 1 and stage 2 IDRP response. In summary, it said that Regulation B3 prevented Dr O from contributing or accruing further pensionable service when she re-joined in 2006. So the contributions should not have been made. But, by refunding the contributions with interest, Dr O had been placed back into the position that she should have been in. An award for distress and inconvenience of £250 was also paid.

18. On referral to this Office the Trust highlighted that at no time was it made aware that Dr O was already in receipt of a Scheme pension. It had acted in accordance with the Scheme rules on the basis of the information available. Dr O ought to have known she could not re-join.
19. NHS BSA added that it accepted that opportunities to identify the error had been missed but that did not change the position that she was not eligible to re-join. Additionally, when she took benefits in 1993 she would have received Booklet R. This confirms that it was her responsibility to tell a new employer that she was already in receipt of Scheme benefits. Additionally, the Scheme Guide, provided to Dr O on re-joining, states:-

‘if you are working for the NHS you can re-join the Scheme at any time unless: you are receiving Scheme benefits (unless you retired on ill health grounds and would be re-joining the Scheme before age 50)’ and ‘if you (sic) aged 50 or more, receiving NHS Scheme Benefits and are prevented from re-joining the Scheme, an NHS employer must offer you a Stakeholder Pension.’
20. In acknowledgement of the disappointment of not being entitled to a second pension it increased its distress and inconvenience award from £250 to £1,000.
21. Dr O did not accept the offer. She confirmed that she had made NHS BSA aware of her re-employment and expected that contact to have been sufficient. She was not asking to be awarded the Scheme pension, merely an alternative that would have been available to her on re-employment. She did not dispute that she was likely to have been in receipt of the booklet referred to, but she says she acted appropriately.

Adjudicator’s Opinion and responses

22. Dr O’s complaint was considered by one of our Adjudicators who issued two opinions, ultimately concluding that further action was required by NHS BSA, but not the Trust. The Adjudicator’s findings are summarised briefly below:-
 - On initial review of the case the Adjudicator concluded that both the Trust and NHS BSA had reason to have identified the error and should have acted earlier. Dr O had made NHS BSA aware of her re-employment and there were a number of subsequent instances when both respondents had sufficient knowledge to conclude she should not have been eligible to re-join.
 - Had Dr O been told that she was not eligible to re-join, it seemed more likely than not, in her circumstances that she would have redirected her contributions into a stakeholder plan. It was a requirement that a stakeholder plan be offered to an individual ineligible to re-join the Scheme. Dr O could afford contributions and, with limited other pension provision, was likely to have been motivated to increase her pension provision through alternative means.

- The Adjudicator recommended that the respondents establish the investment return had Dr O invested her contributions in the Standard Life stakeholder plan using the life styling option and each pay 50% of any loss she suffered. The redress should be paid net of tax and less any interest paid on the refund of contributions.

23. The respondents did not accept the Adjudicator's Opinion. In response NHS BSA said:-

- It accepted its maladministration in allowing Dr O to re-join the Scheme. However, it disputed that NHS BSA had any legal obligation to inform her of the stakeholder alternative, which is separate to the Scheme, and is the responsibility of the relevant employer. The Scheme regulations do not refer to stakeholder alternatives and NHS BSA had no obligation to advise on, or provide information relating to them. This would be onerous because it could give rise to claims of financial advice being provided, for which it is not authorised, and invite disputes about the alternative pension's performance.
- Standard Life is not a respondent as per the relevant rules relating to the powers of the Pension Ombudsman.
- The potential loss highlighted falls outside any entitlements under the rules of the Scheme or would be additional to proper entitlement, and therefore cannot be compensated. NHS BSA referred to previous cases determined by the Ombudsman to demonstrate this point. However, there were no submissions that it did not have the necessary power to compensate outside the Scheme, rather that such a method was contrary to previous Ombudsman determinations and that the acts and omissions in this particular case did not require redress on a negligence basis.
- This was an instance of 'Pure Maladministration', without infringement of Dr O's legal rights. As a result it is not actionable in the court. With reference to *Henderson v Stephenson Harwood [2005]* and *Arjo Wiggins v Ralph [2009]*, NHS BSA argued that it was not appropriate to apply full remedy in a case of 'Pure Maladministration' where there had been no breach of the applicant's legal right.
- NHS BSA had received a joiner form from the Trust. It was received electronically and Dr O's details would have been updated with the date she commenced paying Scheme contributions.
- It also argued that Dr O had reason to know that she was not entitled to re-join because she had been provided with the Scheme booklet on re-employment. This confirmed that she was not eligible to re-join.
- At the time of Dr O's re-employment, she had written to the paying agent in Crawley, not NHS BSA directly, and it had not received a copy of it. Additionally, it

may have been that this was received prior to her re-joining form being received, so it may not have been apparent that she was re-joining the Scheme.

24. The Trust said:-

- It did not agree that it was equally responsible for the error because NHS BSA had many more opportunities to notice Dr O's ineligibility, including: joiner details; annual updates; requests for pension estimates; and an application to purchase added years.
- The Trust did not have access to Dr O's pension records and so it had no way of knowing whether this was her first employment since retirement. It was possible that she could have been eligible through prior NHS re-employment before she had turned 50. Only NHS BSA or Dr O could have corrected the Trust's misunderstanding, they did not.
- The Trust and its predecessor organisation have not used paper SS10 forms for many years. New joiner details are submitted directly from the payroll system, or in rare cases via the Pensions on Line system.
- Dr O had notified Paymaster, a separate organisation, on her return to NHS employment.
- Dr O had been provided with a copy of the Scheme guide.

25. Dr O accepted the initial Opinion. In relation to the Respondents' additional arguments she added:-

- Although she had received the Scheme guide she understood that it meant that she should have been '*prevented*' from re-joining the Scheme.
- She had written to the Scheme at the time to make it aware of her re-employment.
- NHS BSA and the Trust had neglected its duty of care to her.
- She has not been successful in attempts to find re-employment to alleviate her financial situation.

26. On review of the arguments the Adjudicator revised his position. He argued that the redress was appropriate and it was not outside the scope of the Ombudsman to make such an award in the circumstances of the case. Additionally he considered that whilst there may have been information to suggest Dr O ought to have been aware that she was ineligible to re-join, she had contacted NHS BSA to inform it of her re-employment and it was reasonable for her to have expected it to restrict her from joining if she was ineligible. In the circumstances NHS BSA ought to have prevented her from re-joining.

27. Having considered the circumstances further the Adjudicator concluded that the responsibility for allowing Dr O to re-join fell to NHS BSA. It was aware of Dr O's full

circumstances in June 2006 (and 2008 from the abatement decision), whereas it was not until later that the Trust became aware of the pension in payment. As a result the Adjudicator placed responsibility fully upon NHS BSA.

28. The Adjudicator also revised the redress, recommending that NHS BSA establish an appropriate annuity rate on a range of bases and purchase an annuity in Dr O's name. The capital value of the annuity would be based on the loss Dr O had suffered had she been invested in the Standard Life stakeholder plan life styling fund less any interest received on the refunded contributions. The annuity should be backdated to the date of Dr O's retirement.
29. The Trust and Dr O accepted the Adjudicator's revised Opinion, but NHS BSA did not. It said, in summary:-
 - Dr O had not informed the correct party in 2006 on re-employment.
 - NHS BSA was not required to confirm to Dr O that she was ineligible to re-join.
 - The Trust had sufficient information to identify that Dr O should not have re-joined.
 - The complaint is about 'Pure Maladministration', for which the Ombudsman cannot dispense a full remedy, and is limited to a distress and inconvenience payment. It referred to case law and recent cases reviewed by this Office to support its stance and show that the Adjudicator's findings were in error.
 - The recommended redress was outside the 'proper entitlement' under the rules of the Scheme and the losses were additional to what would have been their proper entitlement had there been no maladministration.
 - There was insufficient evidence to show Dr O would have entered into a stakeholder plan if she was not able to re-join the Scheme, and she was, in any event, ineligible to contribute to a stakeholder plan.
30. Having considered NHS BSA's arguments the Adjudicator was not persuaded and the complaint was passed to me to consider. I agree with the Adjudicator's Opinion above, and I will therefore only respond to the key points made by NHS BSA for completeness.

Ombudsman's decision

31. NHS BSA has argued that the Adjudicator's recommended redress should not be upheld as this is a complaint of 'pure maladministration', no legal right has been breached and therefore full remedy is not an option available to me.
32. I do not accept this argument. NHS BSA accepts that maladministration occurred and that it should not have allowed Dr O to re-join the Scheme. It had sufficient information relating to her circumstances to know that she was ineligible when it received the joiner's information from the Trust on her re-employment and it has said

that this should have been checked for errors on receipt from the Trust. I believe an important condition to confirm was whether the individual was eligible to join the Scheme.

33. Additionally, Dr O wrote to a relevant address to inform NHS BSA that she was re-entering NHS employment. In full knowledge of Dr O's circumstances and with its intrinsic responsibility to correctly manage members admitted to the Scheme, I consider that NHS BSA was negligent in allowing Dr O to re-join and accepting her contributions which it would ultimately decide derived no benefits. This is a stance in accordance with my recent determination on PO-12556, which NHS BSA has highlighted, and which I will comment on further below.
34. I believe processes should have been in place at NHS BSA to flag circumstances such as Dr O's and stop such individuals from the false understanding that they had re-joined the Scheme.
35. NHS BSA also, remarkably, missed the opportunity to resolve the issue in 2008 when they noted that Dr O's NHS salary exceeded the permitted amount to enable her to receive her full NHS pension in payment, which was then abated.
36. For those reasons, I do not think the complaint can be viewed as 'pure maladministration' and full remedy can be awarded.
37. Considering now the argument of 'proper entitlement', I believe NHS BSA has misunderstood the cases it has referred to, and the rationale set out in those cases. In the cases cited, the issue of proper entitlement was argued in the context of mitigation.
38. In the case of Mrs Leeks, highlighted by NHS BSA, my predecessor discussed the potential limits on a mitigation defence. In that case NHS BSA argued that Mrs Leeks ought to have mitigated her losses by taking her pension as soon as she was made aware that it was an option. That decision highlights the distinction between Mrs Leeks' circumstances and two other cases, where individuals had claimed for future earnings but had not taken on any alternative employment to mitigate the ongoing loss in the meantime. The distinction that their claim was in excess of their proper entitlement was on the basis of what steps they took to mitigate their loss, not a claim for the underlying financial loss caused by NHS BSA, as in Dr O's complaint. Dr O could not have mitigated her losses as she was not informed by NHS BSA that she should not have been a member of the Scheme. Therefore, as with Mrs Leeks, her claim is for her proper entitlement had there been no maladministration.
39. Although NHS BSA has highlighted one paragraph of that determination a later paragraph is more relevant. Namely paragraph 84, which clearly explains that where financial injustice is suffered, as in Dr O's case, a payment can be made "not as a benefit under the Scheme, but by NHS Pensions as compensation for the loss of the equivalent amount of benefit caused by maladministration." The maladministration there was a failure to stop Mrs Leeks' contributions once she had reached full

accrual. The Court, notably, commented: "One might think that in such a case [a large and complex scheme] there is all the more reason to ensure that the Authority, given its expertise, position and special responsibility for so many people, should have adequate systems in place to ensure that it could provide accurate information to members of the Scheme at appropriate points."

40. NHS BSA has also highlighted a more recent case, mentioned above, with similar issues and which I determined, PO-12556. In that case the applicant argued that they would have arranged alternative pension provision had they been informed they were ineligible to be a member of the Scheme. Although NHS BSA view that case as supporting its position in Dr O's case, I do not agree. In the first instance I explained that the scenario was one of negligent misstatement, and negligence is again demonstrated in this case. As such that case supports the Adjudicator's stance that a legal right has been breached and a court could award full remedy.
41. It is also notable that NHS BSA, on PO-12556, said, in relation to the admittance of ineligible members, "...unfortunately its systems and processes were not sufficiently robust to do so at that time."
42. *Baugniet v Teachers Pensions* [2017] EWHC 501 (Ch) is a more recent case containing a key discussion of the difference between maladministration and breach of a legal right (negligence) and where the conduct complained of can overlap both heads of claim. The Court remitted the matter back to this Office to complete a 'But For' negligence assessment – i.e. but for Teachers Pensions' negligence, would Dr Baugniet have obtained a transfer before these were suspended?
43. NHS BSA highlights that in PO-12556 I concluded that it would not be appropriate to direct a payment in relation to the claimed for alternative pension. In that case the Adjudicator's opinion was that it would not have been possible to establish the investment loss on a personal pension. Of course, it is perfectly possible to estimate the rough return but this was in the context of a determination where I found that Mrs S would not, on balance, have made the necessary outlay to secure equivalent benefits to the Scheme in a personal pension arrangement for the period in question. A further difference between the two cases is that in June 2001, the relevant date for PO-12556, the stakeholder alternative had not been implemented. Whereas in Dr O's case, in 2006, there was a requirement for a stakeholder alternative to be offered to individuals not eligible to join the Scheme. In these circumstances it is an easier task to accurately establish what her investment loss would have been.
44. Further, it is clear that Dr O took an active interest in securing pension benefits, evidenced by her enquiries about and purchase of Added Years. I am satisfied that in the circumstances, on the balance of probabilities, had Dr O been informed she was ineligible to re-join the Scheme and offered the stakeholder alternative as she should have been, she would have taken up the offer of the stakeholder plan.

45. NHS BSA look to place responsibility on both Dr O and the Trust for allowing the situation to come about. It refers to a document provided to Dr O on initial retirement in 1993 showing that she would need to make any new employer aware of her previous retirement. However at the time of Dr O's re-employment this requirement was not communicated to her in the up to date Scheme guide. In the circumstances I do not agree that NHS BSA can rely upon a document provided 13 years earlier.
46. Additionally, I believe it is significant that Dr O did inform NHS BSA at the time of her re-employment. She wrote to an address that was relevant according to the Scheme newsletter issued around that time. On that basis it is fair to say that Dr O made reasonable efforts to inform NHS BSA of her change of circumstances in the context of a potential change in her pension rights. On receipt of this it was reasonable to expect NHS BSA to remind her of her rights or otherwise as a potential member of the Scheme.
47. Finally, it is accepted that Dr O received a Scheme guide, which sets out the circumstances where an individual is ineligible to re-join. This is on page 40 of the guide and it is more than plausible that this could be overlooked.
48. Notwithstanding that, I believe the wording of this section allows for a wider interpretation than NHS BSA seems to think. In particular the wording:-

“If you are aged 50 or more, receiving NHS Scheme benefits and are *prevented* from re-joining the Scheme...” [original emphasis]

In my view the use of the word prevented, with the added emphasis, suggests a proactive action on the part of NHS BSA to stop members from re-joining. Additionally the wording “...and are *prevented*” suggests that there is a possible outcome where an individual might not ultimately be prevented from re-joining.
49. Given the ambiguous nature of the wording of that section of the Guide I take the view that it cannot be relied upon by NHS BSA, and on reading the section it would have been reasonable for Dr O to conclude, having notified her re-employment, that if she was ineligible she would be prevented from joining.
50. Looking now at the Trust's role in Dr O re-joining the Scheme, there is nothing to suggest that it was made aware that Dr O had a pension in payment at the time she re-joined. As I have said above I do not believe it is reasonable to say there was an obligation for Dr O to inform her new employer, the Trust, of her existing pension.
51. Although there were later occasions when the Trust could have become aware of the situation and Dr O's ineligibility, at the point when she re-joined I am not satisfied that it had sufficient information to identify her ineligibility. In any event, as I have found NHS BSA materially responsible for wrongdoing I make no additional findings concerning the Trust.
52. In these circumstances, the primary cause of the error was that of NHS BSA in not confirming Dr O's eligibility when it received the details confirming that she had re-

joined. Had it acted appropriately, or appropriate systems had been in place, it would have identified that she should not be allowed to re-join and informed her of this. As I have quoted above (paragraph 41), NHS BSA has previously accepted that its processes were not sufficiently robust. As a result of NHS BSA's apparently systemic failure, she has lost the opportunity to make alternative pension provision.

53. NHS BSA disputes the Adjudicator's view that Dr O would have made alternative provision suggesting that in any event she would not have been entitled to contribute to a stakeholder plan. Dr O's record within the Scheme of purchasing Added Years shows that she was proactive in relation to securing additional pension benefits. So, it is likely she would have made alternative provision by way of a personal pension of some type. As a stakeholder pension is referenced, it is appropriate to calculate by reference to it. Had she not been entitled to join the Scheme, the guide confirms that her employer "...**must**..." [original emphasis] offer a stakeholder alternative. In my view, the Adjudicator is right to say that had Dr O not been able to re-join and been offered a stakeholder alternative (assuming eligibility) she would, on the balance of probabilities, have entered into such a contract (or similar arrangement).
54. As a result, in my view, Dr O would have addressed the issue of her pension provision but for NHS BSA's negligence and she is quite likely to have suffered a financial loss as a consequence.
55. Therefore, I uphold Dr O's complaint. I have made no findings that Dr O has an entitlement under the rules of the Scheme nor that the Scheme should provide benefits to her. Dr O was not eligible to join the Scheme. But I am directing that she be compensated for negligence, the remedy for which is damages in tort. NHS BSA has not asserted that it does not have the necessary power to pay compensation outside of the Scheme for the breach of a legal right, as I have found here.
56. The measure of damages is the financial loss suffered by Dr O as a result of the negligent act. In this case, NHS BSA's acceptance of Dr O back into the Scheme, and thus her reliance on the information that she was accruing a pension in the Scheme meant that she lost the opportunity to accrue a pension in another arrangement. I have found that she would have done so. Dr O is retiring now so, taking everything into consideration, the compensation seeks to mirror, as closely as possible, what could have been available to her but for NHS BSA's negligence. I have considered the option of an annuity purchase, however I have taken into account that this would require seeking historical rates, that NHS BSA itself offered a lump sum compensation, and that Dr O, who is retiring, has not requested an annuity. Therefore, to mirror the appropriate compensation practically, in my view, the appropriate remedy is a lump sum.
57. The discovery of the potential shortfall in her pension provision, at such a stage in her life, would have caused Dr O considerable distress and worry and I have also made an award to recognise the non-financial injustice caused to her by NHS BSA's actions.

Directions

58. NHS BSA shall, within 28 days of the date of this determination, write to Standard Life and establish the value of Dr O's employee contributions had they been invested in its lifestyle fund via a stakeholder pension plan, up to the date they were refunded to her.
59. On receipt of the response, within 14 days, NHS BSA shall compare the value of the refunded contributions, plus interest, to the value supplied by Standard Life and if Dr O has suffered a loss, pay this to her net of her marginal rate of tax.
60. In addition, as offered, within 28 days of the date of this determination, pay Dr O £1,000 for the significant distress and inconvenience suffered.

Anthony Arter

Pensions Ombudsman
6 October 2017