

Ombudsman's Determination

Applicant	Mrs N
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Pensions

Outcome

1. I do not uphold Mrs N's complaint and no further action is required by NHS Pensions.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. The dispute centres on the final pensionable pay calculation that NHS Pensions have used to calculate Mrs N's retirement benefits.

Background information, including submissions from the parties

4. Mrs N was employed in two concurrent part-time NHS posts from 1 April 2008 to 1 April 2011. She received a different rate of pay for each post.
5. Mrs N decided to retire on 1 April 2011. Her final year's whole time equivalent (**WTE**) pay for each post was respectively £16,753.99 (for 1043 hours), and £18,576.80 (for 740 hours).
6. Mrs N subsequently received pension benefits based on her WTE final pensionable pay from her higher paid post.
7. Shortly afterwards NHS Pensions notified Mrs N that her pension had been overpaid by £16.26 and her lump sum by £1,300.72, as the calculation of her final pensionable pay had been overstated. NHS Pensions advised that her correct final pensionable pay (a composite of her WTE final year's pay) was £17,510.52. Namely,
$$£9,800.57 (£16,753.99 \times 1043/1783) + £7,709.95 (£18,576.80 \times 740/1783).$$
8. The total of Mrs N's WTE pensionable service from both posts was 18 years and 79 days (or 6649 days).

9. The point of dispute is NHS Pensions' composite calculation of Mrs N's WTE final pensionable pay.

10. Mrs N is represented by Joe Egan Solicitors (**the Solicitors**). The Solicitors say:-

- They believe it is accepted that nowhere in the NHS Regulations is it specified that final pensionable pay should be calculated in this way in the case of concurrent part time posts. The Regulations are silent on this point.
- No reasonable reading of regulations C(1)(a) and R4(10) would lead to the conclusion that two rates of pay should be averaged. The former clarifies the types of payments to be included in pensionable pay and the purpose of the latter is to ensure that pensionable pay is maximised by including all relevant pay.
- Given the level of detail elsewhere in the Regulations it is hard to imagine that it was the intention of the drafters that final pensionable pay be calculated by the averaging method that NHS Pensions have used.
- NHS Pensions note ('About Your Annual Pension') clearly establishes the principle of using the most beneficial method where there are different rates of pensionable pay. It states:

"Your final pensionable pay was the highest pay in your last three years of membership. If you worked part-time, we calculated your final pensionable pay as if you had worked full-time.

If you had one or more periods of deferred or protected membership, we calculated your pension using the most beneficial of the following two methods:

- *calculating a pension for each period of membership using the pensionable pay earned in that period, and adding the pensions up, or;*
- *calculating your pension using your final pensionable pay at retirement for all periods of membership."*

Whilst the note relates to separate, not concurrent, periods of employment there is no logical reason why this principle would not be applied consistently.

- If Mrs N had ceased her lower paid job at the start of her final year and worked 740 hours in her higher paid job, while her pensionable service would have been less by 139 days (1,043 hours), because her final pensionable pay would have been higher her pension would have been more than she is receiving by £154.37 per year. Namely, £4,141.61 (that is (£18,576.80 x 6,510) / 29,200) compared to £3,987.24 (that is (£17,510.52 x 6,649) / 29,200).

11. The NHS Pension Scheme Regulations 1995 apply in this matter. Relevant extracts are provided in the Appendix.
12. NHS Pensions subsequently wrote off the £1,316.98 overpayment.

Adjudicator's Opinion

13. Mrs N's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS Pensions. The Adjudicator's findings are summarised briefly below.
 - Pensionable pay is intended to relate to the pensionable service for which the benefits are paid.
 - Regulation R4(10) requires the calculation of a member's final year's pensionable pay to take into account pensionable pay in respect of any other pensionable employment in that final year. As the regulation is widely drafted and does state how pensionable pay from any other pensionable employment should be taken into account it is for NHS Pensions to decide how this is done.
 - Adopting the Solicitors' favoured approach would mean that Mrs N would benefit by receiving higher pension benefits for that part of her pensionable service for which she had paid lower contributions. That is inequitable. Additionally, it took no account of Mrs N's lower pensionable pay and therefore did not comply with regulation R4(10).
 - Regulation L4, provision 3(a) did not apply to Mrs N's concurrent service. The regulation is a protective measure to ensure that a deferred member who returned to a post with a lower salary did not receive benefits based on a lower final pensionable salary where they had accrued service and paid contributions by reference to a higher pensionable salary. Mrs N had not been accruing benefits (or paying contributions) for all of her pensionable service in respect of a higher pensionable salary. Therefore there was nothing to protect.
 - The Solicitors' calculation that Mrs N's pension benefits would have been higher if she had given up her lower paid post and worked only 740 hours for the last year of service in her higher paid post was incorrect. The calculation had not stripped out all of Mrs N's pensionable service from her lower paid post.
 - NHS Pensions' approach to the calculation of Mrs N's final pensionable pay was in accordance with regulation R4(10) - as part of her pensionable service related to lower/higher pensionable salary, this must be accounted for.
14. The Solicitors did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Solicitors provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and

I will therefore only respond to the key points made by the Solicitors for completeness.

Ombudsman's decision

15. The Solicitors say, in relation to regulation L4(3), if a member returns to a post on a higher salary their pension would be calculated applying the higher pensionable pay to all periods of membership. In which case they will not have accrued benefits (or paid contributions) for all of their pensionable service in respect of this higher pensionable salary. They say this is exactly the situation which the Adjudicator said was inequitable in Mrs N's case. They therefore contend that the NHS Regulations have not been applied to achieve a consistent outcome for all members in similar situations and that this inconsistency has not been addressed by the Adjudicator.
16. I think it is right to describe regulation L4(3) as a protective measure. If service is treated as continuous and the second salary is lower, the member would be losing the benefit of the earlier higher salary (on which they have paid contributions). On the other hand, if the second salary is the higher one, the member is allowed to benefit for the whole of their service – as they would have done if they had not left. Nevertheless, the regulation does not apply to this case as Mrs N was not an early leaver returning to pensionable employment and, in any case, the regulation concerns the treatment of pensionable service not the calculation of a member's final pensionable pay.
17. The Solicitors see an inconsistency in the Scheme's regulations, but this is not relevant to determining Mrs N's case. The case has to be considered in relation to the Scheme regulations as they applied when Mrs N retired.
18. The Solicitors say Mrs N's pension would have been higher if she had just worked in her higher paid post in her final year, or if she had worked fewer hours in her lower paid post than she did. Again this is not relevant as I can only consider Mrs N's case based on her actual pensionable service and earnings from her two posts.
19. A member is unlikely to have been earning the same salary throughout their career – they do, however, benefit from having their (usually) higher final salary applied across the whole of their service. This benefit is provided for returning members under regulation L4(3). However, the member has to be earning the final salary.
20. The Solicitors' argument is that NHS Pensions should have calculated Mrs N's pension by using only the higher of her two final salaries across the sum of her pensionable service from both posts. Apart from being inequitable, regulation R4(10) requires NHS Pensions to take account of the fact that Mrs N had pensionable pay from two employments; they simply cannot take the higher salary and apply it across both amounts of pensionable service.
21. NHS Pensions have calculated Mrs N's final pensionable pay by taking her final year's WTE pay from each of her two posts and calculating a proportional average

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based on the hours she worked in each post for that year. I am satisfied that NHS Pensions approach complies with regulation R4(10).

22. Therefore, I do not uphold Mrs N's complaint.

Anthony Arter

Pensions Ombudsman
4 November 2016

Appendix

The NHS Pension Scheme Regulations 1995

23. As relevant regulation C1 ('Meaning of "pensionable pay" and "final year's pensionable pay"') says:

"(1) In these Regulations, "pensionable pay" means, subject to the provisions of this regulation-

(a) all salary...in respect of pensionable employment as an officer".

...

"(6)...in these Regulations, "final year's pensionable pay" means pensionable pay in respect of the member's last year of pensionable employment, ending on the date the member ceases to be in such employment..."

24. As relevant regulation L4 ('Early leavers returning to pensionable employment') says:

"(3)...if the member leaves pensionable employment with a preserved pension under regulation L1 and then returns to pensionable employment 12 months or more after leaving -

(a) the member's pensionable service before and after the break in pensionable employment will be treated separately unless, when the member becomes entitled to receive a pension or the member dies (whichever occurs first), it would be more favourable to the member, or the member's spouse or civil partner, to treat the member's pensionable service before and after the break, and all such other breaks (if any), as continuous;..."

25. As relevant regulation R4 ('Members doing more than one job') says:

"(10) ... in calculating the member's final year's pensionable pay there shall be taken into account pensionable pay in respect of any other pensionable employment in that final year..."