

Ombudsman's Determination

Applicant	Mrs A
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Service Authority (NHSBSA)

Outcome

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

Complaint summary

3. Mrs A has complained that NHSBSA have incorrectly calculated the pension due to her. She believes the pension should be based on her earnings in 2012 and not on a reduced basis.

Background information, including submissions from the parties

4. Mrs A was readmitted to the Scheme on 1 September 1997 when GP Practice Staff were allowed to join. Mrs A was employed in her husband's practice and planned to retire on 31 March 2014. However NHSBSA queried the level of her pensionable earnings and despite going through both stages of the Internal Dispute Resolution Procedure (**IDRP**) she says she has not received the pension to which she is entitled.
5. Mrs A says that she was initially employed as a nurse practitioner but her duties expanded and she took on the practice manager role. Her contract of employment permitted this as it allowed her employer to change her job description. She therefore undertook dual responsibility during her normal working week of 37.5 hours. Mrs A's salary increased between 2006 and 2010 and then decreased in the latter two years due to ill health as follows:

2006/07 £38,753
2007/08 £50,000
2008/09 £60,000
2010/11 £65,000
2010/11 £90,000
2011/12 £90,000

2012/13 £21,000

2013/14 £21,000

6. Mrs A's contract of employment, which commenced from 1 April 2011, states that Mrs A is employed as a Nurse Practitioner at a rate of £46.15 an hour for 37.5 hours a week. Clause 5 of the contract of employment says that "Your employer may change your job description and may require you to carry out different and/or additional duties under this contract."
7. NHSBSA say that the substantial drop in Mrs A's earnings led them to make some enquiries with her employer. The employer confirmed that in addition to her Nurse Practitioner role she had previously taken over the Practice Manager role. Whilst NHSBSA accepts that Mrs A had only one employing authority she actually had two jobs. If both the Nurse Practitioner and Practice Manager roles were full time Mrs A would have been working 74.5 hours per week but only 37.5 hours would be pensionable. Thus NHSBSA believe that Mrs A was fulfilling both posts during a full time working week of 37.5 hours. In NHSBSA's opinion Mrs A's work at the practice should have been split between her Nurse Practitioner duties and her role as Practice Manager. She would then have been given separate contracts of employment and each post would have been paid on a different pay scale.
8. NHSBSA also say that if Mrs A agreed that she had two jobs they would require her employer to provide full pay and membership details for each role. In the interim the Awards Team would calculate Mrs A's benefits on the 2012/13 pensionable pay figure of £21,000.
9. NHSBSA also say, in its formal response to this office, that it believes Mrs A had two distinctive posts requiring different skills and qualifications and that the two posts should have attracted different salaries. NHSBSA has tried to establish what the correct pay should have been for the two posts and does not believe that the figure for the combined role would amount to £90,000 a year. Looking at jobs advertised on the internet, the whole time pay for each of the different posts salaries range between the following amounts, depending on the size of practice and location:

Practice Manager £35,000 to £50,000 a year

Nurse Practitioner £22,000 to £35,000 a year.
10. NHSBSA have also referred to the increase in Mrs A's pensionable pay between 2007 and 2012, and say that this is not in line with pay increases awarded to other NHS employees.
11. NHSBSA maintain that there should have been two part time pensionable posts created and two separate contracts of employment drawn up when there was a significant change to Mrs A's duties. This would be in keeping with what happens in the rest of the NHS. If Mrs A is treated differently then she would have an advantage

over other Scheme members who have two concurrent employments attracting different rates of pay.

12. Mrs A says that the approach taken by NHSBSA is misconceived and based upon a misinterpretation and application of Regulations R4 (1) and (2). She did not have separate employments within the meaning of R4 (1) and therefore her pensionable pay falls squarely within the definition provided by the Regulations. Furthermore, if Regulation R 4 (1) did apply to her situation then R 4 (2) does not, given that the Secretary of State does not appear to have determined what amounts to “a single comparable whole time employment” or an “aggregate”, as applicable to her case.

Adjudicator’s Opinion

13. Mrs A’s complaint was considered by one of our Adjudicators who concluded that the complaint should not be upheld and that the question of whether a pay increase is reasonable, given its impact on the public funding of the pension scheme, should be referred to the Secretary of State. The Adjudicator’s findings are summarised briefly below.
 - This complaint is concerned with the level of earnings used to determine Mrs A’s pensionable salary and whether Mrs A had two distinct employments. Mrs A is insistent that she has had only one contract of employment and that NHSBSA should use the earnings figure of £90,000, for the tax year 2011/12, as that is the highest figure in the last three years of her employment.
 - Schedule 1 of Mrs A’s contract of employment sets out her job title as Nurse Practitioner and describes her duties as concerned with the clinical care of patients. Schedules 2 and 3 confirm her hours of work as 37.5 a week and pay of £46.15 an hour.
 - Mrs A says that although she was initially employed as a nurse practitioner, her contract of employment permitted her employer to change her job description and she took up the role of practice manager. She also says that she did not have separate employments.
 - The contract does allow the employer to change the job description, but as a matter of good practice it would have been preferable to have included a description of the duties of the practice manager and the hours and rate of pay that applied to that role.
 - If the contract had been amended it would have set out the hours Mrs A was expending on each role and the applicable rates of pay. The different terms could have been accommodated by amending the existing contract. But this was not done and the Adjudicator thought that it was reasonable for NHSBSA to ask for a breakdown of the rates of pay and hours that were applicable to each role.

- Mrs A's salary in the years between 2007 and 2012 increased by over 230%. It is not unreasonable for NHSBSA to query the rates of pay that Mrs A has quoted for her combined roles of Nurse Practitioner and Practice Manager. An employer, when agreeing terms for a job, should be aware of the local market rate for that role; in this case North Lincolnshire. To overpay is to artificially inflate the value of the role and the pension benefit. This is inconsistent with the duty of care that the employer should have to the NHS; the public purse; and the taxpayer, who ultimately pick up the cost of their services.
 - The Adjudicator enquired of NHSBSA, whether there were any limitations on the level of pay increases that apply within the Scheme given the restraints on pay within the public sector over this period. He did not receive a reply. He was, however, aware that Regulation U2 of the National Health Service Pension Scheme Regulations 1995, concerns the determination of questions and says:-
 - "Any question arising under these Regulations as to the rights or liabilities of any person shall be determined by the Secretary of State."
 - It was therefore his opinion that the question of the level of pay increase that can be allowed under the Regulations should be directed to the Secretary of State, or his representatives.
14. Mrs A did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs A provided her 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 Mrs A.

Ombudsman's decision

15. Mrs A says that she never suggested she was employed as Nurse Practitioner or that her duties expanded, at the relevant time, she was employed under a contract dated 1 April 2011, which described her as Nurse Practitioner/Practice Manager in the contract of employment. Therefore, her employer did not change her job description. She was employed under a new contract of employment and she carried out a number of varying functions as required in a modern GP practice, some of which are not included in either her contract or under the job description in its schedules. Therefore, Mrs A contends that her pensionable pay falls to be assessed in accordance with the 1995 Regulations and the pay received under the single contractual arrangement.
16. As an independent GP practice, her employer was entitled to agree salary levels with each member of staff. There was no statutory or regulatory limit upon the salary which might be paid to a Nurse Practitioner/ Practice Manager. Paying her salary at the agreed level had an adverse impact on the profits of the practice and reduced her husband's salary and pension contributions. If she had not been paid at this level her

husband would have been entitled to increase his salary and pension contributions within the practice.

17. Mrs A says the suggestion that the taxpayer might ultimately pick up the bill is totally wrong. Mrs A's salary was derived from the budget allocated to her employer. The budget is non-refundable; is not carried over; and is not used for the care of patients. The public purse is, therefore, not worse off.
18. Mrs A says that her contract of employment describes her as Nurse Practitioner/Practice Manager. But Schedule One of the contract of employment Mrs A provided, attached to her letter of 30 April 2015, clearly says that her job title is Nurse Practitioner. I see that there is a reference to acting as practice manager under the main duties of the Nurse Practitioner role but this says "acting as practice manager in regards to staff holidays, keeping the surgery diary, coordinating allied health care and managerial meetings, interviewing of new staff, complaints, staff appraisals." Mrs A also says, in her letter of 30 April 2015, that as well as her Nurse Practitioner role she acted as Assistant Practice Manager to Mrs T, the Practice Manager.
19. I find, therefore, on the balance of probabilities, that the contract of employment dated 1 April 2011, is focussed on Mrs A's main role as a Nurse Practitioner and that the reference to acting as a Practice Manager is a more junior role and one that took up less of her time. Looking at the salary history, I find, on the balance of probabilities, that up until 2006/07 Mrs A was paid a salary more in line with the market average. But from then on Mrs A's salary was increased at a considerable rate. It is unsurprising that NHSBSA queried this with reference to the typical salary ranges for both a Practice Manager and Nurse Practitioner. From this survey it is evident that Mrs A's salary level was way beyond what either a Practice Manager or a Nurse Practitioner would have earned in another GP practice.
20. Mrs A's has also referred to the impact that her salary has had on her husband's salary and profits. I have no way of knowing if this is correct but it does seem to me that Mrs A and her husband have embarked on a blatant attempt to artificially increase Mrs A's salary in the few years before retirement to maximise her pension entitlement. Mrs A says that this does not result in a loss to the public purse. I completely disagree, Mrs A has paid pension contributions on a much lower level of salary for almost the entirety of her Scheme membership. If this was a funded pension arrangement such a large increase in salary in the few years before retirement would lead to a funding strain and would almost certainly require the employer to pay additional funds into the scheme to account for the considerable cost. As the Scheme is unfunded it is the tax payer who will bear the brunt.
21. I also note that the NHS Pension Scheme Regulations 1995 (**the Regulations**), were amended in 2014 to include Regulation D3, entitled "Further contributions by employing authorities in respect of excessive pay increases." This Regulation was introduced specifically to stop abuse of what is already a very generous pension arrangement and to protect the Scheme against excessive pay increases awarded to

members leading up to their retirement thereby placing an unreasonable funding burden on the Scheme and the public purse. The new Regulation D3 does not apply to Mrs A because it was implemented in 2014 and is not retrospective, but it was required because of a few practitioners abusing the system and awarding very large increases in salaries in order to inflate their pension benefits. An increase in salary such as the one enjoyed by Mrs A undoubtedly results in a considerable cost to the public purse in the provision of an inflation linked lifetime benefit.

22. Mrs A has said that her husband was entitled to award pay increases at whatever level he chose and there is nothing in the Regulations to prevent this. This is correct, but as the Adjudicator has said, the employer has a duty of care to the NHS and the public purse.
23. It is not for me to determine what a fair salary for Mrs A should have been. However, the Regulations allow for any question under the Regulations to be determined by the Secretary of State. I therefore find that the question of the employer's duties of care when setting pay increases and the account to be taken of market practice, should be referred to the Secretary of State. It is for the Secretary of State to determine the appropriate the salary level to be applied in Mrs A's case.

Directions

24. I direct that within 28 days NHSBSA refer the question of what duties of care are required by an employer when setting salary levels and what account is to be taken of market practice. Furthermore, the Secretary of State should decide whether to ignore the pay figure of £90,000 and base Mrs A's pension entitlement on an annual pensionable pay figure of £21,000 (her annual salary for the years 2012/13 and 2013/14).

Anthony Arter
Pensions Ombudsman

23 February 2017