

Ombudsman's Determination

Applicant	Dr Y
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

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

Complaint summary

3. Dr Y's complaint against NHS BSA is about their refusal to process his transfer request.
4. Dr Y's position is that NHS BSA failed to alert him to changes in the Pensions Scheme Act 2015 (**the Act**), which restricts transfers from unfunded Public Sector Schemes such as the Scheme. Dr Y believes that NHS BSA have a duty of care to members to inform them when changes affect their benefits.
5. Dr Y believes that his email and letter of 2 April 2015 is sufficient as an application to transfer under the Act and, as a result, that he should be allowed to transfer his benefits out of the Scheme to an alternative Scheme of his choice.
6. Dr Y requests adequate compensation for the distress and inconvenience that NHS BSA have caused him, in their refusal to process his transfer and for their failure to alert him to the effect of the Act.

Background information, including submissions from the parties

7. On 15 August 2014, Dr Y was issued an estimated cash equivalent transfer value (**CETV**) from the Scheme. On 2 April 2015, Dr Y requested by email to transfer his pension out of the Scheme to a Self-Invested Personal Pension (**SIPP**), however no specific scheme details such as its name and address were provided.
8. On 15 April 2015, NHS BSA informed Dr Y that, due to the Act, it was unable to process a transfer, unless it was to another Defined Benefit (**DB**) Scheme that did not

offer flexible benefits. Following this, Dr Y raised a complaint regarding the transfer team's interpretation and application of the Act. He said that he has not received an adequate explanation of the legal basis on which NHS BSA can say that only requests made on a specific form and with a transfer value agreed before 5 April 2015 could be processed.

9. On 5 July 2015, NHS BSA responded to Dr Y's complaint under Stage 1 of the Internal Disputes Resolution Procedure (**IDRP**). The complaint was not upheld as Dr Y did not meet the two stage transfer requirements for his application to be valid. NHS BSA also said that Dr Y's request of 2 April 2015 was not received until 7 April 2015, therefore not before the 6 April 2015 deadline, so the request could not be processed.
10. Dr Y appealed to NHS BSA under Stage 2 of the IDRP. He refuted that his request was not received before the deadline as he sent it via email and next day recorded post on 2 April 2015. The tracking information shows the letter was signed for on 3 April 2015. Dr Y also said that members were not notified of the significant changes the Act would have on their benefits other than a small notice on the website. Dr Y said that nowhere in the Act does it say that an application has to be a two stage process.
11. NHS BSA did not uphold the complaint at IDRP Stage 2 stating that it is governed by both legislation such as the Act and the Schemes statutory regulations. Regulation M4 details the requirements to transfer. As Dr Y's email and letter of 2 April 2015, did not meet these requirements, NHS BSA say his request has been correctly refused. NHS BSA also said that it only became aware of the Government's intention to restrict transfers out of Public Sector Schemes shortly before the legislation became effective. Therefore, it was not feasible to notify members individually and resources were directed at providing guaranteed CETVs and processing transfers.
12. NHS BSA's position is shown below:-
 - The Act means that members transferring their Scheme benefits to an arrangement that offers flexible benefits will not be able to do so unless the necessary transfer documentation was completed and returned before 6 April 2015.
 - There are two stages to transferring benefits out of the Scheme. The first is that the member must request a statement of entitlement or a CETV. After receiving a guaranteed CETV, which is a statement of entitlement, the member must make a formal application to transfer.
 - Where the receiving Scheme is known, and the member is deferred, NHS BSA will provide a guaranteed CETV. Where the receiving scheme is not known or the member is still an active member of the Scheme an estimated CETV, which is not a statement of entitlement, will be provided for information purposes only until the receiving scheme is known. NHS BSA state that for a transfer to be made members

must have received a guaranteed CETV, and both the member and the receiving Scheme must have completed the relevant sections within transfer election forms.

- It has applied the legislation and regulations correctly in this case, specifically Regulation M2 and M4. The Act has no effect on applications made prior to 6 April 2015, and that section 95 (1) of the Pension Schemes Act 1993 applies. HM Treasury and the 26 June 2014 Pensions Bill confirmed that an “application” was a two stage process.
- Reasonable steps were taken to notify members, via the website, of the impact of the Act as soon as information became available. Changes were initially communicated via a news item on the website following the 19 March 2014, Budget. Information regarding the transfer deadline to a Defined Contribution (**DC**) scheme was uploaded to the website on 8 January 2015, and updated on 14 January 2015, and 17 March 2015.

Adjudicator’s Opinion

13. Dr Y’s complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS BSA. The Adjudicator’s findings are summarised briefly below:-

- NHS BSA took reasonable steps to inform members about the impact of the Act on transfers to DC schemes. It would not have been practical to write to every member of the Scheme individually to inform them of the changes. The Act was discussed in the media and its expected implications were widely available from a variety of media sources and the internet.
- Dr Y’s email and letter of 2 April 2015 was not sufficient to qualify as an application to transfer under the regulations or legislation, nor was it sufficient to qualify as a request for a guaranteed CETV as the receiving scheme’s details were not provided.
- While the Act does not set out that an application to transfer is a two stage process it does state at paragraph 68 (8), “The amendments made by this section have no effect in relation to an application made under section 95(1) of the Pension Schemes Act 1993 before 6 April 2015.” Section 95(1) of the Pension Schemes Act 1993 only comes into effect if Sections 93A and 94 have already been met. Dr Y had not met these criteria as he had not received a Statement of Entitlement. Therefore, Mr Y’s email and letter of 2 April 2015 are not sufficient to qualify as an application to transfer.
- The Adjudicator did not agree that NHS BSA could have reasonably done more to notify Dr Y of the impending changes to his transfer options brought about by the Act, nor that his email and letter of 2 April 2015 qualified as an application. The Adjudicator was of the opinion that no maladministration has occurred. Consequently, the Adjudicator was unable to request that NHS BSA allow the

transfer to go ahead, or recommend that an award for distress and inconvenience should be made.

14. Dr Y did not accept the Adjudicator's Opinion and the Adjudicator corresponded with Dr Y regarding the comments he had made. Dr Y confirmed that there were still issues outstanding and the complaint was passed to me to consider. Dr Y provided his further comments which are summarised below:
- Dr Y has contested the Adjudicator's comments that legislation allows up to three months for an occupational scheme to provide a CETV. He points out that it took approximately two months to receive a CETV that was requested in June 2014 and received in August 2014. Dr Y said "that even if he did not want to query that value, he does not see how NHS BSA could confirm or agree a new value in three months".
 - Dr Y also states that even if this three month timescale to complete the transfer could be met, the first notice on the transfer section of the website was not available until 8 January 2015 which he says is not enough time for any member to read the notice and make an application before the 5 April 2015 deadline, less than three months away. Dr Y says that there cannot be a finding that NHS BSA notified its members in an efficient and timely manner, to warn them of their loss of benefits and discharge its duty of care.
 - Dr Y raised comments about a mailing exercise NHS BSA could have undertaken to notify members. He claimed this would be low cost option, considering the total value of member's pension within the Scheme. The Adjudicator explained that an Unfunded Scheme does not hold members individual funds in the same way that a Funded Scheme would and therefore it is not possible for this comparison be made to say that there was a low cost option. The Adjudicator also maintained the view that a mailing of that scale was impractical. Dr Y says that this view shows discrimination against public service pension members and that it does not justify why for the sake of spending a few thousand pounds such communication was not a reasonable requirement for NHS BSA.
 - Dr Y is also concerned with the Adjudicator's view that there is no duty of care on NHS BSA, and no requirement for NHS BSA to inform members of statutory changes to their benefits. He said that this has not been mentioned before.
15. Dr Y's comments 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 Dr Y completeness.

Ombudsman's decision

16. The timescale for providing the CETV also known as a Guaranteed Statement of Entitlement, is provided for under The Occupational Pension Schemes (Transfer Values) Regulations 1996. The relevant part says:

“Part III - Guaranteed Statements of Entitlement and Calculation of Transfer Values

6 Guaranteed statements of entitlement

(1) Subject to paragraph (1A), the guarantee date in relation to a statement of entitlement must be-

(a) within the period of three months beginning with the date of the member's application under section 93A of the 1993 Act (salary related schemes: right to statement of entitlement) for a statement of entitlement; or

(b) where the trustees are unable to provide a statement of entitlement for reasons beyond their control within the period specified in sub-paragraph (a), within such longer period not exceeding six months beginning with the date of the member's application as they may reasonably require.”

17. A CETV is a complex actuarial calculation that is used to assign a cash value to the defined benefits accrued in a scheme. The CETV must represent the fair value of members benefits, based on the actuarial assumptions. However, Dr Y seems to have suggested that he is able to query and negotiate the CETV, but a CETV cannot be negotiated. In any event, Dr Y's assertion that it would take longer than three months to produce a CETV runs contrary to the statutory position as set out above.
18. If Dr Y is instead referring to the process of obtaining an estimated CETV, and then applying for a guaranteed CETV at a later date, this process only applies where the member is in active service or where details of the receiving scheme have not been provided. A guaranteed CETV can be obtained without the need for an estimated CETV as long as the member is a deferred member, which Dr Y was, and the receiving scheme's details are provided to NHS BSA.
19. The Act did not receive royal assent until 3 March 2015 so, arguably, before this date the legislation was subject to change. I do not believe that it is reasonable to expect NHS BSA to provide all members with an update about legislation which has not yet been enacted. In addition to this, the early versions of the Bill provided little information on the intended changes or restrictions that were to be applied to unfunded Public Sector Pensions Schemes.
20. Therefore, I do think it is reasonable that NHS BSA did not publish any information until 8 January 2015, and that the information published was only on the website where members wishing to transfer were required to obtain the necessary forms. While I acknowledge that this leaves less than the three month statutory deadline in which a CETV must be provided. I would expect schemes to provide CETV's well within this deadline and, in order to do this, with the increased demand that the Act created, NHS BSA focused additional resource to ensure that it issued CETVs within the timescale.

21. I note Dr Y's interpretation of the Adjudicators comments regarding unfunded Public Sector Schemes and a mailing exercise. There appears to be misunderstanding here as the Adjudicator was not using the unfunded nature of the Scheme as a reason to not carry out a mailing exercise. Instead the Adjudicator made a valid point that Dr Y's method for justifying the cost would not succeed due to the unfunded nature of the Scheme.
22. Ultimately, the legislation did not bring about a change to Dr Y's benefits within the Scheme. His entitlement to benefits accrued under the Scheme remains unchanged. The changes only affect what can be done with those benefits. This was a Government policy decision, not a matter decided, or indeed influenced, by NHS BSA, so I cannot see that NHS BSA was under any obligation to inform him of this. The legislation itself does not require Schemes to make their members aware of its implementation. Usually, legislation prescribes what information shall be provided and in what circumstances. As the law is silent on the matter of informing members, I do not think it can be assumed that there was a requirement on NHS BSA to provide details of the impact of the Act outside of its general obligations.
23. Most importantly, Mr Y's right to a CETV was not annulled by the Act. Section 93A in Chapter IV of the Pension Schemes Act 1993 confers a right for members to obtain a CETV so, strictly speaking the 2015 Act did not remove his ability to receive a CETV. What it did do, was restrict his options on what he could do with the CETV. If Dr Y wants a CETV, despite being unable to transfer to a DC scheme, or with the intention of transferring to a DB scheme, then NHS BSA is still obligated to provide this.
24. The Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 details what information pension schemes are required to supply to members. As the Act did not change Dr Y's entitlement under the Scheme I do not see that these regulations apply here. There is no requirement within them to disclose information such as the transfer limitations introduced by the Act. There is a requirement to provide information that a member requests, and placing information on the website is a reasonable method of supplying information. I have seen no evidence that Dr Y requested information in relation to the Act, and I have no reason to believe that if he had, it would not have been supplied, or he would not have been directed to the website.
25. I do not agree that Dr Y's duty of care argument could succeed. As explained above NHS BSA was not under any legislative obligation to inform its members of the expected implications of the Act. In addition to this, NHS BSA is not able to provide advice. It would be very difficult for NHS BSA to notify every member, including those not already considering a transfer, of a change in legislation that may affect their transfer options without it being construed as advice. On the balance of probabilities, it is likely that those members without an existing intention to transfer would interpret any such announcement as the suggestion or advice that transferring would be in their best interest, which is not necessarily the case. Instead, I find that the

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notification on the website, directed at those members with an existing intention to transfer, as a sufficient method of communicating the legislative changes.

26. Therefore, I do not uphold Dr Y's complaint.

Anthony Arter

Pensions Ombudsman
28 March 2017