Ombudsman's Determination

Applicant	Mrs Y
Scheme	NHS Pension Scheme (Scotland) (**the Scheme**)
Respondent	Scottish Public Pension Agency (**SPPA**)

Complaint Summary

1. Mrs Y has complained that SPPA provided her with incorrect information in June 2014 concerning the calculation of her final pensionable pay in the Scheme.

2. She contends that:-

    2.1. She relied upon the flawed information to her financial detriment by retiring on 31 December 2018.

    2.2. If she had been given the correct information by SPPA, she would have elected to retire on 31 August 2018 in order to maximise her final pensionable pay.

    2.3. She has suffered a financial loss in the region £200 of annual pension and £600 of tax free lump sum.

Summary of the Ombudsman's Determination and reasons

3. The complaint should not be upheld against SPPA. The evidence does not support a finding of maladministration by SPPA in the way it responded to Mrs Y's enquiry in June 2014.

Detailed Determination

Material facts

4. The Scheme is governed by the NHS Superannuation Scheme (Scotland) Regulations 2011 (**the Scheme Regulations**).

5. Mrs Y joined the Scheme in 1994. She had previously been a member of the NHS Pension Scheme in England and Wales, and her pensionable service in that scheme was transferred into the Scheme.

6. On 2 May 2014, Mrs Y asked SPPA how her final pensionable pay in the Scheme was calculated. She said that:

> “I understand that the Scheme pays benefits based on the member’s highest pay in the three years prior to retirement. Can you please advise whether the measurement years are based on the retirement date, the tax year, the calendar year or on some other basis.”

7. SPPA replied on 10 June 2014 as follows:

> “…your pension benefits are worked out on the best 365 days pensionable pay taken from the date of retirement back over the preceding 3 years."

8. In 2018, Mrs Y notified SPPA that she wished to retire on 31 December 2018. After receiving details of the benefits available to her from the Scheme, she asked SPPA why they were lower than those shown on her 2018 annual benefit statement (**ABS**).

9. In its letter dated 9 November 2018 to Mrs Y, SPPA replied that it: (a) administered the Scheme on behalf of her employer, and (b) relied entirely upon the information her employer provided for pension calculations and statements.

10. SPPA also said that:

> “It is correct that we use the best 365 days of uprated whole time equivalent pensionable pay within three years of your retirement date to calculate your pension. However, it is not an arbitrary 365 day period. It is going back 365 days precisely from the date to retirement for the final year and so on. I am enclosing details that we received from your payroll which was used to calculate your uprated pay, as well as the calculation sheet showing this uprating.
>
> You will notice that the annual salary rate for your post never exceeded £30,000 and so I cannot understand why a payslip, for a specific part time pay, would show it to be over £40,000.
>
> Finally, the 2018 statement is produced by our system based upon the information we receive in annual returns from your employer. They reported that you had earned £24,784.68 from 1/4/17 to 31/3/18 as 197 days pensionable service. When you uprate that to 365 days you get £45,920.85 which is what the statement used. However, I suspect that this payment included arrears of pay for periods other than 1/4/17 to 31/3/18 and this has been adjusted in the pensionable pay figures that we received in your application.
>
> If you have a query with the pensionable pay that was included in your application form, you will need to contact your payroll to question and they should be able to provide an explanation.”

11. Mrs Y was dissatisfied with this response. In her letter dated 15 November 2018 to SPPA, she said that:-

    11.1. It was unacceptable for SPPA to assume that her final pensionable pay figure was wrong and not investigate whether this was indeed the case.

    11.2. The advice which she received in 2014 from SPPA was clear. It did not include a caveat stating that her best 365 day period would be a specific one.

    11.3. There was a marked difference between her pensionable pay for: (a) the best 365 day period, and (b) the specific 365 day period used by SPPA in its calculations.

    11.4. SPPA had consequently either "badly misadvised" her or used an incorrect final pensionable pay figure to her financial detriment.

12. In its letter dated 22 November 2018 to Mrs Y, SPPA replied that:-

    12.1. Her employer confirmed that it had incorrectly inflated her pensionable pay by including pay arrears of £4,043.27, backdated to 2010.

    12.2. The final pensionable pay used to calculate the benefits shown on her 2018 ABS was £45,920.85 per annum, that is, (24,784.68 / 197) x 365. It should have been £38,429.51 per annum, that is, (20,741.41 / 197) x 365.

    12.3. She had misinterpreted what it said on 10 June 2004 about how final pensionable pay was calculated.

13. Mrs Y was dissatisfied with this response and subsequently made a complaint in July 2019 under the Scheme's Internal Dispute Resolution Procedure (**IDRP**).

14. SPPA did not uphold Mrs Y's complaint. In its decision letter dated 19 November 2019, SPPA said that:

    "I do not consider the information provided to you on 10 June 2014 to be erroneous. SPPA has calculated the pensionable pay in the correct manner and in line with the Scheme Regulations. You remain entitled to only the benefits calculated in accordance with the Scheme Regulations and therefore we cannot pay benefits based on the way you have understood the final pensionable pay to be calculated...

    The regulations relevant to the pensionable pay used in the calculation of your pension and lump sum are regulations R2(3), E1(1) and C1(12) of the Scheme Regulations[1]. Regulation R2 provides that your pension is payable from age 55 and is calculated in accordance with regulation E1. Regulation E1(1) provides that your pension should be based on 1/80th of your "final year's pensionable pay". Regulation C1(12) defines "final year's pensionable pay" as ending on the date the member ceases to be in pensionable employment or if

[1] Regulations R2(3), E1(1) and C1(12) of the Scheme Regulations are set out in the Appendix 1.

> pensionable pay was greater in either or both of the two preceding years then, “final year's pensionable pay" means pensionable pay in one of those two years...
>
> …You consider you would have been better off had you retired in August 2018 although there is no supporting evidence.
>
> I have investigated the extent of the issue affecting other scheme members and confirm that SPPA will take any corrective action as deemed necessary.
>
> I recognise that scheme regulations can be complex and that you actively sought clarification of how pensionable pay was used in the calculation of pension awards. I have reviewed the information provided to you on 10 June 2014 and I consider that it accurately paraphrases the scheme provisions. It is unfortunate that you have not interpreted it in this way…
>
> As I consider the information to be accurate, I have not investigated your claim that you would have been better off retiring in August 2018 or considered any financial remedy in respect of your appeal.”

Summary of Mrs Y’s position

15. SPPA clearly told her on 10 June 2014 that it calculated her final pensionable pay in the Scheme on a “rolling year” basis. If SPPA had supplied her with the correct information, she would have retired at the end of August 2018 in order to maximise her final pensionable pay. By doing so, she would have received a larger pension and lump sum from the Scheme despite her period of pensionable service being slightly shorter.

16. Her pensionable pay comprised of two elements, that is, basic pay and “other superannuation payments” (**OSPs**). She worked part-time and had some control over when she received OSPs in order to increase her pensionable pay.

17. In her view, there is clear evidence that: (a) she had actively managed her retirement planning, and (b) she would have acted differently if SPPA had responded correctly.

18. In particular, she had: (a) monitored her pay and increased her OSPs during the three years prior to her retirement, (b) queried the figures provided by SPPA for her retirement benefits as at 31 December 2018 within a few days of receipt, and (c) subsequently raised a complaint to SPPA.

19. It would not have been sensible for her to continue working until 31 December 2018 only to receive a lower pension from the Scheme.

20. She has provided The Pensions Ombudsman (**TPO**) with: (a) copies of her payslips from January 2016 to December 2018, and (b) a spreadsheet showing:

    20.1. her monthly basic pay and OSPs during this period taken from the payslips;

20.2. her calculations of final pensionable pay as at 31 August and 31 December 2018 on a rolling year basis to be £38,540 and £37,831 per annum respectively; and

20.3. her calculations of the pension and tax free lump sum available to her as at 31 August 2018 to be £11,647.89 per annum and £34,943.67 respectively.

21. The actual pension and tax free lump sum which she received from the Scheme on her retirement date of 31 December 2018 were £11,433.53[2] per annum and £34,300.59[3] respectively based upon a final pensionable pay of £37,630[4] per annum. She has consequently suffered a loss of around £200 of annual pension and £600 of tax free lump sum.

22. SPPA has calculated that she suffered “minimal”[5] financial loss by retiring on 31 December 2018 instead of 31 August 2018. It has not, however, provided any details of how her employer had calculated the basic pay and OSP amounts that were used to determine her final pensionable salary at these dates. She is consequently dubious that SPPA has calculated its financial loss figures for her correctly.

23. In particular, her employer calculated that her OSPs for 1 September 2017 to 31 August 2018 to be £2,931.07[6]. In her view, this figure should be around £3,270.

Summary of SPPA’s position

24. The information which it provided Mrs Y on 10 June 2014 about final pensionable pay was not incorrect but should have been more comprehensive.

25. It is not reasonable for Mrs Y to: (a) have interpreted this information to mean that a rolling year basis would be used to determine her final pensionable pay, and (b) claim that SPPA had clearly told her of this.

26. It relied entirely upon the salary information provided by Mrs Y’s employer for her final three years of employment in order to process her retirement application.

27. Regulation C4(4) of the Scheme Regulations stipulates that final pensionable pay for part-time members should be calculated in accordance with the amount Scottish Ministers determine would have been paid in respect of a single comparable whole-time employment (**WTE**).

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[2] According to SPPA, this figure excludes “a pension increase” of 1.0075. Further details of this increase may be found in paragraphs 33 and 34.

[3] As above.

[4] As above.

[5] Please refer to paragraph 35 for further details.

[6] Please refer to paragraph 36 for further details.

28. The WTE rate for Mrs Y's job was set out in the "Agenda for Change" pay scales. The rates for a Band 5 employee on Point 8 of the pay scale from 1 April 2017 and 1 April 2018 were £29,034 and £29,905 per annum respectively.

29. Mrs Y's pensionable pay was based on the number of days worked at the WTE rate for her job. Her OSPs were calculated separately and uprated to WTE.

30. It has submitted as evidence to TPO the basic pay and OSP figures supplied by her employer that it originally used to calculate her final pensionable pay as at 31 December 2018.

31. It provided Mrs Y's employer with her payslips and calculations for information. In December 2022, her employer: (a) amended its figures for her basic pay and OSPs for 1 January 2018 to 31 December 2018, and (b) determined her basic pay and OSPs for 1 September 2017 to 31 August 2018.

32. Using this information, it has calculated[7] that:-

    32.1. Mrs Y's final pensionable pay at 31 August 2018 to be £38,207.04 per annum.

    32.2. Mrs Y would have been entitled to: (a) a pension of £11,523.63 per annum, and (b) a lump sum of £34,570.89 from the Scheme if she had retired on this date.

33. Mrs Y's second last year's pensionable pay of £37,912.87 per annum (37,630.64 x 1.0075[8]) remained her final pensionable pay as at 31 December 2018. It was still higher than her pensionable pay for the final year because she earned more OSPs in 2017 than in 2018.

34. Mrs Y consequently received: (a) a pension of £11,520.58 per annum and a lump sum of £34,561.73 from the Scheme on her retirement date of 31 December 2018.

35. So, she would have received an extra £3.05 of pension each year and £9.16 in tax free cash if she had retired on 31 August 2018. The potential shortfall in her benefits was minimal.

36. In May 2023, it received the following revised details about Mrs Y's basic pay and OSPs from her employer:

    "For the period 1/9/17 to 31/3/18

    Basic Pay in the period should be 617.80 hours at hourly rate 14.8484 = £9,173.34

[7] Details of SPPA's calculations may be found in the Appendix 2.

[8] As her second last year's pensionable pay had a deemed date of 1 January 2018, it attracted a "pension increase" of 1.0075 at the benefit calculation date of 31 December 2018.

OSPs total = £2,931.07

For the period 1/4/18 to 31/8/18

Basic Pay in the period should be 433.50 hours at hourly rate 15.2939 = £6,629.91

OSPs total = £1,766.45

I think the figure for OSP of £3,270 is made up of enhancements paid from September to March however my figures have the enhancements paid from October to April (as the enhancements are paid a month in arrears). I also think the £3,270 figure has 9.5 hours extra basic (£141.06) which I have included in the basic hours of 617.80 above."

37. Mrs Y is now disputing the final pensionable pay figure which it used to calculate the hypothetical benefits available to her from the Scheme as at 31 August 2018.

38. The figures on Mrs Y's payslips are not that "far away" from the revised salary data which it received from her employer. It appreciates why Mrs Y would want to fully reconcile these figures. However, given the "small margins" involved, it considers that the final pensionable pay figure as at 31 August 2018 of £38,207.04 per annum is acceptable and it has calculated her hypothetical financial loss could be £70.16 (that is, 3.05 x 20[9] + 9.16).

39. It does not supply members with Scheme documents detailing how final pensionable pay is calculated. However, final pensionable pay is defined in the Scheme Regulations which are publicly available on www.legislation.gov.uk

40. It provides members with accessible links to the Scheme Regulations and also relevant guidance/information about the Scheme on its website.

Conclusions

41. The Scheme is a statutory scheme made under the Superannuation Act 1972. The Scheme Regulations govern payment of benefits from this scheme. In its capacity as the administrator of the Scheme, SPPA must act in accordance with these regulations and within the framework of the law.

42. SPPA consequently had to follow any procedure laid down in the provisions of the Scheme Regulations, as qualified by overriding pension legislation, when calculating the retirement benefits available to Mrs Y from the Scheme.

43. "Final year's pensionable pay" is defined in Regulation C1(12) of the Scheme Regulations. It is generally the pensionable pay in the last year of pensionable employment ending on the date the member ceased to be in such employment.

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[9] SPPA has assumed that "the average pension is paid for 20 years" in its calculations. It also says that 20 "is the standard factor to calculate total pension fund value".

However, if pensionable pay was greater in either or both of the preceding two consecutive years then, it means pensionable pay in one of those two years.

44. Mrs Y contacted SPPA on 10 June 2014 to ask how her final pensionable pay in the Scheme was calculated. SPPA chose to paraphrase what Regulation C1(12) stipulated in its response to Mrs Y.

45. Having carefully examined SPPA's response, I do not consider that it was incorrect. However, I find that it was a little ambiguous and, without detailed knowledge of Regulation C1(12), open to interpretation in a way that was not its intended true meaning.

46. With the benefit of hindsight, it would clearly have been better if SPPA had replied by quoting regulation C1(12) of the Scheme Regulations in full to Mrs Y. By doing so, she would then have been left in no doubt about how "final year's pensionable pay" in the Scheme was defined.

47. Regrettably, Mrs Y misinterpreted the information supplied by SPPA to mean that her highest final pensionable pay could fall in any 365 day period in the last three years of her pensionable employment.

48. She contends that she had relied upon the information from SPPA to her financial detriment by not retiring earlier on 31 August 2018. According to her calculations, she has suffered a financial loss in the region £200 of annual pension and £600 of tax free lump sum as a result.

49. The basic principle for negligent misstatement is that a scheme is not bound to follow incorrect information. A member is only entitled to receive the benefits provided for under the scheme rules, that is, those based on correct information accurately reflecting the scheme rules.

50. Broadly, I will provide redress if it can be shown that financial loss or non-financial injustice has flowed from incorrect information given. For example, the member may have taken a decision in the expectation of receiving the higher benefits which they would not otherwise have done. I will also consider whether it is more likely than not that a member relied on the incorrect information to their detriment and that it was reasonable for them to do so.

51. A complaint of negligent misstatement must, however, be based upon an inaccurate statement which is clear and unequivocal.

52. Given my findings above, I do not consider that there has been any negligent misstatement by SPPA. The information which SPPA supplied Mrs Y in June 2014 was not incorrect, but it could have been expressed more clearly.

53. It would have been helpful to Mrs Y if SPPA had quoted regulation C1(12) of the Scheme Regulations in full, but I consider its decision not to do so, also does not represent maladministration on its part.

54. The Scheme Regulations were readily available to Mrs Y on request from SPPA, or on its website. It had consequently been open to her to research the definition of final pensionable pay in more detail, in order to satisfy herself that her financial decisions were appropriate to her circumstances.

55. By doing so, it would have become evident to Mrs Y much earlier that she had misunderstood how final pensionable pay in the Scheme is calculated and she would not now be in the unfortunate situation which she finds herself.

56. As the evidence does not support a finding of maladministration by SPPA in the way it responded to Mrs Y's enquiry on 10 June 2014, it follows that it did not cause her to suffer any actual financial loss by retiring on 31 December 2018. To that extent, I do not make a finding of what the "correct" loss suffered by Mrs Y might be.

57. What Mrs Y has suffered is a loss of expectation based on a misunderstanding of how the retirement benefits available from the Scheme are calculated. She expected to receive higher benefits from the Scheme but was not entitled to them.

58. SPPA could only pay her the correct benefits from the Scheme calculated in accordance with the Scheme Regulations which is what has happened.

59. While I sympathise with Mrs Y's circumstances, I do not uphold her complaint.

Dominic Harris

Pensions Ombudsman
25 August 2023

Appendix 1

NHS Superannuation Scheme (Scotland) Regulations 2011

“R2 Nurses, physiotherapists, midwives and health visitors

(3) Where this regulation applies-

(a) regulation E1 (normal retirement pension) will apply to the member as if the references, in paragraph (1) of that regulation, to age 60 were a reference to age 55;

(b) if the member leaves NHS employment because of redundancy but without becoming entitled to an immediate pension under regulation E6 (early retirement pension (redundancy etc.)) or regulation E7 (Redundancy etc. new starters and post transition), regulation E12 (preserved pension) will apply as if the references in that regulation to age 60 were references to age 55.

E1 Normal retirement pension

(1) A member who retires from pensionable employment at any time on or after attaining age 60 is entitled to a pension under this regulation at a yearly rate of 1/80th of final year's pensionable pay for each complete year of pensionable service, plus the relevant daily proportion of that rate for each additional day of such service.

C1 Meaning of "pensionable pay”

(12) Subject to paragraph (13), 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, or dies, whichever occurs first, except-

(b) if pensionable pay was greater in either or both of the two consecutive years immediately preceding the last year, "final year's pensionable pay" means pensionable pay in respect of the year immediately preceding the last year or, if greater, pensionable pay in respect of the first of those two consecutive years.”

Appendix 2

SPPA's calculations of the retirement benefits potentially available to Mrs Y from the Scheme if she had retired early on 31 August 2018

"Potential salary for the period 01/09/2017 – 31/08/2018

01/09/2017 – 31/03/2018

WTE salary rate £29,034.00

Number of days in period = 212 days

WTE earnings for period = £29,034.00/365 x 212 = £16,863.58

01/04/2018 – 31/08/2018

WTE salary rate £29,905.00

Number of days in period = 153 days

WTE earnings for period = £29,905.00/365 x 153 = £12,535.52

OSP's are uprated by dividing by number of part time hours worked in period and multiplying by standard whole time hours in period.

01/09/2017 – 31/03/2018

£2,931.16/605.72 x 1,135.71 = £5,495.85

01/04/2018 – 31/08/2018

£1,766.44/437.14 x 819.64 = £3,312.09

Total potential pensionable pay for period 01/09/2017 – 31/08/2018

£16,863.58 + £12,535.52 + £5,495.85 + £3,312.09 = £38,207.04

Potential pension calculation based on retirement date 31/08/2018

1995 section of scheme – 80^{th} accrual rate

Service accrued to 31/08/2018 = 24 years 47 days = 24.1288

Pensionable pay as above £38,207.04

Pension = 24.1288 x £38,207.04 / 80 = £11,523.63

Lump sum = 3 x pension = £34,570.89"