

## Ombudsman's Determination

Applicant	Mrs S
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondents	East Sussex Healthcare Trust ( <b>ESHT</b> ) NHS Pensions

## Outcome

1. Mrs S' complaint is upheld and to put matters right NHS Pensions shall pay Mrs S £2,000 for the significant distress and inconvenience caused, plus £1,132.71 interest in respect of the return of her pension contributions, and issue any necessary forms to Mrs S to enable her to claim her retirement benefits from age 60. ESHT should refund to Mrs S her pension contributions from 29 September 2001 to 31 March 2015.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs S' complaint is that when she was put back into the Scheme in 2001 she was not informed that she was ineligible to rejoin.

## The Pensions Ombudsman's position on the provision of incorrect information

4. The basic principle for negligent misstatement (in the absence of any additional legal claim) is that a scheme is not bound to follow incorrect information: for example retirement quotes, transfer values or early retirement. A member is only entitled to receive the benefits in accordance with the scheme rules: that is those based on correct information accurately reflecting the scheme rules.
5. Broadly, the Ombudsman 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, such as retiring early. The Ombudsman 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.

An example of this is where the member had already decided to take early retirement before receiving the incorrect information. In this case it is unlikely that any claim for financial loss would be upheld on that basis alone.

6. The above sets out the Ombudsman's views very generally on the application of, negligent misstatement. It is for guidance only; each case will turn on its own facts.

### **Background information, including submissions from the parties**

7. Mrs S was employed by ESHT as a part-time Catering Assistant.
8. In September 1996 the catering service was outsourced and Mrs S was TUPE'd to a non-NHS provider and she became a deferred member of the Scheme. NHS Pensions wrote to Mrs S on 4 November 1997 informing her that her preserved benefits would normally be payable from age 60.
9. On 29 June 2001 the outsourcing was reversed and Mrs S was TUPE'd back to Hastings and Rother NHS Trust (now ESHT) and rejoined the Scheme – the Trust submitted a joiner's form which NHS Pensions processed.
10. However, as Mrs S was then over the age of 60 and her preserved benefits were payable, she was ineligible to re-join.
11. The NHS Pensions Scheme Regulations 1995 apply (**the 1995 Regulations**). At the date Mrs S rejoined the Scheme, as relevant:-
  - Regulation B3, 'Restriction on further participation in the scheme', said:

“ ...

(2) Persons whose pensions under the scheme are payable may not contribute to or accrue further pensionable service under the scheme, except in the cases referred to in regulation E2(11) (further pensionable employment under the age of 50 after early retirement pension becomes payable on grounds of ill-health) and regulation R4(6) (further pensionable employment where early retirement pension becomes payable in respect of concurrent employment on grounds of redundancy).”
  - Regulation L1, 'Preserved pension', said:

“(1)...a member who leaves pensionable employment before age 60 without becoming entitled to a pension under any of regulations E1 to E5 shall be entitled to receive a pension and retirement lump sum under this regulation from age 60 if-

(a) the member leaves with at least 2 years' qualifying service, ...”
12. In December 2001 NHS Pensions sent Mrs S a form to claim her preserved benefits from age 60. NHS Pensions did not receive a response from Mrs S and did not chase the matter.

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13. Mrs S continued to be treated as a re-admitted member. She was subsequently sent: in December 2008 a retirement benefit quotation by ESHT; in June 2010 a Choice Statement by NHS Pensions, to remain under the 1995 Section or transfer to the 2008 Section of the Scheme; and in July 2013 a Member's Statement and a retirement benefit quotation by ESHT.

14. For the period in question the contribution rates of pensionable salary were:

	29/09/01-31/3/13	1/4/13-31/3/14	1/4/14-31/3/15
Mrs Apps	5%	5.3%	5.6%
ESHT	7%	14%	14%

15. In December 2013 NHS Pensions implemented system enhancements to identify ineligible joiners to the Scheme and commenced an audit of existing member records to validate and confirm correct eligibility. The following August NHS Pensions notified Mrs S that she was ineligible to re-join the Scheme and separately informed ESHT.

16. Subsequently Mrs S received a cheque from ESHT returning her contributions (from 29 September 2001 to 31 March 2015) and a cheque from NHS Pensions for £1,132.71 representing base rate interest on this sum. Mrs S chose not to cash either cheque.

17. As Mrs S was not in NHS employment when she reached age 60, on 27 January 2001, she is entitled to claim her deferred benefits back to that date. NHS Pensions has confirmed, in a letter to the Pensions Advisory Service dated 18 January 2016, that it will pay statutory interest on the lump sum and pension arrears calculated by reference to the base rates quoted by the Bank of England at the relevant times.

18. NHS Pensions has offered Mrs S £1,000 for the distress and inconvenience caused.

19. Mrs S' representative says:-

- Mrs S planned her retirement based on receiving 14 years pensionable service from September 2001, which roughly amounts to a yearly pension of £2,836 and a lump sum of £8,508.
- The return of Mrs S' pension contributions (less tax) plus NHS Pensions' compensation offer of £1,000 only equates to slightly higher than the lump sum she was expecting of around £8,508
- If Mrs S had been correctly stopped from paying contributions into the Scheme in 2001 she would have found an alternative pension scheme to cater for her needs.

20. ESHT say:-

- It could not have known that Mrs S had deferred benefits in the Scheme and had reached pensionable age during her deferment when she returned to NHS employment.
- With effect from December 2013 NHS Pensions enhanced its system to identify joiners who were non-eligible Scheme members.
- Prior to then there was no system for NHS Pensions to inform Employers when new joiners had deferred pension rights as in the case of Mrs S.
- NHS Pensions has accepted liability for the error/system failure.

21. NHS Pensions say:-

- Under the Scheme's Regulations Mrs S was ineligible to re-join the Scheme in September 2001, as she had reached retirement age in January 2001 and was not in NHS employment when her deferred benefits became payable.
- The administration of the Scheme is a shared responsibility between it and the NHS Employer.
- ESHT should have been aware of the Scheme Regulations and checked Mrs S' eligibility for membership.
- It should have identified that Mrs S was not eligible to re-join "but unfortunately its systems and processes were not sufficiently robust to do so at that time".
- It considers its offer of £1,000 for the distress and inconvenience caused to Mrs S to be reasonable in the circumstances.

## **Adjudicator's Opinion**

22. Mrs S' complaint was considered by one of our Adjudicators who concluded that further action was required by NHS Pensions and ESHT. The Adjudicator's findings are summarised briefly below:

- Regulation L1 applies. As a deferred member Mrs S is entitled to her pension benefits from age 60. As her benefits were payable from 27 June 2001, the 1995 Regulations did not allow her to re-join the Scheme in September 2001.
- There was a 5 year gap between Mrs S' TUPE to a non-NHS employer and return to ESHT. Understandably ESHT would not have necessarily known that Mrs S had deferred benefits in the Scheme. The joiner questionnaire to assist NHS employers in determining an employee's eligibility to join the Scheme was not in place when Mrs S rejoined the Scheme.
- NHS Pensions had conceded that it should have identified that Mrs S was not eligible to re-join the Scheme when it received the joiner form from ESHT. NHS Pensions acknowledge that at the time its systems were not robust enough. This amounts to maladministration by NHS Pensions.
- Mrs S is seeking pension benefits equivalent to those she would have accrued if she had been eligible to re-join. But as Mrs S was ineligible to re-join it follows that she is not entitled to these benefits.

- Mrs S' representative says if Mrs S had been correctly stopped from paying contributions into the Scheme in 2001 she would have found an alternative pension scheme to cater for her needs. But, on the balance of probabilities, that was unlikely. To secure equivalent benefits would have cost Mrs S considerably more than her own contributions to the Scheme, and likely more than the combined employer/employee contributions that were made. While there would have been some return on her contributions in a personal pension arrangement, it is not possible to say what that might have been. However, she is entitled to interest on the return of her Scheme contributions which provides redress for the possible loss of return on an alternative pension investment.
- NHS Pensions should pay Mrs S £2,000 for distress and inconvenience. It had taken 13 years to identify its maladministration and Mrs S had incurred a significant loss of expectation, which inevitably had caused her considerable upset.
- In addition, Mrs S is entitled to:-
  - The refund of her pension contributions (less 20% tax) after she rejoined the Scheme plus interest. ESHT and NHS Pensions previously issued the respective cheques to Mrs S which she chose not to cash. Both cheques should be reissued to Mrs S.
  - Retirement benefits from age 60. NHS Pensions should pay these with base rate interest from the due date to the date of payment on the lump sum and pension arrears.

23. Mrs S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mrs S for completeness.

### **Ombudsman's decision**

24. Mrs S says she would have found an alternative pension arrangement if she had been told in 2001 that she could not re-join the Scheme. But the cost of securing equivalent benefits to the Scheme in a personal pension arrangement is likely to have been more than the combined percentage of Mrs S' pensionable pay that Mrs S and ESHT paid to the Scheme after she rejoined it. I therefore agree with the Adjudicator that it is unlikely that Mrs S would have made the necessary outlay to secure equivalent benefits to the Scheme in a personal pension arrangement for the period in question.
25. In the circumstances the return of Mrs S' pension contributions (less 20% tax) by ESHT and the payment of interest on this sum by NHS Pensions is appropriate.
26. Additionally Mrs S is entitled to claim her retirement benefits from age 60. I understand that NHS Pensions has recently sent Mrs S a retirement application form for her completion and return.

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27. Turning now to non-financial loss. NHS Pensions has queried the Adjudicator's recommendation that it pay Mrs S £2,000 on the grounds that it is higher than it was directed to pay in the case of Mrs N (PO-8768).
28. While awards for distress and inconvenience typically start at £500 and go up to £1,000, higher awards are occasionally appropriate depending upon the maladministration and the degree of distress and inconvenience suffered. Each case is considered taking into account what happened. In this case it took NHS Pensions 13 years to inform Mrs S that she was ineligible to re-join the Scheme and she incurred a considerable loss of expectation.
29. In all the circumstances this has caused Mrs S exceptional distress and inconvenience and merits a payment by NHS Pensions to Mrs S, in recognition of this, of £2,000.
30. Therefore, I uphold Mrs S' complaint.

## **Directions**

31. To put matters right within 21 days of the date of this Determination:-
  - NHS Pensions shall pay Mrs S £2,000 for distress and inconvenience, plus £1,132.71 interest.
  - ESHT shall refund to Mrs S her pension contributions from 29 September 2001 to 31 March 2015.
32. Within 28 days of NHS Pensions receiving Mrs S' completed retirement form, it shall pay Mrs S her retirement benefits with base rate interest added from the due date to the date of payment on the pension commencement lump sum and pension arrears.

**Anthony Arter**

Pensions Ombudsman  
5 May 2017