

Ombudsman's Determination

Applicant	Mrs H
Scheme	NHS Pension Scheme (the Scheme)
Respondents	Ashford and St Peter's Hospitals (ASPH) NHS Business Services Authority (NHS BSA)

Outcome

1. Mrs H's complaint against ASPH and NHS BSA is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) ASPH shall pay Mrs H £2,000 and NHS BSA shall pay her £500 for the distress and inconvenience caused to her by its mishandling of her case.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs H's complaint is that, as a result of the incorrect information she received from ASPH, she lost her 'special class status' (**SCS**). She therefore is unable to retire at age 55 with unreduced pension benefits.
4. Mrs H has also complained that NHS BSA declined her request for Voluntary Protection of Pay (**VPP**) on the grounds that no evidence had been provided that confirmed both employers (ASPH and South Warwickshire Foundation Trust) made formal step-down arrangements for her in October 2012.

Background information, including submissions from the parties

5. On 8 May 2006, Mrs H was employed at ASPH as a band 8a physiotherapist.
6. In May 2011, Mrs H said she became aware that she could retire 3 years later at 55, with SCS. Mrs H said she started a series of face to face discussions with Pauline Sandu, Pensions Team leader at ASPH, about the options available to her were she to relocate and the impact any move would have on her pension.
7. In January 2012, Mrs H and her husband moved to a new house. Mrs H says she could not find a suitable band 8a job she liked so continued to work at APSPH in her

band 8a role, living with her mother during the week and returning to her new home at the weekend.

8. ASPH say in June 2012, Mrs H met with Pauline Sandu to discuss her options if she were to change jobs as she and her husband were planning to relocate to be closer to her mother in law who was in poor health. ASPH provided her with information about her voluntary protection including factsheets. ASPH has confirmed to this office that Mrs H was given information regarding her options; protection of pension, retirement (as she was within 2 years of retirement age at 55 in the 1995 section and would be able to rely on the best of her last 3 years); and opting out for 12 months which would have protected her SCS and enabled her to re-join the Scheme after 12 months (which would have preserved her band 8a salary). Mrs H has said she was told by ASPH that she could 'freeze' her pension once in her working life which would protect her pension earnings at the band 8a salary. Mrs H has further said she was also told should she not be able to find work at band 8a, she could apply for band 7 posts and if she decided to stay in the band 7 post for longer than 3 years she would not miss out on the pension accrued at her band 8a best salary level.
9. On 12 September 2012, Mrs H submitted a request to ASPH for protection of pay around the same time she took a Band 7 post. As she was moving from ASPH to another Trust she submitted this in advance of waiting for a 12-month reduced salary period.
10. In October 2012, Mrs H accepted a band 7 role with South Warwickshire NHS Trust (the Trust)
11. In June 2014, ASPH submitted the employer form SMR9EA to NHS BSA.
12. On 30 September 2014, Mrs H reached her SCS retirement age of 55, but carried on working.
13. In August 2016, Mrs H was told by NHS BSA that her pension had not been frozen and the paperwork completed by the pensions office at ASPH was not received in a timely manner but was in fact received 2 years after she had left ASPH.
14. In September 2016, Mrs H enquired about her final pension and noticed that the pension quotation she received did not appear to have been calculated using the frozen pensionable salary she was expecting.
15. On 5 October 2016, NHS BSA wrote to ASPH apologising that the request for VPP had been overlooked due to it being logged to a service team and it had only just been made aware of this request.
16. In January 2017, NHS BSA informed Mrs H that she was not entitled to VPP and referred to information that it said both the Trust and Mrs H should have been aware of. However, the factsheet NHS BSA referred to was published after Mrs H left ASPH.

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17. On 12 February 2017, Mrs H appealed the decision made by NHS BSA. Her appeal was dealt with by NHS BSA under stage 1 of the Scheme's internal dispute resolution procedure (**IDRP**).
18. On 6 April 2017, NHS BSA issued its stage 1 IDRP response. The decision maker said as it was Mrs H's choice to move to a lower paid post in 2012, the "step down" provision was most appropriate to her circumstances. A step down arrangement is open to members of the 1995 Section of the Scheme only and allows members who choose to "step down" to a less demanding role to apply to protect their pay. However, a step down arrangement is agreed between a member and their employer as a means of retaining the skills and experience the member has acquired during their NHS career. NHS BSA was prepared to consider the application provided both employers provide information about the negotiations that took place prior to the member moving to the lower paid post. As no evidence had been provided to show that negotiations took place between employer's priors to her taking up a lower paying job, NHS BSA was unable to uphold her complaint.
19. On 6 April 2017, Mrs H appealed under stage 2 of the IDRP.
20. On 5 September 2017, NHS BSA issued its stage 2 IDRP response to Mrs H. The decision maker declined Mrs Y's request for VPP because neither employer had provided information to indicate that a step-down arrangement was agreed between them in October 2012 as is required for VPP. It concluded that Mrs Y's change of employment on 1 October 2012 did not meet the eligibility criteria for VPP because it determined the change appeared to be a voluntary lifestyle change and neither employer completed the necessary steps for VPP to be granted. As such NHS BSA said it was unable to agree that she had entitlement to VPP.
21. On 30 November 2017, ASPH wrote to NHS BSA confirming that, had the application been received within a more reasonable timescale, Mrs H would have had other options open to her to protect her pension. ASPH asked NHS BSA to consider if it could offer Mrs H any options that would put her in a better position and go some way to compensate her for the incorrect information given by ASPH and NHS BSA not responding to her application for nearly 3 years. ASPH asked if NHS BSA could either (a) grant the retrospective protection;(b) permit Mrs H to retrospectively opt out for a year; or (c) any other option NHS BSA suggests that would redress the shortfall.
22. On 12 January 2018, ASPH emailed Mrs H confirming that it had not been able to influence NHS BSA's decision.

Adjudicator's Opinion

23. Mrs H's complaint was considered by one of our Adjudicators who concluded that further action was required by the respondents. The Adjudicator's findings are summarised below:-

- A member is only entitled to receive the benefits provided for under the scheme rules; those based on correct information accurately reflecting the scheme rules.
- 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 consider whether it was 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.
- Mrs H maintains that she had contributed to her pension whilst employed as a band 8a at ASPH at a higher rate due to her higher salary and as such her pension should be based on her band 8 salary. Mrs H also said that had she known the correct position from the outset she would not have changed employers and she would have retired at age 55 as her pension was important to her.
- The Scheme's position is that Mrs H is not eligible to receive incorrect benefits she is only entitled to receive her correct level of benefits as prescribed by the Scheme Regulations. The Adjudicator did not agree that Mrs H suffered a financial loss because she did not meet the criteria to protect her pay under the Regulations. Therefore, she was not entitled to the pension or cash based on her band 8a salary when she undertook the role on a band 7 salary.
- If a financial loss had occurred an Ombudsman would expect Mrs H to attempt to mitigate her loss. Although it is not possible to say with certainty what she would have done if she had been provided with the correct information, the Adjudicator was not convinced based on the evidence that Mrs H had taken sufficient steps to receive confirmation from NHS BSA or ASPH that her pay had been protected, nor did she chase up such information within that period.
- The Adjudicator acknowledged that ASPH has made mistakes and that it has accepted that it incorrectly interpreted the Regulations and was not aware that it needed to negotiate with Mrs H's new employing authority for the protected pay to be approved. Nevertheless, NHS BSA has said that the reasons for the reduction in her pay do not meet the requirements for her pay to have been protected, so even if ASPH had negotiated with Mrs H's new employing authority it's unlikely that NHS BSA would have approved the application.
- The Adjudicator was of the view, that Mrs H suffered a loss of expectation, because of ASPH's error, in that she understood that she was entitled to receive a higher benefit than she was entitled to. This is considered non-financial injustice, rather than a financial loss. The Pensions Ombudsman's approach to non-financial injustice is that no award will be made unless the injustice is significant. On the other hand, if the non-financial injustice is significant then awards should properly reflect this. ASPH has offered Mrs H £1,000 in recognition of the non-financial injustice she has suffered, which the Adjudicator believed to be reasonable.

- Regarding Mrs H's pension contributions, NHS BSA has confirmed that no contributions have been returned to her. The Adjudicator appreciated that her current benefit entitlement is not based on her higher salary in her current employment. However, any Scheme benefits that may have become payable to her during the period she was in receipt of band 8a pay (such as ill-health retirement, benefits payable upon death or entitlement to deferred benefits) would have been based on that higher salary.

24. Mrs H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs H provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs H for completeness.

Ombudsman's decision

25. Mrs H says that had she known the correct position from the outset, she would not have moved to a new house and would have continued employment at ASPH until age 55, as her pension was so important to her having paid into it for so long. She further said based on the advice she was given by ASPH, she decided to put her house on the market and move to the midlands a year later.
26. ASPH has accepted that it incorrectly understood the Scheme's guidance to mean that protection could be transferred to another employer and that it would still apply if the employee moved to a lower banded post. It has further accepted that it interpreted the Scheme rules incorrectly and had viewed the NHS as one employer, not different employers and only became aware of this in late 2014, as such giving incorrect instructions to Mrs H.
27. ASPH has said due to excessive volumes of work, there was a delay in sending the relevant forms to NHS BSA. However, it says that when the forms arrived at the NHS Pensions Agency, they were filed and no action was taken and had it been informed in 2014 that the request for VPP would be denied due to incorrect paperwork being submitted, it could have suggested other options to Mrs H.
28. There is no dispute that maladministration occurred on ASPH's part when it gave Mrs H incorrect information and I have a great deal of sympathy for the frustration she has experienced. There were a number of errors made by ASPH, not just in respect of misinterpreting the requirements of the VPP and giving incorrect instructions to Mrs H, but also the delay in sending the relevant forms to NHS BSA. In addition, NHS BSA's failure to take any action when it received the forms in question, amounts to maladministration. However, for the reasons set out below I do not find that the incorrect information has resulted in Mrs H incurring a financial loss.
29. To conclude that a complainant has suffered direct financial loss because of a misstatement made to them I must be satisfied, on the balance of probabilities, that they reasonably relied upon the misstatement when making their decision and, had

they know the correct state of affairs, they would have acted differently. The burden of proof is on the complainant.

30. In this case I do not consider that Mrs H has demonstrated, on the balance of probability, that she would have made a different decision to the one that she made had she been given the correct information. As stated by the Adjudicator in her Opinion, NHS BSA has confirmed that the reasons for the reduction in Mrs H's pay meant that she did not meet the requirements for her pay to be protected. Therefore, even had ASPH negotiated with Mrs H's new employer it is unlikely that NHS BSA would have approved the application.
31. Whilst I sympathise with Mrs H and can understand why she would have thought that she could freeze her pension, I agree with the Adjudicator's Opinion. For the period Mrs H was contributing to the Scheme under her band 8a pay, any benefits she potentially could have received would have been based on her higher salary. As such, the contributions were correctly collected by Mrs H's employer and there are no provisions within the Scheme Regulations for the contributions to be returned. I cannot see any reason to conclude that she would have acted differently if she had been made aware of the correct position in June 2012.
32. I appreciate that NHS BSA overlooked Mrs H's SMR9 pay protection form, however it was received after the deadline had expired for applying for pay protection. Further, Mrs H did not meet the pay protection criteria due to the absence of any evidence showing that negotiations took place between employers prior to her taking up a lower paid post and the reasons behind the move did not meet the criteria for VPP. Therefore, I do not find that NHS BSA's inaction in this regard has led to any financial injustice.
33. Mrs H has argued that as she believed the information she received from ASPH was correct she took a band 7 post in a new location from 1 October 2012, and she requested VPP at that time. However, Mrs H changed her NHS employment due to her relocation and this was a voluntary lifestyle choice she had made. I appreciate that she has said she took the band 7 position because no band 8a posts were available at her new location and had she known it would not be frozen she would have continued to commute. I agree with the Adjudicator that Mrs H was not provided with confirmation that her VPP request was successful and, therefore, given the importance of this and the reliance Mrs H said that she placed on VPP for her retirement planning, I consider that it is reasonable to expect that she should have chased the outcome at an earlier time. Therefore, taking into consideration all the factors I find that she still would have made the decision to take the band 7 position. Therefore, I find that NHS BSA's decision that her change of employment does not meet the eligibility for criteria for VPP was reasonable.
34. I can see from the evidence that Mrs H's benefits in payment are correctly based upon the highest of her last three years pensionable earnings to 31 January 2018. She is therefore in receipt of her correct Scheme benefits.

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35. Given the considerable delays and the way in which the matter has been handled by NHS BSA on receipt of the SMR9 EA form, I find that an award of £500 is merited in respect of non-financial loss, due to the significant error and delay. ASPH sent NHS BSA the SMR9 form in June 2014, however it was not until 5 October 2016 that NHS BSA took any action. NHS BSA has apologised for the delay stating the matter was overlooked. However, had NHS BSA informed ASPH of the correct VPP rules earlier it may have resulted in Mrs H taking other available options.
36. ASPH also caused a considerable delay in sending the SMR9 form to NHS BSA. Mrs H sent it to ASPH in September 2012, but it was not until June 2014 that ASPH sent the form to NHS BSA. ASPH has offered Mrs H £1,000 in recognition of the non-financial injustice she has suffered which takes into consideration the incorrect information they gave to Mrs H as well as the unnecessary delay. There is no dispute that receiving the incorrect information would have caused Mrs H severe distress and inconvenience. So I have increased the award payable by ASPH for its maladministration to £2,000.
37. Therefore, I partially uphold Mrs H's complaint.

Directions

38. Within 21 days of the date of this Determination:-

- ASPH shall pay Mrs H £2,000 for the severe distress and inconvenience caused to her by its maladministration.
- NHS BSA shall pay Mrs H £500 for the significant distress and inconvenience additionally caused to Mrs H by its maladministration.

Anthony Arter

Pensions Ombudsman
30 January 2019