

## Ombudsman's Determination

Applicant: Mrs R

Scheme: NHS Injury Benefit Scheme

Respondent: NHS Business Services Authority (**NHS BSA**)

## Outcome

1. I do not uphold Mrs R's complaint and no further action is required by NHS BSA.

## Complaint summary

2. Mrs R has complained that NHS BSA is seeking to recover £20,069.74 which it says has been overpaid to her.

## Background information, including submissions from the parties

### Background

3. Mrs R was employed by the NHS as a midwife until August 1997. She retired on the grounds of ill health. Mrs R was also awarded an injury benefit.
4. The relevant regulations are The National Health Service (Injury Benefits) Regulations 1995 (SI1995/866) (as amended) (the **1995 Regulations**). In particular, Regulation 4 "Scale of benefits" which provides:
  - "(1) Benefits in accordance with this regulation shall be payable by the Secretary of State to any person to whom regulation 3(1) applies whose earning ability is permanently reduced by more than 10 per cent by reason of the injury or disease and who makes a claim in accordance with regulation 18A.
  - (2) Where a person to whom regulation 3(1) applies ceases to be employed before 31st March 2018 as such a person by reason of the injury or disease and no allowance or lump sum, other than an allowance under paragraph (5) or (5A), has been paid under these Regulations in consequence of the injury or disease, there shall be payable, from the date of cessation of employment, an annual allowance of the amount, if any, which when added to the value,

expressed as an annual amount, of any of the pensions and benefits specified in paragraph (6) will provide an income of the percentage of his average remuneration shown in whichever column of the table hereunder is appropriate ...

(6) The pensions and benefits specified in this paragraph are -

(a) any pension payable to the person under a relevant pension scheme, ...

(b) any of the following benefits, at the rates in operation at the date on which the employment ceased ... which are payable to the person -

(i) disablement pension or gratuity payable under section 103 of the Social Security Contributions and Benefits Act 1992 or so much of any such pension or gratuity as relates to the injury or disease (hereinafter referred to as “the relevant part”), together with -

(a) any increase in such pension payable by way of unemployability supplement ...; and

(b) any increase in such pension payable ... in respect of a dependant or so much of any such increase as is proportionate to the relevant part of the said pension;

but excluding any increase under sections 104 (increase where constant attendance is needed) or 105 (increase for exceptionally severe disablement) of that Act;

(ii) incapacity benefit payable under section 30A of the Social Security Contributions and Benefits Act 1992 in respect of the injury or disease ...;

(iii) severe disablement allowance payable under section 68 of the Social Security Contributions and Benefits Act 1992 in respect of the injury or disease ...;

(iv) reduced earnings allowance payable under paragraph 11 of Part IV of Schedule 7 to the Social Security Contributions and Benefits Act 1992 in respect of the injury or disease;

(v) retirement allowance payable under paragraph 13 of Part V of Schedule 7 to that Act in respect of the injury or disease.

(vi) employment and support allowance payable under section 1(2)(a) and section 1B of the Welfare Reform Act 2007, in respect of the injury or disease, ...”

5. Mrs R’s injury benefit ceased in August 1997 because her income by way of Incapacity Benefit, Industrial Injury Disablement Benefit (**IIDB**) and her NHS Pension

Scheme pension exceeded the relevant percentage of her average remuneration.

Mrs R's injury benefit became payable again with effect from March 1999 when there was a change to her IIDB. Mrs R's IIDB ceased in 2000 and her injury benefit was increased with effect from March 2000.

6. In November 2001, Mrs R received a damages settlement and her injury benefit ceased with effect from October 2000.
7. Mrs R's Incapacity Benefit ceased in October 2001. Her injury benefit was reviewed in March 2002 as a result of this. NHS BSA and Mrs R also reached an agreement for her to repay an overpayment, which had arisen as a result of her damages settlement, by deductions from her injury benefit.
8. In March 2003, Mrs R returned to work for the NHS.
9. In 2007, Mrs R was informed that she had been underpaid injury benefit by £482.89.
10. Mrs R retired for a second time on the grounds of ill health in November 2013.
11. In 2017, NHS BSA undertook a data-matching exercise with the Department for Work and Pensions (**DWP**) to identify recipients of an NHS injury benefit who were also in receipt of state benefits. This exercise identified Mrs R as a recipient of IIDB and Employment and Support Allowance (**ESA**).
12. NHS BSA requested information about Mrs R's IIDB and ESA from the DWP. It also wrote to Mrs R, on 23 May 2017, requesting information about her ESA. In response, Mrs R said she had not received Incapacity Benefit since 2001. NHS BSA followed up its request for information about Mrs R's ESA. On 31 August 2017, Mrs R responded saying that she did not have any information about when she started to receive "the benefit" or how much she was entitled to.
13. In December 2017, NHS BSA notified Mrs R that her injury benefit had been revised on the basis that she had been in receipt of IIDB continuously since leaving her NHS employment and in receipt of ESA since April 2013. NHS BSA has explained that it subsequently discovered that the information it had received from the DWP relating to Mrs R's IIDB was incorrect and she had not been in receipt of this benefit continuously. It issued a revised injury benefit calculation in March 2018.
14. NHS BSA has also explained that its paying agent calculates any overpayments of injury benefits and this can take several weeks. It has explained that, in Mrs R's case, it was notified that the overpayment amounted to £23,868.48. NHS BSA says it then considered whether, in line with Department of Health guidelines, it could write off that part of the overpayment which related to ESA paid prior to 1 May 2014.
15. On 24 October 2018, NHS BSA notified Mrs R that an overpayment of £23,868.48 had occurred and that £3,798.76 of this amount had been written off. It was seeking to recover the remaining £20,069.72 (sic). Mrs R submitted an appeal under the Scheme's internal dispute resolution procedure (**IDRP**).

16. NHS BSA issued a Stage One IDRP decision on 21 January 2019. It said:-

- Any decisions regarding NHS injury benefits were made in line with the 1995 Regulations.
- It had been acknowledged that Mrs R had suffered a permanent loss of earnings ability of between 11 and 25% as a result of an injury which was wholly or mainly attributable to her NHS employment.
- The 1995 Regulations provided that an injury benefit was payable when the person's income, by way of certain pensions and DWP benefits, was less than the amount determined under the 1995 Regulations.
- It was required to review an injury benefit whenever a relevant benefit started or stopped, but not when it increased or decreased.
- The 1995 Regulations required it to take IIDB and ESA into account. There was no discretion.
- It accepted Mrs R's statement that she had not wilfully done anything dishonest and had considered the other issues she had raised. It had also considered guidance issued by HM Treasury on how to deal with overpayments. The guidelines required it to consider a person's ability to repay an overpayment without causing financial hardship.
- £3,798.76 had already been written off and it could see no reason to write off any further amount.
- It acknowledged that there had been a delay from the initial revision of Mrs R's benefit to notifying her of the overpayment. It was reliant on the DWP to provide certain information and it was satisfied that it had done all it could to obtain this information. There was a further delay whilst it considered writing off part of the overpayment.
- Mrs R had said she had been advised by the DWP that she could claim ESA. At the time, its paying agent had sent out annual newsletters. These informed individuals in receipt of injury benefit about the DWP benefits which were accountable and the changes they should notify NHS BSA about. Therefore, Mrs R should have been aware that she needed to notify it that she had started to receive ESA.

17. NHS BSA said it would send Mrs R an income and expenditure form so that it could assess her ability to repay and arrange a suitable repayment plan.

18. On 31 January 2019, NHS BSA wrote to Mrs R notifying her that there had been a further overpayment of £3,049.74 arising out of her period of re-employment.

19. On 5 February 2019, Mrs R submitted an income and expenditure form and asked that her case be considered under Stage Two of the IDRP. Mrs R's income and

expenditure form indicated that she received a total monthly income of £1,141.31. This was made up of her NHS Pension Scheme pension (£226.09), her NHS injury benefit (£349.60), IIDB (£236.02), and Disability Living Allowance (£329.60). Mrs R listed monthly expenditure amounting to £1,107.60<sup>1</sup> per month. Her expenditure included monthly amounts for annual payments. With regard to savings and investments, Mrs R said she had £322.21 in her current account. She offered to repay the overpayment at the rate of £40 per month.

20. NHS BSA issued a Stage Two IDRP decision on 2 April 2019. It said:-

- It understood that the recovery of the overpayment was distressing and it did not wish to cause Mrs R any distress. However, it had a duty to act on HM Treasury's instructions to recover overpaid sums in order to protect the public purse. It did have discretion to arrange repayment plans which avoided hardship.
- It was unable to accept that Mrs R did not know that she should inform it that her DWP benefits had changed. There was evidence to show Mrs R was aware of this requirement and she had been reminded of this responsibility regularly. She had previously informed it when certain of her DWP benefits had stopped, but failed to inform it when other DWP benefits had started.
- It would write off the additional overpayment of £3,049.74 because it was not satisfied that Mrs R had been adequately informed about the need to inform NHS BSA when she returned to work. It could not see any evidence that Mrs R had informed it of her return to work, but it could only find one instance when it had reminded her to do so. It also did not consider that the requirement to notify NHS BSA of a return to work was adequately expressed on its website or in the annual newsletters.
- It was willing to accept a repayment of £10 per week. This rate of repayment was based upon Mrs R's statement of income and expenditure. It might wish to reconsider this plan within the next 12 months because of the length of time recovery would take.
- Acting on Mrs R's feedback, it had taken steps to ensure its website and annual newsletters fully explained the claimant's responsibility to inform it if they returned to work and to ensure members were aware of abatement.

21. Mrs R applied to The Pensions Ombudsman (**TPO**) on 12 April 2019. TPO received NHS BSA's response to Mrs R's complaint on 19 August 2019.

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<sup>1</sup> Mrs R entered a figure of £979.80 for her total expenditure.

### **Mrs R's position**

22. Mrs R submits:-

- She was unable to work for several years. In 2003, she informed DWP and NHS BSA that she was going to work for two days per week. She was told that her injury benefit would not be affected.
- She was medically retired in 2013. DWP informed her that she was entitled to ESA. She assumed this was because she had been medically retired.
- She has never done a dishonest or illegal thing in her life.
- She now has problems with alcohol and gambling and has sought help from Alcoholics Anonymous and Gamblers Anonymous. She suffers from panic attacks and depression.
- NHS BSA wrote off £3,049.74 on the grounds that she had not been adequately informed of her duty to inform it about her return to work; even though she had done so. She queries why NHS BSA cannot write off the £20,069.72 on the same grounds.

### **NHS BSA's position**

23. NHS BSA submits:-

- Regulation 4(6)(b)(vi) provides authority to deduct ESA from Mrs R's injury benefit.
- Regulation 13(1)(b) provides authority to review and adjust Mrs R's injury benefit.
- Mrs R has explained that she was contacted by the DWP about claiming ESA. However, she failed to notify NHS BSA when her accountable income changed.
- It acknowledges that Mrs R is an honest person and that recovery of the overpayment has had serious consequences for her. It does not wish to cause Mrs R any distress, but it has a duty to act on instructions provided by HM Treasury regarding the recovery of overpaid sums.
- There is evidence to show that Mrs R was aware of the requirement to inform it if any of the accountable DWP benefits commenced payment. It had reminded her of her responsibility regularly by way of letter and newsletters. Mrs R had previously informed it when accountable DWP benefits ceased. This indicates that she was aware of how her DWP benefits affected payment of her injury benefit.
- It is willing to accept repayment at the rate of £10 per week. It has made Mrs R aware that this is subject to review in the future because of the length of time it would take for recovery of the overpayment.

## Adjudicator's Opinion

24. Mrs R'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 below:-

- 24.1 NHS BSA was seeking to recover the sum of £20,069.72 which had been overpaid to Mrs R. The overpayment had arisen because NHS BSA had been unaware that Mrs R had been in receipt of ESA since April 2013 until it had received this information from the DWP in 2017. Mrs R had received more injury benefit than she was strictly entitled to under the 1995 Regulations. She would be required to repay the overpayment unless she could establish a defence against recovery.
- 24.2 The Adjudicator first considered whether the Limitation Act 1980 (**Limitation Act**) applied in Mrs R's case. The Limitation Act provides timescales by which an action must have commenced where there has been a breach of the law.
- 24.3 Action to recover an overpayment of pension benefits by repayment was considered to be a restitutionary claim. Essentially, NHS BSA was seeking a remedy to an "unjust enrichment" to Mrs R by asking her to reimburse the Scheme. These claims were historically based on forms of action found in contract law and so the Limitation Act could apply. Section 5 of the Limitation Act required a claim to be brought within six years of the cause of action (the overpayment). Ordinarily, NHS BSA would have six years from the date of each instalment of overpaid injury benefit in which to bring a claim for recovery. However, the Limitation Act also provided for the six year period to be extended where the overpayment was the consequence of a "mistake". The time for making a claim for restitution (recovery) would not start to run until NHS BSA had discovered the mistake or could, "with reasonable diligence"<sup>2</sup>, have discovered it.
- 24.4 In the Adjudicator's view, NHS BSA could not have known that Mrs R had begun to receive ESA until she notified it of this or until its data-matching exercise with the DWP. Mrs R did not notify NHS BSA about her ESA. Therefore, the earliest date on which it could have become aware of this would have been when it received the information from the DWP. Hence, time started to run, for the purposes of the Limitation Act, from 2017.
- 24.5 The Courts<sup>3</sup> had decided that the cut-off date for the purposes of the Limitation Act in cases before the Pensions Ombudsman was the date on which TPO received a response to a complaint. TPO had received NHS BSA's response to Mrs R's complaint on 19 August 2019. This was well

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<sup>2</sup> Section 32, Limitation Act 1980

<sup>3</sup> *Webber v Department for Education and another* [2016] EWHC 2519 (Ch)

within six years of 2017. NHS BSA was not restricted by the Limitation Act in seeking to recover the overpayment of £20,069.72 from Mrs R.

24.6 The Adjudicator then considered whether Mrs R could rely on one of the legal defences against the recovery of part or all of the overpayment.

24.7 The most common defence against recovery of an overpayment was referred to as “change of position”; that is, the recipient had changed their position such that it would be unjust or inequitable to require them to repay the overpayment either in whole or in part. To make out a change of position defence, certain conditions had to be satisfied. Briefly, the recipient of the overpayment had to be able to show, on the balance of probabilities, that:-

- Their circumstances had changed detrimentally and irreversibly;
- The change of circumstances had been caused by receipt of the overpayment; and
- They were not disqualified from relying on the defence; in particular, they had acted in good faith.

If all of the above conditions were satisfied, the Pensions Ombudsman could find that the recipient of an overpayment was not required to repay all or some of the money paid in error.

24.8 On the last point, a change of position defence was not open to someone who acted in bad faith. The Adjudicator said she wished to make it clear that bad faith, in this context, was not synonymous with dishonesty. It could simply mean that, if the recipient knew, or had grounds for suspecting, that a payment had been made in error but could not be sure, the defence was not open to them. This could include cases of sharp practice but it could also include cases where someone might suspect that there was something amiss and could have taken simple steps to check the position but did not do so. In other words, the recipient of money paid in error could not turn a blind eye to any doubt they might have.

24.9 The Adjudicator said she had absolutely no reason to doubt Mrs R’s honesty. And NHS BSA had been happy to accept that there had been no deliberate attempt on her part to claim benefits to which she was not entitled. However, Mrs R had, in the past, notified NHS BSA when her DWP benefits had stopped. She was, therefore, aware that receipt of state benefits could have an impact on her injury benefit. In fact, her injury benefit had been adjusted on a number of occasions to take account of her IIDB and Incapacity Benefit. Incapacity Benefit was replaced by ESA. When Mrs R began to receive ESA, she would have known that there was a possibility that this might impact on her injury benefit. She did not contact NHS BSA to check the position.



- 24.10 The Adjudicator noted that Mrs R had explained that she had spoken to the DWP about claiming ESA. However, the DWP would not have been in a position to discuss her NHS injury benefit. In order to clarify her position, Mrs R would have needed to contact NHS BSA; as she had done previously. Unfortunately for Mrs R, her failure to contact NHS BSA to clarify the position with regard to her receipt of ESA meant that she could not now rely on a change of position defence to the recovery of the overpayment. The defence failed if one of the conditions was not satisfied.
- 24.11 There were other defences to the recovery of an overpayment; for example, estoppel and contract. These arose less often in pension cases but would be considered if the circumstances of the case suggested that it was appropriate to do so.
- 24.12 Estoppel was a legal principle which provided that if, by statement or action, one person caused another to believe a particular set of facts or circumstances was true, they should not be allowed to draw back from the statement or action if it would be unjust or inequitable for them to do so. They would be “estopped” from doing so. The requirements for an estoppel defence were similar to those for change of position. However, the claimant must be able to demonstrate that they relied to their detriment either:
- on a clear and unequivocal statement (representation); or
  - on a mutual assumption of facts or law (convention).
- 24.13 The Adjudicator said she had not identified any clear and unequivocal statement on NHS BSA’s part that Mrs R could continue to receive the same rate of injury benefit following her receipt of ESA. Nor could she see that there was a mutual assumption between NHS BSA and Mrs R to that effect. In her view, NHS BSA were not estopped from seeking recovery of the overpayment.
- 24.14 With regard to contract, the Adjudicator said she had not been able to identify the necessary elements for a contract to exist; namely, offer, acceptance, consideration and an intention to enter into legal relations. In particular, there was no evidence to suggest that NHS BSA intended to enter into legal relations outside of Mrs R’s entitlement under the Scheme.
- 24.15 It was the Adjudicator’s opinion that the circumstances of Mrs R’s case did not enable her to rely on any of the legal defences against the recovery of the overpayment.
- 24.16 The Adjudicator went on to consider whether there had been any maladministration on NHS BSA’s part in its handling of Mrs R’s case as a consequence of which she had sustained injustice.

- 24.17 Being told that there had been an overpayment, particularly one of this size, would have been extremely distressing for Mrs R but, in and of itself, this did not amount to maladministration on the part of NHS BSA. Having discovered that it had been paying Mrs R more injury benefit than she was entitled to, NHS BSA was obliged to take steps to rectify matters.
- 24.18 NHS BSA had referred to guidance issued by HM Treasury. This is set out in a document entitled “Managing Public Money”<sup>4</sup>. Appendix 4.11 contains the guidelines for managing an overpayment and how public sector organisations should seek to recover an overpayment. Amongst other things, it sets out the possible defences available to a recipient. In addition, the guidance also referred to hardship and states:
- “Public sector organisations may waive recovery of overpayments where it is demonstrated that recovery would cause hardship. But hardship should not be confused with inconvenience. Where the recipient has no entitlement, repayment does not in itself amount to hardship, especially if the overpayment was discovered quickly. Acceptable pleas of hardship should be supported by reasonable evidence that the recovery action proposed by the paying organisation would be detrimental to the welfare of the debtor or the debtor’s family. Hardship is not necessarily limited to financial hardship; public sector organisations may waive recovery of overpayments where recovery would be detrimental to the mental welfare of the debtor or the debtor’s family. Again, such hardship must be demonstrated by evidence.”
- 24.19 In the Adjudicator’s view, the approach taken by NHS BSA to the recovery of the overpayment had, for the most part, followed the HM Treasury guidance. For example, it had invited Mrs R to submit details of her income and expenditure and had agreed to accept repayment at the rate of £10 per week. It had also been prepared to write off elements of the overpayment. In addition, it had acted promptly once it had become aware that there had been an overpayment and thereby prevented any further overpayment accruing.
- 24.20 The Adjudicator acknowledged that Mrs R found herself in extremely difficult circumstances; at least in part because she was faced with repaying such a large sum with very modest means. She noted that the HM Treasury guidance allowed NHS BSA to consider whether repayment would be detrimental to Mrs R’s mental welfare. Any such claim would have to be supported by appropriate evidence; such as a report from Mrs R’s GP. The Adjudicator suggested that Mrs R discuss this with NHS BSA.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1000670/MPM\\_Spring\\_21\\_with\\_annexes\\_080721.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1000670/MPM_Spring_21_with_annexes_080721.pdf)

24.21 The Adjudicator explained that, in making this suggestion, she was not offering a view as to whether it would be appropriate for NHS BSA to waive any more of the overpayment than it already had done. This option had not been explored as yet and there was no supportive evidence available at this time. Any decision as to the strength of any hardship claim by Mrs R would be for NHS BSA to consider.

25. Mrs R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs R provided further comments which are summarised below. I have considered Mrs R's comments, but I find that they do not change the outcome. I agree with the Adjudicator's Opinion.

### **Mrs R's further comments**

26. Mrs R has referred to Managing Public Money and, in particular, to the statement that public sector organisations may waive overpayments where it has been demonstrated that recovery would cause hardship, including detriment to the individual's mental welfare. She says the attempts by NHS BSA to recover the overpayment have caused her financial hardship and had an impact on her mental health.

### **Ombudsman's decision**

27. The starting point when someone has been paid benefits to which they are not entitled has to be that the scheme is able to seek to recover those payments. It is then a matter of deciding whether the recipient of the incorrect payments is able to show that they have a legal defence against recovery; in whole or in part.

28. My Adjudicator went through each of the defences against recovery which might apply in Mrs R's case. I agree with her analysis of the circumstances of Mrs R's case.

29. The defence most likely to apply when there has been a payment of incorrect benefits is the change of position defence discussed in paragraphs 24.7 to 24.10. The evidence indicates that Mrs R was aware that receipt of DWP benefits, such as ESA, could affect her injury benefit payments. Mrs R's injury benefit had been adjusted on a number of occasions to take account of her IIDB and Incapacity Benefit. When her Incapacity Benefit was replaced by ESA, Mrs R would have known that there was a possibility that this might have an impact on her injury benefit. Mrs R had notified NHS BSA when her DWP benefits had stopped in the past. On this occasion, she did not contact NHS BSA to check the position.

30. I too am happy to accept that there was no deliberate attempt on Mrs R's part to claim benefits to which she was not entitled. However, the fact that she failed to check the position when she began to receive ESA means that she is now unable to rely on a change of position defence.

31. For the reasons given in paragraphs 24.12 to 24.14, I do not find that Mrs R is able to rely on estoppel or contract as defences against the recovery of the overpayment of injury benefit.
32. Mrs R has referred to Managing Public Money. This policy document recognises that there may be circumstances where the individual has received payments to which they are not entitled, is not able to establish a legal defence against recovery, but would suffer undue hardship if recovery was pursued. It recognises that such hardship may be financial in nature or entail a detriment to the individual's mental wellbeing.
33. I acknowledge that Mrs R has found herself in extremely difficult circumstances. However, in the absence of a legal defence to recovery, the decision to waive recovery of some or all of the remaining overpayment is for NHS BSA to make. It will require evidence from Mrs R in order to make that decision. For example, Mrs R has alluded to the impact which the recovery of the overpayment is having on her mental health. NHS BSA will need to see reports from those responsible for her treatment in order to decide whether it would be appropriate to waive recovery of any more of the overpayment. I cannot make that decision for NHS BSA.
34. I do not uphold Mrs R's complaint against NHS BSA. I suggest that she provides it with evidence of her health issues in order that it can assess whether it would be appropriate for it to waive recovery of some or all of the remaining overpayment.

**Anthony Arter**  
Pensions Ombudsman

23 May 2022