

Ombudsman's Determination

Applicant	Ms G
Scheme	The Health and Social Care Pension Scheme (the Scheme)
Respondents	HSC Pension Service (HSC Pensions) The Department of Health Northern Ireland (the DoH)

Complaint Summary

1. Ms G's complaint is two-fold. Her first complaint is that her pensionable pay for the 2017/18 tax year was not adjusted for her salary sacrifice election of £200 (**the Salary Sacrifice**), and this resulted in her being charged an incorrect pension contribution rate.
2. The second part of Ms G's complaint concerns the failure of HSC Pensions, HSC Board (**HSC**), (her employer at the time, now dissolved) and the DoH to take remedial action with pensions to avoid the unintended consequences she suffered when she received a 1% pay award in the 2017/18 Scheme year, although they had resolved the same issue for staff at a different pay grade in the 2014/15 tax year. She asserts that their failure has resulted in her being in a worse financial position permanently.

Summary of the Ombudsman's Determination and reasons

3. Ms G's complaint against the DoH is upheld because:
 - 3.1. Ms G has suffered a financial loss as a result of the pay award that was implemented in February 2018; and
 - 3.2. This situation has caused Ms G serious distress and inconvenience.

Detailed Determination

Material facts

4. Ms G was at the relevant time an employee of HSC¹ and a member of the Scheme.

¹ HSC was dissolved on 31 March 2022 pursuant to section 1 of the Health and Social Care Act (Northern Ireland) 2022 (**the 2022 Act**) and its functions were transferred to the DoH while its staff were transferred

5. The DoH is the scheme manager and responsible for the administration of the Scheme. The DoH also set pay on behalf of HSC, taking account of recommendations from the NHS Pay Review Body (**the Review Body**), and determined pension contribution structures taking account of recommendations from the HSC Pension Scheme Advisory Board (**SAB**).
6. HSC Pensions administers the Scheme on behalf of the DoH.
7. Ms G has accrued benefits under the 1995 section of the Scheme (**the 1995 Section**) in respect of a previous period of service with the DoH or HSC or another Scheme employer. The 1995 Section provides benefits on a final salary basis and Ms G's accrued benefits earned in that past period of service remain linked to her current salary. The 1995 Section is governed by The Health and Personal Social Services (Superannuation) Regulations (Northern Ireland) 1995 (**the 1995 Regulations**). While some of the investigation has focused on the 1995 Regulations, they do not appear relevant to the matters I need to determine.
8. In respect of Ms G's service in the period from 2015, and in particular her service with the DoH in the 2017/18 Scheme year to which the complaint principally relates, she has been an active member of the 2015 section of the Scheme (**the 2015 Section**). The 2015 Section was established by the DoH and is governed by The Health and Social Care Pension Scheme Regulations (Northern Ireland) 2015 (**the 2015 Regulations**), (which were laid before the Northern Ireland Assembly (**the Assembly**) by the DoH). As an active member of the 2015 Section, Ms G was required to pay pension contributions in accordance with the 2015 Regulations and earned benefits as provided in these Regulations.
9. The 2015 Section provides benefits on a defined benefit career average basis, that is, benefits earned in any year are calculated by reference to the employee's pensionable earnings in that year, which is then adjusted for inflation in the period to retirement. The accrual rate or "build up rate" is 1/54th for all members, which means that the pension they earn in respect of any year of service is 1/54th of their pensionable earnings in that year.
10. All active members earn benefits at the same rate as a proportion of their pensionable earnings. The 2015 Regulations provide for pension contributions to be paid by active members on a tiered basis, with different percentage rates applying according to the tier in which the member's pensionable earnings in the relevant period fall. Higher earners pay contributions at higher percentage rates with higher rates applied on all pensionable earnings when a tier threshold is crossed. This feature of the 2015 Section is central to this case and is discussed in more detail later.
11. In February 2018:-

under a "hosting arrangement" to HSC Business Services Organisation (**HSC BSO**) and its assets and liabilities were transferred by the DoH pursuant to powers under the 2022 Act to the DoH or to other entities.

- 11.1. Ms G submitted the Salary Sacrifice to be effective from 1 March 2018.
- 11.2. Ms G was awarded a 1% pay increase which was backdated to April 2017 (**the Pay Award**).
12. In April 2018, Ms G was notified by HSC's payroll (**Payroll**) that her pension contribution rate had increased from 9.3% to 12.5%. Ms G said she queried this with Payroll and was informed that the Salary Sacrifice had not been considered; this would be corrected; and she would receive a refund. However, this was not done.
13. On 1 May 2018, Ms G wrote to the DoH. A summary of the points she raised in this letter is provided below, in paragraphs 14 to 19.
14. She was one of over 1,000 staff members at the top of Band 8A pay scale (**Band 8A Staff**) that had suffered an irrecoverable loss because of the Pay Award. Staff had received an increase of £476 whole time equivalent (**WTE**), which triggered higher pension contributions, resulting in a gross reduction in salary of £1,500 per annum. This loss was irrecoverable, as staff at the top of the pay scale had no further increments.
15. There was no additional contribution to the retirement benefit. The impact in the 2018/19 tax year was doubled when combined with claw back for the 2017/18 tax year. This was a £3,000 reduction. The Review Body had made a specific recommendation for this situation, for the tax year 2017/18. The Review Body had advised that the DoH should take action to ensure the Pay Award did not lead to a reduction in take home pay.
16. Band 8A staff were being charged the highest pension contributions of anyone in the Scheme because they were paying 12.5%, which was attributable to high earners gaining 40% tax relief on their pension contributions. Band 8A Staff did not get 40% tax relief. This was inequitable and possibly illegal, with part-time staff paying more than their full-time counterparts.
17. Staff were wrongly advised by HSC Pensions on the impact of salary sacrifice which prevented mitigating action from being taken. Communication was issued to staff after their pay had been affected and out of time for any steps to be put in place, to avoid the current position.
18. The then Minister for Health sought, and agreed to, the principles of the Review Body's recommendations for the 2017/18 tax year. These explicitly said that staff in Northern Ireland should not be adversely affected if the Pay Award caused them to cross pension contribution thresholds.
19. In addition, Ms G queried:-
 - 19.1. Why the DoH had not implemented the changes recommended by the Review Body.

- 19.2. What the DoH or HSC Pensions did to minimise the financial impact the Pay Award had on staff.
20. On 24 May 2018, the DoH replied to Ms G. The letter is from a DoH employee and on DoH headed notepaper but expressed to be “from the Permanent Secretary and HSC Chief Executive”. As such, it appears the DoH was responding on its own behalf and on behalf of HSC, Ms G’s employer at the time. A summary of its response is detailed below, in paragraphs 21 to 37.
21. His Majesty’s Treasury required the Scheme to achieve a yield of 9.8% of the HSC pensionable payroll from member pension contributions each year and the current tiered contribution structure was set to achieve that overall yield. Any changes to tiers or rates impacted the overall contribution yield and so needed to be offset by changes either to all contribution tiers and rates or to specific tiers. This yield, together with the employer contribution rate of 16.3% was expected to meet the cost of future Scheme benefits.
22. The Scheme is a scheme of mutual assurance with inherent elements of cross-subsidy in that, for some employees, the overall cost of the benefits paid to them would be higher than their contribution rate, and for some employees the overall cost would be lower. As such, in common with all such schemes, the value of benefits received was not directly proportionate to the contributions made. Benefits were based on final pensionable earnings and length of membership for members of the 1995 and 2008 sections of the Scheme, and on revalued career earnings for members in the 2015 Section.
23. The member contribution tiers for the Scheme were set out in legislation for the four year period from April 2015 to March 2019, and mirrored those for England and Wales. This contribution structure was designed to achieve the 9.8% yield partly through some members moving up to a higher pension contribution rate tier following a pay increase during the four year period that the earnings bands were fixed. While the document entitled: “Tiered Contributions for Scheme Years 2015/2016 through to 2018/19” acknowledged that mid-year changes to tiers may be required, such changes were not intended to be made due to pay increases moving members into a new tier.
24. The penultimate paragraph on page 1 of that document stated: “The rates and bandings are set for each of the next four Scheme years and will be revised at the next scheme valuation. There are no plans of carrying out any mid-year changes to account for any pay increases as the consequential movement of members across tiers has been factored into the rates shown.”
25. The relevant NHS Pension Scheme Regulations in Scotland provide for Scottish Ministers, with the consent of the Treasury, to determine the pensionable pay bands and pension contribution percentage rates in respect of each scheme year. However, as a result, contribution rates for all members of the Scottish scheme were set 0.2% higher than would have been the case had those been set for four years. The

corresponding legislation in Northern Ireland and England and Wales made no such provision.

26. The required 9.8% yield from member contributions was gross of tax, so the Scheme's pension contribution rates were shown as gross. It was not reasonable to expect pension schemes to take account of the individual tax positions of all members. For example, higher earners were increasingly becoming subject to annual allowance tax charges, which reduced the net of tax value they received from pension scheme benefits. Additionally, the income tax position could vary among part-time members, for example, between a member who only worked three days a week in HSC compared to someone who also had other income outside of HSC.
27. The current tiered pension contribution structures had been in place since 1 April 2015, two years before the introduction of the Pay Award. However, the DoH had asked SAB, which consisted of member and employer representatives, to consider potential employee pension contribution structures and rates, and to make recommendations for consideration in respect of the period from 1 April 2019 to 31 March 2023.
28. Similar exercises were being undertaken in England and Wales and Scotland. The DoH would take into account the recommendations of the SAB work, as well as the outcomes in England and Wales and Scotland, in arriving at a decision on this matter and any new structures would be provided for in regulations, effective from April 2019.
29. It fully appreciated that this had been a difficult and challenging issue for the staff who were affected by a change in pension contribution rate as a result of the Pay Award. With that in mind, it had, with other stakeholders, attempted to minimise the impact of the increased pension contributions on affected staff. This included an agreement that the pension contribution arrears would be recouped from affected employees' pay over a 12 month period, commencing April 2018. In addition, HSC employers would consider further assistance for staff who required it.
30. As the member pension contribution tiers and rates were set out in legislation for the period April 2015 to March 2019, it was not possible to amend the threshold affecting Band 8A Staff.
31. HSC Pensions had advised that it was approached for advice in March 2018, as to whether salary sacrifice should be treated as a change in circumstance to trigger a review of a member's pension contribution tier. The initial reply was that this was not a change in circumstance. However, that was corrected on 6 April 2018. Given the dates involved, the initial advice would not have impacted on members prior to March 2018. The correct advice was provided in relation to the 2018/19 tax year.
32. Guidance on salary sacrifice was available within the document titled: "Tiered Contributions for Scheme Years 2015/2016 through to 2018/19." This stated that "In circumstances where a member commences a salary sacrifice scheme their contribution rate should be assessed in the same way as a new starter with the tier

based on their estimated annualised pay (WTE if they are part-time) for that year after deducting the salary sacrifice amount. The pay sacrificed should not be 'deemed-in' when calculating the WTE and is not classified as pensionable pay."

33. Staff could not have been notified of the impact of any pay award until the actual details of the increase were formally known. HSC employers wrote to affected staff advising that their pensionable pay would be re-assessed following the implementation of the Pay Award to determine the pension contribution rate that should have been paid during that year.
34. The Pay Award could only be implemented once funding had been identified. It would not have been possible to absorb pension arrears or to award a further pay increase to cover the additional costs because the Scheme regulations required that each member in superannuable employment must contribute to the Scheme at the rate set out in the regulations.
35. Additionally, contributions were made by employees for their own pension pot, and employers made a significant contribution. In any event, the DoH was in a very challenging financial position and would not have been in a position to fund the cost.
36. While it made every effort to mitigate the financial impact on hardworking staff, it considered that there were lessons to be learned in terms of HSC / PSSC Payroll communicating implications of pension changes to staff. The DoH would consider improvements in this regard.
37. The member pension contributions were set out in the relevant regulations and, although they were not recoverable, members did receive tax relief, and the pension contribution rates were set to cover the cost of future pension benefits for all Scheme members. The increase in pensionable pay would be reflected in any pension and lump sum payments made to members, either through their final pensionable pay for those in the 1995 or 2008 sections of the Scheme, or through their revalued pensionable earnings from 2017/18 onwards, for those in the 2015 Section.
38. Subsequently, there were further exchanges between Ms G and the DoH concerning this issue.
39. In July 2018, Ms G made a complaint through the Scheme's Internal Dispute Resolution Procedure (**IDRP**). A summary of her complaint is detailed below, in paragraphs 40 to 54.
40. Her complaint concerned the pension contribution rate she had been charged in the 2017/18 tax year and the pension contribution rate set for the 2018/19 tax year.
41. Her pension contribution rate for the 2017/18 tax year was changed in March 2017 from 9.3% to 12.5% following the Pay Award. This caused Band 8A Staff to move into a higher pension contribution threshold, and resulted in an irrecoverable loss for over 1,000 staff. She had lost £900 in the 2017/18 tax year.

42. Pension contributions were set to reflect the costs net of tax relief, with the £47,846 threshold set at the 40% tax threshold in the 2015/16 tax year. This threshold had not been uplifted in line with the 40% tax bracket increases, so resulted in a higher net cost for those paying 12.5% pension contributions but receiving 20% tax relief.
43. The cost of her pension, as a part-time worker, net of tax, in the 2017/18 tax year was higher than her WTE colleagues. Her contribution was 10% in comparison to 8.7%. This was against the legislation.²
44. The pension contribution rate for the 2015 Section was based on a WTE salary while her pension benefits were accruing on the actual part-time salary earned. She was paying a 12.5% pension contribution rate for a pension which was accruing benefits on a salary falling in the 9.3% tier.
45. Pension contributions should align with the benefits accruing. This was a flaw in the contribution tiers of the 2015 Section. She understood the principle for basing contributions on WTE in the 1995 Section where pension was based on WTE salary with years of service reduced for part-time workers. However, this was not the case in the 2015 Section.
46. The Review Body had made three recommendations for the 2017/18 tax year pay round. Two out of the three recommendations were implemented. The third recommendation foresaw the impact of the Pay Award on Band 8A Staff and advised that action should have been taken to mitigate against this. The Review Body was not prescriptive in its recommendation, which gave the DoH the flexibility to meet the recommendation in the most affordable manner. However, the DoH, chose not to act.
47. The treatment of the Salary Sacrifice was not in line with published guidance and the new interpretation remained at odds with the guidance. The guidance said that a changeable effect, such as a salary sacrifice, should be treated in the same manner as a new starter, having immediate effect on pension contribution tiers.
48. In circumstances where a member commenced a salary sacrifice scheme, their pension contribution rate should be assessed in the same way as a new starter with the pension tier based on their estimated annualised pay (WTE if they are part-time), for that year after deducting the salary sacrifice amount. The pay sacrificed should not be 'deemed-in' when calculating the WTE as it was not classed as pensionable pay.
49. New starters contributed to the Scheme from the date of joining based on an estimated annualised salary. Prior to mid-2018, salary sacrifice was not viewed as a changeable event and was taken into account in the following year. However, the new approach to the treatment of salary sacrifice was that the pension contribution tier would be adjusted with effect from the month following the period in which the salary sacrifice was deducted. This was not in accordance with Regulation 2b of the

² Ms G referred to The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

1995 Regulations. The annual review, carried out at the year end, was being used to base the following year's pension contribution and ignored the discrepancy between pensionable pay reported for the year and the pension contribution rate charged.

50. The Salary Sacrifice was deducted from her March 2018 salary and her pensionable pay adjusted with the Salary Sacrifice deemed out. Her contribution rate should have been based on the 9.3% pension threshold.
51. The Pensions Branch information sheet advised that entering into a salary sacrifice would affect the pensionable pay of that year. It had now said that those publications were guidance and may not have been in line with regulations. That was worrying.
52. She had not financially benefited from taking the Salary Sacrifice, which had reduced her pensionable pay to the 9.3% threshold. Her salary had been reduced by £200 in the year and her pensionable pay to £2,400.
53. The £189, which triggered the change in her pension contribution rate, only yielded an annual pension of £124.82 for her at retirement, in comparison to an annual cost of £900 working part-time. This equated to £23,400 until retirement, or if she was working full-time, £1,500 which equated to £39,000 until retirement. This clearly did not demonstrate value for money.
54. She had written to the DoH, about this issue. In response the DoH said there was a requirement for the Scheme to yield 9.8% contributions from HSC's payroll. This requirement should be equitably levied across all members of the Scheme and not the current position where she was being asked for an additional £900 per annum until retirement, which was going to materialise into an annual pension of £124.82.
55. On 12 September 2018, HSC Pensions replied to Ms G's complaint under stage one of the Scheme's IDRP. It reiterated some of the comments the DoH had made to Ms G in its letter dated 24 May 2018, concerning it not being reasonable to expect pension schemes to take account of the individual tax positions of all members. It also made some additional comments, and these have been summarised below, in paragraphs 56 to 63.
56. The pension contribution rates in the Scheme were set for the tax years 2015/16 to 2018/19 by the DoH and were recorded in the Scheme regulations. As administrators of the Scheme, HSC Pensions was duty bound to adhere to the Scheme regulations when applying tiered pension contribution rates for members.
57. The Scheme regulations state that if a member is employed on a part-time basis, that member will have their contribution rate assessed on a notional WTE pensionable pay basis. Each member was assigned a contribution rate based on the full-time earnings for the role but paid a percentage of their actual earnings. In a final salary scheme, this approach allowed for equity of treatment between full and part-time members doing the same role. That is, they both pay the same tiered percentage pension contribution rate but get pension benefits based on a WTE salary proportionate to their length of service.

58. As Ms G was a Transitional 1995/2015 Scheme member, a proportion of her benefits would be calculated using her final salary at retirement, which would be based on her WTE pensionable pay. Although she was not accruing any further service in the 1995 Section, she had retained that final salary link for the calculation of her benefits relevant to that section.
59. As part of her IDRP submissions, Ms G said that the Scheme factsheet (**the Factsheet**) stated that a member, when commencing a salary sacrifice, should be treated in the same way as a new starter when assessing their contribution rate to be applied. This was correct for assessing the rate to be applied only, but not the date it was to be applied from.
60. The date that the rate was to be applied from was covered in Regulation 10 (2R) of the 1995 Regulations and associated regulations of the 2008 and 2015 Scheme Regulations.³
61. The Scheme contribution rates set for the tax years 2015/16 to 2018/19 were currently under review and may change from 1 April 2019. So, it could not comment on the total contributions she would pay between now and retirement.
62. As her pension benefits from each section of the Scheme would be calculated using different formulas, it could not reasonably comment on the accuracy of her forecast in relation to the total contributions she would pay, and the pension benefits she would receive on retirement.
63. It could not comment on actions taken or not taken by the DoH.
64. Subsequently, Ms G appealed the IDRP stage one decision through stage two of the IDRP. A summary of her IDRP stage two complaint is detailed below, in paragraphs 65 to 75.
65. She disagreed with the IDRP stage one decision for several reasons. The Salary Sacrifice brought her WTE pensionable pay for the 2017/18 tax year to £47,735. This was below the 12.5% threshold, but her pensionable pay was not reassessed.
66. The Factsheet stated that if at any time during the current scheme year, a change is made to a member's annual rate of pensionable earnings or pensionable allowances in respect of an existing employment, the member must pay contributions as if the member's employment had started on that date.
67. The Salary Sacrifice should have been taken into account and her pensionable pay for the 2017/18 tax year reassessed. The Salary Sacrifice was implemented before salary shut down in early March 2018 and reflected in her salary for the 2017/18 tax year. Even if this reassessment did not take place until April, it was effective from 1 March as per the Factsheet.

³ HSC Pensions included the relevant extracts of the 1995 Regulations.

68. The Factsheet provided a number of worked examples where an individual received salary increases relating to a previous year, stating that the pension contributions for the previous year need to be reassessed. So, the same principle should have applied where a salary sacrifice had triggered a reassessment for the 2017/18 tax year.
69. This was confirmed in previous correspondence from HSC Pensions. The Salary Sacrifice reduced her WTE pensionable pay for the year from £48,035 to £47,835, which was below the 12.5% threshold.
70. Pension threshold tiers were set to reflect the cost net of tax, this was not a special concession requested by Band 8A Staff, but part of the Scheme principles as set out in a DoH response during consultation.⁴
71. When the threshold was set in the 2015/16 tax year, it aligned the 12.5% threshold to the 40% taxpayers with a net cost of 7.5%. However, increases to tax bands and personal allowances since, have resulted in her being charged the 12.5% rate, contributing the highest rate net of tax to the Scheme but not being able to benefit from 40% tax relief.⁵
72. The pension contribution increase had caused a breach in her employment contract which was based on incremental progression. A Band 8A Staff was now earning less than a person at the salary point below.
73. The Scheme provided calculators to estimate pension benefits at retirement. However, a simple comparison of the additional cost of the Scheme (£1,500 per annum) to the projected benefits on retirement (£124 per annum) showed that she would never recoup the additional cost of the Scheme in her pension.
74. She was no longer able to contribute to the 1995 Section. So, any reference to the defined benefit of that Section of the Scheme in the IDRP stage one response was invalid.
75. The 2015 Section was charging her a pension contribution rate based on her WTE while her pension benefits were accruing on her part-time salary. A career average scheme provided a pension based on the amount she had earned in the year, not on the WTE amount. However, she was being charged as if she had been working full-time. This was against legislation set to protect part-time workers as the cost of the pension, net of tax, was now the highest in the Scheme for those at her grade.
76. On 16 November 2018, HSC Pensions replied to Ms G under stage two of the IDRP. A summary of its response is below, in paragraphs 77 to 81.
77. When a member enters a salary sacrifice, their contributions must be reassessed subject to regulation 10(2R) of the 1995 Regulations. When Ms G commenced the Salary Sacrifice effective from March 2018, her contributions should have been adjusted in the April 2018 salary, as this was her “next pay period following the period

⁴ Ms G quoted the relevant extracts from the consultation in her submissions.

⁵ Ms G provided a table with calculations to show how this had affected her.

in which the change is made.” The reassessment would not be backdated to 1 March 2017. Her contributions effective from April 2018 at the lower rate of 9.3% would then have been payable until another assessment was required, such as an annual review, pay award or cessation of salary sacrifice.

78. In relation to her overpayment of pension contributions for April 2018, she needed to liaise with Payroll regarding this query.
79. Her pension contributions were based on agreed tiered contribution rates that had been set in the Scheme regulations. So, it had to follow those regulations when applying the contribution rate for membership of the Scheme.
80. The regulations were set by the DoH. It could not comment on any impact assessment that may or may not have been carried out.
81. Although Ms G was unable to accrue further service in the 1995 Section, she had scaled service of 9 years, 173 days in that Section. When her pension is calculated, this portion of her benefits would be based on her WTE salary at retirement. That was why her contributions were based on her WTE salary and not her part-time salary.
82. Subsequently, Ms G referred her complaint to The Pensions Ombudsman (**TPO**). This resulted in further correspondence between TPO, Ms G, HSC Pensions and the DoH. A summary of Ms G’s, HSC Pensions’ and the DoH’s comments to TPO is provided below.

Summary of Ms G’s position

83. Ms G provided to TPO, copies of documents she relied on to support her complaint. She also made some additional comments, and these have been summarised below, in paragraphs 84 to 92.
84. The Pay Award caused her to cross a pension threshold which increased her pension contribution rate from 9.3% to 12.5% per annum and reduced her gross salary by £1,500 WTE. This was around £1,000 WTE after the £476 WTE pay increase was netted off. This was a permanent reduction in her salary with no benefit to her pension fund.
85. The Salary Sacrifice, which was a changeable event, was effective from 1 March 2018, and kept her salary in the 9.3% tier. However, a decision was taken not to include this in the calculation of her pensionable pay for the 2017/18 tax year.
86. An interpretation of the 1995 Regulations had been taken that salary sacrifices submitted up to March were adjustable in year but those submitted in March not adjusted until the following year. This was against the annual review methodology

where adjustments must be reflected in the relevant year⁶ and contrary to the advice given by the Pensions Branch.⁷

87. She had suffered stress and financial loss as a result of this situation. She is a single parent with full financial responsibility for three children. She tried to resolve the situation with HSC, Management and the DoH since she became aware of the potential impact in October 2017. However, she received no formal notification that she had been affected, until her pay was adjusted in March 2018.
88. In the tax year 2018/19, she had to pay approximately £900 in arrears for pension contributions in the tax year 2017/18. This resulted in a £800 reduction in her net salary.
89. Since the tax year 2017/18, her net pay has been lower than her pay in the 2016/17 tax year, despite the 1% pay increase in the 2017/18 tax year and the 3% increase in the 2018/19 tax year. She receives a lower net pay than those on the pay point below, because of the failure to take account of the Salary Sacrifice for the 2017/18 tax year or uplift the pension contribution thresholds.
90. The Review Body made a specific recommendation that the DoH should take action to avoid the situation she was currently in. The same situation had arisen in the 2014/15 tax year and the DoH uplifted the pension threshold to ensure incremental progression on both gross and net salary for pay point 16.⁸ This should have been replicated for Band 8A Staff. Other public sector bodies such as the Civil Service had amended their pension contribution thresholds to avoid the same situation. There was no parity across the public sector.
91. Had she received the 2017/18 pay award in the 2018/19 tax year, her pensionable pay would have included the adjustment for the Salary Sacrifice and her pension contribution tier would have been set at 9.3%.
92. She would like:
 - 92.1. her Salary Sacrifice to be taken into account in the calculation of her pension threshold tier for the 2017/18 tax year and the overpayment of contributions to be refunded;
 - 92.2. the 12.5% pension contribution threshold to be uplifted from the 2017/18 tax year to avoid the unintended consequences suffered by Band 8A Staff who were given the Pay Award, as was done for Band 4 staff previously; and

⁶ Ms G referred to examples 2 and 4 from a document entitled: 'The draft National Health Service Pension Scheme Transitional Provisions Regulations 2015, The draft National Health Service Pension Scheme Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2015 – Consultation Document and Explanatory Notes.'

⁷ Ms G referred to a document entitled: 'The draft National Health Service Pension Scheme (Amendment) Regulations 2014. Consultation Document and Explanatory Notes.'

⁸ Ms G referenced documents entitled: 'Tiered Contributions for Scheme Years 2015/2016 through to 2018/2019' and 'NHS Pay Review Body Thirtieth Report 2017' (the 2017 Report).

92.3. the 12.5% pension contribution threshold to be uplifted to the 40% tax threshold, as was the original theory behind the contribution tiers, with 9.3% for those receiving 20% tax relief, 12.5% for 40% tax payers, so net 7.5% contribution rate across scales, to ensure a consistent cost to staff.

Summary of HSC Pensions' position

93. The rules for implementing a salary sacrifice request made by a member and the rules for amending pension contribution tiers in respect of that request were different and must be treated as such. It was imperative that, while the pay adjustment, as a result of the Salary Sacrifice and the amendment of Ms G's pension contribution tier were linked, they must be separated and administered in accordance with their respective rules and regulations.

94. The implications on a Scheme member's pension contributions as a result of entering into a Salary Sacrifice are determined by the Regulations, whereas the process for managing a salary sacrifice by an employer for an employee is determined by the rules laid in HMRC Manual EIM42750.⁹

95. If an amendment is required for a member's pay, and that amendment is made prior to the running of that pay period, the amendment will take place in that month. In other words, if Ms G's request for the Salary Sacrifice to start in March 2018 was received prior to the close down date for amendments for the March 2018 payroll, then that salary sacrifice adjustment would have been implemented in March 2018.

96. As Ms G submitted her request for the Salary Sacrifice to take effect from March 2018 before the pay period closedown, her employer was able to meet this request. As such, Ms G's pay for March 2018 was lower than the pay she had received in February 2018.

97. Ms G paid 9.3% contributions for 10 months of the year because the Pay Award was not implemented until February 2018. Unfortunately, the Pay Award moved Ms G and colleagues in the same pay band into the next tier for pension contributions.

98. It had no control over nationally agreed pay awards and the timing of their implementation. It was not aware of the Pay Award until it was implemented. So, it could not have prepared members for the impact if affected.

99. As Ms G continued to make adjustments to the amount of Salary Sacrifice she was paying in the following months, a review of her tiered contribution rate was required each time that change occurred in accordance with the 1995 Regulations, and the appropriate tier applied.

⁹ [EIM42750 - Salary sacrifice: what is a salary sacrifice: arrangement of guidance - HMRC internal manual - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/publications/eim42750-salary-sacrifice-what-is-a-salary-sacrifice-arrangement-of-guidance)

100. As the administrator of the Scheme, it did not have the authority to amend regulations governing the Scheme including the tiered contribution rates. Nor did it have the authority to implement recommendations from the Review Body. It believed this fell within the remit of the Secretary of State and the relevant ministers from the devolved governments.

Summary of the DoH's position

101. The DoH repeated some of the comments it had made in its 24 May 2018 letter to Ms G and also said in summary:-

- 101.1. The member contribution tiers and rates were set out in legislation for the period April 2015 to March 2019. So, it was not possible to amend the threshold affecting Band 8A Staff without changing this legislation. Any change in one threshold would have had to be offset by changes to other tiers / rates to ensure that the required yield was still met.
- 101.2. Subsequently, it had carried out a comprehensive review of the member contribution structure, which was implemented in two phases from November 2022. In addition to reviewing the structures, new measures were provided in regulations to increase the contribution tier boundaries in line, firstly with Agenda for Change (AfC) pay awards and, since April 2024, the Consumer Price Index (CPI). It hoped that this would reduce the possibility of members having a take home pay reduction as a result of crossing tiers due solely to nationally awarded pay increases.
- 101.3. If the AfC pay award for the year, once it was known, was more than the CPI rate used, it would bring forward legislation to apply any marginal increase to tier thresholds in line with the pay award, which would be applied retrospectively to match the terms of the pay award.

Adjudicator's Opinion

102. Ms G's complaint was considered by one of our Adjudicators who concluded that no further action was required by the DoH or HSC Pensions.

103. The DoH and HSC Pensions accepted the Adjudicator's Opinion.

104. Ms G did not accept the Adjudicator's Opinion and in response said:-

- 104.1. The overarching principle of an annual pension tier has been continually ignored throughout this process, with focus on monthly issues.
- 104.2. Her pensionable pay for the tax year 2017/18 had been adjusted by a salary sacrifice in year. Pension tiers are an annual rate based on previous years pensionable pay, unless a changeable event such as a salary sacrifice takes place. Her pensionable pay for the 2017/18 tax year was in the 9.3% tier.

- 104.3. While the adjustment for the Salary Sacrifice may not have been implemented until April 2018, HSC Pensions would have identified the mismatch between pensionable pay for the year and pension tier, when undertaking the annual review.
- 104.4. Help notes state that if back pay is received in a following year, pension tiers for the previous year may be adjusted and additional contributions due, to ensure pension tier is in line with pensionable pay. The same principle should apply here.
- 104.5. HSC Pensions did not address the matter of in month adjustments of pension tiers in June 2018.

105. Subsequently, there were further exchanges between the Adjudicator, HSC Pensions and Ms G concerning:-

- 105.1. The correct governing legislation of the Scheme. It was confirmed that the correct legislation is the 2015 Regulations.
- 105.2. Ms G receiving a refund of the Salary Sacrifice in July 2024 as she had not used it, and how this refund was treated.

First Preliminary Decision

106. The further exchanges between the Adjudicator, Ms G and HSC Pensions did not change the Adjudicator's view that this complaint should not be upheld. So, as Ms G did not accept the Adjudicator's Opinion, the complaint was passed to me to consider.
107. On 13 May 2025, I sent my Preliminary Decision (**the Decision**) to Ms G, the DoH and HSC Pensions. I explained that I did not agree on all points with the Adjudicator's Opinion and had reached a different conclusion.
108. HSC Pensions agreed with the Decision in respect of my findings in relation to the complaint against HSC Pensions but expressed grave concerns in respect of my findings in the complaint against the DoH. These concerns have been summarised below.
109. The DoH did not agree with the Decision and in response provided further submissions. These submissions have been summarised below.
110. In its response, the DoH clarified that it was not the direct employer of Ms G and that she was employed by HSC. So, there was no employer/employee relationship between the DoH and Ms G.
111. Ms G had brought her complaint against both HSC and DoH (as well as HSC Pensions) but, as HSC had been dissolved in 2022 and its functions passed to the

DoH under the 2022 Act¹⁰ responses had only been sought from DoH and HSC Pensions.

Summary of the DoH's post Decision submissions

112. In 2017/18 it was not the direct employer of Ms G. She was employed by the HSC. So, there was no employer/employee relationship between the DoH and Ms G.
113. The Scheme, as with all public sector schemes, is an extremely valuable part of the staff benefit package. With defined benefits, a significant employer contribution, annual revaluing of Career Average Revalued Earnings (**CARE**) pensions along with index linking in retirement, the return, even for those on the highest contribution rates, is still a significantly greater return on investment across a member's career than could be achieved elsewhere.
114. The 1% pay award for AfC staff in year 2017/18 was not a DoH negotiated outcome, but rather the implementation of the Review Body's recommendation for that year. The Review Body recommended a 1% uplift to all AfC pay scales and this was applied consistently across all four UK nations. Pension implications are one of the factors considered by the Review Body when forming its recommendation, as part of its overall assessment. These are not matters the DoH would typically revisit separately when implementing the recommendation.
115. The Scheme is required to achieve a yield of 9.8% of members' pensionable pay each year to ensure it remains sustainable for all members. The member contribution tiers and rates were set out in legislation for the period April 2015 to March 2019, following consultation and consideration of the review by the Independent Public Service Pensions Commission. So, it was not possible to amend the threshold for Band 8A staff without changing this legislation. Any change in one threshold would have had to be offset by changes to other tiers/rates in order to ensure that the required yield was still met.
116. When setting up the 2015 Section, the decision was taken that the tiering and rates for 2015 to 2019 would remain the same as the 2014/15 rates, save for a small adjustment to the tier 4-5 boundary. The alternative of building in uplifts would have required an increase in the rates and, as at that time it would have been the fourth successive year of such rises, it was felt that this would be unwelcome.
117. Setting contribution thresholds for a pre-determined period provided clarity for both members and employers. It was recognised that this would lead to around 10% of members seeing their contribution rate increase during the four years with a proportion expected to progress to higher contributions through pay progression. This was factored into the calculations.
118. The Review Body report noted that this approach had in some cases led to significant reductions in take home pay for individuals whose pay award meant that a higher

¹⁰ See footnote in the summary of material facts.

contribution tier applied. A recommendation was made for the Health Departments across the UK to ensure that annual pay awards would not have unintended consequences in reducing the take home pay of staff whose pay award caused them to cross pension contribution thresholds. This recommendation was considered as part of the next four yearly valuation of the Scheme with input from the SAB to explore a number of options going forward, including the range and number of tiers, whether the rate payable should be determined using whole-time equivalent or actual earnings and providing for tier boundaries to increase in line with general pay uplifts.

119. At the time of the 2017/18 pay award the DoH was aware of the difficult and challenging issue for some staff who had been affected by a change in contribution rate. It attempted to minimise the impact on affected staff by agreeing the pension contribution arrears could be recouped over a twelve-month period commencing April 2018.
120. It is recognised that delayed pay awards exacerbate situations like Ms G's; however given the need to wait for the outcome of the Review Body's recommendations it is not in a position to implement a pay award earlier than receiving these recommendations.
121. Since the 2017/18 pay award, it has carried out a comprehensive review of the member contribution structure, which was implemented in two phases from November 2022. As part of this review, it reduced the gaps between the tiers with the largest gap now being 1.8 percentage points. It is hoped these changes will reduce the possibility of members having a take home pay reduction as a result of crossing tiers due solely to nationally awarded pay increases. However, it should be noted that, with staff on at least three separate pay structures, it cannot be guaranteed that this will not happen.
122. This situation has also arisen in other Public Sector schemes. Colleagues in the Department of Finance have confirmed that, following similar instances, they introduced legislative changes from 1 April 2019 that aligned the employee pension contribution thresholds with the pay and grading regime of the Northern Ireland Civil Service to ensure that going forward staff did not cross into a higher contribution band as a consequence of a pay award. Civil Service Pensions did not go back and retrospectively adjust employee contribution tiers to amend the situation for previously affected staff.
123. Given the diversity of the Scheme membership in terms of salary, pay scales and career progressions, no policy decisions it takes would have an equal impact across all members. With such a huge workforce on very different pensionable pay figures (even within the same grade), there will always be someone close to the tier thresholds. So, it would be impossible to find solutions for each of them. There were sound reasons for the fixing of the pension contribution tiers at the time, just as there were reasons for its more recent decision to uplift them annually. It is also not possible to make changes to tiering (a protected element under the Public Service Pensions Act (NI) 2014) without full consultation and the Assembly's approval.

124. It might also be noted that if Ms G has remained part-time she will have benefitted greatly from one of the policy moves in 2022 which was that, with all members now in CARE, the contribution banding of part-time staff would be based on actual pay going forward.
125. If, as is suggested in the Decision, it is an employer duty of care to ensure that the pay increase does not cause disadvantage then that takes this out of the realm of a pensions issue and also introduces the complication that Ms G was not a direct employee of the DoH. It should also be noted that while HSC pay deals are ultimately funded through the Northern Ireland block grant, managed by the Department of Finance, the funding of the Scheme is managed through Annually Managed Expenditure directly from His Majesty's Treasury. There is no overlap permissible between the two areas of funding.
126. If, as seems to be the case, the argument is that the issue was caused by the failure of an employer in their duty of care in implementing a pay deal then it suggests that the complaint has perhaps been made through the incorrect authority as at the time Ms G was employed by the HSC.
127. It thinks there would be serious implications for the running of all public sector pension schemes going forward, should the Decision be made final.

Summary of HSC Pensions' post Decision submissions

128. It fully agrees with the findings in the Decisions of the complaint against HSC Pensions. However, it had grave concerns regarding the findings against the DoH.
129. The findings, in its opinion, go against the Scheme regulations particularly the paragraphs in the Decision¹¹ which suggested that Ms G should not pay contributions in accordance with the Scheme regulations.
130. It finds this alarming, given that the contributions collected from members must meet a particular yield in order to ensure that the Scheme remains sustainable for all members. Altering the contribution rates payable, which could set a precedent and which will affect the yield can have a detrimental effect on all members across the Scheme which could potentially result in lower accrual rates or higher reduction factors.
131. It does not think that the wider consequences for all Scheme members had been considered.
132. In addition, it had found reference in this particular case to the calculation of benefit accrual for Ms G as a result of the increase in pensionable pay. That calculation of benefit accrual appears to have ignored the fact that as Ms G is a transitional 1995/2015 section member of the Scheme, and as such benefits accrued prior to the

¹¹ HSC referred to paragraphs 170.1 and 170.2 in the Decision.

implementation of Pension Reform and subsequent McCloud Remedy, are subject to final salary calculations (final salary link).

133. While this is only a short summary of its concerns as it is not the respondent for whom the complaint has been upheld, it thinks that there will be serious implications for the sustainability of the Scheme and a wider impact on current and future members should the Decision be final.

Second Preliminary Decision and further submissions

134. On 21 October 2025, I issued a Second Preliminary Decision (**the Second Decision**) addressing the submissions made by the DoH and HSC Pensions including the material point that the DoH was not the “direct employer” of Ms G.

135. On 11 December 2025, the DoH responded (on behalf of itself and HSC Pensions) with further submissions which are summarised and addressed below in paragraphs 136 to 149 but which do not change the outcome.

136. The DoH contends that there has not been an irrational and unfair exercise of its powers in dealing with the Pay Award. It suggests an inference has been made in paragraphs 201 to 203 below, (dealing with the DoH’s remuneration policy that employees on higher bands should be paid more than employees on lower bands) that failing to adjust pension contribution tiering when determining pay awards is inherently irrational and unfair.

137. However, that is not the inference or the basis of my Determination, which is instead that having created the risk of members on higher bands being paid less and suffering a net pay cut on receiving a pay rise by adopting tiered contribution rates, the DoH was under a duty of care to all potentially affected employees, such as Ms G, when granting pay awards to ensure that any pay award would not sound as a net pay cut after taking account of pension contributions. That risk no doubt could be managed through bringing forth legislative changes to the thresholds or by making pay awards subject to an underpin or addition to take account of the impact of outsized pension contribution increases.

138. The DoH suggests that the relevant legal test is one of process and has provided further information about the process through which its powers in relation to pay award are exercised. I am grateful for the information. However, my decision is not based on any procedural defects.

139. The DoH has referred to the case of *Lennon v South Eastern Education and Library Board* [2015] NICA 3 and the case of *Scally v Southern Health Board* [1992] 1AC 294 and argued that Ms G knew that there might be a 1% pay award since that had occurred in previous years and knew about the pension contribution tiers so that she could have mitigated her loss by repudiating the Pay Award or opting out of the Scheme. I find, on the evidence of the DoH, HSC Pensions and Ms G, that she did not and could not in fact have known what the Pay Award would have been, until it was implemented. That all parties were aware of the risk is not disputed; indeed I find

the fact that the DoH knew about the risk and had itself created the risk is part of the basis for its duty of care.

140. However, this case is not about misinformation. The point is that the DoH acted in breach of its duty of care to Ms G by making the Pay Award on a basis that would cause her financial harm without adopting protective measures. I do not think the suggestion that she could have repudiated the Pay Award or opted out of the Scheme addresses the breach since that is to ask her to choose between different forms of unfair and disadvantageous treatment. I find that, in circumstances where the DoH had itself created the conditions for the financial harm by adopting the tiered contribution rates, it is a breach of duty and unfair and irrational to provide a pay award on a basis that will cause an employee financial harm unless she repudiates the pay award or opts out of the Scheme which would mean forgoing other valuable benefits, including risk benefits and final salary linkage for her accrued final salary benefits.

141. The circumstances making it unfair and irrational include the fact that other employees will not suffer such harm or be required to forgo benefits or repudiate the Pay Award and that there is no meaningful difference between the employees forced to make such choice and those who are not. I also find that Ms G sought to mitigate her loss or protect herself from financial harm by effecting a salary sacrifice before it was eventually recognised by HSC Pensions and Ms G that this would not enable her to avoid the increase in her pension contributions and reduction in net earnings.

142. The DoH has highlighted that pension accrued in any year increases by CPI +1.5% each year until retirement and argues that Ms G has not demonstrated that she is worse off. It is correct to take account of the value of revaluation increases but it is not sufficient to establish that the Pay Award did not cause her financial harm. The increase in the initial rate of annual pension Ms G earned in each year arising from the pay award was 1% of 1/54th of her pensionable earnings before the Pay Award. Application of annual increases at CPI+1.5% to that 1% of 1/54th of her pensionable earnings is unlikely to have outweighed the reduction in her take-home pay. The issue of valuing the increase in her pension is discussed below. The DoH has not provided valuation figures to demonstrate that the increase in her pension arising from the Pay Award was greater than the increase in her pension contributions or the net reduction in her pre-tax earnings and, as explained below, I find that it was not.

143. The DoH has also suggested there are two elements of harm or injustice: the reduction in total remuneration and the lack of additional pension benefit or permanently worse financial situation. My decision is about the failure to protect the employee from a reduction in take-home pay arising from the imposition of a disproportionate increase in pension contributions when setting a Pay Award having created the risk to the employee by adopting tiered contribution rates: the creation and knowledge of that risk created a duty to protect the employee from the relevant harm. The fact that the reduction in pay is not off-set by any equivalent increase in pension is part of the assessment of the harm or economic loss but no additional compensation is provided. A proportionate increase in pension could have provided a

justification for the increase in pension contributions so that her treatment would not have been unfair and irrational but there is no such proportionate increase in the value of her pension.

144. The DoH has objected to the notion that the tiered contribution rates are a “design flaw”. I am content to describe the tiered contribution rates as a design feature, rather than a design flaw or design fault. The point is that it creates a risk of financial harm to employees crossing tier thresholds which is the risk that the DoH allowed to materialise in this case by making a pay award that failed to take account of this risk. I understand amendments have been made to reduce the size of the thresholds to limit the risk of employees suffering pay cuts when they receive pay awards or promotions.
145. The DoH has also argued that it had no option but to comply with the Pay Award recommendation. I do not agree having regard to the warnings provided by the Review Body as referred to below, that should have been heeded.
146. The DoH has said that the burden placed upon it is not one of ‘strict liability’. I agree: it is only a duty of skill and care and more than that it is a duty that is no higher than the duty on an employer not to act irrationally or unfairly or in a manner that might destroy the relationship of trust and confidence between the employer and employee.
147. The DoH argues that all members had a legitimate expectation that thresholds and rates for pension contributions would remain the same from April 2015 to March 2019 presumably to explain why it did not seek to modify those thresholds and rates when making the Pay Award. However, that does not address the duty not to cause financial harm by making a pay award that, having regard to those thresholds and rates, caused financial harm, arbitrarily and irrationally, to a tranche of affected employees. I do not see that that legitimate expectation would have prevented the DoH taking action as recommended by the Review Body (see paragraph 191 below).
148. The DoH argues that the remedy proposed at paragraph 219 below requires it to prioritise Ms G and would have meant considering her case individually when making the Pay Award decision. That is not the case. I am only able to provide a remedy for Ms G as she is the applicant in this case. Avoiding causing her harm would not have required her case to be considered individually as the issue that caused her harm was systemic and known: it would have been sufficient to make a Pay Award on a basis that included an underpin (or addition) for employees who might otherwise suffer financial harm. There may have been other solutions. Systemic problems generally can be addressed with systemic solutions.
149. It is suggested that any measure to avoid causing the financial harm to Ms G would not have been within the ‘vires’ of the DoH. I have considered the arguments put forward. However, while it is not for me to determine what process or options should have been used, the description of the functions of the DoH and of the Minister do not in my view demonstrate that the DoH could not, whether directly or otherwise, have taken steps to avoid causing net pay reductions as recommended by the Review

Body or that it did all that it could reasonably do to discharge its duty. I am not satisfied that the DoH had no means of complying with the recommendations of the Review Body such that it is not fair and reasonable for it to be held responsible for the consequences of the decision it made on the Pay Award.

Conclusions

150. Ms G's complaint is twofold.
151. Her first complaint is that the salary sacrifice she entered into with effect from 1 March 2018 was not taken into account in calculating her contribution rate so that she was required to pay contributions at 12.5% rather than 9.3% under a higher contribution rate tier (**the Salary Sacrifice Complaint**).
152. Her second complaint concerns the failure of the HSC and the DoH to take action to avoid the adverse financial consequences she suffered when she received a 1% pay award in the 2017/18 tax year which resulted in a reduction in her net pay (to a level below the net pay for employees on the pay point below hers) because of the application of a higher pension contribution rate (**the Pay Cut Complaint**).
153. I will give my findings on Ms G's complaint below. However, I think it is helpful first to describe in broad terms the provisions of the Scheme.

Scheme overview

154. The 2015 Section was established and is governed by the 2015 Regulations laid before the Northern Ireland Assembly by the DoH pursuant to the Public Service Pensions Act (Northern Ireland) 2014.
155. It provides, very broadly, for benefits for employees of the DoH and others on a career average basis under which members earn benefits (the "standard earned pension") with an accrual rate (or "build up rate") for each year of service of 1/54th of their pensionable earnings in that year revalued till their retirement date. The employer contribution rate is fixed in the regulations at 16.3% of the pensionable earnings of each member in its employment.
156. The DoH has stated that this is a scheme of mutual assurance and that in common with other such schemes the benefits received are not proportionate to the contributions paid. I do not agree. The Scheme is an occupational pension scheme providing benefits for the employees of the DoH and other employers, subject to applicable pensions and employment law, notwithstanding that its provisions are documented in regulations put forward by the DoH rather than in some other instrument. The 2015 Section provides benefits which are an integral part of the remuneration package for employees of the DoH and other participating employers in respect of their service. The benefits are not social security benefits or mutual assurance benefits; they are earned benefits or "deferred remuneration" (per Lord Reid in *Parry v Cleaver* [1970] AC1).

157. While benefits actually received may not be proportionate to contributions paid mainly because of the pooling of life risk (some members live longer than others), the benefits accrued (or earned) in respect of any period of service can be and, in a career average scheme, usually are proportionate to the contributions paid by employees. In the case of the 2015 Section, benefits accrued are proportionate to salary earned but not to the contributions paid.
158. Under the 2015 Section, member contributions are payable by the member (normally deducted by the employer and paid to the Scheme) in respect of the member's "pensionable earnings" at "the member's contribution rate for the scheme year in question."¹² The member's contribution rate is determined according to a table setting tiered contribution rates ranging from 5% to 14.5% according to the row in which the member's pensionable earnings in the relevant period fall.
159. The 2015 Regulations provide¹³ that the pensionable earnings to be used to determine the contribution rate for the next scheme year are those earned in the previous scheme year and makes adjustments where there has been change to that rate or for new starters. They also provide that the contribution rate is based on the WTE rate for members who had been part-time employees in the previous scheme year. If an employee has not paid contributions at the same contribution rate, current year earnings are used to determine the contribution rate.
160. There is in effect a year's lag for the change in contribution rates except where there has been a relevant change to the contribution rate.
161. The member's pension benefits are proportionate to their pensionable earnings in any year based on a 1/54th accrual rate for all members. The employer's contributions are also proportionate to each member's pensionable earnings at 16.3%. But members on higher earnings will pay higher rates of contributions as a proportion of the benefits they earn in respect of any year of service. Because the contribution rate tiers apply according to WTE earnings for part-timers and not their actual earnings, part-timers will pay higher contributions for the pension they earn compared to employees earning similar pay working on a full-time basis or other part-time employees working slightly more hours on slightly lower pay.
162. Because the contribution rates increase in tiers (7 tiers in total), members whose earnings are just above a threshold pay disproportionately more than those whose earnings are just below a threshold for nearly the same benefit. This is particularly acute between the 3rd and 4th tier with a step up from 9.3% at £47,846 to 12.5% (higher tiers step up by only one percentage point) (see Appendix). Unlike income tax rates, the higher contribution rate is paid on the whole of the member's pensionable earnings, not just the excess above the threshold. The decision to adopt this design was made by the DoH.

¹² See regulation 30(2) of the 2015 Regulations.

¹³ See paragraph 2 and 3 of Schedule 9 to the 2015 Regulations.

163. The design creates the hazard that appears to have arisen in this case where a member's pensionable earnings are pushed into a higher contribution tier by a small pay increase. The effect is that the pay rise results in an increase in contribution obligations for that member materially exceeding the pay rise and the member suffers a reduction in taxable earnings and take-home pay. In effect, rather than receiving a pay rise, the member suffers a pay cut.
164. Moreover, while it may be harder to value, the increase in earned pension from the pay rise may not outweigh the shortfall between the pay rise and increased contribution obligations. A pay rise of £540 would increase the pension accrued for that year by £540/54 (given 1/54th accrual rate) or £10. If valued using the factor that applies for determining whether the additional accrual exceeds the annual allowance, that is, 16, this would have a value of £160 (other valuation factors such as a cash equivalent transfer value factor could be used that might result in a higher estimated value).
165. The pay rise of £540 and additional pension earned (£10 a year of pension (subject to revaluation and inflation increases) or £160 valued with a factor of 16) would be less than the increased contributions payable by the employee for that year arising from the higher contribution rate of 12.5% (3.2% of £47,846, that is, £1,531). The member will have suffered a pay reduction even on a total remuneration basis. Other members who were not so close to a threshold do not suffer the same effect and their pensionable earnings, contributions and benefits all increase proportionately.
166. These threshold hazards may or may not be a 'design fault' in the member contribution basis adopted by the DoH in the Regulations but are at least a design feature created by the DoH. In any event, having regard to the recommendations of the Review Body, it appears to have been understood by the DoH, HSC and HSC Pensions¹⁴. It appears that adjustments were made by the DoH to address it in previous years and in other schemes operating similar tiered contribution rates. The tiered contribution rates clearly create differences in treatment between members in similar circumstances as a small difference in pay can result in a large difference in pension contributions not commensurate to any difference in earned pension. There may be some risk of indirect discrimination for employees with protected characteristics (although this would not be unlawful if justified) but that is not a matter I am able to determine and it has not been part of this investigation.
167. While the parties have referenced differences in tax relief as a rationale, the 7 tiers did not align with income tax thresholds in 2017/18 or 2018/19 or tax relief on contributions. Even after taking account of tax relief, the ratio of pensionable earnings, contributions and benefits earned was uneven across the tiers and within tiers in that period. As such, I do not think the issue of tax relief assists either way and I will say no more about it.

¹⁴ See paragraphs 18 and 46 above and 191 below.

168. Finally, while reference has been made to the final salary linkage in respect of benefits earned under the 1995 Section, those benefits appear to have been earned in respect of past service and were accrued rights, notwithstanding that they were final salary benefits and that the final salary linkage was maintained for employees remaining in HSC service. The benefits earned in respect of 2017/18 were under the 2015 Regulations. That the calculation of proportionate benefits for part-timers relies on the application of a proportionate service fraction to WTE final salary would not appear to have any relevance to the issues in this case which relate to the 2015 Section which is a career average arrangement.

169. I will now turn to Ms G's complaint and her particular circumstances.

The Salary Sacrifice Complaint

170. Much of the investigation has related to the Salary Sacrifice and the submissions of the parties related to the Salary Sacrifice, the timing of it and of its recognition in the calculation of pensionable earnings and the determination of the applicable contribution rate tier. There has been some confusion as to the applicable regulations.

171. During the investigation, Ms G reversed her Salary Sacrifice with the agreement of the DoH by HSC Pensions on its behalf. A salary sacrifice operates as a variation of the employment contract to provide for a lower salary together with some non-cash benefit (in this case, childcare vouchers). A reversal of a salary sacrifice presumably takes effect as an agreed rescission of that variation. In any event, since the Salary Sacrifice has been cancelled with effect from the time that it was made, this part of the investigation must be discontinued, and I will make no determination in respect of the Salary Sacrifice.

The Pay Cut Complaint

172. Regarding the failure of HSC Pensions and the DoH to take action to avoid the adverse financial consequences Ms G suffered when she received a 1% pay award in February 2018 backdated to April 2017, a number of points have been made which I need to address. I must determine the complaints against the respondents separately. I need to determine separately for each of them whether such failure constituted a breach of any legal obligation to Ms G for which I may direct a remedy or was otherwise maladministration that caused her injustice. I am mindful that I cannot make any determination that would adversely affect any person who was not a respondent in this investigation and has not had an opportunity to make representations.

Ms G's loss

173. Ms G suffered a loss as a result of the Pay Award being implemented in February 2018 with effect from 1 April 2017, without adjustments.

174. The effect of the Pay Award increasing Ms G's salary was that her gross earnings and the pension she accrued in respect of the period from 1 April 2017 increased by 1% (or £189), but her pension contribution obligation increased by 3.2% of her previous gross salary plus 12.5% of the increase. The increase in her pension contributions was disproportionate to the increase in her salary and the increase in the pension she accrued for that period of service. More than that, it exceeded the salary increase so that she suffered a reduction in taxable earnings and take home pay. The reduction in her taxable earnings and take home pay also exceeded the increase in the pension she accrued for that period of service. She was worse off even on a total remuneration basis. On a WTE basis, she also earned less than employees on the pay point below hers. The short point is that the 'Pay Award' was in practice a pay cut, both on the basis of what she earned from her service after taking account of pension contributions and on a total remuneration basis.

175. The pay cut was aggravated by the retrospective application of the Pay Award and its late announcement. The retrospective application meant that while Ms G had been working during the period from 1 April 2017 to February 2018 on a salary level that made her liable under the 2015 Regulations for contributions at 9.3% of her pensionable earnings and earned her benefits at 1/54th of those pensionable earnings, the Pay Award purported to make her liable for a higher rate of contributions in respect of that completed period of service.

176. The late announcement of the Pay Award also meant that it was difficult for employees to take action to protect themselves from the adverse effect of this change (that is, the increase in their pension contribution rate). Ms G attempted to mitigate her loss by applying for a salary sacrifice but this was ineffective and there seems to be little else she could have done.

177. Because of the DoH's arrangements, including the 2015 Regulations, Ms G and other employees in Band 8A suffered this pay cut as a consequence of the 'Pay Award' when all other employees benefited from it as the changes to their pay, pension contributions and earned pension for that period of service all increased proportionately.

178. The first issue I need to determine is whether this constituted a breach of contract or other breach of law and whether the DoH or HSC or HSC Pensions should have taken action to avoid this. Action to avoid this was recommended by the Review Body and has been taken in other cases. Indeed, the DoH has stated that it has carried out a comprehensive review of the contribution structures and made changes.

Part-time Worker Regulations

179. Ms G in her IDR application argued that the 2015 Regulations breached The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the

Part-time Worker Regulations). While Ms G raised the issue of the Part-time Workers Regulations in her IDRP, she did not make a complaint to TPO about a breach of those regulations, and this has not been part of the investigation.

180. There are many reasons why it is not appropriate to widen a complaint. In this case, Ms G's employer at the time, HSC, has been dissolved and the Part-time Worker Regulations apply only to employers. As such, I am not extending the complaint to consider whether Ms G suffered less favourable treatment under the Part-time Worker Regulations and I make no determination in that regard.
181. I understand that the less favourable treatment arose from the use of WTE earnings for the pension contribution tiers and that, in recognition of the fact the 2015 Regulations provide for career average benefits, pension contribution tiers are now based on actual earnings for part-timers.

Breach of duty by the DoH

182. On the assumption that the DoH was Ms G's employer, I considered in the Decision that the application of the Pay Award to Ms G without adjustments or alterations to the contribution rate provisions under the 2015 Regulations was a breach of contract by the DoH as a breach of its implied duty of mutual trust and confidence or duty of good faith. Any employer has an implied obligation to each of its employees to act with good faith, mindful of fairness and trust, and to act reasonably and not irrationally.¹⁵ Put more simply, an employer has a duty to treat its employees fairly¹⁶ and not irrationally.
183. In its response to the Decision, the DoH clarified that it was not Ms G's employer and had no employer/employee relationship with Ms G. Instead, HSC was Ms G's "direct employer".
184. I accept the DoH's evidence and must therefore conclude that the DoH had no contractual relationship with Ms G.
185. While Ms G did bring her complaint against both HSC and the DoH, HSC was dissolved on 31 March 2022 pursuant to section 1 of the 2022 Act and its functions were transferred to the DoH while its staff were transferred under a "hosting arrangement" to HSC Business Services Organisation (**HSC BSO**) and its assets and liabilities were transferred by the DoH pursuant to powers under the 2022 Act to the DoH or to other entities. I have not investigated any maladministration or breach of law by HSC or whether its liability to Ms G in respect of any breach of law transferred to the DoH or any other entity.

¹⁵ See *Malik v BCCI* [1997] 1 HL, *Eastwood v Magnox Electric plc* [2004] UKHL 35, *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597.

¹⁶ See Lord Nicholls in *Eastwood v Magnox*.

186. I have considered further whether the DoH acted in breach of any duty to Ms G in making the Pay Award, notwithstanding that it did not have a contractual relationship with Ms G as her “direct employer”.

187. Having reviewed the submissions and documents included, I find that:

187.1. the DoH was empowered to and took the decision on the contributions structure for the 2015 Regulations (although this needed approval from other bodies);

187.2. the DoH took the decision on the Pay Award, having received a recommendation from the Review Body (the ‘NHS Pay Review Body Thirtieth Report 2017’ (**the 2017 Report**) which was addressed to the DoH and similar bodies in relation to England, Wales and Scotland;

187.3. the DoH provided the funding for HSC to pay Ms G and had budgeted a 1% pay award for employees working for HSC and other health and social care employers in Northern Ireland which the Review Body was aware of in preparing its recommendation¹⁷;

187.4. in referring to HSC as Ms G’s “direct employer” in its response to the Decision, the DoH impliedly acknowledges that HSC did not have all the ordinary powers and freedoms of an employer and that, indirectly, Ms G provided services for the DoH and that the DoH indirectly paid her and set the terms and conditions of her employment and remuneration and could and did vary the terms of her employment contract by increasing her pay by the Pay Award.

188. Having regard to the above, I find that the DoH had a sufficient degree of involvement in setting the remuneration and pension terms for Ms G’s employment with HSC and determining the variation of her pay under the Pay Award, to find a duty in respect of the remuneration aspects of her employment with HSC. I find that the relationship was akin to an employment relationship and that the DoH was a quasi-employer of Ms G in the sense used in *James-Bowen v Metropolitan Police Commissioner* [2018] 4All ER 1007 (**James-Bowen**), although such relationship not being defined by a contract of employment, any duty arising from such relationship can only sound as a duty of care (see *Rihan v Ernst & Young Global Ltd* [2020] EWHC 901 at 572 (**Rihan**)).

189. In *Rihan*, the court undertook a review of previous cases on the liability of employers and quasi-employers for economic loss suffered by an employee¹⁸. As relevant, I find that: -

¹⁷ According to the 2017 Report.

¹⁸ The review considered *James-Bowen* and also *Spring v Guardian Assurance plc* [1995] 2AC 296, *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, *Calvey v Chief Constable of Merseyside Police* [1898] AC 1228, *Chandler v Cape plc* [2012] EWCA Civ 525, *Vedanta Resources plc v Lungowe* [2019] 2WLR 1051 (SC), *AAA v Unilever plc* [2018] EWCA Civ 1532 and

- 189.1. There is no general duty to protect an employee against economic loss before or after the end of the employment relationship;
- 189.2. By way of exception, an employer or quasi-employer may come under a limited duty, in tort or contract, to take reasonable care to protect the post-employment economic interests of its employee;
- 189.3. While *Rihan* and many of the cases reviewed concerned post-employment economic interests, the duty must apply no less to economic interests arising during the employment relationship;
- 189.4. Where there is a close relationship, so that the requirements of proximity and foreseeability of damage are sufficiently met for a duty in tort to protect the economic interests of another on *Caparo*¹⁹ principles, the law of tort applies in its “gap-filling role” where there is no contractual relationship but the duty is only to take reasonable care;
- 189.5. A relationship of quasi-employment meets the requirement for proximity on *Caparo* principles but proximity may be satisfied simply because of the role a party working with an employer has, whether or not it is sufficient for it to be a quasi-employer;
- 189.6. A quasi-employer’s liability in tort “closely mirrors”²⁰ and cannot exceed the liability an employer would have for a breach of the mutual duty of trust and confidence implied into an employment contract;
- 189.7. While *Rihan* was concerned with partnerships and corporate entities and whether the defendant effectively had supremacy and was able to require lower entities to submit to its will and leadership, the same principle may be applied to public sector bodies; in this case, the DoH was able to require HSC to comply with its directions on pay and remuneration including the Pay Award, so that there was sufficient proximity between the DoH and Ms G for a duty of care to arise;
- 189.8. As such, the duty that a quasi-employer or person with sufficient proximity to the employees of a closely associated employer will have is to take reasonable care in carrying out the relevant task not to irrationally or unfairly harm the employee’s economic interests (rather than to protect the employee from harm by others or to protect the employee’s economic well-being²¹).

190. I find that for the purpose of the *Caparo* principles, whether or not the DoH was a “quasi-employer” or an “indirect employer” and irrespective of the basis or nature of its relationship with HSC as Ms G’s “direct employer”, the DoH had sufficient control over HSC, pay banding and the Pay Award applicable to Ms G’s employment, to satisfy the requirement of proximity for a duty of care on *Caparo* principles. I find that

¹⁹ *Caparo Industries PLC v Dickman* [1990] UKHL 2.

²⁰ *Rihan* at 617.

²¹ See *James-Bowen*.

the DoH was authorised to make the determination on the Pay Award and the purpose of its power to make pay awards was to benefit employees of HSC and other HSC employers to whom such pay award would apply.

191. Turning to the question of foreseeability on *Caparo* principles, in recommending a 1% Pay Award, the Review Body explicitly warned in the 2017 Report about the risk of a reduction in take-home pay, both in the executive summary and in the section of the 2017 Report addressed to Northern Ireland, where the issue was highlighted in bold text, as follows:

“The tiered structure of pension contribution rates combined with the fixed nominal value of contribution thresholds led to the unintended and perverse consequence of the 2016/17 pay award translating into a significant reduction in take-home pay for some staff since it has led to them crossing contribution threshold boundaries. *We believe that action is required to ensure that the annual pay award has the intended effect of increasing, rather than decreasing, take-home pay for all staff.* (emphasis added)

The Health Departments in England, Wales and Northern Ireland should ensure that annual pay awards do not have unintended consequences in reducing the take-home pay of staff whose pay award causes them to cross pension contribution thresholds.”

192. Even without this warning, the DoH was or should have been well aware of the effect of the 2015 Regulations and the effect that the Pay Award would have on the take home pay, pension contributions and pension accrual of the Band 8A employees as described above. The 2015 Regulations were put forward to the Northern Ireland Assembly by the DoH. I find that the DoH was responsible for the adoption of the tiered contribution rates which created the risk of the Pay Award being a pay cut for certain employees including Ms G and that this created a duty for it to protect her, amongst others, from the risk.

193. I therefore find that the effect of the Pay Award on Ms G’s remuneration and take-home pay was foreseeable (and indeed was foreseen by the DoH and the Review Body).

194. Applying *Caparo* principles, I need also to consider whether it is just, fair and reasonable that the DoH should be subject to a duty of care to Ms G to protect her from financial harm in determining the Pay Award. The issue appears to be addressed in the cases by the principle that the duty cannot exceed the implied contractual duty of trust and confidence in employment relationships. In effect, as the duty is only to take reasonable care in carrying out its responsibilities in respect of reviewing pay terms applicable to Ms G so as not to irrationally or unfairly cause her financial harm, it is just, fair and reasonable that the DoH should be under such duty because such duty demands no more of it than the implied duty of trust and confidence would demand of an employer.

195. In *James-Bowen* policy considerations were raised identifying a conflict that precluded the duty arising. I see no conflicting policy concerns here. Indeed, the public law duties imposed on the DoH in exercising its powers to set or vary pay or terms and conditions for employees working for the DoH and for HSC would require it not to act irrationally, to treat like cases alike and to have regard to the interests and reasonable expectations of affected employees alongside other matters.

196. The reasonable expectations of affected public sector employees, in my view, includes an expectation that a pay rise will increase and not reduce their pay, even going forward; that pay that has already been earned in respect of completed service will not be retrospectively reduced or clawed back; and that in accordance with the NHS Terms and Conditions of Service Handbook (**the Handbook**), employees on higher bands will earn more from their service than employees on lower bands. Therefore, a duty of care not to irrationally or unfairly cause financial harm to affected employees in a manner that would be likely to seriously damage the relationship of trust and confidence if it were itself the employer would not appear to conflict with public law obligations on the DoH in relation to the Pay Award decision.

197. The DoH has referred to the difficulty of its task and the huge number of employees it has to consider. I do not see that these are any objection to the existence of the duty. The DoH must certainly have regard to many stakeholders in setting pay and I have no doubt that the task is challenging and that this is a reason for seeking the advice of the Review Body. But the duty identified is not a duty to prioritise Ms G or consider employees individually or take account of their individual circumstances or tax treatment, only to ensure its systems are not unfair or irrational. It is to a large extent only a duty to act consistently with its own policies (as for instance expressed in the Handbook) and so I cannot see a policy concern that would prevent the duty arising.

198. The issue of unlimited or unquantifiable liabilities can also be raised as an objection to the existence of a duty of care on *Caparo* principles (often referred to as floodgate issues). The DoH and HSC Pensions on its behalf have raised “grave concerns” about the impact of my Decision and stated that it would have serious implications for the running of all public sector pension schemes.

199. My Determination is of course only binding in relation to this complaint. Whether or not the DoH determines to follow the reasoning and adjust pay and pension contributions for other employees or adapt its practices is a matter for the DoH, on which it may wish to take advice. However, I accept the issue as relevant to a floodgates argument. Again, I do not find that there is a floodgates issue or that the duty could impose liability for unquantified losses because the duty is only a duty to take care not to effect pay changes in a manner that causes financial harm such as a reduction in take home pay or total remuneration for the employee. The losses are therefore identifiable and limited to the amount of the excess in the increase in pension contributions that Ms G was being made liable for by the Pay Award above the amount of the increase in her pay. There is no risk of floodgates that would prevent the DoH being subject to a duty of care not to cause Ms G financial harm in determining the Pay Award.

200. In the Decision, I held that the application of a Pay Award in the context of the 2015 Regulations without adjustment so as to have the effect of reducing Ms G's take home pay and reduce her total remuneration in respect of both past and future service without her express consent was irrational and unfair and a breach of contract. I considered that a pay increase should place employees in a better financial position and a pay increase that places them in a worse financial position is irrational.
201. It was also contrary to the DoH's own remuneration policy as set out in the Handbook in force at the time for HSC employees which provided for pay progression for employees on a band basis: employees would progress to a higher band to be paid more by meeting performance or skills tests set under job evaluation requirements.
202. The clear policy of the DoH is that employees on higher bands are to be paid more as their services are deemed to be worth more. To make a Pay Award without adjustments so that employees on higher bands are effectively paid less than employees on lower bands is in contradiction with the DoH's own policy as set out in the Handbook. It was also unfair and irrational that the detrimental change was imposed on Ms G (and some of her colleagues) when other employees in other pay bands did not suffer a similar pay cut or reduction in taxable earnings and when, further, it resulted in Ms G earning less on a WTE basis than employees on a lower pay band (on the basis of earnings net of pension contributions). If the DoH were Ms G's employer and subject to the mutual duty of trust and confidence, I would find the DoH's decision unfair and irrational.
203. As the DoH is not Ms G's employer but had only a duty in determining the Pay Award to take reasonable care not to irrationally or unfairly cause her financial harm (or specifically not to irrationally or unfairly cause her take-home pay or her total remuneration to be reduced having regard to the tiered pension contribution rates it had adopted which were applicable to Ms G under the 2015 Regulations), I find that, for the same reasons, the DoH acted in breach of that duty of care in failing to make adjustments, or take action as recommended by the Review Body, in making the Pay Award.

Retrospection and recoupment

204. The Pay Award was applied retrospectively and, the effect, as applied by HSC Pensions and the DoH, was that Ms G retrospectively became liable for higher pension contributions in respect of her service between April 2017 and February 2018. The DoH provided that, to mitigate the difficulty for affected employees, the underpaid contributions would be recouped over the 12 months from April 2018.
205. I have considered whether it was possible for the Pay Award to take effect retrospectively or for such recoupment to be lawful. Ordinarily a pay award can only take effect on the date it is made or agreed (and can only be treated as earned or taxable on the earlier of the date it is paid or becomes payable). A retrospective pay award is usually an increase in earnings that is made when agreed or determined but

calculated by reference to a period of past service. It does not rewrite history. However, I have not fully investigated the basis on which the Pay Award was made and therefore make no determination as to whether the increase in Ms G's Pay Award could take effect on a date prior to the date it was determined in February 2018.

206. Recoupment is an equitable remedy for the recovery of past overpayments by deduction (or set-off) from future payments. In this case, it is not clear that there had been an overpayment. In the period from April 2017 to February 2018 (when the Pay Award was made), Ms G was paid the salary that was payable to her at the time and paid the pension contributions that were payable by her at the time. As the DoH has emphasised, the Pay Award could not be known or implemented before it was decided.
207. However, I do not consider that I need to make any findings on the effect of the retrospection and the validity of the recoupment arrangement. Even if it was valid or agreed under collective bargaining arrangements and could take effect retrospectively so that Ms G was liable under the 2015 Regulations for the additional pension contributions that were deducted from her pay from April 2018 in respect of the period from April 2017 to February 2018, I find that these additional pension contributions arose because of the failure by the DoH to exercise its powers in setting or agreeing pay in a manner that did not irrationally and unfairly cause her financial harm. The deduction of such contributions was either unlawful and not required by the 2015 Regulations or arose from DoH's breach of its duty of care to Ms G.
208. I have already found that it was irrational and unfair to vary her pay so that, on a take-home basis and total remuneration basis, she would earn less than those on the band below and so that she would suffer a pay cut when colleagues in other bands had a pay increase, and that in failing to take care to avoid such outcome by making adjustments or taking steps as advised by the Review Body, the DoH breached its duty to her. To apply the pay variation retrospectively so as to effectively apply a pay cut and increase her pension contributions in respect of a period of service that she has already completed is also irrational and unfair. Cutting pay that has already been earned is not something any reasonable employer would do, even if it can lawfully be achieved, and would be expected to seriously damage the relationship of trust and confidence.
209. I have found that in exercising its powers to review pay, the DoH was under a duty to take care not to irrationally or unfairly cause Ms G financial harm in a manner that would breach the mutual duty of trust and confidence if the DoH were an employer and I find that in applying the Pay Award retrospectively and recouping or deducting additional pension contributions from her pay from April 2018 to March 2019 (however achieved) or instructing HSC and HSC Pensions to do so, it breached the same duty of care it owed to Ms G. The retrospective element is if anything a more serious breach in my view.

Additional points

210. For completeness I have addressed other points raised by the DoH.

211. The DoH has referred to His Majesty's Treasury's demand that the overall yield from members' contributions should be 9.8% and that the DoH was in a challenging financial position. This is not a justification for such unfairness. There may have been many other ways of meeting His Majesty's Treasury's demand.

212. The DoH has stated that "the 1% pay award for Action for Change staff in year 2017/18 was not a DoH negotiated outcome, but rather the implementation of the Review Body's recommendation for that year. The Review Body recommended a 1% uplift to all Action for Change pay scales and this was applied consistently across all four UK nations. Pension implications are one of the factors considered by the Review Body when forming its recommendation, as part of its overall assessment. These are not matters the DoH would typically revisit separately when implementing the recommendation". However, as quoted above, I find that the Review Body warned that "action is required to ensure that the annual pay award has the intended effect of increasing, rather than decreasing, take-home pay for all staff" and advised that the DoH "ensure that annual pay awards do not have unintended consequences in reducing the take-home pay of staff whose pay award causes them to cross pension contribution thresholds". I find the decision was for the DoH to make and that the Review Body only made a recommendation.

213. The DoH has stated that the contributions were paid by the employees for their "own pension pots." This unfortunately does not reflect the arrangements under the 2015 Section which is not a defined contribution section, so the employees do not benefit proportionately from their own contributions.

214. The DoH has argued that it could not take account of every employee's individual tax position, particularly having regard to income they may earn elsewhere. This is irrelevant. It is not suggested that the DoH needed to ensure that Ms G was not harmed in respect of her tax position. The financial harm that she suffered was to her pre-tax earnings.

215. The DoH has argued that the size and diversity of the workforce means that there will always be some employees close to the pension contribution thresholds and it would not be possible to find solutions for each of them. I accept this, but consider this is a hazard created by the Scheme design for which the DoH is itself responsible: this increased its responsibility for managing the issue of which it was fully aware. I also consider that a systemic solution can usually be found to a systemic issue so I do not think that individual solutions are required. The Review Body suggested steps were needed and presumably considered that there were steps that might be taken and it is not for me to determine what those might be.

216. Since the 2017/18 pay award, the DoH has carried out a comprehensive review of the member contribution structure, which has been implemented in two phases from November 2022 and has reduced the gaps between the tiers so that the largest gap is now 1.8 percentage points. While this is encouraging for the future, it does not

diminish the DoH's responsibility for the reduction in Ms G's take-home pay arising from the February 2018 Pay Award.

217. The DoH has suggested that the failure lay with communications. I do not agree. The late communication of the Pay Award preventing employees from taking any action to protect themselves such as salary sacrifices (assuming this could have been effective) did not help. However, the primary issue is the adoption of tiered contribution rates that could result in employees suffering a cut in taxable earnings from a small pay award and then making a pay award that was less than the associated increase in contributions without taking steps to avoid a reduction in take-home pay for affected employees and thereby triggering such a pay cut.

218. It also does not appear that any improvement in communications would have addressed the issue or that there were any steps Ms G could have taken, short of leaving her employment or opting out of the Scheme, to avoid the increased pension contributions that were imposed on her. In my view, the very fact that an employee would need to take action to protect their current or accrued interests in response to some action of their employer or quasi-employer indicates that such action is likely to seriously damage the relationship of trust and confidence with that employer or quasi-employer.

219. For the reasons set out above, I uphold Ms G's complaint against the DoH. I find that:-

219.1. The DoH had a duty to Ms G in determining the Pay Award to take reasonable care not to irrationally or unfairly cause her financial harm, or, more specifically, not to irrationally or unfairly cause her pension contributions to increase so that her take-home pay or her total remuneration would be reduced;

219.2. The DoH acted in breach of that duty of care in failing to make adjustments, or take action as recommended by the Review Body, in making the Pay Award in February 2018 so as to ensure that:-

219.2.1. She was not required to pay any increase in contributions in respect of any period of service already completed before the Pay Award except as proportionate to the increase in pay referable to the same period under the Pay Award (that is, no more than a 1% increase); and

219.2.2. She was not required to pay any increase in contributions in excess of the amount of the Pay Award in respect of service after 1 February 2018 (so as to ensure she would not suffer a reduction to her earnings net of pension contributions).

220. Finally, I consider that the experience of having a pay cut effectively imposed without reason and while others received a pay rise, with a retrospective element and so as to be paid less than employees in a band below and to have to engage as Ms G did with HSC Pensions and the DoH to seek proper consideration of the issue and fair

redress would have caused Ms G serious distress and inconvenience. The DoH has recognised this issue and made changes for the future but still not remedied the financial harm caused to Ms G. The difficulties over the Salary Sacrifice which were eventually determined to be ineffective and, in fact, could not have been effective given the timing of the announcement of the Pay Award and the provisions of the 2015 Regulations, would have added to her distress and inconvenience.

Complaint against HSC Pensions

221. Turning to the complaint against HSC Pensions. While HSC Pensions may not have helped resolution of this matter and the Salary Sacrifice issue in referring to the 1995 Regulations, I find that there has been no maladministration by HSC Pensions in respect of the loss suffered.
222. HSC Pensions' duty as administrator of the Scheme is to administer it in accordance with its provisions under delegation from the DoH. It did not have discretion to alter the 2015 Regulations or the Pay Award or to make adjustments to Ms G's pay or contribution obligations.
223. I also acknowledge that HSC Pensions could not have communicated the effect of the Pay Award before being notified of the amount of the Pay Award.
224. As such, I do not uphold the complaint against HSC Pensions.
225. I uphold Ms G's complaint against the DoH.

Directions

226. Within 28 days of the date of this Determination, the DoH shall pay Ms G an amount equal to the sum of:-
 - 226.1. Amounts deducted from her pay in respect of any increase in pension contributions above 1% of the pension contributions previously payable in respect of her service before 1 February 2018; and
 - 226.2. Amounts deducted from her pay in respect of any increase in pension contributions in excess of the increase in her salary under the Pay Award in respect of her service from 1 February 2018; and
 - 226.3. Interest on the above amounts calculated at the Bank of England base rate in respect of the period from the date of the deduction of such excess pension contributions to the date of payment; and
227. Take such other steps as are necessary to ensure Ms G's pay net of pension contributions is not reduced by the Pay Award; and

228. Pay Ms G £1,000 for the serious distress and inconvenience caused to her.

Camilla Barry

Deputy Pensions Ombudsman
20 January 2026

Appendix

Relevant section of The Health and Social Care Pension Scheme Regulations (Northern Ireland) 2015 taken from Part 4, Chapter 1, Section 30 (Members' contributions: employees).

“Members' contributions: employees

30.— (1) This regulation applies in relation to an active member (M) who belongs to group A, B or C in regulation 27(1).

(2) M must make contributions to this scheme (“members' contributions”) -

- (a) in respect of M's pensionable earnings;
- (b) at M's contribution rate for the scheme year²² in question.

(3) Where paragraph 2 of Schedule 9 (determination of pensionable earnings for the purposes of setting a contribution rate for members) applies²³, M's contribution rate for each of the scheme years 2015/16 to 2018/19 is the percentage specified in column 2 of the following table in respect of the corresponding pensionable earnings band specified in column 1 into which M's pensionable earnings fall.

Table: Scheme Years 2015-2016 to 2018-2019

<i>Column 1</i> <i>Pensionable earnings band</i>	<i>Column 2</i> <i>Contribution percentage rate</i>
Up to £15,431	5%
£15,432 to £21,477	5.6%
£21,478 to £26,823	7.1%
£26,824 to £47,845	9.3%
£47,846 to £70,630	12.5%
£70,631 to £111,376	13.5%
£111,377 to any higher amount	14.5%

²² “scheme year” is defined as a 12 month period from 1 April each year in Schedule 13 to the Regulations.

²³ Para. 2 of Schedule 9 applies to any member who was employed on the last day of the previous scheme year and the first day of the next scheme year. It also provides that the pensionable earnings to be used are those earned in the previous scheme year and makes adjustments where there had been change to that rate and to apply the whole-time equivalent rate for part-time employees.

..."