

## Ombudsman's Determination

Applicant	Mr S
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondent	NHS Business Services Authority ( <b>NHS BSA</b> )

## Outcome

1. I do not uphold Mr S' complaint and no further action is required by NHS BSA.

## Complaint summary

2. Mr S' complaint concerns a request by NHS BSA for him to repay a lump sum paid to his wife, Mrs S. The lump sum was in full commutation of her ill-health retirement pension. He does not agree with NHS BSA's assertion that Mrs S was not entitled to ill-health retirement and that death in service benefits were payable.

## Background information, including submissions from the parties and timeline of events

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. Mrs S was employed by Sheffield Teaching Hospitals NHS Foundation Trust (**the Trust**). She was a member of the Scheme.
5. Due to her ill health, Mrs S wished to take commuted ill-health benefits from the Scheme.
6. On 11 October 2018, Mr S attended a stage three sickness meeting (**the Meeting**). He was representing Mrs S as she was too ill to attend. Also present were the Nurse Director, the Employee Relations Officer and Mrs S' sister. Information provided by the Trust's Pensions Manager (**the PM**) was discussed and Mr S agreed to sign ill-health retirement forms on Mrs S' behalf.
7. On 14 October 2018, Mrs S died.
8. On 15 October 2018, the Trust wrote to Mr S to confirm the outcome of the Meeting. It said that:-

- Mrs S' employment had been terminated on the grounds of capability due to ill health with immediate effect.
  - Mr S had agreed to sign the ill-health retirement forms during the Meeting on Mrs S' behalf.
  - Mrs S was entitled to payment for 118 hours of outstanding annual leave.
9. On 16 October 2018, the Trust wrote to Mr S enclosing a confirmation letter terminating Mrs S' employment on the grounds of capability due to ill health with effect from 11 October 2018.
  10. On 19 October 2018, Medigold Health wrote to Mrs S to confirm that her application for ill-health retirement had been accepted.
  11. On 22 October 2018, the Trust wrote to Mr S. It asked him to complete a document to enable it to progress the payment of Mrs S' ill-health benefits as a lump sum.
  12. On 25 October 2018, the Trust sent NHS BSA Mrs S' claim form for payment of ill-health benefits. The Trust confirmed that she would be retrospectively retiring with effect from 11 October 2018. An application to commute her ill-health benefits for a one-off lump sum was included.
  13. On 29 October 2018, NHS BSA sent Mrs S a statement of retirement benefits confirming her entitlement to commuted ill-health retirement benefits from the Scheme. It confirmed that a lump sum of £104,179.69 with a payment date of 12 October 2018 was due to her.
  14. In a meeting with the PM, Mr S was notified of the survivor's pension payable to him. He was also notified of the pensions payable to his children up to the age of 23.
  15. On 5 November 2018, £104,179.69 was transferred to Mr S' bank account. NHS BSA wrote to him to confirm that this payment had been made.
  16. Mr S received a telephone call from the Trust. He has said that he was asked if he had spent the money that had been transferred to his bank account on 5 November 2018. He confirmed he had not. He was informed that there may have been a mistake and it was possible that he would have to pay the money back. He has said that no apology was given.
  17. On 21 November 2018, the Trust wrote to Mr S. It referred to the earlier telephone conversation and confirmed that the lump sum paid to him needed to be returned. It provided details of how this could be achieved.
  18. On 22 November 2018, during a meeting that included Mr S and the PM, the sequence of events was outlined. Mr S was notified that he was entitled to death in service benefits following the death of Mrs S. These benefits were explained to him, and the relevant forms were provided for Mr S to complete.

19. On 25 November 2018, Mr S wrote to the PM. He asked for an explanation of why Mrs S' death was being treated as a death in service. He also asked why it had been suggested during the meeting on 22 November 2018 that he would be put on the Trust's payroll for six months.
20. On 3 December 2018, the PM responded to the questions that Mr S had raised. He apologised for the error and said:-
  - The fact that Mrs S' employment with the Trust had ended by reason of capability due to ill health was not in dispute.
  - The reason for the change in the basis on which benefits were payable to Mr S was due to outstanding annual leave. This extended Mrs S' last day of pensionable employment to 2 November 2018.
  - As a result of this, Mrs S was still in pensionable employment when she died.
  - Had NHS BSA known about Mrs S' outstanding annual leave at the time, the submission for payment of benefits on the grounds of commuted ill-health would have been stopped.
  - A death in service lump sum of approximately £65,000 was payable from the Scheme.
  - An initial survivor pension (**ISP**) was payable to Mr S by the Trust for six months through the Trust's payroll. This was estimated to be £2,654.31 per month.
  - An ongoing survivor pension was payable to Mr S from the Scheme once the ISP had ceased. This was approximately £5,000 per annum.
  - Children's pensions were also payable.
21. On 25 February 2019, Mr S sent a completed application form to NHS BSA for consideration under stage one of the Scheme's two stage Internal Dispute Resolution Procedure (**IDRP**). He said:-
  - Benefits had been correctly calculated under the Scheme's commuted ill-health retirement provisions.
  - The relevant forms had been signed and copies of birth and marriage certificates had been prepared for submission.
  - However, the PM's letter of 3 December 2018 said that outstanding annual leave resulted in death in service benefits being payable following Mrs S' death.
22. On 26 February 2019, the Trust wrote to Mr S following its letter of 3 December 2018. It said:-

- The payment of the death in service lump sum, survivor's pension and children's pensions could only be made on receipt of the completed forms that had been provided to Mr S.
- These benefits could not be paid until the commuted ill-health retirement lump sum had been returned to it by Mr S.
- If the £104,179.69 lump sum was not returned within 30 days, the matter would be passed to the NHS Pensions Accounts Recoverable Team.
- It apologised for any confusion that may have been caused.

23. On 17 April 2019, NHS BSA provided its response under stage one of the IDRP. It did not uphold Mr S' complaint. It said:-

- An ill-health pension was payable from the day after the member's last day of pensionable membership of the Scheme. Mrs S' pension had initially been calculated as being payable from 12 October 2018.
- So, a lump sum was paid on 5 November 2018 of £104,179.69 in full commutation of Mrs S' ill-health pension.
- Subsequently, it was discovered that the correct procedure had not been followed when signing the claim forms. This was due to the fact that Mr S was not permitted to sign the forms on Mrs S' behalf. So, the ill-health retirement application was not valid.
- Even if the correct procedure had been followed, further information had been supplied to it, the effect of which annulled the commuted ill-health pension that had been paid.
- When calculating the last day of Mrs S' pensionable employment, the Trust had not taken into account her unused annual leave entitlement. This was pensionable and extended her pensionable membership of the Scheme to 3 November 2018.
- As Mrs S died before that date, she did not qualify for ill-health retirement.
- It did not have direct access to the records held by NHS employers and was reliant on the information sent to it.
- It asked that Mr S return the £104,179.69 payment.

24. On 4 and 23 June 2019, Mr S responded to NHS BSA, asking for his complaint to be considered under stage two of the IDRP. He said that:-

- Its stage one IDRPs response had failed to provide the information that he had requested. This was in relation to extracts from the Regulations that governed the Scheme (**the Regulations**) and the calculation of Mrs S' annual leave<sup>1</sup>.
- Not all the relevant documentation had been considered and those involved interviewed.

25. On 7 August 2019, NHS BSA provided its response under stage two of the IDRPs. It did not uphold Mr S' complaint. It provided a calculation of Mrs S' annual leave and extracts from the Regulations and said that:-

- It could only pay benefits as set out in the Regulations.
- Its medical advisers had approved Mrs S' application for ill-health early retirement on 11 October 2018. However, for ill-health retirement benefits to be paid, she would have had to have completed the necessary form, together with a second form if the benefits were to be commuted.
- During the Meeting, Mr S had been told that he could sign the forms on Mrs S' behalf. This was not the case. The Trust first contacted it about the validity of both forms by email on 7 November 2018. This was after the commuted ill-health lump sum had been incorrectly paid.
- During a telephone call with the PM on 8 November 2018, Mrs S' last day of service was initially confirmed as being 11 October 2018. Based on that information, death in deferment benefits would have been payable. The PM said that Mrs S had annual leave outstanding.
- It then had further communications with the Trust and a change to death in service benefits took place due to 118 hours of untaken annual leave extending Mrs S' leaving date to 31 October 2018.
- It was required to seek recovery of the overpaid benefits. It proposed to offset the death in service lump sum due against the overpaid commuted ill-health lump sum. The death in service lump sum was estimated to be £70,000.
- Once it had the necessary information, it would write to Mr S to confirm the exact figures. Forms were enclosed for Mr S to complete to claim his dependant's pension and the children's pensions.
- To avoid a tax charge of up to 45% being levied, the lump sum death benefit had to be paid within two years of Mrs S' death being notified to it.

26. On 19 June 2020, following receipt of the completed claim form, the children's pensions were authorised for payment. Payment was backdated to 15 October 2018.

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<sup>1</sup> NHS BSA had enclosed extracts from the Regulations with its IDRPs decision and pointed Mr S to a website where he could view the full Regulations.

27. On 21 July 2020, NHS BSA wrote to Mr S. It said:-

- It would process the payment of the children's pensions.
- The payment of Mr S' dependant's pension and the death lump sum would be put on hold until he confirmed his intentions in relation to the overpaid lump sum.
- It proposed to offset the repayment it was requesting by:
  - the death in service lump sum; and
  - with Mr S' agreement, the arrears of dependant's pension including the six months paid at the same rate as Mrs S' pensionable pay.
- Alternatively, it could just use the death in service lump sum in which case the repayment would be higher.
- The estimated figures were a death in service lump sum of £71,131.92, arrears of the initial dependant's pension of £15,925.86 gross and arrears of the continuing dependant's pension of £6,489.24 gross.

28. On 26 November 2020, Mr S agreed to have the repayment offset by both the death in service lump sum and the arrears of his dependant's pension. This reduced the amount that NHS BSA was looking for Mr S to repay to £11,729.65.

29. On the same day, NHS BSA put Mr S' dependant's pension into payment.

30. Mr S made the following additional submissions:-

- He had kept the disputed money in a separate bank account and none of this money had been spent.
- He was continuing to pay his mortgage which was causing financial hardship. The £104,179.69 could have lifted this burden, as it would have allowed him to pay off the mortgage.
- Due to this dispute, he had been caused stress and sleepless nights, and had needed support and medication from his doctor.
- He has had to deal with conflicting information from NHS BSA.

## **Adjudicator's Opinion**

31. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS BSA. The Adjudicator's findings are summarised below:-

- NHS BSA was initially seeking to recover the overpayment of £104,179.69. In November 2020, Mr S agreed to offset this amount by his lump sum death benefit

and the arrears of his dependant's pension. As a result of this, an overpayment of £11,729.65 remained that NHS BSA was seeking to recover.

- NHS BSA was required to pay benefits from the Scheme in accordance with the Regulations and pensions law. An extract from the Regulations can be found in the Appendix.
- When NHS BSA initially processed Mrs S' benefits it was on the basis that her last day of pensionable employment was 11 October 2018. This day was before her date of death and it believed that the necessary ill-health retirement forms had been signed. So, it made arrangements to make a payment of a lump sum of £104,179.69 in full commutation of her ill-health benefits.
- However, NHS BSA was subsequently notified that Mrs S had outstanding annual leave which extended her last day of pensionable employment to 2 November 2018. As Mrs S died before this date, it said that she was no longer entitled to receive the ill-health retirement benefits. It confirmed to Mr S that death in service benefits were payable, and it asked him to repay the £104,179.69.
- Part 3, chapter 3, paragraph 20 of the Regulations is relevant in this instance. It confirms that, if a payment is made in respect of untaken leave, pensionable service is treated as continuing for a period equal to the period of leave. So, in the Adjudicator's view, NHS BSA was correct in recording a date of leaving pensionable employment for Mrs S of 2 November 2018.
- Furthermore, this date was after Mrs S' date of death. So, in the Adjudicator's opinion, NHS BSA was correct in identifying that death in service benefits were applicable as opposed to the ill-health retirement benefits that had already been paid.
- The Adjudicator noted that concerns were raised in relation to the validity of the ill-health retirement forms that had been signed on Mrs S' behalf by Mr S. The Adjudicator did not consider this as, in his view, Mrs S was not entitled to these benefits for the reason stated above. So, the validity of the forms had no relevance to the outcome of this case.
- In the Adjudicator's opinion, on the basis that NHS BSA was correct to say that death in service benefits were payable, an overpayment had occurred.
- Before considering whether Mr S had any defences available to the recovery of the overpaid funds requested by NHS BSA, the Adjudicator considered the applicability of the Limitation Act 1980 (**the Act**). The Act can prevent the recovery of an overpayment made more than six years before the claimant, in this case NHS BSA, took formal action to recover it. The overpayment occurred on 5 November 2018, so the Act did not provide Mr S with a defence from recovery.

32. The Adjudicator went on to consider the most common defence available against the recovery of an overpayment which is referred to as "change of position":-

- Change of position involves the recipient changing their position such that it would be unjust to require them to repay the overpayment; either in whole or in part. Change of position is a defence to a claim in unjust enrichment. To make out a change of position defence certain conditions must be satisfied. Briefly, the recipient must be able to show that, on the balance of probabilities:
  - their circumstances have changed detrimentally;
  - the change of circumstances was caused by receipt of the overpayment; and
  - they are not disqualified from relying on the defence.
- In Mr S' case, he has confirmed that he kept the disputed money in a separate bank account, and he did not spend it.
- In the Adjudicator's view, Mr S' circumstances had not changed detrimentally. In other words, Mr S had not taken any action he would not otherwise have taken but for receiving the disputed money. The Adjudicator noted Mr S' reference to paying his mortgage. However, Mr S would be required to pay the mortgage regardless of having been paid the incorrect benefits. So, he did not have a change of position defence available to the recovery of any part of the overpayment.

33. The Adjudicator considered further possible defences before looking at whether any maladministration had taken place on the part of NHS BSA:-

- Turning now to the defence of estoppel, there are three requirements that need to be satisfied in order to establish estoppel by representation:
  - a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act;
  - an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise; and
  - after the act has been taken, the claimant must be able to show that he/she will suffer detriment if the defendant is not held to the representation or promise.
- For the same reasons as those given to address change of position, the Adjudicator did not consider that Mr S would suffer detriment if the defendant was not held to the representation or promise. This was principally because he did not take any action he would not otherwise have done. Consequently, the Adjudicator did not consider that Mr S had a valid estoppel defence.
- Finally, the Adjudicator was not able to identify the necessary elements for a contract to exist. That is, offer, acceptance, consideration and an intention to enter into legal relations. In particular, he could not see that there was any intention on the part of NHS BSA to enter into a legal relationship with Mrs or Mr S beyond their entitlements under the Regulations.



- Although Mr S did not have any defences available to the recovery of the part of the overpayment that had yet to be repaid, the error was nonetheless unfortunate. Ordinarily, the payment of an incorrect benefit would be considered maladministration. The Adjudicator noted, however, that NHS BSA was unaware of Mrs S' outstanding leave at the time it made the incorrect payment. NHS BSA was not Mrs S' direct employer and could not have known the position with regard to her leave until notified of this by the Trust. In the circumstances, the payment of the incorrect benefits was not as a result of maladministration on the part of NHS BSA.

34. NHS BSA accepted the Adjudicator's Opinion and Mr S provided no feedback. The complaint was passed to me to consider.

35. I agree with the Adjudicator's Opinion.

### **Ombudsman's decision**

36. Mr S' complaint concerns whether Mrs S was entitled to the payment of ill-health retirement benefits shortly before her death. Also, whether NHS BSA was correct in seeking repayment of the lump sum of £104,179.69 that had been paid to her.

37. Mrs S' benefits from the Scheme were initially processed based on her pensionable employment ceasing on 11 October 2018 and her receiving ill-health retirement benefits. However, the Trust subsequently advised NHS BSA that she had outstanding annual leave.

38. The Regulations determine the impact that Mrs S' outstanding leave has on her pensionable service. In particular, as a payment was made in respect of the outstanding leave, Mrs S' pensionable service has to be treated as continuing for a period equal to the period of leave in respect of which the payment had been made.

39. As a result of this, Mrs S' date of termination of pensionable employment would have been extended to 2 November 2018. As Mrs S died on 14 October 2018, she was still in pensionable employment at the time of her death. I find that the correct benefits payable from the Scheme in respect of Mrs S are death in service benefits.

40. NHS BSA is required to pay benefits in accordance with the Regulations. Mrs S was not entitled to the lump sum payment that had been paid to her in full commutation of ill-health benefits. So, it was reasonable for NHS BSA to have asked Mr S to arrange for this sum to be repaid.

41. The Adjudicator has investigated whether Mr S has any defences available to the recovery of some or all of the overpaid funds. I agree with his assessment that the overpayment was too recent for the Act to apply.

42. Furthermore, Mr S advised that he kept the disputed money in a separate bank account. So, I do not consider that he has detrimentally changed his circumstances

as a result of the overpayment. For this reason, I find that Mr S does not have a change of position defence available to him.

43. The Adjudicator also considered the less common defence of estoppel and whether the necessary elements were present for a contract to exist. I agree that neither of these are relevant to this case for the reasons given by the Adjudicator.
44. Finally, I have considered whether any maladministration took place on the part of NHS BSA. I do not find that this was the case as NHS BSA was reliant on information provided by the Trust to calculate Mrs S' benefits. It could not have been aware of the outstanding leave that resulted in her pensionable service being extended until the Trust notified it of this. While I sympathise with Mr S' position, I do not agree that NHS BSA can be held responsible for any distress and inconvenience he has suffered.
45. I do not uphold Mr S' complaint.
46. I suggest that Mr S contact NHS BSA to discuss arrangements for him to make a repayment in respect of the £11,729.65 that is still due.
47. I note that Mr S has kept the disputed money in a separate bank account and has confirmed that none of this money has been spent. So, unless Mr S and NHS BSA choose to reach agreement on an alternative repayment plan, Mr S shall make a one-off payment in respect of the amount due.

**Anthony Arter**

Pensions Ombudsman  
31 October 2022

## **Appendix**

### **Extract from the National Health Service Pension Scheme Regulations 2015**

#### PART 3 Scheme membership

#### CHAPTER 3 Pensionable service

#### Pensionable service

“20 – (3) Paragraph (4) applies if –

- (a) the employment in which M is an active member ceases; and
- (b) a payment is made in respect of untaken leave.

(4) If this payment applies –

- (a) M’s pensionable service is treated as continuing for a period equal to the period of leave in respect of which payment is made; and
- (b) the payment is treated as M’s pensionable earnings for the period.”