

Ombudsman's Determination

Applicant	Mr N
Scheme	NHS Injury Benefit Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. Mr N's complaint against NHS BSA is partly upheld. To put matters right, NHS BSA shall pay Mr N £500 for the significant distress and inconvenience caused.

Complaint summary

2. Mr N has complained that NHS BSA did not pay him the correct amount of permanent injury benefit (**PIB**), having offset the compensation he had received via a civil claim from his pension benefits. He asserts that:-
 - NHS BSA used an incorrect lower pensionable pay figure of £14,333.70 to calculate his PIB award. He referred to several different higher figures NHS BSA should have used.
 - He received £17,000 to £20,000 compensation for the injury and not £62,000 as stated by NHS BSA.
 - He paid £24,457.27 to the Department for Work and Pensions (**DWP**) in respect of payments due to its Compensation Recovery Unit (**CRU**). This is more than the payment of £22,534.22 which was taken into account by NHS BSA.
 - He would like to be paid interest on what he considers to be a late award by virtue of the fact his application was accepted in 2019, rather than 2007, when he suffered his permanent loss of earning ability (**PLOEA**).

Background information, including submissions from the parties

3. In Mr N's case, the pertinent regulations are the NHS Injury Benefit Regulations 1995 (as amended) (**the Regulations**), and the NHS Pension Scheme Regulations 1995 Section SI 1995/300 (**the NHS PS Regulations**). Relevant sections of both regulations are set out in Appendix 1.

4. Mr N worked for Poole Hospital NHS Foundation Trust (**the Employer**) as a Trainee Pharmacy Technician from September 2004. On 31 October 2005, while performing his work duties, Mr N suffered a road traffic accident (**RTA**). Mr N initially worked full time then part time from October 2006. His last day of NHS employment was on 29 January 2007.
5. On 8 February 2010, Mr N was awarded compensation in respect of his RTA. The compensation was paid as a global settlement which meant there was no formal breakdown of figures in the court documents. A letter from Mr N's solicitor, dated 18 February 2010, regarding the compensation is set out in Appendix 2.
6. On 7 March 2018, the Employer told Mr N that his highest pensionable pay was £14,333.70, which was the pay he received in the 2005/2006 tax year.
7. Mr N first applied for PIB on 18 June 2018. In his application form, under employer's section, the Employer provided his total pensionable pay for the last three years as follows:

“£12,440.15 30/01/2006 to 29/01/2007

£14,333.70 30/01/2005 to 29/01/2006

£13,121.12 20/01/2004 to 29/01/2005.”
8. It was in February 2019 that Mr N provided all the required information supporting his application. On 9 May 2019, the Scheme's medical advisers determined that there was sufficient evidence to show that both of the injuries Mr N had suffered, were wholly or mainly attributable to his NHS employment. But that there was not enough evidence to determine that there had been a PLOEA of over 10% by reason of the claimed injuries.
9. In May 2019, during Mr N's appeal process under the Scheme's two-stage internal dispute resolution procedure (**IDRP**), he submitted further medical evidence supporting his claim for PIB. This resulted in Mr N's application being successful at IDR stage one in July 2019. This was on the basis that further evidence showed he had suffered PLOEA of over 75% which led to him being awarded the highest PIB award.
10. On 6 August 2019, Mr N provided to NHS BSA, the letter from his solicitors dated 18 February 2010, and the CRU¹ data from the DWP regarding his state benefits. Mr N further provided to NHS BSA a letter from his solicitors, dated 26 September 2019, that said:

“we were not involved in the CRU payments but we believe that the remaining sums due from the £150,000 constituted the sum paid to the CRU.”

¹ Compensation Recovery Unit at the Department for Work and Pensions

11. On 29 August 2019, Mr N telephoned NHS BSA providing details of his pensions held with other providers and asked whether these would affect his PIB award. He also requested the information on how NHS BSA had calculated the damages annuity.
12. On 10 September 2019, NHS BSA replied to Mr N in writing with the details of his PIB calculation. It also said that, as he did not pay contributions to the other pension schemes while being in NHS employment, those would not be accountable against his PIB award when he started claiming those pensions. The relevant sections of the letter are set out in Appendix 3.
13. On 26 September 2019, Mr N's solicitors wrote to NHS BSA to confirm what Mr N was paid in respect of his settlement. Extracts from the letter are set out in Appendix 4.
14. In October 2019, Mr N emailed the Employer enquiring what his annual salary was as at the date of his RTA, which was 31 October 2005. On 18 October 2019, the Employer replied to Mr N saying his annual salary on the above date was "£14,560.56 full time."
15. In November 2019, NHS BSA paid Mr N's PIB and arrears. His PIB award was backdated to the last day of employment, 29 January 2007. Extracts from NHS BSA's memorandum dated 11 November 2019 showing a breakdown of its PIB calculation is set out in Appendix 5.
16. Dissatisfied with the PIB he was awarded, Mr N appealed under stage two of the IDR. In summary he said:-
 - He believed NHS BSA had used an incorrect lower pensionable pay when calculating his PIB. He wanted a figure of £14,560.56.
 - He wanted to know whether NHS BSA would revise his PIB appropriately should his Employment and Support Allowance (**ESA**) cease.
 - He had provided evidence that he had received £17,000 to £20,000 compensation and wanted NHS BSA to revise his PIB accordingly.
 - He wanted NHS BSA to accept he had paid £24,457.27 to DWP in respect of payments due to its CRU. Therefore, NHS BSA should revise his PIB to take account of this.
17. On 3 January 2020, NHS BSA sent Mr N a response under stage two of the IDR. In summary it said:-
 - Its understanding was that his point regarding ESA had been resolved. It had resolved this issue before issuing the stage two decision. NHS BSA had acted upon his decision to cease his claim for contribution based ESA and had revised his PIB accordingly.

- He was awarded £150,000 in compensation on 8 February 2010. The award of compensation was paid “globally” which meant there was no formal breakdown in the court documents. The Regulations provided that any damages or compensation received in respect of the accepted injury must be taken into account when calculating a claimant’s PIB award.
- His solicitor was not able to provide a clearly delineated formal breakdown of the global figure.
- His PIB award included a reduction called ‘damages annuity’. This reduction was NHS BSA’s method of ensuring the compensation received for the RTA was taken account of and there was no duplication of payment of compensation in respect of the same injury.
- The damages annuity was calculated using an accountable amount of £101,465.78. The figure of £101,465.78 was £150,000 minus the CRU payment of £22,534.22 and minus £26,000 which evidence showed was paid in respect of treatment, pain and suffering.
- It referred to the relevant regulations applicable in Mr N’s case. The Regulations covered (i) the accountability of damages settlement under Regulation 17; (ii) the calculation of his average remuneration pay for PIB purposes under Regulation 4(2); (iii) definitions of average remuneration and pensionable pay under Section 2C(1)(d) and Part C1(6) respectively.
- The figure of £14,333.70 was provided by the Employer who confirmed this was Mr N’s highest pensionable pay, which Mr N received in 2005/2006 tax year. This year was used because his pensionable pay was lower in the 2004/2005 and 2006/2007 tax years, in accordance with Part C1(6).
- The NHS PS Regulations provided that when calculating pension benefits the whole time equivalent pensionable pay should be used. This was why there was a difference in pay in pension documents compared to PIB documents.
- Mr N’ evidence showed his annual salary was £14,560.56. But annual salary was not the same as pensionable pay for the purposes of calculating his PIB. NHS BSA relied on the information it received from the Employer regarding the pay figure as it did not have access to this information.
- It advised Mr N several times to contact the Employer regarding his issue with his pay figure.
- It was satisfied Mr N’s average remuneration had been calculated in accordance with Regulation 2C(1).
- It referred to the solicitor’s letter of 29 September 2019, which confirmed Mr N received £150,000 in respect of his RTA; £17,000 to £20,000 in respect of the injuries. NHS BSA understood this letter to be confirmation that £20,000 of his

settlement was paid solely in respect of pain and suffering and in respect of financial losses.

- NHS BSA could use its discretion to only take into account the financial elements, that is loss of earnings, should a clearly delineated breakdown be provided. It used its discretion to offset the sum of £6,000 which Mr N's solicitor said was paid directly for treatment, and £20,000 which was the maximum amount that the solicitor provided was paid directly for pain and suffering. It was satisfied that that was a reasonable way of administering his damages.
- It was not satisfied that the solicitor had provided sufficient evidence to show Mr N had paid £24,457.27 to the CRU. The solicitor's letter of 26 September 2019 said that the solicitor was not involved in the CRU payments. It referred to Mr N's solicitor's letter dated 18 February 2010 which explained the sum of £22,534.22 had been deducted from the damages settlement in respect of CRU payments.
- It was satisfied that the 18 February 2010 letter was "indisputable evidence" that he paid £22,534.22. However, it was open to revising his PIB award should Mr N provide a letter from the DWP post-dating the compensation settlement to prove £24,457.27 was paid to CRU.

18. On 24 January 2020, NHS BSA wrote to Mr N informing him that an overpayment of £795.15 had occurred regarding his PIB. This error was due to an incorrect rate applied to his PIB on 11 December 2019, and therefore it had to be recalculated. It asked Mr N to repay the £795.15 to the bank of which details were enclosed.
19. Dissatisfied that the overpayment had occurred, Mr N provided further comments to NHS BSA. In his submissions, he said this overpayment had caused him considerable distress and inconvenience. He agreed he could repay the overpayment, and this was to be taken on 8 March 2020, but NHS BSA failed to do so.
20. On 18 March 2020, the Chief Executive Officer of NHS BSA apologised to Mr N for the confusion and distress that had been caused regarding the overpayment.
21. On 19 May 2020, NHS BSA sent Mr N a revised stage two IDR decision addressing the overpayment. It said that unfortunately, although Mr N requested the deduction to be made from the next payment on 8 March 2020, the payroll for March had already been completed. The overpayment was recovered on 8 April 2020. NHS BSA said it acted quickly in recognising and correcting the error therefore offered its apologies and reimbursed Mr N "for any costs incurred in repaying the overpayment, including taxi fare."
22. There was further communication between Mr N and NHS BSA between May and July 2020, regarding different matters unrelated to this complaint. As a result of this, NHS BSA informed Mr N that it considered it had fully addressed his complaint and restricted further communication with him regarding the complaint.

23. Mr N's position:-

- He provided the Pensions Ombudsman's Office (**TPO**) with various documents, such as payslips, and his P45 which he says shows a higher salary than the salary NHS BSA used to calculate his PIB.
- He provided a copy a letter from JobCentre Plus dated 4 June 2010, that shows he made a payment of £24,457.27 to the CRU. Mr N said that due to his poor health, treatments and worry, he was unable to obtain the letter earlier.
- The overpayment caused him distress and inconvenience.
- He was unhappy that NHS BSA had stopped communication with him.
- He made several comments about the Employer's actions regarding his pensionable pay, not informing him earlier of PIB application and the reason for leaving employment.

23. NHS BSA's position:-

- Prior to the complaint being referred to TPO, it had not had sight of the letter dated 4 June 2010.
- After reviewing the letter, it has now accepted that Mr N made a payment of £24,457.27 to CRU and it revised his PIB. NHS BSA cannot be held responsible for not having seen the letter of 4 June 2010 previously, as it can only act on the information provided to it by Mr N.
- It recalculated the PIB correctly, however it incorrectly told the Adjudicator that his PIB would increase by £60 per month. It later confirmed the £60 increase is not per month but per annum.
- It paid Mr N arrears of £505.76 backdated to 8 February 2010, the date he received compensation.
- It apologised for this oversight and explained that this was due to the team incorrectly estimating manually that the increase would be applied monthly. However, when the calculator processed the increase along with his PIB it was identified that his PIB award would be increased by £60 per annum and not £60 per month.
- NHS BSA will only correspond with Mr N through TPO, as it had previously explained to Mr N that it had already addressed all his points under his complaint.

24. In response to the points made by NHS BSA, Mr N said:-

- When he heard NHS BSA made an error with the revised PIB figures, he stopped eating, his ill health was aggravated by worry and stress.

- He wants his arrears to be backdated to his last day of employment which was 29 January 2007 and not 8 February 2010.

Adjudicator's Opinion

25. Mr N's complaint was considered by one of our Adjudicators who concluded that further action was required by NHS BSA. The Adjudicator's findings are summarised below:-

- As part of his original submissions, Mr N complained that NHS BSA had refused to award him PIB. However, this part of his complaint was resolved during the IDR. Accordingly, the Adjudicator only based her investigation on the complaint regarding the calculation of his PIB.
- Mr N raised a few issues regarding the calculation of his PIB award. The Adjudicator addressed each point in turn.
- In Mr N's case, the relevant Regulations were:-
 - Regulation 4(2) of the Regulations which, in summary, states that a person whose employment ceases by reason of injury or disease shall receive an annual allowance which when added to the value of any of the pensions and benefits specified in paragraph (6) will provide an income of the specified percentage of his average remuneration.
 - Regulation 2C(1)(d) of the Regulations which defines average remuneration as: "in relation to a person other than a practitioner to whom the 1995 Regulations apply, such amount as would be or would have been that person's final year's pensionable pay under regulation C1(6) of those Regulations."
 - Regulation C1(6) of the NHS PS Regulations which defines "final year's pensionable pay" as:

"pensionable pay in respect of the member's last year of pensionable employment, ending on the date the member ceases to be in such employment, or dies, whichever occurs first, except—

(a) if pensionable pay was greater in either or both of the 2 consecutive years immediately preceding the last year, "final year's pensionable pay" means pensionable pay in respect of the year immediately preceding the last year or, if greater, pensionable pay in respect of the first of those 2 consecutive years"
- Mr N provided various documents; payslips, and P45, statements, which he said showed a higher pay figure than the pay figure NHS BSA had used to calculate the PIB. He initially wanted a figure of £14,560.56, but later said he wanted over £15,000 to be used to calculate his PIB.

- The Adjudicator noted the Employer provided, in Mr N's application form for PIB, total pensionable pay for the last three years, with the highest figure being £14,333.70. NHS BSA said that the Employer confirmed that Mr N's highest pensionable pay was £14,333.70. So, NHS BSA used £14,333.70 as the pensionable pay for PIB because this was the pensionable pay he received in 2005/2006 year and his pensionable pay was lower in 2004/2005 and 2006/2007. The Adjudicator appreciated that Mr N was told by the Employer on 18 October 2019 that his pay was £14,560.56 full time. But annual salary was not the same as pensionable pay for the purposes of calculating PIB.
- The fact that Mr N reduced his hours from October 2006 until January 2007 may have had an impact on the reduction in his pay. When calculating Mr N's PIB award, NHS BSA used Mr N's whole time equivalent (**WTE**) pensionable pay and not the actual annual salary. In the Adjudicator's view, this may have been the reason that Mr N was referring to different pay figures. As to whether NHS BSA used the correct pensionable pay of £14,333.70 to calculate Mr N's PIB, the Employer confirmed that his pay for 2005/2006 was £14,333.70.
- Mr N's last day of employment was 29 January 2007 and NHS BSA used the pensionable pay for the year immediately preceding the last year of his pensionable employment. In the Adjudicator's view, this approach was in line with Regulation C1(6)(b) and she also noted that Regulation C1 referred to the member's pay up to the date his employment ceased.
- NHS BSA was entitled to rely on the pay information it received from the Employer. So, if Mr N wished to dispute the pay information the Employer had provided to NHS BSA, he would need to raise this matter and other employment matters he mentioned, with the Employer. In the Adjudicator's view, this part of Mr N's complaint should not be upheld.
- Mr N believed he received £17,000 to £20,000 in respect of his injury and he wanted NHS BSA to revise his PIB accordingly.
- Mr N's PIB award was on the basis of his RTA which happened in the course of his NHS employment. In addition, he claimed and received settlement for damages from the Employer in respect of the same injury for which he was receiving PIB. Regulation 17 required that NHS BSA offset the full amount recovered because the damages awarded were in the form of a global settlement. This meant there was no clear delineated breakdown of the settlement.
- The interpretation of Regulation 17 was the subject of a previous Determination, PO-39761, issued by the Pensions Ombudsman. In that Determination the Pensions Ombudsman found that Regulation 17 provided discretion for the Secretary of State to decide how much of any compensation or damages should be offset and that discretion must be exercised reasonably and should not be fettered. In cases involving the exercise of a discretion, the Pensions

Ombudsman will consider whether the discretion has been properly exercised, whether the correct procedures have been applied, and whether the decision reached is one that is within the range of decisions that a reasonable decision maker could reach.

- NHS BSA referred to the letter from Mr N's solicitors dated 26 September 2019. NHS BSA understood this letter to be confirmation that £20,000 of his settlement was paid solely in respect of pain and suffering and in respect of financial losses. Given that a claim against an employer for damages would generally be to compensate for loss of employment, in the Adjudicator's opinion, it was not unreasonable for NHS BSA to take the view that, where no loss of earnings has been clearly specified, then the whole of the settlement related to losses in that respect.
- The Adjudicator noted that, when Mr N's level of compensation was agreed on 8 February 2010, an application for PIB had not even been considered and therefore the value of any PIB could not have been taken into account. Mr N's PIB award included a reduction called 'damages annuity'. This reduction was the method of ensuring the compensation he received for RTA was taken into account and there was no duplication of payment of compensation in respect of the same injury. The damages annuity was calculated using an accountable amount of £101,465.78 (£150,000 minus the CRU of £22,534.22 and minus £26,000 which was paid in respect of treatment and pain and suffering). The £26,000 comprised of £6,000 used for treatment, and £20,000 which was the maximum amount the solicitor confirmed was paid directly for pain and suffering.
- In the Adjudicator's view, the way NHS BSA used its discretion in calculating Mr N's damages award, considering no clear delineated breakdown had been provided, was reasonable. In the Adjudicator's view, this part of Mr N's complaint should not be upheld.
- In the course of TPO's investigation, Mr N provided a letter from JobCentre Plus, dated 4 June 2010, showing he made a payment of £24,457.27 to the CRU. The Adjudicator appreciated due to Mr N's ill health, he was not able to obtain this evidence earlier. The Adjudicator noted that, in response to this letter, NHS BSA accepted that Mr N paid more than the previously accepted figure of £22,534.22. As a result of this, NHS BSA revised Mr N's PIB award and he was provided with new figures.
- He received arrears of £505.76 backdated to 8 February 2010. His PIB award was also increased by £60 per annum. On that basis, the Adjudicator was satisfied that NHS BSA had accepted Mr N paid more to the CRU and rightly revised his PIB. There was no maladministration on the part of NHS BSA, as it had not had a sight of the evidence earlier.
- Mr N also wanted the interest and the arrears to be backdated to his last day of employment, 29 January 2007 and not to 8 February 2010. However, NHS BSA

said that it could only backdate the payments to 8 February 2010 as this was the date Mr N received his compensation. The Adjudicator noted that NHS BSA explained, in the letter of 10 September 2019, the methodology for calculating his PIB. Monies due up to the date of settlement had been withheld. The remaining damages amount was then converted into a damages annuity figure. In the Adjudicator's view, NHS BSA could not have backdated the payments to an earlier date than 8 February 2010, as the monies before that date may be withheld in accordance with Regulation 17. In the Adjudicator's view, this approach was not unreasonable and was in line with the Regulations.

- The Adjudicator noted that during the calculation of the revised PIB, NHS BSA initially told the Adjudicator that the increase was £60 per month and not per annum. She had shared this information with Mr N. It later apologised for the oversight and explained that this was due to the team incorrectly manually estimating that the increase would be applied monthly. However, when the calculator processed the increase along with his PIB award it was identified that his benefit would be increased by £60 per annum and not £60 per month. Mr N said this situation has caused him additional stress and worry and aggravated his condition. The Adjudicator also noted the overpayment which occurred in January 2020.
- NHS BSA offered its apology and reimbursed Mr N for any costs incurred in repaying the overpayment including a taxi fare. However, in the Adjudicator's view, the overpayment and the subsequent error in revising the calculation of Mr N's PIB would have undoubtedly caused Mr N significant distress and inconvenience exacerbated by his existing poor health. For this, in the Adjudicator's view, NHS BSA should make a payment of £500 in recognition of the significant distress and inconvenience suffered which was in line with the Pensions Ombudsman's guidance.
- Consequently, it was the Adjudicator's opinion that this complaint should be partly upheld.

26. Mr N did not accept the Adjudicator's Opinion and in summary said:-

- Had the Employer provided him with relevant information sooner he could have applied for PIB in 2007 and not in 2019. He believes the Employer failed and misled him.
- He referred to various documents, P45s, and statements, which he said show a higher pay figure than the pay figure NHS BSA has used to calculate his PIB. On that basis, he wants NHS BSA to revise his PIB.
- He referred to his own costs incurred in relation to treatment, and travel before he received compensation which was in excess of £100,000. NHS BSA is using £62,000 of his own money against him to lower his pension.

- He referred to his pension contributions of £958.56 which equates to 6% of his pensionable pay of £15,975.82. This figure should have been used by NHS BSA.

27. In response to the Adjudicator's Opinion NHS BSA said:-

- It did not accept the Adjudicator's recommendation that it should pay Mr N £500 for the significant distress and inconvenience caused.
- It believed that the errors mentioned by the Adjudicator are minor and were rectified quickly. Considering "the distress caused by Mr N to employees at NHS BSA including threats of violence and intimidation" it is difficult to justify £500.
- However, it respects the Adjudicator's view and will wait for the Ombudsman's Determination in this matter.

28. As neither Mr N nor NHS BSA accepted the Adjudicator's Opinion, the complaint was passed to me to consider. I agree with the Adjudicator's Opinion and note the additional points raised by Mr N and also NHS BSA.

Ombudsman's decision

29. Regulation 17 of the Regulations provides that NHS BSA, on behalf of the Secretary of State, "**shall** take into account...any damages or compensation recovered by any person in respect of the injury" (emphasis added). However, it also provides that the injury benefit "**may** be withheld or reduced accordingly" (emphasis added). In other words, there are two elements to Regulations 17: a mandatory element (to take account of the damages); and a discretionary element (to determine by how much an injury benefit is withheld or reduced).

30. Mr N's disagreement arises in relation to the discretionary element of Regulation 17; namely, by how much his PIB should have been withheld or reduced. There is an agreement in place by which NHS BSA will normally only take the loss of earnings element of any damages into account, when calculating a PIB. In order to do so, it asks to be provided with a breakdown of any settlement to enable it to identify the loss of earnings element. I find this is not unreasonable and it is the approach it has taken in Mr N's case. Mr N's solicitor was unable to provide such a breakdown to NHS BSA.

31. When it comes to the exercise of a discretionary power, my role is limited to considering the manner in which a decision has been reached. I find that NHS BSA made its decision, to take the whole of the net settlement into account, in a proper manner. For its decision to have been perverse, it would have had to have been one which no reasonable decision-maker would come to. I do not find this to be the case.

32. If NHS BSA was to disregard all of the settlement, Mr N would be compensated for loss of earnings twice; once by receipt of a settlement and once by a payment out of public funds. This would not be the appropriate approach for NHS BSA to take. I find

that NHS BSA has applied Regulation 17 correctly and exercised its discretion in relation to the reduction of Mr N's PIB award in a proper manner.

33. Mr N raised issues regarding the action taken by the Employer in relation to his application for PIB and his pensionable pay figure. I am unable to consider these points as the Employer is not party to the complaint. Mr N will need to raise these issues directly with the Employer. As explained by the Adjudicator, NHS BSA is entitled to rely on the information it receives from the Employer. The Employer confirmed that that Mr N's pensionable pay for 2005/2006 was £14,333.70. Mr N's last day of employment was 29 January 2007 and NHS BSA used the pensionable pay for year immediately preceding the last year of his pensionable employment. I find this approach to be in line with Regulation C1(6)(b) and Regulation C1.
34. I appreciate NHS BSA does not accept £500 is warranted for the distress and inconvenience Mr N has suffered. It believes the errors regarding the overpayment and the initial information about the revised PIB were minor in comparison with Mr N's threats and intimidating behaviour towards NHS BSA employees. I can only consider the facts of this case and I find that these errors would have undoubtedly caused Mr N significant distress and inconvenience, which would have been exacerbated by his poor health. I find that an award of £500 is appropriate, given the circumstances of Mr N's case, but I do appreciate the concern expressed by NHS BSA regarding the alleged threats and intimidating behaviour which would be entirely inappropriate in the circumstances.
35. I partly uphold Mr N's complaint.

Directions

36. Within 28 days of the date of this Determination, NHS BSA shall pay Mr N £500 in recognition of the significant distress and inconvenience caused.

Anthony Arter

Pensions Ombudsman
18 November 2021

Appendix 1

NHS Injury Benefit Regulations 1995 (as amended)

Regulation 17 states:

“(1) The Secretary of State shall take into account against the benefits provided in these Regulations any damages or compensation recovered by any person in respect of the injury or disease or in respect of the death of a person to whom these Regulations apply, and such benefits may be withheld or reduced accordingly.”

Regulation 4(2)

“Where a person to whom regulation 3(1) applies ceases to be employed before 31st March 2018 as such a person by reason of the injury or disease and no allowance or lump sum, other than an allowance under paragraph (5) or (5A), has been paid under these Regulations in consequence of the injury or disease, there shall be payable, from the date of cessation of employment, an annual allowance of the amount, if any, which when added to the value, expressed as an annual amount, of any of the pensions and benefits specified in paragraph (6) will provide an income of the percentage of his average remuneration shown in whichever column of the table hereunder is appropriate to his service in relation to the degree by which his earning ability is permanently reduced at the date that person ceases that employment.”

“Average Remuneration” is defined in Section 2C(1)(d) and states:

“2C.—(1) In these Regulations, “average remuneration” means—

(d) in relation to a person other than a practitioner to whom the 1995 Regulations apply, such amount as would be or would have been that person’s final year’s pensionable pay under regulation C1(6) of those Regulations”

NHS Pensions Scheme Regulations 1995 (as amended)

Part C1(6) states:

“Pensionable Pay, Pensionable Service and Qualifying Service

C1 Meaning of “pensionable pay” and “final year's pensionable pay”

(6) Subject to paragraph (6A), in these Regulations, “final year's pensionable pay” means pensionable pay in respect of the member's last year of pensionable employment, ending on the date the member ceases to be in such employment, or dies, whichever occurs first, except—

(a) if pensionable pay was greater in either or both of the 2 consecutive years immediately preceding the last year, “final year's pensionable pay” means

CAS-44445-W7S6

pensionable pay in respect of the year immediately preceding the last year or, if greater, pensionable pay in respect of the first of those 2 consecutive years”

Appendix 2

Extracts of the solicitors' letter dated 18 February 2010.

“To summarise if I may the terms of the settlement, you are to receive a net sum of £118,465.78 which is the agreed sum of £150,000.00 less the amount due to the DWP in respect of benefits received which total as at 8th February 2010 in the sum of £22,534.22.

...

In addition, also to be deducted from the sum of £150,000.00 are the interim payments which are stated to have been made. This amounts to a sum of £9,000.00. The interim payments were apparently sent on the following date:

5th May 2006- £500.00

20th April 2006- £500.00

1st October 2007- £2,000.00

There is also a further payment which is held by your Trust in the sum of £6,000.00 which is in respect of treatment.

...

It was agreed that the payment which the Defendants would make in the net sum of £118,465.78 will be paid to this firm in order that there will be no difficulties in relation to the Trust which I understand is presently being operated. As you know I have only been dealing with your case since recently, and therefore I have no details as to the actual Trust Fund but I suggest you liaise with those who administer the Fund so that they can assist you in dealing with the relevant monies that are forthcoming.”

Appendix 3

NHS BSA's letter to Mr N dated 10 September 2019 said:

"I can confirm once we obtained details of the settlement and determined the total figure accountable, we first need to calculate the amount of NHS Injury benefit due up to the date of the settlement. In your case, it was decided to account for £127,465.78. Monies up to the date of settlement include a lump sum of £7,415.07 and an allowance of £39,732.77. Therefore meaning a total of £47,147.84 has been withheld. The remaining damages of £80,317.94 was then converted into a damages annuity figure. This figure is reached by dividing the sum of £80,317.94 by the factor advised by the Government Actuary's Department (GAD). To gain the relevant factor we use gender and then age applicable at the time of the settlement. In your case the factor was 52.34, we then revert the amount back to your last day of service.

...

I note you have sent in further information regarding your settlement and have requested that it is reduced by £12,977.50, your correspondence has been logged and we will contact you again regarding our decision in due course."

Appendix 4

The solicitor's letter to NHS BSA dated 26 September 2019 said:

"We can confirm that Mr N's claim consisted of a claim for various losses including care, past services, past loss of earnings and medical costs.

In addition there was a claim for future loss including future care and future lost earnings, services equipment and rehabilitation costs and medical costs.

This matter was due for Trial on the 10th and 11th February 2021 and on the 8th February there was an Appeal Hearing where after a meeting between the Claimant and his Advisors and the Advisors of the Defendant, a settlement was reached.

We can confirm that the settlement agreed was a sum of £150,000.00 and a sum of £7,076.95 was paid to a Trust Fund set up on his behalf on the 28th August 2009 and a further sum of £118,465.78 on the 26th February 2010.

We were not involved in the Compensation Recovery Unit payments but we believe the remaining sums due from the £150,000.00 constituted the sum paid to the CRU.

The figure of £150,000.00 was not broken down in terms of what each sum was for each specific item. It was a generic offer for all heads of Mr N's claim, and therefore it is not possible, to specifically attribute what part of that sum was specific to the specific injury claim as opposed to financial and other losses.

We can however advise that the assessment of the value that was likely to have been made in respect of Mr N's injuries would have been within the bracket of £17,000.00 to £20,000.00 and therefore anything over and above that sum of £20,000.00 is likely to have been in respect of his claim for financial and other losses arising out of his injury claim."

Appendix 5

NHS Injury Benefits Scheme Memo dated 11 November 2019 stated:

“Damages settlement

Date of settlement	08/02/2010
Last day of Employment	29/01/2007
Amount accountable	£101,465.78 (127,465.78-26,000.00)

Our benefit

Lump sum withheld	£7,415.07
PIB allowance withheld to Feb 2010	£29,666.86

Total	£37,081.10
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To annuitise	£101,465.78
	£37,081.10-

Total	£64,384.68
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Annuity Value

Male	Age 37	Factor 52.34
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£64384.68/factor=	£1,230.12
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Reverse PI= 1.0975	=£1,120.84”
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