

Ombudsman's Determination

Applicant	Mrs N
Scheme	NHS Injury Benefits Scheme
Respondents	NHS Business Services Authority (NHS BSA)

Outcome

1. Mrs N's complaint is upheld and, to put matters right, NHS BSA should calculate the amount of overpayment which relates to the period May 2010 to July 2014, including allowing for any repayments Mrs N has already made. They should then agree a repayment plan with Mrs N. NHS BSA should pay Mrs N a further £350 for distress and inconvenience.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

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3. Mrs N has complained that NHS BSA are seeking to recover an overpayment of permanent injury allowance (**PIA**) dating from 1993. The overpayment currently amounts to £2,858.93.

Background information, including submissions from the parties

4. The National Health Service (Injury Benefits) Regulations 1995 (SI1995/866) (as amended), apply. They revoked and replaced the earlier 1980 regulations which applied at the time Mrs N's injury benefit was awarded.
5. In 1993, Mrs N was working as a care assistant. She injured her back and was awarded a PIA.
6. On 8 June 1994, the NHS Customer Services – Injury Benefits wrote to Mrs N informing her of the outcome of her injury benefit claim. Mrs N was told she had been guaranteed an income for life of £6,878.98 per year, based on earnings of £8,092.92 and service of between 5–15 years. The letter explained that an annual allowance was payable if Mrs N's income by way of her NHS pension and certain social security benefits was less than her guaranteed income. The letter also said that "Our

enquiries show that you are (have been) in receipt of the benefits listed below". The benefits listed were an NHS pension of £454.53 per year and Invalidity Benefit of £2,226.50 (from 27 August to 19 September 1993) and £3,327.76 (from 20 September 1993). Mrs N was told an annual allowance of £4,197.95 was payable for the period up to 19 September 1993 and £3,782.29 thereafter. She was also told she would receive a lump sum of £4,046.46. The letter said a leaflet was enclosed, which explained how injury benefits were worked out and what changes Mrs N needed to report.

7. Mrs N was originally due to retire on 26 August 1993. Her retirement date was changed to 30 November 1993. The NHS Pensions Agency wrote to Mrs N explaining they were changing her retirement benefits as a result. Mrs N was told her pension would increase to £481.15 a year. The letter is undated but, during the appeal process, the NHS BSA have said that it was sent after their letter of 8 June 1994.
8. In July 2014, NHS BSA wrote to Mrs N saying her injury allowance had been reviewed because: her employer had changed her last day of service; her NHS pension had increased; and her Invalidity/Incapacity Benefit had changed to Employment and Support Allowance (**ESA**). They said her PIA would decrease.
9. NHS BSA wrote to Mrs N, on 13 February 2015, saying (amongst other things) that they noted from the records that she had received a letter from NHS Pensions, in July 1994, advising her of the change to her last day of service and the increase in her pension. They said there was no record of her contacting the injury benefits office to inform them of the changes. NHS BSA went on to say that, because the NHS Pensions Scheme and the injury benefits scheme have different regulations, NHS Pensions' administration do not automatically inform them of changes.
10. NHS BSA also explained that they understood that the amount Mrs N was receiving as ESA may not have changed from the amount she received as Incapacity Benefit, but they were required to account for the two benefits in a different way. This aspect of Mrs N's complaint has been addressed by a subsequent change in legislation.
11. NHS BSA said there had been an overpayment of injury benefit for the period 27 August 1993 to 22 July 2014 amounting to £8,191.84.
12. Mrs N appealed on the grounds that she had been unaware that she needed to notify the injury benefit scheme that her NHS pension had changed. She said she assumed this would have been reviewed by the NHS at intervals. Mrs N said she was on a low income and had had numerous health issues. She said repaying the overpayment would cause her extreme hardship.
13. NHS BSA issued an appeal decision on 29 June 2015. They declined Mrs N's appeal on the basis that she had not informed them of the change to her pension, they did not make checks in the way she had suggested, and their literature made it clear than she needed to inform them of any changes. NHS BSA said they had referred Mrs N's

case to their finance section for them to issue an income and expenditure form to help them assess her ability to repay.

14. Mrs N contacted the Pensions Advisory Service (**TPAS**) for assistance. Following enquiries by Mrs N's TPAS adviser, NHS BSA agreed to write off £2,019.52 of the overpayment. They did so on the basis that there had been a review exercise in 2007, following the discovery that they had misinterpreted the injury benefit regulations. They said they had assumed the information on Mrs N's file was correct at this time and agreed to write off that part of the overpayment which occurred prior to this exercise. NHS BSA said £6,172.32 remained outstanding.
15. Following further correspondence, NHS BSA informed Mrs N's TPAS adviser that they had reviewed the amount to be written off and revised this to £5,332.91; leaving £2,858.93 remaining. However, they declined her subsequent appeal against recovery of this amount.
16. In their appeal response, dated 7 March 2016, NHS BSA made the following points:-
 - As a public body, they had a responsibility to recover monies paid incorrectly.
 - They did not accept that it was the responsibility of NHS Pensions to inform the injury benefits scheme that Mrs N's pension had changed.
 - Mrs N was or should have been aware that she had a responsibility to inform them that her relevant income had increased.
 - Following the revision of her pension in July 1994, Mrs N had been informed by letter that a higher rate of pension was payable. In addition, NHS Pensions and their paying agent had sought recovery of overpaid pension between October 1994 and January 1995.
 - Mrs N had been informed, on 8 June 1994, that she was entitled to a PIA. She had also been made aware that the rate of her pension was taken into account. This letter was sent just a matter of weeks before her pension was revised. Therefore, it was not unreasonable to find that Mrs N should have been aware that she should inform the injury benefit scheme that her pension had increased.
 - The relevant time period for the purpose of the Limitations Act 1980 (**LA 1980**) began in February 2014, when they became aware of the overpayment. Although NHS Pensions were aware of the change in Mrs N's employment details in June 1994, they were not. The two schemes use different computer systems and there is/was no facility to alert either to changes in the other.
17. In June 2016, NHS BSA wrote to Mrs N explaining that, as a result of a change in legislation, there was now no overpayment arising from her change from Incapacity Benefit to ESA in 2014. They said her PIA would increase and she was due arrears. NHS BSA said they had asked their paying agent to withhold the arrears to reduce

the remaining overpayment. In a subsequent letter, they said the overpayment had now been reduced to £2,559.72. NHS BSA said they would be paying Mrs N the sum of £150 for any distress and inconvenience caused.

Submissions by NHS BSA

18. The key points in the formal response received from NHS BSA are summarised below:-

- Regulations 4(2) and 4(6) provide that a PIA is payable when, at the time of leaving NHS employment, an applicant's income by way of NHS pension and certain social security benefits, is less than a guaranteed amount.
- Regulation 13 (see appendix) provides for the injury benefit scheme administrators to review a PIA when a relevant pension or benefit starts or stops.
- HM Treasury guidelines require them to pursue recovery of overpayments irrespective of how they arose, taking into account the debtor's ability to repay, the length of time since the overpayment, and whether the overpayment was received in good faith. A plea of ignorance, administrative error or hardship is insufficient in itself for them to write off an overpayment. They may write off the overpayment on the grounds of hardship, but hardship should not be confused with inconvenience. A plea of hardship must be supported by reasonable evidence that recovery would be detrimental to the debtor's welfare or the welfare of their family. Where the recipient has no entitlement, repayment in itself does not amount to hardship.
- They have asked Mrs N to complete an income and expenditure form but, to date, she has not done so.
- They acknowledge that NHS Pensions were aware of the change to Mrs N's employment details in June 1994 but say they were not. They point out that NHS Pensions is a separate statutory scheme to the injury benefits scheme.
- The literature provided for Mrs N throughout her claim explained that it was her responsibility to inform the injury benefits scheme of any changes to her relevant pensions or social security benefits. She was informed that, if any information in the documentation supplied was incorrect and an overpayment occurred, she would be responsible for paying back the overpaid monies.
- As a public body, they have a responsibility to recover monies paid incorrectly. Mrs N has received more than she is due and they have no option but to seek recovery.
- It is not their intention to cause financial hardship and they will consider repayment by instalments over a reasonable time.

19. In response to enquiries from this office, NHS BSA have explained that the pension figure of £454.53 was provided by NHS Pensions. They have explained that, at first award calculation stage, the injury benefits administrator contacts NHS Pensions and asks for the required information.
20. Following receipt of an opinion from one of our Adjudicators, NHS BSA made the following further submission:-
 - They have reached their decision in a proper manner and in keeping with the *Edge* principles; i.e. they have asked the right questions, directed themselves correctly in law, considered all relevant and no irrelevant matters, and not come to a perverse decision.
 - Once eligibility for PIA has been established, NHS BSA are responsible for contacting the paying authorities for the benefits which must be taken into account; for example, the Department for Work and Pensions and NHS Pensions. There is no obligation on, or agreement with, these bodies to pass information to NHS BSA unless it is requested.
 - Regulation 13 does not allow them to carry out periodic checks on relevant pensions. It only allows review of PIA if the scheme administrators have reason to believe that any of the relevant pensions have started, stopped or changed. It is for this reason that recipients are asked to notify them of changes.
 - None of the injury benefit accounts reviewed in 2007 had their relevant pensions reviewed, unless there was reason to believe they had changed, because the regulations do not provide for periodic reviews. They had no reason to believe that Mrs N's last day of pensionable service had changed.
 - They are willing to consider a plea of hardship, but will take into account the fact that Mrs N has recently been paid £10,655.05 arrears relating to the cessation of her ESA in March 2015.

Adjudicator's Opinion

21. Mrs 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 briefly below:-
 - The amount of PIA Mrs N was/is entitled to is dependent upon (amongst other things) the pension she receives from the NHS Pension Scheme. Because NHS BSA were unaware that Mrs N's date of leaving had changed, they did not adjust her PIA to take account of the (slightly) higher pension she began to receive in 1994. Mrs N has, therefore, received more by way of PIA than she was strictly entitled to.

- The starting point in any case where there has been an overpayment of a benefit is that the paying authority are entitled to seek recovery. This is the case even if there has been an error on their part. NHS BSA are, ostensibly, entitled to seek recovery of the remaining £2,559.72.
- Having said this, the recovery of any overpayment is subject to the LA 1980. The usual time limit for seeking recovery of an overpayment is six years from the date of the incorrect payment (section 5 LA 1980). There is, however, provision for the six year period to be extended where the overpayment is the consequence of a mistake. Under section 32 LA 1980, the time would not start to run until the mistake was discovered or could “with reasonable diligence” have been discovered.
- The High Court has recently decided that the cut-off date for limitation purposes is the date of receipt by the Ombudsman of the respondent’s written response to the notice of complaint¹. The formal response by NHS BSA to Mrs N’s complaint was received by the Ombudsman in May 2016. For the purposes of LA 1980 this is the date at which time ceased to run. The question is, therefore, whether NHS BSA made their claim for repayment within the applicable limitation period and are able to recover the overpayments from Mrs N. That question will turn upon the date at which the limitation period started to run.
- NHS BSA initially said they only became aware of the overpayment in 2014 and time started to run from then. On that basis, they would have until 2020 in order to make a claim for the recovery of the overpayment (applying section 32 LA 1980). Their response to Mrs N’s complaint was received by the Ombudsman within this timeframe. The question arises, however, whether, by exercising reasonable diligence, NHS BSA could have discovered the error at an earlier date.
- The error which gave rise to the overpayment happened in 1993/94 when Mrs N first retired. NHS BSA say they could not have discovered the error at this time because the injury benefit scheme and the pension scheme used separate computer systems. They have also relied on the fact that members are asked to notify the scheme administrators of any changes in their relevant benefits. However, it is clear that there is/was communication between the two schemes at the beginning. The initial pension amount is not provided by the member, but by the pension scheme at the request of the injury benefits administrator. Mrs N had not been asked to provide details of her initial pension; only of any subsequent changes. It could be argued NHS BSA could, with reasonable diligence, have discovered the error in Mrs N’s PIA in 1994. There was already a (limited) procedure in place for the relevant information to

¹ *Webber v Department for Education and another* [2016] EWHC 2519 (Ch)

be passed between the two schemes and they would have been aware of the need to do so.

- It was not necessary to consider this issue further because NHS BSA had already written off part of the overpayment on the basis that they undertook a special exercise in 2007; at which time Mrs N's injury benefit was reviewed. The error was not picked up this time because NHS BSA assumed that their records were correct. It follows that if the limitation period is said to run from the time the error could, with reasonable diligence, have been discovered, NHS BSA have (by their actions) conceded that this was at least 2007.
- Under section 32 LA 1980, the effect is the same whether limitation is said to run from 1994 or 2007. The amount which NHS BSA may seek to recover is limited to the overpayment which occurred in the six years prior to the cut-off date in May 2016. In other words, NHS BSA may only seek recovery of that part of the overpayment which relates to the period May 2010 to July 2014.

22. NHS BSA did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. NHS BSA provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by NHS BSA for completeness.

Ombudsman's decision

23. Mrs N's pension was recalculated because her date of leaving changed. The amended amount of pension she received in 1993 was, therefore, her initial pension amount. Whilst I accept that Mrs N had been asked to notify NHS BSA of any changes to her relevant benefits during her retirement, she had not been asked to provide them with the initial amount of her NHS pension. NHS BSA accept that they would normally obtain this figure from NHS Pensions. It may be reasonable to rely on PIA recipients to notify them of subsequent changes to relevant benefits; particularly since these are not confined to NHS pensions. However, NHS BSA had accepted responsibility for picking up the initial pension amount. Mrs N was not asked to provide this. They have explained that they did not do so in Mrs N's case because the two schemes were administered using two different computer systems. Despite being housed at the same address, they had no procedure in place for picking up any amendment to the initial pension amount.
24. NHS BSA conducted a review exercise in 2007. However, they say that none of the PIA accounts were reviewed unless they had reason to believe there had been some change. NHS BSA say regulation 13 does not allow them to carry out periodic checks. Regulation 13 requires NHS BSA to "review" a PIA under certain circumstances. However, it does not preclude them from undertaking basic housekeeping checks at any time to ensure that they hold the correct data for recipients; for example, the correct date of leaving pensionable service.

25. NHS BSA could have picked up the change to Mrs N's date of leaving, with reasonable diligence, on at least two occasions: 1993 and 2007. Whichever case applies, they are confined to recovering the overpayment which relates to the period May 2010 to July 2014.
26. NHS BSA have said they are willing to consider a case for hardship. However, they also say they will take into account the fact that Mrs N received £10,655.05 arrears relating to the cessation of her ESA in 2015. I do not find this to be appropriate. The payment of £10,655.05 relates to past payments of PIA. Any hardship claim submitted by Mrs N relates to recovery from future payments. It must, therefore, take account of Mrs N's future financial position; not past payments.

Directions

27. I now direct that, within 28 days of the date of this determination, NHS BSA shall calculate the amount of overpayment which relates to the period May 2010 to July 2014, including allowing for any repayments Mrs N has already made. They shall then agree a repayment plan with Mrs N. In order for them to do so, Mrs N needs to complete the income and expenditure form which NHS BSA have already sent her. As a general rule of thumb, recovery should take place over roughly the same length of time as the overpayment built up. In Mrs N's case, this would be around 50 months. This will, of course, depend on Mrs N's circumstances once she has completed the income and expenditure form.
28. NHS BSA have paid Mrs N £150 for distress and inconvenience. In view of the length of time over which the overpayment accumulated, it must have come as a considerable shock to Mrs N to be told that she would be expected to repay £8,191.84. That figure has been reduced subsequently for various reasons. Nevertheless, the circumstances warrant a slightly higher payment for the significant distress and inconvenience. NHS BSA shall pay Mrs N a further £350 or, if she prefers, put this sum towards reducing the outstanding overpayment.

Anthony Arter

Pensions Ombudsman
3 March 2017

Appendix

The National Health Service (Injury Benefits) Regulations 1995 (SI1995/866) (as amended)

29. Regulation 13 “Review and adjustment of allowance” provides,

- “(1) The Secretary of State shall review the amount of an allowance payable under Part II of these Regulations in the light of -
 - (a) a further reduction of the person's earning ability by reason of the injury or disease;
 - (b) the commencement or cessation of payment to the person of a benefit mentioned in regulation 4(6)(b), by reason of the injury or disease; or
 - (c) the commencement of a pension payable to the person under a relevant pension scheme or an increase in such a pension not being an increase under the Pensions (Increase) Act 1971; ...
- (1A) For the purposes of paragraph (1)(b) -
 - (a) employment and support allowance payable during the assessment phase for that benefit and employment and support allowance payable after that phase has ended shall be treated as separate benefits; and
 - (b) where employment and support allowance was awarded to a person prior to 1st April 2009 and that person continues to be entitled to that allowance on that day, payment of that allowance shall be deemed to have commenced on that day.

...”

The Limitations Act 1980

30. Section 32 “Postponement of limitation period in case of fraud, concealment or mistake” provides,

- “(1) Subject to subsection (3) subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either -
 - (a) ...
 - (b) ...
 - (c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the ... mistake ... or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent ..."