

## Ombudsman's Determination

Applicant	Mr S
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondents	NHS Business Services Authority ( <b>NHS BSA</b> ) Darlington Clinical Commissioning Group ( <b>DCCG</b> )

1. I do not uphold Mr S' complaint and no further action is required by the Respondents.
2. My reasons for reaching this decision are explained in more detail below.

### Complaint summary

3. Mr S has complained that DCCG misreported his redundancy entitlement to NHS BSA, when saying that he is subject to Agenda for Change redundancy terms as opposed to Very Senior Manager (**VSM**) terms, which he says he is contractually entitled to. As a result, NHS BSA has been paying the incorrect level of pension.
4. Mr S also believes that NHS BSA should have more robustly investigated the inconsistent information it was provided with.

### Background information, including submissions from the parties

5. On 20 July 2012, Mr S was appointed to a senior position in DCCG. He says that he was employed by the NHS as a VSM since June 2007 and this remained the case until his retirement.
6. In January 2016, NHS BSA was informed by DCCG that Mr S would receive a redundancy payment on VSM basis, amounting to £210,000. NHS BSA provided a retirement quote on the basis of this figure being used to offset the effect of an early retirement reduction.
7. On 22 April 2016, Mr S signed a Settlement Agreement between DCCG and himself. The termination date was set as 30 April 2016. Key passages from the Settlement Agreement are set out in the Appendix below.

8. A condition of the Settlement Agreement was that Mr S would take early retirement and use his redundancy entitlement to offset the reduction applied to his pension due to the fact he was retiring early.
9. On 1 September 2016, Mr S was informed that his pension benefits would be £34,892 per year with a lump sum of £232,621.
10. On 7 September 2016, Mr S' pension was put into payment.
11. On 13 September 2016, Mr S was informed by DCCG payroll that an error had occurred and his pension would need to be recalculated.
12. On 23 September 2016, NHS BSA wrote to Mr S explaining that DCCG had informed it that he was, in fact, subject to Agenda for Change terms, as opposed to VSM terms, and as such, his pension was recalculated and would be £32,016 per year, with a lump sum of £213,441.
13. Mr S contacted NHS BSA to dispute the recalculation arguing that he was not subject to Agenda for Change.
14. On 19 July 2017, Mr S complained to NHS BSA under the Internal Dispute Resolution Procedure (**IDRP**).
15. On 10 August 2017, NHS BSA provided an IDRP stage one response, explaining that it had initially been informed by DCCG that he was not subject to Agenda for Change conditions, and that was the basis on which the benefits had initially been paid. However, shortly after benefits were put into payment, DCCG had informed it that Mr S was subject to the Agenda for Change cap, and therefore his benefits had to be recalculated. NHS BSA did not uphold Mr S' complaint and reminded him that an overpayment made whilst the incorrect level of pension was in payment needed to be repaid.
16. On 1 February 2018, Mr S appealed the stage one decision. He highlighted that his employment contract entitled him to VSM terms and conditions and at the point of redundancy he was not subject to Agenda for Change terms. He also argued that NHS BSA had not provided any evidence that he was not subject to VSM redundancy terms.
17. On 30 April 2018, NHS BSA responded to Mr S at stage two of the IDRP, confirming that it had reviewed its records and acknowledged the inconsistent information provided by DCCG. NHS BSA had subsequently queried this with DCCG, which had now confirmed that a legal agreement, on which Mr S had received independent legal advice, had superseded his employment contract and it was on that basis that Mr S was now subject to Agenda for Change. NHS BSA had paid Mr S' benefits on the basis of the information provided by DCCG. If Mr S thought there was an error in the information provided by DCCG, then he should challenge its interpretation of the legal agreement.

18. Mr S remained dissatisfied and referred the matter to the Pensions Ombudsman for consideration. On referral to us, Mr S stated:

“...I have always said that if I am in error I am content to agree repayment of the amount quoted to NHS Pensions. If you can get evidential confirmation that the reason for the revision to my pension benefits is correct then this would be very much appreciated...”

19. On 28 February 2019, DCCG commented on the complaint confirming:-

“The amount of [Mr S’] redundancy payment was agreed under a legal agreement. The legal agreement sets out that the terms within it supersedes all prior terms and conditions.”

20. DCCG provided evidence of its communications with NHS BSA over the relevant time but provided no substantive response to the complaint.

### **Adjudicator’s Opinion**

21. Mr S’ complaint was considered by one of our Adjudicators who concluded that no further action was required by the Respondents. The Adjudicator’s findings are summarised below:-

- NHS BSA was given inconsistent information by DCCG, but it was entitled to rely on the information provided by his employer. It did not have access to his employment records and so could not override what DCCG was telling it or compel DCCG to pay additional sums. As NHS BSA was reasonably relying on the information, it cannot be said to have made an error.
- The Settlement Agreement was an employment matter that the Pension Ombudsman cannot overturn. However, it is clear within the Settlement Agreement that the redundancy payment to be paid to NHS BSA would be £160,000, and there is no scope for it to be interpreted as providing a higher redundancy figure.
- The Adjudicator also considered that the Settlement Agreement varied the terms of Mr S’ contract and therefore superseded any alternative redundancy rights he may have had.

22. Mr S did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Mr S provided his further comments which do not change the outcome. I agree with the Adjudicator’s Opinion and I will therefore only respond to the key points made by Mr S for completeness.

### **Ombudsman’s decision**

23. Mr S considers that NHS BSA’s investigation of his complaint lacked a reasonable standard of probity and it made errors in the course of determining his benefits and

the subsequent revision. The errors made by NHS BSA have resulted in him being treated unfairly and demonstrate deficiencies in the assessment and payment of benefits from the Scheme. Unless addressed, this will result in similar mistreatment to other members of the Scheme, and potentially members of other pension schemes.

24. Mr S maintains that over the course of 2016 there was a misunderstanding as to his entitlement. He considers it is not true that all VSM are subject to Agenda for Change redundancy terms and has provided anecdotal evidence that various other senior NHS managers dispute this position. He has also questioned the lack of accurate illustrations in the run up to his retirement.
25. Whilst I acknowledge the arguments Mr S makes in relation to the lead up to his retirement, and there was a misunderstanding when NHS BSA was informed of the incorrect, higher level of redundancy payment he would be entitled to receive, these arguments fail to address the fundamental reason his redundancy payment was capped at £160,000.
26. The Settlement Agreement is clear that the Redundancy Payment (defined in the Appendix below) was being made in the context of Agenda for Change terms. As such the payment would be £160,000 or an alternative, lower amount where DCCG is restricted from paying that amount in full by way of an act of Parliament or secondary legislation. I do not agree with Mr S' argument these terms left any scope for the redundancy payment to exceed £160,000, and, given that he anticipated a redundancy payment of £210,000, I cannot understand why this figure was not challenged at the time.
27. The Settlement Agreement was reached following Mr S receiving legal advice and settled all claims Mr S might have had against DCCG, including a claim for enhanced contractual redundancy pay. Whatever previous entitlements Mr S may have held, following the Settlement Agreement, those entitlements changed. I cannot undo what was agreed under the Settlement Agreement.
28. DCCG did provide NHS BSA with incorrect information about Mr S' entitlement, but that was before the completion of the Settlement Agreement and at a time when DCCG was not aware of the final position. It might be argued that on the basis of this, Mr S has suffered a loss of expectation, but given he had good reason to know through the Settlement Agreement that the final redundancy payment did not match the higher anticipated amount, the argument for loss of expectation cannot be maintained. Mr S ought to have recognised that as he agreed a lower than anticipated final redundancy payment, this would result in a lower pension benefit being paid.
29. Mr S has argued that NHS BSA too readily accepted what it was told by DCCG, and it ought to have asked for evidence of the correct position. Whilst I understand Mr S' frustration that NHS BSA was not more robust, NHS BSA is entitled to rely on the information provided by scheme employers, which is what it did. As NHS BSA is not Mr S' employer, it cannot be expected to validate the information it receives with

members private employment records. This is particularly the case here, where a confidential Settlement Agreement was reached between Mr S and his employer. I also note that Mr S has at no point provided documentary evidence to NHS BSA that he was entitled to VSM terms, and he did not provide a copy of the Settlement Agreement, which is the critical document in these circumstances. I simply do not see that Mr S provided NHS BSA with a compelling reason to challenge DCCG any more robustly than it did.

30. Therefore, I do not uphold Mr S' complaint.

**Anthony Arter**

Pensions Ombudsman  
10 June 2019

## **Appendix**

### **Relevant parts of the Settlement Agreement**

“The Employer and Employee have entered into this Agreement to record and implement the terms on which they have agreed to settle all claims which the Employee believes he has or may have against the Employer or its officers or employees.

The Employee has taken independent legal advice as described in clause 13.1.1 below of this Agreement upon the effect of the terms and conditions set out in this Agreement.

...

“Redundancy Payment”

Means the sum of £160,00 or such sum that may be expressed in any act of parliament or secondary legislation limiting wholly or in part the Employers ability to pay the Redundancy Payment. The Redundancy Payment is inclusive of both any statutory entitlement and any contractual entitlement under section 16 of Agenda for Change.

...

#### **11. Settlement of Claims Against the Employer**

The Employee agrees to accept the terms of this Agreement in full and final settlement of all and any claims or rights of action whether contractual... and accordingly the Employee... waives his rights to pursue such claims including but not limited to the following...

11.1.4 any claim for... enhanced contractual redundancy pay;

...

#### **14. Whole Agreement**

This Agreement sets out the entire Agreement between the parties and supersedes all prior discussions between them or their advisers and all statements, representations, terms and conditions, warranties, guarantees, proposals, communications and understandings ever given whether orally or in writing.”