

Ombudsman's Determination

Applicant	Dr N
Scheme	NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHS BSA) Primary Care Support England (PCSE)

Complaint Summary

Dr N has complained that the tax charge applied to his pension commencement lump sum (**PCLS**) could have been avoided, or significantly reduced, if NHS BSA and PCSE had acted on his requests to update his pensionable pay figures prior to his retirement. Dr N would like NHS BSA and PCSE to meet the Lifetime Allowance (**LTA**) charge that was incurred.

Summary of the Ombudsman's Determination and reasons

The complaint is upheld against NHS BSA and PCSE. NHS BSA negligently failed to provide Dr N with adequate information about the taxation of his benefits and PCSE negligently delayed the handling of his pension contributions.

1. In October 2016, Dr N, a GP, returned his completed AW8 retirement benefit forms (**the forms**) to NHS BSA. He had previously returned copies to PCSE in early September 2016.
2. In October 2016, PCSE wrote to Dr N confirming receipt of the forms and said that no earnings information had been provided to it since May 2016 and it had no record of the company that Dr N worked for. It said that the forms would be processed on the figures held at that time and once the actual figures were established early in 2017, NHS BSA would be notified and a revised pension paid.
3. On 10 November 2016, PCSE sent Dr N a letter confirming that it had processed his retirement application and forwarded it to NHS BSA.
4. On 17 November 2016, Dr N emailed PCSE explaining his concern that NHS BSA had not been updated with his correct pay. NHS BSA was only aware of earnings of £28,000 at that time, when his actual earnings had been £95,000. He requested PCSE update NHS BSA as soon as possible to ensure accurate calculations.
5. On 21 November 2016, PCSE confirmed receipt of updated pay information from his employer for April to September 2016. It said that it would need to review NHS England's bank account to identify the money before it was allocated to his record. In this email, PCSE said that NHS BSA would not be updated until the whole year was reconciled and Dr N's self-assessment form, 2016/2017 was submitted.
6. On 29 November 2016, Dr N wrote to PCSE providing an extract from a NHS Pensions website and his own comments:

"If a member retires towards the end of the financial year and their benefits are likely to exceed the Lifetime Allowance (LTA) it is important that the application is submitted to us in a timely manner to ensure that benefits are paid within the correct financial year. Please notify your employees of this, particularly if any of your members are eligible to retire within the next few months.

As it is possible that I may exceed the LTA (I do hold enhanced protection however) I do think that my 2016-2017 contributions should be brought up to date with NHS pensions asap rather than waiting until 8/2017 when the Type 2 medical practitioners assessment form 2016/2017 appears on their website thus avoiding problems with different tax years."

7. On 15 December 2016, PCSE received forms from Dr N's employer which detailed his income for October and November 2016.
8. On 22 December 2016, Dr N emailed NHS BSA regarding his retirement application. He said the following:

"I am also waiting to hear my position with regards to my enhanced protection or individual protection 2014 in relation to lifetime allowance and pension benefits. I believe that no LTA charge will be applicable?"

If I am mistaken and should there be a LTA charge I understand that should I allocate and/or commute this could be reduced. However I wait to hear from you first with respect to the above before I make a final decision.

I am concerned that my superannuation contributions for the financial year 2016-2017 have not been brought up to date by Capita either at Doncaster or Preston despite repeated requests to them to do so. This is obviously relevant in relation to lifetime allowance. The SOLO forms and contributions up until November 2016 have been made and they have been informed..."

9. On 30 December 2016, NHS BSA responded to Dr N, saying:

"I can confirm that your employer updated your SOLO pay figures in November 2016.

Your benefits have been calculated and, I have prepared an Allocation letter for you.

As the letter contains figures, I need your permission to send it to you via e-mail.

Also, I can confirm that you have retained Enhanced Protection."

10. On the same day, Dr N emailed NHS BSA and explained that his pay was still "significantly underestimated" and said, "I hope this will not make a difference to my retention of enhanced protection?"

11. NHS BSA responded saying:

"As regards the Enhanced protection, as benefits are practitioner benefits, we perform 2 calculations for the Relevant Benefits Accrual (RBA) test. Your benefits failed the first test but passed the second by a substantial margin. This is usually the case with practitioner benefits."

12. On 3 January 2017, after further exchanges of emails, NHS BSA confirmed to Mr N that:

"Your Benefit Crystallisation Event (**BCE**) date is 07/01/2017 for your first award and, for revised awards will be the date on which all the information was available to process the additional benefits."

13. On 4 January 2017, following further exchanges, NHS BSA informed Dr N:

"The original BCE for your first Award remains as your payable date.

Any additional benefits will have a BCE date of the date when all the information to revise benefits occurs."

14. On 6 January 2017, Dr N retired, and his pension was paid with effect from 7 January 2017. A PCLS of £225,303.18 and a pension of £74,603.20 per annum were put into

payment. This was calculated on the basis of his estimated pensionable earnings up to September 2016 as verified by PCSE.

15. The value of his benefits for testing against the LTA was £1,717,367.18 which was 171.73% of the standard LTA at that time. However, Dr N held Enhanced Protection, which provides an individual with protection from LTA tax charges should their pension exceed it, and his benefits passed the Relevant Benefit Accrual (**RBA**) test, so no LTA charge was due.
16. On 9 January 2017, the same individual at NHS BSA informed Dr N:

“Your original NHS benefits won’t change. The relevant benefit accrual test will be performed against the additional benefits and may still protect the additional pension but not any additional lump sum. Additional lump sums will incur a lifetime allowance charge.”
17. On the same day, Dr N queried the LTA charge and asked why it would be affected. NHS BSA responded stating:

“After performing the RBA test, if retained there would not be a charge on the additional pension however, under HM Revenue & Customs Regulations it does not increase the available tax free lump [sum] therefore, as you are already over 100% of the lifetime allowance, a tax charge would apply on the additional lump sum.”
18. On 11 February 2017, PCSE confirmed Dr N’s earnings to NHS BSA for the period up to the end of November 2016.
19. On 20 February 2017, Dr N asked NHS BSA to comment on the taxation of the additional PCLS as he was unable to find further information about it. NHS BSA referred Dr N to HMRC’s website.
20. On 6 March 2017, Dr N provided his December 2016 and January 2017 earnings to PCSE. Dr N also completed and returned the Type 2 Medical Practitioner self-assessment form for the 2016/2017 tax year.
21. On 8 March 2017, NHS BSA received from PCSE an final pensionable pay figure of £117,056.87 for 2016/2017.
22. On 27 March 2017, NHS BSA wrote to Dr N with his amended award. The revised benefits were a PCLS of £234,901.83 and an annual pension of £77,792.39. The letter explained that as Dr N had Enhanced Protection this had eliminated any LTA charge on the annual pension, but it did not increase the amount of PCLS that could be taken. Therefore, in HMRC’s view the additional PCLS of £9,598.65 was an unauthorised payment which was liable for an unauthorised payment charge at 40% (£3,839.46).
23. Dr N asked for payment of the amended award to be put on hold and raised a complaint which was considered by NHS BSA under the Scheme’s two stage Internal

Dispute Resolution Procedure (**IDRP**). Dr N said that he believed that the LTA charge was avoidable, or could have been significantly reduced had his pensionable pay been updated as he had requested prior to his retirement. As such the tax charge should be reduced or paid by NHS BSA and PCSE.

24. NHS BSA did not uphold Dr N's complaint. It said that it put the benefits into payment using the most up to date information provided to it by PCSE. It explained that the only way to avoid the revision of benefits was if it waited until all of the relevant information was available, which would have delayed payment of Dr N's benefits until at least April 2017. It acknowledged that Dr N had requested that his pensionable pay details were updated, but that there was no evidence to suggest it contacted PCSE for this information.
25. Dr N also complained to PCSE, but he did not receive a response.
26. PCSE eventually supplied a response to this Office. This supports Dr N's claim that he repeatedly asked for his pay information to be updated, and that he chased this repeatedly.

Summary of Dr N's position

27. Had his pensionable salary been updated as he had requested on multiple occasions prior to 3 January 2017, any tax charge due on the outstanding lump sum would have been significantly reduced. PCSE had the information it required to update NHS BSA with his pensionable earnings up until the end of November 2016 by 15 December 2016, so it could have provided this information to NHS BSA.
28. NHS BSA should have made him aware of its policy on BCEs and how this would impact his Enhanced Protection if his full benefits were not put into payment on one date. There is no mention of this on NHS BSA's website. He thoroughly researched the position regarding enhanced protection and had liaised with NHS BSA regarding his benefit accrual.
29. It does not appear that NHS BSA published information about its regulations in these circumstances, and had it provided such information, it would not have been advice.
30. NHS BSA had said that it could have delayed payment of any of his benefits until all of the information was available to pay his benefits as one award. However, he was never offered this option or informed it was a possibility. Had he known, he would have taken it up as he had sufficient funds to support himself and his family for 18 months or longer. He has provided evidence to support this.
31. He has not benefitted from taking his benefits in January 2017, rather than waiting up to 18 months to receive his full entitlement. So, his loss is the amount of the tax charge payable on the additional PCLS.
32. Both NHS BSA and PCSE were aware that he held enhanced protection as it was included with his AW8 form. They ought to have been aware of the regulations in the round. If an individual was not sure of an answer the enquiry should have been

passed to a more specialised colleague who could foresee the eventual tax payment. The payment must have been foreseeable at the point of the second BCE.

33. He had sought to ensure his records were up to date because it was foreseeable that things could go wrong. PCSE and NHS BSA ought to have carried out his wishes by ensuring his earnings were up to date and there appears to be no reason why this could not have been done.

Summary of NHS BSA's position

34. Dr N's pension and lump sum was calculated using the available pensionable pay and dynamising factor at the point it was calculated. Dr N's benefits could have been delayed until the final figures were available, but it is not uncommon for this to take 18 months or longer. Dr N would have needed to manage financially without taking his benefits for this period.
35. Dr N's benefits were tested against the LTA in January 2017, taking into account his Enhanced Protection by using the RBA test which Dr N passed. As a result, he retained his Enhanced Protection and no LTA charges were due despite Dr N exceeding the standard LTA. His BCE took place on 7 January 2017 when his benefits were put into payment, and the value of his benefits for testing against the LTA was £1,717,367.18 which was 171.73% of the standard LTA at that time.
36. Dr N's benefits had exceeded the LTA at his first BCE in January 2017, so when updated information was received from PCSE in March 2017 and his benefits were recalculated using this updated information and the revised dynamising factor, he was not entitled to a further PCLS payment. This is because the tax free lump sum payment must be the lower of 25% of the remaining LTA or 25% of the capital value to be paid. As Dr N had no LTA remaining the lower amount is zero.
37. The additional PCLS does not meet any of HMRC's authorised lump sum payments, so it is an unauthorised payment and attracts a tax charge of 40%.
38. LTA legislation restricts the payment of lump sums to 6 months before and 12 months after a BCE. It is not uncommon for benefits to be amended outside the 12 months following a BCE because of the time it can take to obtain the final figures. This means that if NHS BSA amended a pensioner's benefits outside this 12-month window it would be classed as an unauthorised payment. To ensure as many members as possible receive an authorised payment, NHS BSA's policy is to treat all increases to pensioner benefits (excluding the annual increase) as a new BCE. HMRC requires scheme administrators to use the same BCE criteria for all payments of benefits and revisions to benefits. So, NHS BSA is unable to use one method for one member and another method for another member. Dr N's amendment of benefits was treated as a new BCE in accordance with its policy and as he had no remaining LTA, the additional lump sum of £9,598.65 was classed as an unauthorised payment and liable for a 40% tax charge.

39. NHS BSA accepted that Dr N was not offered the opportunity to wait for all of the final information to become available before putting his benefits into payment. However, it would only make this offer where there was an issue in obtaining the relevant LTA information which would result in a tax charge being applicable on the entirety of a member's benefits.
40. It also accepted that Dr N was not informed that a revision or further payment of benefits would be treated as a new BCE. It would not provide this information as a matter of course.
41. It had no duty to inform a member of their personal tax position or provide advice in relation to this. NHS BSA is not authorised to provide financial advice and recommends that members obtain independent financial advice before making any decisions about their benefits. It also did not know Dr N's aims or wishes in regard to his benefits, personal financial or tax position.
42. Dr N did not volunteer any information about his ability to afford to delay payment of benefits. That he contacted NHS BSA on four occasions requesting information on when benefits would be paid does not suggest he could afford to defer the payment of benefits.
43. NHS BSA was aware that further pensionable pay would be notified later, and this was typical for practitioner members. Dr N did not request a deferment of benefits and a request for deferment would have been at odds with his enquiries wanting to know when benefits would be paid.
44. NHS BSA had met HMRC's requirements to inform Dr N of the LTA percentage that had been used, the charges that applied, that the Relevant Benefit Accrual test had been passed and that he had retained enhanced protection. NHS BSA informed Dr N of the facts relating to the RBA and Enhanced Protection and did not speculate on what other information he might require as it was not required to.
45. The statutory basis for the payment of the benefits is set out in Regulation T8 of the NHS Pension Scheme Regulations 1995 (**the Regulations**), which requires NHS BSA to pay benefits within certain time limits on the available information in line with published service agreements. For this reason, it put Dr N's benefits into payment on his retirement date with the information available.
46. Dr N's benefits were authorised for payment on 3 January 2017. In theory, had it received updated information about Dr N's pensionable pay before this date, it could have included that information in the calculation of Dr N's benefits, and the benefits based on a higher pensionable salary could have been put into payment on 7 January 2017.
47. NHS BSA knew that any further lump sums would be unauthorised, but it could not have known whether Dr N would retain Enhanced Protection at the later date as it could be given up or lost before the later benefits were put into payment. Dr N had mentioned an intention to take out a SIPP which would have invalidated his

Enhanced Protection. It is not clear whether Dr N indeed took a SIPP and in doing so invalidated the Enhanced Protection before the later benefits were paid.

48. It is not clear whether Dr N took financial advice about his LTA position. NHS BSA did not withhold any information in its response, but it did not know that Dr N was unaware of the tax position of later benefits payments or that he could afford to defer the initial benefits.
49. When Dr N asked about retention of Enhanced Protection, NHS BSA provided an answer which was correct at the point later benefits were paid. It did not volunteer information that was not requested and cannot be expected to speculate on what the member should ask.
50. NHS BSA's actions do not amount to a breach of the duty of care as it answered all of the questions asked by Dr N.

Summary of PCSE's position

51. The information on Dr N's pensionable pay and his retirement forms should have been provided to it four to six months before his intended retirement date to allow enough time for it to process the application and enable NHS BSA to make the necessary payment arrangements.
52. It received Dr N's retirement application in September 2016 and this was submitted to NHS BSA in October 2016 with the pensionable pay figures held at the time amounting to approximately £28,000 for the 2016/2017 tax year. This information was accurate at the time it was provided.
53. Dr N's employer sent additional pensionable pay information in November 2016 which was provided to NHS BSA later the same month after it had been accounted for in the bank records.
54. It received the October and November 2016 pensionable earnings information on 15 December 2016 from the SOLO provider, and this was provided to NHS BSA on 11 February 2017. It acknowledged that there was a delay in providing this information to NHS BSA which could have been avoided. It could not provide an explanation for the delay due to change in processes and documenting of completed work since this issue occurred.
55. In order for the pension to be put in payment on 7 January 2017, Dr N's account had to be closed "a few months before then." As Dr N was still working the month after the closure of his account it could only be updated through the submission of an AW171. PCSE did this on receipt of the further earnings information.
56. Pension records are normally reconciled in arrears. The member's record would be closed on estimates and then when the end of year certificate is submitted by the member, up to a year later, it would be processed by PCSE and NHS BSA would be informed of the actual figures.

57. The final figures could only be updated once the type 2 self-assessment form was submitted by Dr N. Ordinarily this would mean waiting until that year's form was released, after the end of the financial year. In Dr N's case he requested and was allowed to use the previous year's forms which allowed him to update his information in the same year as his retirement date. This was permitted in order to assist Dr N.
58. The email exchanges in advance of Dr N's retirement did not put PCSE on notice of the potential tax liability. Dr N ought to have taken tax advice to mitigate the possible liability.
59. PCSE is not a tax expert, and it cannot be expected to be aware of the potential liabilities of individual GPs. It is the responsibility of individuals to seek tax advice and Dr N is responsible for his own financial affairs.
60. The delays in Dr N's earnings being updated were not the result of PCSE's communication. Dr N's employer would have been made aware of the new process and that the contract was moving to PCSE.

Conclusions

61. There is no dispute that Dr N has incurred a tax liability and it is required to be paid. However, Dr N has complained that he should have been informed of the tax consequences in advance so that he could mitigate the tax liability or minimise it, and that PCSE failed to update his records in good time, which worsened his tax position. He argues that had it acted sooner the tax liability would have been less.
62. I will consider the actions of each respondent in turn.

PCSE

63. Considering first PCSE, in advance of Dr N retiring there was a period when it had been informed of Dr N's most recent income, for October and November 2016, and had received the necessary contributions but had not updated his record with NHS BSA.
64. PCSE has accepted that there was a delay in notifying NHS BSA of these months' salary information. It was received by PCSE on 15 December 2016 and his records were updated on 11 February 2017.
65. I find that this was an excessive delay to complete the simple task of updating Dr N's salary and was maladministration. Even allowing for Christmas and New Year there is no reason for this to have taken so long. That this was excessive is highlighted by the fact that PCSE received Dr N's salary information for December 2016 and January 2017 on 6 March 2017 and was able to update NHS BSA two days later, on 8 March 2017. This demonstrates that such information could be updated almost immediately.
66. Given Dr N's urgency and concern about possible delays in his emails to PCSE, I find that PCSE could have acted promptly and notified NHS BSA of his October and November salary information in advance of the 7 January 2017 BCE. Had it done so,

the PCLS payable in respect of those months' income would not have been subject to a tax charge as they would have been included in the first BCE.

67. The next question is whether it has any liability for the tax charge that arose. For PCSE to be responsible I would need to conclude that its actions or omissions were negligent. The email exchanges with PCSE show that Dr N made repeated attempts to ensure PCSE updated his record with the most up to date earnings. Further, in the email dated 29 November 2016, Dr N specifically drew PCSE's attention to an NHS news article and commented that it was possible that he could exceed the LTA. He also mentioned that he held enhanced protection.
68. PCSE was therefore aware of Dr N's urgency and that a failure to update his salary information could impact his tax position, and yet PCSE delayed updating his salary information. Although the specific circumstances in which Dr N found himself, in respect of BCEs and enhanced protection, was unusual given Dr N's email on 28 December 2016, I find it was within reasonable contemplation that a delay could adversely affect Dr N's tax position.
69. I am therefore satisfied that Dr N has a successful claim of negligence against PCSE and it has a partial liability for the tax charge incurred through its delay in updating his salary for October and November 2016.
70. These delays will also have caused Dr N distress and inconvenience because he had to chase PCSE and in the context of him being about to retire, I can see that the delays caused him concern. I find that the failures on the part of PCSE to update NHS BSA sooner warrants a distress and inconvenience award.

NHS BSA

71. In respect of NHS BSA, it was aware of the significance of enhanced protection to Dr N through its communications with him in advance of his BCE on 7 January 2017. The question is whether it had any duty to inform him of the tax treatment of his later benefits at that time, and whether the information it did provide was accurate.
72. I consider that NHS BSA had no legal duty to advise Dr N in respect of his personal tax position. It is a well-established position that in circumstances such as this, pension providers are not required to inform individuals of the most tax efficient way to access benefits. Tax is the responsibility of the individual and there is no requirement under the disclosure regulations for NHS BSA to advise Dr N as to how to avoid a possible tax liability.
73. However, the email exchanges between Dr N and NHS BSA shows that it was aware that Dr N had enhanced protection and that his choices at retirement and the structuring of his benefits might be different if his enhanced protection did not effectively mitigate the possible tax liability. In the email dated 22 December 2016, Dr N that said it was his belief that no LTA charges would be payable and explained that he would take steps to reduce any LTA liability by allocating or commuting some of his pension. I acknowledge he did not mention deferring benefits, but it is clear from

Dr N's requests for information that he would actively take steps to reduce his tax exposure.

74. NHS BSA was also made aware through the email exchanges that Dr N's salary was inaccurate and would be updated at a later date. In awareness of this, NHS BSA knew that there would be additional pension and PCLS amounts payable and subsequent BCEs. Despite knowledge of this, NHS BSA confirmed "you have retained Enhanced Protection" and did not mention, contrary to Dr N's belief that no LTA charge would be payable, that any later PCLS would be subject to a LTA charge.
75. I find that NHS BSA's response was not the complete picture. NHS BSA knew that any subsequent PCLS payment would not benefit from any Enhanced Protection and would be subject to a LTA charge. This knowledge is demonstrated by the fact NHS BSA was able to tell Dr N on 9 January 2017 that, "Additional lump sums will incur a lifetime allowance charge". Given how soon after the BCE calculation NHS BSA was able to inform Dr N of the situation in relation to additional PCLS, and the fact that it was the same individual who provided the information. I consider this knowledge was available to NHS BSA prior to the BCE occurring.
76. I note that this later comment was offered in a specific context of what would happen to his enhanced protection if he opened a SIPP. NHS BSA was providing factual information in respect of the SIPP and it could have done the same in response to Dr N's email of 22 December 2016. I do not consider providing this information amounts to advice, it is simply a fact.
77. NHS BSA has acknowledged that Dr N's situation was atypical. Dr N can have had no other way of knowing that a subsequent PCLS would incur a LTA charge, but NHS BSA did know. I find that in this unusual scenario, by not providing this information NHS BSA breached its duty of care to Dr N. It failed to provide a complete and accurate statement of the situation in response to his email of 22 December 2016.
78. Dr N's email dated 30 December 2016 shows that he was relying on NHS BSA's statement that enhanced protection was retained and that there would be no tax charge. In this email he went on to highlight that he considered his salary details remained "significantly underestimated" and whether this would impact his retention of enhanced protection. In this context, and with the knowledge that a subsequent PCLS would be subject to a LTA charge, I consider that NHS BSA had a further duty of care to go back to Dr N and expand on the incomplete and misleading statement.
79. As I have made clear (see paragraph 72 above), NHS BSA had no duty to actively advise Dr N how best to access his pension. However, it did owe a duty of care to ensure that its answers to specific questions about the availability of enhanced protection and possible LTA charges, where it was clear he intended to rely on it, were accurate and complete. I find that NHS BSA's statement that Dr N had retained enhanced protection was incomplete and misleading.
80. Where there has been a breach of a duty of care, the question is whether the losses stemmed from the incomplete statement. I have considered what Dr N could have

done to mitigate the tax liability that would inevitably arise. He has argued that he was in a financial position to delay taking benefits until his salary information was updated. He has provided suitable evidence of his financial situation to demonstrate that this would have been affordable to him and I am satisfied that given his concerns about trying to avoid a possible LTA charge that he would have taken such steps to prevent it from occurring.

81. PCSE's delays in updating Dr N's salary record and NHS BSA's failure to provide complete and accurate information will have contributed to Dr N's distress and inconvenience, which I consider was significant.
82. I uphold Dr N's complaint against PCSE and NHS BSA on a joint basis.

Directions

83. Within 28 days of the date of this Determination, PCSE and NHS BSA shall each pay Dr N £1,919.73, towards the LTA charge of £3,839.46.
84. In addition, within 28 days of the date of this Determination, PCSE and NHS BSA shall each pay Dr N £250 in respect of the significant distress and inconvenience caused.

Anthony Arter

Pensions Ombudsman
4 October 2021