

## Ombudsman's Determination

Applicant	Mrs R
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondents	NHS Business Services Authority ( <b>NHS BSA</b> ) Department of Health & Social Care ( <b>DHSC</b> )

### Complaint Summary

Mrs R's complaint concerns what NHS BSA has termed an overpayment of her pension benefits; it is seeking the return of these funds.

Mrs R does not consider that she has been overpaid and has alluded to an agreement with her former employer regarding the payment of these benefits.

### Summary of the Ombudsman's Determination and reasons

The complaint should be partly upheld against DHSC. I do not find that Mrs R's agreement with Telford and Wrekin Primary Care Trust (**the Trust**) provides her with a separate, additional entitlement to pension benefits.

DHSC shall however pay Mrs R £2,500 in recognition of the exceptional distress and inconvenience she has suffered as a result of the Trust's actions.

## Detailed Determination

### Material facts

1. Mrs R worked for the Trust as a nurse.
2. On 2 March 2000, a circular was issued by DHSC, explaining that a Professional Executive Committee (**PEC**) allowance was only pensionable for GPs. The circular was reissued in 2005 with the same information.
3. On 10 August 2000, a newsletter was issued to certain NHS staff. The letter began by explaining that “the annex to this letter is mainly for hands-on NHS Pensions Officers and clarifies Scheme eligibility...” In paragraph 18 of this annex, it was indicated that a PEC allowance was only pensionable for certain GPs.
4. In 2002, the Trust issued a document explaining that it intended to set up a PEC whose objective it would be to “lead the Board through the detailed thinking on priorities, policies and plans for investment and service development.” It said the PEC would have up to 13 members from a range of medical backgrounds. Under the heading ‘Time Commitment and Remuneration,’ the following was stated:

“GP’s, nurses and AHPs [Allied Health Professionals] who are members of the PEC or the PCT [Primary Care Trust] Board will receive an allowance that will be paid directly to them...PEC allowances are superannuable (but not PCT Board payments). All legitimate expenses associated with membership will be reimbursed (e.g. travel, training etc).”
5. Mrs R subsequently became a member of the PEC for which she received an annual PEC allowance in addition to her normal pay. I understand that pension contributions were deducted from this from April 2002 but these were refunded in July 2002 because it was realised that these contributions should not have been made.
6. On 26 November 2003, the Trust’s Head of Payroll Services wrote to Mrs R saying that the PEC allowance was non-pensionable, referring to the technical newsletter issued in 2000. I understand he also wrote separately to NHS BSA (at that time called NHS Pensions Agency but to be referred to throughout this document as NHS BSA for ease and consistency) for clarification on this point.
7. On 16 January 2004, he wrote to Mrs R saying that NHS BSA’s compliance manager had confirmed that these payments must be non-pensionable.
8. On 21 January 2004, another member of the PEC Board who was an AHP in receipt of the same information as in paragraph seven above, responded to the Head of Payroll Services saying it was now evident that the Trust had made an error in its stated terms and conditions for AHP’s and nurse members of the PEC. She said she considered there to be an issue of good faith for the term of her PEC tenure and would welcome a discussion in respect to this. She copied this reply to Mrs R.

9. On 24 January 2004, Mrs R also wrote to the Head of Payroll Services saying that she was disappointed by the outcome and felt seriously misled. She said she had reduced her hours from 30 a week to 22.5, and no longer worked bank holidays and weekends. She also said she had decided against buying Additional Voluntary Contributions (**AVCs**).
10. Following these developments, Mrs R and the AHP member respectively entered into separate but similar ad hoc agreements with the Trust, whereby an additional responsibility allowance in recognition of their committee responsibilities would be paid for a 12-month period, with the objective of enhancing their benefit provision at retirement.
11. On 29 November 2007, a Senior Policy Development & Compliance Manager of NHS BSA sent the following email in reply to an enquiry made by the Trust's Head of Payroll Services:

“Recent DoH advise [sic] may have indicated that all PEC members can pension their PEC income however this is not the case as there are no provisions under the Regulations to legislate for this. We have advised the relevant DoH branch who issued the notification as has DoH's own pension policy branch.

The only 'back door' way a non GP PEC member could 'pension' their PEC is if the PEC allowance was consumed into the individual's NHS salary; i.e. an all inclusive salary. However this is fraught with complications as it may compromise AfC and PEC work is never permanent so the salary in time would reduce to its normal level which means the individual would have paid additional conts and got nothing in return. Frankly I would not advise this.”
12. In February 2008, Mrs R applied for her retirement benefits.
13. NHS BSA says that on 28 February 2008, it received form AW171 from Mrs R's employer to amend her last day of employment to 1 April 2008. The form also included a revised Notional Whole Time Total Pensionable Pay figure, which was shown to be £43,696.43 for the period 2 April 2005 to 1 April 2006.
14. Mrs R's pension came into payment in April 2008.
15. On 3 July 2015, NHS BSA received an email from Mrs R's previous employer saying that a portion of her previously stated pensionable pay should not have been pensionable, as this pertained to payments she received for her PEC work.
16. Following this, Mrs R's benefits were recalculated; it transpired that she had been overpaid.
17. On 24 July 2015, NHS BSA sent Mrs R a letter saying following the receipt of recent pay information in relation to her Total Pensionable Pay figure, her pension and lump sum had to be revised.

18. Mrs R complained through the Scheme's Internal Dispute Resolution Procedure (**IDRP**).
19. NHS BSA responded under stage one of the IDRP on 6 September 2016. The main points were:-
  - The information supplied by Mrs R's employer to NHS BSA provided that the best of her last three years' pensionable pay was £43,696.43 and her last day of pensionable service was 1 April 2008.
  - A member of the Final Salary NHS Pension Scheme 1995 section was entitled to a pension for life and a lump sum payment based on the Notional Whole Time Equivalent of the best of their last three years' pensionable pay. NHS BSA did not have access to pay records and relied on employers for this information.
  - On 3 July 2015, NHS BSA received information from her previous employer explaining that part of her previously stated pensionable pay should not have been pensionable. Further, it was brought to NHS BSA's attention that her previous employer had calculated her Whole Time Equivalent pay incorrectly. It had advised that that her pensionable pay figure minus the PEC payments with the correct Whole Time Equivalent calculation, should be £38,070.86.
  - Following receipt of this information, Mrs R's pension was recalculated and showed that her pension had been overpaid. NHS BSA has a duty to recover monies incorrectly paid.
20. Mrs R appealed NHS BSA's decision on 12 October 2016. She also referred the matter to The Pensions Advisory Service (**TPAS**). On 31 October 2016, Shropshire's NHS Payroll Services Pensions Department replied to a letter sent by the TPAS representative, making the following comments:-
  - The Trust's Head of Payroll Services had contacted NHS BSA to confirm whether it was possible to make the PEC allowance pensionable for PCT staff who were not GP's. The response clearly stated that it must be non-pensionable.
  - The 'workaround' found was to identify an 'ad-hoc' payment element through the PCT payroll system whereby payments would be paid for a period of 12 months (to be confirmed by the member once a retirement date was identified) to enable the member to benefit through their NHS pension benefits. This element was identified specifically so that NHS BSA would not be aware of its nature or know that a pensionable salary code existed.
  - Payroll services were specifically instructed that these payments must not be made pensionable unless the board member was a GP. There were only two members of the board for whom this 'ad hoc' arrangement was made because they complained that they were disadvantaged. At any time, both of these members were free to resign their board positions and return to their original

contracts of employments, including longer and unsocial working hours, but for obvious reasons they chose not to.

- Payroll Services should not have been manipulated into identifying a solution and should never have allowed such a payment to be made, which would ultimately benefit the individuals for the rest of their lives at a cost to the public purse.
- There was no confusion or conflicting information regarding payment of the PEC allowance apart from the misprint in the original board document. The Trust was clearly advised that these payments were non-pensionable for non GPs. Mrs R was complicit in the agreement to make this payment pensionable for an identified period of 12 months despite her knowledge that NHS BSA's compliance team had confirmed these could not be made pensionable.
- Mrs R wrote to the Head of Payroll Services on 6 November 2005 and requested estimates to both include and exclude the PEC payments, so she was fully aware of the benefit of this arrangement, with little cost in contributions.
- With regard to the Limitation Act 1980 (**the Limitation Act**), and any suggestion that the mistake should have been discovered in 2008, it was not until November 2013, when it was asked to prepare a timeline for the two PEC members by the local PCT Fraud Officer. Therefore, the claim is within the six year period allowed.
- During her period on the board, Mrs R received an annual payment which was £7,428 in her final year.
- The purpose of the PEC was to ensure that the PCT was run efficiently and that NHS monies were spent appropriately and proportionately, so it follows that there was an expectation that the board members themselves should not be beyond reproach.

21. On 29 November 2016, NHS BSA responded under stage two of the IDRPs saying the following:-

- With regard to administration arrangements for the Scheme, responsibilities were shared between staff at NHS BSA in Fleetwood and the payroll/pensions staff working for the member's employment, in this case the Trust. Among the tasks undertaken by the employer was the responsibility for recording the date a scheme member commenced pensionable employment, their pensionable pay for the year, any changes to the member's contracted hours from part-time to whole-time, and submitting these details to NHS BSA electronically.
- NHS BSA compiled and maintained membership history from all the data submitted by employers. It did not have direct access to payroll systems and therefore could not validate the information given.
- Where for example, a nurse or pharmacist employed by the NHS was a PEC member, their duties were part of their overall NHS duties. They were not "out of

pocket" by reason of being a PEC member. Where they did receive additional monies, this was normally to cover their PEC expenses.

- Where an NHS employee was part-time, they could hold other concurrent NHS pensionable posts, however their pensionable income could not exceed an aggregate of whole-time.
- Employers were advised that no individual's pension position should be reduced because of their PEC role and were advised not to reduce the contracted hours of any member of staff appointed to a PCT executive committee. This was so a member would not be disadvantaged in terms of their pension benefits.
- In terms of when NHS BSA could reasonably have discovered the error, NHS BSA was unaware when Mrs R's pension was first put into payment that an incorrect pensionable pay figure had been provided by her employer. The earliest it knew that an error had occurred was 3 July 2015, when the employer emailed revised pay information. Therefore, the Limitation Act did not apply.

22. On 1 June 2017, NHS BSA sent Mrs R a further response. It said:-

- Information was made available to all PCTs in Technical Newsletter 10/2000, which set out that unless the board member was a GP, any payment made in respect of allowances and expenses could not be considered as pensionable pay.
- Whether a local agreement was reached between the Trust and Mrs R was entirely a matter between the two parties, but did not in itself determine whether payments are pensionable. Any local agreement reached between an employee and their employer was separate and could not override the statutory NHS Pension Scheme Regulations.
- With regard to a possible defence of estoppel by representation, which if successful, could prevent a party from going back on their promise, NHS BSA was not party to any agreement. Therefore, Mrs R's complaint concerned how her employer had acted rather than any potential wrongdoing by NHS BSA.

23. Mrs R subsequently referred her complaint to this Office.

24. On 26 January 2018, in response to our request for a formal response, Shropshire's NHS Payroll Services Pensions Department said:

"[Mrs R] states in her complaint that her employer was Telford and Wrekin NHS Primary Care Trust (now known as Shropshire Community Health NHS Trust). For your information Shropshire Community Health NHS Trust was formed in July 2011 following the merger of the provider arms of Shropshire County PCT and Telford and Wrekin PCT. We are informed that Shropshire Community Health NHS Trust are not the legal successor body for the PCT. The Department of Health is the responsible legal successor for PCT legacy issues."

25. In response to enquiries made by the Adjudicator as to how the error was discovered, NHS BSA said that in December 2013, the Deputy Director of Finance at Shropshire Community Health referred the matter concerning Mrs R to their Local Counter Fraud Specialist. It appeared that NHS BSA became aware of this investigation at that time although it was not until 2015 that it received revised pensionable pay details.
26. On 7 August 2019, NHS BSA confirmed the information it received on 21 February 2008, in Mrs R's application for benefits, which showed the following Notional Whole Time Total Pensionable Pay figures:
- “01/04/2007 to 31/03/2008 £38,063.04
- 01/04/2006 to 31/03/2007 £35,284.47
- 01/04/2005 to 31/03/2006 £43,723.00 (earliest year being the most beneficial)”
27. It also provided details it held in relation to Mrs R's pensionable pay until the financial year 2006-7:
- |          |             |
|----------|-------------|
| “1999/00 | £23,291.94  |
| 2000/01  | £21,500.25  |
| 2001/02  | £22,314.74  |
| 2002/03  | £22,695.01  |
| 2003/04  | £22,833.82  |
| 2004/05  | £22,498.51  |
| 2005/06  | £31,969.20  |
| 2006/07  | £26,142.55” |

### Summary of Mrs R's position

28. She believed the allowance should be treated as pensionable as it was paid to her for her PEC work. Therefore, it should fall under the category of “all salary, wages, fees and other regular payments”, which are stated in the NHS Pensions Scheme Regulations 1995 (as amended) (**the Regulations**) as being pensionable. Her allowance was £7,428 per annum, which NHS BSA was classing as expenses, which she disputed.
29. One of her main reasons for taking the PEC role was because she was advised by her employer that the allowance would be pensionable. A letter from DHSC in 2007 also advised that the PEC allowance could be treated as pensionable.

30. NHS BSA was now advising that the solution found by her employer went against the Regulations. If this was found to be correct, she wished for the following arguments to be taken into account.
31. She had been disadvantaged in terms of her pension by taking the PEC role. She reduced her hours and stopped working unsocial hours to enable her to manage her PEC role. If she had known that the PEC allowance was not pensionable, she would not have reduced her hours or stopped the unsociable work, all of which would have been pensionable.
32. Based on the information that the PEC allowance was pensionable, she chose not to pay AVCs to boost her pension.
33. There were two occasions where her former employer made an agreement with her for the PEC allowance to be pensionable. This was firstly, when she took on the PEC role, and secondly when it increased her salary by the equivalent of the PEC role. She accepted the offer, fulfilled her PEC role and paid contributions on the allowance. Hence, a contract existed between her and the Trust.
34. NHS BSA should be estopped from refusing to pay the pension agreed between her and the Trust.
35. The Trust had breached its duty of care to her and was negligent for failing to put in place an arrangement in 2004 that ensured her pension would not be reduced by the fact that the PEC allowance wasn't pensionable or, if this was not possible, failing to explain the effect of the arrangement. She had trusted her employer and the local pension department.
36. If she did have to repay the overpayment, she believed that NHS BSA should be restricted from recovering the whole amount due to the Limitation Act.
37. Since hearing about the reduction in pension and receiving invoices for £19,866, her life had been in turmoil; it had been an incredibly difficult few years. She had been receiving haemodialysis for a few years prior to this, so her health had not been very good.
38. Further, six months after receiving the invoices for repayment her husband died unexpectedly, which was hard to come to terms with. It also meant a significant reduction in her income.
39. Following this, she received a kidney transplant then underwent further surgery. This had caused a significant reduction in her transplanted kidney function.
40. The pension issue had been ongoing through all of this and caused great anxiety. With regard to her personal finances, she was inhibited from spending her own money confidently. Also, the long-term impact of what the reduced income would be was very stressful.



41. The accusation that she had been complicit in fraud was very upsetting. At no time during her long career in the NHS had this been the case. Her integrity had never been questioned previously.
42. Working as a nurse had given her a great understanding of people from all walks of life. However, it had never provided an understanding of pensions or the language used by NHS BSA. In the same way, a pensions officer would not be expected to understand nursing jargon.
43. As a nurse she was accountable for the treatment and information she provided to patients and their families. For example; if she gave a diabetic patient the wrong dose of insulin, she was accountable for that and the consequences. Here however, it was unclear whether the person or department who made the initial mistake had been held to account. She had received no apology for the mistakes of others. Instead, she felt she had been treated in a way which constituted bullying by the pensions department. Some of the letters she had received were aggressive and appeared to blame her for their mistakes, when she had trusted them.
44. There had been other problems concerning her NHS pension, unrelated to the current issue, which she was mentioning to highlight that there had been a series of issues, none instigated by her.
45. She felt this matter could have been handled in a far better way if discussions had been held with her in the first place and a resolution found. That would ultimately have been more efficient, effective and economic, as well as humane.

#### **Summary of NHS BSA's position**

46. A local agreement was made between Mrs R and her employer, resulting in the overpayment. However, NHS BSA was not party to these discussions. Guidance regarding these payments in relation to pensionable pay was provided in the Technical newsletter 10/2000 and by DHSC in Health Service Circular 5 (2000). It was therefore unclear why Mrs R believed that such payments formed part of her pensionable pay.
47. In summary, it did not accept the complaint put forward by Mrs R. Her employer had deliberately increased her pay and as a result she was put in a more advantageous position when compared to other colleagues. This decision was inappropriate.
48. The decision to increase the pay for Mrs R was not made by NHS BSA. Once it received details of the correct pay, it had no alternative but to revise Mrs R's ongoing pension benefits and seek recovery of the overpayment.

#### **Summary of DHSC's position**

49. The Pay and Pensions Section at DHSC was responsible for NHS pay policy and for making the rules and policy of the Scheme, legislated for under the statutory NHS Pension Scheme Regulations.

50. PCTs could pay staff enhanced rates (allowances) for work on the PEC, however, unless they were General Medical Service contractors (GPs) the allowance was not pensionable.
51. If the PCT employed staff on Agenda for Change, or under the previous Whitley arrangements, as was the case here, they would be expected to work within the parameters of the relevant existing employment contracts. This meant that by attending the PEC, the person's core NHS pay, or contracted hours of work did not reduce. This meant that their NHS pension benefits were not compromised by becoming a PEC member.
52. It was accepted as a matter of fact that the PEC allowance was not pensionable; both Mrs R and the Trust were aware of this before the temporary salary increase. It seemed that the intention behind the arrangement in question was to prevent any disadvantage to Mrs R as a result of the PEC income not being recognised as pensionable pay. However, Mrs R was not disadvantaged; the Ombudsman's role was to place the person in the position they would have been in had no mistake occurred. This meant that her benefits should be as recalculated.
53. Although Mrs R's PEC allowance was not pensionable income, she could have used her additional PEC income to boost her NHS pension benefits at retirement by buying Added Years or done so through an alternative top-up arrangement.
54. Mrs R had no legal entitlement or right to the inflated salary or resulting pension payments. Therefore, she could not be disadvantaged by not receiving payments that she was never entitled to under the terms of her employment and under the Regulations.
55. In respect to the comments of Shropshire's NHS Payroll Services Pensions Department regarding the workaround for the ad-hoc payment arrangement, its view was that the employer acted outside the powers of the Regulations in forming its agreement with Mrs R.

## **Conclusions**

56. Mrs R has been faced with two issues which resulted in an overpayment, the first concerning her Notional Whole Time Total Pensionable Pay and the second involving the agreement with the Trust. I make no comment on the former, which is not part of this dispute. The overpayment, which I refer to in these conclusions, concerns the pay figures which were inflated as a consequence of the agreement with the Trust.
57. The document issued by the Trust in 2002, advertising the PEC roles, stated that nurses would receive an allowance that would be pensionable. However, on 26 November 2003, the Trust's Head of Payroll Services wrote to Mrs R explaining that her PEC allowance was not pensionable, referring to the technical newsletter issued in 2000. He re-confirmed this to her on 16 January 2004, after writing to NHS BSA.

58. Mrs R replied on 24 January 2004, saying she was disappointed and felt misled. At this point, both Mrs R and the Trust were fully aware that her PEC allowance was not pensionable. The events that followed involved an agreement whereby extra payments would be made by the Trust to Mrs R, to provide her additional pension at retirement. This was in order to remedy what both parties deemed to be an unfair or disadvantageous position for her.
59. Whilst it is most regrettable that the PEC role was wrongly advertised, I do not agree that Mrs R was unduly disadvantaged overall. Essentially, Mrs R was remunerated for her role within the PEC, so although she was led to believe that she would have the additional benefit of this allowance being pensionable, the remuneration itself served as a substantive benefit.
60. I find that the Trust's actions, which were taken to essentially remedy the misinformation, were disproportionate to the mischief which had occurred. Promising a benefit to which the aggrieved party was never entitled, does not constitute an acceptable remedy.
61. Further, the course of action taken by the Trust went against the Regulations and I note that it was warned against such a method by a Senior Policy Development & Compliance Manager for NHS BSA. In forming its agreement with Mrs R, the Trust acted in a manner which went beyond its powers and I deem this a misguided approach on its part. Accordingly, given that both parties were aware that the agreement was not possible under the Regulations, I do not consider that it is of any effect.
62. I do however have sympathy for Mrs R in respect to her current position; the overpayment pertaining to her arrangement with the Trust has arisen because it wrongly entered into an unenforceable agreement with her. Mrs R clearly relied on the Trust, in its capacity as her employer, in the discussions she had with it. Following the agreement, she was led to believe that she would be provided with an additional benefit. Instead, she is now faced with the repayment of a debt as the result of an approach which should never have been made. Accordingly, the Trust should pay Mrs R an award for the exceptional distress and inconvenience she has suffered as a result of its maladministration.
63. With regard to the recovery of the overpayment, I will now consider whether the Limitation Act applies, which provides timescales by which an action must have commenced where a breach of the law has occurred. During the IDRP, NHS BSA argued that the period of limitation did not begin until it discovered the mistake or could have discovered the mistake with reasonable diligence. It considers that the limitation period applies from 3 July 2015, when Mrs R's previous employer emailed it the revised pay information.
64. Ordinary breaches of contract are actionable for six years after the cause of action accrued (applying section 5 of the Limitation Act), as are actions to recover sums recoverable by statute. However, section 32(1) of the Limitation Act 1980, entitled,

“Postponement of limitation period in case of fraud, concealment or mistake”, provides that in certain circumstances the six year limitation period does not begin to run until the claimant has discovered the fraud, concealment or mistake, or could with reasonable diligence have discovered it. The question then is whether NHS BSA could, with reasonable diligence, have discovered the mistake any earlier.

65. In initially calculating Mrs R’s pension benefits, NHS BSA proceeded on the basis that her Whole Time Total Pensionable Pay was a figure of £43,696.43, but later found out that this figure included an amount relating to her PEC allowance. NHS BSA has highlighted that it relies upon employers to submit accurate pay information and does not have direct access to their records.
66. I am however mindful that the £43,696.43 figure was higher than the Total Pensionable Pay figure for the years which followed. I am also aware that Mrs R’s pensionable pay figure for 2005-6, known to NHS BSA, was markedly higher than the years which preceded and followed it. It could be argued that NHS BSA ought to have noticed these discrepancies and made enquiries. However, NHS BSA has put forward that a member’s pay can fluctuate, sometimes, for example, if they have worked additional shifts or where temporary promotions are given. Taking this into account, I am satisfied that figures provided for the year in question were not unusual to the extent that NHS BSA was irresponsible when not questioning the information provided. Hence, I do not consider that NHS BSA, on the basis of this information alone, could, with reasonable diligence, have discovered the error.
67. However, NHS BSA has acknowledged that in December 2013, it became aware of the fraud investigation concerning Mrs R. I consider this to be the point at which it, with reasonable diligence, could have discovered the error by making the appropriate enquires.
68. Therefore, the limitation period did not begin to run until December 2013. NHS BSA had six years from this date to seek recovery of the overpayment, which means that the limitation period expired in December 2019. NHS BSA made its claim for recovery of the overpayment on 2 February 2018, when the Pensions Ombudsman received its formal response to Mrs R’s complaint. This follows the case of *Webber v Department for Education* [2016] EWHC 2519 (Ch) (an overpayment case concerning Teachers’ Pensions), where the High Court held that the applicable cut-off date for Limitation Act purposes, was the date when Teachers’ Pensions brought its claim during the course of the Pensions Ombudsman’s complaints procedure. That date was identified as being the receipt by the Pensions Ombudsman, of Teachers’ Pensions response to Mr Webber’s complaint.
69. NHS BSA has made its claim for recovery of the overpayment within the applicable limitation period and as a result, there is no limitation defence available to Mrs R.
70. Turning now to other defences to the recovery of the overpaid funds, in order to make out a change of position defence, certain conditions must be satisfied. Broadly, the applicant must, on the balance of probabilities, show that because of the

overpayment, which they received in good faith, they detrimentally changed their position. The money must have been spent on something the applicant would not otherwise have bought; and the expenditure was irreversible.

71. Mrs R has provided financial statements to help explain how she spent the overpaid funds. However, I will need to consider whether the requirement of good faith has been satisfied. Before entering into the above agreement with the Trust, Mrs R was fully aware of the correct position, this being that her PEC allowance should not be pensionable. The difficulty is that her employer was in a position of trust, and it is arguable that she reasonably assumed her employer was acting appropriately.
72. However, I also consider that she was aware that the arrangement entered into was unique, involving face to face discussions, and only applied to one other member at the Trust. While Mrs R might have placed her faith in the Trust and believed that the arrangement was legitimate or valid, the good faith requirement does not only concern instances where the defendant might have known of the error, but also where they ought to have known of/could have discovered the error by making enquiries.
73. I consider that Mrs R had the requisite knowledge to make enquires about the agreement before her pension was put into payment; Mrs R cannot rely on the defence of change of position, nor can she rely upon the defence of estoppel, as this also requires for good faith to be made out on the part of the applicant.
74. In conclusion, I uphold Mrs R's complaint in part.

### **Directions**

75. Within 21 days of the date of the Determination, DHSC shall pay Mrs R £2,500 in recognition of the exceptional distress and inconvenience she has suffered as a result of the Trust's actions. It will offer Mrs R the option of having this amount offset against the overpayment owed, or paid to her directly as a lump sum.
76. NHS BSA shall then, if necessary, recalculate the overpayment owed, then enter into a mutually acceptable repayment plan with Mrs R.

**Anthony Arter**

Pensions Ombudsman  
24 January 2020