PO-20704

Ombudsman's Determination

Applicant	Mrs E
Scheme	NHS Pension Scheme (**the Scheme**)
Respondents	NHS Business Services Authority (**NHS BSA**) Department of Health & Social Care (**DHSC**)

Complaint Summary

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

Mrs E 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 shall be partly upheld against DHSC. I do not find that Mrs E'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 E £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 E worked for the Telford and Wrekin Primary Care Trust (**the Trust**) as a Speech and Language Therapist.

2. On 2 March 2000, a circular was issued by the Department of Health and Social Care, stating 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 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, including General Practitioners, two nurses and an allied health professional (**AHP**), the last category being the one which fitted Mrs E's role. Under the heading 'Time Commitment and Remuneration,' the following was stated:

   > "GP's, nurses and AHPs 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. I understand Mrs E subsequently became a member of the PEC for which she received a PEC allowance of £7,407.37 per annum in addition to her normal pay.

6. On 16 January 2004, in response to a query, Shropshire NHS Payroll Services confirmed to Mrs E that her PEC remuneration was being treated as non-pensionable, and that this was the correct position.

7. On 21 January 2004, Mrs E responded to the above letter saying that it was now evident that the Trust had made an error in its stated terms and conditions for the AHP PEC role. She said she had agreed to the terms stated and a large part of her decision to accept the position was based upon the allowances being pensionable and the effect this would have on her pension.

8. I understand that following this, various discussions followed between Mrs E and the Trust about whether a solution could be found.

9. On 5 May 2004, the Director of Finance and Performance Management at the Trust wrote to Mrs E (**the 2004 letter**) saying:

"Further to our previous discussion…I am pleased to confirm the following arrangements.

In order to ensure that you will not be financially disadvantaged, as a consequence of your PEC remuneration not being recognisable as 'pensionable pay', the PCT will make arrangements to increase your salary, for the twelve month period, immediately preceding the date of your retirement. To facilitate this, you will of course, need to advise the PCT of your intention to retire, at least twelve months in advance of the anticipated date of retirement.

Clearly I am not able to provide specific financial proposals with regards to the uplift, as this will obviously depend upon the timing of your retirement – nevertheless, I provide some illustrations on the attached sheet, which will hopefully be to your satisfaction."

10. On 25 October 2004, Mrs E sent a letter in response saying the following:

"Following discussions with you, [the Head of Payroll Services] and [the Head of Human Resources], and your letter dated the 5th May 2004 and [the Head of Payroll Services'] of the 24th August 2004, I confirm that I accept the Primary Care Trust's offer to arrange an increase in my salary for a twelve month period to ensure pensionable remuneration of my PEC allowance.

After discussions, my understanding is that we have agreed that this should be paid for my last, the fourth PEC year, which this agreement encompasses, April 2005 to 2006.

This enhancement then falls into a three year period, within which I will take my pension.

I would be grateful if you can confirm that we have now all reached agreement on this course of action and that arrangements will be put in hand to begin paying this additional amount with a pensionable code from the new financial year April 2005."

11. On 7 March 2005, the Director of Finance & Performance Management sent Mrs E a letter which said:

"Thank you for your letter of 17 February 2005, I am pleased to confirm that an additional responsibility allowance in recognition of your committee responsibilities will be paid for the 12 months, commencing on 1 April 2005.

This allowance will be the equivalent, in cash terms, to the allowance payable to members of the Professional Executive Committee (currently £7282 per annum), however, due to the payment terms agreed, in future it will be deemed to be pensionable, and shown as a separate item on your Speech Therapist pay advice slip."

12. On 27 September 2005, Payroll Services sent Mrs E a letter in reply to a recent enquiry, saying that should she retire on the grounds of age, she would receive a pension of approximately £12,770 per annum with a lump sum retiring allowance of £38,310. It said these figures were based on her "current rate of pensionable pay of £42807 + £7428 = £50235."

13. On 29 November 2007, a Senior Policy Development & Compliance Manager of NHS Pensions 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."

14. In 2008, Mrs E made enquiries to NHS BSA about retiring on 31 March 2008. She subsequently decided to retire on 1 April 2008 as doing so allowed her to take advantage of the option to be paid a larger lump sum.

15. I understand that from 2 April 2008, a pension of £11,267.84 was awarded with a lump sum retiring allowance of £75,118.94.

16. On 27 July 2015, NHS BSA sent Mrs E a letter which said:

> "Your benefits are being revised because your former employer has informed us that your pensionable pay has decreased to £42,807.00. Your pension from 02 April 2008 has been revised to £9,605.66 a year. Your lump sum retiring allowance is now £64,037.74."

17. On 21 August 2015, Mrs E formally complained to NHS BSA regarding her benefit revision. She made the following points:-

    - The abrupt changes to her pension had been made immediately with no opportunity for her to address the incorrect information from her past employers.
    - During the financial year 1 April 2005 to 31 March 2006, she was paid an "Additional Responsibility" increase added to her salary that was pensionable; she had letters to this effect.
    - When the Trust was set up in 2002, the terms and conditions for the document entitled 'Creating Telford and Wrekin PCT' stated that the additional salary was

pensionable for all members. Aside from welcoming this opportunity in her career, a significant motivation in accepting the role was the increase in salary and pension, where she was a single parent following her divorce.

- When the Trust realised it had made an error, there was consternation at both the members and an executive level. A part solution was put forward in the form of an offer to her and another member of staff whereby their salaries would be increased by an Additional Responsibility Payment for a period of one year and be pensionable.

- She lacked confidence in NHS BSA's calculations and after 7.4 years of being in receipt of her pension, she had been confronted with a substantial reduction to her pension and possible repayments, with the matter being dealt with by the NHS Pension Fraud Team.

18. On 3 December 2015, NHS BSA sent Mrs E a stage one response under its Internal Dispute Resolution Procedure (**IDRP**). This said the following:-

- Members of a PEC for a Primary Care Trust (**PCT**) were paid allowances and expenses and for most people, such payments were not pensionable, meaning the money paid was not included in the member's Total Pensionable Pay (**TPP**). The position was confirmed in a technical newsletter issued in 2000.

- On 25 February 2008, NHS BSA received Mrs E's application for payment of her pension benefits and it was confirmed that she would be retiring on 31 March 2008. Mrs E had signed to confirm that she understood she would have to repay any overpayment of benefits.

- Mrs E's employer subsequently emailed NHS BSA to say that her retirement date had changed to 1 April 2008. This was the first date on which the option to convert some of her pension into a bigger lump sum became available. Her pensionable pay figure for the year 2 April 2005 to 1 April 2006 was £50,214.37. Mrs E wished to convert her pension into an additional lump sum.

- An award of retirement benefits was calculated on 7 April 2008, but the additional lump sum was not included, and some days of her membership had been omitted. A revised award was calculated on 21 May 2008 based on a TPP figure of £50,214.37 and her accrued membership of 22 years and 124 days. Her benefits were calculated to be an annual pension of £11,267.84 and a lump sum of £75,118.94.

- In June 2015, Mrs E's former employer contacted NHS BSA regarding her TPP and it came to light that some of her PEC allowance had been included in the figure supplied. PEC payments are not pensionable, so it had to recalculate her benefits. Based on a TPP figure of £42,807.00, Mrs E's benefits now amounted to an annual pension of £9,605.66 and a lump sum of £64,037.74.

- Equiniti Paymaster had confirmed that her pension had been overpaid by £20,558.62 and the lump sum by £16,820.59. The complaint could not be upheld as Mrs E's benefits had been calculated in accordance with the Scheme's Regulations.

- NHS BSA noted that she had incorrectly paid pension contributions of £444.00 on her PEC allowance and with her agreement this could be offset against the overpayment monies.

19. In January 2016, NHS BSA wrote to Mrs E saying that as her stage one complaint had not been upheld, her pension had still been overpaid. It requested repayment of the whole amount and said this could be done by cheque, electronic banking, or alternatively, Mrs E could provide proposals for repayment over a period of time.

20. In April 2016, the Trust's Head of Payroll Services for the time in question, provided Mrs E a written statement of what he could recall regarding the arrangement to provide Mrs E with some pension provision for her PEC role. This concurred that such an agreement was put in place and said that the Trust, Shropshire County Primary Care Trust, their respective advisers and Shropshire Payroll Services, acted in what they regarded as being within the scope of the Scheme's regulations.

21. On 24 May 2016, Mrs E submitted a series of documents to NHS BSA to evidence that the Trust had agreed a workaround for the PEC role not being pensionable. She said she expected it to withdraw its claim for overpayment and restore her pension to the correct amount.

22. On 29 June 2016, NHS BSA responded under stage two of the IDRP, making the following points:-

    - The NHS Pension Scheme was a Statutory Scheme governed by legislation, namely the NHS Pension Scheme Regulations. Responsibilities for the administration of the Scheme were shared between NHS BSA and the Payroll/Pensions staff of the member's employer. The employer was responsible for recording a member's pensionable pay. NHS BSA did not have direct access to payroll systems and therefore could not validate the information given.

    - In accordance with Regulation C1 of the NHS Pensions Scheme Regulations 1995 (as amended) (**the Regulations**), Mrs E's benefits were based on the best of her last three years of pensionable pay. Pensionable Pay was made up of all salary, wages, fees, and other regular payments, made to a member in respect of their pensionable employment. Payments in respect of Mrs E's PEC post were not pensionable.

    - It was initially informed that Mrs E's last day of membership would be 31 March 2008, and a figure of £50,215 had been provided in relation to Mrs E's TPP for 1 April 2005 to 31 March 2006. On 3 March 2008, NHS BSA was informed that Mrs E's last day of membership had been changed to 1 April 2008; the best of

the last three years TPP period was now 2 April 2005 to 1 April 2006, and this amounted to £50,214.37.

- In June 2015, it received information from the Pensions Manager of Mrs E's former employing authority, that the figures provided for her TPP included an amount relating to her PEC allowance. It was informed that Mrs E received a payment of £619.00 per month which had been included as pensionable earnings for the year 1 April 2005 to 31 March 2006, in line with the approach of the 2004 letter. Taking the PEC pay out of her benefit calculation meant that Mrs E's revised TPP amounted to £42,807.00.

- PEC payments should not have been pensionable, and it could be suggested that the methodology used by the Trust, to inflate Mrs E's pay to include PEC pay, appeared to be a selection against the Scheme.

- Mrs E had provided a written statement from the Trust's former Head of Payroll Services. This referenced an email of 29 November 2007, between him and a Senior Policy Development & Compliance Manager for NHS Pensions, in which he indicated an apparent 'workaround' to the matter at hand, which was seized upon by the Trust. It did not believe this email provided approval for the steps taken. Further the decision on this purported workaround appeared to be decided three years prior to this. The complaint could not be upheld.

23. The matter was subsequently referred to The Pensions Advisory Service (**TPAS**). On 19 January 2018, the Director of Finance at Shropshire Community Health NHS Trust sent the TPAS representative the following email:

> "Please see below the legal advice I have recently received. This confirms the view that the successor body is the Department of Health in this matter and therefore it is appropriate to channel all further enquiries through that route.
>
> The legal liability for this matter has not transferred to Shropshire Community Health NHS Trust and therefore the Trust is not in a position to respond further to the matters raised through your investigation and the appeal [Mrs E] is progressing. The Department of Health is the responsible legal successor body for PCT legacy issues."

24. Mrs E then referred the matter to The Pensions Ombudsman for independent review.

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 E (and another member in the same position) to their Local Counter Fraud Specialist. It appeared that NHS BSA became aware of this investigation at that time, but it was not until 30 June 2015, that it received revised pensionable pay details for Mrs E.

26. It also provided an extract of the application for the payment of Mrs E's benefits which showed the pay details provided by the Pensions Manager at Shropshire NHS Payroll

Services Department on behalf of the Trust. These were as follows (the figures below are taken from the Employer Pay column):

"1 April 1999 to 31 March 2000 - £27,726.96

1 April 2000 to 31 March 2001 - £28,628.04

1 April 2001 to 31 March 2002 - £45,165.98

1 April 2002 to 31 March 2003 - £38,919.00

1 April 2003 to 31 March 2004 - £40,173.96

1 April 2004 to 31 March 2005 - £41,469.96

1 April 2005 to 31 March 2006 - £50,215.00

1 April 2006 to 31 March 2007 - £42,889.96

1 April 2007 to 31 March 2008 - £42,807.00"

Summary of Mrs E's position

27. 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 Regulations as being pensionable. Her allowance was £7,407.37 per annum, which NHS BSA was classing as expenses.

28. One of her main reasons for taking the PEC role was because she was advised by her employer that the allowance was pensionable. A letter from DHSC in 2007, also advised that the PEC allowance could be treated as pensionable.

29. NHS BSA was now advising that the solution found by her employer went against the Regulations. If this was the case then she had been disadvantaged; had she known that the PEC allowance was not pensionable she would have continued working full time until 2012.

30. Since retiring, she had spent money on gifts, travel, social activities and home/garden improvements, which she would not have done had the lower pension and lump sum been paid to her.

31. In regard to the Limitation Act 1980 (**the Limitation Act**), and whether NHS BSA could with reasonable diligence, have discovered the mistake that her TPP figure included an amount relating to her PEC allowance earlier, the correct test was as set out and approved in Allison v Horner [2014] EWCA Civ 117 (**Allison v Horner**): "section 32(1) [is] concerned with whether the claimant could (rather than should) with reasonable diligence have discovered the relevant deceit…at any particular time…the burden of proof [i]s on a claimant to establish that he could not have discovered the fraud [or mistake] without taking exceptional measures which he could not reasonably have been expected to take."

32. Accordingly, it was for NHS BSA to show that it could not have discovered the mistake without taking exceptional measures which it could not have reasonably been expected to take. In terms of whether NHS BSA "could" have discovered the mistake, the Ombudsman must consider the question on the basis of a desire to investigate.

33. NHS BSA appeared to rely on the argument that it relied upon employers to submit accurate pay information. This fell short of meeting the high bar of reasonable diligence and NHS BSA had explicitly accepted that it abdicated responsibility with regard to checking the accuracy of pay information supplied by employers. Hence, NHS BSA should not have the benefit of the section 32 Limitation Act exemption.

34. Making enquiries in relation to a markedly higher TPP figure was clearly not an "exceptional measure." This was especially as the markedly higher figure was in the three years preceding retirement and the higher figure of 2005-6 represented an increase of 21% on the reported figure for 2004-5.

35. NHS BSA had sought to argue that fluctuations in pay figures were not uncommon where additional shifts might have been worked or temporary promotions given. However, Speech and Language Therapists did not do shift work.

36. The other purportedly anomalous figure was for 2001-2, but this was not in the three years preceding retirement and represented a permanent step change in her pensionable pay from this point onwards. Consequently, NHS BSA could, with reasonable diligence, have discovered the mistake by making appropriate enquiries in April 2008, when she applied for pension benefits. The limitation period for NHS BSA to make its claim therefore ended in 2014, so any claim to recover payments now is time-barred.

37. Further, it was wholly contradictory to the principles of natural justice for NHS BSA and DHSC to seek to blame each other for their respective mistakes and for her to be penalised. If NHS BSA relied on DHSC to provide the correct information, then it must follow that DHSC's state of actual knowledge should be imputed to NHS BSA for the purposes of any argument on limitation. At the very least, given the number of cases involving the Ombudsman, similar to this, which NHS BSA deals with, NHS BSA should have been on notice that the information provided by employers might not be accurate (to adopt the Ombudsman's wording in PO-3093 – Mr Jackson).

38. Her position was factually similar to that of Mr Jackson and she had acted in a manner almost identical to him. In that case, the Ombudsman found that despite general information (about the subject matter in dispute) being available, that availability did not prevent Mr Jackson from successfully arguing that he relied on the incorrect information provided to him by his employer and reported to NHS Pensions. Similarly, in her own case, she did not know that what was being suggested by DHSC was not permitted and this did not change the fact that she accepted and relied upon its offer to her detriment. Had the information in her retirement estimate been different, she would not have retired when she did.

39. In respect to the defence of change of position and good faith, the starting point must be that she was entitled to rely on the representations made to her in the agreement made with the Trust. Everything that was sent to and said to her, by very senior members of her employer, was designed to assure her that a legitimate workaround to the PEC issue had been found. She was entitled to receive those assurances in good faith and did so.

40. In terms of whether she ought to have known of the error or should have made further enquiries, in or around January 2004, she sought clarification of her pensionable income. Following protracted correspondence, meetings and negotiations with the Head of Payroll Services, she reasonably believed a solution had been found by late 2004. All communications she received thereafter and the pension award she received on 2 April 2008, from NHS BSA, accorded with her understanding on the pension to which she was entitled. Hence, this was not a case of her turning a blind eye, rather, there was nothing that could have put her on notice in regard to the error. She would not have reduced her working hours when she did (or taken her pension in 2008) if she believed there was any inaccuracy in the calculations presented to her.

41. She was not sent, and therefore never saw, the 29 November 2007 email. If she had, this may have prompted a further enquiry from her but without it, she had no reason to question the legitimacy of the arrangements made. In any event, although the email said that consuming the PEC allowance into the individual's NHS salary was not advised, this was an available "back door." So even the email would not have alerted her to the fact that the agreed "workaround" would not be effective.

42. There was no requirement of good faith in establishing estoppel by representation, albeit, it must have been reasonable for her to rely on the representation. The award constituted an unequivocal representation by NHS BSA that she was entitled to the amounts therein. This was a formal document from her employer and it was entirely reasonable for her to have relied upon the representation in the award. She did so to her detriment.

43. The monthly payments made by NHS BSA to her between 2008 and 2015 (which were consistent with the Award) each constituted an unequivocal representation by NHS BSA that she, as a member of the Scheme, was entitled to those amounts and that the payment of the sums was in satisfaction of her entitlement.

44. Given the long period of correspondence and negotiation in 2004 and the final agreement in late 2004 with regard to her salary and pension position, it was entirely reasonable for her to rely on those representations.

45. Contract was one of the defences to the recovery of an overpayment in the Ombudsman determination of Mr N against Kent and Medway Fire and Rescue Authority and Kent County Council (PO-16358). In that case, the Adjudicator found that the facts did not meet the conditions required to establish a contract.

46. Here however, it was clear that an agreement (**the Contract**) was reached between her and the Trust. This was demonstrated by the letter of 5 May 2004 (**the 2004**

letter), from the Director of Finance and Performance Management at the Trust, which evidenced the Trust's offer, and her letter of 25 October 2004, indicating her acceptance.

47. There was no question concerning consideration, the intention to enter into legal relations and certainty of terms. It was evident that all of these requirements were fulfilled.

48. The Contract could not be deemed void because it was viewed that such an offer was disproportionate. The offer was made and accepted and the Ombudsman was bound to enforce that contract.

49. In terms of whether the Trust acted in a manner which went beyond its powers, in the absence of any evidence or submissions from DHSC, such a finding was not open to the Ombudsman. Even if this was open to the Ombudsman, such a finding would need to be made explicitly with the legal basis for this explained. DHSC's position was that it entered into a contract with her and the information provided to NHS BSA was correct in accordance with that contract, but as the contract was, as it later decided, ultra vires, she should be penalised for accepting the offer made. Whether or not DHSC had the power to make that offer did not change the fact that an offer was actually made and accepted. It was a basic principle of contract law that the later discovery that one party should not have entered into a contract, does not invalidate it.

50. DHSC made an offer to her which she accepted in good faith. This was wholly different from the factual situation in Mrs Y (PO-6007), where the wrong information was provided by the Trust to NHS BSA and the applicant in that case. Here, a contract was offered, accepted and concluded between the Trust and the applicant. This was not simply a case of the wrong benefits calculation being provided. For DHSC to now be able to renege on that contract and rely on the contract being ultra vires was repugnant as a matter of public policy, particularly when NHS BSA had said it relied on the figures provided to it by DHSC.

51. The Contract was a legally binding agreement on specific terms and must be enforced. It was an arms-length agreement between employer and employee, in circumstances where a relationship of trust and confidence plainly existed between the parties. It was contrary to public policy for any party to the Contract to be permitted years, after the event, to renege on it because the "workaround" one party designed was not permitted.

52. It was even less attractive for the Trust/DHSC to be allowed to renege on the Contract now, because this was not a case of the Trust discovering after the event that the terms of its agreement were not permitted.

53. If the Contract could not act as a defence to NHS BSA's claim for recovery, the Ombudsman should consider directing DHSC to contribute any repayments payable by her, with the appropriate contribution being 100%.

54. It had been suggested that her PEC responsibilities would have formed part of her normal hours. In fact, her work on the PEC meant that her work far exceeded her normal working hours, as reflected in the "extra responsibility payment" in her payslips.

55. In the case of NHS Business Services Authority v Wheeler & Ors [2014] Pens. L.R. 639, the court found that the Ombudsman was entitled to direct that the applicant executors' cost be reimbursed where "the costs in question had been incurred in dealing with the consequences of the Authority's actions and would not otherwise have been incurred." Hence, it would be appropriate for DHSC to pay her costs, which included £4,500 in solicitors' costs as well as £1,900, where she had estimated she had spent 100 hours on the issue since it was first raised, and the accepted rate for a litigant in person was £19 per hour.

56. Her way of life had been compromised by the substantial reduction in her pension, causing her to worry that she will not be able to meet the costs in maintaining her home. Since this issue had arisen, she suffered from severe anxiety, depression, panic attacks and insomnia. She had been particularly distressed by NHS BSA's decision to conduct a pension fraud investigation into the matter when there had been no intended wrongdoing on her part.

Summary of NHS BSA's position

57. Each PCT had a PEC which healthcare professionals, such as GP's and nurses, sat on. Where the PEC member was a local GP provider, they were reimbursed by the PCT for their PEC services. This was because GP providers were self-employed and incurred expenses by attending PEC meetings. As GP providers were required to superannuate all of their GP NHS income, it meant that their PEC income, less expenses, was pensionable.

58. In terms of other PEC members, for example pharmacists and nurses, their PEC duties were part of their overall NHS duties and they were not "out of pocket" by taking on such a role. Where they did receive additional monies from the PCT this was normally to cover PEC expenses.

59. As the pension benefits for GPs was based upon their NHS profitable earnings, the allowance paid for attending board meetings was allowed to be pensionable to ensure that their GP pensionable pay did not suffer. Mrs E's attendance at meetings would have formed part of her normal hours.

60. The allowances for PEC work were classed as expenses and were therefore non-pensionable under Regulation C1 of the Regulations. The pension position of these payments was communicated to employers in Technical Newsletter 10/2000 and by the Department of Health in Health Service Circular 5 (2005).

61. 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 the PEC. In the same respect, neither should a

PEC member gain an advantage by the payment increasing their whole time pensionable pay. Paragraph 15 of Health Service Circular 5 (2005), explained that members, such as Mrs E, were pensionable for their normal NHS employment and as such would suffer no detriment as they were salaried employees.

62. The information received in June 2015, meant that NHS BSA was required to revisit the calculation of Mrs E's pension benefits using a TPP of £42,807.00 and 22 years, 124 days reckonable membership. Mrs E's benefits were revised, and this meant that previous benefits had been overpaid.

63. Mrs E had stated that NHS BSA should be restricted from the whole overpayment due to the Limitation Act. Part 2 of the Limitation Act provided an extension or exclusion of the ordinary time limits; section 32 stated that where a mistake occurred the period of limitation did not begin until the error was discovered or could reasonably be found.

64. NHS BSA was not aware when Mrs E's pension was put into payment, that an incorrect pensionable pay figure had been provided by the employer. The earliest NHS BSA knew that an error occurred was on 30 June 2015, when her former employer revised its pay information. Therefore, the Limitation Act did not apply in this instance.

65. In regard to whether NHS BSA could have uncovered the mistake with reasonable due diligence, Mrs E was a member of the 1995 Section NHS Pension Scheme, and both her membership and the responsibilities of her employer were subject to the Scheme Regulations for that Section. Regulation U3 of the Regulations describes the role and responsibilities of the employer with the emphasis being on the employer to record and check the information gathered. Although, NHS Pensions records this information against a member's pension record, it has no direct access to individual employer's payroll systems or local pay agreements, and is, therefore, not in a position to verify the information provided. Fluctuations in pay did occur for some members, for example, when a member worked shifts and received additional allowances, or where they were placed on a temporary promotion and working outside of their usual grade.

66. The Pensions Ombudsman's previous case of Mrs Y (PO-10114) involved a similar argument to that put forward by Mrs E concerning whether NHS Pensions ought to have known that the pay provided on the award application was incorrect. However, it was successfully proved that NHS Pensions relies on employers to supply accurate information. Where there are changes to a member's pension record it remains the responsibility of the employer to notify it of the change using the form AW171.

67. To consider Mrs E's case in a similar manner, NHS Pensions did not receive revised pay information until June 2015, when her former employer identified the issue in respect of the pensionable pay. NHS Pensions acted immediately on this information and revised the pension benefits for Mrs E. Accordingly NHS BSA was not time-barred from recovering the overpayment.

68. Therefore, the test on due diligence falls to the employer rather than NHS Pensions.

69. Mrs E also believed that estoppel should apply. Reviewing the information available, it was clear that the agreement was between Mrs E and her former employer, her complaint was more about how her employer acted rather than any potential wrongdoing by NHS BSA; estoppel does not apply.

70. It had been argued by Mrs E that her responsibilities exceeded her normal working hours. A member of the Scheme could only incur pensionable hours worked up to and including a maximum of whole-time. Mrs E's standard working hours for the week would have been 37.5, and any additional pay in excess of these hours would not have been pensionable.

Summary of DHSC's position

71. 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.

72. 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.

73. 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. By attending the PEC, a 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.

74. Hence, it was unclear why, in the 2004 letter, the Trust referred to Mrs E being 'financially disadvantaged,' as this was not the case. Mrs E's NHS pension benefits did not reduce by virtue of her being a PEC member, rather, they increased by virtue of her continuing pensionable service in her main therapist post.

75. It was accepted, as a matter of fact, that the PEC allowance was not pensionable; both Mrs E and the Trust were aware of this before the temporary salary increase. The wording of the 2004 letter made clear that the purpose behind the temporary salary increase was to prevent "disadvantage" as a result of the PEC income not being recognised as pensionable pay. However, Mrs E 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 would mean her benefits should be as recalculated.

76. Although, Mrs E'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. Mrs E chose not to do so, and it was unclear why this option was not explored.

77. Mrs E was subject to the NHS Agenda for Change pay structure: where a NHS employer chooses to increase pay, it must be in accordance with the NHS Agenda for

Change pay rules. Where an employee's pay increased by a significant amount, such as over 20%, it would be due to a change in circumstances such as promotion, re-banding of grade, etc. This was not the case here because Mrs E's pensionable pay returned to the correct rate in her final two years.

78. If a NHS employer chose to pay staff more, they would be expected to objectively justify the decision. Mrs E and the Trust understood that PEC payments were not pensionable. The Trust took a unilateral decision, which they had no power to make under the Regulations and the Agenda for Change pay structure.

79. There was no evidence to corroborate that there was either a contract of service, or for services, regarding the PEC work. Even if the Trust and Mrs E had entered into a separate contract of employment in respect to her PEC role, it would not have been pensionable as Mrs E was already a whole-time NHS Pension Scheme Officer member. Officer members of the NHS Pension Scheme could not 'pension' income in excess of whole-time. Further, if the Trust and Mrs E had entered into a contract for a services arrangement, any income generated could not have been pensionable.

80. Mrs E 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.

81. The PEC allowance was not pensionable under the relevant NHS Pension Scheme Regulations and Mrs E's employer was not in a position to give a binding undertaking that the payments could be included in her pensionable pay. In purporting to offer a temporary increase to Mrs E's salary, so as to compensate her for the fact that PEC income was not pensionable, the Trust took a decision which it had no power to make under the relevant NHS Pension Scheme Regulations and the Agenda for Change pay structure.

82. It would not be appropriate for the Ombudsman to order DHSC to pay Mrs E's costs in dealing with this matter.

Conclusions

83. The document issued by the Trust in 2002, advertising the PEC roles stated that AHP's would receive an allowance that would be pensionable. On 16 January 2004, however, Shropshire NHS Payroll Services confirmed to Mrs E that her PEC remuneration was not being treated as pensionable and said this was the correct approach.

84. Mrs E acknowledged this point on 21 January 2004, when she wrote to the Trust, saying it was evident that it had made an error in its stated terms and conditions. At this point, both Mrs E and the Trust were fully aware that her PEC allowance, according to the Regulations, should not be classed as pensionable. The events that followed involved a 'workaround' to this position, whereby extra payments would be made by the Trust to Mrs E, to provide her additional pension at retirement, in order

to remedy what both parties deemed to be an unfair or disadvantageous position to her.

85. Whilst it is most regrettable that the PEC role was wrongly advertised, I do not agree that Mrs E was unduly disadvantaged in the overall context. Essentially, Mrs E 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 attached to the role.

86. I find that the Trust's actions, which were taken to essentially remedy a matter of misinformation, were disproportionate to the situation at hand. In such instances, promising a benefit which the aggrieved party was never entitled to does not constitute a fair remedy.

87. 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 Pensions. In forming its agreement with Mrs E, the Trust acted in a manner inconsistent with its role and I deem this a misguided approach on its part. Accordingly, I do not consider that the agreement in question stands.

88. I do however have sympathy for Mrs E in respect to her current position; this overpayment would not have arisen had the Trust not wrongly entered her into an unenforceable agreement. Mrs E 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 a substantial debt to pay caused by an agreement which should never have been made. I find that the Trust should pay Mrs E an award for the exceptional distress and inconvenience she has suffered because of its maladministration.

89. In terms of the recovery of these funds, 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. NHS BSA has 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 30 June 2015, when Mrs E's previous employer emailed it revised pay information.

90. 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, 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 which follows is whether NHS BSA could, with reasonable diligence, have discovered the mistake any earlier. Mrs E clearly feels that it could have done.

91. In initially calculating Mrs E's pension benefits, NHS BSA proceeded on the basis that her Whole Time TPP was a figure of £50,214.37, and later found out that this figure included an amount relating to Mrs E's 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.

92. I am however mindful that the £50,214.37 figure was markedly higher than the TPP figure for the years preceding and following this. It could be argued that NHS BSA ought to have noticed this and made enquiries. However, when considering all of the data submitted to NHS BSA for Mrs E's retirement, the period 1 April 2001 to 31 March 2002, is another anomalous year where the figure is much higher than other years. Taking this into account, one could infer that such fluctuations, which can be the case where additional shifts are worked or temporary promotions are given, were not unusual to the extent that NHS BSA were irresponsible in not questioning this information. On this point, Mrs E has said that shift work was not available to her, however this was just one example for a fluctuation in pay.

93. Mrs E has referred to the Court of Appeal case, Allison v Horner, highlighting the fact that in this case, the burden of proof was on a claimant to establish that they could not have discovered the deceit (or mistake) without taking exceptional measures which they could not reasonably have been expected to take. She had also made reference to a test of "reasonable diligence" with the "notion of a desire to know, and, indeed, to investigate."

94. However, there is no prior reference to these cases and the concept of placing a burden on a claimant in pension case law regarding overpayments and section 32 of the Limitation Act. The matter of Webber v Department for Education [2014] EWHC 4240 (Ch) (**Webber**), an overpayment case concerning Teachers' Pensions, reviewed the application of section 32 and how reasonable diligence should be applied. In this case, the High Court determined that the Teachers' Pension scheme had sufficient information available to it such that it did not need to take exceptional measures to determine whether overpayments had been paid.

95. Hence, I do not consider that the argument which Mrs E has put forward is a relevant comparison. This is especially so bearing in mind that NHS BSA relied on the employer to provide accurate salary information. I consider that NHS BSA did not have sufficient information in 2008, to be aware that Mrs E was overpaid, and undertaking further investigations at that point would have been excessive and/or exceptional.

96. NHS BSA has said that it became aware of the fraud investigation concerning Mrs E in December 2013. I consider this to be the point at which it, with reasonable diligence, could have discovered the error by making the appropriate enquires.

97. Given my finding above, 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 7 March 2018, when the Pensions Ombudsman received its formal response to Mrs E's complaint. This follows the approach taken in Webber, 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.

98. NHS BSA has made its claim for recovery of the overpayment within the applicable limitation period; I do not find that a limitation defence applies in the circumstances.

99. 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.

100. Mrs E has supplied statements, invoices and letters, to demonstrate how she spent the overpaid funds. However, the first matter to consider is whether the requirement of good faith has been satisfied. Before entering into the agreement with the Trust, Mrs E was fully aware of the correct position, this being that her PEC allowance should not be pensionable. The difficulty here is that her employer was in a position of trust, and it is arguable that she reasonably assumed her employer was acting appropriately.

101. 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. Whilst Mrs E might have placed her faith into 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.

102. I find that Mrs E had the requisite knowledge to make enquires about the agreement before her pension was put into payment. Mrs E cannot rely on the defence of change of position.

103. Mrs E has also sought to rely upon the defence of estoppel. There are three requirements that need to be satisfied to establish estoppel by representation: (1) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act; (2) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise; and (3) after the act has been taken, the claimant being able to show that he/she will suffer detriment if the defendant is not held to the representation or promise.

104. Mrs E has said the payment of her pension constituted an unequivocal representation by NHS BSA and that it was entirely reasonable for her to rely on the representation.

However, from the negotiations undertaken by Mrs E, it is clear that she was aware that the PEC allowance was not pensionable and she would have known that the pension, initially awarded to her, was calculated using incorrect data when considering the Regulations. She cannot rely on the defence of estoppel.

105. Mrs E has also argued that an agreement was reached between her and the Trust amounting to a contract which should be enforced, serving as a defence to the recovery of the overpayment. As iterated by Mrs E, to establish a contract: offer; acceptance; consideration; the intention to enter into legal relations; and certainty of terms, all need to be apparent. However in this matter, it is not clear whether the Trust wished to enter into a legal relationship, or, whether certainty of terms existed.

106. It was noted by Arnold J in HR Trustees Ltd v German (1) IMG Ltd (2) [2009] EWHC 2785 (Ch), that it is difficult in employer/employee relations to find an intention to create legal relations so as to alter pension entitlement. He said:

> "I consider that the Employers must establish not merely that there was an intention to create legal relations, but specifically an intention to create contractual relations. The reason why I say this is that the parties may have intended to create legal relations to be regulated by the applicable trust documents. What the Employers must establish is an intent to create contractual relations, so that the contract is binding even if its terms differ from those of the applicable trust documents."

107. Mrs E accepted the proposal contained in the 2004 letter before the terms of any agreement had been finalised. In the 2004 letter, the Director of Finance and Performance Management commented that he was not able to provide "specific financial proposals with regards to the uplift" and in his letter of March 2005, he merely said that an additional responsibility allowance would be paid. Hence, Mrs E's pension entitlement is subject to the terms of the Regulations; the representations made to her were uncertain and do not alter the manner in which her benefits are lawfully calculated.

108. Lastly, Mrs E has suggested that it would be appropriate for DHSC to pay the costs she has incurred in dealing with the consequences of the Trust's maladministration and has referred to the case of Wheeler in support of her request. However, I do not consider that the two matters are comparable, or that Mrs E's circumstances are exceptional, particularly as she was aware that the PEC allowance was not pensionable.

109. In conclusion, I partly uphold Mrs E's complaint.

Directions

110. Within 21 days of the date of this Determination, DHSC shall pay Mrs E £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 E the option of having this amount offset against the overpayment owed, or paid to her directly as a lump sum.

111. NHS BSA shall then, if necessary, recalculate the overpayment owed, and enter into a mutually acceptable repayment plan with Mrs E.

Anthony Arter

Pensions Ombudsman
27 March 2020