

## Ombudsman's Determination

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|-------------|---|
| Applicant   | Mrs N   |
| Scheme      | Health and Social Care Pension Scheme 2015 ( <b>2015 Scheme</b> ) |
| Respondents | HSC Business Services Organisation ( <b>HSC BSO</b> )             |

## Outcome

1. I do not uphold Mrs N's complaint and no further action is required by HSC Business Services Organisation.

## Complaint summary

2. Mrs N has complained that she has been awarded a pension and lump sum at a level significantly below that which she was expecting on her retirement on the grounds of ill health. She has complained that the information she was provided with by HSC BSO was incorrect and incomplete.

## Background information, including submissions from the parties

### Background

3. The relevant regulations are The Health and Social Care Pension Scheme Regulations (Northern Ireland) 2015 (SR2015/120) (as amended) (the **2015 Regulations**). These came into operation on 1 April 2015. Extracts from the relevant regulations are provided in Appendix 2. Chapter 5 contains the provisions for ill health pensions. The 2015 Scheme provides for two tiers of pension depending upon the member's level of incapacity for employment. If a member qualifies for a Tier 2 pension, Regulation 91 provides for the payment of a Tier 2 addition to the annual pension.
4. The Health and Social Care Pension Scheme (Transitional and Consequential Provisions) Regulations (Northern Ireland) 2015 (SR2015/122) (the **Transitional Provisions**) also apply. Chapter 7 covers retirement benefits. Regulation 27 provides for the continuity of existing applications for ill health retirement where an application form AW33 was submitted before the member's transition date. If Regulation 27 does not apply, Regulation 28 (see Appendix 2) applies to ill health retirement where the member is below their old scheme's normal pension age.

5. On 24 February 2015, HSC BSO received a request for an estimate of the benefits Mrs N might receive if she were to retire on 31 March 2015. At the time, Mrs N had been on long term sickness absence since February 2014.
6. On 10 March 2015, HSC BSO provided two benefit illustrations: one for Tier 1 ill health retirement benefits and one for Tier 2 ill health retirement benefits. The Tier 1 benefits comprised an annual pension of £19,508.11 and a lump sum of £58,524.32, based on 14 years and 93 days of scheme membership. The Tier 2 benefits comprised an annual pension of £40,662.21 and a lump sum of £121,986.62, based on 29 years and 260 days of scheme membership. This included 15 years and 167 days of "unscaled enhancement". Both letters included the statement:

"Please note that this illustration is based on uncertified details of service and pensionable earnings and so cannot be taken as a guarantee of what may be awarded."
7. On 10 August 2015, HSC BSO received an application for ill health retirement from Mrs N. By this time, Mrs N was a member of the 2015 Scheme; having transitioned on 1 April 2015.
8. On 1 June 2016, HSC BSO wrote to Mrs N notifying her that she was entitled to Tier 1 ill health retirement benefits comprising an annual pension of £14,197.05 and a lump sum of £94,641.15. The pension was effective from 6 October 2015.
9. HSC BSO wrote to Mrs N, on 23 August 2016, notifying her that her benefits had been changed to Tier 2 and providing details of her Tier 2 addition benefits. These comprised an annual pension of £929.90 and a lump sum of £6,180. It also informed her that arrears of pension amounting to £755.03 and a balance of lump sum amounting to £6,132 would be paid.
10. HSC BSO wrote to Mrs N again on 30 September 2016. It said the forecast which had been provided in March 2015 had been based on the 1995 Scheme regulations and had been correct at the time. HSC BSO said it had not been told to forecast beyond the 1995 Scheme. It said Mrs N's application for ill health retirement was not completed prior to her joining the 2015 Scheme.
11. HSC BSO said Mrs N had automatically moved over to the 2015 Scheme on 1 April 2015. It explained that the salary figure used in the 2015 Scheme was based on Mrs N's actual pensionable earnings and not her annual earnings. HSC BSO referred Mrs N to Regulation 20(3) and said this provided for pensionable service to be treated as continuing when a payment was made in respect of untaken leave. HSC BSO also referred Mrs N to a 2015 factsheet, which explained that the 2015 Scheme is a career average revalued earnings (CARE) scheme. A member's pension is based on her/his pensionable pay across her/his career; the pension earned in each year is based on the pensionable pay for that year and revalued each year up to retirement.
12. HSC BSO said Mrs N had been awarded a Tier 2 pension, having previously been awarded a Tier 1 pension. It said the revision for Tier 2 was only based on her

membership of the 2015 Scheme because this was the scheme she was in when she collected her pension. HSC BSO set out the calculation of Mrs N's Tier 2 pension based on the formula:-

$$A \times (C+E)/C - A$$

Where

A = the annual pension accrued to the last day of pensionable service

C = the total number of days over which the pension was accrued

E = the period equal to 50% of the period from the last day of pensionable service to normal pension age

13. In Mrs N's case, the Tier 2 enhancement was:-

$$£11.76 \times (46+5598)/46 - 11.76 = £1,431.14$$

14. On 5 January 2018, HSC BSO received an appeal from Mrs N under the Scheme's two-stage internal dispute resolution (**IDR**) procedure. It issued a stage one decision on 29 March 2018. The decision is summarised below:-

- It had received her request for an estimate of benefits on 10 March 2015; at which time she was a member of the 1995 Scheme. It had provided an estimate based on membership of the 1995 Scheme.
- It had received her application for ill health retirement on 10 August 2015; at which time she was a member of the 2015 Scheme.
- The benefits from the 2015 Scheme differ to those of the 1995 Scheme. Information about both Schemes was available on its website.
- The calculation of the Tier 2 enhancement was detailed in Regulation 91 of the 2015 Regulations.
- In Mrs N's case, her annual pension of £11.76 had been accrued over 46 days and she had 11,195 days between the last day of her pensionable service and her normal pension age in 2046. This resulted in an enhancement of £1,431.07.
- It had clarified with the Shared Services Payroll that the earnings used to calculate Mrs N's benefits in the 2015 Scheme were correct.
- Mrs N's last principal practitioner earnings had been included in her annual certificate of pensionable profit for 2014/15. These earnings would not have altered her pension in the 2015 Scheme because there were no earnings for the principal post or any sessional work in the 2015/16 period.

15. Mrs N made a further appeal under the IDR procedure. HSC BSO issued its stage two decision on 12 November 2018. Its decision is summarised below:-

- It had adhered to the Scheme regulations. Mrs N was in receipt of the correct amount of benefit.
- The estimated benefits had been calculated on the basis of the details held in the 1995 Scheme only, because the estimate had been requested on the basis of service up to 31 March 2015.
- It had been advised to provide an estimate up to 31 March 2015, which did not include any 2015 Scheme benefits. The information provided was not misleading.
- The date of entitlement to ill health benefits was 20 August 2015, because that was the date on which Mrs N's application had been accepted on appeal.
- Mrs N's only source of pensionable income for 2015/16 was £634.87. It had been correct to use this in the calculation of her 2015 Scheme benefits.

### **Mrs N's position**

#### 16. Mrs N submits:-

- At no point was she advised of the effect of transferring from the 1995 Scheme to the 2015 Scheme. She was not told of the very significant effect that this would have on her benefit entitlement.
- Based on the illustrations provided to her, she applied to retire on 19 May 2015. Had she been advised or warned about the impending changes to entitlement due to the transfer, she would have ensured that her application had been submitted and completed before the relevant date. She was not given this opportunity.
- Whilst transition arrangements were put in place to assist those with applications already in the pipeline, she was not given any assistance to enable her to mitigate or remove her loss.
- The decision is unfair and contrary to the intention of the Regulations, which is to provide those who are unable to work in the future with an income relative to their previous earnings.
- She was provided with insufficient and misleading information. Both the pension service and the payroll were aware of information which would have enabled her to make an informed decision about her pension application. As a consequence, the position regarding her application was misrepresented to her by the pension service.
- She relied on the representations to her detriment and she has lost benefit as a consequence.

- The misleading 1995 Scheme illustrations were provided just three weeks prior to the transfer. HSC Pensions was aware that the illustrations would only be valid for a period of three weeks. After this point, Tier 2 awards would be based on the 2015 Scheme. No illustrations representing her situation were provided. She was given no indication that the illustrations would change once the transfer had happened.
- HSC's payroll was aware that the transfer would take place on 1 April 2015 and could affect her pension entitlement. Specifically, it was aware that she was in a period of no-pay following a lengthy period of paid sick leave and that she was considering retiring through ill health.
- It is not clear why her application was backdated to 20 August 2015, and not to a date prior to 31 March 2015.
- A single payment of £634.87 was made in respect of unused holiday entitlement, which was accrued prior to 31 March 2015. This was not her main source of income throughout her pensionable service and is not representative of her earnings during her career. This was, however, taken as her actual earnings for the year and used to calculate her pension. This pension was then used to calculate her Tier 2 enhancement.
- As a result of the failure to provide any transitional arrangements for members on long term unpaid sick leave at the point of transfer, she has been denied the full benefit of a Tier 2 award.

### **HSC's position**

17. HSC has referred to its IDR responses.
18. In response to a request for clarification, HSC BSO said, prior to implementation of the 2015 Scheme, it had held workshops across the province to highlight the changes and advertised this in "Business Matters 2014". It provided copies of the literature which had been made available to staff on a dedicated microsite within its website before April 2015. Extracts from the literature relating to ill health retirement are provided in Appendix 1. HSC BSO provided a link to the 2015 area of its website which now contains the information previously held in a designated pension reform area. It also provided a copy of an Employer Technical Update which asked all employers to make staff aware of the consultation on Pension Reform.

### **Adjudicator's Opinion**

19. Mrs N's complaint was considered by one of our Adjudicators who concluded that no further action was required by HSC BSO. The Adjudicator's findings are summarised below:-

- Mrs N's position was, essentially, that she should have received more advice as to how she could maximise the benefits she might receive if she retired on the grounds of ill health.
- HSC BSO had received a request for an illustration of ill health retirement benefits on 24 February 2015. The proposed retirement date was 31 March 2015. HSC BSO had provided Mrs N with illustrations based on membership of the 'old scheme'. This information was entirely correct at the time it was provided. Had Mrs N retired on 31 March 2015, her benefits would have been calculated under the terms of the 'old scheme'.
- Mrs N argued that HSC BSO should have gone further and, in effect, warned her that she would receive lower benefits if she delayed her retirement.
- The Scheme Manager for the 2015 Scheme was the Department of Health, Social Services and Public Safety (the **Department**). Its role was akin to that of a trustee of a private sector trust based pension scheme. HSC BSO administered the 2015 Scheme for the Department. As Scheme Manager, the Department would have had certain responsibilities to provide information for members under the Disclosure legislation<sup>1</sup>. It could have arranged for HSC BSO to carry out these responsibilities on its behalf.
- However, the kind of information which the Department and/or HSC BSO would have been required to provide under the Disclosure legislation largely related to the amount of Mrs N's prospective benefits and the circumstances in which they could be paid. Mrs N appeared to envisage HSC BSO going beyond the simple provision of information about her benefits and advising her as to the best time to take them.
- The provision of financial advice was strictly regulated in the UK and HSC BSO was not authorised to give financial advice. The Adjudicator acknowledged that it was not always clear where providing information ended and giving advice began. There had been a number of Court cases relating to when it was necessary or appropriate to go beyond the simple provision of information.
- In *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, the House of Lords had come close to deciding that there was a duty on employers to advise in respect of pension rights and benefits. The case involved a group of junior doctors who were members of the NHS pension scheme. Members had a right to purchase additional years' service on beneficial terms, which then enabled them to obtain enhanced pensions. However, this right had to be exercised within a short period of time, after which the terms became less beneficial. The doctors had argued that they had not been informed about their rights and therefore had been disadvantaged.

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<sup>1</sup> The Occupational and Personal Pension Schemes (Disclosure of Information) Regulations (Northern Ireland) 2014 (SR2014/79) (as amended)



The House of Lords concluded that, in the particular circumstances, it was appropriate to imply a term into the doctors' employment contracts that the employer would take reasonable steps to inform them about their rights. However, the Court did not go as far as to say that the employer had to give advice to the members about the exercise of their rights.

- In *University of Nottingham v Eyett* [1999] 1 WLR 594, Mr Eyett had been provided with an illustration of benefits for retirement on 31 July 1994. The information was based on his pensionable salary as at 1 August in each of his previous three years of employment. However, his employer did not tell Mr Eyett that, if he waited until 31 August 1994, his benefits would be higher. This was because his final pensionable salary would take account of a pay rise he would receive on 1 August 1994. The High Court found that Mr Eyett had been aware of his pension benefits and had been provided with all the scheme documents necessary to ascertain that he would be better off if he continued to work for a further month. Mr Eyett had not asked his employer for any advice about his chosen retirement date and there was no evidence that it was aware that he was making his decision on the grounds of a mistaken belief. The Court did not accept the argument that Mr Eyett's employment contract included an implied duty of good faith that encompassed an obligation on his employer to warn Mr Eyett that his decision to retire a month earlier might be financially detrimental.
- In *Corsham v Police and Crime Commissioner for Essex* [2019] EWHC 1776 (Ch), the High Court had considered a claim in which former police officers had been subject to adverse tax consequences when they took up further employment within a month of taking early retirement. They had brought claims against both their police authority and chief constable. The officers' argument that, as the relationship between a police officer and a chief constable was akin to an employment relationship, the Court should find a similar duty of care as in *Sally* failed. However, the Court did find that the police authority, as administrator of the Police Pension Scheme, should have known about the adverse tax consequences arising where police officers were re-employed into civilian roles within one month of retirement. The police authority was found to be liable for negligent misstatement where it had informed retiring officers that they would receive a tax-free lump sum despite knowing about offers to re-employ them straight after retirement.
- In *Sally* and *Eyett*, the decisions were founded upon there being an implied term in a contract of employment which the member could rely on; or not in Mr Eyett's case. Mrs N did not have such a relationship with HSC BSO. Her circumstances were more akin to those of the police officers in *Corsham*. In *Corsham*, the Court had considered what the police authority, in its roles as scheme administrator and future employer, should have known. It decided that, at the time of informing the police officers that they could take tax free lump sums, the police authority would or should have known both about the

consequences of re-employment and that the officers would be re-employed. The Court decided that informing the police officers that their lump sums would be tax-free amounted to negligent misstatement.

- The circumstances of Mrs N's case differed from those of the police officers in *Corsham* inasmuch as HSC BSO only fulfilled the role of pension scheme administrator. When asked to provide an illustration of ill health retirement benefits for retirement on 31 March 2015, it could not know whether Mrs N was actually going to retire on that date. In the Adjudicator's view, this was an important distinction with *Corsham*. The statement made to the police officers, to the effect that their lump sums would be tax-free, should have been known to be incorrect at the time it was made, because it was known that they were to be re-employed. The actual date of Mrs N's retirement was not and could not have been known to HSC BSO when it provided her with the illustrations in March 2015. In the circumstances, the Adjudicator did not consider that the illustrations provided by HSC BSO in March 2015 could be said to amount to negligent misstatement.
- Even if it could be said that the March 2015 illustrations amounted to negligent misstatement, it was questionable how reasonable it was for Mrs N to rely on them to the extent claimed. A great deal of information had been produced in the months leading up to the introduction of the 2015 Scheme; much of it explaining how pension arrangements would change. Mrs N cannot have been unaware that change was imminent and likely to impact on her benefits if she retired after moving to the 2015 Scheme. Even if she was not fully aware of the extent or form of the change, there was sufficient information made available to put her on notice that the figures she had been provided with were likely to change.
- In summary, the Adjudicator said she had not identified any grounds on which it would be possible to say that HSC BSO had a responsibility to warn Mrs N in any way when it provided her with benefit illustrations in March 2015. Nor had she identified any grounds for saying that the information it did provide amounted to negligent misstatement.

20. Mrs N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs N provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the main points made by Mrs N for completeness.

### **Mrs N's further comments**

21. Mrs N submits:-

- The service she was provided with, concerning the seeking and furnishing of information relating to her HSC pension, was performed in a negligent manner. The request, completed on her behalf by HSC payroll services, did not take account of the imminent introduction of the 2015 Scheme. She was not



informed, three weeks prior to its introduction, that the benefits illustration provided was time-limited nor was she informed of the transitional protection.

- No illustration of benefits available under the 2015 scheme was provided. HSC BSO knew or had the means of knowing that she had not returned to work since her injury and had been on unpaid leave for the majority of this time. The service provided an inadequate account of her circumstances and the information provided was incomplete. In consequence, she lost the opportunity to apply for ill health retirement under the 1995 Scheme.
- The starting point for any consideration of negligent misstatement is the discussion by the House of Lords in *Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1963] UKHL 4.
- A person who makes a negligent statement may owe a duty of care to a person who suffers financial loss through reliance upon the statement. The principle has been applied to omissions and to the negligent performance of a service.
- Whilst she was not an employee of all HSC business services, she was within a framework of services provided to her by all HSC organisations, including payroll, human resources and pension services. She sought the services of HSC BSO to provide information to her in relation to ill health retirement benefits. HSC BSO was under a duty to her to take reasonable care to provide services to her in a non-negligent manner. So, whilst she was not within the protection of a term implied into her contract of employment, as in the case of *Sally*, she was within the wider framework of services furnished to her by her employer and by virtue of her contract of employment. This amounts to a special relationship between the HSC organisations and her, as envisaged by Lord Reid in *Hedley Byrne*.
- In *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5, the governing principle of *Hedley Byrne* was identified as an assumption of responsibility by the defendant together with a reliance by the plaintiff.
- She disagrees with the Adjudicator's interpretation of the precedents cited in paragraph 19 above, in so far it applies to the existence of a special relationship between her and the HSC organisations which were, in fact and in law, emanations of her employer.
- She used HSC BSO, in February 2015, to seek information concerning her benefits. The form used to request the illustration was prepared by HSC payroll services. The date of 31 March 2015 was selected by the party who completed the form. She had no input in relation to its contents. HSC payroll services did not complete the section of the request form concerning retirement within the subsequent 12 months and the use of figures to support a decision to retire.

- The HSC organisations were plainly aware of the significance of the date. The 2015 Scheme was about to come into effect. It is noted that the booklet concerning the move to the 2015 Scheme, available on the HSC BSO website, does not mention ill health retirement.
- The 2015 Scheme effected a significant change in the calculation of her retirement benefits. It had the potential to provide substantially less than valuable benefits under the 1995 scheme. The calculation of the Tier 2 enhancement under the 2015 Scheme would have a particular effect on members whose earnings had been reduced in the final scheme year. In particular, they would not be in a position to rely upon the best of the preceding three years' service.
- In February and March 2015, when HSC payroll and HSC pension services were dealing with her, they knew or ought to have known that the significant changes were imminent.
- Moreover, HSC payroll, which completed the request for her, knew or ought to have known certain important aspects of her particular circumstances. It knew, or was in a position to find out, that she had not worked on grounds of ill health since February 2014 and, for a substantial period of the previous year, had been on unpaid leave. It knew that her pensionable service had accordingly come to an end. It was reasonable for HSC BSO to consider that she was considering retirement in the next 12 months, in the circumstances envisaged in the relevant section of the request form, which was not completed.
- Given the methodology of the 2015 Scheme for calculating the Tier 2 element, HSC BSO knew or ought to have known that a person in her position was likely to be treated very differently under the 2015 Scheme in comparison to its predecessor. HSC BSO knew or ought to have known that she would transfer automatically to the 2015 Scheme after 31 March 2015. It knew or ought to have known of the transitional arrangements in place in respect of applications for ill health retirement in progress at that time.
- When the HSC organisations undertook to provide her with the service of obtaining and providing information as to her pension entitlements, they assumed the responsibility of doing so in a way which avoided the reasonably foreseeable risk that she would suffer loss. The steps taken by the said organisations resulted in the provision of information to her which was incomplete.
- The request itself was not completed. She was not informed of the time limited nature of the illustrations, or the transitional arrangements. In the absence of the provision of information as to the position under the 2015 Scheme, it was reasonably foreseeable that she would suffer a financial loss if she retired under that scheme.

- The HSC's knowledge, or the means thereto, of the particular circumstances in the preceding year created a sufficient degree of proximity to justify the imposition of a duty of care in the context of the services it was providing to her. In all the circumstances of her case, it is fair, just and reasonable that HSC was under a duty to her to provide information as to the benefits available to her under the 2015 Scheme and the transitional arrangements at the time of her request. In simple terms, if a party undertakes to perform a service for another, it must do so in a manner which does not cause reasonably foreseeable loss. It must do so in a non-negligent way.
- She was not seeking advice as to the best time to retire, or financial advice more generally. She was using the HSC services to seek information as to her retirement benefits. In consequence of the manner in which these services were actually performed, she was provided with information which was incomplete and incorrect. It had the potential to and in fact did distort the picture.
- HSC could have provided information to her about her benefits under the 2015 Scheme in addition to those provided under the 1995 Scheme. It could have informed her that the information which was provided had a three-week time-limit. It could have advised her of the transitional arrangements. This would not have amounted to advice. She would have been able to see the difference in practical terms at the material time and to make arrangements accordingly. She was denied that opportunity.
- If the HSC services had been provided properly, and she had received the information at the material time, she would have had an opportunity to apply for ill health retirement whilst a member of the 1995 Scheme. Due to the failure on the part of the HSC services, she sustained a significant financial loss as a consequence. She considers that she is entitled to compensation in association with same.

## **Ombudsman's decision**

22. Mrs N has based her complaint upon the principle of negligent misstatement. This is an action brought at common law in tort. Briefly, a claim may be brought where a party A owed a duty of care to party B and carelessly made a false statement to B on which B then relied and, as a result, suffered a loss. In order to bring a claim for negligent misstatement, B must prove, on the balance of probabilities, that:-

- A owed B a duty of care.
- A breached the duty of care.
- B has suffered a loss which was caused by A's breach of duty.

23. The first question is, therefore, whether HSC BSO owed Mrs N a duty of care. I note that Mrs N has sought to expand her complaint to encompass all HSC agencies. I do not find that this is appropriate in the circumstances. Mrs N's complaint concerns the provision of information by HSC BSO in its role as Scheme administrator and it is on this basis that it has been accepted for investigation. This is not to say that HSC BSO did not owe Mrs N a duty of care when providing her with information about her pension benefits. But any duty of care must be founded upon its relationship with Mrs N as a member of the relevant pension scheme; not through her relationship with other HSC agencies.
24. The Courts have developed a number of tests for establishing whether a duty of care exists, whilst also acknowledging that whichever test is applied the result should be the same. The principal test applied in cases of economic loss is a three-fold test established by the House of Lords in *Caparo Industries v Dickman* [1990] 2 WLR 358. This was a case involving the auditing of accounts on which the claimant had relied in the purchase of shares. The three-fold test requires: foreseeability; proximity; and fairness. In other words, was it reasonably foreseeable that the defendant's conduct would cause loss to the claimant; was there a sufficient degree of proximity or a special relationship between the claimant and the defendant; and would it be fair, just and reasonable to impose a duty of care in the circumstances?
25. Mrs N has cited *Hedley Byrne and Co Ltd v Heller and Partners Ltd* and *Henderson v Merrett Syndicates*. In these cases, the Courts applied an assumption of responsibility test. This provides for a general duty to take care when making statements where there has been an assumed responsibility by the defendant towards the claimant and a special relationship exists between the parties.
26. Whichever test is applied, one of the principal factors in establishing a duty of care is the existence of a special relationship between the parties. Mrs N argues that there was such a special relationship between her and HSC BSO. She has sought to do so by relying on HSC BSO's position in a "framework" of services which, as I have said, is not appropriate in the context of her complaint to me. Nevertheless, I am satisfied that there was sufficient proximity between HSC BSO, as Scheme administrator, and Mrs N, as Scheme member, for a duty of care to exist.
27. The question then arises as to the extent of HSC BSO's duty of care; that is, did it extend beyond providing Mrs N with details of the benefits she might receive if she retired on 31 March 2015. Mrs N argues that HSC BSO should have additionally provided details of the benefits she might receive if she retired after transitioning to the 2015 Scheme. She also argues that it should have provided details of the protection offered by the transition provisions; that is, the continuity of existing applications for ill health retirement where an application form AW33 was submitted before the member's transition date.
28. However, both of these actions would have required HSC BSO to assume that Mrs N would not retire on 31 March 2015. Mrs N has argued that HSC BSO knew, or could have known, that she had been absent from work through injury and was on unpaid

leave. If that was the case, and I make no finding to that effect, it would simply have added weight to the likelihood that Mrs N was going to retire on 31 March 2015. It would not have prompted HSC BSO to speculate as to the possibility that Mrs N would defer retirement beyond 31 March 2015. In general, members who are retiring on the grounds of ill health do so because they have reached the point at which they are unable to continue working. The likelihood of such a retirement being deferred must be considered quite low.

29. In *Caparo Industries v Dickman*, the Court held that one factor to consider, in determining whether a relationship of sufficient proximity exists, is whether the information was required for a particular purpose which the adviser knew of, or ought to have known of. In Mrs N's case, HSC BSO would have known that the information it had been asked to provide was intended to inform Mrs N of the benefits she might receive if she retired on 31 March 2015. It would have been reasonably foreseeable that Mrs N would use the information for that purpose. It would not have been reasonably foreseeable that she would use the information to defer retirement or that she would do so without making any further enquiries.
30. Mrs N has argued that HSC BSO would have known the 2015 Scheme was about to come into effect. This is so. However, Mrs N also knew, or ought to have known, that the 2015 Scheme was about to come into effect. She would have, or ought to have, known this from as early as August 2014. Moreover, Mrs N knew, or ought to have known, that the ill health retirement provisions under the 2015 Scheme were different and would take effect from 1 April 2015. Mrs N points to a booklet available on the HSC BSO website relating to the move to the 2015 Scheme which did not mention ill health retirement. However, this is ignoring the ample alternative information available to Mrs N which made it very clear that the way in which ill health retirement benefits were calculated in the 2015 Scheme was different to the 1995 and 2008 sections of the existing scheme.
31. I note that Mrs N has argued that she was not informed that the benefit statements provided were time-limited. I do not find this to be the case. The benefit statements provided by HSC BSO clearly stated that they were for retirement on 31 March 2015. It would not have been reasonable for Mrs N to assume that these figures would still apply if she did not, in fact, retire on 31 March 2015. They were, therefore, time-limited.
32. Equally, Mrs N says she had no input into the choice of date on the request form and that this was completed by HSC's payroll administrators. She knew, however, that HSC BSO had provided the benefit statements on the basis of a retirement date of 31 March 2015. She did not query this at the time and was, therefore, presumably content with this date at that time. In any event, HSC BSO was simply responding to the request it had received, which was for figures based upon ill health retirement on 31 March 2015. Mrs N was also aware that no figures had been provided for retirement at some date in the following 12 months. Again, she did not query this or request such figures; for which she would have had to have specified a date by reference to which she required them calculated.

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33. In summary, I find that HSC BSO did owe a duty of care to Mrs N. That duty of care was to provide the correct figures in response to the request for details of the benefits which might be payable if she retired on the grounds of ill health on 31 March 2015. HSC BSO did not breach that duty of care. The information it provided for Mrs N was not incorrect or incomplete.

34. I do not uphold Mrs N's complaint.

**Anthony Arter**

Pensions Ombudsman

4 May 2020



## **Appendix 1**

### **Scheme literature**

35. HSC BSO provided copies of 11 documents relating to the introduction of the 2015 Scheme. Those listed below made specific reference to ill health retirement.

#### **Factsheet “The new 2015 HSC Pension Scheme explained”**

36. The factsheet, dated August 2014, listed an ill health retirement pension under the heading “Range of Benefits”. A footnote said the way in which ill health retirement benefits were calculated in the 2015 Scheme was different to the 1995 and 2008 sections of the existing scheme.

#### **2015 Pension Scheme FAQs**

37. The FAQ document began by explaining that the changes to the pension scheme would come into effect from 1 April 2015. In the second question, “What will the 2015 scheme look like?”, the document stated that ill health benefits would be based on current arrangements but upper tier benefits enhancements will be at the rate of 50% of prospective service to normal pension age.

#### **HSC Superannuation Scheme Comparison Table**

38. In the section for “Ill health arrangements”, the table said the 2015 Scheme provided lower tier benefits as for the 2008 section and an upper tier enhancement of 50% of prospective service to normal pension age.

## Appendix 2

### The Health and Social Care Pension Scheme Regulations (Northern Ireland) 2015

39. Regulation 91 provides:

- “(1) The annual rate of Tier 1 IHP payable to a member (M) is found by –
- (a) taking the amount of full retirement earned pension specified in M’s pensioner member’s account;
  - (b) subtracting the conversion amount (if any) specified in that account in relation to that amount; and
  - (c) adding the amount of accrued additional pension (if any) calculated in accordance with regulation 69(3)(b) less the conversion amount (if any) specified in the account in relation to the additional pension.
- (2) The annual rate of Tier 2 IHP payable to M is the sum of –
- (a) the annual rate of Tier 1 IHP; and
  - (b) the Tier 2 addition.
- (3) The Tier 2 addition is found by applying the following formula –

$$\frac{A \times (C + E)}{C} - A$$

where:

A is the aggregate of the amounts of all of M’s pensions from pensionable service on the day after M’s last day of pensionable service (L+1) –

- (i) disregarding any additional pension; and
- (ii) including any increases applied by virtue of the Pensions (Increase) Act (Northern Ireland) 1971(a);

C is the total period of pensionable service counted in days over which the pensions aggregated to find A were accrued; and

E is the period equal to 50% of the length of the period starting on L+1 and ending on M’s prospective normal pension age, and any part of a day must be taken to be a whole day.”

**The Health and Social Care Pension Scheme (Transitional and Consequential Provisions) Regulations (Northern Ireland) 2015**

40. Regulation 6 provides:

“Unless otherwise provided in these Regulations, a transition member who is an active member of the new scheme is to be treated, for the purposes of the old scheme, as though they continue to be an active member of the old scheme notwithstanding the operation of section 18(1) of the 2014 Act.”

41. Regulation 28 provides:

- “(1) This regulation applies in relation to a transition member who –
- (a) becomes entitled to an ill-health pension under the new scheme; and
  - (b) has not reached the old scheme normal pension age.
- (2) If this regulation applies –
- (a) an ill-health pension and lump sum are not payable under the old scheme;
  - (b) an ill health pension is payable under the new scheme in accordance with this regulation; and
  - (c) the member becomes a deferred member of the old scheme (but no entitlement to a pension arises under –
    - (i) regulation 49(3) of the 1995 Regulations;
    - ...by virtue of becoming a deferred member pursuant to this regulations).
- (3) If the member meets the Tier 1 conditions set out in regulation 89 (entitlement to ill-health pension) of the 2015 Regulations –
- (a) the annual rate of ill-health pension payable under the new scheme is the sum of –
    - (i) the annual rate of a Tier 1 ill-health pension payable under the new scheme; and
    - (ii) the annual rate of earned pension that would, if the member was entitled to payment of an ill-health pension under the old scheme, be payable to the member at the old scheme normal pension age; and

(b) the member is entitled to payment of a lump sum of the amount of the lump sum (if any) which would, had the member been entitled to payment of an ill-health pension under the old scheme, be payable to the member under –

(i) regulation 17 (Lump sum on retirement) of the 1995 Regulations;

...

(4) If the member meets the Tier 2 conditions set out in regulation 89 (Entitlement to ill-health pension) of the 2015 Regulations, the annual rate of ill-health pension and lump sum payable under the new scheme is the sum of –

(a) the amounts specified at paragraph (3); and

(b) the annual rate of a Tier 2 addition payable under the new scheme.

...

(7) In this regulation and regulation 29 –

(a) a reference to the annual rate of earned pension payable under the old scheme means the annual pension payable under the following provisions –

(i) if the member was an active member of the 1995 Section before becoming an active member of the new scheme, regulation 12 of that Section;

...

(b) a reference to an ill-health pension payable under the old scheme means a pension payable under the following provisions –

(i) if the member was an active member of the 1995 Section before becoming an active member of the new scheme, regulation 13A of that Section;

...

(c) a reference to an ill-health pension payable under the new scheme means an ill-health pension payable under regulation 89 of the 2015 Regulations;

(d) a reference to the old scheme normal pension age means –

- (i) as regards the 1995 Section, normal benefit age under the 1995 Regulations; ...”