

## Ombudsman's Determination

Applicant	Mr W
Scheme	NHS Pension Scheme (the <b>Scheme</b> )
Respondents	Royal Devon and Exeter NHS Foundation Trust (the <b>Trust</b> ) NHS BSA

### Complaint Summary

Mr W has complained that he was provided with incorrect information about his pension entitlement. He says that he relied on this information when deciding to apply for ill health retirement (**IHR**) and take benefits.

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

The complaint is partly upheld. While Mr W's claim fails on reliance, as he would have retired anyway, the Trust's provision of an incorrect IHR Estimate and its subsequent failure to note that Mr W's pensionable pay in the 1995 Section had been erroneously inflated merits a payment by the Trust to Mr W of £1,000 for serious distress and inconvenience.

## Material facts

1. In this matter, Mr W is represented by Dr T and UNISON.
2. Through his employment with the Trust, Mr W accrued benefits as a member of the 1995 Section of the 1995/2008 Scheme and the 2015 Scheme.
3. From July 2010, Mr W worked part-time.
4. In November 2016, Mr W received an Annual Benefit Statement for his membership of both schemes. The 1995 Section showed pensionable pay of £19,456.90. The 2015 Scheme showed pensionable pay of £10,119.72.
5. In August 2017, due to a deteriorating disability (brittle bone disease<sup>1</sup>) and several injuries which had resulted in long periods of sickness absence, Mr W decided to consider IHR.
6. On 22 August 2017, the Trust provided Mr W with two same-day estimates, an IHR Estimate and an Age Retirement Estimate. To produce these, the Trust entered details into NHS Pensions' online pension calculator (the **Calculator**).
7. The IHR Estimate for the 1995 Section showed pensionable pay of £31,229.17, an annual pension of £6,168.83 and lump sum of £18,506.83 and a reduced annual pension of £4,957.10 and maximum lump sum of £33,047.30. The Age Retirement Estimate for the 1995 Section (entitled 'Benefit Statement (1995 Section)') showed pensionable pay of £19,650.94. The IHR Estimate and Age Retirement Estimate for the 2015 Scheme showed the same pensionable pay for 2016 of £10,119.72 and for 2017 of £10,220.72.
8. On 30 August 2017, Mr W called the Trust's pension team and queried the estimates provided. He also met the Trust's Pensions Manager (**Ms N**) on 11 September 2017. In a letter to NHS Pensions, dated 25 May 2018, Mr W described the call and meeting as:

"On the call with [Ms N] we asked which of the 2 statements [sic] we should be reading from to work out what I would get and if she could explain Tiers 1 & 2. During the call [Mr W's friend] specifically asked (I was on the call too) if the £6168.83 a year, and the £18,506.49 were the amount I could expect to receive if I chose the higher monthly pension and the lower lump sum. [Ms N] confirmed that we were correct, although the amounts may differ slightly as more money would be paid into the pension by the time it was settled. We then asked lots more questions about the tiers, and about the 2005 [sic] Scheme. [Ms N] again confirmed that we were reading it right and on Tier 1 it would be £579.94 a year, or £372.82 a year with a lump sum of £2485.46 [these figures are for benefits accrued in the 2015 Scheme only].

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<sup>1</sup> Osteogenesis Imperfecta.

It was a long phone call and I asked if we could come in and see her as we had more questions and wanted to go through the figures again as it was such a big decision, and I needed to make sure it was the right financial choice for me and my family. ... We met with [Ms N] and again went over the figures with her in her office. She confirmed again that these figures were correct although they may change slightly due to more being paid into the pension, and she looked up on her computer some of my information as I queried the total years I was in the scheme. We also asked lots of other questions about NI contributions, the tiers, how long the process could take etc.”

9. On 28 December 2017, Mr W’s application for IHR was accepted and it was confirmed he was entitled to Tier 1<sup>2</sup> pension benefits.
10. On 29 March 2018, NHS BSA calculated Mr W’s benefits. For the 1995 Section, using pensionable pay of £19,650.94, an annual pension of £3876.38 and a lump sum of £11,629.14.
11. Subsequently, Mr W complained to the Trust and requested it investigate the difference between the August 2017 estimates and the pension put into payment by NHS BSA.
12. In May 2018, NHS BSA wrote to Mr W. It said the discrepancy was a result of an incorrect pay figure being used in the calculation of the IHR Estimate for the 1995 Section, but the Trust had provided the estimate and NHS BSA had had no opportunity to correct it. Nevertheless, his pension in payment was correct.
13. On 25 May 2018, Mr W complained to NHS BSA invoking the Scheme’s two-stage Internal Dispute Resolution Procedure (**IDRP**).
14. On 4 June 2018, the Trust formally responded to Mr W’s complaint:-
  - The Trust acknowledged that the pensionable pay used (£31,229.17) in the 1995 Section of the IHR Estimate was “excessively higher” than his notional whole-time equivalent pay at that time (£19,852.00) but said it was unable to establish the source of the error.
  - The Trust said the benefits statement<sup>3</sup> stated it was “an estimated quotation only” and that the standard letter enclosed with all estimates requested members to notify the pensions department of any discrepancies.
  - The Trust said it did not hold records of conversations with members either by telephone or at meetings and due to the high volume of both it was not able to recall individual conversations as far back as August 2017. It said at one-to-one meetings it explained the procedure for applying for IHR and the differences

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<sup>2</sup> Under the Scheme Regulations, a Tier 1 pension is payable if the member is deemed permanently incapable of efficiently discharging the duties of their NHS employment.

<sup>3</sup> ‘Benefit Statement (1995 Section)’.

between Tier 1 and Tier 2 pension benefits. It said had both estimates been present at the time of the meetings it may have become apparent that there was a significant difference in the pensionable pay figures used, which would have been investigated.

- The Trust apologised that the pensionable pay error was not identified at any of the meetings Mr W had with it. It said its aim was to ensure that the details it entered in the Calculator were correct, but due to the large number of members it dealt with very occasionally errors occurred. For this reason, all pension figures included a statement that they were estimates only and exact figures could not be provided until actual retirement. Additionally, members were required to reference the details supplied to check that the estimates were reasonable, particularly in respect of pensionable pay.
  - The Trust confirmed that Mr W's pension benefits would be paid as per the correct pensionable pay submitted to NHS BSA.
15. On 27 July 2018, NHS BSA issued its Stage One IDRPs decision. NHS BSA explained why his pension had been calculated in the way it had. It said the Trust was responsible for the calculation of the overstated IHR Estimate and did not uphold his complaint.
16. On 8 October 2018, Mr W invoked Stage Two IDRPs highlighting that his decision to pursue ill health was based on the incorrect IHR Estimate.
17. On 27 November 2018, NHS BSA turned down Mr W's final appeal, reiterating that the error in the IHR Estimate was not its responsibility. It also suggested that Mr W ought to have identified that his pensionable pay had been overstated given how different the figures were.
18. On 18 December 2019, Mr W provided my Office with a further account of the events leading up to his retirement. This is set out in the Appendix below.

### **Summary of Mr W's position**

19. Dr T says on behalf of Mr W:-
- Mr W relied on the information provided by the Trust to make his decision to take IHR.
  - The decision to seek IHR was instigated by Mr W after a series of accidents. At no point did the Trust suggest he should seek IHR.
  - Had Mr W been provided with a correct financial forecast he would not have decided to seek IHR and potentially would have stayed in employment.
  - Mr W has suffered a substantial financial loss – a) because of the substantial difference between the incorrect IHR Estimate and the benefits paid and b) what

would have been his earning capacity to age 68 and his retirement pension from then.

- Mr W asked the Trust to clarify the two different estimates. It is not his fault that no notes were taken by the Trust. Ms N confirmed that she had a few meetings with Mr W – where the figures were confirmed as correct.
- Mr W has a recording of a telephone conversation he had with Ms N, who admits liability and that her department made a mistake in relation to the estimates provided

20. UNISON, also acting for Mr W, has requested an Oral Hearing to determine the facts of the communications that took place between Mr W and Ms N. Specifically, whether Mr W did query the pensionable pay figure shown in the IHR Estimate and whether Ms N addressed that query by suggesting that the figure was enhanced because Mr W was retiring early because of ill health.

21. UNISON says:-

- Mr W does not dispute that he knew his pensionable pay had been overstated, which is why he questioned it.
- Mr W recalls that Ms N explained to him that the IHR figure had been enhanced because he was taking retirement early due to ill health.
- The issue is that Ms N did not view the pensionable pay of £31,229.17 as a discrepancy. On the facts recalled by Mr W, Ms N verbally explained that the figure was correct because of the 'enhancement'.
- Without a sophisticated understanding of pensions, it is unclear what more Mr W could have been expected to ask Ms N.
- Ms N has failed to explain why she did not notice the discrepancy between the pensionable pay shown in the 1995 Section of IHR Estimate and the Age Retirement Estimate.
- Ms N has not expressly disagreed with Mr W's recollection of events or denied the conversation as recounted by Mr W.
- Ms N's comments indicate that she does not recall what occurred in the meeting with Mr W. By contrast, Mr W does as retirement was a significant decision in his life
- Ms N's statement about what would normally happen if a discrepancy was highlighted does not contradict Mr W's recollection of events. Mr W's recollection is that Ms N informed him that the difference in pensionable pay figures for IHR and Age Retirement was because he was retiring for health reasons, so his pension entitlement was enhanced. As Ms N did not consider that there was a discrepancy the matter was not investigated.

- Ms N should be asked whether it is possible that during her meeting with Mr W, on noting the difference in pensionable pay figures, she either recalls saying or could have said that the difference was due to an enhancement applied to IHR. Additionally, Ms N should be asked what is normally said when an individual queries estimates provided and would she expect herself or her team to recognise such a disparity in pensionable pay.
- If Ms N's evidence is that she cannot recall anything, then Mr W's evidence should be preferred, given he does have a clear recollection.
- In the alternative to negligent misstatement, this matter should be considered in respect of estoppel by representation. It would be unconscionable to permit the Trust to resile from the representation it made to him about his IHR entitlement:-
  - Mr W took an irreversible and life changing decision based on the representation.
  - Mr W made attempts to query the figures. He does not have a sophisticated understanding of pensions and tried his best in the circumstances to verify the estimates.
  - The Trust has individuals specialised in pension administration who gave assurances to him.
  - The Trust has vastly greater resources to take responsibility for its error.
- Mr W does not consider that his loss is too uncertain. There is no medical evidence to suggest that Mr W would have struggled to be employed until his retirement age of 68. There was no suggestion from the Trust that he was close to being dismissed on capability grounds due to his ill health.
- Tier 1 benefits are awarded to an individual if they are 'deemed' permanently incapable of 'discharging efficiently the duties of their employment with the Trust. Being 'deemed' permanently incapable is different from 'in fact' being incapable. An individual's ability to discharge their duties 'efficiently' is different from their ability to discharge their duties 'in fact'.
- Employers have a duty to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 for individuals with disabilities to assist them in carrying out their employment duties. The duty to make reasonable adjustments is wide ranging and can entail permitting an employee to work part-time, reduced hours or providing an alternative or more suitable role. Redeployment was never explored as an option by the Trust. Occupational Health did not say that Mr W was unfit for an alternative role or a part-time role in the future, only that it was difficult to determine.
- If Mr W had been provided with a correct IHR Estimate he would not have taken IHR. Mr W would have remained in part-time NHS employment until his children

were older and established in school. He would then have returned to full-time employment until retirement age.

- For me to find that Mr W would have retired because he was awarded Tier 1 benefits, I must necessarily find that no reasonable adjustments could have been put in place to facilitate Mr W remaining in NHS employment in an alternative role and continuing to accrue benefits in the Scheme.

22. Mr W's claimed loss (excluding "any lump sum which would have been awarded" at retirement age) is £644,673.03. This is based on Mr W working to age 68 and then receiving his pension to age 81.

### **Summary of the Trust's position**

23. Ms N says:-

- The estimates provided to Mr W in August 2017 would have included a covering letter which requested that he check all the details and notify the Trust if he felt any details were incorrect.
- The Benefit Statement (1995 Section) states it is an estimated quotation based on Mr W's current pay and pattern of service. The pensionable pay figure shown of £19,650.94 was a true reflection of Mr W's whole-time equivalent pay at that time. However, the IHR Estimate used an excessively high pensionable pay of £31,229.17. The Age Retirement Estimate also included Mr W's pensionable pay for the year ending 2016 of £10,119.72 and for the year ending 2017 of £10,220.64, which were also much lower than the £31,229.17 pensionable pay shown in the IHR Estimate.
- Unfortunately, it is unable to establish where the figure of £31,229.17 originated from or why the inflated figure was not identified before the estimates were issued to Mr W.
- Mr W had a few meetings with herself and members of her team post issuance of the estimates. Unfortunately, it does not keep records of verbal conversations with members. It deals with approximately 16,000 employees and hold a high volume of one-to-one meetings. So, it is difficult to recall individual meetings.
- Nonetheless, any discrepancies that are brought to its attention are investigated fully and rectified as soon as possible. Mr W did not at any point bring to its attention that he did not feel that the pensionable pay figure shown in the IHR Estimate was wrong.
- While it does attempt to identify discrepancies within the department, due to the volumes of staff it deals with, very occasionally errors do occur for which it sincerely apologises.

- It has since increased its checking procedures on all estimates that are now sent out from the department to ensure that this kind of error does not reoccur. This includes thorough checks to ensure the pensionable pay figures used are correct.

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

#### **24. NHS BSA says:-**

- Employers have access to online systems provided by NHS Pensions, which they can use to assist in calculating a member's pension benefits.
- While NHS Pensions provides employers with instructions on how to use its online systems, it cannot account for every event and how an employer may use the online systems.
- NHS Pensions does not have access to an employer's payroll systems. So, it is unable to assess whether a member's pensionable pay has been correctly inputted.
- In August 2017, Mr W received two same day estimates from the Trust. The first used a pensionable pay of £19,650.94, while the second used a pensionable pay of £31,229.17. When compared to the estimate he received in November 2016, which used a pensionable pay of £19,456.90, it may have caused Mr W to query the estimate he had received using a pensionable pay that was 60% higher.
- Mr W's pension record did not show that he had made such an enquiry with NHS Pensions.
- The Trust uses the Electronic Staff Record (**ESR**). When supplying payslips through ESR it provides the employee with both their actual annual pay and whole-time equivalent pay. If Mr W had access to his payslips, it may have caused him concern that an estimate had been provided with an inflated whole-time equivalent pay.

### **Conclusions**

25. I will first deal with Mr W's request for an oral hearing.
26. I have the power to hold an oral hearing under the procedural discretion contained in Section 149(4) of the Pension Schemes Act 1993. However, I tend not to exercise my discretion unless I am of the view that a complaint cannot adequately and appropriately be determined without me hearing directly from the parties. For example, I might require clarification of the parties' statements or there is some ambiguity in the evidence presented to me.
27. After careful consideration I have decided that an oral hearing is unnecessary as the evidence available to me is sufficient to determine Mr W's complaint.
28. Mr W does not dispute that he knew his pensionable pay had been overstated and says that is why he queried it. But it seems unlikely that Mr W would have been told

that his pensionable pay had been enhanced, given that enhancement is via increased pensionable service and only applies to Tier 2 IHR. Nonetheless, I accept that Mr W does not have a sophisticated understanding of pensions and was reassured by the Trust that the IHR Estimate was correct.

29. Having said that, nothing turns on this as Mr W's claim fails on reliance.
30. Mr W says that if he had been provided with a correct IHR Estimate he would not have retired. Mr W says he would have remained in part-time NHS employment until his children were older and established in school. He says he would then have returned to full-time employment until aged 68. But this pre-supposes that the Trust would have been willing to keep him on its payroll.
31. Mr W says, that in August 2017, he decided to see if he was eligible for IHR, because of his deteriorating disability. The fact that Mr W made an application for IHR shows an acknowledgement on Mr W's part that he considered that he was incapable of continuing in his job with the Trust.
32. Tier 1 IHR benefits are awarded based on an assessment of the member's capacity for the role they are undertaking immediately prior to retirement (their 'employment'). To qualify the member must be permanently incapable of efficiently discharging the duties of their employment.
33. The argument proffered that being 'deemed' permanently incapable is different from 'in fact' being incapable and that an individual's ability to discharge their duties 'efficiently' is different from their ability to discharge their duties 'in fact' is merely semantics. Indeed, the word 'deemed' is not used in the Scheme Regulations.
34. The fact that Mr W was awarded Tier 1 IHR means that he could not have continued in his job with the Trust. So, Mr W cannot say that he relied on the IHR Estimate as he would have had to have retired anyway. If Mr W had been capable of remaining in his part-time employment or returning to full-time employment before age 68, as he suggests, he would not have qualified for Tier 1 IHR.
35. Redeployment is irrelevant to the assessment for Tier 1 IHR because, of necessity, it involves the individual moving to another role. I do not need to consider this because my consideration starts from the point that Tier 1 IHR had been awarded.
36. As Tier 1 IHR is not in dispute, I do not need to consider whether the medical evidence supports the Tier 1 decision. As Mr W cannot qualify for Tier 1 IHR and argue that he could have remained in his employment with the Trust, I also do not need to consider reasonable adjustments. To do so would be to revisit the Tier 1 decision.

37. Mr W suggests that he could have remained on long-term sickness absence and pay. However, it is unlikely that the Trust would have been able to sustain this position indefinitely. Although, Mr W's union has pointed out that the Trust had not taken any action to dismiss Mr W on the grounds of capability, it is likely that it would have had to consider this at some point; certainly before he reached age 68.
38. Mr W might have been able to undertake another role within the NHS. The fact that Mr W was not awarded Tier 2 benefits acknowledges that he is capable of alternative part-time employment (of like duration). That option is, of course, still open to him.
39. Mr W says it would be unconscionable to permit the Trust to resile from the representation it made to him about his IHR entitlement. Again, this fails on reliance.
40. Clearly, this matter has caused Mr W serious distress and inconvenience. I find the Trust's provision of the incorrect IHR Estimate and its subsequent failure to note the inflated pensionable pay shown in the 1995 Section merits a payment of £1,000.
41. I uphold Mr W's complaint only in respect of the serious distress and inconvenience which he has undoubtedly suffered.

#### **Directions**

42. Within 28 days of the Determination, the Trust shall pay Mr W £1,000 for serious distress and inconvenience.

**Anthony Arter**

Pensions Ombudsman  
17 December 2021

## Appendix

### Mr W's account of his September 2017 meeting with the Trust

43. Mr W says:

"I telephoned [Ms N] upon the receipt of the pension estimates to request a face to face meeting at her office and informed her a friend of mine would be accompanying me to said meeting. On the day of the meeting, I arrived on crutches due to my knee injury and was duly informed the lift was broken and I would have to go upstairs. As you can imagine this was not an ideal situation and put me under unnecessary stress and pain. We were finally escorted into what can only be described as a small office (which I believe was [Ms N's] office). To my surprise this office was not private but was in-fact shared with two other colleagues - one of whom throughout the duration of the meeting preceded to come and go repeatedly. Also, any conversation happening between myself and [Ms N] was not confidential - which would now contravene GDPR but even then I would have thought highly irregular practice.

[Ms N] did reiterate that no advice could be given about any pension decision - to which I stated I understood this, agreeing that we all knew that advice about what to do with your pension could not be solicited. I told [Ms N] that this was not why I had requested the meeting. I had explained on the telephone my need for confirmation of the figures supplied which she confirmed verbally but I said I would like a meeting face to face to receive clarification and confirmation that the figures she had supplied were indeed correct. [Ms N] asked me what I needed and I stated that I was there to query the two different estimates - the age retirement figure and the ill-health retirement figure. She categorically replied that I should disregard the age-retirement figure as this is representative of what I would receive if I retired under normal circumstances and at pensionable age but that they were required to send it anyway. She stated that I only need concern myself with the ill-health retirement figure as this is how I would be applying for early retirement - so to focus on those figures she had supplied.

Then I said - okay so can you explain to me why this figure related to ill-health retirement is so higher and why is this written as an estimate and not a quotation? She replied confidently that due it being an ill-health retirement. the figure gets enhanced because you are taking retirement early due to health reasons. She continued and added, the reason it is an estimate and not a quotation is down to time scale - you would have made more contributions to your pension between the claim and it being processed so we only ever give estimates.

I then asked for more clarification - I asked would there be a chance that the figure I receive could be lower as obviously this was a huge decision that was going to

change my current life but also my future so needed to be sure. She definitively stated certainly not, if anything it will be slightly higher but not by much - more than likely a few hundred pounds more. So then I asked if I get Tier One the figure will be as you have stated? She said yes. So then I asked, is this the figure I get if I apply for Tier two and she again said yes. I asked if I could have all of this confirmation in writing and she stated that I had it in writing in the written estimates I had received. Then she assured me not to worry, that if I lost any of the paperwork it would all be stored on the computer system - at which point she turned around her screen and showed myself and my friend. She then asked if I had any other pensions and I replied I did - she said okay I need to contact them and apply for ill-health retirement from those also as you may be liable for tax on lump sums of money.

The meeting was closed with verbal thank [yous] sic and a hand shake - at which point I had to painfully retrace my steps back down the stairs on crutches.

The whole decision to proceed with the ill-health retirement was based on the figures [the Trust employee] supplied and confirmed repeatedly were correct. I was dealing with declining physical health and trying to decide the best course of action for myself and my family. I was going to be in deficit to the amount of £200 a month based on the figures supplied as opposed to my current wages at that time. I went away and did all my calculations - coming to the conclusion that if I used the lump sum to pay off debts I would be able to just survive. However, due to your negligence I now live on the breadline in borderline poverty. Had I known the extent to which you had fabricated the truth about these figures - I would have made a very different decision. I could have continued on long term sick leave and pay and applied for permanent sickness within the parameters of jobseekers allowance. In this case, I would have been better off financially. Instead, I am struggling not only with my disability but also trying to keep a mortgaged property whilst bringing up my 9 year old triplets on £390 a month.

I hold [the Trust employee] and the NHS fully culpable and responsible for this gross miscalculation of the ill-health retirement figures. Your negligence has completely and utterly devastated my current life but also any chance I have of providing a secure financial future for my children. I am not sleeping, this has affected my mental health and I haven't even got the capacity of thought to tackle applying for Tier Two. I want and demand answers and more importantly to receive a serious financial settlement in light of the devastation caused by you and your department."