

**PENSION SCHEMES ACT 1993, PART X**  
**DETERMINATION BY THE PENSIONS OMBUDSMAN**

<b>Applicant</b>	Mr D Jackson
<b>Scheme</b>	The NHS Pension Scheme
<b>Respondent(s)</b>	NHS Pensions Hywel Dda University Health Board (the <b>Health Board</b> )

**Subject**

Mr Jackson has complained that an earnings cap has been applied to his final pensionable pay, thereby reducing the benefits he received. He asserts that he relied to his detriment on incorrect benefit statements which did not apply the cap.

**The Pensions Ombudsman's determination and short reasons**

The complaint should be upheld against NHS Pensions because the systems they had put in place for the use of members and employers did not provide any warning that the figures provided may not be correct in particular circumstances. The complaint should also be upheld against the Health Board because they should have been aware that Mr Jackson's benefits would be affected by the earnings cap.

## DETAILED DETERMINATION

### Material Facts

1. Mr Jackson was a consultant surgeon at a hospital in mid-Wales covered by the Health Board. He was a member of the Scheme, having rejoined on 4 December 1995 after a previous period of membership ending on 4 February 1979. In the interim, Mr Jackson served in the Armed Forces and was a member of the Armed Forces Pension Scheme.
2. The relevant Regulations are the National Health Service Pension Scheme Regulations 1995 (SI1995/300) (as amended). As at the date Mr Jackson rejoined the Scheme, Regulation C1 covered “pensionable pay” and “final pensionable pay”. Regulation C1(2) provided that,
 

“any amount by which a member's pensionable pay exceeds the permitted maximum will be ignored when calculating the amount of any contributions or benefits payable under these Regulations.”
3. Regulation C1 allowed for pensionable pay in excess of the permitted maximum not to be ignored where a member had joined the Scheme before 1 June 1989 except in relation to a period of service following a break of more than 12 months. In 2008, the maximum was removed in respect of service after 1 April 2008.
4. References to “the permitted maximum” in Regulation C1 are to the earnings cap, introduced in 1989, limiting the benefits which could be paid by tax approved occupational pension schemes. The earnings cap applied to all tax approved occupational pension schemes. It did not apply directly to the Scheme, but was imported into it by the reference in Regulation C1. The earnings cap was abolished with effect from April 2006.
5. The Scheme booklet in 1995 stated,
 

“There is an Inland Revenue limit of pensionable pay for anyone joining an occupational pension scheme for the first time on or after 1.6.89. The limit for the 1995/96 tax year is £78,600. This limit is reviewed each year.”

6. Mr Jackson's break in service was more than 12 months and the earnings cap would have applied to him when he rejoined the Scheme. However, Mr Jackson's earnings did not exceed the permitted maximum until the year ending 31 March 2004.
7. Mr Jackson's 2006 benefit statement quoted a projected annual pension payable at age 60 of £27,380.84 and a lump sum of £82,142.53. These calculations were based on total pensionable pay of £117,923.40. The earnings cap was then £105,600.
8. In 2008, Mr Jackson's financial adviser requested a benefit statement on his behalf. That statement, provided by NHS Pensions on 3 November 2008, quoted a projected annual pension payable at age 60 of £29,375.64 and a lump sum of £88,126.91. The figures were based on a total pensionable pay of £126,514.54. The earnings cap was then £117,600. The notes to the statement stated that the final pensionable pay was the last pay reported to NHS Pensions. In their covering letter, NHS Pensions referred the financial adviser to guides and booklets available on their website.
9. In 2010, Mr Jackson requested quotes from the Health Board for retirement on 31 May or 31 October 2010 (age 61). On 21 January 2010, the Head of Payroll wrote to Mr Jackson quoting an annual pension of £46,933.58 and a lump sum of £140,800.73 or an annual pension of £47,936.49 and a lump sum of £143,809.46 respectively. The figures were based on an annual salary of £191,405.09. The covering letter contained the warning that precise amounts of benefits would not be given until final pay and membership details had been confirmed by NHS Pensions. Mr Jackson also used an online pensions calculator available on NHS Pensions' website. He input a current salary of £191,000 and 20 years' membership. The results were an annual pension of £47,750 and a lump sum of £143,250.
10. Mr Jackson decided to retire on 31 October 2010. He recalls that he informed his employer in around March 2010. Mr Jackson says that it was his intention to continue working on an ad hoc basis until he had been replaced and to provide a handover. He thought this would be until around June 2011, which was when his wife was due to graduate, having given up her employment to concentrate on her degree. Mr Jackson's salary was reduced in June 2010 when an appointment was

made to the post he was covering for. Mr Jackson says that he submitted the necessary retirement forms in July 2010 and received an acknowledgment of receipt from the Health Board's Head of Payroll.

11. NHS Pensions wrote to Mr Jackson on 19 October 2010, confirming the benefits which would become payable from 1 November 2010. Mr Jackson says that he received the letter on 30 October 2010. NHS Pensions quoted an annual pension of £37,546.97 and a lump sum of £112,640.91. They explained that they had calculated Mr Jackson's benefits on the basis of 12 years and 118 days of capped membership (pensionable salary of £123,600, the notional earnings cap then published by HMRC) and 7 years and 260 days of uncapped membership (pensionable salary of £191,978.27).
12. On 22 October 2010, the Health Board's Head of Payroll wrote to Mr Jackson. He said that he had been informed by NHS Pensions that Mr Jackson had been subject to the earnings cap and was due a refund of pension contributions for the period April 2004 to March 2008. The refund amounted to £3,134.96 and was paid to Mr Jackson in November 2010. In March 2011, Mr Jackson was paid £300.45 interest.
13. In subsequent correspondence with Mr Jackson, the Health Board said that they had never received notification from NHS Pensions that he was above the earnings cap. They said that NHS Pensions would normally write to the local pensions staff, who would write to the individual and refund the contributions.
14. Mr Jackson's financial adviser wrote to NHS Pensions in November 2010 asking that the break in service be set aside and the period be treated as "career training". In response, NHS Pensions said that all employers had been made aware of the earnings cap in 1989 and information was available on their website. They provided copies of the original notice to employers dated 7 August 1989.
15. On 30 November 2010, the Health Board's HR Manager wrote to NHS Pensions explaining that Mr Jackson had taken on additional duties in 2008 on the understanding that the additional payments were fully pensionable. She said that this had been verified in writing by their payroll and pensions department. The HR Manager said that the additional duties were onerous in nature and she thought that Mr Jackson would not have taken them on had he known that it would have contributed to him exceeding the earnings cap. She mentioned that

Mr Jackson had also received forecasts from NHS Pensions. The HR Manager said that, having taken financial advice, Mr Jackson had decided on the basis of those forecasts and an online calculator to retire in October 2010. She confirmed that Mr Jackson had submitted the necessary forms in July 2010 but had not received any communication from NHS Pensions until the October 2010 letter. The HR Manager said that, by then, it was too late for Mr Jackson to take any steps to rectify the situation.

16. The HR Manager also asked the Health Board's pay and pensions department whether they had ever had any information about Mr Jackson exceeding the earnings cap. In response, the pay and pensions department said that they had not received any correspondence from NHS Pensions to inform them that Mr Jackson was subject to the earnings cap. They said that they had checked earnings in 2006 to see if anyone had exceeded the earnings cap and had picked up one person who had joined the NHS in August 1989. The pay and pensions department said that they did not know why Mr Jackson had been missed, but pointed out that his record showed him joining the NHS in July 1972.
17. Mr Jackson returned to work on a fixed 12 month contract at a salary of approximately £120,822. This no longer included on-call payments or commitment awards. Mr Jackson has explained that his clinical sessions were reduced from 13 to 11. The contract was subsequently extended to September 2012. Mr Jackson says that the contract could have been extended further but for personal reasons he did not ask for this.
18. The Hospital Manager wrote to the BMA (who were representing Mr Jackson at the time) saying that he had approached her and said he did not wish to continue the extra on-call duties. She explained that, as a result, they had brought forward recruiting a consultant. The provision of services in Wales was under review at the time. The Hospital Manager explained that, without this appointment, she would have required Mr Jackson to continue the additional duties.
19. Mr Jackson took his case through the Scheme's internal dispute resolution (**IDR**) procedure. At stage one of the IDR procedure, NHS Pensions determined:
  - The application of the earnings cap is a legislative requirement and must be applied in respect of all members who joined on or after 1 June 1989. It was abolished on 1 April 2008 for future service only.

- Information about the earnings cap had been widely available to both NHS employers and members since its introduction in 1989. Further information had been published when the cap was abolished in 2008.
  - NHS Pensions rely on employers to ensure that only contributions up to the effective limit of the cap are collected and to update their pension records accordingly.
  - Because of his break in service, Mr Jackson's earnings were subject to the cap.
  - NHS Pensions had a duty of care to Scheme members and should take the necessary steps to ensure that the estimates of benefits they provided were as accurate as possible.
  - Mr Jackson's employer was responsible for ensuring that the contributions they collected did not breach the cap.
  - They apologised for not identifying the fact that Mr Jackson had exceeded the earnings cap when they process his pension estimates.
  - NHS Pensions investigate contributions for high earners wherever possible and should have identified that Mr Jackson's earnings exceeded the cap. Appropriate checks did not appear to have been carried out in his case and NHS Pensions upheld this part of his complaint.
  - It was regrettable that Mr Jackson's expectations of retirement income had been unnecessarily raised, but they could only pay the pension benefits to which he was entitled. There was no scope to raise Mr Jackson's benefits to the levels he had expected.
  - They did not agree that Mr Jackson had suffered any financial loss, other than interest on his excess contributions. An increase in expectation did not amount to actual financial loss.
20. NHS Pensions said they would arrange for Mr Jackson to receive interest on his refunded contributions and they offered him £150 for distress and inconvenience.

21. At stage two of the IDR procedure, NHS Pensions determined:

- The earnings cap was introduced under the Finance Act 1989 and applied to all members joining an occupational pension scheme on or after 1 June 1989. The Scheme Regulations were amended accordingly.
- HMRC had allowed the NHS Pension Scheme a concession to allow for a break in service of up to 12 months before members rejoining the Scheme were subject to the cap. This concession was not agreed for other public sector schemes.
- Mr Jackson's break in service exceeded the maximum 12 months.
- Information about the earnings cap had been widely available to employers and members. They provided a list of online links to information available to employers since 1989.
- Further information had been provided in 2008.
- They did not accept that Mr Jackson's employer had been unaware that his earnings might be subject to the cap. If there had been any doubt, it was not unreasonable to expect them to have clarified the matter with NHS Pensions.
- They had made enquiries with the scheme to which Mr Jackson had belonged at the time the earnings cap had been introduced (the Armed Forces Pension Scheme). The scheme's guide, which would have been available to Mr Jackson, provided information about the earnings cap.
- In 2007 and 2008, they had been approached by financial advisers acting for Mr Jackson and had provided estimates of benefits for them. These were reputable firms and it was not unreasonable to expect them to have been aware of HMRC limits.
- It was not unreasonable to expect Mr Jackson to have made enquiries with NHS Pensions when he rejoined the Scheme.
- NHS Pensions were not solely responsible for monitoring members who were affected by the earnings cap.
- It had been argued that, had he been aware of the earnings cap, Mr Jackson would not have given up his on-call duties and would have

continued to receive the additional payments. Mr Jackson had received the benefit of the higher pensionable pay (including the on-call payments) because the uncapped elements of his benefits had been based on it.

- It appeared that Mr Jackson had decided that he no longer wished to undertake the extra on-call duties and recruitment to a vacant consultant post was undertaken ahead of the Health Board's strategic review.
  - Under Chapter 3 of the consultant's contract, the Health Board was required to have plans in place for reducing high frequency rotas. In addition, Mr Jackson was covering for a vacant post. It was not guaranteed, therefore, that he could have undertaken the additional duties indefinitely.
22. NHS Pensions increased the amount offered for distress and inconvenience to £250.
23. In response to Mr Jackson's claim that his wife's situation should also be taken into account, NHS Pensions said that they were sympathetic to his wife's situation, but that any duty of care was owed to him as Scheme member and not to his wife. In subsequent correspondence, NHS Pensions referred to the fact that Mr Jackson had returned to work. They said they considered that he had taken reasonable steps to mitigate any loss arising from the incorrect benefit statements and, by returning to work, had completely eliminated it. NHS Pensions offered Mr Jackson £500 for distress and inconvenience and apologised.

### **Detrimental reliance**

24. Mr Jackson asserts that he relied to his detriment on inaccurate information regarding his potential retirement benefits provided by NHS Pensions. Mr Jackson says that he would have taken different actions if he had been aware that his pensionable salary was subject to the earnings cap. Specifically:
- He could have made alternative FSAVC arrangements over the six years from 2004 (when his salary first exceeded the earnings cap). He has lost six years of potential investment which has not been offset by receiving interest on his refunded contributions.



- He has a pension arrangement with St James' Place to which he contributes on a monthly basis. Had he known the true position, he would have increased his contributions.
  - He has lost two years of uncapped reckonable service by retiring early on the basis of inaccurate information. The fact that he returned to work is evidence that he would have remained in pensionable employment. He has lost £28,000 in lump sum and £11,000 annual pension.
  - He lost approximately £46,383 in salary by retiring when he did. This is only partially offset by his £39,000 pension. Had he remained in post, his salary would have been £158,000.
  - He was not required to retire in October 2010 nor was he required to give up the extra on-call duties. He could have continued to work for a further two years. His enhanced salary would still have counted as the best of the last three years even if his pay had changed.
  - His wife gave up her employment with a university to complete a degree. They had calculated that he could afford to support her from the pension he was expecting but not from his actual pension. Had they been aware of the actual pension figure, she would have remained in employment and completed her degree in two years' time as originally planned. Having resigned, she was no longer exempt from tuition fees. She has lost two years of salary and pension contributions. She is suffering from anxiety aggravated by the stress of the situation and is now unable to work. Had she not resigned, she would have been entitled to sick pay.
  - He and his wife had intended to buy a house near to her elderly parents. They were unable to buy the house they had intended to and have had to purchase a smaller property for which he has had to take out a substantial mortgage.
25. Mr Jackson has calculated his financial loss to be £302,594.76. This is based on the difference between his expected pension (£47,936.49) and his actual pension (£37,546.97) multiplied by 19 years (estimated lifespan), together with a difference in the lump sum of £31,168.55 (£143,809.46 - £112,640.91). Mr Jackson has also included financial loss suffered by his wife. He says he has not taken into account the investment potential of the refunded contributions.

26. Mr Jackson's financial adviser provided a statement saying that, from 2008 onwards, Mr Jackson had been concerned that, on the basis of the projections provided by NHS Pensions, he would exceed the Lifetime Allowance and incur a tax penalty. He said that, in July 2010, Mr Jackson had considered ceasing contributions to his St James' Place Retirement Plan to avoid exceeding the Lifetime Allowance and that this was on the basis of a projection of £47,936.49 annual pension. The financial adviser said that Mr Jackson had been reassured by his calculations that there was sufficient headroom for him to continue contributions to this plan. He went on to say that, by the time Mr Jackson received details of his actual pension, it was too late to implement alternative strategies to rectify the shortfall.
27. The financial adviser also provided a statement saying that their discussions had been informed by the projected benefit statements from NHS Pensions and Mr Jackson's payslips. He referred to the March 2009 payslip and said that this had showed pensionable earnings of £15,891.97 and contributions of £1,350.82. The adviser said that, had the earnings cap been applied, the contribution would have been £833 (£117,000 earnings cap). He provided a list of 17 meetings over the period 2008 to 2013, starting in February 2008 with a fact find.
28. The BMA calculated Mr Jackson's financial loss on the basis of the difference between his projected benefits and his actual benefits to age 80, assuming pensions increases at 2.5% per annum and a discount rate of 3%.
29. Mr Jackson would like NHS Pensions to pay his full unreduced benefits. If this is not possible, he would like NHS Pensions to put him in the financial position he would have been in had they not made an error in the pension forecasts they provided.

### **Summary of Mr Jackson's Position**

30. A summary of the other key points submitted by Mr Jackson is given below:
  - He stated that he wished to reduce his on-call commitments for personal reasons, but the most important factors in his decision were the benefits forecasts provided by NHS Pensions. He did not rely on the online calculator.

- As he felt that he had achieved his retirement objective (based on the forecasts), he ceased the extra on-call duties and the enhanced payment ceased in June 2010. He would not have taken this action had he had the correct information. It was against the wishes of his employer and colleagues.
- The letter informing him of his actual benefits arrived a couple of days before his retirement. He had no opportunity to withdraw his retirement and he thought that the figures were wrong.
- His wife suffers from poor mental health, but had been able to work part-time and study part-time for a degree. She was not coping well in 2010 and, following the final forecast, they decided that he could retire at the end of 2010. He could go back to work for a few months to help his replacement if necessary. His wife would give up her job and study full time so that they could finally retire together in the summer of 2011 when she graduated. She has been unable to get her old job back or find an alternative.
- Because of the difference in their ages, it is likely that he will predecease her and, therefore, any reduction in his pension is relevant to her.
- NHS Pensions have never accepted that local conditions resulted in an increase in his on-call commitments. Their references to the 2003 Consultants Contract overlook provision for local circumstances.
- Information about the earnings cap was not readily available on the NHS Pensions website. Nor did the benefits calculator at the time refer to it (it has since been amended to include specific reference to the earnings cap).
- He had never been informed that he was subject to the earnings cap in any communication from NHS Pensions.
- NHS Pensions should have been aware that he was paying excess contributions because they had his service record.
- He has not accepted the £500 distress and inconvenience referred to by NHS Pensions.

## Summary of NHS Pensions' Position

### 31. NHS Pensions submit:

- Under the Regulations, the earnings cap applies to Mr Jackson and they have no power to disapply it.
- They do not accept that information about the earnings cap was not readily available. They have provided examples of information available to members and employers. Information had also been available to Mr Jackson in 1989 from his previous scheme.
- The standard benefits calculator now clarifies the position for members who are subject to the earnings cap. Previously the calculator asked the member to enter their current salary, excluding anything they did not pay contributions on. This would have covered members whose pensionable pay was limited by their employer because of the earnings cap.
- The administration of the Scheme is carried out in partnership between NHS Pensions and employers. As Scheme manager, NHS Pensions is responsible for issuing instructions to ensure employers are able to meet their obligations. The employer is responsible for distributing Scheme literature to their employees.
- If the Health Board had provided Mr Jackson with a copy of the Scheme booklet "A guide to the NHS Pension Scheme", he would have had some awareness of the earnings cap.
- The Health Board should have limited Mr Jackson's pensionable pay. They accept that when the Health Board did not do so, they should have intervened.
- Mr Jackson's advisers should have been aware of the earnings cap.
- Mr Jackson has benefited from the pensionable pay he received in respect of his on-call commitment on the uncapped elements of his benefits.
- Mr Jackson's wish to reduce his commitments in 2010 suggests that he may have given up his on-call commitment regardless of subsequent events.

- They referred to the 2003 Consultants' Contract to indicate that the additional on-call duties could not have continued indefinitely.
- Mr Jackson has argued that the additional on-call duties could have continued until his retirement, but he could not have anticipated the outcome of the Health Board's strategic review.
- Whilst they apologise for any distress and inconvenience suffered by Mrs Jackson, any duty of care they owe is to Mr Jackson as the Scheme member. They have acknowledged that he has suffered distress and inconvenience and have offered £500 in recognition of this.
- Mr Jackson could have withdrawn his retirement application and continued working.
- Mr Jackson has said that he expects to predecease his wife because of their age difference and that she will then receive a reduced widow's pension. This does not represent an actual financial loss and, knowing the correct position, he has an opportunity to mitigate for any perceived loss.
- Mr Jackson's retirement application form confirmed his re-employment as a consultant from 1 December 2010 after a one month break. They do not accept that Mr Jackson has lost two years of retirement since it was his intention to continue working.
- Mr Jackson said that his contract was renewed in 2011 because he had not reached his financial goal until his retirement in 2012. They believe that he took steps to mitigate his loss and has completely eliminated it.

### **Summary of the Health Board's Position**

32. The Health Board submit:

- The estimate provided in January 2010 was not a separate employer produced estimate as such; it was produced by extracting information from the NHS Pensions' online system. They would argue it is therefore an NHS Pensions estimate.
- They would not check the calculations but simply extract the information from the NHS Pensions' system. They have thousands of employees and potential NHS Pension recipients and are not set up to check every

calculation obtained from the NHS Pensions' website, nor written forecasts. It is NHS Pensions who administer the Scheme and employees obtain figures either directly from NHS Pensions, from their employer or from the website.

- They provided one estimate for Mr Jackson in January 2010. He obtained all the others either directly from NHS Pensions or from their website.
- The January 2010 letter included the standard waiver and disclaimer. This stated that precise amounts could not be given until final pay and membership details had been confirmed by NHS Pensions. It also stated that use of the figures for personal financial calculations was at the individual's own risk and NHS Pensions could not be held responsible for any changes to the quoted figures once final pay and membership were confirmed. Since the figures are NHS Pensions' figures, the employer cannot be held responsible for changes either.
- NHS Pensions are responsible for how the figures are produced. They are responsible for the rules and regulations and the running of the Scheme. They are also responsible for how they notify users of changes to the Scheme rules and are responsible for their own website and the computation software on that website.
- The notification of the 1989 changes sent out by NHS Pensions stated that they were considering what changes needed to be made to administrative systems. It said that employing authorities needed to take action to identify affected staff until that work had been completed. They would have expected NHS Pensions to have completed this work by 2010. NHS Pensions had had 20 years to make their website and systems clear, to ask for the correct input and to flag up any exceptions.
- They did not actively mislead Mr Jackson and were to some extent misled themselves by the online calculator.

## Conclusions

33. Under Regulation C1 and the overarching pensions/tax legislation, Mr Jackson's earnings were subject to the earnings cap. He accepts this, but considers that more should have been done to make him aware of it.

34. When Mr Jackson rejoined the Scheme in 1995, the members' booklet explained that there was an Inland Revenue limit on pensionable pay. However, it referred to someone *joining* an occupational pension scheme for the first time on or after 1 June 1989: Mr Jackson was *rejoining* the Scheme. In addition, at that time, Mr Jackson's earnings were below the cap. In fact, his earnings did not exceed the cap until 2004; some nine years later. I do not consider it reasonable to expect Mr Jackson to have remembered a provision which did not apply to him at the time he rejoined the Scheme. Equally, whilst I accept that there was information available to him on the NHS Pensions website, he had no reason to go looking for it after 1995, until perhaps he was contemplating retirement.
35. There are two consequences for Mr Jackson's Scheme benefits arising from the application of the earnings cap: he should have been paying contributions on the capped salary between 2004 and 2008 and his benefits must be calculated to take account of the period of capping.
36. The Health Board should have been deducting contributions by reference to Mr Jackson's capped salary from 2004 to 2008. It is clear that the Health Board's payroll staff were aware of the earnings cap because they said they had conducted a review in 2006 and found one other member of staff who was affected. The payroll staff said that they had not picked up Mr Jackson because his records showed that he joined the NHS in 1972. It is perhaps surprising that their records did not also show that Mr Jackson had joined the Health Board (or its predecessor) in 1995 from outside the NHS; they were clearly aware of this. Regardless of this, the Health Board (as Mr Jackson's employer) was responsible for making the correct deductions (not only in terms of pension contributions) from his salary. It was maladministration on the part of the Health Board not to deduct the correct contributions.
37. Any redress should aim to put Mr Jackson in the position he would have been in had the maladministration not occurred. Mr Jackson has received a refund and interest in respect of the excess contributions deducted between 2004 and 2008. He argues that he would have made alternative FSAVC (free standing additional voluntary contributions) arrangements with the excess contributions over the six year period in question. Mr Jackson also says that he would have increased his contributions to his other pension arrangement. He argues that he has lost six years of potential investment return. However, the HMRC limits in place until

2006 would have restricted the alternative pension arrangements available to him. It is entirely possible that, had Mr Jackson reviewed his arrangements in 2004 (when the earnings cap first applied to him) he might well have decided to invest an equivalent amount elsewhere. However, there is no way of telling what that alternative might have been at this remove or what return it might have yielded. In the absence of any clear advantage that Mr Jackson could have obtained had he invested the contributions elsewhere, the interest paid on the refunded contributions is sufficient.

38. The earnings cap also affects the way in which Mr Jackson's benefits are calculated. Failing to apply the cap meant that Mr Jackson's benefits were overstated.
39. Members of the Scheme can obtain estimates of potential retirement benefits either directly from NHS Pensions or from their website or by requesting figures from their employer. Mr Jackson has, over the years, employed all three methods. Where members obtain figures from an employer, the estimate is generated by use of an online calculator provided by NHS Pensions. The Health Board has explained that this is what they did in January 2010.
40. The Health Board argue that the online calculator is the responsibility of NHS Pensions and that they cannot be held responsible if the figures produced are incorrect. This is true – up to a point. NHS Pensions are responsible for the online calculator and it should have calculated benefits in accordance with the Scheme Regulations. If there were known circumstances in which the calculator could overstate benefits, NHS Pensions should have included a warning to this effect or limited the use of the calculator. I note that the standard calculator has now been amended by NHS Pensions and members who are subject to the earnings cap are asked not to use it. Previously members were asked to enter their current salary, excluding any amounts they did not pay contributions on. Had the Health Board been applying the earnings cap, the calculator would have been able to provide a reasonably accurate estimate of Mr Jackson's likely benefits. However, this was only the case until 2008 when the earnings cap no longer restricted the amount of contributions.



41. I have said that NHS Pensions are responsible for the output generated by their online calculator up to a point. This is because they cannot be held solely responsible for what is input into the calculator by those using it. If an employer inputs incorrect information into the online calculator, NHS Pensions should not be held responsible for the incorrect information generated as a result. Whilst I find that the lack of a warning about the earnings cap after 2008 was maladministration on the part of NHS Pensions, I do not find that the Health Board can entirely wash their hands of the matter. I find that they should have been aware that Mr Jackson's benefits would still be, in part, subject to the earnings cap and that using the online calculator might not have provided a correct estimate of his benefits.
42. Mr Jackson also used the online calculator to generate an estimate of benefits. As I have said, I do not find that it is reasonable to expect Mr Jackson to have been aware of the earnings cap in 2004 or later. It was a technicality that a layperson would not necessarily be aware of unless it was specifically drawn to his attention at a relevant time. I find that it was reasonable for Mr Jackson to take any figures provided by NHS Pensions and/or the online calculator at their face value and assume that they were correct.
43. The next step is to consider what the consequences of the incorrect benefit estimates were and what, if any, injustice Mr Jackson has suffered. In other words, did Mr Jackson rely on the incorrect information to his detriment and was it reasonable for him to do so?
44. The benefit statements provided directly by NHS Pensions in 2007 and 2008 were based on uncapped earnings and were incorrect. NHS Pensions have argued that Mr Jackson's financial advisers could be expected to have noticed this. The HMRC requirement for earnings to be capped had applied to all approved occupational pension schemes and the advisers could be expected to be aware of the principle. The HMRC requirement ceased in 2006. However, schemes were not required to cease capping pensionable salary immediately. This is something a financial adviser might be expected to be aware of.
45. The incorrect statements predicted an annual pension in the region of £29,000 payable at age 60. There is no evidence that Mr Jackson took any particular action in reliance on these benefit statements. He and his financial adviser have

suggested that the 2008 statement raised a concern that he might exceed the lifetime allowance. No action was taken, however, because the adviser determined that the lifetime allowance would not be exceeded. I do not find that Mr Jackson relied to his detriment on the incorrect statements provided in 2007 and 2008. (I have already dealt with Mr Jackson's claim regarding alternative and additional investment.)

46. The benefit estimate which gave rise to Mr Jackson's expectation of a pension in the region of £47,000 was the one sent to Mr Jackson by the Health Board's Head of Payroll in 2010. The Head of Payroll used a salary figure of £191,405.09. No allowance was made for the fact that part of Mr Jackson's membership was subject to the earnings cap. In addition to the figures provided by the Head of Payroll, Mr Jackson also used the online calculator for members provided on the NHS Pensions website. This too returned a figure of around £47,000 per annum because Mr Jackson also entered an uncapped salary figure. I do not find that Mr Jackson should have been aware that there was anything amiss with these benefit estimates; it was reasonable for him to rely on them. I acknowledge that the estimates came with a warning that they were open to change when NHS Pensions had confirmed correct salary and service details. However, I find that Mr Jackson was entitled to expect that any adjustment would be marginal. The difference between Mr Jackson's expected annual pension (£47,936.49) and his actual annual pension (£37,546.97) amounted to £10,389.52 or a 22% reduction. I find this to be more than could reasonably be allowed for in the caveat attaching to the benefit estimates.
47. The marked increase between the estimate provided directly by NHS Pensions in 2008 and those produced by Mr Jackson and the Health Board in 2010 was the result of an increase in his salary. Mr Jackson had taken on additional duties and been told that the additional payments would be pensionable. However, he was not told this by NHS Pensions, but by his employer. And indeed they were pensionable, inasmuch as they formed part of the pensionable salary used to calculate the uncapped elements of Mr Jackson's benefits. There is nothing to suggest that Mr Jackson would not have taken on the additional duties when he did.

48. Mr Jackson says that he would not have retired when he did, had he known what his actual benefits would be. The difference between the estimated annual pension and the actual annual pension is of a magnitude that would, more likely than not, have changed his retirement plans. Mr Jackson has said that he would have worked for a further two years. The Health Board have said that they brought forward recruiting a consultant when Mr Jackson informed them that he no longer wished to do extra on-call duties and would otherwise have required him to continue. Whilst it was not possible for Mr Jackson to remain in post when NHS Pensions informed him of his actual retirement benefits, he was able to secure a 12 month contract with the Health Board; later extended to September 2012. Mr Jackson has said that there was scope for further extension but he chose not to pursue this for personal reasons. In view of this, I find that it would be reasonable to say that, but for the incorrect information, Mr Jackson would have remained in post until September 2012. NHS Pensions have referred to a general requirement to reduce additional duties. Mr Jackson argues that the local conditions experienced by the Health Board would have made this difficult. I take NHS Pensions' point that the extra duties may not have continued indefinitely, but there is no evidence to indicate that they would have ceased before September 2012.
49. The aim of any compensation due to Mr Jackson should be, as far as is possible, to put him in the position he would have been in but for the maladministration. Had Mr Jackson not retired in October 2010, he would have continued working at the higher salary level at least until September 2012. Offset against this is the fact that, for that period, Mr Jackson was in receipt of his pension. In addition, Mr Jackson would still have been accruing pensionable service in the Scheme. The compensation should be calculated as follows:
- Two years at the higher salary less Mr Jackson's actual salary and his pension.
  - The additional pension and lump sum Mr Jackson would have received had he accrued a further two years of pensionable service. The pension is to be converted into additional lump sum using the commutation factors provided for by the Scheme Regulations.

The Health Board are to provide the correct salary figures for NHS Pensions to calculate the amounts due. Use of the Scheme's commutation factors allows for the fact that the pension would have been subject to increases and provided for a spouse's pension. I have taken the facts that Mr Jackson received a lump sum earlier than he would have done, and that the additional salary will be late, as offsetting each other in round terms.

50. I also find that Mr Jackson will have experienced non-financial loss in the form of disappointment on being informed that his benefits would be lower than he expected. Some recognition of this would be appropriate. However, I note that NHS Pensions have offered Mr Jackson £500 for "distress and inconvenience". This is in-line with the sums I tend to award in similar circumstances and, as a result, I am not minded to make alternative directions.
51. I have said that NHS Pensions cannot be held solely responsible for the production of incorrect figures if incorrect data is input into the online calculator. The Health Board should have been aware that Mr Jackson's salary fell to be capped for a period of his pensionable service and that this would have an effect on the calculation of his benefits. This should have been enough to at least alert them to the possibility that the figures produced by the online calculator might not be accurate; at least to the extent that they might have queried this with NHS Pensions before proceeding to use the calculator. I have, therefore, considered whether it would be appropriate to apportion responsibility for compensating Mr Jackson between NHS Pensions and the Health Board.
52. I find, however, that it is not possible to apportion the contribution that each made. Mr Jackson's loss results from all of their failures taken as a whole. So NHS Pensions and the Health Board should be treated as jointly and severally liable.
53. Mr Jackson has also put forward an argument that his wife should receive compensation because she decided to give up work to concentrate on her degree in reliance on the incorrect information. I can understand why he says that; it is not uncommon for couples to take joint decisions on matters of retirement. However, the legal position is that consequences/losses may be viewed as too remote for either NHS Pensions or the Health Board to be held liable – that is, if the consequences were not reasonably foreseeable by them at

the time. In Mr Jackson's case, it was foreseeable that he would take a decision as to whether he would retire in 2010 on the basis of the information provided. I do not, however, find that it was reasonably foreseeable that his wife would decide to give up her job on the basis of that information. I do not find that either NHS Pensions or the Health Board can be held responsible for any loss suffered by Mr Jackson's wife.

54. Mr Jackson has also submitted a claim on the basis that he and his wife were unable to proceed with a property purchase. He says that he had to purchase a smaller property and take out a substantial mortgage. This does not represent a financial loss to Mr Jackson. He was not entitled to the higher pension and lump sum and, therefore, cannot suffer a loss by not being able to use the higher amounts. In the circumstances, he has suffered disappointment in discovering that he could not afford to purchase the property he wished to. This is non-financial loss and I find that it covered by the compensation offered by NHS Pensions.

#### **Directions**

55. Within 28 days of the date of my final determination, Mr Jackson is to receive compensation as described above, with NHS Pensions and the Health Board being jointly and severally liable for payment, including for the £500 previously offered by NHS Pensions.

**Tony King**  
Pensions Ombudsman

25 March 2015