

## Ombudsman's Determination

Applicant	Mrs N
Scheme	NHS Pension Scheme
Respondent	NHS Business Services Authority ( <b>NHS BSA</b> )

## Outcome

1. I do not uphold Mrs N's complaint and no further action is required by NHS BSA.

## Complaint summary

2. Mrs N has complained that NHS BSA has adjusted her permanent injury benefit (**PIB**) award by reference to the total amount of the damages she received in connection with her accident.

## Background information, including submissions from the parties

### Background

3. Mrs N was involved in a road traffic accident in 2009. She retired on the grounds of ill health in 2011. In 2013, Mrs N received a lump sum of £269,503.21 (net) in settlement of a personal injury claim relating to the accident. A consent order was issued by the County Court on 5 December 2013. This stated that Mrs N accepted the sum of £302,385.31 in full and final settlement of her claim for damages (inclusive of general and special damages and interest). A copy of a without prejudice schedule of loss submitted in connection with Mrs N's claim has been provided to The Pensions Ombudsman (**TPO**).
4. Mrs N was awarded a PIB in March 2018. In a letter notifying Mrs N about the amount of her PIB, NHS BSA included details of benefits which would be taken into account against her PIB. From February 2013, this included a "damages annuity" of £9,071.07 per year. NHS BSA said it understood that Mrs N's claim for damages had been settled in December 2013. It said it had assessed the amount of damages which was accountable against her PIB award as £269,385.21. NHS BSA said that, in order to reduce this amount, it would need to see an agreed breakdown of the settlement.
5. NHS BSA explained that it would withhold a lump sum due to Mrs N (£22,290.76) and the annual allowance due in respect of the period prior to the date of settlement

(£33,814.67). It said the balance of her settlement (£213,396.78) had been converted into an annual annuity, which would be deducted from Mrs N's future PIB.

6. The relevant regulations are The National Health Service (Injury Benefits) Regulations 1995 (SI1995/866) (as amended) (the **Regulations**). Regulation 17 provides:

- “(1) The Secretary of State shall take into account against the benefits provided in these Regulations any damages or compensation recovered by any person in respect of the injury ... and such benefits may be withheld or reduced accordingly.
- (2) For the purposes of paragraph (1), a person shall be deemed to have recovered damages-
  - (a) whether they are paid in pursuance of a judgement or order of a court or by way of settlement or compromise of his claim and whether or not proceedings are instituted to enforce the claim; or
  - (b) if they are recovered for his benefit in respect of a claim under the Fatal Accidents Act 1976.
- (3) Where any payments in respect of a benefit under these Regulations are made before the right to, or the amount of, such damages or compensation is finally determined, then if and when a right to and the amount of such damages or compensation is finally determined the Secretary of State shall have the right to recover from the beneficiary an amount not exceeding-
  - (a) where the amount of the payments made by the Secretary of State is less than the net amount of the damages or compensation, the amount of those payments;
  - (b) where the amount of those payments is not less than the net amount of the damages or compensation, such part of those payments as is equal to the net amount of the damages or compensation.
- (4) So far as any amount recoverable under this regulation represents a payment made by the Secretary of State from which income tax has been deducted before the payment, the proper allowance shall be made in respect of the amount so deducted, and in this regulation the expression “the net amount of the damages or compensation” means the amount of the damages or compensation after deducting any tax payable in the United Kingdom or elsewhere to which the damages or compensation are subject.
- (5) No proceedings shall be brought to recover any amount under this regulation-

- (a) after the death of the recipient of the payments; or
  - (b) after the expiration of 2 years from the date on which a right to, and the amount of, the damages or compensation is finally determined or from the date on which the final determination first came to the knowledge of the Secretary of State, if later.
- (6) A certificate issued by the Secretary of State and stating the date on which the final determination of a right to, and of the amount of, any damages or compensation first came to her knowledge shall be admissible in any proceedings as sufficient evidence of that date.”
- 7. On 22 February 2018, NHS BSA wrote to Mrs N's solicitor saying that Regulation 17 required it to consider the impact of the damages settlement. It said the Regulations allowed it to account for the whole of the settlement but it would try, wherever possible, to account for the loss of earnings element only. It explained that this included past and future loss of earnings, Smith v Manchester awards, loss of pension and any gratuitous care. NHS BSA said it appeared, from the evidence it had received, that there was no common ground between the parties as to a breakdown of the settlement and it had to account for the whole of the damages.
- 8. Following further correspondence between NHS BSA and her solicitors, Mrs N appealed the reduction to her PIB via the Scheme's two-stage internal dispute resolution (**IDR**) procedure. NHS BSA issued a stage one IDR decision on 14 August 2018. This largely reiterated the points it had made previously. NHS BSA confirmed that it did consider any agreements made at the time of a settlement. It said it would consider a schedule of losses to see if it could find any common ground on which to limit the impact of a damages settlement. NHS BSA did not uphold Mrs N's appeal.
- 9. Mrs N appealed further. In support of her case, Mrs N's solicitor provided a copy of notes taken during a settlement meeting and a summary document setting out her claim<sup>1</sup>. It argued that it was clear that the sum paid to Mrs N was not all related to loss of earnings or loss of pension. Mrs N's solicitor argued that it was contrary to the intention of Regulation 17 to take account of all of her damages settlement.
- 10. NHS BSA issued a stage two IDR decision on 19 February 2019. In addition to the points made previously, NHS BSA explained that the custom and practice of limiting the offset relating to a damages settlement stemmed from an agreement reached many years ago between the then Head of Division and NALGO<sup>2</sup>. It said it sat comfortably with the income protection nature of the injury benefits scheme. NHS BSA said the practice of limiting the offset had no basis in law other than custom and practice.
- 11. NHS BSA said it did not agree that it was clear that the sum received by Mrs N was not all paid in respect of loss of earnings and loss of pension. It referred to the notes

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<sup>1</sup> Copies have been provided to TPO.

<sup>2</sup> The National and Local Government Officers' Association, now merged with Unison.

of the settlement meeting and noted that the amount claimed was £285,000. It referred to the summary document and noted that the amount claimed for loss of earnings was £387,158. NHS BSA said it maintained that there was no evidence that the total sum received by Mrs N was not paid in respect of loss of earnings. It referred Mrs N's solicitor to a previous Ombudsman determination (PO-585) which it considered to be supportive of its stance that accounting for the whole sum was correct.

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

12. It is submitted on behalf of Mrs N:-

- The issue between the parties is relatively simple. There is no definitive breakdown of the award made to Mrs N in respect of her accident claim. Exhaustive attempts have been made to try to provide an exact breakdown. These have proved unsuccessful.
- As with many injury claims, the parties negotiate and compromise, find figures which they consider acceptable for various parts of the claim, come to a round figure, and find some middle ground between them.
- For the purposes of the settlement, the precise breakdown is not important. It is probably not possible, serves little purpose and would lead to unnecessary complication. A settlement is reached based on what each party thinks a court might decide. It is a guesstimate; not a precise calculation.
- From Mrs N's perspective, what is clear is that, when taking into account the overall figures, the claim was made up of several parts. No award at all could have been made, agreed upon or settled if she had not been injured. That injury must attract an award which should not be taken into account.
- The legislation makes provision for the full award to be deducted. However, under agreement, NHS BSA will not take account of elements of an award which do not relate to loss of earnings, Smith v Manchester awards or gratuitous care. In Mrs N's case, NHS BSA has taken those elements into account.
- NHS BSA appears to have misunderstood the nature of the claims process. Without injury, and an award for that injury, there cannot be a claim for loss of earnings, because the loss of earnings flows from the injury. If Mrs N had not been injured, she could work and there would be no loss of earnings.
- NHS BSA's policy of taking the whole amount of damages into account when the loss of earnings element is not clearly identified has led to a great injustice to Mrs N. It is clearly perverse because NHS BSA must know that it is taking into account damages for other elements.

- Mrs N is apparently to be penalised because she did not insist that each element of her claim was agreed at the time. She could not have appreciated that this would make any difference. She took advice to settle her claim based on the risks of litigation when the best which could be suggested as appropriate was on a broad brush basis. Those advising Mrs N at the time were and have been unable to provide a breakdown of the figures.
- There is sufficient evidence to show that there must have been an element of general damages. The NHS accepted a repayment of 18% of the subrogated claim for loss of earnings because the full amount claimed was not recovered.

### **NHS BSA's position**

#### **13. NHS BSA submits:-**

- Regulation 17 requires it to recover any, meaning all, damages or compensation received by either withholding or reducing a PIB. However, it is custom and practice to try to limit the offset to that part of any damages which relates to loss of earnings and/or loss of pension.
- The practice of limiting the offset has no basis in law other than custom and practice and, in order for this to be agreed, a formal breakdown of the damages settlement agreed by the parties is required.
- It has tried on more than one occasion to obtain a clearly delineated breakdown of the damages settlement in Mrs N's case. Mrs N's solicitors maintain that it is impossible to provide a breakdown because the damages settlement was a global one. It has not been possible to identify a definitive figure for loss of earnings or loss of pension.
- Mrs N's solicitors submit that it is perverse because monies must have been awarded in respect of general damages by virtue of the fact that she suffered an injury. The solicitors take the view that a major component of the settlement was in respect of professional care and case management.
- It has considered all of the information provided by Mrs N's solicitors. However, there is no resemblance between what was claimed and what was paid. The sum claimed by Mrs N in respect of loss of earnings is very close to the final figure of £269,503.21 which was paid to her.
- The Pensions Ombudsman has previously determined (PO-585) that its method of using the whole sum if a breakdown is not clearly delineated is the correct approach.

## Adjudicator's Opinion

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

- Regulation 17 stated that Secretary of State "shall take into account against the benefits provided in these Regulations any damages or compensation recovered by any person in respect of the injury ... and such benefits may be withheld or reduced accordingly". The only reduction to the amount to be taken into account specifically referred to in Regulation 17 was in respect of any tax to which the damages have been subject.
- However, under a 1974 agreement with NHS trade unions, NHS BSA would limit the amount of damages it took into account to the loss of earnings element. Where an "out of Court settlement" was reached between the parties, NHS BSA would ask for a breakdown of the agreed settlement amount. This was to enable it to identify the loss of earnings element. If NHS BSA did not receive a breakdown which enabled it to identify the loss of earnings element, its policy was to account for the whole settlement. NHS BSA stated that the practice of limiting the offset had no basis in law other than custom and practice.
- Regulation 17 had been considered by past and current Ombudsmen on a number of occasions<sup>3</sup>. It had previously been determined that Regulation 17 contained both mandatory and permissive elements indicated by the use of the words "shall" and "may". It was mandatory for NHS BSA to "take into account" the settlement which Mrs N had received, but the amount by which her benefits were withheld or reduced was at its discretion. The Adjudicator did not consider it entirely accurate to say that Regulation 17 "requires" NHS BSA to recover all damages. However, she felt that this point did not affect the outcome of Mrs N's case.
- Where a decision was made under a discretionary power, the Ombudsman's role was limited to determining whether the decision-making process had been undertaken in a proper manner. There were certain well-established principles against which the decision-making process was measured. These were that the decision-maker had:-
  - Taken all relevant matters into account and no irrelevant ones;
  - Asked itself the right questions;
  - Interpreted the relevant rules or regulations and the law correctly; and
  - Not come to a perverse decision.

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<sup>3</sup> For example, 83710/2, PO-429 and PO-585

In this context, a perverse decision was one which no reasonable decision-maker, properly advising itself, could have reached in the circumstances. Provided that these principles had been followed, neither the Ombudsman nor the Courts might interfere in the decision.

- It was the Adjudicator's opinion that NHS BSA had followed the above principles in reaching its decision to reduce Mrs N's PIB by reference to the whole of her net damages. Mrs N's solicitor had suggested that NHS BSA had failed to take into account the fact that her settlement was made up of elements other than loss of earnings. In the Adjudicator's view, NHS BSA had considered this but, in the absence of supporting evidence, determined that it was not possible to identify these. This was not the same as failing to consider whether it should make allowance for these other elements. The Adjudicator noted that NHS BSA had provided Mrs N and her solicitor with ample opportunity to provide evidence which would enable it to consider this matter further.
- As to whether NHS BSA's decision could be said to be perverse, the Adjudicator was of the view that it was within the range of possible decisions which a reasonable decision-maker could have reached in the circumstances.
- The Adjudicator also considered whether NHS BSA could be said to have fettered its discretion under Regulation 17 by applying its policy of offsetting the whole of the damages in the absence of an agreed breakdown. It had previously been said that it was perfectly proper for NHS BSA to have a policy in place. It would only be deemed to have fettered its discretion if it adhered rigidly to that policy without giving genuine consideration to the circumstances of Mrs N's case. In the Adjudicator's view, NHS BSA had not fettered its discretion in Mrs N's case. It had taken appropriate steps to obtain the evidence it required to consider the extent to which her PIB should be reduced and had indicated a willingness to consider such.
- The Adjudicator did not consider that there were grounds for the Ombudsman to require NHS BSA to re-take its decision to reduce Mrs N's PIB by reference to the whole of her damages settlement.

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

## Ombudsman's decision

16. Regulation 17 provides that NHS BSA, on behalf of the Secretary of State, "**shall** take into account ... any damages or compensation recovered by any person in respect of the injury" (emphasis added). However, it also provides that the injury benefit "**may** be withheld or reduced accordingly" (emphasis added). In other words, there are two



elements to Regulation 17: a mandatory element (to take account of the damages); and a discretionary element (to determine by how much an injury benefit is withheld or reduced).

17. There appears to be agreement between the parties that NHS BSA was correct to apply Regulation 17 to Mrs N's damages settlement. The disagreement arises in relation to the discretionary element of Regulation 17; namely, by how much should Mrs N's benefit be withheld or reduced.
18. There is an agreement in place by which NHS BSA will normally only take the loss of earnings element of any damages into account. In order to do so, it asks to be provided with a breakdown of any settlement which identifies the loss of earnings element. This is not unreasonable and it is the approach it has taken in Mrs N's case.
19. Mrs N and her solicitor say they are unable to provide such a breakdown. Mrs N's solicitor has stated that, at the time the settlement was agreed, it was only possible to take a broad brush approach. He argues that, because of the nature of personal injury claims, it is obvious that part of the settlement must relate to other elements.
20. As outlined by my Adjudicator, when it comes to the exercise of a discretionary power, my role is limited to considering the manner in which a decision has been reached. I find that NHS BSA made its decision, to take the whole of the net settlement into account, in a proper manner.
21. I note that Mrs N's solicitor argues that NHS BSA's decision is perverse because it must be taking elements of her settlement which do not relate to loss of earnings into account. It may well be the case that Mrs N's settlement included elements which do not relate to loss of earnings.
22. However, NHS BSA is not prohibited from taking these elements into account under Regulation 17. It has agreed to disregard them when it is provided with evidence which enables it to identify the loss of earnings element. For its decision to be perverse, it would have to be one which no reasonable decision-maker would come to on the evidence. I do not find this to be the case.
23. Mrs N and her solicitor have maintained their position that it is not possible for them to identify the loss of earnings element of her settlement. On that basis, they appear to be suggesting that NHS BSA should not take any of the settlement into account. Mrs N and her solicitor appear to accept that at least part of her settlement does relate to loss of earnings.
24. If NHS BSA was to disregard all of the settlement, Mrs N would be compensated for loss of earnings twice; once by receipt of a settlement and once by a payment out of public funds. This would not be an appropriate approach for NHS BSA to take.



PO-39761

25. I find that NHS BSA has applied Regulation 17 correctly and exercised its discretion in relation to the reduction of Mrs N's injury benefit in a proper manner. I do not uphold Mrs N's complaint.

**Anthony Arter**

Pensions Ombudsman  
29 January 2020