

## Ombudsman's Determination

<b>Applicant</b>	Mr Joseph Leps
<b>Scheme</b>	NHS Pension Scheme
<b>Respondent(s)</b>	NHS Business Services Authority

### Complaint Summary

Mr Leps complains that the NHS Business Services Authority (the **NHSBSA**) should honour their commitment to pay his pension benefits. Mr Leps was incorrectly informed he could stay in the Scheme, but his benefits have now been reduced and he is required to repay a substantial overpayment.

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

The complaint should be partly upheld against the NHSBSA because:

- they accepted contributions from the NHS Dental Services for Mr Leps when he was beyond the upper age limit, which amounts to maladministration;
- they have perpetuated his belief that he was earning pension rights beyond age 70, leading to a loss of expectation (as opposed to a right), resulting in a significant amount of disappointment, distress and inconvenience;
- the evidence indicates that this matter has still not been completely rectified and further remedial action is necessary.

## Detailed Determination

### Material facts

1. Mr Leps is a member of the Scheme, which he joined in 2000 (aged 63). His normal retirement age under the Scheme was age 60. He says he was never given any member's booklet or explanatory guide when he joined.
2. Mr Leps says he started employment at Croxley Dental Clinic (the **Clinic**) in September 2000, and headed up the NHS side of the Clinic. He has never been a partner of that dental practice and for the first five years (2000-2004) he was employed on a PAYE basis. Thereafter he has been self-employed. Effectively he contracts his services to the Clinic. Whilst they pay him for his services the Clinic has never been responsible for the deduction of his pension contributions. NHS Dental Services (which is also a division of the NHSBSA) automatically deduct contributions each month before paying the Clinic for carrying out the contract.
3. On 7 November 2007, Mr Leps reached age 70, the Scheme's then upper age limit.
4. From 1 April 2008, the upper age limit under the Scheme was amended to age 75.
5. Mr Leps says that in 2008 he had been made aware of the following written material from NHSBSA's website which said,
  - “● In light of the Heyday challenge to the Government's default retirement age which is currently awaiting confirmation by the European Court of Justice, a number of NHS organisations have anticipated the outcome and have already removed retirement age from their policies. Many feel that making people retire at a prescribed age when they do not wish to is now longer helpful, especially given the need to retain talent and to encourage people to stay in work longer. In one cluster of PCTs, staff received information with their pay slips indicating that the retirement age had been removed. Managers were provided with a written brief advising them of the reasons and the practical implications of this move, which has been well received.”
6. Mr Leps says he telephoned the NHSBSA, and a note dated 25 June 2008, at 10.20 hours, is evidence of that telephone call to the NHS Pensions Agency (now known as NHS Pensions). The note says,
  - “What are the rules & conditions of deferment of pension?
  - How do I defer my pension?
  - How do I find out the estimated tax free sum & estimated pension?
  - 01253 774774
  - NHS Pensions Agency
  - Practitioners@nhspa.gov.uk3
  - Name: Mrs C...
  - Confirm – can just carry on working and paying in to pension fund”.

7. Mr Leps says he had no information about deferment from the NHSBSA. The topic of deferment had arisen during a social conversation among various professional friends of similar age, after which he decided to contact the NHSBSA.
8. NHS Dental Services issued Form SD86c to Mr Leps each year setting out his actual superannuation remuneration and the total contributions. This information is prepared from the net pensionable earnings declaration signed by the Clinic - the Provider of the contract (the **Provider**) - which the dentist performs. Mr Leps has such forms for each of the five years from 2007/08 to 2011/12.
9. The NHSBSA issued a 'Choices exercise pack' (the **Choices Pack**) to Mr Leps on 28 October 2011, under which he could either choose to stay in the 1995 section of the Scheme, or opt to move to the new 2008 section of the Scheme, with effect from 1 April 2008. Unfortunately, a personal statement could not be provided for him. The Choices Pack explains that the most common reason for not producing a personal statement was due to incomplete member records. Nonetheless, a 'NHS Pension Choice Example Benefit Comparison' was enclosed. This showed how the benefit of an average member would be affected by changing to the 2008 section.
10. On 6 January 2012, Mr Leps completed the 'Your NHS Pension Choice Form' and opted to move to the 2008 section of the Scheme. Additionally he said,

"I should very much appreciate it if you could process this form speedily as I would very much like to give notice to take my pension at the end of April 2012".
11. The NHSBSA acknowledged Mr Leps' choice on 23 January 2012.
12. Mr Leps subsequently applied to take his Scheme benefits at the end of April 2012.
13. On 13 March 2012, the NHSBSA wrote to Mr Leps setting out his benefits from 1 May 2012 (aged approximately 74½ years old). Following his transfer to the 2008 section Mr Leps chose a higher lump sum of £55,152 and a reduced annual pension of £8,274.
14. Mr Leps' benefits were put into payment shortly after 1 May.
15. In a letter dated 30 October 2012, to Mr Leps, the NHSBSA said that there had been an error in the calculation of his Scheme benefits. The NHSBSA has confirmed this error was discovered during an internal audit by their Finance Team. The NHSBSA told Mr Leps that the Dental Practice Board should have ceased contributions under the 1995 section of the Scheme when he was aged 70 and they should have given him an application for the payment of retirement benefits (Form AW8) at that time.
16. The NHSBSA told Mr Leps that because these actions had not occurred it wrongly appeared that he was an active member of the Scheme and his records remained open. As a result, it had seemed he was eligible for the 'Choice' exercise. Though he chose the 2008 section of the Scheme, they informed him that under the regulations governing the Scheme he was never eligible to be in that section.

17. The NHSBSA also said that under the Scheme's regulations they could not allow the benefits in payment to stand. His benefits had to be paid under the 1995 section of the Scheme from 7 November 2007 and contributions paid after that date would be refunded to him. They confirmed his revised benefits were a lump sum of £15,639 and an annual pension of £5,213. A sum of £23,352.82 was payable which represented approximately five years of backdated pension plus pension increases. Additionally there would be a refund of his contributions paid after age 70 with interest.
18. The NHSBSA also said the benefits from the 1995 section (i.e. lump sum and pension arrears) along with the contribution refund would offset the overpaid lump sum of £55,152 from the 2008 section of the Scheme.
19. On 12 November 2012, Mr Leps replied to the NHSBSA about them changing his Scheme benefits. He said their proposed action was outrageous and unlawful, and he believed they were estopped from taking that course of action. Mr Leps then recounted past events. As the matter was in dispute, he requested the NHSBSA take no further action or steps to recoup any money until the matter had been settled.
20. The NHSBSA wrote to Mr Leps on 19 November 2012, saying after seeking clarification from their policy department they would be taking action to amend his benefits to those applicable to the 1995 section, and they had contacted his employer to refund the contributions. Under a separate letter on the same day, the NHSBSA told Mr Leps his revised benefits which reflected what he was told on 30 October 2012.
21. Mr Leps said he intended to complain and requested the NHSBSA suspend any action mentioned in their letter. In response, the NHSBSA said his benefits had already been amended and put into payment, but any further action or amended would cease when a complaint was brought forward through the official complaints procedure.
22. On 14 December 2012, Mr Leps instigated both stages (one and two) of the Scheme's internal dispute resolution procedure ("**IDRP**"). The parties' positions are included in their submissions below.
23. The NHSBSA's paying agent (Xafinity Paymaster) wrote to Mr Leps on 4 January 2013, saying as his lump sum had reduced (from £55,152.00) to £15,639.95 an overpayment of £39,512.05 had occurred. They asked for the amount to be repaid by a cheque or money order.
24. Mr Leps responded by saying he had been informed that until the dispute was resolved all actions were suspended. Consequently, he would not be paying this "so called overpayment" until the matter had been settled after the complaints procedure.

25. Following receipt of five newly issued contribution certificates for the years 2007/08 to 2011/12, Mr Leps wrote to NHS Dental Services on 29 January 2013, saying they could not send new certificates completely reneging the previous ones to suit their own ends. He maintained the old certificates remained legally valid.
26. NHS Dental Services produced a pay statement on 1 February 2013, saying a total amount of £12,667.47 for non-superannuable employee deductions had been made for the years 2007/08 to 2010/11. A few days later they replied to his letter of 29 January 2013, and told Mr Leps they had been instructed by NHS Pensions to refund all contributions after 7 November 2007, and they (as administrators) had to abide by the regulations set by NHS Pensions.
27. A breakdown of the £12,667.47 shown in the NHS Pay Statement is as follows:

Employee standard contributions for the year 2007/08:	£2,298.86
Employee standard contributions for the year 2008/09:	£4,147.44
Employee standard contributions for the year 2009/10:	£4,147.44
Employee standard contributions for the year 2010/11:	£2,073.73
28. Mr Leps says that £13,326.91 and £12,667.47 was paid into his bank account on 28 January 2013, and 18 February 2013, respectively. The NHSBSA has confirmed that the amount of £13,326.91 was the net arrears of pension (after tax) that was due to Mr Leps. No lump sum from the 1995 section of the Scheme has been paid but instead has been offset against the incorrect lump sum already paid to the member. Mr Leps wrote to NHS Dental Services on 20 February 2013, saying he wished to place on record that he did not accept these sums as being correct. He had therefore transferred them to a separate bank account where they would be held until the outcome of the official dispute.
29. During the second stage of the Scheme's IDRP, the NHSBSA has said the overpaid employee contributions amounted to £19,096.01 for the years 2007/08 to 2012/13, and these were refunded, with interest, to Mr Leps on 1 March 2013. The breakdown was as follows:

Employee contributions from 7 Nov 2007 to 31 March 2008:	£2,298.86
Employee contributions from 1 April 2008 to 31 March 2009:	£4,147.44
Employee contributions from 1 April 2009 to 31 March 2010:	£4,147.44
Employee contributions from 1 April 2010 to 31 March 2011:	£4,147.46
Employee contributions from 1 April 2011 to 31 March 2012:	£4,147.44
Employee contributions from 1 April 2012 to 30 April 2012:	£207.37
30. The NHSBSA has subsequently said that Mr Leps has received £19,154.51 as a refund of his contributions from the NHS Dental Services.

### **Summary of Mr Leps' position**

31. He spoke to the NHSBSA in June 2008, and neither his birth date nor his age was a secret. They were discussed during the course of this conversation.
32. He did not keep the outcome of the Heyday challenge under review. Nevertheless, his employer was happy for him to stay on and work.
33. In good faith he planned his retirement dependent upon the lump sum and monthly benefit, and by the NHSBSA reneging on their commitment to him, they will leave him seriously financially disadvantaged.
34. He considers the actions of the NHSBSA to be unfair and unlawful. He believes he entered into a binding contract with the NHSBSA and there is ample evidence of this, including the payment and acceptance of his contributions for almost five years, the issuance of receipts, the offer of 'Choice' between the 1995 and 2008 sections of the Scheme and acceptance of his choice, and the payment of his pension benefits for six months. All this happened over a long period of time.
35. The NHSBSA has summarily broken this contract; claimed they had made a mistake; re-issued nil balance receipts to replace the original receipts; demanded money back and ceased to pay the benefits promised. The NHSBSA needs to standby the original contract, confirm his membership of the 2008 section of the Scheme and restore all his benefits. He would like them to honour their commitment to him.
36. He considers the following is evidence of a contract between the NHSBSA and himself; the fact that he paid contributions, that these were accepted by the NHSBSA, that they sent an annual statement, that they offered him a Choice between the 1995 and 2008 sections of the Scheme, that they accepted his Choice, that they accepted his notice to retire and that they paid his benefits.
37. The NHSBSA has made a series of mistakes. They had a duty of care toward him, and were negligent in that duty by their mistakes. They made those mistakes and he should not be made to pay for their blunders.
38. Several critical life decisions were made by him on the expectation of the pension he was to receive. He has rejected their offer of £250 for distress and inconvenience. He is content to receive compensation, but it should be evidence based. There is a tremendous loss of expectation. He feels it is of vital importance that there should be an actuarial assessment of his actual loss.

39. He had no private pension and was satisfied undertaking NHS treatment in the knowledge that he was contributing to a reliable pension scheme. Had he been told in 2007 that he could not have stayed in the Scheme beyond age 70, he would probably have ceased to work for the NHS but instead transferred to working in private dentistry which would have been more lucrative. In support of his contention, he has provided a letter dated 21 July 2015, signed by the three Clinic principals saying they would have allowed Mr Leps to switch from NHS Dentistry to Private Dentistry in November 2007. Further they estimate his average earnings would have increased to a maximum of £114,000 gross per year. Mr Leps says this is instead of earnings of £80,000 gross per year.
40. He officially ceased working for his employer (Croxley Dental Clinic) at the end of April 2012, and started working there again in June 2012, in accordance with the regulations that retired dentists had to have a month's abstinence from work after retiring and then being re-employed. He continues to work for this same employer, but only for three days per week.
41. When he was informed in 2012 that he was not supposed to have been contributing to the NHS Pension Scheme since November 2007, it was too late for him to start in a private practice, especially as he is only working three days per week.

#### **Summary of NHS Business Services Authority's position**

42. Under the Scheme's IDRP they upheld Mr Leps' complaint in part.
43. At the time of Mr Leps' 70th birthday the Scheme's Regulations prevented further membership of the Scheme beyond age 70. Though the upper age limit has since been amended (from 1 April 2008) the change was not retrospective and the Scheme's Regulations in force at his 70th birthday must be applied. As such, Mr Leps' membership of the Scheme must cease on 6 November 2007, and his benefits are payable from the 1995 section of the Scheme.
44. The administration arrangements of the Scheme are shared between NHS Pensions, the former Primary Care Trust (now Area Team), and NHS Dental Services. The Provider and NHS Dental Services are responsible for the notification of the net pensionable earnings on which contributions are based. NHS Pensions is not responsible for the deduction of pension contributions and it is unclear why NHS Dental Services (or the practice where Mr Leps worked) deducted his pension contributions beyond age 70.
45. It is unable to confirm if the extract regarding the Heyday challenge was on their website. However, the default retirement age was not relevant to Mr Leps because in 2007, when he reached age 70, the default retirement age had not yet been removed.

46. There is no note of any telephone conversation on 25 June 2008, on Mr Leps' pension record. NHSBSA can confirm that "Mrs C" did work for them in 2008 and she was a Senior Pension Administrator on the Practitioner team. It is difficult for them to comment on what may or may not have been said during a telephone conversation but if Mr Leps had been given incorrect advice that he was entitled to contribute to the Scheme beyond age 70 they sincerely regret that.
47. Nevertheless, they have accepted ineligible pension contributions without querying this and, by issuing a 'Choice' statement in error and processing his initial award incorrectly, they have most regrettably given rise to an expectation of benefits that Mr Leps is not entitled to. By virtue of these failings and as compensation for any distress and inconvenience they have offered a payment of £250 which they consider appropriate.
48. Mr Leps was never eligible to partake in the 'Choice' exercise as it was only those members in pensionable employment on or before 31 March 2008, and who were a contributing Scheme member on 1 October 2009, who were eligible to take part in 'Choices'.
49. It is unclear why Mr Leps believes their actions are unlawful. They may only authorise the payment of benefits in line with the Regulations that govern the Scheme. They have no statutory power to comply with his request to continue to pay the incorrect level of benefits as contained within the initial award and which Mr Leps is seeking. They are obliged to seek recovery of all such overpayments.
50. There has been no overpayment of pension; the amount owed to Mr Leps from the 1995 section was greater than the overpayment of his incorrect pension from the 2008 section. Hence the overpayment has been offset against the arrears. Though they have awarded the revised (1995 section) lump sum before they recovered from Mr Leps the incorrect (2008 section) lump sum this further award has not been paid and instead has been offset. The overpayment has therefore reduced to £39,512.05, i.e. £55,152.00 minus £15,639.95.

## **Conclusions**

### *Initial observations*

51. In his submissions Mr Leps has referred to the fact that he read about the Heyday challenge to the Government's default retirement age (of 65) on NHSBSA's website indicating a number of NHS employers had removed a retirement age from their policies. When he says he read about the Heyday challenge he was, however, already over age 65. But, in any event, this reference relates to whether an employer (and Mr Leps' 'employer' is not a party to this complaint) can end someone's employment by retiring them. It does not relate to the Scheme itself and, in particular, when Scheme benefits might be payable - including any upper age limit. It follows that I do not see that Mr Leps' submissions concerning the Heyday challenge are relevant here, particularly since he is self-employed and therefore, has no employer as such.



52. Mr Leps has also submitted that the NHSBSA have a contractual duty to provide him with the higher level of benefits (i.e. those put into payment shortly after 1 May 2012) and that their refusal to now do this constitutes breaching that contract. Pension benefits can be set up in a number of ways. Whilst they can be established under a contract, they can also be established under trust or by statutory provisions. In this case Mr Leps' pension under the NHS Pension Scheme is governed by statutory provisions and, as such, it is the NHS Pension Scheme's regulations which set out the terms of his pension rights. It follows that, given the manner in which the NHS Pension Scheme is governed and in the absence of all the elements necessary to create a contractual relationship, Mr Leps does not have a contract with NHSBSA. It follows that the NHSBSA, in failing to keep paying his benefits at the level put into payment shortly after 1 May 2012, has not breached any contractual promises to Mr Leps.
53. What is clear is that NHSBSA mistakenly paid Mr Leps benefits from the NHS Pension Scheme to which he was not entitled. The starting position is that if a person or body pays money to another under a mistake of fact, he is entitled to recover the payment "however careless the party paying may have been, in omitting to use due diligence to inquire into the fact"<sup>1</sup>. Nevertheless, there may be defences to recovery.
54. One such defence is estoppel. Mr Leps says that the NHSBSA should be "estopped from taking this course of action" i.e. from going back on their decision to provide him with the incorrect, higher level of benefits. Estoppel is an 'equitable' remedy applied by the courts mainly in circumstances where an individual does not have a clear contractual entitlement to a remedy but where the particular circumstances would make it unfair (unconscionable) not to provide a remedy. The two types of estoppel relevant to pension schemes are estoppel by convention and estoppel by representation. Although Mr Leps does not say which type of estoppel he is claiming, I will consider both (as well as considering whether Mr Leps has 'changed his position' as a consequence of the NHSBSA's payment of the incorrect, higher level of benefits).

#### *Estoppel by Convention and Estoppel by Representation*

55. Estoppel by convention requires the following to apply:
- the parties to a transaction acted on an assumed state of facts or law and took them to be true;
  - that their acceptance of the facts was more than passive;
  - that one party now wants to ignore the assumption;
  - it would be unjust for one or other party to go back on the assumption.

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<sup>1</sup> Kelly v Solari [1841] 9 M&W

The Courts look for more than passive acceptance on the part of the member. Thus, payment of contributions, receipt of booklet/payslips/benefit calculations, receipt of benefits, have all been found to be insufficient to establish estoppel by convention.

56. Four ingredients must be present for estoppel by representation (also known as promissory estoppel) to apply:

- one party has made a clear unequivocal promise, or a representation, to the other, which was intended to be acted on;
- the other party claiming estoppel acted in good faith and in reliance on that promise;
- as a result the other party has acted to his/her detriment; and
- the party who made the presentation or promise is now pursuing a claim that is inconsistent with the representation or promise;

When these are all present, estoppel may prevent a party going back on their promise.

57. Below I consider each instance where estoppel could apply:

*Telephone call of 25 June 2008*

It seems that Mr Leps' telephone call of 25 June 2008, was prompted following discussions with friends and colleagues about deferring pensions. His handwritten note of that call is the only evidence of such a discussion. That note says the telephone operator at the NHSBSA confirmed he could carry on working and pay in to the Scheme. Whilst he now says that his age was not a secret and was discussed during that call, there is no indication of that in his note. There is, no evidence of a clear representation that he could continue in the Scheme above the upper age limit of 70. Indeed, by the time of the discussion the Scheme's upper age limit had changed to age 75 and the operator may not have considered the fact that Mr Leps had reached age 70 prior to the upper age limit increasing from age 70 to 75. So in the absence of a clear and unequivocal promise estoppel by representation does not apply. Further, there is no evidence of any agreement or assumption by the NHSBSA that continuing beyond the upper age limit of 70, prior to 1 April 2008, was possible so, in my view, estoppel by convention does not apply either.

*Choices Pack issued in October 2011*

The NHSBSA has explained that this was issued to Mr Leps in error because he was still mistakenly shown on their records as an 'active' member of the 1995 section of the Scheme. They argue that he should have retired under the 1995 section with effect from 7 November 2007, when he reached age 70, and so the pack should not have been issued to him. The pack, issued in error, clearly gave a representation to Mr Leps that he could switch to the 2008 section. Mr Leps applied to switch to the 2008 section and the NHSBSA accepted his application. So it appears that Mr Leps

was made a clear and unequivocal promise by NHSBSA which he subsequently acted in reliance upon. The NHSBSA's conduct would support the argument that they had agreed to this switch and that argument is strengthened by the fact that for a period they went on to quote and pay retirement benefits from the 2008 section. So both parties assumed that Mr Leps met the eligibility criteria to join the 2008 section and acted upon that assumption. As such, certain elements of estoppel by convention also appear to be met.

Nevertheless, for estoppel to apply (irrespective of whether by convention or representation) Mr Leps needs to show he acted to his detriment and that it would subsequently be unjust to go back on such representation or assumed state of facts.

Had Mr Leps known the true position, what could he have done? He would have had to have had his pension benefits paid from the 1995 section of the Scheme at age 70 and he may have continued working thereafter.

After receiving the Choice's exercise pack Mr Leps has continued to work (doing mainly NHS work) and joined the 2008 section of the Scheme, which are both to his benefit, and not to his detriment.

Mr Leps says that if he had known the true position, he would have undertaken private dentistry. The letter of 21 July 2015, from the principals at the Clinic indicates this was a possibility. Had he not found out the true position at either November 2007 or June 2008, the next opportunity for possibly doing so may have been at October 2011, when the Choices Pack was issued. It is difficult to put ourselves in Mr Leps' position. But even if this matter had been discovered in 2011, I cannot conclude that he acted to his detriment in this regard at that time. Even when Mr Leps discovered, in October 2012, the true position his conduct – by staying at the Croxley Dental Clinic and continuing to work in the majority for the NHS – suggests that, on the balance of probability, he would not have moved to private dentistry work had he known the true position in either 2007, 2008, or 2011. I appreciate he says it was too late by 2012. But it is unclear to me why he would have done this aged 70 but not aged 74 or 75.

*Retirement quotation of 13 March 2012*

The retirement quotation satisfies some of the elements of estoppel by representation. The key question, though, as with his election dated 6 January 2012, to join the 2008 section considered above, is did Mr Leps act to his detriment when retiring aged nearly 74½? In his letter of 6 January 2012, Mr Leps said that he wanted to take his pension at the end of April 2012, i.e. prior to seeing the March 2012 retirement quotation. It is therefore, on the balance of probabilities, unlikely that the retirement quotation and the figures therein induced him to retire since the indications are that he wanted to retire anyway.

*Change of position*

58. For similar reasons, I cannot see that Mr Leps has changed in his position. He says that had he known the true position, he would have gone into private dentistry. However, his conduct after October 2012 (when he did find out about the true position), does not support that contention. I am, therefore, unable to conclude that he would have left NHS-work at Croxley Dental Clinic for more lucrative private work.
59. Other than retiring and claiming that he would have undertaken private dentistry, Mr Leps has not said he has changed his position in any other way. Mr Leps also appears to have set aside £25,994.38 (i.e. £13,326.91 and £12,667.47) paid to him which can go towards repaying the £39,512.05 overpayment.

*Other issues*

60. My role is to consider whether there has been maladministration, which includes neglect. It does not, however, extend to claims in tort.
61. Despite the above, there has clearly been maladministration by the NHSBSA in allowing Mr Leps to continue membership of the 1995 section of the Scheme beyond age 70, which they accept. Whilst Mr Leps feels that there should be some actuarial assessment of his actual loss, he cannot lose benefits to which he has no entitlement (as opposed to a loss of what he was expecting). Therefore, there is no need to actuarially value the benefits he feels he should be entitled to compared to those he is entitled to.
62. There would appear to be some confusion over the amount of employee contributions that have been returned. Mr Leps has provided a copy of his bank statement for February 2013, verifying the amount he says was paid. He also has provided a bank statement for March 2013, which confirms he has not been paid the amount that the NHSBSA say they have paid him. The NHSBSA, in turn, has provided no evidence to support their contention that all his contributions have been returned with interest on 1 March 2013. Indeed, it would be odd for NHS Dental Services to pay £12,667.47 in February 2013, and then to pay a further £19,096.01 (or £19,154.51), i.e. refund all his employee contributions having already refunded £12,667.47.

63. Based on the evidence I have seen, it would seem that only part (i.e. £12,667.47) of Mr Leps' employee contributions of £19,154.51 have been returned to him and no interest. Therefore, I am making a direction that they pay the balance, along with interest on the entire sum. Although NHS Dental Services deducted pension contributions prior to paying Croxley Dental Clinic for the dental contract, this money has been paid to the Scheme which has had use of that money. Further, NHS Dental Services is also a division of NHSBSA.
64. Whilst I agree the benefits payable to Mr Leps should be those that he ought to have received from the Scheme, he should also be compensated with interest for the late payment of his benefits (which has not happened). My directions also take account of this.
65. Finally, I note that the NHSBSA accepts that there has been a loss of expectation and offered Mr Leps £250. Whilst I agree with that position, I do consider the sum of £250 is inadequate compensation and make a suitable award below.

### **Directions**

66. I direct that, within 28 days, the NHSBSA shall:
- reduce the overpayment of £39,512.05 by £6,487.04 (this amount representing the outstanding employee contributions which have not yet been returned to Mr Leps).
  - reduce the balance of the overpayment by £750 to acknowledge the loss of expectation, distress and inconvenience that has been caused to Mr Leps by the NHSBSA's failure to administer his benefits in accordance with the Scheme's regulations.
  - separately calculate the amount of interest, calculated at the rate of interest quoted by the reference banks, due on:
    - (i) Mr Leps' refunded employee contributions of £12,667.47 between the dates when each employee contribution was deducted from his pay up to 18 February 2013;
    - (ii) the balance (£6,487.04) of Mr Leps' non-refunded employee contributions between the dates when each employee contribution was deducted from his pay up to the date of this determination;
    - (iii) Mr Leps' retirement lump sum of £15,639 (from the 1995 section of the Scheme) from 7 November 2007, up to the date of when the incorrect retirement lump sum from the 2008 section of the Scheme was paid to him;
    - (iv) Mr Leps' net pension arrears of £13,326.91 between the date each pension instalment was due up to the 28 January 2013.

- Once the NHSBSA has calculated the interest due, they are to write to Mr Leps confirming the amount of interest due on each part ((i) to (iv)) and how those sums have reduced the overall overpayment.

**Anthony Arter**

Pensions Ombudsman  
31 July 2015