

Ombudsman's Determination

Applicant	Mrs Jacqueline Handysides
Scheme	NHS Injury Benefit Scheme (the Scheme)
Respondent(s)	NHS Business Services Authority (NHSBSA)

Complaint Summary

Mrs Handysides complains that NHSBSA are seeking repayment of an overpayment of her Permanent Injury Benefit (**PIB**) of £13,046.28 and an award of damages of £12,500 she received from her NHS employer. She says that NHSBSA are not entitled to recover both amounts.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against NHSBSA because they have waived the recovery of the overpayment and their decision to offset the loss of earnings element of Mrs Handysides' damages settlement against her PIB is not perverse.

Detailed Determination

NHS Injury Benefits Regulations 1995 (as amended) (the Regulations)

The Regulations provide for payment of PIB where a person has suffered an injury or illness in the course of and/or attributable to NHS employment. The amount of annual benefit is a percentage of NHS earnings, the percentage depending on the impact on the person's earnings ability and the length of their NHS service.

As relevant, Regulation 17 "Damages" says:

"(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 or disease or in respect of the death of a person to whom these Regulations apply, 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

...

(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."

Material Facts

1. Mrs Handysides was previously employed as a Staff Nurse, she says for two nights a week. She also worked two nights a week at Windsor Court Nursing Home (**Windsor Court**), a private nursing home. She suffered a back injury at her NHS employment on 27 May 1997, which kept her off all work until 9 June 1999, when she was reallocated to an administrative role with her NHS employer as a Clerical Assistant. She was unable to return to her work at Windsor Court. She applied for, and received, Temporary Injury Allowance (**TIA**) up to June 1999, when she applied for PIB.
2. Mrs Handysides' PIB application was accepted on 3 July 2000, and backdated to June 1999. NHSBSA wrote to her on the same day to inform her that she had been assessed as having a Permanent Loss of Earning Ability of up to 25% (band 2) and incorrectly said that she would get £8,514.73 a year. This was equivalent to 60% of the best of her last three years' Total Pensionable Pay (although that was not identified in the letter). A leaflet sent with the letter showed that a member with NHS service of between 15-25yrs was only entitled to a 45% allowance and a 12.5% lump sum. The PIB would be subject to abatement as Mrs Handysides had returned to NHS employment and her combined PIB and current salary could not exceed her previous salary.
3. On 14 July 2000, and subsequently on 24 August 2000, NHSBSA wrote to Mrs Handysides informing her of the requirement to tell them of any damages received from her case against her NHS employer which was still proceeding at the time. They also wrote to her solicitors, Thompsons.
4. Overpayments arose over the next two years. They were connected to the amount that Mrs Handysides could earn without her PIB being abated and reflected some confusion between Xafinity Paymaster and Mrs Handysides' NHS employer, as to what her earnings actually were. They do not form part of the complaint with which I am dealing. They amounted to some £5,700. Xafinity Paymaster wrote to Thompsons (Mrs Handysides' solicitors) on 28 November 2001, confirming their agreement to wait for the settlement of her claim against her NHS employer before requesting repayment of the overpayment. Thompsons wrote back to Xafinity Paymaster on 23 January 2002, referring to the repayment agreement and asking for further information. This letter was passed on to NHSBSA who replied on 26 February 2002.
5. Meanwhile, on 11 February 2002, and subsequently on 19 March 2002, NHSBSA wrote to Mrs Handysides and her solicitors again, reminding her to inform them about any potential damages award received. Thompsons replied on 15 February 2002, and again on 26 March 2002, confirming that the hearing was imminent as a trial date of 18 April 2002, had been set.
6. On 29 April 2002, Mrs Handysides reached a financial settlement with her NHS employer. She received £30,000 in damages, of which £12,500 was described as

loss of earnings. Thompsons wrote to NHSBSA on 16 May 2002, confirming the settlement of £30,000 and they said NHSBSA would be notified when the cheque was received.

7. On 24 June 2002, Xafinity Paymaster wrote to Mrs Handysides confirming the total overpayment of £5,791.35 would be recovered as agreed by deduction of £400 a month from her pension commencing 30 June 2002. This amount was ultimately repaid.
8. Mrs Handysides says that Thompsons wrote to NHSBSA again on 28 June 2002, confirming the £30,000 had now been received. NHSBSA say that the letter was not received and they were unaware of the damages settlement until 2010.
9. On 22 September 2004, Mrs Handysides' NHS employer wrote to her and confirmed that her employment contract would be reduced from 18.5 hours a week to 16 hours a week from 1 November 2004. She says this was after discussions with NHSBSA following notification that her PIB would be abated. She, therefore, reduced her working hours so that her PIB would increase correspondingly.
10. Xafinity Paymaster wrote to Mrs Handysides on 4 June 2009, regarding the re-assessment of her benefits taking her earnings into account. She was told that her benefits for the 2008/09 tax year had been underpaid by £1,105.53 but her benefits would be reduced from 1 June 2009, to prevent an overpayment.
11. In May 2010, Mrs Handysides contacted NHSBSA to query if her PIB lump sum had been paid to her. On 26 May 2010, NHSBSA confirmed the PIB lump sum payment of £3,547.81 had been paid and asked about the settlement of her case against her NHS employer. Mrs Handysides informed NHSBSA of the damages settlement she received and NHSBSA initially asked for the full amount of £30,000 to be repaid to them. This was later reduced to the identifiable "loss of earnings" portion of £12,500.
12. On 19 July 2010, NHSBSA also informed Mrs Handysides that when looking at the offset of damages, they realised her PIB had been paid on the wrong basis since 1999. They eventually calculated that she had received an overpayment totalling £13,046.28.
13. Mrs Handysides complained about being asked to repay both amounts. She argued that she had already repaid two lots of overpayments and the award of damages had taken place a long time before. She also said that the damages took account of the PIB she was receiving so she was not being paid twice for the same injury. Additionally she argued that the loss of earnings was in regard to her second non-NHS employment.
14. In their Stage One decision of the two-part Internal Dispute Resolution Procedure (IDRP), NHSBSA accepted that there had been maladministration on their part in incorrectly calculating her PIB annual allowance and lump sum. They apologised for the error but said that Mrs Handysides could have noticed it at the time. They said

that, as a public body, they had a responsibility to recover monies incorrectly paid. They said Mrs Handysides could plead hardship, estoppel, or change of position, as a defence to recovery but she would need to provide evidence in support.

15. With regard to the damages awarded to her, NHSBSA mentioned Regulation 17 of the Regulations which they said allowed them to offset damages received for the same condition for which PIB was being paid. However, instead of offsetting the full amount of damages, NHSBSA would only require the identifiable loss of earnings element as a result of an agreement with the unions. They explained that they had a legal obligation to offset the amount from any PIB and “there is no choice in the matter”. NHSBSA went on to say that it was unfortunate that the case was filed away once the Finance Department had dealt with the abatement overpayment and no further enquiries were made regarding the damages settlement. Nonetheless, they said that the onus was on Mrs Handysides to inform them of any settlement.
16. Mrs Handysides appealed the decision. Among other things she said that she had reduced her working hours in reliance on the amount of PIB paid to her. The appeal was considered under Stage Two of the complaint process. NHSBSA repeated the earlier explanation about Regulation 17 of the Regulations which they said meant that they could not disregard the damages she received. They said that they were satisfied about the amount of the overpaid PIB and Mrs Handysides should provide documentary evidence if she felt that the calculations were flawed. NHSBSA further said that Mrs Handysides may have reduced her working hours to avoid the abatement of her PIB, or for other reasons. They were prepared to treat her circumstances sympathetically when considering options for repayment.
17. Mrs Handysides brought her complaint to us. We issued the first preliminary decision on 7 January 2014, upholding her complaint. We directed NHSBSA not to pursue her for recovery of the overpayment and pay £250 for the distress and inconvenience caused to her. We also said NHSBSA should make a new decision regarding the PIB award in the light of her settlement.
18. NHSBSA asked to review the case and decided not to seek recovery of the overpayment. They did however decide to carry on with the offset of £12,500 against her PIB and recover this amount.
19. NHSBSA are requesting repayment of an amount equivalent to £12,500 from her in accordance with Regulation 17 of the NHS Injury Benefits Regulations 1995 (as amended). They are currently deducting £83 a month from Mrs Handysides’ benefits in respect of the damages offset.

Summary of Mrs Handysides’ position

20. Mrs Handysides considers that it is unfair for NHSBSA to require her to repay £12,500 as the loss of earnings element of her settlement. She says that this amount includes non-NHS loss of earnings which should not be recoverable. Her PIB relates

purely to her NHS earnings and if any amount is recoverable it should not include non-NHS earnings.

21. She says that the loss of earnings element in the damages she was awarded is for the 18-month period she was off work from her injury. During that time, she was unable to work in the private nursing home and was only receiving a portion of her NHS salary via TIA.
22. Thompsons informed NHSBSA of the damages received back in 2002 and it is unfair to expect her to repay it over 10 years later due to maladministration by NHSBSA.

Summary of NHSBSA's position

23. NHSBSA strongly reject the view that they overlooked the purported letters from Thompsons, or that they went astray. They say that it is likely that the letters were not received.
24. Regulation 17 allows them to offset the damages received against Mrs Handysides' PIB and they have adopted a benevolent approach by limiting it to the loss of earnings element only. The Regulations do not make a distinction between NHS and private earnings, so it does not matter if the damages were in respect of non-NHS loss of earnings. This is consistent with the Pensions Ombudsman's view in the recent case of Dr Timmins (PO-71) in which he said that the Secretary of State had discretion regarding the amount of damages that should be offset and he can offset compensation for loss of non-NHS earnings.
25. The Regulations allow the whole amount to be offset but NHSBSA operate a discretionary policy of limiting this to loss of earnings. NHSBSA makes the assessment of what proportion of any award is non-income related
26. It is NHSBSA (on behalf of the Secretary of State) that are responsible for exercising the discretion inherent in Regulation 17. Respectfully, it is not for the Ombudsman to import his own criteria or considerations. Rather, it is for him to consider whether the decision by NHSBSA is so perverse that no reasonable decision maker would have arrived at that decision. Although they are not required to, NHSBSA have considered the effect that reducing Mrs Handysides' PIB would have on her. They have been mindful to protect the public purse and avoid duplication of payments from public monies for the same injury.
27. They have relied on the letter from Thompsons dated 28 June 2002, which sets out the breakdown of the settlement. This letter identifies that £12,500 was set aside for loss of earnings.

Conclusions

28. The damages Mrs Handysides received relate to the same injury for which she is claiming PIB. NHSBSA have correctly identified Regulation 17 as being applicable. They have also referred to a past case (Dr Timmins PO-71) in which we said that the NHSBSA (acting on behalf of the Secretary of State) can offset compensation for loss of non-NHS earnings. While that may be so, we went on in that case to explain that the power to do so was discretionary. We also expressed misgivings about the exercise of such discretion to offset Dr Timmins' PIB.
29. NHSBSA say that they have exercised their discretion in this case in that they are no longer seeking recovery of the overpayment. Also, they are only seeking to offset the loss of earning element indicated by Thompsons.
30. As we did in the previous case, I think it is helpful to consider the purpose of the Regulations. They are designed to compensate a person with payments of a percentage of their NHS earnings if NHS earnings ability is reduced as a result of an injury associated with NHS employment. So the risk of double compensation, should there be a Court award or settlement, is limited to lost NHS earnings. Offsetting of the whole of a settlement or award would effectively redirect to NHS compensation paid to others for earnings that they would have received from unconnected parties.
31. Mrs Handysides says that she lost non-NHS earnings as she was no longer able to carry on her employment at Windsor Court. While this may be the case, there does not appear to be any specific reference to this in the settlement. The letter from Thompsons dated 28 June 2002, mentions the loss of earnings as £12,500. It is therefore reasonable to take this figure as reliable. I appreciate that Mrs Handysides would have experienced loss of earnings from her employment at Windsor Court but it is not for me to determine how much of the general loss of earnings should be put towards it. Accordingly, the offset of the loss of earnings element against her PIB is not perverse in my view.
32. Mrs Handysides has provided evidence that her solicitors wrote to NHSBSA on 16 May and 28 June 2002, to inform them of the damages received in settlement of her claim. NHSBSA say that there is no evidence the letters were received and "it is unfortunate...that the file was put away...without any further enquiries being made about the damages settlement". The letters were correctly addressed to NHSBSA and there is no reason that they should ordinarily not have been received. NHSBSA agree that it is highly unusual for two separate letters to go missing in the post.
33. In my view, it is unlikely than at least one letter would not have been received. If the parties were reversed and NHSBSA was the sending party, I would be of the same mind that at least one letter would more than likely have been received but probably overlooked or otherwise mislaid. It is, my view that Mrs Handysides, via Thompsons, informed NHSBSA of the settlement and some administrative error prevented them from following it up.

34. The effect of this is that NHSBSA are now, many years later, seeking to recover £12,500 from Mrs Handysides' entitlement to PIB when this should have taken place in 2002. Nonetheless, Mrs Handysides would have been aware prior to the settlement that NHSBSA was seeking to recover some of the damages awarded. NHSBSA wrote to Thompsons on this matter on 14 July 2000, 24 August 2000, 11 February 2002, and 19 March 2002.
35. On 26 February 2002, in response to an enquiry from Thompsons, NHSBSA did incorrectly say that Mrs Handysides would "not be liable to refund any element of her current pension above the overpayment already agreed". I do not place much reliance on this letter as NHSBSA had written to Thompsons on several occasions (and more recently on 11 February 2002), saying that any loss of earnings element in the damages payment would be recovered. Therefore, it should have been clear that this statement was incorrect.
36. Having written to NHSBSA twice via Thompsons and not receiving a response, Mrs Handysides was not entitled to assume that recovery was no longer an option. However, if NHSBSA had properly dealt with the letters from Thompsons then this matter would have been dealt with at an earlier stage when the funds were still available. It is my view that the recovery action by NHSBSA would have caused some distress and inconvenience to Mrs Handysides but this is mitigated by NHSBSA no longer seeking recovery of the overpayment.
37. Overall, NHSBSA have exercised their discretionary power under Regulation 17 and I do not think that they have done so in a manner that can be described as perverse. They have also waived their right to recovery of the accrued overpayment.
38. Mrs Handysides' complaint is not upheld.

Anthony Arter

Pensions Ombudsman
14 August 2015