

Ombudsman's Determination

Applicant	Mrs K
Scheme	NHS Injury Benefit Scheme (the Scheme)
Respondent(s)	NHS Business Services Authority (NHS BSA)

Complaint Summary

Mrs K has complained that NHS BSA's decision to recover an overpayment of Personal Injury Benefit (**PIB**), which was paid by the Scheme, is unfair.

Summary of the Ombudsman's Determination and reasons

The complaint should be partly upheld against NHS BSA. Part of the overpayment, accrued in the period before 16 March 2010, is subject to limitation under the Limitation Act 1980 (**the Limitation Act**) and a valid change of position defence applies to part, but not all, of the remainder of the overpayment which is not statute barred.

In addition, Mrs K has suffered severe distress and inconvenience, such that an award is warranted.

Detailed Determination

Material facts

1. Mrs K applied for PIB in 1986, following an injury at work which led to permanent, lower paid employment. The application was accepted, and Mrs K was granted a 'Band 3' PIB award on the basis that she was assessed as having a permanent loss of earning ability of between 25% and 50%.
2. On 27 June 1990, Mrs K received a letter explaining that her PIB entitlement had been reviewed and that this was now to be paid free from income tax. The letter said:

"An allowance is payable if your income by way of any superannuation pension and certain Social Security benefits is less than this amount..."

...A full explanation of how injury benefits are calculated is given in the enclosed leaflet. The leaflet also explains what changes you need to report to this office."

3. Mrs K has provided a copy of the 'IB Leaflet 2' which she received with the letter dated June 1990. The front cover of the leaflet says:

"This leaflet explains how we have worked out your Injury Benefits and tells you what changes you must report to us.

It is very important that you tell us straight away about these changes.

If you do not, we might be paying you a higher amount of Injury Allowance than you are entitled to and you would then have to pay back the extra money.

For this reason you must keep the leaflet safely and read what it says every time there is a change in any of your Social Security benefits"
(original emphasis).

4. Page two set out the benefits considered when calculating the PIB entitlement. These are listed as:

- Sickness Benefit or Invalidity Benefit.
- Industrial Disablement Benefit (either a lump sum or a pension).
- Reduced Earnings Allowance.
- Unemployment Supplement.
- Severe Disablement Allowance.

5. In 2006 and early 2007, as she was approaching her retirement date, Mrs K informed several different departments of the NHS about her retirement including: NHS Pensions Agency in Fleetwood (which shares its offices with the Scheme); the Head of HR and the HR team at Yorkshire and the Humber Strategic Health Authority; and a Pensions Adviser at York NHS Trust.

6. Mrs K also sought clarification that she had completed all of the requirements in relation to her pension and received confirmation that she had. For example, in an email dated 13 June 2006, an NHS HR Adviser confirmed, "As you have 'special class status' and this isn't a voluntary early retirement issue, then you've covered everything as far as I'm aware."

7. In April 2007, Mrs K applied to take benefits from the National Health Service Pension Scheme (**NHSPS**), she submitted form AW8 'Declaration of entitlement and application for payment'. In the section of the form which enquires about other pensions there is a handwritten annotation in which Mrs K declares, "Permanent Injury Allowance (paid from Crawley)."

8. In May 2007, Mrs K started to receive her pension benefits from the NHSPS.
9. In July 2014, after reaching State Pension Age, Mrs K was subject to a routine review of her PIB award. At this point the Scheme became aware that Mrs K had been receiving an NHSPS income since 9 May 2007.
10. Income from the NHSPS is accountable against the annual PIB award. Between 9 May 2007 and 22 September 2014, an overpayment of PIB had accrued amounting to £106,890.50.
11. On 15 September 2014, NHS BSA wrote to Mrs K explaining that there had been an overpayment. However, NHS BSA's letter did not notify Mrs K of the value of the overpayment. Mrs K said that she subsequently telephoned NHS BSA and was verbally informed the overpayment was £106,890.50. On 23 December 2014, NHS BSA informed Mrs K of the value of the overpayment in writing.
12. Mrs K appealed the decision to recover the overpayment through the Scheme's two stage internal dispute resolution procedure (**IDRP**). On 16 April 2015, Mrs K submitted a detailed stage two IDRP complaint including the following explanation of decisions she had made in 2013:

"I have always lived and spent well within my means... never accruing debt except for a mortgage and occasional car loans...

I do not have the overpaid monies I did not save it. Since September 2014 my income has significantly reduced, which I am getting accustomed to... to repay the overpayment at the same rate it was paid to me i.e. over the same timeframe would cause severe hardship in terms of what I had prepared for my retirement and what income I would be left with...

...after retirement we had the time to take advantage of our love of travelling so we then travelled several times a year. I had made plans for my retirement and to ease our financial commitment we decided to invest in Solar Energy which long term would keep our energy bills down. In 2013 following further major surgery and after several really bad years' health wise, our 40th Wedding Anniversary and my husband's 70th birthday was approaching. We decided our 'rainy day' had come and... decided to travel around the world for 2 months; we changed our car and refurbished our staircase...

Since 2007 we have taken 23 holidays. Prior to retirement this would have been 2 holidays per year... since September 2014 we have not travelled anywhere."

13. On 13 May 2015, NHS BSA informed her of the outcome of the stage two decision, in which it noted her position that she had, "expended monies received in reliance that you were entitled to the monies paid." It upheld the original decision to seek recoupment and continued, "if you wish to make a claim that you are unable to repay any or all of the overpayment because this would cause you hardship you will need to

demonstrate this by providing details of your income and expenditure on the form previously provided. Receipt of this information would enable our Finance Department to give thorough consideration of your ability to repay the overpayment.”

14. In July 2015, Mrs K provided a statement of her income and expenditure as at 2015, which was disclosed to NHS BSA in the course of our investigation. In this Mrs K declared spending of £25,000 on an around the world holiday in 2014, £40,000 on a new car in 2013, £6,000 on solar panels and £7,000 on a new staircase and hall. Mrs K declared a current savings balance at that time of £48,600 and said she had been saving £400 per month into an ISA since the beginning of 2015.
15. As the investigation progressed Mrs K provided further information which has been shared with NHS BSA. Following the Adjudicator’s Opinion, NHS BSA submitted a response which stated that it thought further information was needed before a change of position defence could be fully considered. Mrs K provided additional evidence on 1 June 2017 which was shared with NHS BSA on 6 June 2017.
16. On 16 June 2017, NHS BSA informed this Office that its Financial Analyst had reviewed the additional evidence Mrs K had provided and said, “Having reviewed the further evidence supplied by Mrs [K] I am of the opinion that we cannot fully assess a “Change of position” defence as there are significant elements of evidence missing and questions that require clarification.” It went on to say “...there has been insufficient information provided so far to reach a conclusion relating to a change of position defence. It is understood that further information would be required relating to daily expenses and complete household outgoings, which would include those of Mr [K]”
17. On 4 July 2017, as part of the investigation this Office requested Mrs K complete NHS BSA’s Income and expenditure form and provide information on her and her husband’s finances.
18. On 30 August 2017, Mrs K provided further evidence including NHS BSA’s Income and expenditure form which she had completed with her husband. This was provided to NHS BSA on 15 November 2017 along with the first Preliminary Decision.
19. On 23 November 2017, NHS BSA confirmed that it had no further comments to make.
20. On 4 December 2017, Mrs K provided further comments in response
21. Mrs K’s further comments and the second Preliminary Decision were sent to NHS BSA on 6 November 2018.
22. On 19 November 2018, NHS BSA responded stating that it has not had the opportunity to consider Mrs K’s defence to recovery of the part of the overpayment not statute barred from recovery and that it considers the award for distress and inconvenience to be excessive.

23. On 23 January 2019, NHS BSA were given further opportunity to consider any of the defences against recovery.
24. On 28 January 2019, NHS BSA responded confirming that it has and continues to place all recovery consideration on hold pending the Ombudsman's Determination.
25. On 4 February 2019, NHS BSA were asked to provide their comments on the change of position defence provided by Mrs K.
26. On 19 February 2018, NHS BSA responded.

Summary of Mrs K's position

27. Mrs K has said she was not aware that she had to inform the Scheme separately that she had claimed her NHSPS benefits. Mrs K thought the two departments fell under the same "umbrella."
28. The Scheme and NHSPS operated from the same office, frequently corresponded using the same letterhead and both referred to themselves as a 'pension' and to her as a 'pensioner'. So, there was nothing to alert her to the fact that they were two distinctly separate schemes.
29. Contrary to what NHS BSA has said, Mrs K considers that she did properly inform the correct office of her situation saying, she has always kept NHS BSA informed about changes to her circumstances.
30. Mrs K has said it is unreasonable for NHS BSA to blame her for not acting on a leaflet sent over 17 years ago. She also points out, "On all the leaflets I have the first reference I can see linking [PIB] and what I would call a work/private pension is on the 2014 revised leaflet, the year my problem was identified."
31. NHS BSA has accepted that it could have identified the issue in 2007, so it is unfair to pursue her now for money which has been paid to her over the course of seven years. Mrs K questions whether limitation applies.
32. NHS BSA's argument is that it must recover the overpayment as this comes from public funds. But, had it not been for the overpayment, Mrs K says that she would have claimed, and would most likely have been eligible for, state benefits, specifically disability and or mobility allowances, which would have been payable up to and possibly beyond her statutory retirement age in July 2014. These would also have come from public funds, so there is some question about whether recovering the overpayment would be counteracted by the payment of benefits.
33. Further, Mrs K says she has suffered detriment because her income was reduced and she did not apply for the benefits to which she may have been entitled absent the continued receipt of the PIB.
34. Mrs K has said she acted in good faith and has spent the money she received to enrich her lifestyle. She cannot see how NHS BSA can seriously question that the

same expenditure or level of expenditure would have been incurred without the additional income, or that the overpayment did not have a causative effect on what was spent over the period 2007 to 2014.

35. In relation to the overpayment, and how this has been spent, Mrs K has made the following submissions: -

- The holidays which she and her husband had taken were always according to their means and had grown more expensive as her salary increased. Post-retirement the frequency and standard of her family holidays increased, they paid for her son and his family to join them and upgraded to a higher standard of accommodation. They would always have continued to travel but even if the holidays had been to the same standard as pre-retirement she could not have continued to afford the increase in frequency without the extra income from the PIB because her salary had halved.
- There was no way Mrs K would have taken such an expensive trip for her 40th wedding anniversary and her husband's 70th birthday without the comfort of the additional income. She and her husband would have done something, but this would have been, "within their budget".
- The solar panels fitted in December 2013 at a cost of £6,995 had a quoted payback of 7.86 years, but, based on return to date, it is likely to take longer. The panels are not likely to be resalable because the feed in tariffs payment only applies to new installations. Further, there would be the cost of removal and making good the roof to consider.
- Mrs K provided further detail of costs incurred renovating the house over the period with supporting documentation, including £6,325 spent on the hall and stairs in 2014.
- Mrs K also listed (but did not produce evidence of) other significant expenditure over the period; £4,000 on bedroom refurbishment, £6,000 on a bathroom, £2,000 on the kitchen, £30,000 spent on her son's wedding along with a further £6,500 supporting him in his business.
- She explained her husband's financial circumstances stating that in 2007 his income was roughly £10,700 per year. He retired in 2011 with a state pension of £532.72 per month and a private pension of £444.52 per month. Mrs K has always been the major wage earner. She and her husband own their house jointly and have always held a joint current account. For simplicity the ISA is in her sole name.
- Mrs K explained that at the time she retired, she had a two-seater Mercedes SLK which she used for her extensive work travel. In 2011, her husband sold his work van for £1,200 and they bought a second-hand estate car for £15,000. In 2013, Mrs K sold her car for £9,000, gave the estate car, then worth around £10,000, to

her son, and bought a new Mercedes for £47,347. Mrs K says she would not have given her son their existing car if they had not had the additional income.

- Mrs K gave further details of her savings over the period; at retirement, in 2007, she took a lump sum of £66,324.21 bringing her and her husband's joint savings to around £78,000 in total. That was reduced by around £20,000 when markets fell in 2008 after which the money was transferred into 'no risk' bonds. In 2010, Mrs K's mother gave her £45,000 which now forms the bulk of their current savings. Having that buffer and the regular additional income allowed her and her husband to spend their other money as they did. They would not have spent money so as to reduce their savings to zero over the period between 2007 and 2014.
- In September 2014 their savings stood at £11,275 in a current account and £31,642.80 in an ISA, totalling £42,918.04.
- If £106,000 had been taken out of the household financial equation during the period 2007-2014 she and her husband could not have spent as they did without getting into substantial debt, even if they had spent all their savings. It is therefore clear that she spent substantially more than she would otherwise have spent based in the belief that she was entitled to the PIB.
- Repayment of the £68,197.41 overpayment made post 16 March 2010, at a rate of £400 per month would take 12 years, by which time she will be 77 and her husband 86. There would be further detriment if one of them were to pass away, leaving the other solely responsible for repayment.

Summary of NHS BSA's position

36. NHS BSA accepts that it could have passed information from the NHSPS administration team to the Scheme administration team alerting it to the fact Mrs K was applying to take benefits from the NHSPS. It has also accepted that the way in which Mrs K was informed of the overpayment was "inappropriate."
37. But, notwithstanding this, NHS BSA has said the fact of the matter is that the NHSPS and the Scheme are run as two separate schemes, so the onus was on Mrs K to inform the Scheme of any changes to her circumstances.
38. The 'IB Leaflet 2', sent with the PIB award letter on 27 June 1990, confirms what changes need to be reported to the Scheme.
39. NHS BSA says that as a public department, it is subject to Treasury guidance on dealing with overpayments. As a result, it will always seek to recover overpayments, regardless of blame. Further, it is incumbent on Mrs K to make a change of position argument, and it would be unjust for NHS BSA to be expected to advise Mrs K on how best to lay out her defence.

40. A successful change of position defence relies on Mrs K showing that her circumstances have changed detrimentally, that the change of circumstances was caused by receipt of the overpayment and that she is not disqualified from relying on the defence.
41. It accepts that since 2007 Mrs K spent money on holidays, including an around the world holiday, a new car, solar panels and new stairs and hall. However it is not clear that the expenditure is due to the overpayment; the expenditure might have been incurred in any event.
42. With respect to the round the world holiday, the reference to the 40th wedding anniversary and 70th birthday show there were, "other external reasons" for that trip which are unrelated. There is no clear evidence to show Mrs K would not have used savings to go on such a trip had she not received the overpayment.
43. Mrs K notes that she was in the habit of taking two holidays a year pre-retirement and was likely to continue that pattern post-retirement. Given she and her husband had more time they would, "inevitably" have travelled more. The additional expense cannot therefore be linked to the overpayment.
44. The defence may not be available where Mrs K has used money to buy assets with a resale value. The resellability of the solar panels should be investigated further. Alternatively the energy bill savings generated should be made available to recoup the overpayment.
45. Mrs K should provide statements in respect of all of her savings so it can be assessed whether these savings were made as a result of the overpayments made to her; saving overpayments would clearly not put her in a detrimental position.
46. Mrs K had not put forward any supporting evidence to demonstrate her financial situation during the IDRPs and the further evidence disclosed in the course of investigation by the Ombudsman contains gaps.
47. NHS BSA accepts that the overpayment which occurred before 16 March 2010 is irrecoverable under limitation principles. This was £38,693.09. The overpayment accrued since 16 March 2010 was £68,197.41.
48. In May 2015 NHS BSA was informed by Mrs K that she would address proposals for repayment once she had received the final outcome from the Ombudsman. NHS BSA had at that point already provided Mrs K with the opportunity to provide details of her income and expenditure which would allow NHS BSA to consider ability to repay the overpayment. The onus is on Mrs K to provide evidence and submit a case for change of position.
49. All financial information from Mrs K has been provided to NHS BSA during the course of the investigation. In June 2017 NHS BSA's Financial Analyst/Accountant had concluded that there was 'insufficient information provided so far by Mrs K to determine a defence of change of position'.

50. Additional financial information was only received on 16 November 2017 and therefore could not have been considered during IDRPs or at the time when the second preliminary decision was issued because all recovery consideration had been placed on hold pending the completion of the investigation by the Pensions Ombudsman.
51. To date NHS BSA has not been in a position to consider this particular information in relation to a defence of change of position as all recovery consideration had been placed on hold pending the completion of the investigation by the Pensions Ombudsman. Mrs K, "would be in the position to repay the balance of the overpayment without any severe impact on her lifestyle. Mrs [K] has indicated on the income and expenditure form dated 30 August 2017 an offer of repayment at £400 per month whilst still making savings. NHS BSA submits that it would be unfair to deprive the public purse of the overpayment in such circumstances."

Conclusions

52. The starting position is that the Scheme is only required to pay what is due under the rules. Neither party disputes that an overpayment has occurred.
53. Mrs K has argued that she should not have to repay the overpayment. Given the period of time in respect of which recovery is sought, I must first consider the effect of the Limitation Act.
54. NHS BSA has confirmed it is making a restitutionary claim for unjust enrichment by requesting repayment of the overpayment rather than recoupment. It has not disputed that the Limitation Act applies in this case.
55. The usual time limit for seeking recovery of an overpayment is six years from the date of the incorrect payment (the Limitation Act, section 5). There is, however, provision for the six year period to be extended where the overpayment is the consequence of a mistake. Under section 32 of the Limitation Act, the time would not start to run until the mistake was discovered or could "with reasonable diligence" have been discovered.
56. I find that time started to run (for the purposes of the Limitation Act) in 2007 when Mrs K first received the overpayment of benefits. I say this because, being reasonably diligent, NHS BSA should have known that it would be making an overpayment at this time. NHS BSA failed to make Mrs K aware of the distinction between NHSPS and the Scheme upon which it now relies. Mrs K had in fact already provided information to NHSPS that she was in receipt of PIB in a letter dated 2 August 2005, addressed to NHS Pensions Agency, Hesketh House, Fleetwood – the same office in which the Scheme is located. Mrs K said: -

"I am also in receipt of Permanent Injury Allowance... following a back injury during my work as a District Nursing Sister in 1981."

57. Consequently, NHSPS would have held information on file, prior to it paying benefits, which being reasonably diligent, ought to have alerted it to the fact that Mrs K was also in receipt of PIB.
58. In April 2007, when Mrs K completed the AW8 form to apply to take benefits from the NHSPS she declared once again that she was also in receipt of PIB. I again think that this ought reasonably to have made NHSPS aware that Mrs K was in receipt of PIB. I see no reason why NHSPS could not have shared this information with the Scheme. I am not persuaded in Mrs K's case that NHS BSA had to take any exceptional or excessive measures to discover the mistaken overpayments in 2007. I find that with reasonable diligence the overpayment could have been discovered at this time.
59. NHS BSA therefore had six years from 2007, and the date of each overpayment thereafter, in order to make its claim for recovery.
60. I turn now to the date on which NHS BSA made that claim. In the recent High Court case of *Webber v Department for Education and another [2016] EWHC 2519 (Ch)* (**Webber**) the Judge hearing the appeal decided that the cut-off date for limitation purposes (in overpayment cases before the Ombudsman) was the date when Teachers' Pensions brought their claim during the course of the Ombudsman's complaints procedure. That date was identified as being the receipt by the Pensions Ombudsman of Teachers' Pensions' response to Mr Webber's complaint.
61. NHS BSA's formal response to Mrs K's complaint was received by the Ombudsman on 16 March 2016. For the purposes of the Limitation Act this is the date at which time ceased to run.
62. Following the decision in *Webber*, NHS BSA is only able to recover those overpayments dating back 6 years from 16 March 2016, (so only those overpayments which occurred post 16 March 2010). The overpayments of £38,693.09 made during the period 2007 to 2010 are therefore statute barred by virtue of the Limitation Act and NHS BSA is unable to effect recovery for those.
63. I turn now to whether Mrs K should be required to repay the balance of £68,197.41. Mrs K has argued that she should not be required to repay the balance of the overpayment because she no longer has it, in effect she has changed her position.
64. NHS BSA has argued that it has not been afforded the opportunity to consider the defence put forward by Mrs K as she has only provided evidence to this Office during its investigation. There is no dispute that NHS BSA has had sight of the financial information and Mrs K's submissions during the course of the Ombudsman's investigations. I therefore understand NHS BSA's argument to be in two parts, firstly that NHS BSA could not consider the change of position defence which Mrs K was putting forward at IDRPs because it did not have the financial information at that stage, and secondly that it still cannot consider those defences because it has placed a hold

on recovery proceedings, and it should now be given a further opportunity to make its own first instance decision.

65. Turning first to the IDRP decision, I agree that the onus was on Mrs K to raise a change of position of defence and to produce evidence in support. I consider that she did so. The obligation was then on NHS BSA to determine whether the change of position defence which she had raised was made out or not. That does not appear to have happened in this case.
66. NHS BSA did ask Mrs K for further information but indicated that this was required only to inform the affordability of a repayment plan. There was no indication that it was still considering the defence to repayment in principle. Mrs K therefore brought her complaint asserting that defence to the Ombudsman as she was invited to do if she disagreed with NHS BSA's decision to pursue recovery. I am therefore satisfied that NHS BSA had an opportunity to consider Mrs K's change of position arguments at IDRP stage.
67. I turn now to the argument that NHS BSA should now be permitted further opportunity to consider the defence. For the avoidance of doubt, as noted in paragraphs 15-26 above, NHS BSA has explicitly been invited to comment on the defence in the course of this investigation. I therefore understand NHS BSA to be arguing that I should permit NHS BSA to consider the defence again at first instance. I do not agree. It is the practice of this Office in the event of an overpayment complaint to consider the matter in full rather than remit back particular aspects that may not have been considered in full during the scheme's IDRP. This generally reduces the length of time a matter is disputed for all parties involved.
68. Our process allows both parties to provide comments and consider the information provided during the course of our investigation. NHS BSA has been provided with all of the evidence which Mrs K has submitted in the course of the investigation. It has been given the opportunity to present its comments to me on that evidence having had sight of preliminary decisions setting out how it has been taken into account.
69. I am therefore satisfied that NHS BSA has had the opportunity to consider and comment on all of the evidence which Mrs K has provided in respect of her change of position defence. I understand that the recovery proceedings themselves have been put on hold pending the outcome of Mrs K's complaint to the Ombudsman, but I do not agree that NHS BSA therefore continues to be unable to consider and make representations about the defence. The availability of the defence is a separate issue which needs to be determined before NHS BSA makes a decision about affordability in the sense of rate of repayment. I make no direction about rate of repayment, which I agree is still for NHS BSA to consider, but I can see no reason now to remit consideration of the change of position defence to NHS BSA.
70. To establish a defence of change of position, Mrs K needs to demonstrate: -
 - That the overpayment was received in good faith;

- that, but for the mistake, she would not have acted in the way that she did;
- that the action taken is irreversible; and,
- that it would be inequitable for NHS BSA to seek recovery.

71. I have no reason to doubt that Mrs K received the overpayment in good faith. NHS BSA has said NHSPS and the Scheme are distinctly separate schemes, so the onus was on Mrs K to inform the Scheme of her NHSPS benefits. However, I am not persuaded that this was adequately communicated to Mrs K.
72. The 'IB Leaflet 2', enclosed with the letter sent in June 1990, awarding Mrs K PIB, emphasised the need to make the Scheme aware of any changes to the Social Security benefits she was entitled to. It did not emphasise the need to notify the Scheme directly about receipt of pension.
73. There is some question about which version of the leaflet Mrs K actually received. Mrs K and NHS BSA have both provided different versions of the leaflet, Mrs K has said the copy she provided is the version she received in 1990, whilst it seems the version NHS BSA has provided is an archive copy. On the balance of probabilities, I am satisfied that the leaflet Mrs K has provided is the version she received in 1990.
74. The need to make the Scheme aware of any changes to the Social Security benefits was set out in a bold typeface on the front of this document, and it went on to list the benefits which would impact the PIB award. By contrast, the only reference to pension income being included in the calculation is in a worked example provided on page five of the leaflet.
75. The explanatory note to the worked example said:
- “Because the person is getting a superannuation pension plus certain Social Security benefits, we have to take these away from the guaranteed income to work out how much Injury Allowance we can pay.”
76. That note explains that there are dependencies and calculations required, but it does not say that the result of taking a pension should be no injury allowance. It also makes no mention of who Mrs K needed to notify about what in order to enable the necessary calculations to be done.
77. Bearing in mind Mrs K received the leaflet some 17 years before taking benefits from the NHSPS, I also find it unlikely that she would recall the detail of the worked example.
78. I find that Mrs K was generally open about her PIB in her dealings with NHSPS, the Scheme and her employer. She has provided a substantial amount of evidence in support of her complaint including copies of letters she sent when she moved to a different Primary Care Trust and when she began working in a seconded position. These documents confirm that Mrs K did, in so far as she understood the requirement

to do so, take steps to keep the Scheme updated with changes to her circumstances. Mrs K has, for example, provided a letter dated 10 September 2003, which says, "Having been in receipt of Permanent Injury Allowance for several years, I am writing to inform you of a change to my employment circumstances and salary increase..." This letter was addressed to Paymaster in Crawley, rather than the Scheme in Fleetwood, yet there is no suggestion that this was not received or properly processed by the Scheme. Similarly, in the lead up to her retirement Mrs K was diligent in updating different departments of the NHS about her retirement plans. She also sought clarification that she had completed all of the requirements in relation to accessing pension benefits and was told she had. I find it more likely than not that, had Mrs K been aware of the need to specifically and separately inform the Scheme that she had started to receive her NHSPS pension, she would have done so.

79. Mrs K has provided copies of the payslips she receives for her NHSPS income and the PIB income. Both payslips are very similar, save for the reference and financial values, and both make reference to the payments being a 'pension'. Moreover, they both have the same address, so I can see how Mrs K would fail to see the distinction between NHSPS and the Scheme.
80. I do not find that NHS BSA made Mrs K sufficiently aware that her letters addressed to the Fleetwood address would not also be passed to the Scheme. The distinction between NHSPS and the Scheme, which NHS BSA has relied on and which it considers to be so important, is largely internal. I have not seen anything to convince me that Mrs K would be aware of this difference, or the significance of this.
81. I conclude that Mrs K genuinely thought she had informed the relevant parties of all that they needed to know. In making this finding I have taken into account that both schemes operate from the same offices and when Mrs K wrote to Paymaster in Crawley her correspondence was seemingly dealt with by the Scheme, despite this being addressed to an entirely different office.
82. NHS BSA has accepted that PIB is payable for life and this accords with Mrs K's understanding. I can also see nothing in the 'IB Leaflet 2' which makes it plain that this was not the case. I do not conclude it would automatically follow that Mrs K should have expected her PIB to end simply because she started to receive benefits from the NHSPS.
83. For the reasons above, I conclude that Mrs K reasonably relied on NHS BSA processing her retirement application properly, and there is nothing I have found to suggest Mrs K was capable of identifying that she was in receipt of an overpayment. Consequently, I find that the overpayment was received in good faith.
84. Turning to the second criteria, whether, but for the mistake, Mrs K would have acted differently. Mrs K was asked to provide as much evidence as possible to document the spending which she incurred in reliance on the overpayment.

85. Mrs K has produced a complete list of holidays taken, along with evidence on credit card statements of some spending towards these holidays, but there are no invoices for the holidays and Mrs K has been frank about the difficulty of reconstructing the spending. It is extremely difficult to conclude that particular, quantifiable elements of holiday spend would not have been incurred had the overpayment not occurred. However, I accept that there was probably an element of upgrading in the standard of those holidays.
86. Mrs K has been able to produce receipts in respect of the new car purchase totalling £38,624.74. She explained that her previous statement about its cost was a mistake. The receipts show the purchase was completed by her husband in multiple payment stages and I accept that explanation. I have considered carefully the extent to which the purchase of the new car was caused by receipt of the additional income stream. I conclude Mrs K would have sold her existing car anyway, because she says she could no longer drive it comfortably. I accept that she was unlikely to have bought a brand new one in 2013 unless she believed she was entitled to keep the additional income since she had recently bought an estate car which was suitable for her future needs. I also accept her evidence that she would not have given that estate car away, particularly as she was already supporting her son's family in other ways.
87. On the evidence before me I find that Mrs K would probably not have incurred as much of the expenditure as she did between 2010 and 2014, had it not been for the overpayment. With the exception of the new car, I have found it impossible to isolate individual items of spending which would not have been incurred had it not been for the overpayment. I accept that Mrs K may not have spent her savings down to zero, but that does not mean she would have spent none of them on the rainy day which she says she felt had arrived in 2013.
88. Regarding the third point, whether the actions taken are irreversible. The additional spending on holidays is plainly irreversible, so too is spending on providing a generally higher standard of living. At the point of notification of overpayment, the new car had suffered irreversible depreciation, but was itself resalable. Mrs K had by then given away her old car and would have had to buy another. Therefore, she elected to keep the new one. The additions to the house are not readily extractable and resalable and I am satisfied that they should be considered irreversible unless and until the house is sold.
89. Turning to the final and overarching element of the defence, I have to consider whether it would be inequitable now to require Mrs K to pay back those elements of irreversible spend, the recovery of which is not statute barred.
90. Mrs K's primary argument is that she should not be required to pay back the balance of £68,197.41 which has been overpaid since March 2010 because she increased her standard of living generally in reliance on the overpayment.

91. I accept that there was an overall increase in standard of living which would not otherwise have occurred, it occurred over a long period of time during which savings were built up and then spent down again. In these circumstances, I cannot isolate the benefit of the overpayments made since March 2010 from those which occurred before it
92. Since I issued my first preliminary decision, Mrs K has argued that there should be an apportionment of the balance due since March 2010 which takes account in some way of the payments made that would definitely not have been made. I see the force in this argument.
93. I am mindful of the standard of proof applicable in this situation. This is set out in *National Westminster Bank plc v Somer International UK Limited* [2002] 1 All ER 198, where the Court held that a change of position defence is not limited to cases where funds have been spent on specific identifiable items of expenditure, and that it may be right for the Court not to apply too demanding a standard of proof when an honest defendant says he has spent an overpayment on improving his lifestyle but cannot produce detailed accounting. I am satisfied that this is one of those cases.
94. Consequently, and to assess the overall equity of requiring repayment, I have looked at Mrs K's finances over the overpayment period as a whole. Since Mrs K and her husband's finances are very much intertwined, this also requires consideration of Mr K's income.
95. Prior to her retirement, Mrs K was the main wage earner with a salary in excess of £50,000.00. Post-retirement, using the figures from 2007, provided by Mrs K, she was entitled to £1,555.10 per month in pension alone. The PIB brought in, "an additional £1,083 - £1,345 per month over the relevant period." Thus, in 2007 Mrs K contributed £2,638.10 per month to the household finances compared with Mr K's income of £977.24 comprised of his state and private pensions, producing a household total income of £3,615.34. Had the correct level of income been paid; that is, without the overpayment, Mrs K would have earned £1,555.10 to Mr K's £977.24, producing a household total income of £2,532.34. Thus, at that point Mrs K's household income was 43% higher than it should have been.
96. Based on the evidence, I am satisfied that during the period in which the entire overpayment accrued, Mrs K was overspending in a relatively consistent way on providing an overall increase in her standard of living. Mrs K's pattern of spending demonstrates that she was living within her means and maintaining a savings buffer, as she had prior to the overpayment commencing. Therefore, it is reasonable to conclude that when Mrs K says she would have spent less on things, she would have spent 43% less on them.
97. Working on the principle that it is inequitable for an individual to repay overpaid money, which they would not otherwise have spent, and which is now irrecoverable, I find that Mrs K should not be required to repay £29,324.88. This represents 43% of

£68,197.41, where £68,197.41 is the amount of overpayment made after 16 March 2010. Thus, NHS BSA's overall recovery is limited to £38,872.52.

98. In conclusion, I am satisfied that Mrs K could not reasonably have identified that she was in receipt of an overpayment. She spent the additional money in good faith and, although, I cannot quantify specific items of irreversible spend which she would not have incurred but for the overpayment since March 2010, I am satisfied that overall Mrs K has detrimentally changed her position as a result of spending 43% more than she would otherwise have done, over the entire period in which the overpayment accrued. Therefore, I am satisfied that it would now be inequitable to require her to make repayment of that proportion of the debt which is not statute barred.
99. NHS BSA have been given an opportunity to comment on the approach set out above in light of all of the financial evidence which Mrs K has provided and I have considered their response. For the reasons set out below, I do not consider that Mrs K could repay the whole balance of the overpayment without detrimental impact on her lifestyle. As soon as Mrs K became aware that there was an overpayment liability she curtailed her spending, in particular by not taking any holidays and started to set money aside in anticipation of having to pay money back to NHS BSA. That was a responsible response which has already had an impact on her lifestyle. She says she is now saving £500 per month so that she can in future take holidays again in addition to setting aside £400 towards repayment of the debt. I consider this is consistent with trying to re-establish her pre-overpayment lifestyle where she maintained a savings buffer and took holidays out of money which she saved for that purpose. I do not consider it unfair to the public purse to allow her to attempt to re-establish the lifestyle which she would have had without any overpayment. I remain satisfied that Mrs K has shown change of position to the extent which I have set out above.
100. Turning now to the separate issue of the period over and the rate at which recovery may take place, I make no direction about this. I would expect NHS BSA to take account of all of Mrs K's available savings, income and expenditure when assessing the affordability of her repayment proposals. I do not consider it necessary or appropriate for me to determine a rate of repayment or to try to anticipate future changes of circumstance. If an agreed repayment plan were to become unaffordable in future because of a change of circumstances, that is an issue which I would expect NHS BSA to reconsider at that point.
101. Lastly, I have considered Mrs K's submission that she has suffered very considerable stress as a result of perceiving that she is being blamed for what has occurred and that she is suffering sleepless nights. I accept that she has suffered distress and inconvenience as a result of the failure to identify the overpayment earlier, and the need now to make long term adjustments to future expenditure which she was not expecting. Awards for distress and inconvenience are modest and not intended to punish the party directed to pay. In this case, I take account of the long history of the

overpayment and the ongoing nature of the distress and inconvenience caused by the need to repay the unforeseen debt, I consider an award of £2,000 is justified.

102. I therefore uphold Mrs K's complaint in part.

Directions

103. NHS BSA shall write off £38,693.09 of the overall overpayment in view of limitation. From the £68,197.41 balance, NHS BSA shall write off £29,324.88, as Mrs K has a valid change of position defence against the recovery of this sum which is 43% of £68,197.41.

104. NHS BSA shall liaise directly with Mrs K to agree mutually acceptable terms for the recovery of £38,872.52 which is 57% of the £68,197.41 balance.

105. NHS BSA shall pay Mrs K £2,000 in respect of her severe distress and inconvenience.

Karen Johnston

Deputy Pensions Ombudsman
18 June 2019