

Ombudsman's Determination

Applicant	The Surgery
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold the Surgery's complaint and no further action is required by NHS BSA in relation to the complaint.

Complaint summary

2. The Surgery has complained about the application of a final pay control charge for the pension of an employee of the Surgery (**the Member**).

Background information, including submissions from the parties

3. Final pay controls were introduced by the Department of Health and Social Care (**DHSC**) in April 2014. They can apply to all Officer and Practice Staff members of the 1995 section of the Scheme who retire with entitlement to pension benefits, or transfer out their NHS pension to another scheme.
4. The management of the 1995 section of the Scheme is governed by the 1995 Regulations (**the Regulations**). Regulation D3 covers the final pay control and was added to the Regulations by The NHS Pension Scheme (Amendment) Regulations 2014. There have been subsequent amendments to the wording of Regulation D3. The current wording is set out in the Appendix.
5. On 23 January 2020, NHS BSA wrote to the Surgery to notify it that the Member had received an increase in pensionable pay, within their last three years of employment, which exceeded the allowable amount stated in the Regulations. This meant that a final pay control charge of £35,565.32 (**the Charge**) was payable by the Surgery, as the Member's employer. An invoice for the Charge was included with the correspondence.

6. On 29 January 2020, the Surgery emailed NHS BSA to query the Charge. It said that the Member's pay was increased in January 2018, after they had become an Advanced Nurse Practitioner (**ANP**). This change in the Member's grade of employment meant they moved onto a new, higher, pay scale. The Member was not looking to retire at this time, so this factor had not been considered by the Surgery. However, in 2019, the Member became seriously unwell and ultimately took the decision to draw their pension in November 2019, then return to work on reduced hours. The Surgery said it was a small practice and the Charge would have a highly detrimental effect on its finances.
7. On 6 February 2020, NHS BSA emailed the Surgery to explain that it is bound by the Regulations. The DHSC is able to amend the legislation, but NHS BSA has no discretion to deviate from the Regulations that are in place. NHS BSA confirmed that the Member's pay increase did not fall under any of the exemptions in the Regulations, so the Charge was due and remained live. NHS BSA advised the Surgery that if it believed the Member's circumstances should be considered as an exception, it should contact the DHSC to request a review.
8. On 29 March 2020, the Surgery wrote to NHS BSA to complain about the Charge. It reiterated that the Member became an ANP in October 2017 and had no intention to retire at that time. In 2019, the Member went on sickness leave for around six months. During this period of illness, the Member took the decision to retire via the 'retire and return' scheme. Following their retirement, the Member returned to work part-time, while also receiving their pension.
9. The Surgery explained that as an ANP, the Member had to undertake more complex duties and their pay was increased in line with the NHS Agenda for Change. It had no discretion over the increase in the Member's pay, or their decision to retire in December 2019. The Surgery believed it was being unfairly penalised for the Member's career progression and choice to retire, which was beyond its control.
10. On 22 April 2020, NHS BSA emailed its complaint response to the Surgery. It advised that there was no provision in the Regulations for a final pay control charge to be appealed. It considered that the Charge was a consequence of the increase in the Member's pensionable pay, which had exceeded the allowable amount. It noted that the Surgery had reverted the Member's pay to the NHS Agenda for Change, but confirmed that the Regulations did not make an exemption for a pay increase which arose through comparison to Agenda for Change pay scales. It explained that as the Member retired on the basis of age, not ill-health, the Member's period of illness could not be taken into account. It also confirmed that the Member's return to work after retirement had no bearing on the Charge.
11. NHS BSA said that it would be possible for the Surgery to pay the Charge in instalments, rather than as a single payment. It provided details of how to arrange a repayment plan, if desired, and indicated that interest would be applied to the Charge if an agreement was not reached.

12. On 12 November 2020, NHS BSA wrote to the Surgery to highlight that it had not received payment for the Charge. It said that if payment was not received by 26 November 2020, it would refer the debt for recovery.
13. On 8 July 2021, NHS BSA emailed the Surgery to explain that the Regulations had been amended. This included changes to the implementation of final pay control charges from 1 July 2021, which were to be applied retrospectively to 1 April 2018. If an invoice for a charge had been received or paid, the employer could ask for this to be reviewed. It explained that the allowable amount for increases in pensionable pay had been changed from the consumer prices index (**CPI**) plus 4.5%, to CPI plus 7%. It said that exemptions were also introduced for increases in pensionable pay as a result of:-
 - Nationally agreed contracts, framework agreements, or re-banding where this is authorised under particular NHS terms and conditions.
 - A National Clinical Excellence Award (**CEA**).
 - Promotions following fair and open competition.
 - The ending of a salary sacrifice arrangement.
 - An increase in practice profits impacting non-GP providers in certain circumstances.
14. On 12 July 2021, the Surgery wrote to NHS BSA to ask that the Charge be reviewed. It provided details of the Member's circumstances, as had been included in previous correspondence.
15. On 23 November 2021, NHS BSA emailed the Surgery to explain that it had reassessed the Charge and found that the Member's circumstances would not be exempt under the amended Regulations. It advised that the amount now due was £35,138.56 (**the New Charge**), as a result of the increase in the allowable amount to CPI plus 7%. It said that the Surgery should make arrangements for repayment to commence, otherwise further interest would be added.
16. On 24 November 2021, the Surgery emailed NHS BSA to ask for further clarification of its decision.
17. On 9 December 2021, NHS BSA responded to the Surgery to explain that the Member was considered to have been re-banded, rather than promoted, and this was not an exemption under the Regulations. It also considered that the Member was not a non-GP provider, so any associated exemptions would not apply. It advised that a non-GP provider would be an individual in a non-GP role, who is a partner, shareholder, or sole trader of their practice.

18. On 10 January 2022, the Surgery emailed NHS BSA to set out its understanding that the Member was employed as a nurse and was therefore a non-GP provider. It also highlighted that the guidance NHS BSA had provided on the amendments to the Regulations listed re-banding as an exemption for final pay control charges. It asked that this point be considered.
19. On 22 February 2022, NHS BSA emailed the Surgery to explain that the Member would not be classed as a non-GP provider, because they were not a partner of the Surgery. It said that its previous guidance had incorrectly included re-banding as an exemption. Re-banding did not meet the criteria for fair and open competition, so this wording had been removed from subsequent guidance. It apologised for any confusion and confirmed that it had adhered to the Regulations, specifically Regulation D3 (19E), in its decision about the New Charge.
20. The Surgery has since set out its position that it had no choice regarding the Member's pay, as they had achieved a degree of clinical excellence which warranted re-banding to a higher pay scale. Similarly, it had no power over the Member's decision to retire. It advised that there was no competition involved in the Member's achievement of ANP status and there were no other candidates for her position. The Member was the first practice nurse in the local area to achieve this award. The Surgery said that given the Member's prior service, it did not make sense to advertise the re-banded role. It also confirmed that the Member's increase in pay was not linked to a CEA.

Adjudicator's Opinion

21. The Surgery's complaint was considered by one of our Adjudicators, who concluded that no further action was required by NHS BSA. The Adjudicator's findings are summarised below:-
 - The Adjudicator was not in a position to comment on whether the Regulations were fair, only if they had been correctly applied by NHS BSA. In this case, the Adjudicator's view was that NHS BSA had correctly interpreted the Regulations in its application of a final pay control charge to the Surgery.
 - In the opinion of the Adjudicator, the circumstances of the Member's pay increase, as set out by the Surgery, did not fall under any of the exemptions stated in Regulation D3.
 - It was noted that NHS BSA had provided incorrect information in its correspondence of 8 July 2021, regarding an exemption to the final pay control charge, where the increase in pensionable pay was due to re-banding. The Adjudicator's view was that although NHS BSA should have provided accurate information from the outset, the matter was clarified within a reasonable time and did not lead to a financial loss.

22. The Surgery did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Surgery provided further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the Surgery's additional points which are as follows:-

- While the Regulations which allowed the Member to retire when they wished are sensible, those same Regulations simultaneously applied a charge to the Surgery, when it had no say in the Member's chosen retirement date. It had no other option in this matter and now faces a significant additional cost as a result.
- It was common sense for the Member to continue in a practice where they had worked for 25 years, rather than advertise their position. The exemption for promotion on the basis of open competition, although suitable for other vacancies, would not have been appropriate in this case.
- When the Member received the pay increase, this was on merit, and they had no intention to retire at that time. It was only when they became seriously ill that they considered retirement, then a return to work on reduced hours, which was permitted within the Regulations. This was approximately 22 months after the pay increase.
- It asked the Member not to fully retire, because they were needed in what was a single-handed GP practice. The Member could have chosen to retire through ill-health, but decided to stay, as they were dedicated to their role.
- The Regulations are perverse and inequitable. Part of the Ombudsman's role is to prevent the imposition of unfair laws, protect people from unfair decisions, and restore confidence in the system. This should involve a reconsideration of the law, which underpins any administrative action.
- The correspondence of 8 July 2021, which incorrectly stated that re-banding was an exemption to the imposition of a final pay charge, was corrected in NHS BSA's subsequent correspondence. However, it did not re-issue a corrected circular to GPs in the rest of the country and there have been no other nationwide updates since, so other practices may have been caught out by this incorrect information.

23. NHS BSA also submitted further information for the complaint, which is summarised below:-

- It has previously asked the DHSC to confirm whether a final pay control charge would apply, if a member was promoted, then unexpectedly retired on ill-health grounds. DHSC said that a charge was still applicable in these circumstances. Further, this scenario does not align with the Surgery, because the Member was not promoted on the basis of fair and open competition, so is not exempt under Regulation D3 (19E), and they did not retire on ill-health grounds.

- It is the administrator of the Scheme and any challenge to the Regulations would need to be taken up directly with the DHSC.
- A corrected version of the Final Pay Control factsheet is available on its website.
- It is currently undertaking a review of the New Charge to ensure that the correct rate of CPI was used for the calculations. This does not alter its position that a charge does apply to the Surgery, but the review may result in a change to the charge amount.

Ombudsman's decision

24. I note that NHS BSA's review of the calculation for the New Charge may result in a revised amount being payable by the Surgery. The specific calculation process used by NHS BSA does not form part of this Determination, as it was not part of the complaint referred to The Pensions Ombudsman by the Surgery. If, following NHS BSA's review, the Surgery remains concerned that NHS BSA has incorrectly calculated the amount, it should raise this matter with NHS BSA.
25. This complaint concerns whether it was correct for NHS BSA to have concluded that a final pay control charge was applicable to the Surgery, given the circumstances of the Member's pay increase and subsequent retirement.
26. The Regulations were established by an Act of Parliament and any amendment would require a similar process to be undertaken. A challenge to the application of the Regulations, on the basis that they are unreasonable, would need to be referred to the DHSC for it to consider. I cannot determine that the Regulations are unfair or should not be applied, nor can I recommend that they should be changed. Changing the Regulations is a matter for Parliament.
27. The Surgery has set out the circumstances which led to the application of the original charge. While I sympathise with the position that it, unwittingly, finds itself in, I find that NHS BSA was correct to apply a final pay control charge to the Surgery, in accordance with the Regulations. The exact amount payable through this charge is to be confirmed by NHS BSA.
28. I find that the circumstances of the Member's pay increase do not correspond to any of the exemptions listed in Regulation D3. The increase occurred in January 2018 and did not fall under the 'Framework agreement on the reform of Agenda for Change', adopted in August 2018, covering the period 1 April 2018 to 31 March 2021. The Surgery has confirmed that the Member's pay increase was not the result of a CEA, and it did not arise through promotion on the basis of fair and open competition.

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29. With regard to the correspondence of 8 July 2021, I find that NHS BSA did clarify the incorrect information in reasonable time once this had been highlighted to it by the Surgery. It is not within the remit of this complaint for me to comment on information that may have been received by other GP surgeries.

30. I do not uphold the Surgery's complaint.

Anthony Arter CBE

Deputy Pensions Ombudsman

18 May 2023

Appendix

Regulation D3 of the NHS Pension Scheme Regulations 1995

“Further contributions by employing authorities in respect of excessive pay increases

- (1) This regulation applies where a member becomes entitled to a benefit in accordance with regulation E1, E2A, E3A, E3C, E5 or L1 and the Secretary of State determines that the member's final year's pensionable pay determined under regulation C1(6) exceeds the allowable amount.
- (2) For the purposes of this regulation—
- (a) Year 1 is the year in which the member ceases to be in pensionable employment or dies, whichever occurs first;
 - (b) Year 2 is the year immediately preceding Year 1;
 - (c) Year 3 the year immediately preceding Year 2.
- (3) The allowable amount in respect of Year 1 is the lower of—
- (a) the member's pensionable pay for Year 1, and
 - (b) the allowable amount for Year 2 increased by the lower of—
 - (i) the aggregate of 7% and the percentage (if any) by which the consumer prices index for the February before the start of Year 1 is higher than it was for the previous February, and
 - (ii) the percentage increase in the member's pensionable pay for Year 1 compared with Year 2.
- (4) The allowable amount in respect of Year 2 is the lower of—
- (a) the member's pensionable pay for Year 2, and
 - (b) the allowable amount for Year 3 increased by the lower of—
 - (i) the aggregate of 7% and the percentage (if any) by which the consumer prices index for the February before the start of Year 2 is higher than it was for the previous February, and
 - (ii) the percentage increase in the member's pensionable pay for Year 2 compared with Year 3.

(5) The allowable amount for Year 3 is the lower of—

(a) the member's pensionable pay for Year 3, and

(b) the member's pensionable pay for the year immediately preceding Year 3 increased by the aggregate of 7% and the percentage (if any) by which the consumer prices index for the February before the start of Year 3 is higher than it was for the previous February.

(6) An excess employer contribution is determined as follows—

Step 1: find Amount A, which is the difference between the member's final year's pensionable pay and the allowable amount for that year

Step 2: calculate Amount B, which is the amount of the pension payable to the member as if the member's final year's pensionable pay consisted only of Amount A increased by an amount equal to any increases that would be due under the Pensions (Increase) Act 1971 on a pension of that amount

Step 3: calculate Amount C, which is the amount of the lump sum payable to the member as if the member's final year's pensionable pay consisted only of Amount A increased by an amount equal to any increases that would be due under the Pensions (Increase) Act 1971 on a lump sum of that amount

Step 4: multiply Amount B by the applicable factor to find Amount D

Step 5: in the case of a member who is entitled to a benefit under regulation L1, multiply Amount C by the applicable factor to find Amount E

Step 6: add together—

(a) Amount D and Amount E, in the case of a member entitled to a benefit under regulation L1;

(b) Amount C and Amount D, in all other cases,

to find the amount of the excess employer contribution.

(12) The amount of an excess employer contribution must be paid to the Secretary of State within 1 month of the Secretary of State notifying the payer of its liability for that amount: but the Secretary of State may exceptionally specify that it is to be paid within some other period.

(12A) Paragraphs (12B) to (12G) apply in circumstances where a payer has been notified of a liability to pay an excess employer contribution on or after 1st April 2018.

(12B) Where a payer—

- (a) has paid all of the excess employer contribution; and
- (b) applies for a determination under this paragraph which is received by the Secretary of State within a period of six months from the commencement of this regulation, the Secretary of State must determine the excess employer contribution in accordance with this regulation as in force on 1st July 2021.

(12C) Where the amount of any excess employer contribution payable following a determination under paragraph (12B) is less than the amount of any excess employer contribution together with any interest already paid, the Secretary of State must pay to the payer a sum equal to the difference between those amounts.

(12D) Where a payer—

- (a) has failed to pay all, or any part, of the excess employer contribution; and
- (b) applies for a determination under this paragraph which is received by the Secretary of State within a period of six months from the commencement of this regulation, the Secretary of State must determine the excess employer contribution in accordance with this regulation as in force on 1st July 2021.

(12E) Subject to paragraph (12F), the amount of any excess employer contribution payable following a determination under paragraph (12D) must be paid to the Secretary of State within 1 month of the Secretary of State notifying the payer of its liability for that amount.

(12F) Where the amount of any excess employer contribution payable following a determination under paragraph (12D) is less than any excess employer contribution together with any interest already paid by the payer, the Secretary of State must pay to the payer a sum equal to the difference between those amounts.

(12G) Where the Secretary of State makes a determination under paragraph (12B) or (12D), any previous determination of an excess employer contribution payable in respect of the same member has no effect.

(13) Where a payer fails to pay all, or any part, of the excess employer contribution it is liable to pay, the Secretary of State is to give that payer a written notice (“a late payment notice”) specifying all of the following—

- (a) the amount of the excess employer contribution that is unpaid;
- (b) the amount of any interest due on the amount referred to in paragraph (a);
- (c) the amount of the supplementary charge arising from the late payment of the excess employer contribution;
- (d) that the amounts in (a) to (c) are to be received by the Secretary of State within 1 month of the date of the notice.

(14) Where a payer fails to comply with a late payment notice, the Secretary of State may issue a further late payment notice amended to take account of that failure.

(15) Where a member has pensionable employment with more than one employing authority during the years referred to in paragraph (2), this regulation applies to each such employment separately.

(16) In the case of a member in part-time employment, this regulation is subject to regulation R5.

(17) For the purposes of this regulation an increase in pensionable pay during Year 3, Year 2 or, as the case may be, Year 1 is to be ignored where the Secretary of State is satisfied it arises as a result of—

(a) the member taking up a new employment with a new employer: provided the Secretary of State is satisfied that the employer in question is a new employer;

(b) the ending of a salary sacrifice arrangement made before 1st April 2014.

(18) If the Secretary of State is not satisfied that the employer in question is a new employer, that employer is to be treated as an employing authority liable for an excess employer contribution in accordance with this regulation.

(19) An increase in a member's pensionable pay due to the acceptance of a transfer payment in the circumstances described in regulation C1(5) shall be ignored for the purposes of this regulation.

(19A) An increase in a member's pensionable pay solely due to an increase in the national minimum wage is to be ignored for the purposes of this regulation.

(19B) An increase in a member's pensionable pay pursuant to the "Framework agreement on the reform of Agenda for Change" adopted on 17 August 2018 is to be ignored for the purposes of this regulation.

(19C) Where—

(a) the Secretary of State has approved terms and conditions relating to NHS employment; and

(b) a member's pensionable pay has increased pursuant to those terms and conditions, the increase in the member's pensionable pay is to be disregarded for the purposes of this regulation.

(19D) An increase in a member's pensionable pay by reason of an amount in respect of a national award recommended by the Advisory Committee on Clinical Excellence Awards is to be ignored for the purposes of this regulation.

(19E) An increase in a member's pensionable pay due to promotion on the basis of fair and open competition is to be ignored for the purposes of this regulation.

(19F) An increase in the pensionable pay of a non-GP provider due to an increase in partnership profits within the three year period immediately prior to the date on which the non-GP provider ceased to be in pensionable employment is to be ignored for the purposes of this regulation if the non-GP provider's percentage share in the partnership profits:

- (a) has not increased during the same three year period;
- (b) has increased during the same three year period, but only as the result of another partner leaving the practice; or
- (c) has increased during the same three year period, but only as the result of another partner reducing their sessional commitment.

(19G) An increase in a member's pensionable pay solely due to the ending of a salary sacrifice arrangement is to be ignored for the purposes of this regulation.

(20) In any particular case the Secretary of State may direct that, for the purposes of this regulation, "employing authority" includes one or more of—

- (a) the transferee under a transfer of staff order pursuant to—
 - (i) in the case of England, section 28(4)(b) of, or paragraph 29(3) of Schedule 4 to, the 2006 Act;
 - (ii) in the case of Wales, section 22(4)(b) of, or paragraph 8 of Schedule 3 to, the 2006 (Wales) Act;
- (b) without limiting sub-paragraph (a), a successor, transmittee or assignee of an employing authority's business or functions.

(21) For the purposes of this regulation—

- (a) a "payer" is the person who is liable to pay all or part of an excess employer contribution to the Secretary of State in accordance with this regulation;
- (b) the pensionable pay to be taken into account by the Secretary of State for a year or part of a year referred to in paragraph (2) will be derived from the pensionable pay for that period recorded in scheme year pension records provided to the Secretary of State in accordance with paragraph (5) of regulation U3;
- (c) where the member is in pensionable employment for less than 12 months pensionable pay for that year means—
 - (pensionable pay/number of days pensionable employment) x 365
- (d) no account is to be taken of increases in pensionable pay prior to 1st April 2014 or more than 1095 days prior to the member's last day of pensionable employment,

(e) the applicable factor is to be determined from time to time by the Secretary of State having considered the advice of the Scheme Actuary and having obtained the Treasury's consent;

(f) if the percentage increase in the consumer prices index referred to in paragraphs (3), (4) and (5) is less than zero, it will be regarded as a percentage increase of 0% for the purposes of this regulation;

(g) a benefit referred to in paragraph (1) means—

(i) in the case of regulation E2A, a benefit including the effects of any increase in pensionable service referred to in paragraph (4) of that regulation;

(ii) in the case of regulation E5, a benefit including the effects of any reduction referred to in paragraph (2) of that regulation;

(i) “national minimum wage” means the single hourly rate prescribed by the Secretary of State pursuant to section 1(3) of the National Minimum Wage Act 1998.

(j) “salary sacrifice arrangement” means an arrangement under which the member gives up the right to receive an amount of pensionable pay in return for the provision of a benefit in kind including, but not limited to, a benefit consisting of a motor car or other vehicle, meals, care or vouchers.”