

## Ombudsman's Determination

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

### Complaint summary

1. Dr N's complaint concerned NHS BSA's handling of his ill health early retirement (**IHER**) application in 2014. Dr N says, following a successful appeal in 2021, and the payment of a pension arrears lump sum, he has been subjected to unnecessary tax liabilities. He would like to be compensated for the additional tax liabilities, and the distress and inconvenience he has suffered due to NHS BSA's actions.

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

2. The complaint should not be upheld against NHS BSA because:-
  - 2.1. The source of Dr N's complaint in 2014, falls outside of my jurisdiction and the time limits within which legislation requires that a complaint should be brought to me to investigate and determine. The complaint is also affected by the limitation period imposed by the Limitation Act 1980 and, as a result, I would be unable to provide Dr N with a remedy in respect of this complaint.
  - 2.2. NHS BSA has taken appropriate steps to remedy any errors that occurred in 2022.

### Detailed Determination

#### Material facts

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. Dr N was employed by the NHS as a GP Partner. By virtue of his employment, he was a member of the 1995 Section of the Scheme, a defined benefit arrangement. Under the Scheme, Dr N's normal retirement age (**NRA**) was 60.

5. The 1995 Section of the Scheme is governed by the NHS Pension Scheme Regulations 1995 (**the 1995 Regulations**)<sup>1</sup>.
6. In June 2013, Dr N was diagnosed with Idiopathic Membranous Glomerulopathy (kidney/renal disease) and Idiopathic Benign Cramp-Fasciculation Syndrome (**CFS**). Dr N also experienced severe fatigue and cognitive dysfunction, which he and his specialists believed were a consequence of his CFS/renal disease.
7. On 26 March 2014, Dr N applied for the early payment of his benefits through IHER (**the 2014 Application**), he was 54 at the time. He completed form AWE33E and referred it onto his GP, Dr Andrews, to complete Part C of the application. Dr Andrews completed the relevant sections of the form and returned it to Dr N.
8. Decisions on applications for IHER are made by the Scheme's Medical Adviser (**the MA**), Medigold Health (**Medigold**), in the first instance and NHS BSA, on appeal, under the delegated authority of the Secretary of State, as the Scheme manager. The MA is required to provide an opinion on whether the applicant satisfied the tier 1 and 2 IHER conditions of the 1995 Regulations.
9. On 26 June 2014, NHS BSA wrote to Dr N and explained that his IHER application had been referred onto Dr Martin, a MA appointed by Medigold. Dr Martin did not agree that Dr N met the criteria for an IHER benefit and provided an opinion explaining her reasoning behind the decision, and what evidence she had considered. Enclosed with NHS BSA's decision letter was a leaflet which explained how Dr N could appeal the decision, if he wished to.
10. On 31 October 2014, Dr N left NHS employment.
11. On 11 September 2019, Dr N applied for the payment of his deferred Scheme benefits from his NRA, which was in January 2020. He said that he wanted to claim the maximum lump sum available to him without incurring a lifetime allowance<sup>2</sup>(**LTA**) tax charge.
12. In January 2020, after an exchange of correspondence between Dr N and NHS BSA, Dr N began to receive his pension. This consisted of a yearly pension of £45,343.96 and a lump sum of £302,291.85. This took into account the fixed protection 2016<sup>3</sup> (**FP16**) that Dr N held, which meant that he did not incur a LTA tax charge upon the crystallisation of his benefits.

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<sup>1</sup> SI 1995/300.

<sup>2</sup> The lifetime allowance is the maximum amount of benefits that an individual can hold across multiple pension schemes without incurring a tax charge. If the lifetime allowance is exceeded, then 55% on the value in excess of the lifetime allowance is subject to a tax charge.

<sup>3</sup> Fixed protection 2016 allows an individual to fix their lifetime allowance at £1.25 million; however, they are then no longer permitted to contribute into a pension.

13. On 4 October 2021, Dr N submitted an appeal against the decision to decline the 2014 Application, under the Scheme's Internal Dispute Resolution Procedure (**IDRP**).
14. Notwithstanding the time that had passed, NHS BSA considered the appeal. On 28 October 2021, NHS BSA provided its response and explained that Dr N's appeal had been referred to Dr Evans, a Medigold appointed MA. Dr Evans had no prior involvement with the 2014 application. Dr Evans disagreed with the opinion of Dr Martin and said that Dr N met the tier 1 and tier 2 criteria under the 1995 Regulations.
15. On 30 October 2021, Dr N wrote to NHS BSA and asked it to provide clarity on a number of points, one of which was whether his IHER pension would be backdated to 31 October 2014. He asked NHS BSA to consider awarding him compensation in recognition of the distress caused to him by initially declining the 2014 application.
16. On 18 November 2021, NHS BSA informed Dr N that his IHER pension was payable from 1 November 2014, and that he would shortly receive notification of his entitlement under the Scheme.
17. On 13 December 2021, Dr N emailed NHS BSA and said that he was yet to receive any communication about his IHER entitlement. In response, NHS BSA told Dr N that it would follow the matter up with its retirement team.
18. On 25 January 2022, Dr N chased NHS BSA for confirmation of his entitlement under IHER, as he was yet to receive any figures.
19. On 27 January 2022, NHS BSA sent Dr N an annual allowance<sup>4</sup> pension savings statement for the tax year 2021/22 and said:-
  - 19.1. From 6 April 2021 to 5 April 2022, Dr N's pension input in the Scheme was £51,170.23, this was £11,170.23 above the annual allowance limit of £40,000.
  - 19.2. In the previous three tax years his pension input amounts were £0 for tax year 2018/2019, £8.07 for tax year 2019/2020 and £0 for tax year 2020/21.
  - 19.3. The opening and closing value for Dr N's Scheme pension between 2018 to 2022 were:
    - 19.3.1. tax year 2018/19 opening at £1,047,685.42, closing at a value of £1,047,632.26;
    - 19.3.2. tax year 2019/2020 opening at £1,072,775.43, closing at a value of £1,072,783.50;
    - 19.3.3. tax year 2020/21 opening at £1,091,020.82. closing at a value of £1,091,020.65; and

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<sup>4</sup> Annual allowance is the maximum amount you can contribute to your pension pots in a tax year (from 6 April to 5 April) without incurring a tax charge.

19.3.4. tax year 2021/22 opening at £1,096,475.75, closing at a value of £1,147,645.98.

20. On 31 January 2022, Dr N emailed NHS BSA and asked it to provide him with additional information about the potential annual allowance tax charge that he might be subject to.
21. On the same day, Dr N received a pension payslip which explained that he was due to receive a payment of £268,576.67, of which £116,459.00 would be deducted as income tax and paid to HMRC.
22. On 1 February 2022, NHS BSA wrote to Dr N and explained that interest was due on his pension as it was not paid within one month of the due date of 1 November 2021. His pension would not be paid until 2 February 2022, so he was due an interest payment of £55.93.
23. On 3 February 2022, NHS BSA sent Dr N a statement of entitlement for his revised IHER pension and said that his revised annual pension was £48,040.82. He was also due an additional lump sum of £10,980.01. The value of his amended Scheme benefits meant that he had used 109.61% of his available LTA. Consequently, he was due a total LTA tax charge of £2,220.99, which would be deducted from his benefits.
24. On 4 February 2022, Dr N emailed NHS BSA. He said he had received £152,117.87 into his bank account without any explanation as to what it related to. He was not even sure of what his revised IHER benefits were. He was extremely unhappy with the way NHS BSA had communicated with him about his IHER entitlement.
25. On 6 February 2022, Dr N followed up his previous email with NHS BSA and said that it had paid a significant amount of money into his account without informing him of any potential tax implications, or if it included any compensation. He asked NHS BSA to confirm:
  - 25.1. how the figure of £152,117.87 was calculated;
  - 25.2. what were the potential tax implications he might incur due to the value of the sum received;
  - 25.3. was NHS BSA penalising him for its failure to apply the correct “balance of probabilities test” in 2014;
  - 25.4. whether any consideration was given to a compensation payment, and if so, how much he would likely receive; and
  - 25.5. if it intended to apologise for the distress caused to him by declining the 2014 Application.
26. On 7 February 2022, NHS BSA wrote to Dr N and said that he was due interest of £2.46 on the lump sum payable to him. This was because it was not paid within one month of his IHER pension due date of 1 November 2021.

27. On 15 February 2022, Dr N raised a complaint with NHS BSA about the inconsistent service he had received, as well as the lack of information he had been sent about his IHER pension.
28. On 31 March 2022, NHS BSA wrote to Dr N and provided him with:-
- 28.1. A breakdown of how it had calculated the IHER pension arrears (£268,576.67) and the tax-free lump sum arrears (£10,980.01) that were due to him from January 2020, the date on which his deferred pension was paid.
- 28.2. A breakdown of how it had calculated the tax deduction of £124,970.46 on the pension arrears sum.
- 28.3. The rate of tax each part of the gross amount of pension (£306,363.57) he had received from 1 May 2021 to 2 February 2022 had attracted, which was:
- 28.3.1. of the £306,363.57, £799.20 was tax free under tax code 0095T, the remainder of £305,564.37 was taxable;
- 28.3.2. a deduction of £6,283.33 was made at 20%, £37,433.33 was deducted at 40% and £81,253.80 was deducted at 45%, making a total deduction of £124,970.46;
- 28.4. A table showing the accrual of the pension arrears sum over tax years 2014 to 2021:

<b>Tax year beginning 6 April</b>	<b>Arrears due</b>
2014	£20,146.18
2015	£48,278.35
2016	£48,281.02
2017	£48,753.10
2018	£50,198.30
2019	£39,954.20
2020	£6,952.80
2021	£6,012.92
<b>Total</b>	<b>£268,576.87</b>

29. NHS BSA notified Dr N that if he wanted the income tax deducted from the arrears sum to be apportioned across the relevant tax years, and his tax liability recalculated, he should contact HM Revenue and Customs (**HMRC**) with the information provided.
30. On 6 April 2022, NHS BSA responded to Dr N's complaint under stage two of the Scheme's IDRP. NHS BSA upheld Dr N's complaint, in part, and said:-
- 30.1. Under the IDRP, Dr Evans said that his opinion differed to Dr Martin as he (Dr Evans) was in receipt of a report from Dr Williamson dated 19 September 2014. That report provided additional insight into Dr N's conditions; however,

that report was not available to Dr Martin during the review of the 2014 application.

- 30.2. Dr N's entitlement to an enhanced IHER pension meant that additional membership was calculated and added to his pension which had been in payment since January 2020. The Finance Act 2004 required NHS BSA to check if the additional membership exceeded Dr N's annual allowance in that tax-year (2021/22). This check was done by reviewing the opening and closing value of Dr N's pension in payment at 5 April 2021 and 5 April 2022, without taking into account any commutation of a pension for an additional lump sum amount. In summary:
- 30.2.1. opening value as at 5 April 2021:  $£57,422.41 \times 16 = £918,754.56 + £172,66.41$  (lump sum) =  $£1,091,020.65$ , adjusted for inflation  $£1,096,475.75$ ;
- 30.2.2. closing value as at 5 April 2022:  $£60,402.42 \times 16 = £966,438.72 + £181,207.26$  (lump sum) =  $£1,147,645.98$ ;
- 30.2.3. pension input for April 2021 and 2022:  $£1,096,475.75 - £1,147,645.98 = £51,170.23$ .  $£11,170.23$  over the annual allowance limit of  $£40,000$ .
- 30.3. When Dr N's pension was set up, in January 2020, it was calculated based on his membership, and pensionable pay in respect of his deferred benefits as at 31 October 2014. At his request, part of his annual pension was commuted to provide an additional lump sum amount. In January 2020, his benefits used up 96.73% of his available LTA.
- 30.4. NHS BSA had to pay Dr N's revised IHER benefits in the same way he claimed his deferred benefits, that was by commuting the annual pension for a lump sum. Following the revision of his benefits, he was due an additional pension and lump sum amount. The revised value of his pension exceeded his FP16, incurring a LTA tax charge. NHS BSA was required to pay the LTA tax charge to HMRC<sup>5</sup>.
- 30.5. Dr N was originally paid a pension when he reached age 60 in January 2020. The acceptance of his IHER appeal meant that he should have been paid a IHER pension from 1 November 2014, and then an increased pension from 1 February 2022. The arrears payment of  $£268,576.67$  was taxable income and a deduction of  $£116,459$  was made.
- 30.6. Dr N was due a gross payment of  $£4,380.69$  on 1 April 2022; however, from 1 May 2022, he was due an annual cost of living increase. So, the 1 May 2022 payment would receive a partial cost of living increase, as the increase was effective from 11 April 2022. From 1 June 2022, he would receive his first payment with the full increase applied.

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<sup>5</sup> See Appendix 1 for details of how NHS BSA calculated Dr N's revised benefits and the LTA tax charges.

30.7. The LTA tax charges were calculated correctly; however, the recovery date of the LTA tax charge on Dr N's pension started from its payable date, instead of the date his revised benefits were authorised. His benefits would be revised, and he would receive an additional one-off payment, which would again be subject to income tax. This element of his complaint was upheld.

30.8. It agreed that Dr N had not been provided with sufficient information to understand his correct position. While NHS BSA had provided its usual level of information, this was not sufficient given his circumstances.

### **Summary of Dr N's position**

31. Dr N believes that Dr Martin did not apply the correct balance of probabilities test when reviewing the 2014 Application. Dr Martin said that it was likely that he would sufficiently recover to enable him to return to his role as a GP before his NRA.
32. NHS BSA says that its decision to accept the appeal, in 2021, was because Dr Evans was in receipt of a report by Dr Williamson, dated 19 September 2014. However, Dr Williamson's report did not contain any new information about his condition that was not available in the 2014 Application.
33. The cause of his cognitive dysfunction in 2014 is unknown. It is thought that his slow processing speed could have been secondary to sleep deprivation brought on by the cramps he was experiencing in his legs. This is, however, only possible, not probable, as cognitive dysfunction is not a symptom of CFS. He does not believe that Dr Martin considered the cause, or treatment, of CFS. It was never likely, on the balance of probabilities, that he would recover enough to return to his role as GP, based on the evidence included within the 2014 Application.
34. He was prevented from appealing NHS BSA's initial decision because of an undiagnosed condition; that was gluten ataxia cerebellar cognitive affective disorder. This was the cause of his cognitive dysfunction and affected his brain preventing him from being able to understand the reason why the 2014 Application was declined. It was not until 2021, after his gluten intolerance diagnosis, that his cerebellar function improved enough to allow him to query whether the decision in 2014 was incorrect, based on the evidence available.
35. The grounds for appeal document, in his view, made clear that new evidence needed to be submitted with an appeal. It was only after he received his gluten intolerance diagnosis that his cognitive dysfunction improved allowing him to proceed with an appeal in 2021.
36. Dr Martin believed that his CFS would likely respond to treatment with the secondary affect of improving his cognitive function. Dr Martin referred to Dr Hadjivassiliou's comments that medication could be used to help his CFS related symptoms. Dr Martin, without further investigation, said that he would likely recover sufficiently to return to NHS employment.

37. Dr Evans, in 2021, upheld his IHER appeal on the basis that no available treatment in 2014 would likely have allowed for him to make a sufficient recovery to return to work. It is likely that Dr Williamson's report did help Dr Evans arrive at this opinion, however Dr Evans also undertook a review of medical literature available in 2014, to help form his opinion.
38. Sums ranging between £2.46 and £152,117.87 were paid into his bank account, without explanation. He had been in constant correspondence with NHS BSA to establish what his IHER pension entitlement was, and what the potential consequences would be regarding how much tax he should pay. NHS BSA was unclear on how it calculated the pension arrears sum and the additional tax-free lump sum.
39. As the 2014 Application was declined, and then accepted in October 2021, the pension arrears sum he received meant that he was subject to an excess tax bill of £72,191.45. It is estimated that if his IHER application had been accepted in 2014, he would have paid an additional amount of £47,351.64 as income tax. Instead, NHS BSA deducted, and paid, £116,543.09 to HMRC without consulting him.
40. NHS BSA has suggested that he should contact HMRC to ask for the pension arrears sum to be apportioned between the relevant tax years from 2014. He understands that this could also be applicable for his annual allowance. NHS BSA should have consulted him before any decision regarding the deduction and payment of tax was made. There is nothing to suggest that HMRC will agree to the apportionment of the pension arrears sum.
41. By allocating the increase in pension contributions to one year, instead of over a number of years since 2014, he is now faced with an additional annual allowance tax charge of £4,468.09.
42. NHS BSA should consider paying him an amount in recognition of the distress and inconvenience he has suffered. His IHER application was not properly considered against the legal test of the balance of probabilities, nor did Dr Martin seek additional evidence when required. NHS BSA's letters indicated that late interest payments were paid as the revised IHER benefits were paid more than one month after the decision to uphold his appeal was made; however, he believes that he was owed interest from 1 November 2014.

### **Summary of NHS BSA's position**

43. It does not accept that Dr N's IHER application was not properly considered. Dr Martin provided her opinion based on the available medical evidence, weighting it appropriately. The fact that the outcome differed to that of Dr N's own opinion did not mean it was incorrect, or reached in an improper manner. Dr Martin asked herself the right questions, understood the relevant regulations, considered all relevant factors while disregarding any irrelevant ones.



44. Letters to members are routinely sent by second class post due to the cost involved in sending written communications. Some communications may be sent via email; however, any that contain personal/financial information are sent in the post.
45. Dr N has been provided with sufficient information, which he could forward onto HMRC, to help deal with his personal tax circumstances. Dr N's benefits were subject to an LTA tax charge as they exceeded his FP16, for which a comprehensive explanation was provided to him under stage two of the IDRPs.
46. The payment of Dr N's pension, or when arrears are paid, is always subject to income tax. The amount of income tax is confirmed by HMRC and NHS BSA has no discretion in the amount deducted. If Dr N believes that HMRC has deducted too much income tax, he should confirm this to NHS BSA who will then provide a letter explaining the exact amounts of pension that would have been paid if the 2014 Application had been accepted. NHS BSA is unable to confirm how HMRC will react to the provision of this information.
47. Dr N did not submit his IHER appeal until 4 October 2021, some seven years after the decision was made to decline the 2014 Application. Between 2014 and 2021, Dr N did not contact NHS BSA about any changes in his condition, nor did he request any information on how to appeal the 2014 decision.
48. If Dr N had successfully appealed NHS BSA's decision in 2014, the pension would still have been subject to income tax. NHS BSA does not have access to Dr N's income tax position (including tax band, etc) for the period between 2014 and 2021, so it does not know what level of tax he would have paid during that time and cannot know if he has paid any excess income tax. HMRC does not confirm an individual's tax position to NHS BSA, only the relevant tax code to be applied.
49. The Finance Act 2004 requires NHS BSA to check if an individual's growth in benefits exceeds the annual allowance. Growth associated with an increase due to the payment of an IHER pension is measured against the annual allowance. The growth is recorded in the tax year that it occurred. The increase to Dr N's pension amounted to £51,170.23, which was £11,170.23 over the annual allowance of £40,000.
50. If Dr N did not hold sufficient carry forward from the three previous tax years prior to 2021/22, there would have been a charge due on the £11,170.23 of 40% (that is £4,468.09). Dr N has not confirmed what pension contributions, or pension growth, if any he had three years prior to 2021/22. If he did not have any pension growth that counted against the annual allowance, he has sufficient carry forward to mean that there is not an annual allowance tax charge for year 2021/22
51. If the 2014 Application had been accepted in the first instance, the growth in his pension due to the payment of an IHER pension would likely have pushed his benefits above the 2014 annual allowance incurring a tax charge. This is if he did not have sufficient carry forward from the three previous tax years. The assessment of his final annual allowance position, as well as the reporting and payment of a tax charge to HMRC, is Dr N's responsibility.

52. Regulation T8(4), of the 1995 Regulations, provides that interest, in line with the Bank of England's base rate, is due if a payment is made more than one month after the due date. The due date is defined as the first day on which NHS BSA, on behalf of the Scheme manager, is in possession of the required evidence to calculate the value of an IHER pension. In Dr N's case, this was 28 October 2021, the date of the Second Report. There is no requirement to pay Dr N interest before 28 October 2021 as before then it did not have the necessary information to uphold his appeal.

## Conclusions

53. The source of Dr N's complaint, and the issues that have entailed thereafter, surround the way in which NHS BSA handled the 2014 Application<sup>6</sup>. Dr N has maintained that due to an undiagnosed gluten intolerance, his cognitive and cerebellar functions were impaired, which prevented him from being able to dispute the outcome of the 2014 Application.
54. My powers are set out in Part X<sup>7</sup> of the 1993 Act and subsequent regulations. This legislation sets out what I can and cannot do. In particular, I must apply the law that applies at the relevant time and determine whether it has been applied correctly. I must decide complaints and disputes in accordance with established legal principles rather than by reference to what I may consider fair and reasonable<sup>8</sup>.
55. My jurisdiction for investigating and determining complaints is governed by legislation. Of particular relevance to this case is the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (**the Ombudsman Regulations**). While my office carries out an initial jurisdiction assessment before a complaint is accepted for investigation, it is necessary to continue to consider my jurisdiction throughout the investigation process because additional information may become available, or further submissions are made, which could alter the initial jurisdiction decision.
56. Regulation 5 of the Ombudsman Regulations (see Appendix 2) deals with the time limits for making complaints and referring disputes to me. Under Regulations 5(1) and 5(2), a complaint to my office must be made no later than three years from the date the events complained about occurred, or within three years of when the applicant

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<sup>6</sup> Dr N acknowledges this. For example, the covering letter attaching Dr N's original complaint to TPO explains that his "*complaint relates to decisions made by the NHS Pension scheme going back many years*". The supporting documents bundle, accompanying that letter, is headed "*Formal complaint against the NHS Pension Scheme decision about my ill health benefits claims in June 2014*", with reference to his claim being rejected by Dr Martins. Similarly, in his initial submission under the heading "*The tax implications if their original decision*" Dr N comments that "*As a result of how they reached their original decision in June 2014... I am now faced with a very late excess tax bill over £72,191,45 more than I would have paid if my if my initial application had not been rejected.*" However, late in the day, after my preliminary decision, Dr N has asked to pivot and "rephrase" his complaint as one against the report provided by Dr Evans in 2021 (as "*it wrongly implies that Dr Martin's opinion in 2014 was probably correct given the evidence available to her*"). However, it is too late to raise that argument for the purposes of this complaint, NHS BSA having not had an opportunity to consider it at IDRPs or as a part of this process.

<sup>7</sup> <https://www.legislation.gov.uk/ukpga/1993/48/part/X/enacted>

<sup>8</sup> *Henderson v Stephenson Harwood* [2005] Pens LR 209 (s12)

knew or ought reasonably to have known of those events. I also have the discretion, under Regulation 5(3), to consider a complaint made outside the three-year time period. However, for me to look at a complaint under Regulation 5(3), it has to be considered reasonable, in my opinion, that an application was not made within the three-year period following the occurrence (or awareness) of what is being complained about; and, additionally, if the complaint was not brought within three years, it has to be brought within a further period that I consider to be reasonable<sup>9</sup>.

57. I have considered whether Dr N's complaint, regarding NHS BSA's handling of the 2014 Application, has been brought to me within the time limits prescribed by the Ombudsman Regulations.
58. Dr N made an application for an IHER pension from the Scheme on 26 March 2014. Dr N received NHS BSA's decision to decline the 2014 Application on 26 June 2014. The decision included information on Dr N's right to appeal NHS BSA's decision, and how he might go about doing so. So, the date that Dr N was reasonably aware of the issues that he is complaining about, was 26 June 2014. This was not long after he had made the proactive decision to make the original application (and Dr Williamson's report of 19 September 2014 also noted that "*Overall, there were no significant difficulties observed in your cognitive profile as your performance was consistently within the average range, or above, on all tests of memory, concentration, language, attention and executive functioning*").
59. As a result, in the absence of conclusive evidence to the contrary, I do not consider that I have sufficient information that would enable me to conclude that Mr N was incapacitated to the extent that it affected his ability to make a decision as to whether to appeal that decision. Thereafter, Dr N had three years to bring a complaint regarding NHS BSA's decision to decline the 2014 application. I find that Dr N's complaint, in relation to the 2014 Application is out of time under regulations 5(1) and Regulation 5(2) because he did not bring the complaint to me within three years of the event, or within three years of when he knew, or ought reasonably to have known, about the event.
60. As I have said, Regulation 5(3) allows for the exercise of discretion where the delay in making the complaint is, in my opinion, reasonable (and if the complaint is then received by me within such further period as I consider to be reasonable). Dr N has argued that he was of the belief that new evidence was required for an appeal. However, Dr Williamson's report was available from 19 September 2014. Despite Dr N's belief that this report does not contain any new information, it was nonetheless, new evidence. I find that there was nothing to prevent Dr N from seeking clarification from NHS BSA about his right to an appeal.

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<sup>9</sup> Notwithstanding that discretion, it is also important to note that, in most circumstances, I cannot make a finding that a court would not be able to make - and so I must also have regard to other legislative time limits (for example, the Limitation Act 1980).

61. I have every sympathy for what must have been a difficult time for Dr N, in 2014, having left his NHS role as a GP. However, if he felt he was unable to himself appeal NHS BSA's decision, he could have appointed a representative to do so, but he did not. Overall, I do not consider that there are reasonable grounds for the delay in this case, so there is no basis for the exercise of discretion.
62. Dr N is therefore, in respect of his complaint against the 2014 Application, 'out of time' for the purposes of Regulation 5 of the Ombudsman Regulations.
63. But even if that was not the case, I would also be prevented from providing any meaningful remedy, as the matter is also time barred under the Limitations Act 1980 (**the Limitation Act**). Limitation periods have been considered in the case of *Arjo Wiggins Limited v Henry Thomas Ralph* [2009] EWHC 3198 (Ch). In this case, the Court held that the powers available to me, when investigating a complaint that is time-barred, are the same as those which are available under the Limitation Act, except in cases of pure maladministration, and the remedy must not go beyond what a court could order.
64. As the complaint about NHS BSA's handling of the 2014 Application is one that a court would recognise as a claim made in negligence, the relevant period within which a claim has to be made is six years of the negligent act or omission (section 2 of the Limitation Act); or (if later) within three years from the date of knowledge (section 14A Limitation Act). This is subject to an overriding time limit (long stop) of 15 years from the date when the negligent act or omission occurred (section 14B Limitation Act).
65. I find that the relevant start date for the purpose of the Limitation Act is 26 June 2014, the date Dr N received the outcome of the 2014 Application and information on his appeal rights. If Dr N had pursued this matter through the courts, he would have needed to have brought the claim within six years of 26 June 2014; that is, by 26 June 2020. Therefore, following the principles laid down by the court in *Arjo Wiggins*, I am unable to provide a remedy.
66. Turning now to the elements of Dr N's complaint that occurred in 2022. I understand that in October 2021, NHS BSA upheld Dr N's IHER appeal and agreed that he was eligible for an IHER benefit, backdated to 1 November 2014. Consequently, Dr N has explained that the tax liabilities he has suffered are:
  - 66.1. the growth of his pension benefits, in tax year 2021/22 breached the annual allowance by £11,170.23, for which he may be subject to a tax charge;
  - 66.2. NHS BSA deducted £116,543.09 from the pension arrears sum without consulting him;
  - 66.3. this resulted in him overpaying an estimated £72,191.45 in income tax, whereas, if his IHER pension had been paid in 2014, he would likely have paid an additional amount of £47,351.64, in income tax; and

- 66.4. the amendments to his pension meant that he breached his FP16, incurring an LTA tax charge.
67. There is no dispute that the decision to backdate Dr N's IHER pension to 1 November 2014, with the subsequent payment of a substantial arrears lump sum, has brought about a number of tax complications. The value of the arrears lump sum consists of over seven-years' worth of pension payments owed to Dr N from 1 November 2014.
68. I note that NHS BSA accepts that during the recalculation and payment of Mr N's IHER benefit, a number of errors occurred. Namely, in the recovery of a LTA tax charge, delays in the payment of the arrears lump sum, and that Dr N was provided with insufficient information given his unique circumstance. These errors appear to have been remedied when Dr N received an additional sum, due to the LTA charge, and the payment of interest on the arrears lump sum for the delay in paying it.
69. Dr N says the payment of the arrears lump sum resulted in him incurring a tax liability of £72,191.45, as opposed to £47,351.64, as calculated by Dr N. However, this is a consequence of the successful appeal of the original decision made in 2014. The steps taken by NHS BSA in paying the arrears as a lump sum was to ensure that Dr N's IHER benefit was backdated to the appropriate date, based on the decision it had made, having considered the additional evidence provided on appeal.
70. NHS BSA, under IDRPs stage two has provided Dr N with a substantial amount of information to help him effectively engage with HMRC about his personal tax position, following the increase in his pension and in the payment of the arrears lump sum. That is, it has provided Dr N with a breakdown of how the arrears lump sum should be apportioned, over the relevant tax years, between 2014 and 2022. Further, NHS BSA has also provided Dr N with sufficient information to help him understand his position in regard to the annual allowance charge he sustained.
71. Overall, I am satisfied that, in spite of NHS BSA's minor errors, NHS BSA has taken appropriate steps to remedy any errors that occurred in 2022. This is in addition to remedying any of the perceived errors that Dr N claims occurred during the decision-making process in 2014, by backdating his IHER pension to 2014.
72. I do not uphold Dr N's complaint.

**Dominic Harris**  
Pensions Ombudsman

24 December 2024

## Appendix 1

### NHS BSA's calculations for Dr N's revised IHER pension and LTA tax charges

#### "Calculation of the original Lifetime Allowance

When your deferred benefits were payable from age 60 you confirmed you wanted the maximum lump sum that did not have a Lifetime Allowance charge and that you had Fixed Protection 2016 giving a protected amount of £1,250,000.00.

Your benefits were calculated to give a basic pension of £52,707.19 and a lump sum of £158,121.57. However, these benefits were due immediate cost of living increases increasing them to a pension of £56,427.96 and a lump sum of £169,283.85.

To stay within the Pension Commencement Lump Sum limits

The Finance Act 2004 (as amended) restricts the amount of lump sum that can be paid to the lower of:

- 25% of the capital value of the benefits to be paid or
- 25% of the available Lifetime Allowance as adjusted for Fixed Protection 2016

This meant you could commute a maximum of £11,084.00 leaving a pension of £45,343.96 to give an additional lump sum of £133,008.00 and a total lump sum of £302,291.85.

The NHS Pension Scheme regulations only allow whole £s to be commuted to additional lump sum and if another £1 pension has been commuted to additional lump sum you would have incurred charges on your lump sum.

As you had confirmed you had not used any of your protected Lifetime Allowance elsewhere the Finance Act 2004 (as amended) which introduced the Lifetime Allowance requires that a Scheme administrator deducts the lump sum to be paid from the available Lifetime Allowance:-

$$£1,250,000.00 - £302,291.85 = £947,708.15$$

From the remaining Lifetime Allowance is deducted the capital value of the pension to be paid the capital value is calculated by multiplying the pension by 20:-

$$£45,343.96 \times 20 = £906,879.20$$

$$£947,706.15 - £906,879.20 = £40,828.95$$

As you have remaining capital value this mean that there is no Lifetime Allowance to be paid on the benefits to be paid.

### **Calculation of the revised Lifetime Allowance**

When your benefits were revised your pension was increased to £60,402.42 and a lump sum of £181,207.25 but there was no increase for the cost-of-living increase as the payable date and the date of the cost-of-living increase was calculated from were not the same.

NHS Pensions calculated your Lifetime Allowance position on the assumption that you still had Fixed Protection 2016 and had not used any Lifetime Allowance elsewhere since your original NHS Pension Scheme benefits were paid.

This meant you had a remaining Lifetime Allowance from your Fixed Protection 2016 of £40,828.95...

You had already elected to take the maximum lump sum and had commuted £11,084.00 pension to additional lump sum. There is no opportunity when benefits are revised to amend a previous amount of pension to be commuted to additional lump sum.

The increase in your benefits meant you were due a further lump sum of £11,923.40. This exceeded the permitted amount of lump sum by £1,715.25 calculated as follows:-

$$£1,250,000 \times 25\% = £312,500.00$$

$$£314,215.25 - £312,500.00 = £1,715.25$$

This exceeds the Lifetime Allowance lump sum limit which is charged at 55%:-

$$£1,715.25 \times 55\% = £943.39$$

This charge has to be paid directly to HMRC by the NHS Pension Scheme and is recovered directly from your lump sum.

You were also due extra pension (after the existing communication of pension to additional lump sum) of £7,456.34 (£52,800.30 - £45,343.96). Which also has to be tested against the Lifetime Allowance:-

$$£52,800.30 \times 20 = £1,056,006.00$$

This leaves an excess capital value over the remaining amount of charge free capital value £1,250,000 - £312,500 = £9,37,500:-

$$£397,500.00 - £1,056,006.00 = £118,506.00$$

The excess capital value has a charge of 25% applied:-

$$£118,506.00 \times 25\% = £29,626.50$$

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This is recovered by reducing your pension by £1,277.60. This figure is calculated by dividing the chargeable amount to be paid to HMRC by a factor (of 23.1891) provided by the Scheme Actuary.

After the deductions in respect of the Lifetime Allowance charges and before the addition of any cost of living increases you were due to a pension of £48,040.82 and a lump sum of £313,271.86.”



## **Appendix 2**

### **The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996**

#### Time Limit for making complaints and referring disputes

“5.---

(1) Subject to paragraphs (2) and (3) below, the Pensions Ombudsman shall not investigate a complaint or dispute if the act or omission which is the subject thereof occurred more than 3 years before the date on which the complaint or dispute was received by him in writing.

(2) Where, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission referred to in paragraph (1) above, the period of 3 years shall begin on the earliest date on which that person knew or ought reasonably to have known of its occurrence.

(3) Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under paragraphs (1) and (2) above, the Pension Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing with such further period as he consider reasonable.”