

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

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| Applicant | Mr Paul Stewart (on behalf of the executors of the estate of Mrs Samantha McLeod (deceased)) |
| Scheme | NHS Pension Scheme (the Scheme) |
| Respondent | NHS Pensions |

Subject

Mr Stewart says that Mrs McLeod's estate (**the Estate**) is entitled to receive the commuted ill-health lump sum (of £105,016.78) paid to it in July 2012. Accordingly, Mr Stewart says that my office should find that the Estate is entitled to keep the lump sum and should not return it (as is currently being requested by NHS Pensions). Mr Stewart also says that if it is found that Mrs McLeod was not entitled to receive the commuted ill-health lump sum, NHS Pensions acted negligently in failing to tell Mrs McLeod that her membership of the Scheme would be extended to 8 July 2012 as a consequence of her being paid unused annual leave in lieu.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint is not upheld against NHS Pensions because the relevant regulations provide that Mrs McLeod was not entitled to receive the commuted ill-health lump sum. It follows that the Estate cannot receive the commuted ill-health lump sum. (The Estate is instead entitled to a death in service lump sum from the Scheme.). Further, NHS Pensions did not act negligently in their dealings with Mrs McLeod as they did not have a duty to advise Mrs McLeod about her rights under the Scheme. Finally, the Estate is not entitled to recover their legal fees from NHS Pensions, or to any compensation for distress and inconvenience.

DETAILED DETERMINATION

Relevant regulations

1. Extracts from the relevant provisions of The National Health Service Pension Scheme Regulations 1995 (as amended) (**the Regulations**) can be found in the Appendix.

Material Facts

2. Mrs McLeod joined the Scheme in May 1991.
3. Mrs McLeod became ill in May 2011. She was formally diagnosed with a serious illness in January 2012. Mr Stewart says that it was at this time that Mrs McLeod became aware that her condition was terminal.
4. Mr Stewart's submissions suggest that, in the period between November 2011 and March 2012, Mrs McLeod sought the advice of her employer, the National Health Service (**the NHS**), and NHS Pensions as to her options in respect of taking her benefits from the Scheme.
5. My office has received some records from Mrs McLeod's union - Unite - which provide a very brief précis of the discussions that took place about Mrs McLeod's pension in the period between November 2011 and March 2012. Aside from these basic records there does not seem to be any comprehensive documentary evidence of the discussions that took place in this period. However, Mr Stewart, in his application to this office, says that NHS Pensions advised Mrs McLeod that she could apply for ill-health retirement and as her prognosis was poor, she could seek to have her retirement benefits commuted into a single lump sum payment.
6. On 6 June 2012 the NHS wrote to Mrs McLeod terminating her employment on grounds of capability (due to ill-health). The letter says that Mrs McLeod's last day of employment would be 8 June 2012 and that the annual leave she had accrued - amounting to 106.25 hours - would be paid in lieu. Mrs McLeod's P45 gave her leaving date as 8 June 2012 and her payslip to 30 June showed her pension contributions and pay in lieu of holiday as £1,857.

7. Mrs McLeod applied for ill-health retirement from the Scheme on 11 June 2012 (by completing form AW33E). The application was received by NHS Pensions on 18 June 2012. NHS Pensions' medical advisors accepted the application on 20 June 2012. NHS Pensions' medical advisors sent a letter to Mrs McLeod on that date informing Mrs McLeod that her application for ill-health retirement had been successful.
8. NHS Pensions received an application for payment of ill-health retirement benefits from Mrs McLeod's employer, the NHS, on 25 June 2012 (i.e. Form AW8). This form was submitted to NHS Pensions online and asked for Mrs McLeod's last day of employment or Scheme membership taking account of any periods of leave due and untaken at the date of retirement. The answer given by the NHS was 8 July 2012.
9. On 2 July 2012 NHS Pensions received the NHS's application for Mrs McLeod's ill-health retirement benefits to be commuted to a single lump sum (i.e. Form AW341). Mrs McLeod had signed the Form AW341 on 16 June 2012 and it was dated (presumably by the NHS) on 25 June 2012. The date stamp suggests that NHS Pensions received the completed Form AW341 from the NHS on 2 July 2012.
10. Mrs McLeod died on 2 July 2012.
11. NHS Pensions say that they "authorised" payment of a commuted ill-health lump sum of £105,016.78 on 3 July 2012. NHS Pensions say that they were not aware at that time that Mrs McLeod had died the previous day.
12. A full statement of retirement benefits was also sent to Mrs McLeod by NHS Pensions on 3 July 2012. This showed that Mrs McLeod would be paid a commuted ill-health lump sum of £105,016.78 and gave details of her benefit entitlement before commutation from 9 July 2012 based on her last day of pensionable employment being 8 July 2012.
13. On 5 July 2012 NHS Pensions were informed by the NHS that Mrs McLeod had died on 2 July 2012. NHS Pensions say that the NHS said at that time that NHS Pensions should stop payment of the lump sum to prevent an overpayment. NHS Pensions say they telephoned their paying agents, Xafinity Paymaster, on 6 July 2012, to try and stop the payment. However, Xafinity Paymaster told NHS Pensions on that call that the payment had already been made.

14. Mr Stewart says that the commuted ill-health lump sum was received on 9 July 2012.
15. In a letter dated 24 August 2012 NHS Pensions requested repayment of the commuted ill-health lump sum. The letter said that the repayment was due because Mrs McLeod died before the benefit had become payable.

Summary of Mr Stewart's position

16. The Estate is entitled to receive the commuted ill-health lump sum.
17. Mrs McLeod's employment terminated on 8 June 2012 and that, as in "a normal employment situation", the payment made in lieu of Mrs McLeod's accrued holiday entitlement did not extend her leaving date (for the purposes of the interpretation of the Regulations) beyond that date. Accordingly, as Mrs McLeod was not a member of the Scheme at the time of her death, she was entitled to receive the commuted ill-health lump sum and therefore the Estate is now entitled to receive the commuted ill-health lump sum.
18. In the alternative, if it is found that the payment made in lieu of Mrs McLeod's accrued holiday entitlement did extend her membership in the Scheme beyond the date she left work with the NHS (and, therefore, she was not eligible to receive the commuted ill-health lump sum until 9 July 2012), then in the period between November 2011 and March 2012 NHS Pensions acted negligently in failing to inform Mrs McLeod of this.
19. Had Mrs McLeod been aware that the payment made in lieu of Mrs McLeod's accrued holiday entitlement did extend her membership in the Scheme beyond the date she left employment and, therefore, that she was not eligible to receive the commuted ill-health lump sum until 9 July 2012, the nursing staff at the hospice caring for her in her final days could have kept her alive until 9 July 2012 (and therefore she would be eligible to receive the commuted ill-health lump sum).
20. Irrespective of the finding made in this complaint, NHS Pensions should reimburse the Estate for the legal fees incurred by the Estate in having to bring the complaint. (The Estate retained a firm of solicitors to assist them in making their application at an overall cost of £900.)

Summary of NHS Pensions' position

21. The Estate is not entitled to receive the commuted ill-health lump sum.
22. NHS Pensions say that Mrs McLeod's last working day had been extended to 8 July 2012 by paid annual leave. Accordingly, NHS Pensions say that the Estate should not have been paid the commuted ill-health lump sum as Mrs McLeod remained a member of the Scheme at the time of her death. The Regulations provide that a commuted ill-health lump sum is not payable in these circumstances.
23. It follows that NHS Pensions say that the Estate are entitled to a death in service benefit calculated in accordance with the Regulations, rather than the commuted ill-health lump sum.

Conclusions

24. I should note at the outset that the Scheme is governed by regulations laid down by Parliament. Accordingly, I am not able to question the fairness of the operation of those regulations, but can only assess whether they have been applied correctly by NHS Pensions in the circumstances.

Entitlement to a commuted ill-health lump sum

25. The question to be considered is whether the Estate is entitled, under Regulation C2(5)(a), to the benefit payable on death to a member of the Scheme or whether it should instead be paid the benefit payable under regulation E2A. To answer this question the key issue that needs to be established is whether Mrs McLeod was still a member of the Scheme when she died on 2 July 2012.
26. Regulation C2(5)(a) provides that where a member leaves pensionable employment or dies any payment in respect of annual leave that has not been taken will be treated as though the member continued in pensionable employment for the period that the leave encompasses. Mrs McLeod's employer, the NHS, said that due to annual leave Mrs McLeod had not taken she paid pension contributions up to and including 8 July 2012. I am therefore satisfied that, in accordance with regulation C2(5)(a), Mrs McLeod was a member of the Scheme at the time of her death on 2 July 2012.

27. As Mrs McLeod's employment - and, accordingly, her membership of the Scheme - had not terminated at the date of her death she was not entitled to an immediate payment of her ill-health pension or to the commuted lump sum payment representing her ill-health pension. The Estate was not, it follows, entitled to receive the commuted ill-health lump sum.
28. In addition, I do not consider that the incorrect payment of the commuted ill-health lump sum was the result of any maladministration on the part of NHS Pensions. Although Mrs McLeod had received confirmation from NHS Pensions' medical advisors on 20 June 2012 that she was entitled to receive ill-health retirement benefits, the form that she completed to be considered for entitlement to ill-health retirement benefits - Form AW33E - said that if it transpired that Mrs McLeod qualified for ill-health retirement benefits she "must complete form AW8 to request payment of these benefits". The NHS completed Mrs McLeod's application for her ill-health retirement benefits - Form AW8 - on 25 June 2012. It was submitted to NHS Pensions online. Form AW8 required that, in order for Mrs McLeod's ill-health retirement benefits to be paid as a lump sum, Form AW34I also needed to be completed by Mrs McLeod and sent to NHS Pensions by her employer, the NHS.
29. Mrs McLeod had signed the Form AW34I on 11 June 2012. However, the NHS did not date and send the Form AW34I to NHS Pensions until 25 June 2012. This short delay is presumably because it was waiting to know the outcome of NHS Pensions' medical advisor's decision which was not communicated to Mrs McLeod until 20 June 2012. The date stamp on the Form AW34I shows that it was received by NHS Pensions on 2 July 2012. NHS Pensions "authorised" Mrs McLeod's application on 3 July 2012 and instructed Xafinity Paymaster to make a payment of a commuted ill-health lump sum.
30. However, Mrs McLeod had died on 2 July 2012.
31. Mrs McLeod's application was authorised by NHS Pensions on 3 July 2012. Although the medical advisor had indicated in their letter to Mrs McLeod of 20 June 2012 that, in their view, she was eligible to receive ill-health retirement benefits, the statement in Form AW33E says that a further application must be made (via Form AW8) to request payment of such benefits. Mrs McLeod had therefore not successfully requested payment of the commuted ill-health lump

sum until Form AW8 and Form AW341 had been completed. (As stated in Form AW8, Form AW341 was also necessary as Mrs McLeod was applying for a commuted ill-health lump sum). These two forms were completed by 25 June 2012 and Form AW341 was subsequently received by NHS Pensions on 2 July 2012. NHS Pensions had to authorise payment for the benefit to be paid. NHS Pensions acted very quickly in authorising payment - doing so within a day of receiving completed Form AW341.

32. The payment arrived with the Estate on 9 July 2012 (i.e. the date after Mrs McLeod's membership of the Scheme ended). As such, it appears that NHS Pensions acted quickly to ensure that Mrs McLeod would be paid her commuted ill-health lump sum on the day she became entitled to it (i.e. 9 July 2012). NHS Pensions cannot, therefore, be said to have unduly delayed the payment process in any way.
33. I also consider that NHS Pensions could not have known - or reasonably have been expected to have known - that Mrs McLeod had died when they authorised payment of the commuted ill-health lump sum on 3 July 2012. As such, authorising the payment of the commuted ill-health lump sum on 3 July 2012 was not maladministration on the part of NHS Pensions.

Entitlement to a death benefit

34. From the date of Mrs McLeod's death on 2 July 2012 NHS Pensions were only authorised by the Regulations to pay the Estate a death benefit. NHS Pensions no longer had the authority, under the Regulations, to pay Mrs McLeod (or, incidentally, the Estate) a commuted ill-health lump sum. Accordingly, on 3 July 2012, NHS Pensions incorrectly approved the payment of a commuted ill-health lump sum.
35. Having established that the Estate is not entitled to receive the commuted ill-health lump sum it has been paid, I now need to consider the Estate's true entitlement.
36. Regulation FI(1) provides that if a member dies in pensionable employment before reaching age 75 a lump sum is payable. Regulation FI(2) provides that the lump sum payable under regulation FI(1) will be equal to twice Mrs McLeod's final year's pensionable pay. In Mrs McLeod's circumstances this amount has been calculated as £45,534.76. I do not have the necessary information to confirm

whether this amount is correct, however I am satisfied that the statutory basis on which it has purportedly been calculated by NHS Pensions is correct. Accordingly, NHS Pensions have applied the Regulations correctly in these circumstances.

Negligent advice

37. In order to make a successful claim that NHS Pensions acted negligently in failing to tell Mrs McLeod that her membership of the Scheme extended to 8 July 2012 as a consequence of being paid her unused annual leave in lieu, Mr Stewart must establish that NHS Pensions' owed Mrs McLeod a duty of care, that the duty was breached by NHS Pensions and that such breach caused the Estate to suffer a loss.
38. There is no general legal duty on trustees (or their administrators) or employers to advise members about their pension scheme rights. Informing Mrs McLeod that the operation of the Regulations would provide that her membership of the Scheme extended to 8 July 2012 as a consequence of being paid her unused annual leave in lieu would clearly constitute advising Mrs McLeod about her pension rights under the Scheme. No duty of care is therefore owed to Mrs McLeod by NHS Pensions in these circumstances.
39. Accordingly, I am satisfied that NHS Pensions did not act negligently in failing to advise Mrs McLeod that she would remain a member of the Scheme until 8 July 2012 as a consequence of being paid her unused annual leave in lieu.

NHS Pensions' maladministration

40. I have found that there was no maladministration on the part of NHS Pensions in *authorising* the payment of the commuted ill-health lump sum. I shall now consider whether their failure to inform the Estate of the incorrect payment until 24 August 2012 was maladministration.
41. NHS Pensions knew that the payment they authorised on 3 July 2012 was incorrect by 5 July 2012. NHS Pensions says that it did in fact take steps immediately to try to suspend payment of the commuted ill-health pension, but this had already been paid. It did also try, via the employer, to obtain next of kin information but apparently the employer had some difficulty in tracing the next of kin.

42. In any event, no information has been provided which suggests that, during the period commencing around 5 July 2012 until the date NHS Pensions actually told the Estate that the incorrect payment had been made (i.e. in their letter dated 24 August 2012), the Estate changed its position in such a way where it was committed to fulfilling a financial obligation to an extent that was irreversible. Accordingly, I do not need to consider this matter any further.
43. It follows that all Mr Stewart has suffered is a loss of expectation that the commuted ill-health lump sum paid to the Estate on 9 July 2012 was the correct benefit.

Length of employment/pensionable service

44. Mr Stewart has said, in his application form, that even after having had several discussions on the issue of her employment the NHS did not make it clear to Mrs McLeod that any payment made in lieu of holiday entitlement would effectively extend her pensionable service. Further, Mr Stewart has also said, in his response to my office's request for information of 30 May 2014, that had Mrs McLeod (and the nursing team at the hospice where she was being cared for) known that she could not receive the commuted ill-health lump sum unless she survived until 9 July 2012, her life could have been extended to beyond that date.
45. This complaint is essentially about the NHS and not about NHS Pensions. This is because the complaint relates to the information that Mrs McLeod was provided about her employment termination date and the possibility that she could have acted differently in the event that she knew the effect of the date on her benefit entitlement (i.e. in the nursing team employing methods to keep Mrs McLeod alive until 9 July 2012).
46. Mr Stewart has confirmed - in his email to my office of 6 May 2014 - that the present complaint is only about NHS Pensions. It follows that I am not able to deal with any complaints about the NHS in this provisional decision.

Payment of legal fees incurred

47. Mr Stewart has requested that NHS Pensions reimburse the legal fees that the Estate has incurred to date in making this complaint. He has provided an invoice which suggests that to date the Estate has incurred legal fees of £900.

48. In these circumstances I am only able to reimburse legal fees that the Estate has incurred due to the mistaken overpayment by NHS Pensions of the commuted ill-health lump sum. This does not include the legal fees that the Estate has incurred in bringing a complaint to my office. Mr Stewart has provided an invoice from a law firm which shows that he/the Estate has incurred £900 in legal fees. The title of the firm's invoice says that the matter the fees relate to is a "Complaint to the Pensions Ombudsman". It follows that I assume that all of the £900 fees incurred have been incurred in bringing the complaint to this office. As such, NHS Pensions should not be required to reimburse these fees.

Distress and inconvenience

49. It is clear from Mr Stewart's application to my office that he and the other executors of the Estate have experienced distress and inconvenience as a consequence of NHS Pensions' payment of the commuted ill-health lump sum on 3 July 2012 and their subsequent efforts to recover the benefit.
50. However, I have not found that the authorisation of the payment by NHS Pensions on 3 July 2012 was maladministration and, further, I have found that the Regulations provided that the benefit was not payable.
51. Although I have concluded that Mr Stewart personally (and presumably his co-executors) will have been disappointed on learning of the error, disappointment or distress does not apply to the Estate as a legal entity. As such, I do not make any award to compensate the Estate in this respect.
52. Accordingly, I do not uphold Mr Stewart's complaint.

Directions

NHS Pensions are at liberty to seek to recover from the executors of the Estate the amount of £59,482.02. (This amount represents the difference between the incorrect amount of £105,016.78 paid in July 2012 and the actual amount due to the executors of the Estate (in accordance with the Regulations) of £45,534.76.)

Jane Irvine
Deputy Pensions Ombudsman

31 October 2014

Appendix: Relevant statutory provisions*The Regulations*

Regulations C2 and F1 of the Regulations say as follows:

“C2 Meaning of "pensionable service"

...

- (5) If, when a member leaves pensionable employment or dies, a payment is made in respect of leave not taken-
- (a) the member's pensionable employment will be treated, subject to paragraph (3), as continuing for a period equal to the period of leave for which payment is made; and
- (b) the payment will be treated as the member's pensionable pay for that period.

...

F1 Member dies in pensionable employment

- (1) If a member dies in pensionable employment before reaching age 75, a lump sum on death shall be payable in accordance with regulation F5.
- ...
- (2) Subject to regulation S4 (benefits on death in pensionable employment after pension becomes payable), the lump sum on death will be equal to twice the member's final year's pensionable pay.”

Regulation E2A says

- (7) Subject to paragraph (8), where a member becomes entitled to a pension by virtue of meeting the tier 2 condition [permanently incapable of regular employment of like duration], the Secretary of State may discharge her liability for that pension by the payment of a lump sum ...
- (8) A lump sum payment under paragraph (7) may be made only if the Secretary of State is satisfied that it is appropriate in all the circumstances having regard to the life expectancy of the member
- ...
- (10) The amount of the lump sum payable under paragraph (7)-
- (a) will be equal to 5 times the yearly rate of the member's pension (calculated in accordance with this regulation) ...