

# The NHS Pension Scheme Public Service Pensions Remedy Cost Claim Back Scheme

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## **Preamble**

*The Public Service Pensions and Judicial Offices Act 2022 (“PSPJOA 2022”) put in place a legal framework to rectify the unlawful discrimination identified by the McCloud judgment (“the Public Service Pensions Remedy”), in which the Court of Appeal found that the transitional protections provided when reformed public service pension schemes were introduced in 2015 were discriminatory.*

*This Scheme (the NHS Pension Scheme Public Service Pensions Remedy Cost Claim Back Scheme) sets out the process by which the NHS Pension Scheme manager will exercise the power in section 23(1) of the PSPJOA 2022 to pay compensation in respect of compensatable financial losses (as defined by the PSPJOA 2022 and the related Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022 (“Treasury Directions”)) incurred by members, or in the case of deceased members, their personal representatives, that are not rectified by a members’ immediate or deferred choice and the provisions of the National Health Service Pension Schemes (Remediable Service) Regulations 2023 (“2023 Regulations”).*

*This Scheme also summarises the relevant provisions of the PSPJOA 2022 and the Treasury Directions (which set out the detailed rules by which the power to pay compensation must be exercised) and should be read in conjunction with that legislation. If the relevant legislation is amended, the Scheme rules will be applied in accordance with those amendments.*

## **Part 1 - Preliminary, Interpretation & Governance**

### **1. Preliminary**

- 1.1 This Scheme sets out the process by which the scheme manager for the National Health Service Pension Schemes in England and Wales will exercise the power to pay amounts by way of compensation for compensatable losses incurred by members, or in the case of deceased members, their personal representatives by virtue of section 23(1) of PSPJOA 2022 and in accordance with the Treasury Directions.
- 1.2 This Scheme will be known as the NHS Pension Scheme Public Service Pensions Remedy Cost Claim Back Scheme and applies to England and Wales.
- 1.3 This Scheme must be read in conjunction with the compensation provisions contained in—
  - (a) Part 1 of PSPJOA 2022;
  - (b) Part 2 of the Treasury Directions; and
  - (c) Part 8 of the 2023 Regulations.

### **2. Interpretation**

#### **2.1 In this Scheme—**

- “the 1995 Regulations” means the National Health Service Pension Scheme Regulations 1995 (S.I. 1995/300);
- “the 2008 Regulations” means the National Health Service Pension Scheme Regulations 2008 (S.I. 2008/653);

“the 2015 Regulations” means the National Health Service Pension Scheme Regulations 2015 (S.I. 2015/94);

“the 2015 Scheme” means the National Health Service Pension Scheme for England and Wales set out in the 2015 Regulations;

“the 2023 Regulations” means the National Health Service Pension Schemes (Remediable Service) Regulations 2023 (S.I. 2023/985);

“annual allowance charge” has the meaning given by section 227(1) of the Finance Act 2004 (c.12)<sup>1</sup>;

“appropriate person” has the same meaning as in section 15(10), 16(8), or 17(9) of PSPJOA 2022 as the context requires;

“authorised independent financial advisor” means a person who has permission under Part 4A of the Financial Services and Markets Act 2000, or resulting from any other provision of that Act, to carry out a regulated activity specified in regulations made by the Secretary of State or is acting as an appointed representative (within the meaning given by section 39(2) of that Act) in relation to a regulated activity so specified;

“deferred choice election for 2015 Scheme benefits” means an election made under regulation 12 of the 2023 Regulations;

“designated person” has the same meaning as in regulation 7(2) of the 2023 Regulations;

“immediate choice election for 2015 Scheme benefits” means an election made under regulation 9 of the 2023 Regulations;

“independent financial advice” means advice that it is given by an authorised independent financial adviser;

“IP 2016” has the same meaning as in direction 2 of the Treasury Directions;

“legacy scheme” means the National Health Service Pension Scheme for England and Wales as set out in the 1995 Regulations and the 2008 Regulations;

“lifetime allowance charge” has the meaning given by section 214(1) of the Finance Act 2004 (c.12)

“lifetime allowance protection” has the same meaning as in direction 2 of the Treasury Directions;

“mixed service” has the same meaning as in section 19 of the PSPJOA 2022;

“NHS Pension Scheme” means either the legacy scheme or the 2015 Scheme;

“non-discrimination rule” has the same meaning as in section 25(8) of the PSPJOA 2022;

“out-of-scope tax year” has the same meaning as in direction 9(8) of the Treasury Directions;

“PSPJOA 2022” means the Public Service Pensions and Judicial Offices Act 2022 (c.7);

“registered pension scheme” has the meaning given by section 150(2) of the Finance Act 2004 (c. 12);

“relevant tax years” means the tax years from 2015-16 to 2021-22 inclusive, and references to a relevant tax year mean one of those tax years;

“remediable service” has the same meaning as in section 1 of the PSPJOA 2022;

“remedy member” has the same meaning as in regulation 2 of the 2023 Regulations;

“Treasury Directions” means the Public Service Pensions (Exercise of Powers, Compensation and Information) Directions 2022.

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<sup>1</sup> Section 227(1) was amended by the Taxation of Pensions Act 2014 (c. 30), Schedule 1, paragraph 63, and by the Finance (No 2) Act 2015, Schedule 4, paragraph 11.

### **3. Decision makers**

- 3.1 The Secretary of State for Health and Social Care is the Scheme manager.
- 3.2 The Secretary of State may arrange for any or all the Scheme manager's functions under this Scheme to be performed on the Secretary of State's behalf by one or more persons and, in particular, by the NHS Business Services Authority ("NHSBSA").
- 3.3 NHSBSA claims officers ("claims officers") are responsible for making determinations of applications made under this Scheme.
- 3.4 NHSBSA Disputes Managers ("claims managers") are responsible for carrying out appeals made under this Scheme.
- 3.5 In these Scheme rules, claims officers, claims managers and the Scheme manager are "decision makers".

### **4. Policy review board**

- 4.1 There is to be a board ("the policy review board") with the responsibility of providing advice (on request or otherwise) to decision makers in relation to the effective administration and management of this Scheme.
- 4.2 The policy review board is to consist of one or more senior officials from the Department of Health and Social Care, and one or more officials from the NHSBSA. The policy review board will be chaired by a senior official from the Department of Health and Social Care.

## **Part 2 - Compensatable Losses**

### **5. Compensatable losses**

- 5.1 Section 23 PSPJOA 2022 and direction 9 of the Treasury Directions prescribes where a loss incurred by a member, or by a member's personal representatives may be "compensatable" ("a compensatable loss") and these circumstances are summarised with reference to the 2023 Regulations, as they apply, in this Part. A loss is "compensatable" if any of the following conditions are met—
- (a) first condition—
- (i) the loss is—
    - (aa) a direct financial loss, or
    - (bb) a specified Part 4 tax loss, and
  - (ii) the decision maker is satisfied that it is more likely than not, that the loss is attributable to an actual or anticipated relevant breach of a non-discrimination rule<sup>2</sup>;
- (b) second condition—
- (i) the loss is—
    - (aa) a direct financial loss which is directly related to the member's remediable service in an employment or office which is mixed service, or
    - (bb) a specified Part 4 tax loss, and
  - (ii) the decision maker is satisfied that it is more likely than not, that the loss is attributable to the application of any provision of, or made under, Chapter 1 of the PSPJOA 2022;
- (c) third condition—
- (i) an immediate choice election for 2015 Scheme benefits has been made, and

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<sup>2</sup> See section 25(9) of the PSPJOA 2022 for the circumstances in which a breach of a non-discrimination rule is "relevant".

- (ii) the decision maker is satisfied that the remedy member or deceased member has paid more annual allowance charge in the relevant tax years than they would have done had no immediate choice election for 2015 Scheme benefits been made.

5.2 For the purposes of paragraph 5.1—

- (a) the Scheme manager considers that a direct financial loss, referred to in direction 9 of the Treasury Directions, may include (but is not limited to) payments for professional services or advice, including, but not limited to, accountancy services and independent financial advice, but does not include a payment for information or services that in the opinion of the decision maker the applicant could have reasonably obtained from the Scheme manager of the NHS Pension Scheme or the NHSBSA without charge.
- (b) “a Part 4 tax loss” is a “specified Part 4 tax loss” if and to the extent that it falls within one of the following descriptions (which summarise direction 9(6) of the Treasury Directions, as it applies to the NHS Pension Scheme)—
  - (i) where, by reason of the operation of section 2(1) of PSPJOA 2022, a member has overpaid an annual allowance charge in relation to an out-of-scope tax year, the amount of the overpayment;
  - (ii) where, by reason of the operation of section 2(1) of PSPJOA 2022, a member has overpaid a lifetime allowance charge in relation to an out-of-scope tax year, the amount of the overpayment;
  - (iii) where, by reason of the operation of section 2(1) of PSPJOA 2022, a member has overpaid an annual allowance charge or a lifetime allowance charge in relation to a registered pension scheme which is not—
    - (aa) a Chapter 1 scheme<sup>3</sup>,
    - (bb) a judicial scheme, or
    - (cc) a local government scheme,and the member is unable to recover the amount of the overpaid annual allowance charge or lifetime allowance charge from that pension scheme, the amount of the overpayment that is unrecoverable from that pension scheme;
  - (iv) where, notwithstanding the operation of section 2(1) of PSPJOA 2022—
    - (aa) any lifetime allowance protection to which the member was entitled immediately before the 6 April 2015 cannot be restored because the member can no longer meet the statutory criteria,
    - (bb) the member is unable to mitigate their loss in full by applying for IP 2016, and
    - (cc) the member is no longer accruing pension benefits,the difference between the amount of any additional lifetime allowance charge the member has paid as compared to what the amount of the lifetime allowance charge would have been if the lifetime allowance protection was restored, less the amount of any mitigation that is possible by applying for IP 2016, and less any appropriate reduction;
  - (v) where direction 4(7)(b)(ii) of the Treasury Directions applies in relation to a member, the amount of the negative aggregate sum, less the amount of any tax relief under section 188 of Finance Act 2004<sup>4</sup> the appropriate person receives on the amount

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<sup>3</sup> See s.33 PSPJOA 2022.

<sup>4</sup> 2004 c. 12.

- of pension contributions (if any) that the appropriate person pays to the scheme under regulations 4 or 5 of the 2023 Regulations;
- (vi) where, by reason of the exercise of any of the regulations in Part 4 of the 2023 Regulations—
- (aa) the rights to additional benefits, that would otherwise have been secured by the payment of the voluntary contributions are extinguished, in relation to a member,
  - (bb) the person whose rights are extinguished receives rights under the legacy scheme that are of an equivalent value to the extinguished rights or rights are conferred under the legacy scheme that would have been secured under that scheme if the voluntary contributions had been paid to that scheme in relation to that member, and
  - (cc) that member has overpaid an annual allowance charge in relation to a relevant tax year when compared to the amount of annual allowance charge the member would have paid in that relevant tax year if the voluntary contributions had been paid originally to the section of the legacy scheme in which the member now has rights,
- the amount of the overpayment;
- (vii) where, by reason of the exercise of any of the regulations in Part 4 of the 2023 Regulations —
- (aa) the rights to additional benefits, that would otherwise have been secured by the payment of the voluntary contributions are extinguished, in relation to a member,
  - (bb) the person whose rights are extinguished receives rights under the legacy scheme that are of an equivalent value to the extinguished rights or rights are conferred under the legacy scheme that would have been secured under that scheme if the voluntary contributions had been paid to that scheme, in relation to that member, and
  - (cc) that member has overpaid an annual allowance charge in relation to a subsequent tax year when compared to the amount of annual allowance charge the member would have paid in that subsequent tax year if the voluntary contributions had been paid originally to the legacy scheme in which the member now has rights,
- the amount of the overpayment, less the aggregate amount of annual allowance charge the member would have paid in the relevant tax years if the voluntary contributions been paid originally to the section of the legacy scheme in which the member now has rights; or
- (viii) where, by reason of the exercise of any of the regulations in Part 4 of the 2023 Regulations—
- (aa) the rights to additional benefits, that would otherwise have been secured by the payment of the voluntary contributions are extinguished, in relation to a member,
  - (bb) the Scheme manager is required to pay the member who paid the contributions, or if that member is deceased, that member's personal representatives an amount by way of compensation equal to the aggregate of the voluntary contributions paid less the value of the tax relief the member

was entitled to in respect of the voluntary contributions in relation to that member, and

(cc) that member has overpaid an annual allowance charge in relation to a relevant tax year when compared to the amount of annual allowance charge the member would have paid in relation to that relevant tax year if the voluntary contributions had not been paid,

the amount of the overpayment.

5.3 For the purposes of paragraph 5.2(b)(iv) the “appropriate reduction” is the amount (if any) of any tax relief on pension contributions that the member has received in the relevant tax years which the member would not have received had any lifetime allowance protection been maintained.

5.4 For the purposes of this Part, “a subsequent tax year” means a tax year from 2022-23 onwards.

### **Part 3 - Applications**

#### **6. Eligible applicants to the NHS Pension Scheme Public Service Pensions Remedy Cost Claim Back Scheme**

6.1 An application under this Scheme may only be made by—

- (a) a remedy member;
- (b) a personal representative of a deceased remedy member; or
- (c) a designated person.

#### **7. Applications relating to specified tax losses**

7.1 An application must be submitted by way of the HMRC Digital Service where payment is sought in relation to—

- (a) a loss which falls within the third condition in paragraph 5.1(c), or
- (b) a specified Part 4 tax loss (paragraph 5.2(b)).

7.2 Where a completed application is received via the HMRC Digital Service it will be treated as an application made under this Scheme in relation to the losses described in paragraph 7.1 only.

#### **8. Information to be provided by an applicant**

8.1 An applicant must provide such information in connection with their application as the decision maker may reasonably require, which is information within the applicant’s possession, or that the applicant might reasonably be expected to obtain, in particular—

- (a) evidence of loss, as described in paragraph 5 which may include a written statement;
- (b) where the applicant is applying as a personal representative, a signed indemnity form; and
- (c) where the applicant is applying as a designated person, a signed declaration that the applicant is the designated person of the remedy member.

#### **9. Time limits**

9.1 An application must be received by the NHSBSA before the end of the period of 12 months, beginning with the later of, the day on which a remediable service statement or a pension saving statement, is first provided in respect of the remedy member.

## **Part 4 - Determinations and payment**

### **10. Making determinations**

- 10.1 A decision maker may request such further information from the applicant as they consider appropriate.
- 10.2 A decision maker may request advice from the policy review board in relation to the effective administration and management of the Scheme.
- 10.3 When exercising the power to pay amounts by way of compensation, the decision maker must act in accordance with direction 8 of the Treasury Directions, which are summarised below for ease of reference. The decision maker must;
- (a) have regard to the purpose of the compensation;
  - (b) comply with the principle of regularity;
  - (c) comply with the principle of propriety;
  - (d) comply with the principle of value for money;
  - (e) have regard to the particular circumstances of the person to whom the compensation is to be paid;
  - (f) have regard to whether sufficient evidence has been provided or is otherwise available to the decision maker to establish—
    - (i) whether, and to what extent, any of the three conditions in paragraph 5.1(a)-(c) are met;
    - (ii) the existence, nature and extent of the loss incurred by the member, or by the member's personal representatives;
    - (iii) the appropriate quantum of the compensation;
  - (g) have regard to whether, if a claim for compensation, was brought in litigation, it is more likely than not, that compensation would be awarded, and if so, have regard to the likely quantum of the compensation that would be awarded;
  - (h) in determining the quantum of the compensation, have regard to whether, and to what extent, the member (or, if different, the person to whom the amounts by way of compensation are to be paid), has or should have, taken reasonable steps to mitigate the loss;
  - (i) subject to sub-paragraph (h), ensure any payment of amounts by way of compensation is reasonable and proportionate to the loss incurred by the member, or by the member's personal representatives; and
  - (j) in relation to a loss which falls within the first condition in paragraph 5.1(a), not make any payment of amounts by way of compensation which would allow any person to whom the compensation is to be paid, to gain an unreasonable financial advantage compared to what would have happened if there had not been a relevant breach of a non-discrimination rule.
- 10.4 For the purposes of paragraph (10.3 (a)) the "purpose of the compensation" means—
- (a) in relation to a loss which falls within the first condition in paragraph 5.1(a), the purpose to pay only such amounts by way of compensation (if any) as are necessary (and no more than are necessary) to put the person to whom the amounts by way of compensation are to be paid into the position they would have been in had there not been a relevant breach of a non-discrimination rule, or
  - (b) in relation to a loss which falls within one of conditions in paragraphs 5.1(b) or (c), the purpose to pay only such amounts by way of compensation (if any) as are necessary

- (and no more than are necessary) to compensate the member (or if that member is deceased, that member's personal representatives) reasonably in respect of the loss.
- 10.5 For the purposes of paragraph 10.3(b), when considering what the principle of regularity requires, the decision maker must have regard to any applicable legislation and wider legal principles.
- 10.6 For the purposes of paragraph 10.3(c), when considering what the principle of propriety requires, the decision maker must have regard to maintaining high standards of public conduct, ensuring robust governance, and ensuring compliance with any applicable financial controls or reporting obligations.
- 10.7 For the purposes of paragraph 10.3(d), when considering what the principle of value for money requires, the decision maker must have regard to whether, in comparison to any reasonable alternative possibilities or doing nothing, any payment of amounts by way of compensation delivers value for the Exchequer as a whole.

## **11. Payment for compensatable loss**

- 11.1 Where a decision maker determines that a payment should be paid for compensatable losses, the member or, if the member is deceased, the member's personal representative will receive a payment subject to paragraphs 11.2, 11.3 and 11.4.
- 11.2 The maximum payment which may be made under this Scheme for independent financial advice, where the advice relates to making an immediate or deferred choice election for 2015 Scheme benefits, is £500 per piece of advice.
- 11.3 The maximum payment which may be made under this Scheme for accountancy services, where the service relates to the use of the HMRC Digital Service for the completion of applications described in paragraph 7.1, is £1,000 per piece of advice.
- 11.4 In accordance with direction 8(6) of the Treasury Directions the Scheme manager may only pay the amount determined to be compensatable by virtue of section 23(1) of PSPJOA 2022 in respect of a Part 4 tax loss to the extent that the compensatable loss relates to;
- (a) a tax charge which the member originally paid directly to HMRC in money, or
  - (b) tax relief.

## **12. Notification of determination**

- 12.1 An application will be determined by a claims officer in accordance with this Scheme.
- 12.2 A claims officer will notify the applicant in writing of the determination of the application within 30 days of a determination being made.
- 12.3 The written notice of determination must provide the applicant with an explanation of how the relevant amounts (if any) have been determined in accordance with direction 18(4) of the Treasury Directions.
- 12.4 If it is determined by a claims officer that an application is invalid, then it may be rejected, and the claimant will be notified in writing the reason for this.

## **13. Arrangements for payment**

- 13.1 The Scheme manager must pay the amount determined to be compensatable as soon as reasonably practicable—
- (a) after the written notice of determination has been issued, or
  - (b) where the Scheme manager requires the applicant to provide further information to facilitate the payment, after receipt of that information.

## **Part 5 - Reviews and Appeals**

### **14. Reviews**

- 14.1 An applicant may seek a review of a decision as to the determination of an application or the amount determined to be compensatable.
- 14.2 An application for a review must be made in writing and in such form as the Scheme manager determines and be accompanied by the grounds on which the review is sought, including a reasoned explanation of a proposed alternative amount and any supporting evidence.
- 14.3 It must be received by the claims officer before;
- (a) the end of the period of 56 days beginning with the day after the written notice mentioned at paragraph 12.3 was issued, or
  - (b) such later deadline as the claims officer considers reasonable in all the circumstances of the case.
- 14.4 A review will be decided by a claims officer, other than the claims officer that made the initial determination. The claims officer who conducts the review will not be bound by any previous decision made in connection with the application.
- 14.5 A claims officer will notify the applicant in writing of the determination of the review, providing a reasoned explanation of its decision.
- 14.6 An applicant may not seek a review of a decision made on review but may make an appeal to the claims manager against that decision (see paragraph 15).

### **15. Appeals**

- 15.1 An applicant who is dissatisfied with a decision on a review may appeal to a claims manager against that decision.
- 15.2 An applicant may not appeal an initial determination, without first seeking a review (see paragraph 14).
- 15.3 An appeal must be made in writing and in such form as the Scheme manager determines and be accompanied by the grounds on which the appeal is sought, including a reasoned explanation of a proposed alternative amount and any supporting evidence.
- 15.4 An appeal must be received by the claims manager before;
- (a) the end of the period of 56 days, beginning with the day after the written notice of determination mentioned at paragraph 14.5 was issued, or;
  - (b) such later time, as the claims manager considers reasonable in all the circumstances of the case.
- 15.5 An appeal will be decided by the claims manager. The claims manager will not be bound by any previous determination made in connection with the application.
- 15.6 The claims manager will notify the applicant in writing of the determination of the appeal, providing a reasoned explanation of their decision.
- 15.7 An applicant who is dissatisfied with a decision on an appeal may make a complaint to the Pensions Ombudsman.

## **Part 6 - General**

### **16. False Representations and withheld information**

- 16.1 The Scheme manager may, unless satisfied that it would be unjust—
- (a) decline to make payment under this Scheme; or
  - (b) recover any payment made under this Scheme

if they are satisfied that the applicant has made a false representation or withheld relevant information regarding their application.

16.2 If false information is given, in relation to applications relating to specified tax losses, the applicant may face civil action or prosecution, or both.

#### **17. Double recovery**

17.1 A payment will not be made in respect of a compensatable loss which has already been compensated through this Scheme, or by any other means.