

Ombudsman's Determination

Applicant	Mr R
Scheme	NHS Pension Scheme (the Scheme)
Respondents	East London NHS Foundation Trust (the Trust) NHS Business Services Authority (NHS BSA)

Outcome

1. Mr R's complaint against the Trust and NHS BSA is partly upheld. To put matters right, NHS BSA and the Trust shall each pay £1,000 to Mr R, in recognition of the severe distress and inconvenience they have caused.

Complaint summary

2. Mr R's complaint is that:
 - NHS BSA incorrectly refused to pay death in service benefits from the Scheme for his late wife, Mrs R, on the grounds that she was a contractor working for the Trust's casual worker arrangement (**the Bank**), not an employee, and therefore, not eligible to join the Scheme.
 - The Trust and NHS BSA misled Mrs R because the Trust required her to change her status from contractor to Bank employee in order to comply with amended tax regulations (**IR35**), admitted her to the Scheme, but then reversed their decision after she died.
 - The Trust and NHS BSA caused great distress to him and his family in their handling of his complaint.

Background information, including submissions from the parties

3. In 2016, the Trust employed Mrs R, as an agency contractor, to fill a role as Head of Information Governance. She had reached state pension age but continued to work in administration.
4. On 3 January 2017, the Trust extended Mrs R's appointment as Head of Information Governance for a further six months, as it had not been able to recruit permanently to the role. This time she was engaged as an independent contractor through her own company, Aspen House Training & Consultancy Limited (**AHTC**).
5. In February 2017, NHS Improvement, the Trust's regulator (**the Regulator**), issued general guidance about IR35 that applied from 6 April 2017. It advised that all contractors engaged through a service company should be deemed to fall within the scope of IR35 and taxed like employees. Details of IR35 are set out in Appendix 1.
6. On 27 March 2017, the Trust decided to follow the Regulator's guidance on IR35. It agreed that from April 2017, the Trust would be responsible for deducting tax and National Insurance contributions directly from all payments made to a personal service company for work done by the contractor. This would include Mrs R as her services were provided to the Trust through AHTC.
7. On 29 March 2017, the Trust identified that it would need to extend Mrs R's employment for a further period of six weeks. The Trust's Associate Director of Information Governance, Mrs R's line manager (**Ms K**) met Mrs R. They agreed that she would be employed through the Trust's Bank from 1 April 2017, in order to comply with the new process for deducting tax under IR35, although the services she provided would continue as before.
8. On 4 April 2017, the Trust sent an email to Mrs R, headed "Confirmation of Bank Registration" that said:

"I am pleased to confirm your Bank start date with effect from 1 April 2017. Your payroll paperwork has been processed and sent to Payroll under Assignment number 26585307. Your line manager [**Ms K**] will complete details of your shifts directly into [the timesheet system]...and you will be paid accordingly."
9. On 7 April 2017, Mrs R completed and signed a form (**Staff Appointment Form**) provided by the Trust, on its headed paper. She also completed the forms set out in Appendix 4. The Staff Appointment Form included the words "I certify that I have received and read the NHS Pension Scheme starter pack and the information I have provided is true to the best of my ability."
10. On 3 May 2017, Mrs R sent an email to Ms K stating that she had completed the HMRC online employment status tool for IR35 purposes which returned "not liable".
11. On 12 May 2017, Mrs R died unexpectedly at home, on a working day.

12. On 22 May 2017, in an internal email, Ms K confirmed that Mrs R had been put on the Bank payroll from 1 April 2017, as a spot contractor. She was paid £35.16 per hour. Her estate had been paid for her work pre-1 April 2017.
13. On the same day, Mrs R was sent a letter entitled "Introduction to the NHS Pension Scheme", advising her that, following her start date with the Trust, she had become a member of the Scheme, having satisfied the auto enrolment criteria. It added: "To check if you are a member of the Scheme, see your payslip under deductions."
14. On 23 May 2017, the Trust completed a leaver form for Mrs R, citing death in service. Section 1 referred to her as an employee with an employee number and confirmed that she was employed under the Trust's Bank.
15. On 26 May 2017, Mrs R's final pay slip stated that her Department was "Bank Admin", and her job title was "Admin Bank Contractor (Spot)" at an hourly rate of £35.16. Scheme contributions had been deducted from her earnings at 9.3%.
16. On 9 June 2017, NHS BSA notified Mr R that Mrs R was not entitled to death in service benefits as she had not been eligible to join the Scheme. A refund of pension contributions was paid to Mrs R's estate.
17. From 3 to 4 July 2017, Mrs R's son regularly called NHS BSA's Bereavement Team asking if the Trust had decided that Mrs R was not eligible to join the Scheme because she was over State Pension age (**SPA**).
18. NHS BSA initially responded that Mrs R was eligible to join the 2015 section of the Scheme, even if over SPA, and that she had no previous Scheme membership to affect this. It then changed its view and said that the Trust's external payroll provider (**NHS payroll**) had confirmed that Mrs R was not eligible to join the Scheme because she was a contractor. Mrs R's son questioned this decision because she had changed her status to Bank employee on 1 April 2017.
19. On 12 July 2017, Mr R contacted the Trust and Ms K and complained that they had not replied to his son's enquiries about NHS BSA's decision, though they had had time to pick up the Trust's computer equipment the day of Mrs R's funeral. He said the lack of explanation was very distressing and he would contact his MP.
20. On 19 July 2017, Mr R wrote to the Trust's Chief Executive Officer (**CEO**), copied his MP, and formally complained about the delay in dealing with his complaint about Mrs R's death benefits under the Scheme, that amounted to £137,501.
21. On 26 July 2017, the Trust provided NHS BSA with the information required to assess Mrs R's eligibility for Scheme membership. The Trust explained that:-
 - Mrs R was formerly a self-employed contractor with the Trust and joined the Trust's Bank and the Scheme on 1 April 2017.
 - She was enrolled in the Scheme from 1 April 2017 and had paid pension contributions. She was recorded in the Trust's employee staff records system as a

Bank worker from 1 April 2017 to 12 May 2017. Mrs R died on a day she was scheduled to work with the Trust. This meant she should have been eligible for a death in service payment.

- The Trust had not instructed NHS payroll to withdraw Mrs R from the Scheme. NHS payroll had concluded that Mrs R was not eligible to join the Scheme and had withdrawn her membership. It had told the Trust to refund the pension contributions that she had made.
 - The Trust had suggested that NHS payroll should reinstate Mrs R's pension rights in the Scheme and deduct the contribution refund from her death in service benefit.
22. On 28 July 2017, the Trust's CEO wrote to Mr R confirming he would respond to his complaint.
 23. On 14 August 2017, Mr R returned to the Trust, the cheque of the refunded pension contributions Mrs R had paid to the Scheme.
 24. On 16 August 2017, Mr R's MP wrote to the NHS BSA's CEO regarding his complaint.
 25. On 4 September 2017, NHS BSA's CEO replied to Mr R's MP, stating that NHS BSA had established that Mrs R was, in fact, a member of the Scheme. He said there had initially been confusion about whether she should have been enrolled in the 2015 section of the Scheme. NHS BSA had now confirmed that she had properly been enrolled into the Scheme and that the Trust had been informed of this.
 26. On 23 October 2017, NHS BSA's Bereavement Team emailed Ms K stating that it was satisfied that Mrs R was, in fact, a self-employed contractor and not an employee.
 27. On 27 October 2017, the Trust's CEO wrote to Mr R stating that, as a contractor, Mrs R was not permitted to join the Scheme even though the Trust had initially admitted her from 1 April 2017. Its decision was final, and the Trust had done all it could. She apologised for the confusion, delay and long complexity between three bodies, the Trust, NHS BSA and NHS payroll, which had challenged the decision. The rationale for this conclusion was that:-
 - The application forms indicated that Mrs R was a contractor.
 - Mrs R had signed the declaration of interest form as a director of her own company.
 - The bank account that the return of contributions would be paid into was a business account.
 - She was put on the Bank's payroll to comply with IR35.

28. On 24 January 2018, Mr R emailed the Trust and indicated that he was going to make a formal complaint because Mrs R was entitled to death in service benefits.
29. On 14 March 2018, NHS BSA asked the Trust several key questions so that it could consider Mr R's claim and issue a formal response. On 11 July 2018, the Trust confirmed to NHS BSA that Mrs R was a "Bank worker contractor" from 1 April 2017, and was only placed on the Bank for IR35 purposes, while the Trust was in the process of negotiating a new agreement.
30. On 17 July 2018, NHS BSA's Technical Manager wrote to Mr R, confirming that Mrs R was not entitled to Scheme death benefits. He explained as follows:-
 - Mrs R was never eligible to join the Scheme as she was never formally employed under a contract of service by the Trust.
 - An eligible employee is a person employed by a Trust under a contract of service, who is under the age of 75 and not already in receipt of a Scheme pension.
 - Mrs R was included in the Trust's payroll, on a 'Bank worker contract' but she was not an employee at the time of her death. She had not yet been issued with an employment contract. She was a Bank worker/contractor and was only placed on the Bank to comply with IR35.
 - Some self-employed contractors are afforded access to the Scheme. However, they must be a qualified General Practitioner, General Dental Practitioner, or Ophthalmic Medical Practitioner.
 - The Secretary of State was responsible for the Scheme and an employer could not decide if death benefits were payable. Even if an employer had incorrectly included an individual into the Scheme and collected employee contributions that person was not entitled to Scheme membership.
 - It was unclear if the Trust's long-term intention was to offer Mrs R a contract of service. However, as she was not an employee at the time of her death, she did not meet the requirements for an 'Officer' under the Scheme.
31. On 2 April 2017, Mr R complained to my office saying that all the documentation pointed to Mrs R's appointment as a Bank employee, so she was misled as to her status and consequent entitlement to Scheme benefits.
32. In response to Mr R's complaint, the Trust provided a copy of the Trust's Staff Bank Handbook for temporary staffing, dated October 2011 (**the Handbook**). Extracts from this are set out in Appendix 3. It explained:-
 - Up to 31 March 2017, Mrs R had been engaged by the Trust as a temporary independent contractor.

- From 1 April 2017, and in compliance with the guidance issued by the Regulator, the Trust employed Mrs R through the Bank.
- Mrs R was not misled as to her status. Mrs R was fully aware of the reason for the Trust's proposed engagement through the Bank.
- NHS BSA is the administrator for the Scheme and is responsible for deciding entitlement to benefits under the Scheme, subject to the Scheme regulations.
- The Trust and its CEO had initially considered that Mrs R was eligible for death in service benefits and had kept Mr R and his son updated on the progress of their enquiries.
- On 23 October 2017, NHS BSA was satisfied that at the time of her death, Mrs R had been engaged by the Trust as a self-employed contractor. This meant that she was not eligible to join the Scheme or entitled to any benefits under it. This decision was confirmed to the Trust who, in turn, updated Mr R.
- The appointed designated officer had liaised with Mr R's son and communicated its decision to Mr R in a letter dated 27 October 2017. It was not necessary for the Trust to have separate independent oversight or opinion of Mr R's formal complaint.
- The Trust acted and dealt with Mr R's complaint appropriately. As soon as reasonably practicable, it responded to enquiries made by Mrs R's family and provided information to NHS BSA about Mrs R's eligibility for the death in service benefit.
- A Bank worker contract is generally an arrangement for an individual to work for an organisation but there is no obligation for the organisation to provide work or for the individual to accept work. As such, it is generally used for the purposes of carrying out casual work. Bank workers generally would not be entitled to the same terms and conditions of employment as employees.
- The Trust did not have a Bank worker agreement in place at the time Mrs R was engaged. She was moved to the Bank arrangement to put her onto the Trust's payroll to comply with IR35.
- The Trust did not create any separate new documentation in respect of this change for Mrs R as it was intended to last for a short six-week period. For convenience only, it had used generic forms that were already in place for new starters.
- The Trust did not agree that those forms expressly stated that the individual completing the form was an employee or that references to "employee" were indicative of an employment relationship.
- The Staff Appointment Form showed that Mrs R had provided the same business bank account details that applied during her engagement as a

contractor, which confirmed that the move on the Bank was purely for administrative purposes.

- Bank workers were not treated as employees and were generally subject to different terms. If Mrs R had been regarded as an employee, she would have been issued with an employment contract (rather than placed on the Bank) which was the normal process when recruiting employees.
- Ms K held discussions with Mrs R and explained that the changes to IR35 meant that the Trust's only option was to move her engagement to the Bank. Mrs R raised concerns about whether the move would impact on her pay and she was advised that nothing would change and that the terms and conditions of her engagement would remain the same. She continued to be treated as a contractor and was paid a daily rate.
- These discussions demonstrated that Mrs R was fully aware that her engagement as a contractor would continue for a further short period of six weeks and that she was only placed on the Bank from 1 April 2017, for administrative purposes.
- The Trust also confirmed that if it had intended to change Mrs R's contractor status to Bank worker/employee, she would have been engaged as a "Band 8b," in accordance with its internal processes. The salary for that role would have been significantly lower than the daily rate for a contractor. Mrs R was very clear that she would not accept a reduction in pay.
- The Handbook confirmed that Bank workers were automatically enrolled into the Scheme, as a matter of course. However, the Trust did not accept that this was indicative of Mrs R's employment status. The Trust reiterated that Bank workers ultimately needed to satisfy the eligibility criteria for the Scheme and the final decision on eligibility lay with NHS BSA, not with the Trust.
- The true nature of an individual's status was always based on the legal tests. There was no mutuality of obligation between the Trust and Mrs R, a key requirement for employment status, before or after she was moved on to the Bank.
- The Handbook confirmed that the following terms applied: there was no obligation to offer work or accept work when offered, workers were only entitled to statutory sick pay for sick leave and workers were paid rolled-up holiday pay. These were indicative of a casual Bank worker relationship (and would not normally be applied to employees).
- Mrs R completed the HMRC on-line tool which found that she should pay tax as a self-employed person. She would have remained engaged on her existing contract as a self-employed contractor but for IR35.

33. NHS BSA agreed with the Trust's submissions.

34. In response, Mr R said:-

- Use of documentation of a type normally issued to employees clearly indicated an employment relationship. Otherwise, Mrs R was misled as to her status and entitlement to join the Scheme.
- The Trust said it did not intend to create an employment relationship, but this was not made clear at the time.
- It is possible for an employment relationship to exist even though there was no obligation on an employer to offer work or on an employee to accept any work offered.
- Mrs R had only one bank account and was entitled to have her salary paid to any account she chose, without this indicating her employment status.
- In November 2018, he had made a Subject Access Request (**SAR**) to the Trust under the Data Protection Act but neither notes of such “discussions” nor any HMRC IR35 test results were included in the documentation supplied.
- The Trust claims that Mrs R was “automatically enrolled” into the Scheme as a matter of course. The fact that she was enrolled, and payments deducted is clear evidence that she was entitled to become a member of the Scheme. Otherwise, she was misled.
- Regarding the claim that Mrs R was a contractor because her payslip said she was a “spot contractor” and paid an hourly rate, he provided a copy of recent Trust Bank job adverts for Community Nurses Band 5 Nurses. They were required to work on a temporary basis, as and when required. The advert showed they would be paid an hourly rate on the Bank and were also eligible to join the Scheme.
- He questioned the view that the only change after 1 April 2017, was that Mrs R’s pay was made through payroll. He noted significant discrepancies between pre- 1 April 2017 and post 1 April 2017, arrangements for Mrs R such as:-
 - Post 1 April 2017:
 - Paid an hourly rate of £35.16.
 - Paid through a payslip for Mrs R (not AHTC).
 - Contribution refund payment was made to Mrs R’s estate (not AHTC).
 - Extra hours would have been paid at hourly rate if worked.
 - Pre-1 April 2017:
 - Paid a day rate of £315.83.
 - Paid against invoices raised by AHTC.
 - Payment was made to AHTC.
 - No scope for extra hours worked as this was included in daily rate.

35. Mr R added that:

“These are further examples of the uncertainty and confusion at the Trust and misunderstanding [sic]. It is likely that the Trust moved [Mrs R] from contractor to Bank employee with attendant Staff Appointment Forms, without understanding the implications. Only after [Mrs R’s] death have the implications of moving her ‘to the Bank’ become clear. Since then they have struggled unsuccessfully to reconcile their contradictory positions and those of their partners. Their lawyers have tried to create an explanation to which the Trust is now committed but it all remains confused and unproven.”

Adjudicator’s Opinion

36. Mr S’ complaint was considered by one of our Adjudicators who concluded that, on the balance of probabilities, the Trust and NHS BSA had correctly treated Mrs R as a contractor at the time of her death and so she was not eligible to join the Scheme. The Adjudicator’s findings are summarised below.

- There was no evidence that Mrs R was formally employed by the Trust before she died. She had not been issued with a formal contract of service and she remained a contractor.
- She was not eligible to join the Scheme as she was not an employee or medical contractor or practitioner and did not meet the terms and conditions of an “Officer” under the 2015 section of the Scheme.
- Mrs R was required to complete and sign the Staff Appointment Form which made express reference to an employee, but the evidence showed that the Trust did not intend to change her position from contractor to employee (even though it originally treated her as an employee and a Scheme member).
- The changes made by the Trust to comply with IR35 were compatible with Mrs R working as a “contractor,” not an “employee”. It was only the timing and direct deduction of tax that had to be changed. The evidence of the Trust was that contractors did not change their status even if they were paid through payroll.
- The Trust had not provided notes of meetings with Mrs R about her new status but on the balance of probabilities, it was likely that Mrs R would have preferred to be treated as a “contractor,” rather than as an “employee”, for tax reasons. Mrs R had also taken an online IR35 test that showed she was a contractor for tax purposes.
- Compelling was the wage slip dated 26 May 2017, issued by the Trust, that stated that Mrs R was a “spot contractor”, paid an hourly rate, not a salary.
- There were no specific determining factors that showed Mrs R was a contractor in the way that the Trust and NHS BSA claimed. The fact that she was a director of AHTC and paid through her company bank account did not prove whether she

was working as an “employee” or a “contractor”. Her appointment only extended a further six weeks and it was likely that she did not make changes to her banking account for that reason.

- There was evidence of maladministration because:-
 - The Trust did not provide sufficiently clear information to Mrs R and required her to sign forms, usually signed by employees. These were incorrect and confusing.
 - The Trust incorrectly asserted that she was an employee and entitled to join the Scheme on several occasions.
 - Both the Trust and NHS BSA provided incorrect information to Mrs R’s family on numerous occasions.
- Mr R did not suffer any financial loss, but the maladministration caused severe distress and inconvenience to Mrs R’s family. So, the Trust and NHS BSA should each pay £1,000 to Mr R.

37. The Trust and NHS BSA accepted the Adjudicator’s Opinion, but Mr R did not. He provided further submissions which are detailed in Appendix 5, but his main points were:

- There was no verifiable evidence or a contract to prove that Mrs R was a contractor from 1 April 2017.
- Mrs R signed the Staff Appointment Form and other documents as an “Employee” and two forms were countersigned by Ms K, confirming this. These forms were correct and appropriate as the Trust did engage Mrs R as an employee from 1 April 2017.
- There was no evidence that the position of ‘self-employed contractor through the Bank’(IR35 contractor) existed or that the Trust made any changes to deal with IR35. The Trust’s simple solution to get Mrs R ‘onto payroll’ was to employ her as a Bank worker for the remaining few weeks, unaware of the implications for the Scheme.
- There was no evidence that Mrs R was ever engaged as a ‘Spot Contractor.’ The HR Information document stated she was Interim Head of Information Governance, Band 8b.
- For five months, the Trust and NHS BSA maintained that Mrs R was an employee (a Bank worker) and was correctly enrolled in the Scheme. Only after a telephone conversation, in late October 2017, did NHS BSA change its opinion of her status and the Trust followed suit immediately.

38. As Mr R did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. Mr R's additional comments do not change the outcome. I agree with the Adjudicator's Opinion.

Ombudsman's decision

39. Mr R's complaint is that Mrs R was employed by the Trust, through the Bank, from 1 April 2017 and was a member of the Scheme when she died. Therefore, she was entitled to death in service benefits of £137,501.
40. NHS BSA contends that Mrs R was a contractor and was never employed by the Trust. She was paid as a casual Bank worker from 1 April 2017, for IR35 purposes and was not eligible to join the Scheme. The Trust contends that it was bound by NHS BSA's decision that Mrs R was a contractor and not eligible to join the Scheme.
41. I have considered the submissions made by all parties. I note Mr R's concern that the Trust required Mrs R to sign a Staff Appointment Form, appointing her as an employee, and then enrolled her in the Scheme, only for this to be reversed after she died unexpectedly. However, the Staff Appointment Form that Mrs R signed was not conclusive evidence of a contract of employment. The Trust did not countersign it or issue a contract to Mrs R, offering her employment with the Trust, which she signed and accepted in return.
42. Mr R contends that there was no such role as an IR35 contractor, as the Trust claims, whereby Mrs R was paid through the Bank but was still engaged as a contractor not an employee. However, I find that this is exactly what happened.
43. IR35 created a new situation and the Trust, from its evidence, had to act quickly to comply with the Regulator's guidance that all contractors engaged through a personal services company should be paid with tax deducted through PAYE. As the Trust required Mrs R's services for a further period of six weeks, it decided to use the Bank to deduct tax from Mrs R's earnings to continue her engagement. The Trust did not have a Bank worker or contractor agreement in place at the time, so for convenience, the Trust used the "Staff Appointment Form". Although Mrs R was engaged via the Bank, she continued her role as before, in other respects. Her wage slip showed she was paid a daily rate as a "spot contractor" not a salary, and the only difference was that her earnings were paid net of tax.
44. Although the Trust maintained that Mrs R was an employee for seven months, this did not make Mrs R entitled to benefits from the Scheme. She had to meet the criteria to be an eligible member of the Scheme, to be entitled to such.
45. The requirements for membership of the 2015 section of the Scheme are set out in regulation 18 of The National Health Service Pension Scheme Regulations 2015 (**the 2015 Regulations**). 'Membership' at paragraph (1)(a) states that a person is eligible to join the Scheme if they are "employed" by an NHS organisation or, pursuant to

paragraph (1)(b), they are a “medical contractor” or “medical practitioner”. Extracts from the 2015 Regulations are set out in Appendix 2.

46. All parties agreed that Mrs R was not a medical contractor or practitioner, so she had to qualify as an “employee” within the Regulations, to be eligible to join the Scheme. The statutory definition of “employee” is “an individual who has entered into or works under a contract of employment and “contract of employment” means “a contract of service whether express or implied, and (if it is express) whether oral or in writing” (section 230 ‘Employees, workers etc’ of the Employment Rights Act 1996).
47. “Employee” is not defined further, so it is necessary to consider whether the key factors identified in case law¹ are present to determine if Mrs R was “employed” under a “contract of service” at the time of her death. The main factors are: the agreed terms; the actual legal obligations; true intentions or expectations of the parties; control; and mutuality of obligation, that is, the obligation on an employer to provide work and the obligation on an individual to accept that work.
48. From a review of the factors in Mrs R’s case, I find there is no evidence that any requirements of her role had changed from a contractor to make her an employee from 1 April 2017.
49. Mrs R was required to complete and sign the Staff Appointment Form which made express reference to an employee, but this was for administrative purposes only, as the Trust explained. When she died on 12 May 2017, she had not been issued with a formal contract and had been providing the same services as she had prior to 1 April 2017. As Mrs R’s appointment was only for a further six weeks, it is unclear if it were the Trust’s long-term intention to offer her a permanent contract of service. There are no meeting notes between the Trust and Mrs R in this regard.
50. A wage slip dated 26 May 2017, issued by the Trust, showed that Mrs R was a “spot contractor”, paid an hourly rate. The Handbook states that staff were paid at the standard rate in a band set by the Bank. Mrs R’s job title was Interim Head of Information governance, Band 8b, so if she were an employee, she should have been paid a weekly wage linked to this, not an hourly rate.
51. The Handbook also states that, even if Mrs R had been engaged through the Bank, the overall Bank agreement did not have mutuality of obligation in between assignments and so it was not an overarching employment contract. It is possible that each assignment under an overarching agreement, like the Bank, was a contract of service, even if it is short and temporary. However, I find that there is not sufficient evidence that the Trust intended Mrs R to be employed on a short-term assignment for six weeks.
52. From a review of the facts, and on the balance of probabilities, I find that Mrs R was a contractor at the time of her death and not eligible to join the Scheme. She was not

¹ Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497.

employed by the Trust and did not meet the terms and conditions of an “Officer” under the 2015 section of the Scheme .So, her estate was not entitled to receive the death in service benefit of £137,501 following her death on 12 May 2017.

53. Mr R asserts that Mrs R was misled by the Trust and NHS BSA as to her status as an employee and member of the Scheme. I find there is no evidence of this. Mrs R’s status was only changed for administrative purposes. Her new appointment was only for six weeks, so, I find that it is unlikely that Mrs R would have remained in the Scheme, and not opt out and receive a refund of the contributions she had paid to the Scheme, after her six week employment had ended.
54. With that being said, I consider there is evidence of maladministration. The Trust did not provide sufficiently clear information to Mrs R about the Staff Appointment Form. Both the Trust and NHS BSA also provided incorrect information to Mrs R’s family on numerous occasions and the CEOs of both NHS BSA and the Trust wrote to Mr R and his MP confirming that Mrs R was a valid member of the Scheme, before later retracting this.
55. Although there is no actual financial loss arising from the maladministration, I find that the Trust’s and NHS BSA’s actions caused severe distress and inconvenience to Mrs R’s family, at a very sensitive time. I find that both the Trust and NHS BSA shall each pay £1,000 to Mr R in recognition of this, plus a refund of Mrs R’s contributions to the Scheme.
56. I uphold Mr R’s complaint in part.

Directions

57. Within 21 days of the date of this Determination:
 - (i) the Trust and NHS BSA shall each pay £1,000 to Mr R, in recognition of the severe distress and inconvenience caused by their maladministration; and
 - (ii) the Trust shall refund Mrs R’s Scheme contributions to her estate.

Anthony Arter

Pensions Ombudsman
25 November 2020

Appendix 1

IR35 Tax Legislation (IR 35)

Chapter 8 Part 2 (ss 48-61) Income Tax (Earning and Pensions) Act 2003

IR35 specifically applies to contractors, particularly those who supply their services via a 'personal service company', whom HMRC consider should be classed as 'disguised employees'. This means that they are not recognised as genuine contractors and should be taxed in the same way as employees, under PAYE.

From 6 April 2017, the tax rules changed so that the task of determining whether or not IR35 applies moved from the intermediary to 'public authorities' (which includes all NHS providers). Public authorities are generally required to deduct tax and national insurance at source where IR35 applies.

NHS Improvement Guidance

Working through intermediaries: IR35 update February 2017

To comply with changes to IR35, Trusts would need to ensure that all locum, agency and bank staff were subject to PAYE and on payroll for the new financial year.'

Working through intermediaries: IR35 update May 2017

Updated guidance to NHS providers

It revised its decision to place all contractors inside IR35 tax legislation and admitted blanket IR35 determinations were 'not accurate'

It said that an assessment of whether or not IR35 applies should be carried out in a fact-specific way; that is, it should be applied on a case-by-case basis, rather than by a broader classification of roles. Therefore, NHS providers ...will need to consider whether or not an individual in their situation is self-employed when they determine the application of the IR35 rules in that case.

HMRC provided a simple tool to help determine whether an individual should be considered employed for tax purposes.

Appendix 2

The National Health Service Pension Scheme Regulations 2015

Regulation 18

Membership

“(1) Subject to regulation 19, a person is eligible to join this scheme if the person is a health service worker and is—

- (a) employed by an NHS organisation listed in Part 1 of Schedule 5;
- (b) an individual who is a medical contractor, or who is employed by a medical contractor or dental contractor, listed in Part 2 of that Schedule;
- (c) an individual who is employed by an independent provider in circumstances described in paragraph (4).
- (d) an individual who is a medical practitioner or dental practitioner listed in Part 3 of that Schedule; or
- (e) who is employed by a determination employer: see Part 4 of that Schedule.

(2) Subject to regulation 19, a person is eligible to join this scheme if the person is—

- (a) an individual of a category or description listed in Schedule 6; and
- (b) a person in respect of whom the Secretary of State has made a determination under section 25(5) of the 2013 Act.

(3) Where such a determination is made, these Regulations apply to the person subject to any modification made by the Secretary of State by direction under section 25(8) of the 2013 Act.

(4) The circumstances are that the person—

- (a) performs services pursuant to an approved qualifying contract (see regulation 150(3)); and
- (b) satisfies the wholly or mainly condition (see regulation 150(4)).

(5) In paragraph (1), the reference to a person being employed does not include a reference to a person engaged under a contract for services.

(6) Where, in relation to a single employment or engagement for provision of services, a person is eligible to join this scheme by virtue of more than one of the sub-paragraphs of paragraphs (1) or (2), the scheme manager must determine which one sub-paragraph is to be used as the basis for membership.”

Appendix 3

THE TRUST STAFF BANK HANDBOOK Temporary Staffing 2011

Selected Extracts

“The purpose of the Trust Staff Bank ...is to provide temporary cover to wards and departments, often at short notice, to cover for planned and unplanned shortfalls in staffing.

Staff registered on the Bank include:

- Nursing Assistants Admin & Clerical Family Planning Nurses
- Staff Nurses Consultant Psychiatrists General Practitioner’s
- Community Nurses Junior Doctors District Nurses
- Psychologists Allied Health Professionals Health Visitors
- Sessional workers Phlebotomists School Nurses

The Bank Office will also directly engage agency staff on behalf of wards/departments if it is unable to provide cover.

A GUIDE TO WORKING ON THE STAFF BANK

The following guidance is issued to assist staff in the course of their employment on the Staff Bank. It should be read carefully in conjunction with the Bank Membership Agreement.

General Terms of Bank Registration

The terms set out govern your membership of the Trust Staff Bank. Each period of engagement as a member of the Staff Bank will constitute a separate engagement (here in referred to as the ‘booking’). In periods between such engagements there are no subsisting obligations on the Trust or on you as a member of the Bank. Although you may remain a member of the Bank between such periods of engagement the Trust will be under no obligation to offer you work nor are you under any obligation to accept work.

You will be asked to complete and sign a Staff Appointment Form and you will be asked to decide whether you wish to join the Pension Scheme. Employees will automatically be entered into the Pension Scheme unless you make a formal request to opt out by completing form SD502.

Pay Day

You will be paid weekly, one week in arrears by credit transfer to a nominated bank or building society account on a Friday.

Roles and Responsibilities

Your duties and responsibilities will vary according to the shift/job being covered and these will be explained to you in advance of any agreement that you accept. Your main responsibilities are to provide a skilled and sensitive clinical and/or administrative service, which provides personal assistance emotional and physical care to patients and service users.

On a day-to-day basis, you will be professionally accountable to the ward/department manager where you are undertaking the booking. You will also be responsible to the Trust Staff Bank Manager.

Hours of Work

You are required to attend work punctually and regularly. Your normal working hours will be dependent on a booking being agreed and your availability to work. Failure to attend shifts without reasonable explanation may result in your removal from the bank.

Procedure for obtaining work on the Staff Bank

All staff who are registered with the Bank Office are required to inform the relevant Staff Bank Officer of their availability to work via telephone or e-mail on a regular basis. Once received, the Staff Bank Officer will note your availability to work and put you forward to fill bookings that have been requested by Trust managers (or designated deputies).

Bank Timesheets

The Bank working week runs from Friday to Thursday, as reflected in the timesheet. Only one timesheet should be used per week in each location that Bank work is undertaken.

Bands that Staff claim when working Bank

Staff will be paid at the standard rate of a band as set by the Bank office. For substantive staff, this may not be their substantive band and pay point.

Where a bank shift requires a member of staff to work on a lower band, they will be paid on the standard band that needs to be covered, for example if a band 6 substantive nurse is required to cover a band 5 post, they will be paid at the standard rate of a band 5.

Working Time Regulations 1998

In compliance with the Working Time Regulations 1998 (WTR) no member of staff, may work more than 48 hours a week on average whether substantive staff or Bank staff unless they have signed the Individual Working Hours Agreement form.

The above will also apply to staff who entered substantive employment contract with the Trust (inclusive of both normal and Bank work).

All Directorates

Substantive staff on Bank are not entitled to Bank annual leave allowance.

It is the responsibility of staff who are substantively (permanently) employed by the Trust to ensure that they take a minimum of 28 days annual leave per year (pro-rated for part-

time workers). During the annual leave period you agree not to undertake bank/agency work or duties within the localities of the Trust or with another organisation.

Mandatory Training

All Bank Staff are required to attend mandatory training before they commence work on Bank. Substantive staff should have already completed the required training when they attended induction but need to ensure it is kept up to date.

In addition to this, Bank-only staff will receive a Trust Induction booklet outlining Health and Safety, Information Governance, Equality and Diversity, Safeguarding Children and Introduction to Safeguarding Adults.

Period of Notice

Due to the sessional nature of working on the bank, there are no formal periods of notice applicable to or from either party. If you decide to leave your employment permanently with the Staff Bank, you should do so in writing to the Trust Staff Bank Manager. On leaving the Trust you must ensure that you return all Trust properties. This includes keys, ID badge, documentation, etc. If you do not do so, your final payment may be delayed.

The Bank Office periodically reviews its register of Bank staff. If you do not undertake any work for a continuous period of 12 months then you will be terminated with immediate effect and issued a P45. You will be required to undergo the full recruitment process should you wish to re-join.”

Appendix 4

Staff Appointment Form

On 7 April 2017, Mrs R completed and signed a Staff Appointment Form provided by the Trust on its headed paper. It included:

Section 1 Employee to complete

Bank account details - Mrs R inserted her bank account details with AFCH.

She confirmed "I certify that I have received and read the NHS Pension Scheme starter pack and the information I have provided is true to the best of my ability."

Name of employee Mrs R Date 7 April 2017.

HR Information

Job title....Interim Head of Information governance Band 8b.

Signature of employee Mrs R Date 7 April 2017.

Individual Agreement on Working Hours

Section A Compliance with Working Time Directives

Mrs R confirmed "For 28 days a year I will not undertake bank/agency duties". This was countersigned by her Line Manager.

Section B Compliance with Trust Health and Safety Rules

Mrs R confirmed "On returning from sickness....I will refrain from undertaking any additional agency/Bank working for 7 days."

Signature of employee Mrs R Date 7 April 2017.

Staff Appointment Acceptance Form

Job title Interim Head of Information Governance Department Assurance.

Location [Trusts address]

Mrs R confirmed "I confirm I wish to accept the post offered. I have read the full documents. I agree the provisional date and I am aware that I must not start employment until that date is confirmed to me Provisional date 1 April 2017. I confirm that I would like to be registered for Staff bank as well as my substantive[permanent] role"

Signature Mrs R Date 7 April 2017.

NHS Pensions New Employee Questionnaire

This asks questions to identify if an individual had previous Scheme membership but does not ask about current status.

Signed and dated with declaration that information is correct.

It states " please send this to your payroll dept ...to enable the correct assessment of your pension position."

Notes Once your assessment is made you will be notified by your employer of which scheme you are in... and contribution rates by your first payday. Assessment will not be possible until your first payday.

HMRC Starter checklist

Mrs R also completed this checklist for employer and employee, signed and dated 6 April 2017.

Declaration of Interest form

Mrs R declared an interest as Director of AHTC and signed it on 7 April 2017. This was countersigned by her line manager as indicating no conflict of interest, on 27 April 2017.

HR Induction Book Acceptance Slip

Mrs R confirmed she had received a copy of the HR Induction Booklet and that it contained important information. She agreed to complete core and essential training for the role within the first 30 days of employment with the Trust.

Signed and dated 7 April 2017.

Appendix 5

Assumptions submitted by Mr R.

- Mrs R's employment status changed on 1 April 2017.
- She continued to work for the Trust until her death on 12 May 2017, a working day.
- Mrs R's service after 1 April 2017 was subject to an agreement between her and the Trust.
- There was no evidence of an employment contract signed by both parties.
- Mrs R completed a set of Staff Application Forms in which her signature appeared in eight places as an "Employee", she was referred to as an Employee at least nine times in this set of forms and her Line Manager's counter signature appeared twice.
- An application for her to join the Scheme was included with these forms and she completed it.
- There was no endorsement on the Staff Application Form to indicate that it was being used temporarily to induct contractors and, in that form, Mrs R was never referred to as a Contractor after 1 April 2017.
- The HR Information form stated that, from 1 April 2017, her job title was Interim Head of Information Governance, Band 8b.
- An email from the Trust on 4 April 2017 confirmed that she "had a Bank start date of 1 April 2017."
- Her Line Manager confirmed in an email on 22 May 2017 that the Trust had "agreed to put her on the Bank ... this was extremely problematic." This was clearly not simply a mistake or clerical error.
- The Trust provided no evidence that it had a policy or procedure providing for any employment status of "IR35 Contractor" or similar.
- The Trust stated in a letter to NHS BSA on 26 July 2017 that "... Mrs R then joined the Trust Bank and the Scheme on 1 April 2017" and then "The Trust position is that Mrs R was on the Trust's Employee Staff Records System (ESR) as a Bank Worker between 1 April 2017 and 12 May 2017."
- The Trust maintained from 1 April 2017 to 27 October 2017 (seven months) that Mrs R was an employee and therefore entitled to Scheme membership.

- The Trust advised NHS BSA on 20 October 2017 that “it paid for an NHS payroll service then it was up to the Trust whether Mrs R’s earnings were pensionable” as the Trust had employed her.
- NHS BSA refused without due cause to accept that the Trust was the authority for Mrs R’s employment agreement and therefore status.
- The Bank Handbook states explicitly on page 3 “Casual staff such as Bank Workers are regarded as being in pensionable employment if they are at work and paying into the Scheme. Mrs R fulfilled both conditions.
- On 4 September 2017, NHS BSA’s CEO confirmed to Mr R’s MP that “We have determined that she was correctly a member of the 2015 section of the Scheme and have advised her employer accordingly.”
- In October 2017, the Trust accepted advice from NHS BSA who in turn accepted the same advice from NHS payroll that said, in their opinion, Mrs R was a contractor and gave five reasons for their opinion, which were without merit. The Trust, NHS BSA and NHS payroll had no legitimate reasons for categorising Mrs R as a contractor from 1 April 2017.
- These assumptions show that the Trust, as Mrs R’s employer and party to her employment agreement, regarded her as an Employee (Bank Worker) from 1 April 2017 and therefore she was entitled to join the Scheme.