

Ombudsman's Determination

Applicant	Mr S
Scheme	1995 NHS Pension Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHS BSA) Barts Health NHS Trust (the Trust)

Outcome

1. I do not uphold Mr S' complaint and no further action is required by NHS BSA or the Trust.

Complaint summary

2. Mr S has been authorised by the other Executors to act on behalf of Dr L's Estate. He has complained that:-
 - A serious ill health lump sum is due from the Scheme, rather than a death in service payment.
 - Dr L's estate should be paid the value of the serious ill health lump sum which he was offered before his death.
 - The Trust delayed Dr L's ill health retirement application in 2018.

Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. The Scheme is governed by regulations; the regulations in this case being the National Health Service Pension Scheme Regulations 1995 (**the Regulations**).
5. Dr L was employed by the Trust. He was a member of the Scheme and his benefits are governed by the Regulations. Pension Services for the Trust are provided by North East London Pay Consortium (**NELPC**).

6. Prior to May 2016, Dr L had been on long term sick leave over varying protracted periods since 2011. He returned to work in May 2016 but had to go off sick again at the beginning of June 2016.
7. On 23 May 2018, Dr L contacted his manager to say that he wished to retire on grounds of Serious Ill Health (supported by his Oncologist) and for the Trust to start the process immediately.
8. On 26 May 2018, the Trust requested Form AW33E (Consideration of entitlement to ill health retirement) from NELPC on Dr L's behalf. This was with the purpose of enabling Dr L to take ill-health early retirement and to receive "tier 2" benefits, under Regulation E2A of the Regulations, on the grounds that he was permanently incapable of engaging in regular employment.
9. On 30 May 2018, NELPC issued Form AW33E to the Trust. NELPC asked that the Trust:
 - complete the remaining section of Part A (to be completed by the Employing Authority);
 - arrange for Dr L to complete Part B;
 - arrange for the completion of Part C by the Occupational Health (OH) Department / General Practitioner; and
 - forward the completed form together with any additional enclosures directly to NHS BSA.
10. It appears from the evidence that the Trust started to complete the remainder of Part A in June 2018.
11. Mr S says that, between 24 May 2018 and 2 October 2018, there was an ongoing dialogue between Dr L, supported by Mr S, and Dr L's General Manager in an attempt to arrange a meeting and to move his application along. There was some delay in June 2018 as Dr L was too unwell but on 20 June he consented to his case being referred to the Trust's OH advisers.
12. Following a meeting between Dr L and the General Manager on 29 June 2018, the General Manager emailed the Form AW33E to Dr L asking him provide details for the absence management part of the employer section as no records had been kept by the Trust.
13. An appointment was made for Dr L to see the OH doctor on 13 August 2018. However, from 9 August 2018 to 25 September 2018, Dr L was treated as an in-patient and so was unable to keep the appointment. It was agreed that his application would be assessed on the basis of medical records and documents. The Form AW33E, now completed by the Trust, was received by Dr L on 7 September 2018, for him to finalise and sign the employee section. The completed form was delivered by hand to OH on 11 September 2018.

14. The completed form was sent to NHS BSA and referred to the Scheme's medical advisers, Medigold, for a decision on whether Dr L qualified for early retirement on the grounds of Serious Ill Health.
15. On 2 October 2018, Medigold confirmed to NELPC that Dr L's ill health application was granted. Medigold advised Dr L of this decision on the same day.
16. On 4 October 2018, NELPC asked the Trust to arrange for a leaver's form to be completed.
17. On 11 October 2018, the leaver's form was submitted to NELPC. This advised that Dr L's last working day was 9 October 2018, but due to 35 days outstanding annual leave his last day of pensionable service was 27 November 2018.
18. Also on 11 October 2018, form AW8 (Retirement Benefits Claim Form) and AW341 (Application to commute ill health retirement benefits form) were posted to Dr L's home address for completion.
19. The completed forms AW8 and AW341 were returned and received by the Trust's Pensions Section on 18 October 2018.
20. Form AW8 was then submitted electronically to NHS BSA on 23 October 2018. The completed AW341 was emailed to NHS BSA on the same day.
21. Dr L died on 15 November 2018.
22. The final pay advice for Dr L shows that £3,298.79 was paid in lieu of annual leave for 2017/18 and £1,304.49 was paid in lieu of annual leave for 2018/19. The original leaver's form had shown that both these payments were pensionable but on 22 November 2018 this was changed by the Trust as it was considered that the leave entitlement for 2017/18 was not pensionable as it related to a previous financial year. As a result his last day of membership of the Scheme was amended from 27 November 2018 to 19 October 2018.
23. On 27 November 2018, NELPC advised NHS BSA that it had previously processed Form AW8 for Dr L showing a last day of service as 27 November 2018. But following Dr L's death it had now been told by the Trust that it had issued a revised leaver's form stating that the last day of service was 9 October 2018 and that contributions for 9.5 days pensionable annual leave only should be paid. Consequently, the last day of pensionable service was now 19 October 2018. It added that a further payment for outstanding annual leave had also been made but that it had been advised by the Trust that this referred to a previous financial year and should therefore not be subject to pension contributions.
24. NHS BSA responded on 13 December 2018. It said that, according to the Regulations, any outstanding annual leave at the date of severance was pensionable and should be added on at the end thereby extending the last day of service. In Dr L's case the last day of service should therefore remain as 27 November 2018. NHS

BSA said that it could only proceed with death in service benefits and ill health benefits were no longer an option.

25. On 21 December 2018, NHS BSA sent Mr S (as Dr L's husband) a letter providing details of how to apply for death in service benefits.
26. On 31 July 2019, Mr S raised a complaint in writing with NHS BSA as he felt that it was not right that his late husband's death had been treated as in service. He believed that the serious ill health lump sum should be paid to Dr L's Estate as a remedy. He pointed to lengthy delays in getting an appointment with the OH doctor, by which time Dr L was critically ill in hospital. He said that Dr L's last day of working in the NHS was 9 October 2018 as per the P45. He added that at no time had anyone at the Trust mentioned that the unused holiday entitlement would be added to the last day of service.
27. On 25 September 2019, Mr S received a response under the first stage of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). This did not uphold the complaint. It outlined that the payment of death benefits had to be paid on in service terms as, according to the Trust, Dr L was due to retire on 27 November 2018 and so was still considered to be in employment at the time of his death. It said that as annual leave is paid, pension contributions are deducted and this had the effect of extending Dr L's date of retirement.
28. On 12 November 2019, Mr S submitted an appeal under stage two of the IDRP to NHS BSA. He set out a timeline of events and said this showed a failure in process. These were:-
 - Policies and procedures for sickness management were not followed by the NHS in the years following Dr L's cancer diagnosis.
 - The Trust kept inadequate sickness and HR records.
 - Referral to OH was delayed breaching the Trust's stated timescale of one month.
 - No apparent procedure was in place for employees too ill to attend a health examination.
 - It took two months from Dr L meeting his General Manager to the AW33E being completed.
 - There had been a failure to comply with the 'NHS BSA - Employers Charter'.
29. He said that he and the other Executors disputed the policy of adding annual leave to the last date of service as it had been paid in lieu, thereby meaning it was not taken. They considered that the situation would not have arisen had the NHS undertaken the processes in a timely manner.
30. On 6 February 2020, NHS BSA responded to Mr S under stage two of the IDRP. It said that as Dr L had died before the last day of pensionable employment it had to

pay benefits in accordance with Regulation F1. It explained that Regulation C2 stated that in a situation where a payment is made in respect of leave not taken “the member’s pensionable employment will be treated...as continuing for a period equal to the period of leave for which payment is made.”

31. It said that, with regards to delays, it received completed form AW33E from the Trust on 27 September 2018 and sent it to its medical adviser on 1 October 2018 for their clinical decision. That decision was issued to both Dr L and the Trust on 2 October 2018. Following receipt of forms AW8 and AW341 it had made several enquiries with the Trust regarding Dr L’s last day of pensionable employment. The Trust confirmed that Dr L had outstanding annual leave which extended his pensionable service to 27 November 2018.

32. Mr S’ position

- Dr L had started the process of retiring, on grounds of ill-health with less than 12 months to live, on 23 May 2018. There were significant delays by the Trust between May and September 2018 before he was accepted as eligible for tier 2 benefits.
- A P45 was issued showing Dr L’s date of leaving as 9 October 2018 but by the time he died the commuted pension still had not been paid.
- Form AW33E is not fit for purpose for people wishing to retire on Serious Ill Health grounds where life expectancy is limited. To subject people to completing this form in such circumstances is at best unnecessary and at worst extremely cruel.
- The Trust told Mr S that Dr L had died in service as unused annual leave had been added to his leaving date: 9.5 days from the current year and 25 days from previous years. On a final payslip this service was paid ‘in lieu’ which is defined as ‘instead of’ so it is questionable how these days can be added.
- The Executors of Dr L’s Estate believe that the commuted ill-health pension should have been paid to Dr L and now to his Estate as he was no longer in service after 9 October 2018.

33. NHS BSA’s position

- Dr L applied for ill health retirement benefits; his application was received by NHS BSA on 27 September 2018. Where an application for entitlement to ill health retirement is received for a member who is terminally ill, NHS BSA endeavours to process the application urgently and advise the member and their employer within 48 hours of the application being sent to the Scheme’s medical advisers for assessment.
- Dr L’s application was forwarded to NHS BSA’s medical advisers on 1 October 2018 and both Dr L and the Trust were sent a letter the following day advising that his application had been accepted and advising that he should complete the application form AW8 to claim his pension benefits.

- Dr L's AW8 was input by the Trust via the Pensions Online system on 23 October 2018. Form AW341 was also received on 25 October 2018. This form is confirmation that a member wishes to commute their ill health retirement benefits to a single lump sum. This option is only available to members whose life expectancy is less than 12 months.
- The AW8 showed a last day of pensionable service for Dr L of 27 November 2018. NHS BSA queried the last day of service and unpaid sick leave with the Trust and was advised of the dates of his unpaid sick leave and annual leave; his last day of pensionable service was also verified.
- In accordance with Regulation C2(5) Dr L's outstanding annual leave had extended his last day of pensionable service. Unfortunately, this meant that the commuted ill health retirement lump sum was no longer payable; Dr L died while still in pensionable service and as such death in service benefits were payable.
- In summary, NHS BSA refutes any allegation of maladministration and submits that it has properly considered Dr L's case in accordance with the correct regulations.

34. The Trust's position

- Dr L was particularly unwell during the early part of June 2018 and it took some while to obtain his agreement to the release of medical records and for an OH review to take place. Once consent was obtained (on or around 20 June) the referral was completed on 25 June 2018 and triaged by OH on 28 June. A date for a review meeting with an OH doctor was scheduled for 13 August 2018.
- Due to a combination of factors the date for the review was extended compared to what was normal at the time. These factors included: the nature of the medical condition Dr L was suffering from; the fact the review was taking place during the holiday period; and the fact there was a limited bank of suitably qualified doctors available at the time to complete the assessment. Completion of the medical review is crucial to the application being progressed as Form AW33E cannot be completed until the OH report is finalised. This service is not under the direct control of the Trust.
- To try and speed up the employer's part of the process and in anticipation of the OH Review proceeding conclusively on 13 August 2018, the then General Manager (who didn't have a detailed knowledge of the previous seven years of sickness related absence) contacted Dr L directly to obtain details of the various stages in the sickness absence management process. This resulted in a series of emails being sent by Dr L on 4 July 2018.
- The OH appointment on 13 August 2018 was cancelled due to Dr L being unable to attend as a result of being admitted to hospital. Given Dr L's deteriorating health, it agreed to take the exceptional step of abandoning the usual review meeting and, instead, progress the matter based on an analysis of the medical information available around his condition. Records were collated for review by the OH

department and, having received confirmation from OH, Form AW33E was given to Dr L to finalise the member section at the beginning of September 2018. This was signed by Dr L on 8 September 2018, with the AW33E signed off on 24 September 2018.

- Confirmation that a tier 2 ill health pension had been granted was received on 3 October 2018 and a P45 was issued showing a last working day of 9 October 2018.
- While the circumstances of Dr L's death have not seen matters dealt with to achieve the desired outcome, the Trust does not believe it is correct that the situation arose as a result of delays on the part of the Trust in attempting to advance the process.
- The Retirement policy is clear that an application (including of serious ill health) could take up to four months to process. In this case while delays arose due to the unavailability of an OH doctor able to review Dr L's condition, the ongoing illness suffered by Dr L led to cancellation of the review and added to earlier delays in obtaining the written confirmation required to set up the review and obtain records. This was just part of a set of circumstances which all parties had to react to as the illness evolved.
- In relation to the fact that the date of the end of employment and the cessation date of pensionable service differ, this has been a part of the NHS Regulations for over 20 years. Form AW8 includes confirmation, in part I, of the fact information about annual leave would need to be added for pensionable service purposes.

Adjudicator's Opinion

35. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS BSA or the Trust. The Adjudicator's findings are summarised below.
36. The Adjudicator considered firstly Mr S' complaint that a serious ill health lump sum, which Dr L was offered before his death, was due from the Scheme, rather than a death in service payment.
37. The Regulations that govern the Scheme have been laid down by Parliament. Accordingly, it is not open to the Ombudsman to make a decision based on whether or not the effect of those Regulations is fair to the Scheme's beneficiaries. He can only assess whether NHS BSA has applied the Regulations correctly in the applicable circumstances.
38. Regulation E2A(1) provides as follows:

“(1) This regulation applies to a member who—

(a) retires from pensionable employment on or after 1st April 2008;

(b) did not submit Form AW33E (or such other form as the Secretary of State accepted) together with supporting medical evidence if not included in the form pursuant to regulation E2 which was received by the Secretary of State before 1st April 2008, and

(c) is not in receipt of a pension under regulation E2.”

39. Regulation E2A(2) provides that:

“(2) A member to whom this regulation applies who retires from pensionable employment before normal benefit age shall be entitled to a pension under this regulation if—

(a) the member has at least 2 years qualifying service or qualifies for a pension under regulation E1; and

(b) the member's employment is terminated because of physical or mental infirmity as a result of which the member is—

(i) permanently incapable of efficiently discharging the duties of that employment (the “tier 1 condition”); or

(ii) permanently incapable of regular employment of like duration (the “tier 2 condition”) in addition to meeting the tier 1 condition.”

40. As set out in paragraph E2A (1) above, for Regulation E2A to apply, the member must have retired from “pensionable employment”. However, paragraph E2A (2)(b), refers to the termination of the member’s “employment” (not pensionable employment).

41. The Adjudicator considered It was clear, from the Trust’s notification of 11 October 2018, that Dr L’s employment was terminated on 9 October 2018. It was also confirmed, on 2 October 2018, that Dr L’s application for tier 2 benefits had been approved. Therefore, the requirement under paragraph (2)(b) of Regulation E2A had been met.

42. However, the Adjudicator’s view was that it did not necessarily follow that, by virtue of Dr L’s employment having been terminated, his pensionable employment had also been terminated on 9 October 2018.

43. “Pensionable employment” is defined, in Regulation A2, as “NHS employment in respect of which the member contributes to the scheme in accordance with [the 1995 section of the NHS Pension Scheme]”.

44. “NHS employment” is defined as “employment with an employing authority”.

45. “Employment” is not defined by the Regulations. However, its ordinary definition includes an agreement, between an employer and an employee, that the employee will provide certain services in return for being paid by the employer. It does not

necessarily follow that, to be employed for the purposes of defining “pensionable employment”, the employee has to be working at all times.

46. Under Regulation C2:

“pensionable service” is defined, for the purposes of ascertaining entitlement to benefits under the Regulations and for calculating those benefits, as including:

“(a) any period of pensionable employment in respect of which the member contributes to [the 1995 Section] of the [Scheme] under regulation D1 (contributions by members).”

47. Under Regulation C2(5):

“(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.”

48. Interpreting Regulation C2(5) as applying to the wider definition of “pensionable employment” under the Regulations would be consistent with the contrasting use of the terms “employment” (under Regulation E2A(2)(b)) and “pensionable employment” (under Regulation E2A(1)). Regulation C2(5) did not alter the date on which Dr L's “employment” ended, but it did have the effect of his “pensionable employment” having continued for an additional period after the termination of his employment, as the payment made in respect of his outstanding leave was pensionable.

49. It was not in dispute that Dr L had retired from “employment”. Reading Regulation E2A in isolation from the other provisions of the Regulations, a consequence of retiring from employment would be that the member had also retired from pensionable employment, the latter being employment in respect of which the member contributed to the Scheme.

50. However, Regulation C2(5) is a deeming provision. Guidance on interpreting deeming provisions is set out in the case of *Fowler v Revenue and Customs Commissioners* [2020] UKSC 22, at paragraph 27, with the caveat that the statements made in case law over the years are “useful but not conclusive”, as “they may fairly be said to point in different directions, even if not actually contradictory”.

51. The following guidance is set out in paragraph 27 of *Fowler*:-

(1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.

(2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then

apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.

- (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
- (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.
- (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, at 133:

“The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.”

- 52. In this case, it was clear from the final pay advice that Dr L was to receive a payment in respect of his untaken leave. That payment was to be the equivalent of the pay that Dr L would have received for a period equal to the total length of the period of untaken leave had he continued to work for that period.
- 53. While there was some debate over the matter, it was eventually agreed that contributions were payable to the Scheme in respect of the payment for the total of the untaken leave and, therefore, in respect of the period that the payment for untaken leave was deemed to cover. This accords with the extension of “pensionable employment” under Regulation C2(5). It is clear, therefore, that the scope of Regulation C2(5) extends to modifying the meaning of “pensionable employment” under Part D (Contributions) of the Regulations. For example, Regulation D1 provides that:
 - “(1) Each member in pensionable employment must contribute to this Section of the scheme in accordance with the following paragraphs of this regulation.”
- 54. If Dr L had remained alive until 27 November 2018, when his pensionable employment was deemed by Regulation C2(5) to have ended, he would effectively have been in receipt of pay for that period, as well as contributing to the Scheme. During the extended period of pensionable employment, Dr L was entitled to death in service benefits and was effectively (by virtue of the payment in respect of untaken leave) in receipt of remuneration for deemed service. It would have made no sense for him to have been in receipt of tier 2 benefits for that period in addition to an amount equal to his normal pay for that same period.
- 55. In the Adjudicator’s view, the deeming provision under Regulation C2(5) was intended to prevent members from contributing and receiving pay while, at the same time and in respect of the same period, receiving pension payments. On that basis,

he considered that Regulation C2(5) did not mean that Dr L remaining in pensionable employment without having become entitled to his tier 2 benefits produced an absurd result.

56. While, in Dr L's case, the benefits payable on his death in pensionable employment were less favourable than the benefits that would have been payable to him within his lifetime had tier 2 benefits become payable to him, it will not always be the case that scope of the deeming provision under Regulation C2(5) is disadvantageous to members and/or their survivors.
57. For example, if on retirement a member's pensionable employment is extended by Regulation C2(5) to a date beyond that member's actual date of retirement the lump sum payable on the member's death (should that occur during the extended period of pensionable employment) would in many cases be greater than that which would be payable if the member's pensionable employment had not been extended and they had instead died in retirement or with a preserved pension.
58. Applying the above principle, that a member should not be receiving pay while also receiving Scheme benefits in respect of that same period, and bearing in mind that death in pensionable employment will not, in all cases, lead to less generous benefits being payable in respect of the member, in the Adjudicator's opinion applying NHS BSA's interpretation of Regulation C2(5) to situations in which the member either dies in pensionable employment or leaves pensionable employment in their lifetime does not produce an incorrect outcome.
59. Therefore, his view was that the scope of Regulation C2(5) is broad enough to affect the interpretation of Regulation E2A in Dr L's case, so that he must be deemed not to have retired from pensionable employment prior to his death. As a consequence, Dr L must be deemed to have died in pensionable employment, without having become entitled to tier 2 benefits under Regulation E2A(2).
60. In the Adjudicator's view NHS BSA's interpretation of the Regulations, that Dr L died in pensionable employment, is correct. The Adjudicator acknowledged that, in this case, the Regulations were disadvantageous for Dr L's estate however, in other cases, members would benefit. It is not for the Ombudsman to interpret the Regulations differently on this basis.
61. The Adjudicator also considered Mr S' view that unreasonable delays were caused by the Trust which contributed to the delay in the settlement of Dr L's application to take early retirement on the grounds of serious ill health.
62. Dr L had initially indicated his wish to apply for ill health early retirement on 23 May 2018. The first step in the application process was the completion of Form AW33E. This is a fairly lengthy and complex form in three parts: Part A has to be completed by the employing authority; Part B by the member; and Part C by the OH doctor.

63. The Trust appears to have kept limited records of Dr L's sickness absence, but in the Adjudicator's opinion this falls outside the Pensions Ombudsman's jurisdiction as it is an employment matter and so he did not consider it further.
64. The evidence showed that the Trust had started to complete Part A of the AW33E sometime in June 2018. Dr L's General Manager wanted to arrange a meeting with Dr L, presumably to progress his application, but a worsening of Dr L's condition in the early part of June 2018 made this impossible. Eventually, a meeting between Dr L and the General Manager took place on 29 June 2018, following which a copy of the partially completed AW33E was emailed to Dr L with the request that he provide some of the missing information. Dr L returned this to the General Manager on 4 July 2018 and she acknowledged receipt on 11 July 2018 but said she would not be able to complete the form that week.
65. Mr S says that as the General Manager had not returned the AW33E by 17 August 2018, Dr L submitted the information for Part B to her.
66. Separately, an appointment had been made for Dr L to see the Trust's OH doctor on 13 August 2018, but as it transpired Dr L was too ill, and in fact was being treated as an in-patient, to attend. The Trust has said that there was some delay in making this appointment due to a lack of qualified doctors able to carry out the assessment. Mr S has argued that this was not an acceptable reason, but the Adjudicator disagreed. He considered this was something outside of the Trust's control and there was contemporaneous evidence to show that the Trust was keen to progress Dr L's application as quickly as possible.
67. Mr S says that it was he and Dr L who arranged for Part C of the AW33E to be completed by the assessment of reports from Dr L's doctors rather than an examination. There was no reason to doubt this and the Adjudicator agreed that this was not overly exceptional (the form clearly provided for a GP or Specialist to provide a medical report as an alternative to an OH assessment). But there was no evidence that this was resisted by the Trust or that it caused any unreasonable delay.
68. This must have been an incredibly distressing time, but it would be wrong to look at the events with the benefit of hindsight. There was a process that the Trust had to follow and while there were delays which might have been avoided, many of these were caused by elements that could not have been foreseen and/or that were outside the Trust's control. Furthermore, Form AW33E could not have been submitted until Part C had been completed and so the fact that the General Manager did not complete Part A of the form earlier than she did, made no material difference to the outcome.
69. In the Adjudicator's view, the process itself leaves a lot to be desired and is not suited to circumstances such as this where the member has a limited life expectancy and where speed is essential as the situation can deteriorate very quickly. Form AW33E in particular is lengthy and complex. But the Trust had no option but to follow the

process and cannot be criticised for doing so. Consequently, the Adjudicator's opinion was that its actions do not amount to maladministration.

70. NHS BSA and the Trust accepted the Adjudicator's Opinion but Mr S did not and the complaint was passed to me to consider. Mr S provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mr S.

Mr S' additional points

71. The Adjudicator had referred to all OH appointments as being with Medigold. In fact, Medigold was only involved once the AW33E form had been sent to NHS BSA. Medigold assessed whether the evidence showed Dr L to be suitable for retirement on the grounds of having less than twelve months to live.
72. The Trust has its own internal OH Service which was the department Dr L had to deal with as part of the process prior to the submission by the Trust of the AW33E form. The appointment arranged for 13 August 2018 was with the Trust's OH service. Mr S disagrees that this was outside of the Trust's control as it is a department within the Trust. Dr L had consented to the General Manager making the Trust's OH referral on 20 June 2018 and an appointment was eventually given for 13 August. This is seven weeks from the General Manager being given consent by Dr L to a referral being made. The Trust's policy states an appointment should be made within four weeks for long term sickness therefore the Trust is in clear breach of its own policy for something that was under its direct control.
73. There were two significant delays in processing Dr L's application: The Trust's OH appointment and the General Manager completing Part A of the AW33E form. The OH referral and appointment was entirely within the Trust's control (and breached the Trust's Policy) and the General Manager completing Part A of the AW33E was entirely under the Trust's control. There can be no reasonable excuse for the length of time it took for the General Manager to complete Part A of the AW33E. The Trust received this on 30 May 2018 by virtue of starting the process yet it took the General Manager until 7 September 2018 to complete Part A and send this to Dr L for completion of Part B.
74. The statement that the General Manager not completing Part A of the form earlier makes no material difference is wrong; it directly made a material difference to the outcome. The General Manager's tardiness affected the timing of the process and therefore the outcome. Not even taking into account the OH referral and appointment delay, the General Manager certainly knew the date of the Trust's OH appointment.
75. At the time it was not known by any party that Dr L would not be able to attend the appointment due to acute admission just days prior to the OH appointment. However, it would have been reasonable to expect the General Manager to have had Part A completed and for Dr L to be in receipt of this prior to the appointment for the Trust's OH department to proceed with Part C.

76. When it became clear that Dr L was not able to keep the appointment, nor was he likely to be able to attend an OH appointment, the Trust's OH agreed to the use of Medical Reports from Dr L's Consultant. Dr Amen Sibtain, Consultant Clinical Oncologist, wrote to OH on 17 August 2018 with the evidence used for the application. Had the Trust's OH department had the AW33E at this point the process would have progressed approximately three weeks sooner.
77. Mr S has two payslips from the Trust for October 2018 and November 2018. He says it is clear from the November payslip that £3,298.79 was non-pensionable and only £1,304.49 was pensionable. The October payslip showed Dr L as being paid in that month which was then reversed in November including reversing the pensionable pay for October. This does not appear to reconcile with the stated pensionable pay/days.
78. The Adjudicator's Opinion makes no reference to the "NHS Pensions - Employers Charter" (**the Charter**). The contemporaneous version, dated February 2018, states the NHS Employers' (and therefore the Trust's) legal responsibilities in relation to the Scheme. This clearly states the employer's responsibility for Ill Health Retirees that the timing should be "as soon as applicable" and "The timing of an ill health application is very important"
79. Had the Trust adhered to its policy the OH appointment would have been scheduled by the third week of July 2018 at the latest. Compounded by the General Manager not completing the AW33E Part A in good time, Mr S estimates in total around six or seven weeks delay in the process was caused solely by the Trust.
80. These delays in timing directly caused a detrimental effect to Dr L's pension benefits and subsequently to his Estate. The Trust does not appear to have adhered to the legal obligations in the Charter with regard to the timings clearly laid out. For a usual retirement pension the timing is three months, the charter states Ill Health Retirees "should be made as soon as applicable"; the Trust has clearly failed in this process.

Ombudsman's decision

81. I accept Mr S' statement that Dr L did not return to work in May 2018. I believe this was a misreading of information provided by the Trust. However, I do not consider this to be material to the outcome of the complaint.
82. I also acknowledge that some references in the Opinion to Medigold should refer to the Trust's OH department. I will return to this later in this Determination.

Delays in processing Dr L's application

83. The evidence shows that following Dr L's request to be considered for retirement on grounds of serious ill health on 23 May 2018, the Trust requested Form AW33E from NELPC three days later. NELPC issued the form on 30 May 2018 and the Trust started the completion of Part A in June 2018. I note that the Trust said on the form that it would appreciate every effort being made to expedite Dr L's application,

thereby indicating that it was aware of the urgency of the situation and the need to progress matters quickly.

84. In order to progress matters, the Trust's General Manager offered to telephone Dr L to discuss his retirement application, but Dr L expressed a preference for a face-to-face meeting. The General Manager subsequently wrote to Dr L on 15 June 2018 to arrange a review meeting with him. The General Manager's letter said that a face-to-face meeting was preferred, but if Dr L were unable to travel, teleconference facilities could be arranged.
85. As Mr S has previously acknowledged, this was part of an ongoing dialogue between himself and Dr L, and the General Manager over five months. There was some delay in June 2018 as Dr L was too unwell but on 20 June 2018 he consented to his case being referred to the Trust's OH advisers.
86. Following the meeting between Dr L and the General Manager on 29 June 2018, the General Manager emailed the Form AW33E to Dr L, on 2 July 2018, asking him provide details for the absence management part of the employer section as no records had been kept by the Trust.
87. On 6 July 2018, an appointment was made for Dr L to see the OH doctor on 13 August 2018. The Trust has said that the delay here was caused by there being a lack of suitably qualified doctors able to carry out the assessment, exacerbated by it being the holiday period. I find no reason not to accept the Trust's statement in this regard – although it is clearly unfortunate.
88. Mr S argues that the timing of the appointment was in the Trust's control. But the Trust has said that OH was a completely separate department and I am not persuaded that the General Manager had it within her power to expedite matters (for example, perhaps by re-prioritising some other less urgent appointments), particularly given the lack of resource available within the OH department. Moreover, there is no evidence to indicate that either Dr L or Mr S complained at the time or took any steps to try to bring the appointment forward.
89. As it transpired, shortly before 13 August 2018, Dr L was admitted to hospital as an inpatient, as he was acutely unwell. In the days following this, Dr L's Consultant Medical Oncologist and Consultant Clinical Oncologists provided information to the Trust's OH department.
90. Although it is not entirely clear when the OH department completed its assessment, the General Manager confirmed that, as at 30 August 2018, she still had not received the information she needed from OH in order to complete the AW33E.
91. The AW33E form was eventually sent to Dr L on 7 September 2018 for him to complete the employee section. The completed form was then delivered to OH on 11 September 2018 and subsequently referred to NHS BSA and to Medigold.

92. Medigold confirmed that Dr L was eligible for retirement on grounds of Serious Ill Health on 2 October 2018 and Dr L's employment was terminated on 9 October 2018.
93. I acknowledge there was a lengthy delay between Dr L's application for early retirement and the date of his appointment with the OH doctor, but, on balance in this case, I do not consider that this constitutes maladministration on the part of the Trust as much of this was outside its immediate control. I find the Trust was looking to deal with the application as speedily as the process allowed while at the same time treating Dr L with respect and in accordance with his wishes.
94. Mr S argues that the General Manager should have had the AW33E form completed and available for the OH department before 13 August 2018 and that had she done so this would have enabled OH to have progressed matters approximately three weeks sooner.
95. OH was required to complete Part C of the AW33E. This consisted of factual information relating to Dr L's condition that would have been readily available from the reports from Dr L's Consultants that were provided on or soon after 17 August 2018, together with an opinion on whether Dr L's condition had a serious impact on his life expectancy.
96. I find no reason to conclude that the earlier completion of other sections of the AW33E, if indeed required, would have led to OH completing its assessment of Dr L's condition before it did. It was the fact of Dr L not being able to attend the appointment on 13 August 2018 that caused the delay and not any failure on the part of the General Manager.
97. I agree that had it been known at an earlier stage that Dr L would not be able to attend the examination on 13 August 2018 the Trust could indeed have taken a different approach, but that is to view matters entirely with the benefit of hindsight.

Pensionable pay

98. Mr S has referred to two payslips he has from the Trust for October 2018 and November 2018. He says it is clear from the November payslip that £3,298.79 was non-pensionable and only £1,304.49 was pensionable.
99. NHS BSA had confirmed to the Trust, on 13 December 2018, that the Regulations stipulated that any outstanding annual leave at the date of severance was pensionable and had to be added on at the end.
100. Evidence provided by the Trust shows that, following this clarification it then amended its records so that Dr L's 'Employee Pensionable Pay' was revised from £1,304.49 to £4,603.28 and 'Employee Contributions' were revised to £189.15 plus £478.32 arrears.
101. I agree with NHS BSA's interpretation of the Regulations and find that the total of Dr L's service, including his outstanding annual leave, was pensionable.

The Charter

102. Mr S has referred to the Charter. This is a document jointly produced by the Department of Health, NHS employers and NHS Pensions with the aim of setting out the roles and responsibilities of each Scheme employer to enable successful administration of the Scheme. It aims to provide clarity on the employer's local scheme administration requirements and summarise what it can expect from NHS BSA.
103. I agree that the Charter sets out the roles and responsibilities of the various parties involved in the administration of the Scheme. It details the various processes and establishes suggested timescales.
104. But the Charter is a reference guide and in itself it is not a legally binding document, except to the extent that in certain areas it makes clear that all parties must comply with the Regulations and other legislation.
105. In this case, I find that the Trust and NHS BSA have applied the Regulations correctly and I do not find that in not adhering to the timings set out in the Charter the Trust has failed to meet its legal obligations.
106. I do not uphold Mr S' complaint.

Dominic Harris

Pensions Ombudsman

26 March 2024