

## Ombudsman's Determination

Applicant	Miss S
Scheme	The Police Pension Scheme 1987 ( <b>the Scheme</b> )
Respondent	National Crime Agency ( <b>NCA</b> )

## Outcome

1. Miss S's complaint is upheld and, to put matters right, the NCA shall reconsider her application for ill health retirement benefits.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Miss S's complaint about the NCA, her former employer, is it has refused to award her an "in service" ill health pension from 30 September 2015.

## Background information, including submissions from the parties

4. In February 1991, Miss S joined Essex Police and became a member of the Scheme. Payment of retirement benefits under the Scheme was governed by the Police Pensions Regulations 1987 (**the 1987 Regulations**).
5. In 1999, Miss S joined the National Crime Squad. In 2006, she moved to the Serious Organised Crime Agency (**SOCA**). In 2009, she says she received an injury on duty related to her mental health, which resulted in bullying and harassment; this is denied by the NCA.
6. In April 2010, an agreement was made by the Police Negotiating Board (**PNB**), PNB Circular 10/4 (**the Circular**) which stated:

"At the meeting of the Police Negotiating Board on 15 April 2010 authority to formally agree revised joint guidance for police authorities and senior force managers on the key areas of managing ill-health (to take account of the procedures in the New Police Pension Scheme 2006) was delegated to the Official Side and Staff Side Secretaries. Agreement has accordingly been reached out of committee on revised joint guidance. The full text of the guidance document is set out in the attached memorandum. [Paragraph 1]

This agreement requires no amendment to police regulations or specific authorisation by home department circular. [Paragraph 2]

Where the officer has been assessed as permanently disabled for the ordinary duties of a member of the force, the police authority should consider all the evidence before it before reaching a decision on medical retirement (see A20 [1987] and 21 2006]). The police authority will bear in mind the policy presumption in favour of retaining the officer until normal retirement age wherever that is practicable. Key factors include...

whether the officer faces outstanding or impending misconduct proceedings – in cases where the conduct in question is serious, or where the completion of disciplinary proceedings is necessary for the maintenance of public confidence, the public interest in completing the proceedings will outweigh the significance of the officer's condition, except in the most compelling compassionate cases." [Paragraph 53]

7. In 2013, Miss S was suspended from work following an internal investigation, which she says exacerbated her mental health condition; this is denied by the NCA. Later, SOCA became part of the NCA.
8. In August 2014, an application was made for Miss S by her union, the National Crime Officers Association (**NCOA**) for ill health retirement (**IHR**) benefits. Payment of these benefits is governed by the Police Pensions Regulations 2006 (**the 2006 Regulations**).
9. In November 2014, Miss S was examined by an Independent Registered Medical Practitioner by the name of Dr Cheng (**the first IRMP**) as part of her application. He recommended Miss S be referred to a specialist, to assist with his assessment.
10. In December 2014, there were various email exchanges between the first medical examiner and the NCA. Miss S did not agree to be seen by a specialist as she felt this was unnecessary. The first medical examiner temporarily suspended Miss S's application on the basis that he could not make a decision without specialist input. In the end, the NCA agreed to appoint a second medical examiner.
11. In May 2015, the NCA arranged for a Dr Hussain (**the second IRMP**) to reconsider Miss S's case. Having reviewed the written medical evidence, he produced a report. His conclusion stated:

"...based on my assessment of this case and the medical information available to me, my opinion is that [Miss S] cannot be considered permanently unfit to perform the ordinary duties of a Police Officer as defined in the Police Pensions Regulations. The Regulations do state that the Officer must be permanently disabled from performing the ordinary duties of a Police Officer due to an infirmity of mind or body. My opinion is that the main barriers here preventing any progression are her feelings towards the Police Force and her employers rather than any permanently disabling medical condition."

12. In July 2015, after agreeing to review further medical evidence, from a Mr Copeland and a Dr Higson, the second medical examiner produced another report. His conclusion stated: -

“...I think the evidence presented is that [Miss S] is suffering from anxiety and depression but that is potentially treatable through appropriate treatment channels and that with a willingness and a degree of motivation on her part to return back to the duties of a Police Officer, from a medical perspective there is no evidence of permanent incapacity... treatment in itself is unlikely to create a situation where she would wish to return to work due to her very clear and strong feelings of anger, resentment and dissatisfaction towards the [NCA]... You have asked me to address these matters as quickly as possible and I have therefore done so expeditiously. I can confirm that the additional information does not alter my opinion regarding this case.”

13. The NCA accepted the second IRMP’s findings.

The NCOA appealed the NCA’s decision and a hearing date was set for January 2016.

14. On 30 September 2015, Miss S resigned from the NCA. Mr C, her representative in this complaint, says this was due “seriously deteriorating mental health” and “serious risk of her self-harming or committing suicide”. Miss S signed a settlement agreement (**the Agreement**) which stated:

“...nothing in this agreement shall affect the Claimant’s [Miss S] application or any future application and/or appeal of hers in relation to ill health retirement and/or injury on duty award under her pension scheme. [Para 3]

The Respondent agrees to... Upon the Respondent’s representative (The Government Legal Department for the attention of Joanne Mackie) receiving notice of the Claimant’s resignation, the Respondent shall immediately cease all disciplinary proceedings/allegations that are ongoing against the Claimant, whether in whole or in part. The Respondent hereby agrees not to recommence any disciplinary proceedings or make any such allegations against the Claimant or bring any fresh proceedings arising out of the same facts as those contained within the disciplinary proceedings against the Claimant and/or the proceedings. Further the Respondent is not aware of any facts or circumstances which could give rise to any other disciplinary proceedings being commenced against the Claimant. The Respondent agrees not to raise or initiate any other disciplinary proceedings/allegations against the Claimant in future.” [Para 5]

15. On 26 January 2016, a hearing of the Policy Medical Appeal Board (**PMAB**) took place to review Miss S’s case.
16. On 8 February 2016, after reviewing all the evidence, the PMAB produced a report. Its summary stated:

“The Board unanimously upholds this appeal and considers that [Miss S] on the balance of probabilities is permanently disabled from performing the ordinary duties of a police officer.”

17. In April 2016, Miss S was contacted by the NCA. The key point was her benefits would be treated as a pension being put into payment from deferred, not active, service.
18. Mr C wrote to the NCA and argued that the decision of the PMAB supported his belief that IHR benefits should be awarded to Miss S from active service. In addition, the decision of the second IRMP was flawed, causing Miss S to resign for the sake of her health in September 2015.
19. As at August 2016, the NCA was consulting its legal advisers regarding whether to award Miss S IHR benefits and, if so, whether they should be paid from active or deferred service.
20. In September 2016, dissatisfied with the NCA's response, Miss S formally referred her complaint to this Office. The main points were:-
  - She had suffered a substantial loss, namely the difference between the extra income from an award of IHR benefits from active, rather than deferred status; and, the extra lump sum from active rather than deferred status.
  - If the IRMPs had conducted themselves properly, she would have received IHR benefits from active service, and avoided the “trauma” of the PMAB and an extended wait for her benefits.
  - To resolve the complaint, the NCA should award her “in service” IHR benefits and they should be backdated to the date of her resignation date of September 2015.
21. In January 2017, the Government Legal Department (**GLD**) on behalf of the NCA wrote to this Office with its formal response and made the following points:-
  - Any allegations of harassment, bullying or injury at work by Miss S were denied and outside the Pensions Ombudsman's jurisdiction. The NCA was not found liable for any claims brought against it. In any case, Miss S had withdrawn the claims under the Agreement.
  - It was denied that Miss S suffered an injury at work in 2009 or any other time. There was no claim for personal injury and any claim would be defended. Any claims relating to bullying or harassment were similarly denied.
  - Ten allegations were made against Miss S by the NCA, and she was subject to disciplinary proceedings but they were unresolved at the time she resigned. She was also subject to a criminal investigation and there was sufficient evidence to warrant suspending her, but she resigned before the investigation could be completed.

- During the investigation, she applied for IHR benefits but was turned down, as not meeting the criteria and she was examined “on the papers” by an IRMP.
  - The PMAB decided that Miss S was “permanently disabled from performing the ordinary duties of a police officer”, but that was not the end of the matter.
  - The Director General, under delegated authority, had the power to decide whether to award IHR benefits in line with Circular 10/4. A particular consideration was “whether an officer faces outstanding or impending misconduct proceedings – in cases where the misconduct in question is serious, or where the completion of disciplinary proceedings is necessary for the maintenance of public confidence, the public interest in completing the proceedings will outweigh the significance of the officer’s condition...”
  - The GLD further stated, “... [the NCA] regardless of any appeal decision has discretion awarded to it under sound public policy reasons, to restrict payments to officers subject to misconduct proceedings and this has the legitimate aim of maintaining public confidence in the police service... [The NCA] has exercised this discretion appropriately and legitimately in this case...”
  - Finally, it stated “At present [Miss S] is not in receipt of a Pension. [The NCA] offered [Miss S] her Deferred Pension, but she had decided not to receive it...”
22. Havens Solicitors (**Havens**) representing Miss S wrote to this Office with its further comments, the main points of which are set out below:-
- The NCA had reneged on paragraph 3 of the Agreement by refusing to pay Miss S the IHR benefits from active status.
  - The first medical examiner had a face-to-face appointment with Miss S in November 2014. In Haven’s view, the first medical examiner was guilty of various omissions. But, in the end, he could not make a decision without an independent psychiatrist’s opinion, so a decision was suspended. But the relevant regulations provided a decision could and should be made on the basis of the paper evidence.
  - Its interpretation of the relevant regulations was the medical examiner should provide a medical report, and could not suspend the decision-making process. It agreed with the findings of the GMC investigation into the first medical examiner, which found there were serious failings in his assessment of Miss S.
  - Miss S was cleared of any criminal conduct, all disciplinary matters ceased as a result of the Agreement, and no further matters arising out of those facts could be restarted.
  - It was a matter of fact and record that a second IRMP had to be found and it was the acts and omissions of the first IRMP which caused deterioration in Miss S’s health, and a further delay, before her appeal was finally upheld.

- It cited several court cases to support its belief that IHR benefits should be paid to Miss S from active status. Moreover, it argued the NCA had no power to restrict payment of the IHR benefits.
- A Crown Court (R v Phillip Sean Tully) was compelling authority that it would be unjust if Miss S were unable to obtain her benefits from date of retirement, in circumstances where there was unchallenged medical evidence that she was permanently disabled at that time.
- Miss S had a “lawful right to an ill health pension” which had been denied to her due to the failure of the NCA to deal with her application lawfully, promptly and fairly.

## **Adjudicator’s Opinion**

23. Miss S’s complaint was considered by one of our Adjudicators who concluded that further action was required by the NCA. His findings are summarised below:-

- There were two factors affecting whether a member of the Scheme could be awarded IHR benefits. Firstly, she must meet the relevant ill health criteria. Secondly, there must be no other restrictions on payment. The NCA accepted that Miss S met the first test as established by the PMAB’s decision. But the NCA nonetheless said it had the power to restrict the benefits for public policy reasons.
- Once a member met the relevant medical criteria, there was a further stage of the decision-making process in the “Police Pension Regulations”. The NCA went on to cite the Circular, in particular paragraph 53.
- But the Adjudicator did not think that the Circular was sufficient authority for the NCA to restrict the IHR benefits in the way it had. In his view, the NCA’s claimed ability to do so was coming from outside the 2006 Regulations.
- He cited three possible authorities (1) ‘Forfeiture’ in section 40 of the 2006 Regulations, (2) ‘Forfeiture’ in Section K5 of the 1987 Regulations and (3) ‘Withdrawal of early payment of deferred pension’ in Section 54 of the 2006 Regulations.
- But Miss S was not convicted of a criminal offence so she did not meet the criteria under (1) or (2). Nor was she dismissed or required to resign under the “Conduct Regulations” in the 2006 Regulations; she resigned by mutual agreement. So, she did not meet the criteria under (3). Therefore, none of these could be used as a basis for restricting the IHR benefits. The NCA might have the power to restrict the benefits. But it had not demonstrated why it was allowed to do so. Nor had it provided Miss S with a proper decision outlining why it was restricting her benefits.
- So, the NCA should (1) reconsider whether Miss S was entitled to IHR benefits from active service, (2) if it decided to award the benefits, then it should backdate them to the appropriate date under the regulations, and (3) if it still maintained it could restrict the benefits, it provide a regulatory basis for its decision to restrict them.

24. Havens on behalf of Miss S accepted the Adjudicator's Opinion but the NCA did not so the complaint was passed to me to consider. The NCA provided its further comments which do not change the outcome. I agree with the Adjudicator's Opinion and will therefore only respond to the key points made by the NCA for completeness.

### **Ombudsman's decision**

25. As the PMAB in February 2016 overturned all previous decisions, and decided that Miss S met the criteria for payment of IHR benefits, I do not propose to consider in detail, earlier stages of the decision-making process. Miss S has stated she was forced to resign on account of various failings by the first and second IRMPs. However, I find there is insufficient evidence that any maladministration on the part of the IRMPs created a situation where Miss S had no option but to resign. Rather, the evidence indicates Miss S resigned under terms both she and the NCA agreed to accept. Moreover, whilst the decision-making process arguably took longer than necessary, there is evidence that this is because Miss S declined to be seen again by the first IRMP, which necessitated finding another one. In any case, should the NCA agree to award Miss S IHR benefits, the correct course is for them to be backdated to the relevant date under the 2006 Regulations, that is, her date of leaving employment.
26. The NCA accepts that Miss S meets the criteria for payment of IHR benefits. But it maintains that it nonetheless has the power to restrict these benefits. This being the case, I shall focus on, firstly, whether I agree that the NCA has that power and, secondly, whether it has exercised that power properly in this case.
27. The NCA states it is clearly not in the interests of good public policy to allow officers to retire or resign to avoid disciplinary action against them; and, this is entirely correct for an agency needing to uphold the trust and confidence of the public. I agree that these considerations are important. However, I find both the Circular and the Agreement are relevant in this particular instance.
28. The NCA states PNB Circulars are agreements and guidance for police authorities. They set out how authorities, including the NCA, should act. In this particular instance, the NCA's position is it is for a police authority to make the NCA's decision whether or not to award IHR benefits; as the NCA is not a police authority, in practice the Director General of the NCA has delegated powers to make this decision. The NCA states it remains of the view that the Circular is persuasive and should be taken as clear guidance on how pension benefits may be restricted in Miss S's case.
29. I agree that the Circular is "persuasive". However, I consider that the important question is whether it is binding. What I must decide is whether, in general, the Circular gives the NCA the power to restrict benefits and whether, in the particular circumstances of Miss S's case, the NCA was right to rely on the Circular as a basis for restricting the benefits.

30. To reiterate, the NCA states that payment of IHR benefits requires the approval of the Director General who is the delegated “police authority” for the NCA. It states the Director General is required by the Circular to consider:
- “...whether an officer faces outstanding or impending misconduct proceedings – in cases where the conduct in question is serious, or where the completion of disciplinary proceedings is necessary for the maintenance of public confidence, the public interest in completing the proceedings will outweigh the significance of the officer’s condition...”
31. The NCA has also latterly explained that, in its view, both appeals and restrictions on benefits are part of the discretion of the policy authority. It states this is set out in the Circular. It further states that PNB Circulars are agreed joint guidance for police authorities and, unless specified on their cover, they are themselves authority to implement agreements. It has pointed out this is stated on the front-page footnote of the Circular. Finally, it states that the Circular is given powers by the Police Act 1996 (**the 1996 Act**); that is, the Circular has statutory authority and can override the 2006 Regulations.
32. However, I do not find that the 1996 Act overrides the 2006 Regulations in this case. Under section 62 of the 1996 Act, the Secretary of State is required to take into consideration any recommendation made by the PNB before making regulations in respect of certain matters. Matters relating to pensions are expressly excluded from section 62(1). The requirement under section 62(3), for the PNB to be consulted before regulations relating to pensions can be made under section 52 of the 1996 Act, only covers regulations made in respect of police cadets. In other words, I find there is no express requirement under the 1996 Act for the PNB to be consulted (nor for its circulars to be considered) before making regulations in respect of pensions relating to police officers.
33. I find there is no express provision in the 1996 Act granting PNB circulars overriding status in respect of the 2006 Regulations. Therefore, I do not find that the Circular is overriding. Rather, I find the Circular to be persuasive in nature, rather than having any statutory authority. It reflects an agreement reached between police authorities as to how ill-health retirement should be handled. Whilst police authorities should seek to follow the guidance provided by the Circular, as it reflects the policy in place in relation to handling ill-health retirement, should there be any discrepancy between the provisions of the Circular and those of the Regulations, the latter should prevail.
34. Moreover, paragraph 53 of the Circular refers to Regulation 21 of the 2006 Regulations (Compulsory retirement on the grounds of disablement). Under Regulation 21(1), a police pension authority: “may require a regular police officer to retire on the date on which, having considered all the relevant circumstances, advice and information available to them, they determine that he ought to retire on the ground that he is permanently disabled for the performance of the ordinary duties of a member of the police force.”



35. Paragraph 53 of the Circular, which as explained above, I find to be persuasive rather than binding in nature, sets out certain factors that should be taken into account by the police pension authority in making its decision under Regulation 21(1). Those factors include, “the SMP’s [selected medical practitioner’s] advice on the officer’s capabilities” and “whether the officer wishes to remain in the force”. Further, if the officer wishes to remain in the force, it is stated that “the presumption in favour of retention will arguably be greater still”; and “whether the officer faces outstanding or impending misconduct proceedings”. In the last case, the public interest in completing the proceedings will outweigh the significance of the officer’s condition.
36. When Miss S was finally assessed as permanently disabled for the performance of her ordinary duties as a member of the police force, and her appeal against the original decision not to grant her IHR benefits was upheld in February 2016, she had already entered into the Agreement, which had put an end to the misconduct proceedings. So, when Miss S’s appeal was upheld, she was no longer facing “outstanding or impending misconduct proceedings”. On that basis, I find the NCA acted wrongly in taking into account the previous misconduct proceedings against Miss S in deciding whether to award her IHR benefits from the date of her leaving the police force, as those proceedings were not a relevant factor to the decision-making process.
37. Additionally, the other factors I have listed above as being those which the Circular expressly required the police pension authority to consider, would all have pointed towards a decision to grant IHR benefits, had they been properly considered. When the appeal was upheld, the SMP found that Miss S was permanently disabled from working as a police officer and she clearly did not wish to remain in the police force. I find that those factors were therefore not considered properly.
38. I note from the NCA’s email of 18 May 2018, that it is also relying on paragraph 104 onwards of the Circular as well as Regulation K3 of the regulations governing the 1987 Police Pension Scheme, as authority to reduce Miss S’s ill health pension. I assume that the NCA actually meant to refer to Regulation 33 of the 2006 Regulations (incorrectly referred to by the Circular as Regulation 32). This is on the basis that the 2006 Regulations have been referred to above, and on the assumption that, although Miss S joined the police force before the New Police Pension Scheme 2006 was established, she either transferred to the 2006 Scheme or other circumstances caused her to become a member of the 2006 scheme.
39. However, I do not consider that paragraph 104 could be relied upon by the NCA for purposes of reducing Miss S’s benefits. Paragraph 104 of the Circular concerns situations in which IHR benefits in payment can be reviewed and, where appropriate, reduced or stopped. Reducing or ceasing payment of IHR benefits can only be done on the basis of “*the decision of an SMP on whether or not a former officer is still disabled*”. Under Paragraph 114 of the Circular, under the New Police Pension Scheme 2006, the purpose of a review of IHR benefits in payment is to determine whether the former officer in receipt of the pension is still disabled or still disabled at

the level she was at the time of retirement. I understand that, since the medical opinion that Miss S was permanently disabled from continuing in her role as a police officer was obtained and Miss S's appeal was upheld, there has been no medical assessment. I find there is nothing in the Circular to suggest that the level of IHR benefits payable can be reduced on account of misconduct proceedings.

40. Therefore, I uphold Miss S's complaint.

## **Directions**

41. Within 28 days of the date of this determination, the NCA shall confirm in writing that it will reconsider Miss S's claim for IHR benefits.
42. Its reconsideration can have regard to any discretion it may have under the regulations, but any discretion should be exercised correctly, taking into account only the relevant factors, and disregarding any irrelevant ones.
43. In particular, I find the NCA cannot rely on the importance of completing disciplinary proceedings against Miss S, in circumstances where the NCA agreed to end such proceedings.
44. Should the NCA decide to award Miss S ill-health retirement benefits, they shall be backdated to her date of leaving service and interest shall be added to the lump sum back payment at the base rate for the time being quoted by the reference banks.

**Anthony Arter**

Pensions Ombudsman  
20 June 2018