

Ombudsman's Determination

Applicant	Mr S
Scheme	Police Pension Scheme (the Scheme)
Respondent	Essex Police

Outcome

1. I do not uphold Mr S' complaint and no further action is required by Essex Police.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr S has complained that Essex Police delayed in referring him to a Selected Medical Practitioner (**SMP**) for consideration of whether he met the criteria for ill health retirement. It was later established that he did not meet the criteria, but this delay caused Mr S to suffer a financial loss due to his reduced pay whilst on sick leave between 20 May 2013 and 18 August 2014 and between 8 December 2014 and 14 June 2015.
4. Mr S argues that had he been referred to the SMP earlier, he would have returned to work more quickly, and received higher pay for the periods highlighted in paragraph 3 above.

Background information, including submissions from the parties

5. In 2000, Mr S joined Essex Police.
6. In July 2012, Mr S was transferred to a new department, a decision he challenged.
7. On 6 September 2012, Mr S sent an email stating:-

"Notification – of pending absence from duty

...

Given the circumstances of my posting I feel this is unacceptable and has forced me to take the following decision – With this in mind, I now intend to start my four rest days and review how I feel when these are reaching an end. If my feelings

remain the same as at the present time I will refrain from returning from work until the questions I have asked have been answered. I have no idea how the replies will affect me, so I am unable to say if this will result in an immediate return to work or a continuation of sickness.”

8. Following this, Mr S went on sick leave and was signed off with work related stress.
9. In May 2013, Mr S met with the Force Medical Adviser (**FMA**) and was referred to an independent psychiatrist for assessment, Dr Jackson. Dr Jackson concluded that Mr S was not suffering from a mental illness; although he did raise the possibility that Mr S had a personality disorder. He stated:-

“There is a question mark over whether [Mr S] has a narcissistic/paranoid personality disorder. I think it is quite likely that he does have sufficient traits of those personality types, to meet the diagnostic criteria for a personality disorder.”

10. On 16 May 2013, the FMA met with Mr S and completed a memo recording the conversation. On the basis of Dr Jackson’s assessment the FMA concluded that there was no medical evidence to support referral to the SMP. The memo states:-

“[Mr S] is aware that according to the Psychiatrist there is no evidence to suggest that he is suffering mental illness at this time.

...

The Psychiatrist has also concluded that there are no psychiatric reasons why [Mr S] could not join a different Police Force and work successfully in that Force.

In my opinion there is no medical evidence to present [Mr S]’ case to the SMP for independent medical opinion in relation to ill-health retirement.”

11. Mr S disagreed and asked that he be referred to the SMP for consideration. In the following months Mr S was subject to an Unsatisfactory Performance Procedure which he challenged on the basis that he should be referred to the SMP for consideration of his medical issues.
12. In October 2013, Mr S submitted additional medical evidence for consideration.
13. On 23 October 2013, Essex Police responded, stating having reviewed the additional medical evidence there remained insufficient reason to refer the matter to the SMP. This decision could be appealed via the Crown Court.
14. Mr S referred the matter to the Crown Court for consideration. The Court date was eventually set for November 2014.
15. On 24 July 2014, the FMA met with Mr S and discussed the matter further. As a result of the meeting the FMA put forward an attempt to resolve the situation by recommending that the matter be put to the SMP for consideration. In the memo relating to this meeting the FMA stated:-

“My initial decision not to refer [Mr S] was based on medical evidence. As you might recall, the Independent Consultant Psychiatrist Dr Jackson has confirmed that [Mr S] does not have a mental illness. Although he mentioned that [Mr S] has sufficient traits to fit the criteria for a personality disorder... Consequently, I did not consider that [Mr S] has a mental illness, injury or medical condition so; I concluded that he may not have a permanent disability.”

16. In October and November 2014, Mr S was seen by the SMP for assessment. The SMP also sought the views of another doctor, Dr Pitkanen for assessment. The conclusion was that Mr S was disabled by an anankastic personality trait, but that it was unlikely to be permanent and did not prevent him from working.
17. Following this Mr S' sick pay extension was rescinded by the Force. He was informed that on successful appeal to the Police Medical Appeals Board (**PMAB**), the sick pay would be reimbursed.
18. On 30 April 2015, the PMAB met and concluded that Mr S was not permanently disabled. In the discussion of his case, the PMAB reached the view that the appeal had not been frivolous or vexatious given the contrasting opinion between the SMP and Dr Pitkanen.
19. In July 2015, after a period of annual leave Mr S returned to work.
20. Mr S subsequently raised this complaint. Essex Police responded to the complaint through the internal dispute resolution procedure (**IDRP**). It took the view that the complaint was not a pension matter, as it related to the payment of sick pay, but notwithstanding that, it could find no instances of maladministration.
21. Dissatisfied with the response, Mr S referred the complaint to this Office for independent consideration.

Adjudicator's Opinion

22. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Essex Police. The Adjudicator's findings are summarised briefly below:-
 - Initially, the Adjudicator took the view that on the basis of PNB Circular 10/4 (**the 2010 Circular**) Essex Police should have referred Mr S to the SMP sooner. The 2010 Circular sets out three circumstances when a request for an SMP referral can be declined, when the request is vexatious, frivolous, or seeking to reopen a case previously decided without evidence. But the Adjudicator could not see which of these Essex Police relied upon when declining the referral. On the basis of this procedural error on the part of Essex Police, the Adjudicator recommended a distress and inconvenience award of £500.

- However, in respect of lost earnings, the Adjudicator took the view that it was not reasonable for Mr S to argue he would have returned to work earlier had the SMP referral occurred more quickly. Either Mr S was fit for work and should have attended, or he was unfit for work and regardless of the SMP referral, he could not have attended. Assuming Mr S was unfit for work, he has suffered no loss of earnings.
 - Having considered both parties responses to the initial opinion, the Adjudicator took a different view.
 - In the second opinion, the Adjudicator concluded that the only possible justification for Mr S to pursue the ill health claim was the suspected personality disorder. However, Mr S' comments over the course of his application and the PMAB show that this was not a new condition and had never prevented him from working previously. Further, the evidence indicated that Mr S did not think he was permanently incapable of undertaking his duties going forward. Given this Mr S could not reasonably argue the referral was justified, and the Adjudicator could not see why he had not returned to work whilst the matter was being resolved.
 - Following the first opinion, Essex Police had stated that part of the reason Mr S was not initially referred to the SMP was "... the frivolous conduct of the Appellant." The Adjudicator noted that this had not been made clear at the time of the application, but given Mr S' comments about his condition it was reasonable to conclude it was a frivolous application. This was one of the justifications for non-referral cited in the 2010 Circular.
 - The Adjudicator also noted that the 2010 Circular refers to the need for the applicant to provide evidence of permanent disablement from a medical practitioner in order to justify a referral to the SMP, however it did not appear that he had done so.
 - In that context the Adjudicator changed his opinion, concluding that the decision not to refer Mr S to the SMP was justified in the absence of medical evidence supporting permanent disablement and that the evidence indicated that Mr S could reasonably have returned to work, even if the issue of the SMP referral remained unresolved. As such no distress and inconvenience award was justified.
23. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S and Essex Police provided further comments which do not change the outcome. I agree with the Adjudicator's Opinion and my decision in response to the key points made by Mr S, is set out below.

Ombudsman's decision

24. Mr S has complained that due to the delay in referring him to an SMP he has suffered a loss of earnings. Had he been referred to the SMP earlier, he would have known

the outcome sooner and been able to return to work with full pay. I have set out the relevant Regulations, case law and guidance below.

25. In relation to a referral such as this the Police Pensions Regulations 1987 (**the Regulations**), state:-

“H1 Reference of medical questions

- (1) Subject as herein provided, the question whether a person is entitled to any and, if so, what awards under these Regulations shall be determined in the first instance by the police pension authority
- (2) Where the police pension authority are considering whether a person is permanently disabled, they shall refer for a decision to a duly qualified medical practitioner selected by them the following questions –
 - (a) Whether the person concerned is disabled;
 - (b) Whether the disablement is likely to be permanent;”

26. The Judgment in the case of R v Merseyside Police Authority [1999] (**the Judgment**), states:

“It follows that a Police Authority is not entitled to pre-empt the answers of the medical practitioner by coming to adverse conclusions as to fact, or law, in relation to the claim in order to avoid reference to the medical practitioner. That would not, however, prevent a Crown Court from declining to require the Police Authority to refer the matter to a medical practitioner in a case where the claim is obviously spurious or vexatious.”

27. Home Office Circular 34/1996 (**the 1996 Circular**) states:-

“7. Regulation H1 makes it clear that while entitlement to an award under the Police pension Regulations is to be determined in the first instance by the police authority, it must refer the question of an ill-health award or an injury on duty award to a medical practitioner for decision. We have no authority to give a binding interpretation on a point of law, but our view now is that such a referral must be made as soon as the authority is aware of either permanent disablement or injury on duty as an issue for consideration.”

28. The PNB Circular 10/4 (**the 2010 Circular**) states:-

“17. The police authority should refer the case to the SMP unless there is reason to believe the officer’s request is vexatious, frivolous or seeks without evidence to re-open a case which has been decided either by the SMP... or on appeal to a board or medical referees”.

29. Mr S argues that the Regulations required Essex Police to immediately refer him to the SMP when he requested permanent disablement to be considered. He highlights the 1996 Circular and the Judgment to support this stance.

30. Essex Police counter the suggestion that it was automatically required to refer Mr S to the SMP on the basis that the Circular is not binding and the Regulations take primacy. It argues that there is scope for an initial consideration of the facts before a referral to the SMP is agreed.
31. I do not agree with Mr S' argument for immediate referral. I find that the Regulations, the Judgment and the 2010 Circular adequately demonstrate that there is intended to be a stage of consideration prior to referral to an SMP. Although the 1996 Circular states that "a referral must be made as soon as the authority is aware of either permanent disablement... as an issue for consideration", the other sources show that this is not always the case and the Regulations and Judgment take precedence over the 1996 Circular.
32. I also consider it significant that there is an appeals process via the courts within the Regulations, highlighting that it was intended that not every request to be referred to an SMP would be accepted. An appeals process would not be necessary otherwise.
33. The Judgment and the 2010 Circular make reference to claims that are deemed to be 'frivolous', 'vexatious' or 'spurious'. In those instances it would be for the police authority to decide whether to allow a request for the SMP to review the matter.
34. Initially, Essex Police's position was that Mr S' request was not supported by the medical evidence and that argument has more recently been extended to describing the request as frivolous, although Essex Police did not state this to him at the time.
35. Mr S argues that it is not permitted for Essex Police to have pre-empted the judgment of the medical practitioner or look retrospectively for reasons why the referral was not made. In Mr S' view, it is clear that Essex Police was relying on the misunderstanding that its FMA could take a medical view on the issue.
36. I am not persuaded that the conclusion that a request is spurious, frivolous or vexatious, can be separated from the medical facts as Mr S has suggested would be necessary. In order to reach a view on whether a request is frivolous, spurious or vexatious, the individual reaching that conclusion must have regard to the medical facts, without which it would be very difficult to reach such a view.
37. In Mr S' case the FMA had referred Mr S to Dr Jackson who reported that there was no evidence of mental illness at that time. The rejection of the request, and the absence of subsequent medical evidence to support a referral, implies that Essex Police's position was that Mr S' assertion that he was permanently disabled was spurious. If it was not he would have been referred to the SMP.
38. Although Essex Police did not explicitly inform Mr S that it considered his claim was spurious, I cannot see that the Regulations required it to do so. As I have said, the fact that the medical evidence did not support referral implies this. On that basis I am satisfied that Essex Police had the option to decline the request for referral to the SMP and had legitimate reason to do so.

39. I have also considered whether there are other reasons why the complaint should not be upheld. For example, I would expect an individual to mitigate their loss whenever reasonably possible. So Mr S' claim for lost income as a result of not being immediately referred to an SMP could have been mitigated by him.
40. I have considered the wider circumstances and medical evidence and take the same view as the Adjudicator with regard to mitigation. Having become aware of the possible personality disorder following consultation with Dr Jackson, Mr S cannot logically argue that his health had changed to the extent that he was permanently disabled. Mr S had been able to work as a police officer in the past, in spite of a possible personality disorder, so, I cannot see why he could not have done so whilst the referral to the SMP was in dispute. By returning to work and pursuing the SMP referral simultaneously, Mr S could reasonably have mitigated his loss, Mr S was not prevented from returning to work.
41. I appreciate that Mr S was originally signed off on the basis of work related stress, but that was not the reason for his request to be referred to the SMP. The basis of his request for referral was the suspected personality disorder.
42. Mr S argues that the uncertainty and lack of clarity with regard to whether he had a personality disorder, and the resulting stress caused by this, prevented him from returning to work. However, it would be difficult to disentangle those concerns that he stated he had from the, clearly significant to him, employment concerns that he had prior to identification of the possible personality disorder. The employment concerns were articulated in Mr S' email of 6 September 2012, and were sufficient in his view to prevent him from working.
43. Additionally, over the course of the application there were a number of statements made by Mr S implying that the suspected personality disorder had not prevented him from undertaking his duties previously, that it had in fact assisted him in his career, and, as he stated at the PMAB, that given the opportunity he would return to work tomorrow. I also note that within Dr Jackson's medical report, where the suspected personality disorder was first suggested, Dr Jackson confirms that "there was no reason Mr S wouldn't be able to join a different Police Force and work there successfully." This implies that the reason Mr S was not returning to work was based on non-medical factors.
44. I have seen no evidence that Essex Police prevented him from returning to work, and I can see no reason why Mr S could not have returned earlier. Had he done so, his losses would have been mitigated.
45. There are clearly wider issues surrounding Mr S' employment that deterred him from returning to work. But the only issues I can consider is whether Essex Police was required to automatically refer Mr S to an SMP, and whether Mr S' suspected personality disorder prevented him from working whilst the matter was progressed. I do not agree that the referral was required and even if I were to conclude that it was

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required, which I do not, in my view there was nothing to stop Mr S from returning to work in order to mitigate in his loss.

46. Therefore, I do not uphold Mr S' complaint.

Anthony Arter

Pensions Ombudsman
8 March 2018