

Ombudsman's Determination

Applicant	Mrs N
Scheme	NHS Pension Scheme (NHSPS)
Respondents	Betsi Cadwaladr (the employer)

Outcome

1. I do not uphold Mrs N's complaint and no further action is required by the employer.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs N's complaint is that her late husband's employer should have notified NHSPS that a commuted ill health pension was due rather than a death in service lump sum.

Background information, including submissions from the parties

4. Mrs N is the executrix of her late husband's estate and her solicitor is acting as her representative in relation to this complaint.
5. Mr N joined the NHS Trust as a Band 7 team manager in August 2009.
6. On 24 December 2012, Mr N was diagnosed with a tumour and he ceased work.
7. On 9 May 2013, Mr N completed an application for ill health retirement.
8. On 14 May 2013, the employer wrote to Mr N following a final review meeting in line with its sickness absence policy and his contract of employment was terminated. At the meeting, it was confirmed that Mr N's last working day would be 30 June 2013 and his effective date of termination of employment would be 29 October 2013, to include outstanding leave and his notice period. The letter also said that if Mr N wanted to appeal against the decision to terminate his employment on grounds of capability, he could do so within 14 days. It ended: "I hope that you do not feel the need to appeal, as I understand this action has been taken with your agreement."
9. On 22 May 2013, the NHSPS wrote to Mr N and confirmed that his application for ill health retirement benefits had been accepted.

10. On 24 June 2013, the employer wrote to Mr N to confirm that since their last meeting, it had been agreed that Mr N was happy to reduce his annual leave so that his last working day would be 30 June 2013. His annual leave would be taken from 1 July 2013 to 22 July 2013 making his last effective date of employment 22 July 2013. He would then be paid 12 weeks in lieu of notice.
11. Mr N died on 28 June 2013.
12. On 26 July 2013, the employer wrote to Mrs N and thanked her for meeting with them on 24 July 2013 to discuss Mr N's pension arrangements. As Mr N had passed away whilst in service, this was being treated as a death in service. The employer said it appeared that there was a substantial difference between pension arrangements for a death in service as opposed to ill health commuted benefits. The employer had been in contact with the pensions department again who had confirmed that they would continue to treat this as a death in service.
13. In January 2014, NHSPS wrote to Mrs N and confirmed that although the late Mr N had applied for ill health retirement, he died before those benefits became due for payment. The employer had confirmed that Mr N was still employed on the day he died. There was therefore no entitlement to payment of retirement benefits. Instead, life assurance benefits were now payable which was a lump sum equal to twice Mr N's pensionable pay in addition to a widow's pension and possibly a child allowance.
14. On 23 January 2014, Mrs N's solicitor wrote to the employer and set out why Mrs N was unhappy with the way the employer had dealt with Mr N's request for commuted ill health retirement benefits. The solicitor said Mr N should have been advised that his employment could be terminated sooner, in April 2013, due to his declining health.
15. On 7 March 2014, the employer replied to Mrs N's solicitor. It said that Mr N raised concerns that his contract of employment would be ended before his ill health application was approved. Mr N was aware that his last working day was 30 June 2013 and due to his annual leave entitlement, the effective date of termination of employment was 22 July 2013. No concerns were raised by Mr and Mrs N at this point. The employer felt that it had always acted within Mr N's wishes and best interests and it was not in a position to change or amend any documentation.
16. On 21 July 2014, NHSPS wrote to Mrs N and enclosed a pension statement she had requested. It noted that this "...is a hypothetical estimate showing what the commuted ill health benefits would have been as at 28th June 2013." The amount of £202,687.48 was "an estimate to commute the pension to a once and for all immediate payment that includes your Lump Sum..."
17. Mrs N's solicitor wrote to the employer again in May 2015 and complained that Mr N's effective date of termination was calculated incorrectly. He said that the employer's decision to keep Mr N's last working day as 30 June 2013 was unacceptable given that:
 - he had not worked since December 2012;

- he was informed on 14 May 2013 that his contract of employment was terminated in line with the employer's sickness absence policy; and
 - he had informed his employer that his life expectancy had significantly shortened. His employment needed to be terminated before he died so that he could receive commuted ill health benefits and he requested that his employment be terminated.
18. The employer replied in June 2015 and said that from a Health Board point of view, Mr N died in service. It said, that prior to June 2013, Mr N was very anxious to remain in pay as long as possible and his wishes were followed. Mr N agreed to his termination date by signing a leaving form and did not appeal any of the employer's decisions, although he had the option of doing so. Mr N was fully aware that his effective date of termination of employment would be 22 July 2013 and the last working day of 30 June 2013 was a date requested by Mr N. At no time did Mr N request for the agreed leaving date to be changed.
19. On 23 June 2016, a payment of £81,119.92 was made to Mr N's estate in respect of his death in service lump sum.
20. Mrs N's solicitor says that Mr N would have been entitled to a lump sum payment of £202,687.42 had his employment been terminated prior to his death as he had wished. Instead, a payment of only £81,119.92 was received as a death in service benefit. This is a financial loss to Mr N's estate of £121,567.56. Mrs N would like the employer to acknowledge that Mr N was not employed at the time of death so that NHSPS can pay the outstanding amount of £121,567.56 to the estate.

Adjudicator's Opinion

21. Mrs N's complaint was considered by one of our Adjudicators who concluded that no action was required by the employer. The Adjudicator's findings are summarised briefly below:
- Mrs N has brought the complaint on behalf of Mr N's estate. Mrs N, through her representative, has argued that Mr N should have received a commuted ill health pension rather than a death in service lump sum.
 - Mr N was sadly diagnosed with a terminal illness and had stopped working in December 2012. With the agreement of his employer, a decision was made to terminate Mr N's employment. Mr N applied for ill health retirement benefits and this application was accepted by NHSPS on 22 May 2013.
 - Mr N died before 22 July 2013, his effective date of termination, and therefore he was not entitled to commuted ill health retirement benefits. He was only entitled to a death in service benefit lump sum which was considerably less than the commuted ill health pension.

- The Adjudicator found that although the difference in the two sums was significant, the employer could not be held responsible for the circumstances of the case. It was evident that Mr N did not have long to live and understandably, he wished to arrange his affairs before his death. The Adjudicator considered the employer followed Mr N's wishes in relation to the termination of his employment.
 - The Adjudicator found there was no written evidence that Mr N asked his employer to change his last day of employment to an earlier date and also found that there was no obligation on the employer to have advised Mr N to change his date of employment as that was a personal matter to him. The employer had commented that Mr N wished to ensure that his application for ill health retirement benefits was approved before his contract was terminated. There was therefore an element of negotiation and the employer followed Mr N's wishes which in the circumstances, was not unreasonable.
 - Mr N's death was treated as a death in service as he died before his effective date of termination. The employer passed this information to the NHSPS who then made arrangements to pay a death in service lump sum. The employer followed the correct procedures and the Adjudicator did not therefore consider that there had been any maladministration.
22. Mrs N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs N has provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mrs N for completeness.

Ombudsman's decision

23. Mrs N, through her representatives, has provided a copy of a letter from a Consultant doctor dated 11 July 2013 from Wrexham Maelor Hospital in relation to Mr N's ill health. The letter says:
- “Mr [N] was under the care of the Palliative Care Team at the Wrexham Maelor Hospital. He died on 28th June from complications of his lung cancer. I believe that he died very soon before he would have been entitled to his full pension payment and I know this caused him and his family a great deal of distress. I understand that his family's claim will be dealt with in the near future by the necessary agencies and I am writing to ask if it could be considered sympathetically given the short time between his death and the date in which he would have been entitled to full benefits.”
24. Mrs N has asked me to consider this letter as it shows that Mr N's last days were spent trying to resolve his pension and that it caused him a great deal of distress. There is no doubt in my mind that this is true and the seriousness of Mr N's ill health is not in dispute. It is clear that Mr N was attempting to resolve his pension as he completed an application for ill health retirement in May 2013, which was accepted.

Unfortunately, the sequence of events that followed meant that Mr N died before his ill health retirement benefits became due for payment. Instead, Mr N received a death in service lump sum.

25. I can appreciate why Mrs N would like the employer to acknowledge that Mr N was not employed at the time of death. However, the records which exist show that at the time of his death, Mr N was effectively still employed. The employer completed all paperwork including relevant dates for termination of employment, as agreed with Mr N. I am therefore satisfied that no maladministration has taken place.
26. Therefore, I do not uphold Mrs N's complaint.

Karen Johnston

Deputy Pensions Ombudsman
27 June 2017