

Ombudsman's Determination

Applicant	Mrs N
Scheme	New Airways Pension Scheme (the Scheme)
Respondents	1. New Airways Pension Scheme Trustees Limited (the Trustee) 2. British Airways Plc (British Airways)

Outcome

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

Complaint summary

3. Mrs N says she asked to be considered for ill health pension while on long term sickness absence. However, she was wrongly informed that she had to first return to work, and re-engage in British Airways' absence management process.
4. Mrs N maintains that she was discriminated against because she was unable to return to work, and therefore denied any opportunity to claim her pension on the terms that would have applied had she retired from active service.

Background information, including submissions from the parties

5. Before entering into a compromise agreement in 2007, and accepting voluntary severance, Mrs N was an active member of the Scheme. Her employment was terminated on 30 September 2007, following continued absence from work from February 2006. Mrs N was below normal pension age (**NPA**).
6. Section 4 of British Airways' absence management policy (**EG300**), sets out its position in respect of absences exceeding 21 consecutive days. EG300 says:

"Where employment had been terminated under Section 4 of this policy, the employee may be entitled to an ill health pension if they belong to the company's Occupational Pension Scheme. This will depend on the rules of the scheme applicable at the time employment ends which will always be applied.

As an example only, at the time this policy is published, an ill health pension is usually payable after five years of service provided that incapacity is expected to be reasonably permanent.”

7. Where termination of contract on the grounds of medical incapacity following absences of more than 21 consecutive days is being considered, or after absence which affects the employee's ability to work for medical reasons, EG300 states that the line manager must write to the employee and explain why he/she is considering terminating employment due to medical incapacity.
8. The excerpt from the copy of EG300 Mrs N has provided to this office does not indicate that consideration for ill health retirement is conditional on the employee returning to work.
9. Where a member's employment is terminated before NPA on the grounds of medical incapacity, rule 14 of the Scheme rules (the **Rules**), provides that the member will have a right to an immediate pension, if British Airways informs “the Management Trustees” that the contract ended due to the member's medical incapacity. A Member under NPA may, within three months of the date of ceasing employment, apply to British Airways for immediate payment of pension on the grounds of medical incapacity under sub rule 14(c).
10. Sub rule 12 (a) of the Rules says:

“... a Member being a General Staff Employee or an Air Cabin Crew Employee who ceases to be employed by a Participating Employer before Normal Retirement Age in consequence of incapacity to perform his normal duties arising from mental or physical infirmity not resulting from his own wilful misconduct and a Pilot or an Officer who ceases to be employed by a Participating Employer before Normal Retirement Age by reason of his ceasing to be qualified to hold the appropriate licence to enable him to perform his normal duties with a Participating Employer shall be entitled to an immediate yearly pension commencing on the date of such retirement and payable to him until his death.”
11. Where the above rule applies, a member who has completed at least five years' service shall be entitled to a yearly pension based on completed service, and an additional pension based on 50% of his/her potential service between the date of ill health retirement and NPA.
12. On 28 September 2007, Mrs N's legal adviser (the **Adviser**) wrote to British Airways saying:

“Before advising our client on the compromise agreement fully we want to explore the position with regards to an assessment for ill health retirement. Our client has informed us that such a proposition, in addition to the compromise agreement would be of interest to her. Bearing in mind that the

agreement effectively terminates our client's career this is to be considered as a reasonable request from our client.

We therefore request that the compromise agreement is either put on hold until such enquiries are made by [British Airways] on behalf of our client or the agreement provides for such action to be taken, whereby our client is referred to the relevant authorities for ill health retirement." (the **Enquiry**)

13. Mrs N says British Airways contacted her Adviser in late September 2007. During the telephone conversation her Adviser had with British Airways, it was explained that Mrs N would need to terminate her employment before ill health retirement could be considered (the **Call**).
14. British Airways has been unable to locate a copy of the Enquiry or any reply to it. Mrs N's personnel file was destroyed six years after she left British Airways. Mrs N has not provided any contemporaneous notes from her Adviser of what was discussed in relation to the Enquiry, or provided a recording of the Call.
15. The Trustee and the administrators of the Scheme, British Airways Pension Services Limited (**BAPSL**), are separate legal entities from British Airways.
16. Mrs N and the Trustee have confirmed that BAPSL did not correspond with Mrs N's Adviser at any time.
17. After Mrs N's contract had been terminated, BAPSL sent out a statement of deferred benefits in response to notification from British Airways that Mrs N's employment had ended due to "severance."
18. Under Rule 13 of the Rules, a member entitled to a deferred pension on leaving service, who becomes incapacitated before the pension would otherwise come into payment, may choose to take immediate pension "at a rate which is the Actuarial Equivalent of the deferred pension which would have commenced at Normal Retirement Age."
19. In late October 2007, Mrs N requested early payment of pension after being notified of her deferred benefits the same month. In response, BAPSL issued figures that had been actuarially reduced.
20. Mrs N says she asked about early release of her pension on ill health grounds. She was told, via her Adviser, that she would be unable to obtain an unreduced ill health pension unless she returned to work. She could not return to work due to her ill health and personal circumstances in that employment. She therefore made the decision to terminate her employment rather than continue with the long term sickness absence route. She has since discovered that she was misinformed. Rather than needing to return to work, she needed only to have remained on long term sickness absence.
21. Mrs N previously brought a complaint to us about British Airways' decision not to award her an ill health pension. That complaint was determined and was not upheld.

Mrs N's previous complaint concerned the Trustee's failure to respond to her request for information and the parties' mishandling of her complaint.

22. In the Trustee's response to this office of 17 June 2013, the then Scheme Secretary stated:

"[British Airways] confirmed that [Mrs N] was being managed under EG300 however the process was suspended when [Mrs N] entered into Voluntary Severance and Compromise Agreement negotiations with [British Airways]. [British Airways] confirmed that detailed discussions took place with [Mrs N] and her legal adviser which clarified that termination via Voluntary Severance/Compromise Agreement would not lead to ill health retirement and that ill health retirement could only be considered **by returning to work** [my emphasis] and re-engaging in the EG300 process" (the **June 2013 response**)

23. The then Deputy Pensions Ombudsman found that British Airways' decision to terminate Mrs N's contract, was separate from the decision as to whether she met the criteria for ill health pension.
24. The Deputy Pensions Ombudsman also considered the Adviser's assertion that Mrs N was informed she would need to end her employment, by entering into a compromise agreement, before her application for ill health retirement could be considered. The Deputy Pensions Ombudsman concluded that there was "no written evidence" to support the allegation. That aside, she considered that it was correct that a decision needed to be made to end Mrs N's contract of employment before she could be considered for an ill health pension. Mrs N's further comments are outlined below:

- When she asked to be considered for ill health pension, she was told that it was not appropriate to consider termination on ill health grounds until her grievance had been dealt with.
- She signed the compromise agreement approximately 10 days after being told that she had to first return to work to be considered for ill health pension.
- The requirement that she return to work, was not addressed by the then Deputy Pensions Ombudsman.
- That information, given by British Airways' legal advisers, was wrong and misleading. She only became aware that she had been misinformed when she received the Determination.

25. British Airways' comments are summarised below.

- The allegations Mrs N has made are of a similar nature to her previous complaint.

- As Mrs N has provided no new information, British Airways requests that this office review the outcome of that decision.

26. The Trustee's submissions are summarised below.

- British Airways has informed the Trustee that detailed discussions took place between Mrs N, her Adviser and British Airways to make clear the difference between the options that were put to Mrs N.
- Those options were either entering into the compromise agreement, which would not have involved consideration for ill health retirement, or continuing with the Company's absence management process which may or may not have resulted in an award of an ill health pension.
- The Trustee considers that the statement in the June 2013 response, that ill health retirement could only be considered by Mrs N returning to work and re-engaging in the absence management policy process, was a mistake.
- There is no documentary evidence to support the Adviser's claims that she was informed (in 2007) that Mrs N would need to return to work to continue with British Airways' absence management procedure.
- As Mrs N's employment was terminated, she is no longer eligible to be considered for early retirement from active status. The Trustee has no role in the matter.

27. Mrs N says recalculation of her pension, based on an immediate award from her date of leaving British Airways, would resolve the issue.

Adjudicator's Opinion

28. Mrs N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee or British Airways. The Adjudicator's findings are summarised below: -

- The Adjudicator did not consider that Mrs N had provided independent evidence to support her assertion that she was provided with misleading information at the time.
- While the Adjudicator accepted that the June 2013 response appeared to support Mrs N's position, the Adjudicator was not persuaded that the Trustee could be held to a statement which it says was erroneously made, without corroborating documentary evidence.
- The June 2013 response was issued on behalf of the Trustee, a separate legal entity from British Airways. The Adjudicator also noted that Mrs N's personnel

records have since been destroyed. As such, it is not possible to verify the information British Airways provided in response to the Enquiry, if any.

- The fact that Mrs N queried the reduced figures provided by BAPSL, tended to support the view that she had, until then, assumed her pension would be based on her taking ill health retirement from active status.
- The Adjudicator considered this to be inconsistent with Mrs N's expectation that she needed to return to work and re-engage with EG300 to retire with an immediate ill health pension.

29. Mrs N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs N provided further comments, but these do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs N for completeness.

Ombudsman's decision

30. Mrs N says it would have been impossible for anyone in her position to have returned to work. Her claim to have been misled has been corroborated by her Adviser, and the Trustee. She simply wants justice and to be able to claim what is due to her under the Scheme.
31. Mrs N says the evidence provided by British Airways and the Trustee during her previous complaint "explicitly confirm", in their own words, that she was told she had to return to work. More importantly, the evidence provided by British Airways supports that she was given incorrect and misleading information, which she acted on to her financial detriment.
32. Mrs N contends that the Trustee has provided no evidence to substantiate that the statement made by the Scheme Secretary in the June 2013 response was erroneous. That "mistake" was never corrected by either Respondent during the original investigation.
33. Mrs N points out that the Trustee maintains that the June 2013 response demonstrates that she and her Adviser, were made aware that "the only way which she would be entitled to be considered for an unreduced ill-health pension would be to continue in section 4 of the EG300 process." Mrs N says British Airways' own evidence does not refute this.
34. Contrary to British Airways' assertions, Mrs N says she was not informed at any time during the "first grievance Final Appeal" meeting in May 2007, nor in the "Reconvened Final Appeal Meeting" held in June 2007, that the voluntary severance option was an alternative route which, if taken, would prevent her from being considered for ill-health retirement. When her Adviser contacted British Airways in August 2007, it was confirmed that ill health retirement could only be considered after termination of contract. By 28 September 2007, she had not received a salary or

sickness pay for over a year. So, she requested that her Adviser contact British Airways. “[The] request of 28 September [original emphasis] regarding consideration for an [ill health pension], was made with the concession that [she] would sign the [compromise agreement] ...”

35. Mrs N has highlighted that the EG300 does not state that the only route to ill health retirement is via termination under that policy. Nor do the Rules state that British Airways would inform the Trustee that an employee has left service on grounds of “Medical Incapacity”. It follows that enhanced ill health pension should be provided where an employee has completed more than five years’ service.
36. Mrs N explains that she was suffering from a mental disability and on long term sick. She was repeatedly told that termination went before consideration for ill health retirement. She was also told that she had to sign the compromise agreement quickly. The only alternative options were to continue in financial hardship or to return to work, which she obviously could not do; and for her contract to eventually be terminated before being considered for ill health pension. Had she resigned from her post, [instead of accepting voluntary severance], she would have lost six months’ pay in lieu of notice.
37. Mrs N says the Trustee and British Airways accept that leaving via voluntary severance is an alternative route to termination of contract, which could not lead to ill health retirement. If the Adjudicator did not agree, contrary to the evidence, that she was told to return to work, the Adjudicator should have considered what response she received at the time, as this is crucial to her complaint. Mrs N is adamant that she acted on that response, and accepted the voluntary severance and compromise agreement route, something she says she had previously refused. And, in doing so, Mrs N says she gave up a valuable ill health pension of £12,260 per annum. But for British Airways terminating her employment, she is certain would have continued to meet the criteria for an ill health pension from active service.
38. My starting point is the determination of the former Deputy Pensions Ombudsman, which found that British Airways had not breached its duty of care because Mrs N had accepted voluntary severance before she had been considered for ill health pension under rule 14 of the Rules.
39. I also note that the Deputy Pensions Ombudsman was unable to find evidence of maladministration on the part of British Airways in relation to its refusal to grant Mrs N an ill health pension from active service. The ruling was that Mrs N’s complaint should not be upheld because she was not entitled to a pension under sub rule 14 (a), or 14 (c) of the Rules.
40. I do not intend to revisit matters that have already been determined. The parties are entitled to rely on the earlier determination in so far as the issues raised have already been considered in the course of that Determination.

41. I acknowledge that the Deputy Pensions Ombudsman found that Mrs N understood consideration of ill health pension is independent of the decision to terminate employment through medical incapacity under EG300, or voluntary severance.
42. Mrs N now argues that her complaint that she was told she had to return to work before being considered for a pension, formed no part of the previous determination and can therefore be considered now. However, I am also aware that she says she was given the advice, about which she now complains, in 2007 and it is clear that the June 2013 response highlighted the issue.
43. The issue was certainly live during the investigation of the previous complaint. In my view any information allegedly provided that was inconsistent with the EG300, should have been queried at the time, and addressed as part of Mrs N's original complaint to this office. It was also open to Mrs N to lodge an appeal against the Determination, if she considered that the Deputy Pensions Ombudsman had failed to consider a material fact which should have changed the outcome of the decision.
44. I have also considered what is left for me to decide if I accept that this point formed no part of the former Deputy Ombudsman's decision and that I can therefore consider it now. It seems to me I am being asked to form a view about events which caused Mrs N to sign a severance agreement. That is, a complaint concerning how her employment came to be terminated rather than a complaint about how the Scheme was administered. I consider that issue is outside my jurisdiction altogether.
45. For these reasons I do not uphold Mrs N's complaint.

Karen Johnston

Deputy Pensions Ombudsman
08 May 2019