

Ombudsman's Determination

Applicant	Mr N
Scheme	British Transport Police Superannuation Fund (the Fund)
Respondent	Railways Pension Trustee Limited (the Trustee)

Outcome

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

Complaint summary

3. Mr N's complaint against the Trustee concerns its decision not to award him an enhanced ill health pension in 1999.

Background information, including submissions from the parties

4. Mr N worked for the British Transport Police from 1990. From 1998, as a result of head and neck injury Mr N received on duty in May 1996, he has been unable to work.
5. In July 1999, Mr N submitted an application for incapacity benefits and was intending to retire in October 1999 on the grounds of ill health.
6. In his submission, Mr N provided a report from his Consultant Psychiatrist, Dr Cody, dated 23 July 1999, that said:

"It is difficult to give a prognosis in this case. It is unlikely, I feel, that Mr N will be able to return to work with the police because of his physical disabilities and also because he has been emotionally traumatised by his experience...Given his current depressive symptoms, his poor concentration and his lack of motivation and goal-directedness, I think he would be unable to function in employment of any capacity at the present time, although this situation could change in the future."

7. On 29 July 1999, a medical certificate was issued by the Fund's medical officer (**MO**), Dr Palmer. Under the section titled, "In your opinion it is unlikely that the member will be capable of performing full police duties, is it possible that the member will become capable of performing any kind of alternative employment?", Dr Palmer said, "Possibly depending upon his clinical progress after leaving BTP". The MO also said that Mr N was not medically capable of performing his police duties.

8. On 30 July 1999, a medical report was issued by Dr Palmer who considered all the medical evidence and concluded that:

"In January 1999 an independent neurological opinion on behalf of British Transport Police was commissioned and the examining neurologist did not feel that on balance the injury in May 1996 had led to any permanent brain damage...It is not possible to...predict the timescale and outcome of any recovery from his depression but if he does recover it is possible that he could return to civilian employment. He appeared to make a full recovery from his physical injury but in the long term he may have premature degenerative changes in his neck region because of his old injury and the subsequent surgery. It would therefore be prudent for him not to embark on a career where he had to do a lot of heavy lifting. It may be that he would prove to be vulnerable to stress and he therefore might require a job without high level of innate occupational stress or pressure, to minimise the risk of any recurrence of his depressive illness."

9. On 11 August 1999, the Force Personnel Manager sent a letter to the Secretary of the Trustee saying that:

"The enclosed report from the Medical Officer indicates that the officer is permanently unfit for full police duties and I am, therefore, writing to request that you consider him/her for an incapacity pension. I enclose a copy of PC [N's] service history, sickness record and the Board's Medical Officer's report...Please advise of your decision as soon as possible."

10. In October 1999, Mr N retired from his service and was subsequently awarded a standard ill health pension, which was communicated to him in the letter from the Pensions Administrator. His pension was as follows:

"Pension lump sum of £24600.75 to be credited on 22 October 1999

Annual pension of £3086.05."

11. Unhappy with the Trustee's decision, Mr N appealed in February 2000 by providing a report from Dr Cody dated 2 February 2000 that said:

"This report should be read in conjunction with the previous reports I have written for [Mr N] ... [Mr N's] current medication is Paroxetine 40mgs per day. I believe he is still showing symptoms of reactive anxiety and depression. I have asked him to continue on Paroxetine 40mgs per day and to continue seeing Dr

Aidan Jones, Clinical Psychologist, for a psychological approach to his problem.”

12. On 14 February 2000, the Pensions Administrator sent Mr N a letter informing him that his information would be considered at the next police committee meeting on 15 March 2000.
13. On 20 March 2000, the Management Committee (**the Committee**) sent Mr N a letter informing him that it had upheld its decision not to award him an enhanced ill health pension.
14. Mr N further appealed in March 2000 by invoking the Fund’s two-stage internal dispute resolution procedure (**IDRP**).
15. On 31 March 2000, the Pensions Administrator sent Mr N a response under stage one of the IDRP that said:

“The definition of incapacity in the Fund Rules is “incapable of performing his duties on account of bodily or mental infirmity other than of a temporary nature”. The Fund provides two rates of incapacity retirement pension. The first is the standard pension, which comprises the payment of immediate benefits unreduced for early payment. The second is the enhanced pension, which increases the standard pension by the addition of up to seven extra years’ service, if the Committee, at their discretion, think it appropriate...Generally, the Committee exercises their discretion to pay an enhanced pension when it appears to them that the applicant is not only incapacitated from police work, but from all other employment also. In your case, the Committee did not conclude that you were incapable of other duties other than temporarily. They therefore awarded you a standard incapacity pension. My decision is to confirm the determination previously made by the Management Committee that you are not entitled to an enhanced level of retirement pension.”

16. Mr N further appealed by invoking stage two of the IDRP. In his submission, Mr N challenged the Committee’s decision by saying that:

“Your explanation of the reasons for my standard level pension is contradictory and unclear. On one hand you explain that an enhanced pension may be granted when it appears to the trustees that the applicant is incapacitated from, not only police work, but also all other employment. Yet, at the same you introduce the committee’s additional findings that they believed, in my case my total incapacity is only temporary.”

17. On 6 April 2000, the Pensions Administrator sent Mr N a response that further explained:

“I am sorry that you found my explanation unclear. I would refer you again to the definition of incapacity quoted in paragraph 3 of my letter and its reference

to incapacity being other than temporary. This proviso applies whether considering fitness for police duties or any other suitable duties... I note your request to progress your appeal under stage 2...I have therefore arranged to submit your appeal, including your recent correspondence, to the... Management Committee at its next scheduled meeting on 26 July 2000."

18. On 30 May 2000, the Pensions Administrator sent Mr N a letter apologising for the delay in responding under stage two of the IDRP. He informed Mr N that the Committee's meeting had been rescheduled to 15 August 2000.
19. On 30 July 2000, Mr N sent the Committee an additional medical report from Dr Cody dated 25 July 2000 that said:

"My impression is that Mr N continues to be under a considerable amount of stress and shows symptoms of mood disorder. I think it unlikely that he would be able to work in any occupation at present, owing to anxiety, poor concentration and lack of motivation. I have carried out an MRI scan of his head, which was normal and have made a referral to our Clinical Psychologist for further cognitive behavioural treatment. I think it likely, however, that he will remain symptomatic until [the] Court case with the Metropolitan Police is settled and he is able to think about his future again."

20. On 21 August 2000, the Pensions Administrator sent Mr N a letter informing him that the Committee's meeting had taken place on 15 August 2000, and the Committee's decision was to defer his case pending information being received from the Fund's Sub-Committee.
21. On 24 August 2000, the Director of Pensions Fund sent the Pensions Administrator a letter saying that:

"I confirm that, on this basis, I would agree the grant of an incapacity pension at the enhanced rate in this case."

22. On 30 August 2000, the Clerk to the Committee sent the Pensions Administrator a letter saying that:

"I am not prepared to grant a pension at the enhanced rate. If the Sub-Committee is not unanimous then I suggest in this case, we arrange a meeting of the Sub-Committee to discuss it."

23. On 21 September 2000, the General Secretary to the Committee sent the Pensions Administrator a letter saying that:

"We still contend that the evidence does not amount to permanent disability in that, I quote from the report "this situation might change in the future". We therefore do not feel that the case for an enhanced pension has been made. We would value the opinion of Dr Smith [MO] prior to making a decision in this case."

24. Mr N's case was subsequently referred to Dr Smith for assessment in October 2000.
25. On 8 February 2001, Dr Smith sent Mr N a letter informing him that he had received a report from Dr Cody and requested a report from his original Consultant Neurologist, Dr Harvey, who Mr N was under the care of at the time of his head injury in May 1996.
26. On 30 March 2001, Dr Smith considered all Mr N's medical evidence, including the previous reports by Dr Harvey and Dr Lloyd, Consultant Psychiatrist from 1998, and issued his report that concluded that:

“...the final paragraph of the lengthy first report by Dr Harvey which, to some extent at least, provides explanation as to Mr N's feelings...Mr N was referred to Dr Lloyd who agreed that depressive illness was present, although there was no past history of psychiatric disorder...In advising on treatment Dr Lloyd considered that anti-depressants should be continued but at a higher dose...Finally to deal with the matter of Mr N's application for Incapacity Benefits at the Enhanced Rate, given the volume of information now available and the opinions therein expressed, I believe it to be unlikely that Mr N will obtain any substantive employment for probably another year if not two and on that basis, the award of Incapacity Benefits at Enhanced Rate is almost certainly appropriate but perhaps with a review of the situation after say two years.”

27. On 25 April 2001, the Committee sent Mr N a response under stage two of the IDRP, informing him that its decision was to uphold its previous decision not to award him the enhanced ill health pension. This was because whilst he was “currently unable to seek employment, this position is not considered to be life-long and these circumstances did not justify the awarding of a pension at an enhanced rate.”
28. On 5 May 2001, Mr N sent a letter seeking clarification with regard to the Committee's decision and the process it had followed.
29. In June 2001, the Secretary to the Fund sent Mr N a letter in response to his challenging the decision. The letter clarified that:

“The Management Committee have discretion to award or otherwise an ill health pension dependant on whether the individual satisfies the requirements as laid down in the Rules. The award of an enhanced pension is paid under a similar discretion. Please note that whilst the individual is appointed by the Federation, Pensioners or the Employer all members have a fiduciary duty to all parties to the Trust Deed Rules. Generally, decisions are unanimous however if not all in agreement majority voting applies. The Management Committee do not have the ability to award an enhanced pension and subsequently reduce the pension to a STANDARD level as the Rules do not permit this. If there is any doubt the Committee award a STANDARD pension and then investigate further to ascertain whether an ENHANCED pension is appropriate.”

30. In 2012, Mr N developed further health issues and he contacted the Trustee to consider his level of incapacity benefits, but it refused to do so.
31. In 2014, Mr N made a Subject Access Request (**SAR**) with the Trustee to obtain a copy of all his documents and records it held about him.
32. It was not until May 2016 that Mr N raised concerns with the Trustee about the original decision in 2001. His main points were as follows:-
- The report by Dr Smith dated 30 March 2001 supports enhanced ill health pension however the Committee chose not to honour it.
 - The Committee contradicted its decision with the Fund rules.
 - Two members of the Committee had a conflict of interest due to the fact that Mr N had raised a grievance against them.
 - In his letter dated 24 August 2000, the Director of Pension Fund agreed with granting Mr N enhanced ill health pension, so he doesn't understand why the Committee didn't.
33. On 22 July 2016, the Quality Analyst for the Fund sent Mr N a letter in response to his letter that said:

"The extract that [Mr N] has supplied you with, is from the Rules as they were when he commenced employment in 1990, and not when his application was considered. As such, please find enclosed a copy of the letter dated 14 June 2001, with the extract of the Rules that was enclosed... [The Committee's] decision not to award an enhanced pension...is further backed up by the fact that when completing his 'Review of Incapacity Pension' forms between 2001 and 2015, [Mr N] confirmed he was working. In conclusion [the Committee] considered [Mr N's] appeal properly in accordance with the Rules of the Fund and their duty as trustees...With this in mind, I can confirm that we would not be willing to look into this matter further for [Mr N], as the IDR procedure...was exhausted back in 2001."

34. In April 2017, Mr N brought his complaint to the Ombudsman.
35. In June 2018, the Trustee sent us a formal response that maintained its previous stance and added that:

"The Trustee's powers under Rule 16 are delegated to the Management Committee. [The Committee] has no strict criteria for the exercise of its discretion under Rule 16(2), treating each case on its merits. It does, however take into consideration an individual's capacity to earn an income outside the British Transport Police Force...On 20 March 2018, Mr N wrote to [the Fund], providing the details of health conditions he had developed since leaving employment. [The Fund] responded to Mr N on 9 May 2018 and once again confirmed that his ill health pension was awarded to him at the time he left

service, based on his health at that date, in line with the rules of the Fund, and any changes in health since that date would not be considered.”

36. Mr N provided us with his response which is summarised below:-

- The doctor used the word 'possibly' in the certificate which is not a definitive word that his health condition would improve.
- He believes that the Committee had misinterpreted the Fund rules as it is not necessary for a member to have a life-long health condition to be awarded an enhanced ill health pension.
- The Committee has the power to “vary, suspend or revoke his annuity” at a later stage, as per Rule 14(2).
- He referred to the Disability Act 1995 and said the Trustee discriminated against him as it failed to update its policy to prevent discrimination against a disabled person due to his mental health.
- Referred to case law of Dundee General Hospitals v Walker, Kerr v British Leyland (Staff) Trustees Ltd and Thomas Edge & Ors v The Pensions Ombudsman & Anor in which the Trustee failed to apply scheme rules correctly and misinterpreted rules.

37. In the email dated 27 February 2019, the Fund’s administrators confirmed that Rule 16 applies in Mr N’s case and that Rule 14, set out in the Appendix, is solely applicable in the calculations of the pension benefit and not the eligibility for it.

Adjudicator’s Opinion

38. Mr N’s complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee. The Adjudicator’s findings are summarised below: -

- The decision whether or not to award an enhanced ill health retirement pension lies with the Trustee under the Rule 16. Mr N had no automatic entitlement to such a pension. The Trustee needed to consider Mr N’s enhanced ill health application in accordance with the Fund’s Rules and properly explain why his application either could or could not be approved.
- Essentially, in order to qualify for an enhanced ill health award, a member must meet the criteria under the Fund’s Rules. Under Rule 16, a “Member who leaves Service before Pension Age...because he is incapable of performing his duties on account of ...mental infirmity other than of a temporary nature shall, on production of such evidence of his incapacity as the Trustee may require, receive a pension...”. Then “the Trustee at their sole discretion consider it appropriate be granted an additional annual pension...”.

- In his report, Dr Smith concluded that Mr N was unlikely to perform his duties and that it would be unlikely that “Mr N will obtain any substantive employment for probably another year if not two and on that basis, the award of Incapacity Benefits at Enhanced Rate is almost certainly appropriate but perhaps with a review of the situation after say two.” Even though Dr Smith said that Mr N would be unlikely to work for another year or two, this did not meet the criteria for permanent incapacity until pension age, 65. Under Rule 16, it is at the Trustee’s sole discretion that the member is awarded enhanced ill health pension on the condition that the permanent incapacity has been established. In Mr N’s case, the Trustee accepted that Mr N was unable to continue in his job but did not agree that he had established permanent total incapacity until pension age. On that basis, it did not award Mr N ill health pension at an enhanced rate but a standard rate.
- Mr N made an assertion that the Trustee applied incorrect rules; that Rule 14 should apply and not Rule 16 as stated by the Trustee. However, the Adjudicator noted that Rule 14 only applies to the calculation of the ill health pension once it has been awarded and not the eligibility for it. Once awarded, the pension cannot be increased at a later stage, as suggested by Mr N. It can only be awarded at the Trustee’s discretion upon the initial application. Mr N’s assertion was that, in order to meet the criteria for an enhanced pension, his condition need not be life-long. The Adjudicator appreciated Mr N’s assertion. However, Rule 16 requires a member to be incapacitated until pension age of 65 and not temporarily as concluded by Dr Smith. Therefore, the Adjudicator disagreed with Mr N when he said that the appeal Committee has misinterpreted the rules.
- In the adjudicator’s view the MO and subsequently the Trustee had properly considered Mr N’s application for an enhanced ill health pension. Consequently, having considered its MO report, its decision was properly made. The Adjudicator therefore considered that the Trustee had exercised its discretion appropriately and that its decision not to grant Mr N an enhanced pension was reasonable and in accordance with the Rules. Consequently, she did not uphold Mr N’s complaint.

39. Mr N did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Mr N provided his further comments which do not change the outcome. I agree with the Adjudicator’s Opinion and I will therefore only respond to the key points made by Mr N for completeness.

40. Mr N mostly reiterated his previous points and added the following comments:-

- There is a lack of consistency in the Trustee’s approach when considering granting an enhanced pension.
- The Rules do not allow the Trustee sub-delegating responsibility to the Committee for making a decision.

- He referred to the case of Mrs Percox v Railways Pension Scheme Trustee Company Limited N00910, determined by the Ombudsman, having a bearing on his case.
- The Adjudicator has been misled by the Trustee with regard to the correct Rules being applicable in his case.
- He finds the Trustee's decision is unreasonable as it goes against his own doctor.
- It is clear that he is incapacitated for any work as he is classed as disabled under The Equality Act 2010.

41. On 13 May 2019, Mr N provided us with a copy of the letter he sent to the Trustee, in relation to its failure to supply all copies of his yearly 'Review of Incapacity' forms, as requested in his SAR, dated 11 April 2019. He believes the Trustee does not have full or complete records of his file but chose instead to suggest to us that it did which proves it has deliberately lied and this unlawful behaviour must be challenged. He also asked how he can make a formal complaint about the Trustee's deceitful behaviour.
42. On 16 May 2019, the Trustee provided us with a copy of Appendix 6 and 7 of the Fund's Trust Deed and Rules confirming the Trustee's process of sub-delegation, relevant sections of which can be found in the Appendix 2.

Ombudsman's decision

43. In order to qualify for an enhanced ill health award, Mr N must meet the criteria under the Fund's Rules. The Rules set out in the Appendix are the ones that apply in Mr N's case, specifically Rule 16, which is the relevant provision.
44. Rule 16 of the Rules of the Fund makes it clear that an enhanced ill health pension is payable at the Trustee's "sole discretion."
45. Neither I nor the courts may interfere with the Trustee's discretionary powers under the Rules unless it had not properly considered Mr N's particular circumstances. When the Trustee exercises its discretion, it has to follow certain well established principles. It must apply the relevant rules correctly, take account of all relevant evidence, disregard irrelevant evidence and the decision reached must not be perverse that is to say the decision is one which no reasonable decision maker could have reached on the basis of the facts.
46. The Trustee's power to provide enhancement is entirely discretionary. The only requirement is that the Trustee must not make a perverse decision. The Trustee refused Mr N's pension to be enhanced on the basis that permanent incapacity, as required by Rule 16, has not been established in Mr N's case. I find that the Trustee has provided valid reasons why it declined Mr N's request for a discretionary award. I find that the evidence does not indicate that the Trustee took irrelevant matters into account or omitted any relevant ones, it interpreted Rule 16 correctly and I do not find

that it came to a perverse decision; that is a decision which no reasonable decision-maker could have come to on the basis of the facts.

47. Rule 16 does not specify the conditions under which a member may receive an enhanced benefit, other than having less than 30 years' membership. The Trustee has determined Mr N's case on the basis of his capacity for any work. Since a standard ill health pension is payable if the member is incapable of performing his own duties, it is not unreasonable that an award of enhanced benefits should be considered where the member's incapacity goes beyond this. In other words, it is not unreasonable for the Trustee to consider Mr N's capacity for any employment in reaching its decision on awarding enhanced benefits.
48. Mr N referred to one of the determinations issued by the previous Ombudsman however every case is investigated on its own merits. The previous case relates to a different scheme and rules, so I do not consider it helpful to Mr N's case as the circumstances are different.
49. I have reviewed the Rules and have found no evidence that Rule 16 is not applicable in Mr N's case.
50. I also considered the Trustee's delegation point raised by Mr N. I appreciate Mr N was unhappy that one of the Trustees agreed to an enhancement but the Committee did not. However, the Rules permit the Trustee has delegated its decision to the Committee under section 16(1), Evidence of Incapacity. The Committee's decision is made by majority present at the meeting. If, however, an equal division of votes, the Chairman has a second or casting vote.
51. I have considered the fact that Mr N made a SAR in relation to his yearly incapacity reviews, however I do not find this information relevant in his case, as his complaint relates to the Trustee's original decision and not his latter reviews of his incapacity. Mr N has asserted that the Trustee has lied to us by not providing all his incapacity forms. Mr N will need to raise this issue with the Trustee as this is a new point, not previously considered by the Trustee.
52. I have great sympathy for Mr N's situation and I appreciate that he is classed as disabled under the Equality Act 2010, however it is assessed under different criteria to the ones Mr N is assessed for when it comes to enhanced ill health pension.
53. Therefore, I do not uphold Mr N's complaint.

Anthony Arter

Pensions Ombudsman
13 June 2019

Appendix 1

Retirement before Pension Age due to Incapacity

“Rule 16

Subject to the provisions of this rule, a Member who leaves Service

...

(b) before Pension Age

Because he is incapable of performing his duties on account of an accident or bodily or mental infirmity other than of a temporary nature shall, on production of such evidence of his incapacity as the Trustee may require, receive a pension calculated in accordance with rule 13 and a lump sum calculated in accordance with rule 14.

A Member entitled to benefit under this rule who has less than 30 years' Beneficial Membership may, if the Trustee at their sole discretion consider it appropriate be granted an additional annual pension...

(5) If in the opinion of the Trustee a Pensioner in receipt of a pension under this rule recovers sufficiently before Pension Age in its absolute discretion reduce or suspend his pension as it deems the circumstances justify.”

Rule 14

“Lump Sum between Pension Age and Maximum Pension Age

(1) Subject to the provisions of this rule, a Member who leaves Service

(a) after completing 5 years' Qualifying Membership

and

(b) at or after Pension Age

and

(c) before or at Maximum Pension Age

shall receive a lump sum payable on the day after the date he leaves Service.

(2)(a) The amount of the lump sum shall be

(I)

(i) whichever is the lesser

(A)

1/40th of Final Average Salary

or

(B)

3/10ths of Final Average State Flat-Rate Pension

multiplied by

(ii) the number of years of the Member's Beneficial Membership subject where a notice has been given by or in respect of the Member under Rule 11(1) to a maximum of 30 years

plus

(II)

(i) whichever is the lesser

(A)

1/120th of Final Average Salary

or

(B)

1/10th of Final Average State Flat-Rate Pension

multiplied by

(ii) the number of years of the Member's Beneficial Membership subject where a notice has been given by or in respect of the Member under Rule 11(1) to a maximum of 30 years.

Provided that there is in force at the date contributions under Rule 11 (Member's Normal Contributions) and / or sub-rule 12(5)(a) (as appropriate) cease to be payable by or in respect of the Member to the Fund a certificate from the Actuary that the benefit under this sub-rule (II) may be paid.

(b) In addition to the lump sum determined under (2)(a) above a Member who leaves Service on or after 1 September 2000 shall receive an additional lump sum of 3.83% of the lump sum determined under paragraph (2)(a) above for Beneficial Membership prior to 1 September 2000 other than Preserved Membership subject to a maximum of 30 years.

(c) In addition to the lump sum determined under (2)(a) above a Member with Preserved Membership who leaves Service on or after 2 September 2002 but, for the avoidance of doubt, before or at reaching Maximum Pension Age, shall

receive an additional lump sum of 3.3% of the lump sum determined under paragraph 2(a) above for Preserved

Membership prior to 2 September 2002 subject to a maximum of 30 years (taking into account, for the purposes of calculating 30 years, his years of Contributory Membership prior to 1 September 2000 on which increase is awarded under (b) above)."

Appendix 2

"Appendix 6

Committee of Management and the Secretary

6 Decisions of the Committee

The decision of the majority of those of the Committee present at a meeting shall be deemed to be the decision of the Committee. On an equal division, the Chairman of the meeting shall have a second casting vote.

A resolution consented to in writing by the majority of the Committee shall be as valid and effective as if it had been passed at a meeting attended only by those of the Committee who formed the said majority."

"Appendix 7

Trustee Powers Delegated to the Committee of Management

...

1970 Section: Power

...

16(1) Evidence of incapacity"