

Ombudsman's Determination

Applicant	Ms I
Scheme	NHS Pension Scheme (the Scheme)
Respondents	Hampshire Hospitals NHS Foundation Trust (the Trust) NHS Business Services Authority (NHS BSA)

Outcome

1. I do not uphold Ms I's complaint and no further action is required by the Trust or NHS BSA.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Ms I has complained that she made an application for ill health retirement (**IHR**) benefits on 9 December 2016, but that this was unduly delayed by the Trust and NHS BSA.

Background information, including submissions from the parties

4. On 9 December 2016, Ms I wrote to the Trust asking to be referred to Occupational Health (**OH**) in order to be considered for IHR. The Trust responded to explain its process and that Ms I would need to arrange an appointment to see an OH physician.
5. On 10 January 2017, Ms I met with the OH physician, who recommended that the Trust commence the IHR process for Ms I.
6. On 18 January 2017, The Trust informed Ms I that OH was in the process of completing Part A of the preliminary IHR application form (**the AW33E form**).
7. On 7 February 2017, Ms I confirmed receipt of the AW33E form. It was necessary for Ms I to complete Part B, which was the employee section. However, Ms I raised some concerns with the content of Part A, and so it was referred back to OH for review.
8. On 23 February 2017, the Trust asked OH for an update on the amendments and was told OH would aim to complete these by 8 March 2017.

9. On 23 March 2017, Ms I asked the Trust and OH to make some further amendments to one of the addendums to the AW33E form.
10. On 19 April 2017, after the Trust and the OH physician discussed Ms I's application, the AW33E form was submitted to NHS BSA.
11. On 21 April 2017, NHS BSA received the completed AW33E form with supporting evidence.
12. NHS BSA has said that the form stated Ms I's date of termination of employment was 'unknown'.
13. On 16 May 2017, NHS BSA informed Ms I that her IHR application had been successful and that she would be eligible for Tier 2 benefits.
14. On 6 June 2017, the Trust emailed Ms I to say:

“...to enable [NHS BSA] to process your [IHR] pension, [the Trust's Pensions Officer] will need to complete form AW8 and submit it to [NHS BSA]. Before [the Pensions Officer] is able to do this, she will need a Termination Form, completed by your manager, following their having received your written resignation.”
15. On 21 July 2017, NHS BSA contacted the Trust to ask for an update on the AW8 form, necessary to process the IHR claim. The Pensions Officer at the Trust told NHS BSA that she was awaiting details of the termination of Ms I's contract.
16. On this same date, NHS BSA informed Ms I that a completed AW8 form would be needed in order to process her IHR benefits.
17. On 24 August 2017, the Trust emailed Ms I to say:

“It is clear to me from your emails that you wish 31 March 2017 to be your ill health retirement date. Whilst not in any way accepting your arguments, I do understand your rationale for wishing this to be your ill health retirement date. There are, however, two fundamental problems with using this date:

Firstly, [NHS BSA] did not grant you ill health retirement until May 2017 and you cannot take ill health retirement prior to the date that it was granted;

Secondly, and of equal if not greater significance, you continue to remain an employee of this Trust. You have not resigned your employment but have continued to submit Fit Notes from your GP and the Trust has continued to pay you contractual sick pay. The Trust has also continued to pay employer pension contributions towards your pension and you have continued to pay your employee pension contributions and so you have continued to accrue pensionable service. Even though I am clear that you wish the Trust to do so, [the Trust's Pensions Officer] cannot therefore complete form AW8 and forward it to [NHS BSA] so they can process your pensions, for as long as you remain a Trust employee without a confirmed leaving date.”

18. Several more communications followed between Ms I and the Trust on the same matter. On 10 October 2017, the Trust wrote to Ms I to say:

“Having, over the course of 3 meetings, considered and explored all of the information contained in the Management Case Report of 6 December 2016 and the Addendums dated 10 February 2017 and 27 April 2017 and in the absence of you having chosen to resign your employment to claim your NHS Pension following having been granted Tier 2 ill health retirement, my decision is to dismiss you from your employment with the Trust on the grounds of capability (medical).

Your dismissal is with notice from the date of the meeting on 5 October. You are entitled to 7 weeks contractual notice and so your last date of employment with the Trust will be 23 November 2017.”

19. On 20 October 2017, Ms I notified the Trust that she wished to appeal its decision to dismiss her.
20. On 25 October 2017, the Trust notified Ms I that an appeal hearing would take place on 31 October 2017.
21. On 27 October 2017, Ms I wrote to the Trust to inform it she wished to withdraw her appeal against her dismissal, and instead wished to raise formal grievances about contractual PAYE, IHR and permanent injury benefits.
22. Following this, Ms I asked the Pensions Ombudsman to consider her complaint.

Summary of NHS BSA's position

23. NHS BSA has informed my office that it received the completed AW8 form for Ms I on 30 October 2017. It has confirmed that, as Ms I's employment was terminated as of 23 November 2017, her IHR benefits were put into payment from 24 November 2017.
24. NHS BSA has confirmed that, under the rules of the Scheme, it cannot process an IHR claim until a member ceases to be in active employment.

Summary of the Trust's position

25. In its response to the Pensions Ombudsman, the Trust provided a copy of its Managing Health and Attendance Policy. Section 10, 'Dismissal on grounds of Capability' is quoted in Appendix 2.
26. The Trust has explained that it informed Ms I on several occasions that she would need to resign on capability grounds in order to complete her IHR claim. The Trust has said that it is not its policy to terminate employment where a member has been accepted for IHR.

Adjudicator's Opinion

27. Ms I's complaint was considered by one of our Adjudicators, who concluded that no further action was required by the Trust or NHS BSA. The Adjudicator's findings are summarised below:-

- There were no avoidable delays caused by the Trust, NHS BSA or OH.
- Ms I's repeated requests for amendments to the documentation caused some delay.
- Regulation 90 of the NHS Pension Scheme Regulations 2015 (**the Regulations**), quoted in Appendix 2, requires that a member must cease to be in employment before IHR benefits can be paid.
- It is against the Trust's policy to terminate a member's employment if they have been accepted for IHR.
- The Trust took reasonable steps to explain to Ms I that she would need to resign from employment in order for her IHR claim to be put into payment.

28. Ms I did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms I provided her 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 Ms I for completeness.

Summary of Ms I's response

29. Ms I made many comments about an IHR application she made in 2010, her recorded salary, pension contributions and incorrect data within her historical payslips.

30. Ms I referred to the following advice, quoted from the Ill health Retirement page of the Royal College of Nursing website:

"Increasingly, NHS employers are trying to avoid termination of contract on grounds of ill health capability and are encouraging staff to resign once they have been accepted for IHR. You are advised not to do this as you will relinquish any potential entitlement to contractual notice pay or accrued annual leave."

Ombudsman's decision

31. My Office issued its jurisdiction decision to Ms I on 8 May 2018, which set out the reasons why her complaints about her 2010 IHR application, and complaints about payroll and contributions will not be considered. I will not comment further on her responses involving these events, as it was dealt with in the jurisdiction decision letter of 8 May 2018.

PO-19961

32. I acknowledge Ms I's referral to the advice issued by Royal College of Nursing, a nursing Trade Union, against resigning from employment. It would appear that the Trust's Managing Health and Attendance Policy is in conflict with the advice.
33. It is for the Trust to set its own internal policies and procedures. It is down to each NHS employer to decide whether it takes into account advice issued by a Trade Union such as Royal College of Nursing.
34. Having reviewed the extensive correspondence between Ms I and the Trust throughout 2016 and 2017, it is clear that the two parties were in regular contact concerning the details of Ms I's IHR application.
35. Ms I has suggested that she did not resign because of the advice on her Union's website.
36. Having reviewed the extensive correspondence between Ms I and the Trust throughout 2016 and 2017, it is clear that the two parties were in regular contact about its requirements for progressing Ms I's IHR application.
37. Whilst I would recommend that the Trust reviews external advice given to its employees, I do not find that the Trust's Managing Health and Attendance Policy is in breach of the Regulations.
38. The Trust explained its policies to Ms I on several occasions and gave her a reasonable amount of time to resign, in order that her IHR claim could be progressed. Once the Trust recognised that Ms I was not prepared to resign, it took the necessary steps to terminate Ms I's employment on ill health grounds.
39. Ms I then appealed the Trust's decision to terminate her employment.
40. Whilst Ms I later withdrew this appeal, her behaviour towards the termination decision demonstrates that she may not have accepted this decision had it been made earlier in the process. I cannot say with sufficient certainty that Ms I would have accepted the decision to terminate her employment, had the Trust initially chosen this action.
41. I do not find that the Trust's actions have been of material detriment to Ms I.
42. I do not uphold Ms I's complaint against the Trust and NHS BSA.

Anthony Arter

Pensions Ombudsman
11 October 2019

Appendix 1

Hampshire Hospitals NHS Foundation Managing Health and Attendance Policy

10. Dismissal on grounds of Capability

An employee may be dismissed from employment on the grounds of capability due to health reasons. This should be discussed and considered in any of the situations where an employee:

- Remains on long term sick, with no scheduled return to work date and is not eligible to apply for ill health retirement, or;
- Remains on long term sick and does not wish to be considered for ill health retirement, or where their application has been turned down, or;
- Where a decision on ill health retirement is not expected from the NHS Pensions Agency within a reasonable time period, or;
- Is currently on a Final Written Warning for short term absence and has now breached an improvement target.
- Cannot have any adjustments made to their current role which meet their health requirements and enable them to remain at work and/ or fulfil their role and suitable redeployment cannot be located.
- Adjustments made to their current role have not enabled the individual to remain at work and/or cannot meet the health requirements of the individual and suitable redeployment cannot be located.
- Whether or not they are currently on sick leave, has been unable to sustain an acceptable level of attendance over a continuous period of 12 months or over a longer period, as the result of either recurring periods of long-term sickness absence, or as the result of the combination of recurring periods of long-term sickness absence and short-term sickness absence.

Appendix 2

Regulation 90 of the NHS Pension Scheme Regulations 2015

(1) An active member (M) is entitled to immediate payment of—

(a) an ill-health pension at Tier 1 (a Tier 1 IHP) if the Tier 1 conditions are satisfied in relation to M;

(b) an ill-health pension at Tier 2 (a Tier 2 IHP) if the Tier 2 conditions are satisfied in relation to M.

(2) The Tier 1 conditions are that—

(a) M has not attained normal pension age;

(b) M has ceased to be employed in NHS employment;

(c) the scheme manager is satisfied that M suffers from a physical or mental infirmity as a result of which M is permanently incapable of efficiently discharging the duties of M's employment;

(d) M's employment is terminated because of the physical or mental infirmity;
and

(e) M has claims payment of the pension.

(3) The Tier 2 conditions are that—

(a) the Tier 1 conditions are satisfied in relation to M; and

(b) the scheme manager is also satisfied that M suffers from a physical or mental infirmity as a result of which M is permanently incapable of engaging in regular employment of like duration.