

## Ombudsman's Determination

Applicant	Mrs S
Scheme	NHS Pensions Scheme ( <b>the Scheme</b> )
Respondent	NHS Property Services Limited ( <b>NHS PSL</b> )

### Outcome

1. The complaint should be upheld against NHS PSL because of NHS PSL's maladministration in failing to expedite Mrs S' application for an ill-health retirement pension, preventing that application from being received by the Secretary of State before 1 April 2015 (**the Deadline**).
2. The reasons for reaching this decision are explained in more detail below.

### Complaint Summary

3. Mrs S' complaint against NHS PSL, her employer, concerns the impact of NHS PSL's actions and omissions on the calculation of her benefits. She considers that, as she submitted her application for an ill health early retirement pension (**IHRP**) before 1 April 2015, she should have been entitled to higher benefits. This is because her pension would then have been calculated under the National Health Service Pension Scheme Regulations 2008 (**the 2008 Regulations**). This would have provided an IHRP at a more favourable level than that which she is entitled to under the National Health Service Pension Scheme Regulations 2015 (**the 2015 Regulations**), which replaced the 2008 Regulations. Mrs S contends that her employer failed to inform her of the transitional provisions with regard to her Tier 2 benefits, and failed to expedite her application to take an IHRP in time for her to take advantage of those transitional provisions.

### Background information, including submissions from the Parties

4. Mrs S' IHRP falls under Regulation 27 of the National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015 (**the Transitional Provisions Regulations**), which is set out in the Appendix.
5. Mrs S worked for NHS PSL until she retired on the grounds of ill health on 21 September 2015. Her last day of work was 27 October 2014.

6. Prior to her last day of work, Mrs S had an occupational health (**OH**) assessment on 1 May 2014. It was conducted by Capita, NHS PSL's occupational health provider at that time. The report said:

“Within the limitations of a telephone assessment and the information that was provided to me by Mrs S, I would advise that Mrs S is fit for work.... I have not arranged a further review, however please contact occupational health if you feel further advice is required. “
7. On 19 November 2014, Mrs S emailed NHS PSL, enquiring who she needed to contact with regard to applying for an IHRP.
8. On 25 November 2014, NHS PSL emailed Mrs S back, saying that she should contact NHS Business Service Authority (**NHSBSA**) to request form AW33E (**the Form**).
9. On 27 November 2014, Mrs S emailed NHSBSA to inform it that she wished to apply for an IHRP. She requested the Form which NHSBSA subsequently provided to her, together with a link to the NHSBSA website for further information on IHRPs.
10. Around the same time, from 28 November 2014, Capita stopped accepting new occupational health referrals as it was exiting the public sector occupational health market. NHS PSL then appointed a new occupational health provider, OH Assist, to undertake this work. However, OH Assist's services to NHS PSL were not fully up and running until the end of January 2015.
11. On 29 November 2014, Mrs S emailed NHSBSA saying:

“I'm really confused as the link takes me to the information I had already looked at...there is no link to download the form. I've just done a general search on the Internet and found this 2009 version of form...is this the correct version of the form?”
12. The same day, NHSBSA replied to Mrs S providing the correct link to the most recent form on its website.
13. On 1 December 2014, Mrs S sent an email to NHS PSL saying:

“I have now got a link to the correct version of the form (below) from [NHSBSA]. NHS PSL need to complete Section A, this includes details of sick leave and attendance management going back 5 years...I then complete Section B and finally Section C needs to be completed by Occupational Health. I'm not sure how the OH part will work.”
14. Later in December 2014, following a review meeting with her employer, an occupational health adviser (**OH Assist**) sent Mrs S a letter. The letter set out that Mrs S felt she would not be able to return to work again. Her GP had agreed with this and recommended that she apply for an IHRP. The OH Assist adviser said:

"We discussed about ill health retirement estimation/quotation...if Occupational Health do not fit [sic] you are able to return in any capacity, as you feel, that the organisation may have to arrange a formal meeting in which your contract may be terminated on the grounds of ill health. Mrs S has ongoing medical conditions for which there is no cure. Treatment is by control of symptoms. All these conditions have had an impact on attendance. She has been absent from work for the last two years out of four."

15. On 30 December 2014, NHSBSA sent Mrs S an IHRP benefit estimate under the 2008 Scheme. It showed projected benefits under Tier 2 for £12,011.21 per annum.

16. On 29 January 2015, Mrs S sent a chaser email to NHS PSL that said:

"I've now seen my own GP, Dr Ramachandra and he is still happy to support my application for ill health retirement. His understanding of the process is that at some point he will be asked to complete some sort of form or report. Is that correct? What is happening with my application, do you know how long it is likely to take? I still don't know what I'm expected to do regarding the restructure."

17. NHS PSL referred Mrs S to an occupational health adviser on 30 January 2015.

18. On 6 February 2015, Mrs S attended a telephone assessment with OH Assist. Following this assessment, OH Assist applied for further medical evidence from Mrs S' GP in order further to consider her application for an IHRP.

19. On 9 February 2015, Mrs S' employer completed the Employing Authority's section, Part A, of the Form and sent it to Mrs S to complete the Member's section, Part B, of the Form.

20. Mrs S signed the Form on 11 February 2015. On 13 February 2015, Mrs S emailed NHS PSL saying that:

"I've completed the Ill Health Retirement Form, but the envelope which you enclosed is to send it back to NHS Business Services Authority. My understanding is that Part C needs to be completed by the NHSPS Occupational Health Doctor, so I thought that the form would need to go to OH Assist next."

21. The same day, NHS PSL replied to Mrs S' email saying:

"You are correct in that the 3<sup>rd</sup> part does need to be completed by occupational health provider. My understanding is that [OH Assist] have requested access to medical records so it may be after this point when they complete the form. In my absence I will ask my colleague...to clarify with OH with regards to completing the form and timescales if possible."

22. Mrs S did not return the completed Form to NHS PSL until 2 March 2015. At the time, OH Assist was still waiting for Mrs S' further medical evidence from her GP, and it

said it requested the information three further times between February and early May 2015.

23. Mrs S subsequently raised a grievance against NHS PSL with regard to unreasonable delays in processing the necessary paperwork required for her to apply for IHRP. On 2 March 2015, Mrs S had a grievance hearing that took place at her home.
24. On 20 March 2015, OH Assist sent a letter to NHS PSL recommending that “management proceeds with Ill Health Early Retirement with their providers.” On the same day, Mrs S sent an email to NHS PSL saying:

“I have had another attempted telephone appointment with [OH Assist] this morning...As far as I could tell, she confirmed that “Further Medical Evidence...had been requested from my GP, but that this was a general request and makes no reference to an application for ill health retirement. [OH Assist] seemed confused as I was about the aim of the call as they had not received any further medical evidence... [NHS PSL] suggested closing the existing referral and opening a new one however I am concerned about this ‘re-starting the clock’ and it being another four months to get to this point.”
25. On 26 March 2015, Mrs S sent an email to NHS PSL chasing up the progress of her application. On the same day, in response to her email, NHS PSL said:

“I’ve just spoken to OH Assist. They tell me that their ‘bespoke’ team are dealing with it, so it is being treated as specific [IHRP] referral. I said that you had been contacted by a nurse but needs to be a physician. They had made a note on the file to call you tomorrow and to ensure it’s a physician who calls you. I’m not sure how the confusion happened, apologies.”
26. On 27 March 2015, NHS PSL sent Mrs S a response to her grievance that concluded:

“[NHS PSL] proceeded with the application, ensuring the relevant documentation was in order, fully complete and directed accordingly. I have noted this process was delayed by the change in Occupational Health provider from Capita to OH Assist. This was resolved, however, by the 3<sup>rd</sup> February 2015 when the occupational health referral was completed and... forwarded the forms to you...whilst the process of applying for Tier 2 Ill Health retirement has taken some 4 months to date, I am satisfied that [NHS PSL] has acted in a timely manner in respect of its actions in the application process which are within [NHS PSL] control. Whilst the change in the OH provider was untimely in as much as it led to a short delay to the application process in your case, I am satisfied that the process has been pursued with due expediency.”
27. On 9 April 2015, OH Assist sent NHS PSL a report confirming that Mrs S was unfit to work in any capacity, and there were no workplace adjustments that would facilitate her return to work.

28. On 16 April 2015, OH Assist sent Mrs S a letter informing that it had now approached Mrs S' GP, Dr Ramachandra for a medical report.
29. On 24 April 2015, Mrs S appealed against the grievance outcome. Her main points were made by Mrs S' representative:

"...the normal process was for the AW33 form to be completed and the medical report to be obtained...section C of the form had still not been completed - despite it being many months since the original request. She referred to a letter dated 16 February where OH Assist had advised they were obtaining a medical report from her GP. She said she received two letters from OH Assist one saying they had not got her consent and the other saying they were writing to her GP. She stated that the medical report was originally requested in February. Mrs S advised that her GP practice had confirmed that they had not yet received the request for the report. Three chasing letters had been sent yet they had still not received the request detailing what report was required."

30. On 14 May 2015, OH Assist received further medical evidence required from Mrs S' GP in order to complete its assessment, and on 29 May 2015, it completed Part C of the Form with the above recommendation.
31. On 11 June 2015, NHS PSL sent an email to Mrs S confirming NHSBSA had received the completed Form. It also said that NHSBSA would contact her once the decision had been made.
32. On 13 July 2015, Mrs S sent an email to NHS PSL informing it that she had received a letter from NHSBSA advising that her application for an IHRP had been accepted.
33. On 26 October 2015, NHSBSA sent a statement of retirement benefits to Mrs S. It showed her benefits had been calculated under both the 2008 Scheme, and 2015 Scheme and amounted to £10,319.26 per annum.
34. In December 2015, Mrs S raised a complaint against NHSBSA by invoking the Scheme's two-stage internal dispute resolution procedure (**IDRP**).
35. On 25 January 2016, NHSBSA sent Mrs S a response under stage one of the IDRP that said:

"Prior to retiring on ill health grounds on 21 September 2015, your employer provided you with an estimate of your benefits but had calculated the whole of scheme membership under 2008 Section rules. This was correct, at the time, as the figures had been produced in December 2014, although employers had been made aware of the new 2015 Scheme coming into effect in April 2015. When we calculated your actual retirement benefits in October 2015, we correctly calculated all your scheme membership up to 31 March 2015 under 2008 Section rules and your scheme membership from 1 April 2015 to 20 September 2015 under the new 2015 Scheme regulations. As a result, your

retirement benefits are less than those given in the estimate provided by your employer...However, I think that it is important to explain that it was agreed by all parties: NHS Pensions, employers and staff side representatives, that publicity to current employees should be disseminated by their employers. This would ensure that all current NHS employees were aware of and prepared for the inception of the new 2015 Scheme. The payslip drop method has been adopted in previous years and proven very successful as all employees...have to be issued with a payslip each month. Therefore, I am concerned that you were not made aware by your employer that your scheme membership was changing.”

36. On 18 May 2016, Mrs S’ solicitor raised a complaint against NHS PSL. Mrs S’ key points were:

- Mrs S was not aware, or informed prior to 1 April 2015, of the changes in her scheme membership.
- NHSBSA did not make sure that the employer attached the leaflet about the change to Mrs S’ payslip. None of the January and February 2015 payslips contained a copy of the said leaflet.
- The only information provided to OH Assist for the telephone assessment of 6 February 2015, was regarding Mrs S’ sick leave and health condition. OH Assist was not aware of her IHRP request and did not have a copy of the Form.
- The Scheme membership changes were never individually negotiated or consulted with Mrs S.
- Had Mrs S been informed of the changes, she would have made sure that the Form and supporting medical evidence was received by NHSBSA prior to 1 April 2015.
- Mrs S has incurred a financial loss of at least £1,691.95 per annum with future increases in accordance with the terms of the 2008 Scheme.

37. On 14 December 2016, NHS PSL’s solicitor sent Mrs S a response to her issues. NHS PSL’s main points were as follows: -

- The payroll department distributed the leaflet (**the Leaflet**) containing information about changes by enclosing it with payslips at the end of January.
- It made no difference that OH Assist did not have the Form on 6 February 2015 during Mrs S’ telephone assessment, as the purpose of it was to see whether she was eligible to apply for an IHRP.
- Mrs S was in possession of the Form by 1 December 2014, which was provided to her within 4 working days, from the date of her initial enquiry.

- NHS PSL spoke to OH Assist in an effort to expedite the assessment and as a result of the effort, an appointment was made for Mrs S to see an OH Doctor on 9 April 2015.
- NHS PSL was under no duty to inform Mrs S individually of the proposed changes to the Scheme Regulations. It was her responsibility to consider it, and be aware of the process.
- It would not have been possible to speed up the process either in relation to the provision of evidence by Mrs S' GP, or the progress of her IHRP application by OH Assist, had Mrs S known of the changes.
- The delays in processing Mrs S' application were caused by the process of changing OH provider which was out of NHS PSL's control.

38. On 14 June 2017, Mrs S' solicitor sent a letter to NHS PSL providing further comments and said:

"As previously highlighted..., in Scally, the House of Lords approved a prescribed implied contractual obligation on an employer to inform its employees about a contractual term...Lord Bridge implied an obligation on the employer to take reasonable steps to bring a contractual term to the employee's attention...The pension was imposed on employees under a collective agreement rather than by individual consultation and negotiation...our client's payslips were sent to her on an ad hoc basis, rather than as part of the standard administrative task of processing payslips...it would appear that they accumulated at her place of work and that they were eventually forwarded to her by her colleagues...we do not consider that the leaflet constituted a 'reasonable step' to inform her of the valuable benefits referred to above...Accordingly, adopting the multipliers provided by the Ogden Tables, we would now value our client's loss as being £138,840.18."

39. On 8 September 2017, NHS PSL's solicitor sent a response to Mrs S that said:

"We note the points you make in relation to the case of Scally but they are not admitted. A Scally implied duty is one which is to be narrowly defined. In particular, it remains our client's position that the changes to the NHS Pension Scheme was reasonably brought to your client's attention and that information about the NHS Pension Scheme was also available to your client on the NHS BSA website...knowing that she was considering applying for ill-health retirement benefit, she should have visited the website referred and made further enquiries as appropriate...The leaflet provided sufficient information and also where to obtain further information if she was at all unclear...Whilst your client was absent from work due to sickness our client continued to send her copies of her payslips by post...payslips were produced at the same time as all other employees' payslips and were sent to her at around the same time each month...your client was provided with a link directly to the NHS BSA website which contained information about ill health retirement and links to the

necessary forms to complete by a Pensions Team Member on 29 November 2014. Your client was therefore directed to the appropriate forum to obtain information on her rights...Your client was not in a position to submit the form until it had been properly completed, and we contend that your client submitting it herself part completed, simply with the aim that it be determined under the old rules, would not have resulted in the form being accepted...as having been submitted in accordance with Regulation 27...expressly states that the transitional provisions apply to a member whose Form...and... supporting medical evidence was received ...before the transition date...The projected benefit calculation you have used is out of date and higher than the projected benefit provided to your client by NHS Pension in 2014...you do not appear to have utilised the correct Ogden Table...”

### **Summary of Mrs S’ position**

40. Further comments from Mrs S are set out below: -

- The correct process is for the employer to complete Part A of the Form. The Form should then be passed to the member to complete Part B. Finally, Part C should be completed by OH Assist. The Form itself, and the Guide to Ill Health Retirement, are clear that “where this is not possible, the report can be completed by your GP/Specialist”.
- It seems unlikely that NHS PSL, as a limited company, had no control over its decision to change OH provider, in fact this was a business decision wholly within its control. NHS PSL acknowledged that she had requested IHRP on 25 November 2014, before the change of OH provider. No explanation has been given by NHS PSL for why it was necessary to wait until the new OH provider was not just in place, but able to receive ‘electronic referrals’.
- In the grievance outcome, NHS PSL did not accept liability but said “in recognition that there have been delays in the progress of your ill health retirement application...as a gesture of goodwill I am prepared to exercise my discretion to extend your contractual sick pay for a further three months”. In Mrs S’ view, NHS PSL extended her sick pay because it felt guilty about the way in which her IHRP application had been handled.
- Between 11 February 2015 and 2 March 2015, she repeatedly tried to obtain the contact details of the OH provider, to whom Mrs S should have sent the Form. The contact details for OH Assist were provided during her grievance hearing on 2 March 2015. Mrs S believes that there was ample opportunity, during her grievance hearing, for the Regional HR Manager to make her aware of the negative impact of the transitional pension changes on IHRP, and specifically the availability of protection to employees who had submitted an IHRP application before the Deadline.

- Mrs S never claimed to have been completely unaware of the pending changes to the NHS Scheme in general, but rather she was specifically unaware that, if the Form had been submitted to NHS BSA before the Deadline, her IHRP benefits under the 2008 Regulations would have been protected. This specific right to protection was also not publicised at the time and as a result, NHS PSL failed in its duty of care to make her aware of this valuable right.
- NHS PSL did not have a payroll department. Its payroll service was outsourced. As far as she is aware, there was no formal procedure or structure to how payslips were distributed. From her experience, they were handed out by whichever manager was around when they had been given to them by someone from HR. No such procedure document has been offered by NHS PSL as evidence of a standard procedure.
- In any event, the Leaflet gave no information from which the Scally duty would be satisfied. There is an additional point from the Leaflet, as at Section C it asks "If I move to the 2015 Scheme, what will happen to the pension benefits I have already built up? These benefits will not be affected." Mrs S said that the Leaflet at best obfuscates, and at worst misleads, as to the comparative position on IHRP benefits, rather than providing information.

### **Summary of NHS PSL's position**

41. Further comments from NHS PSL's solicitor are set out below: -

- At the end of October/early November 2014, NHS PSL was advised that Capita (the previous OH provider) was exiting the public sector OH market and, as a matter of urgency, NHS PSL needed to procure a new OH provider. As a result, Capita ceased taking on any new referrals after 28 November 2014. In December 2014, a new OH provider, OH Assist, was selected.
- Initially, the online referral system was not immediately available with OH Assist for part of January 2015, and a temporary process was put in place (namely paper referral) until the online referral system became available on 27 January 2015. It appears that Mrs S' case was finalised on 30 January 2015, and received by OH Assist on that date.
- NHS PSL maintains its stance that the Scally duty does not apply in Mrs S' case as it is one which is to be narrowly defined and not widely, as suggested by Mrs S.
- NHS PSL asserts that the Leaflet was received by Mrs S with her payslip, and that other information was available on the NHS website, all of which was clearly sufficient to signpost to her that changes would be made to the Scheme, and that further enquiries should have been carried out by Mrs S in relation to her benefits.

- NHS PSL denies that there has been a breach of its duty of care to inform Mrs S of the changes. It is quite clear that for an application to have been submitted in accordance with Regulation 27, both the Form and the medical evidence would have to have been received by the NHSBSA, on behalf of the Secretary of State, before the Deadline. Further, that medical evidence would have needed to be provided by an official source, and not a “bundle” put together by Mrs S.
- NHS PSL contends that OH Assist repeatedly made requests of the applicant’s GP for the necessary information over a considerable period of time. Whilst the Practice Manager of Mrs S’ GP may now indicate to the applicant they would have done their utmost best to complete the Form as promptly as possible, it remains the case that the GP did not provide the required information over a period of time. Further, that the GP did not appear to understand what was required from these repeated requests from OH Assist, seems highly unusual, as it seems unlikely that the GP in question had never dealt with enquiries of this nature from an OH provider.
- It is noted that Mrs S acknowledged in correspondence with NHS PSL, dated 9 April 2015, that a report from her GP would take 6 to 8 weeks to be produced.
- Throughout the process, it was always possible for OH Assist to complete Part C of the Form and provide the required medical evidence. There was no necessity for the applicant’s GP to complete this instead of OH Assist as Mrs S is suggesting. Nevertheless, OH Assist was endeavouring to complete its assessment, and obstacles were being created by the applicant’s GP which made the process more difficult.
- NHS PSL reiterates that the legislation was not in final form and any changes were also subject to the approval of Parliament. So again, the applicant would not have been able to do anything that would have resulted in her application being submitted before the Deadline.

### **Ombudsman’s decision**

42. I need to consider the actions taken by NHS PSL in processing Mrs S’ application for ill health retirement, to determine whether it should be held liable for the loss in the value of Mrs S’ benefits, incurred as a consequence of her application for IHRP having missed the Deadline for applications to receive IHRP benefits under the 2008 Regulations.

### Sally

43. I will deal with the issue of the *Sally* duty first. The question of whether and to what extent an employer has a duty to provide information about pension scheme options for an employee has been considered by the Courts on a number of occasions. In *Sally v Southern Health & Social Services Board* [1991] IRLR 522, the House of Lords found that, in a limited set of circumstances, a duty to inform employees about a contractual right could be implied into a contract of employment. The circumstances are that: 1) the terms of the contract have not been negotiated with the individual employee; 2) a particular term of the contract makes a valuable right available contingent upon the individual taking some action; and 3) the employee cannot reasonably be expected to know of the term unless it is drawn to his attention. In the *Sally* case, the employees had a right to purchase additional pensionable service but were required to exercise that right within a prescribed period of time. This was not brought to their attention in time for them to exercise that right.
44. Subsequent cases have indicated that this implied duty is to be narrowly defined. For example, in *University of Nottingham v Eyett & another* [1999] IRLR 87, the employee was in possession of all of the knowledge required for him to have worked out that retiring when he did would result in his retirement benefits being lower than they would have been had he waited a further month before retiring. No *Sally* duty was found by the Court in that case. In *Outram v Academy Plastics* [2000] IRLR 499, the court decided that there was no general implied duty on an employer to provide information and/or advice to an employee about a pension scheme in order to prevent economic loss.
45. In this case, Mrs S already knew of the right in question (i.e. her right to apply for an IHRP) so, as NHS PSL was under no general implied duty to provide information or advice to Mrs S about the Scheme in order to prevent economic loss (as established by the case of *Outram v Academy Plastics*), the third limb of the test for establishing a *Sally* duty to inform Mrs S of the Deadline is not satisfied. Consequently, I do not find that a *Sally* duty existed in Mrs S' case.

### Negligence

#### *Duty of care*

46. Although I have not found that a *Sally* duty existed, I do consider that, from the point at which Mrs S informed NHS PSL that she wished to apply for an IHRP, NHS PSL assumed a basic duty to act with reasonable care and skill and without undue delay in processing Mrs S' IHRP application, in accordance with general practice as detailed below. Further, in its response to Mrs S' stage one IDR complaint, NHSBSA informed Mrs S that employers under the Scheme had agreed to disseminate to their staff, information concerning the 2015 Regulations coming into effect (paragraph 35 above). On that basis, I consider that NHS PSL, as Mrs S' employer, had voluntarily assumed a duty of care to inform her that changes to the regulations governing the Scheme were imminent, and that there would be a deadline

after which she would no longer be able to apply for an IHRP under the 2008 Regulations.

47. NHS PSL knew of the Deadline which was soon to be imposed. Therefore, I consider that NHS PSL's duty to process Mrs S' application without undue delay extended to requiring NHS PSL to expedite Mrs S' application with the Deadline in mind.
48. As explained below, I consider that NHS PSL was able to take action which would have expedited Mrs S' application sufficiently to meet the Deadline, but did not do so.
49. NHS PSL has not, at any point during this investigation, denied that it knew of the deadline for submitting IHRP applications in order to receive an IHRP under the 2008 Regulations. Whilst I accept that the Deadline was not set until 5 February 2015 when the Transitional Provisions Regulations were finalised, it does appear that NHS PSL was aware that a deadline for IHRP applications under the 2008 Regulations was to be imposed. NHS PSL had known, prior to the Transitional Provisions Regulations coming into effect, that the 2008 Regulations were to be replaced by the 2015 Regulations. For example, the benefit estimate, dated 29 December 2014, that Mrs S received having requested an IHRP, stated that "benefits for membership after 2015 may change". I consider that NHS PSL could reasonably have been expected to have deduced that the deadline for submitting an application for an IHRP under the 2008 Regulations was imminent, even before the Transitional Provisions Regulations had been finalised.
50. NHS PSL should at least have: informed Mrs S that it expected a deadline to be imposed for submitting her IHRP request; expedited her application; and informed Mrs S of the date of the Deadline when that date had been finalised.
51. Directing Mrs S to the source of the information or providing non-specific information about the deadline and allowing her to discover the deadline herself through her own further research would not have reflected the urgency which should have applied. Having considered the copy of the Leaflet, I note that it contained only generic information regarding the 2015 Scheme, and the transitional provisions. I do not consider that the contents of the Leaflet are particularly relevant to the issues between Mrs S and her employer. The Leaflet stated that benefits already built up under the 2008 Scheme and the 1995 Scheme would not be affected. I can see why Mrs S might read it as covering her ill health benefits, but I do not consider it was actually addressing the status of ill health benefits because these are contingent and not 'built up' in that sense. Further, NHS PSL has not confirmed with any certainty that the Leaflet was actually sent out to Mrs S with her payslips.
52. I consider that the information contained in the 29 December 2014 benefit statement was technically correct, but again did not address Mrs S' particular situation. The reference to "benefits for membership after 2015 may change..." gave no indication that the right to IHRP benefits under the 2008 Scheme would only be protected in respect of applications submitted before any particular date. I note that Mrs S followed the link to the NHSBSA website, and found no further information that could

have led her to discover that there would be a cut-off date for IHRP applications under the 2008 Regulations.

53. Given the limited information that Mrs S received or had access to, I do not consider that she could reasonably have been expected to know of the Deadline, or that failing to submit her IHRP application within a certain timeframe would result in her receiving IHRP benefits of a lower amount.

*The argument that the OH Provider's actions or inaction were beyond NHS PSL's control*

54. It is clear that conversations took place between Mrs S and NHS PSL during November and December 2014 (detailed in paragraphs above) that resulted in NHS PSL being aware that Mrs S was going to apply for an IHRP imminently and that OH Assist would need to be involved.
55. When Mrs S contacted NHS PSL on 1 December 2014, providing a link to the Form and asking it to complete Part A of the Form, OH Assist had been already appointed by NHS PSL as its occupational health provider and a paper-based referral system was in place, pending the implementation of OH Assist's online referral system. However, NHS PSL did not use that paper-based referral system and only referred Mrs S' application to OH Assist on 30 January 2015, once the online referral system was up and running. That caused avoidable delay.
56. I consider that, once NHS PSL had referred Mrs S' case to OH Assist, the time taken by OH Assist to arrange for a call between Mrs S and an occupational health doctor after receiving details of Mrs S' application from NHS PSL (nearly two months) was unreasonably long. I note that the contract between NHS PSL and OH Assist contains target timescales for completing the services provided by OH Assist, which are considerably shorter than the time that actually elapsed in Mrs S' case. I consider that NHS PSL could and should have used those targets as leverage in chasing OH Assist to complete Mrs S' application. Mrs S was proactive, to the point of raising a grievance with NHS PSL regarding the delay in the processing of her application, but NHS PSL appears to have made no attempt to clarify with OH Assist the reasons for that delay until 26 March 2015.
57. Regarding the time taken by Mrs S' GP to provide his report, submissions from the parties in that respect are conflicting: NHS PSL has submitted that it made several requests for a report from the GP over a period of time and that the GP did not appear to understand what was being requested; Mrs S has submitted that the GP practice had not actually received the request until late April/early May 2015. I have not been provided with a copy of the instructions that were sent to Mrs S' GP. However, given OH Assist's handling of Mrs S' case and the evident confusion on OH Assist's part (for example, arranging for a telephone consultation with a nurse, when a physician was required to carry out that consultation), I find it more likely than not that the reason for the delay in obtaining the report from the GP was due to that report not having been properly requested until late April/early May 2015. I therefore

do not find that the delay in processing Mrs S' application can be attributed to any shortcomings on the GP's part.

58. NHS PSL has submitted that there was no need for Mrs S' GP to have completed Part C of the Form, as OH Assist could have provided the required medical advice. I agree with that submission; had NHS PSL acted in accordance with its duty to act with reasonable care and without undue delay in processing Mrs S' IHRP application, by referring Mrs S' application to OH Assist at the earliest opportunity and taking action to ensure that OH Assist met its contractual targets, it would not have been necessary to ask Mrs S' GP to complete Part C of the Form. Taking into account all of the above, I am satisfied that there has been maladministration by NHS PSL in this case and, more specifically, that NHS PSL failed to fulfil its duty to deal with Mrs S' application with reasonable care and skill, and without undue delay. Consequently, I find that: NHS PSL acted negligently in failing to take the necessary steps to enable the application to be submitted before the Deadline; and, but for NHS PSL's negligence, Mrs S' application would have been submitted before the Deadline and thus she would have received a higher level of IHRP benefits.
59. For completeness, I set out below the way I have considered the further representations which have been made about whether it would have been acceptable for Mrs S' GP to complete Part C instead of OH Assist. Because NHS PSL did not tell Mrs S about the effect of the impending deadline on the application process which she was pursuing, I am satisfied that she had no opportunity to chase completion of that process any harder than she did. I am satisfied that she did what she could to ensure it was expedited. I am satisfied that Mrs S was not in possession of facts which should have caused her to consider whether she should ask her GP to fill in Part C, instead of relying on OH Assist. On these facts, the question of whether NHSBSA would or should have accepted a form completed by her GP is hypothetical, and I do not consider I need to make a finding about it.

## Directions

60. I direct that within 28 days of the date of this Determination, NHS PSL shall pay Mrs S a sum of money equal to:
- 60.1. the difference between:
- 60.1.1. the amount of IHRP benefits that Mrs S has received by that date of payment; and
- 60.1.2. the amount that Mrs S would have received by that date of payment, had her application for IHRP been received by the Secretary of State before the Deadline on a date in line with the average time taken to process and submit applications for IHRP under the Scheme, plus compound interest on the above amount; and

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- 60.2. an amount, to be calculated actuarially, to cover the shortfall in Mrs S' future IHRP benefits under the 2015 Regulations, compared with the future IHRP benefits that Mrs S would have been entitled to, had her IHRP application been received by the Secretary of State before the Deadline.

**Karen Johnston**

Deputy Pensions Ombudsman  
11 July 2019

## **Appendix**

### **The National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015 (SI 2015/95)**

#### **27 Ill-health benefits: continuity of existing applications**

- (1) This regulation applies to a member-
  - (a) Who, apart from the operation of this regulation-
    - (i) is prevented from contributing to or accruing further service in the 1995 Section or being an active member of the 2008 Section-
      - (aa) on or after 1<sup>st</sup> April 2015; or
      - (bb) after the member's eligibility cessation date has been reached...
    - (ii) becomes eligible to join the new scheme on either 1<sup>st</sup> April 2015 or the day after the member's eligibility cessation date (the member's "transition date");
  - (b) who submitted Form AW33E (or such other form as the Secretary of State accepted) together with supporting medical evidence if not included in the form) for the purposes of regulation E2A of the 1995 Section or regulation 2.D.8 or 3.D.7 of the 2008 Section before the transition date;
  - (c) whose Form AW33E and supporting medical evidence was received by the Secretary of State before the transition date.
  - (d) whose ill-health pension has not become payable under the 1995 Section or the 2008 Section before the transition date.