PO-23164

Ombudsman's Determination

Applicant:	Ms N
Scheme:	NHS injury Benefit Scheme
Respondent:	NHS Business Services Authority (**NHS BSA**)

Outcome

1. I do not uphold Ms N's complaint and no further action is required by NHS BSA.

Complaint summary

2. Ms N has complained that NHS BSA has ceased her permanent injury benefit (**PIB**) and refused to reinstate it. She has also complained that NHS BSA is now seeking to recover the payments already made to her.

Background information, including submissions from the parties

Background

3. Extensive submissions have been received in relation to Ms N's case. What follows is, of necessity, a summary of events.

4. Ms N was employed by an NHS Foundation Trust (the **Trust**) until February 2012. Her employment was terminated on the grounds of gross misconduct.

5. Ms N had been on long term sickness absence since November 2010. In February 2011, Ms N's solicitors had submitted a formal grievance on her behalf alleging bullying and harassment. In September 2011, Ms N had applied for a Temporary Injury Allowance (**TIA**). This had been awarded on appeal.

6. In April 2012, Ms N applied for PIB.

7. The relevant provisions are contained in The National Health Service (Injury Benefits) Regulations 1995 (SI1995/866) (as amended) (the **Regulations**). Extracts from the Regulations are provided in Appendix 1.

8. In brief, the conditions which must be satisfied for receipt of PIB are that the claimant has:-

   - Sustained an injury, or contracted a disease, in the course of their NHS employment which is wholly or mainly attributable to that employment[1]; or
   - Sustained an injury, or contracted a disease, which is wholly or mainly attributable to the duties of their NHS employment[2]; and
   - By reason of the injury or disease, their earning ability is permanently reduced by more than 10%[3].

9. NHS BSA initially determined that Ms N had sustained an injury in the course of her NHS employment which was wholly or mainly attributable to that employment. However, it also determined that she had not suffered a permanent loss of earning ability (**PLOEA**) in excess of 10%. As a result, no PIB was payable at that time.

10. In May 2012, Ms N lodged an Employment Tribunal (**ET**) claim for unfair dismissal. This was stayed pending the outcome of a personal injury claim, which was heard in the High Court in July 2014. A judgment was handed down in October 2014 (the **High Court judgment**) and a copy has been provided.

11. In June 2015, Ms N applied for a review of her case under Regulation 13(1)(a); that is, on the basis that there had been a further reduction in her earning ability by reason of her injury. NHS BSA obtained an opinion from a medical adviser (**MA**), who advised that Ms N had suffered a PLOEA of between 76% and 100%. NHS BSA commenced payment of a PIB and invoiced the Trust accordingly.

12. The Trust queried the payment of PIB to Ms N on the grounds that the Court had found that she was not entitled to PIB. In its response, NHS BSA explained that the injury benefit scheme was governed by its own set of regulations and the Court could not determine whether an applicant was entitled to PIB. It suggested that the Court may have made a decision on damages.

13. Following further correspondence, the Trust submitted evidence relating to the termination of Ms N's employment to NHS BSA, including a copy of the High Court judgment. NHS BSA sought further advice from its MA.

14. On 5 November 2015, NHS BSA wrote to Ms N explaining that her PIB award had been paid on the basis that her employment with the Trust had terminated on the grounds of ill health[4]. It said that, as this was not the case, it would have to consider whether she was entitled to PIB under a different part of the Regulations[5]. NHS BSA said it had forwarded Ms N's case to its MA for them to consider her application afresh. It said the MA would have to be satisfied that Ms N's ongoing medical

[1] Regulation 3(2)
[2] Ibid
[3] Regulation 4(1)
[4] Regulation 4(2)
[5] Regulation 4(3)

condition was not wholly or mainly attributable to the disciplinary action and subsequent termination of her employment. NHS BSA said it would continue to pay Ms N's PIB whilst it reviewed her case.

15. On 24 November 2015, solicitors acting for Ms N wrote to NHS BSA setting out the grounds on which they considered her PIB should be maintained.

16. On 26 November 2015, the MA wrote to NHS BSA saying they had read the High Court judgment and thought this demanded a reconsideration of Ms N's case. They said the judge's view was that much of what Ms N had told others was untrue, a skewed version of events or a fabrication. The MA said the judge was of the view that a psychiatrist who had found a causal link between Ms N's ill health and her employment had been misdirected by her. They said the judge had accepted another psychiatrist's evidence that subsequent events, such as Ms N's dismissal and the litigation, had contributed substantially to her ill health. The MA concluded that, as the High Court judgment was "the ranking evidence", attribution could not be accepted for a PIB.

17. NHS BSA responded, on 8 December 2015, disagreeing that the High Court judgment was the ranking evidence. It said the judge had only to make a decision as to whether the bullying and harassment had occurred; it had to consider Ms N's perceptions of agreed incidents. NHS BSA said it was evident that there were perceived negative work experiences. It listed: difficulties in Ms N's relationship with her line manager; concerns about job security; concerns about obtaining similar work in the local area; lack of support from managers; the judge's view that she was prone to exaggeration was at odds with an exemplary work career and no previous psychiatric history. NHS BSA said it had to discount Ms N's sense of injustice in not being allowed to apply for the new role. It also said it did have to reconsider Ms N's case, under Regulation 4(3), because she had been dismissed for gross misconduct, rather than her employment being terminated by reason of her injury. It noted that this did not mean her claim should be dismissed.

18. The MA asked NHS BSA to confirm that it wished them to disregard the judge's comments and said, if so, a different MA would look at the case.

19. On 13 January 2016, NHS BSA asked that an MA who had not previously seen Ms N's case provide comments. NHS BSA said:

> "Whilst we are not saying that the legal judgment should be ignored, it should be understood that the judgment was based upon accepting that bullying and harassment has occurred. The rules for Injury Benefits do not require acceptance that bullying and harassment has occurred, but rather that we need to consider how her perception of corroborated events has affected her psychological health. We cannot accept therefore that the judgment is the ranking evidence in this case.
>
> The findings of the judge are only his opinion and this must be weighed against the rest of the evidence on file. For example, it is only his opinion that

she is unreliable and prone to exaggeration. This must be weighed against the evidence that she had an exemplary work career and no issues at work or psychological ill health prior to the period in question."

20. On 3 February 2016, NHS BSA's MA said they could not recommend entitlement to a PIB because they were unable to conclude that Ms N has suffered an injury which was wholly or mainly attributable to the duties of her NHS employment. A summary of the MA's report is provided in Appendix 2, together with summaries of and extracts from other medical evidence relating to Ms N's case.

21. On 24 June 2016, NHS BSA wrote to Ms N informing her that, following the review, it had determined that the psychological condition for which she had claimed PIB was not wholly or mainly attributable to her NHS employment. NHS BSA said, as Ms N was no longer entitled to PIB, payment would cease from the next payable date. It also said that the PIB paid with effect from October 2014 had been overpaid and it would write to her separately about this. Ms N was informed that there was a two-stage Internal Dispute Resolution Procedure (**IDRP**) available if she was dissatisfied with NHS BSA's decision.

22. On 8 July 2016, Ms N's solicitors wrote to NHS BSA setting out grounds for disagreeing with its decision. They also asked that the decision to cease payment of Ms N's PIB be revoked, pending the conclusion of her dispute. In response, NHS BSA said it was unable to comply with this request because it had been determined that Ms N did not meet the eligibility criteria and there were no legal grounds for paying the PIB.

23. Ms N's solicitors submitted a complaint under the IDRP. They submitted an addendum to the complaint on 8 March 2017.

24. NHS BSA issued interim responses on 6 March and 20 June 2017. The interim response dated 20 June 2017 included a response by NHS BSA's MA to arguments submitted by Ms N's solicitors. The MA's response is summarised in Appendix 2.

25. NHS BSA issued a stage one IDRP decision, on 17 July 2017, declining Ms N's appeal on the basis that its MA had advised that Ms N had not sustained an injury which was wholly or mainly attributable to her NHS employment. The decision quoted the advice NHS BSA had received from its MA. This is summarised in Appendix 2.

26. Ms N's solicitors made a stage two IDRP submission on 18 August 2017.

27. On 8 September 2017, solicitors acting for NHS BSA's Corporate Finance – Accounts Receivable team wrote to Ms N asking her to repay the sum of £171,849.58 within seven days.

28. Ms N's solicitors wrote to NHS BSA referring to a previous request for confirmation that no further recovery action would be taken. They also asserted that NHS BSA was acting as an agent for the Trust.

29. NHS BSA confirmed that action to recover the overpayment should have been placed on hold on receipt of the IDRP stage one submission. It apologised. NHS BSA did not agree that it was acting as an agent of the Trust. It explained that it was acting as decision-maker under delegated authority from the Secretary of State.

30. On 1 February 2018, Ms N's solicitors submitted two further reports: CPN Kawome, dated 17 January 2018, and Dr Owen, dated 10 January 2018. They asked that these be passed to the MA.

31. NHS BSA issued a stage two IDRP decision on 3 April 2018. Its decision is summarised below:-

- Its MA was not satisfied that the injury for which Ms N had claimed a PIB was wholly or mainly attributable to her NHS employment. It quoted the advice it had received (see Appendix 2).
- The MA had said they had not read any of the previous MAs' recommendations in order to provide a fair and independent view.
- The MA was unable to recommend that Ms N's impaired mental health was wholly or mainly attributable to her NHS employment because: (a) she was evidently overcome with a sense of injustice and was aggrieved by the decision to review her department but there was no evidence of bullying or harassment; (b) Ms N's own account of events and her psychological state was not reliable; and (c) Regulation 3(3) specified that the Regulations should not apply to a claimant whose injury or disease was wholly or mainly due to, or seriously aggravated by, their own negligence or misconduct.
- It was the administrator for the Scheme, but the Department for Health and Social Care (**DHSC**) was responsible for the Scheme. The DHSC had confirmed that a qualifying injury was required to be wholly or mainly attributable to NHS employment or to the duties of that employment.
- It agreed with its MA because their recommendation did not contradict the reliable contemporaneous occupational health records, GP records, employment records and the High Court judgment.

Ms N's position

32. The submissions provided by Ms N's solicitors are summarised as follows:-

- NHS BSA has said that Ms N does not satisfy the requirements set out in the Regulations for receipt of PIB. This is false. The true reason why NHS BSA has withdrawn Ms N's PIB, refused to reinstate it and demanded repayment of sums already paid is that the Trust has refused to pay what is due from it.
- NHS BSA is required to apply the Regulations. It should have asked the following questions:-

(a) Was Ms N in NHS employment?

(b) Did Ms N sustain an injury while in NHS employment and was that injury attributable to her NHS employment?

(c) Did Ms N's injury cause a PLOEA of more than 10%?

- The answer to all of the above questions is yes and the PIB should be granted.
- NHS BSA has asserted that there must be a link to specific events. This is not provided for in the Regulations.
- Ms N has advanced evidence of having suffered an injury in the course of her NHS employment and the Court has accepted that this has occurred. There is nothing to support the assertion that nothing Ms N has said is true. This is the explicit assertion by NHS BSA and it is without basis. The judge stated he "was prepared for present purposes to proceed on the basis that her condition is as severe as described by Dr Broadhead".
- NHS BSA has relied on the High Court judgment. The High Court judgment is incapable of determining Ms N's entitlement to PIB. It is a judgment on a claim under the Protection from Harassment Act 1997. This requires a claimant to show that a defendant has harassed them, that they suffered damage and that it was foreseeable that the harassment would cause the damage. The High Court judgment shows that Ms N's litigation failed on the last limb.
- NHS BSA asserts that the High Court judgment found that the alleged imprisonment, threat to Ms N's family and campaign of bullying and harassment did not occur. The Court found that the event in November 2010 did not occur as pleaded by Ms N. It did not find that the campaign of bullying or threats did not occur.
- The Regulations do not require Ms N to show causation in this way. Therefore, the absence of causation in litigation under the Protection from Harassment Act 1997 cannot negatively determine Ms N's application for PIB.
- NHS BSA has ignored findings of fact in the High Court judgment which support Ms N's application.
- NHS BSA ignored other documents from the Court case. NHS BSA asserted that the High Court judgment provided sufficient information to determine whether the factual allegations made by Ms N were, on the balance of probability, made out. This is incorrect. The High Court judgment reached a ruling on whether Ms N's claim under the Protection from Harassment Act 1997 was made out; not whether she was entitled to PIB.
- There was no finding by the Court that Ms N's original application was false or a misrepresentation. The medical evidence was accepted by the Court; albeit that the Court concluded that Ms N's perceptions were incorrect. This was sufficient to

defeat her claim in litigation, but not her application for PIB, because the tests are different. Ms N's perceptions are material and relevant evidence for the purposes of assessing her entitlement to PIB, even if they did not assist her in proving statutory harassment.

- The transcripts of evidence from the Court case are relevant and material to whether Ms N should be granted PIB. They were provided to NHS BSA and the reasons why they were relevant were set out in the addendum to Ms N's IDRP complaint dated 8 March 2017. This evidence was wrongly ignored.

- NHS BSA initially, and correctly, rejected attempts by the Trust and its own MA to rely on the High Court judgment. NHS BSA has not explained the continued reliance on the High Court judgment.

- NHS BSA was in possession of extensive medical evidence which unequivocally demonstrated Ms N's entitlement to PIB. Her initial application was rejected on the grounds that she had not suffered a PLOEA in excess of 10%. This was reconsidered and Ms N was awarded PIB in June 2015. By this stage, the effect of her injury was clear.

- NHS BSA asserts that Ms N suffered, at most, a temporary and brief period of distress. This is in contradiction to the evidence. It is also in contradiction to the Court's findings. Ms N continues to suffer a severe injury, some eight years after her first diagnosis.

- At stage two of the IDRP, NHS BSA said: the legal argument submitted at stage one and two would not be addressed; previous advice from an MA had not been read; the legal argument formed the majority of the submissions; legal advice had been received which required the assessor to rely on the High Court judgment and ignore the transcripts; and the medical evidence would be considered to determine Ms N's injury as at 11 January 2012.

- The IDRP stage two approach is problematic because: (a) the decision not to address the legal argument meant that the grounds of Ms N's challenge were not addressed; (b) the MA ignored some aspects of the evidence contributing to the High Court judgment but accepted others; and (c) the MA ignored material evidence.

- The MA noted that the vast majority of the medical opinion supported Ms N's claim. However, the MA discounted all of the medical evidence on the basis of three sentences in the High Court judgment:

  "[Ms N] took the opportunity of manufacturing a picture of herself as an aggrieved victim …"

  "[Ms N] revealed herself as a person prepared to manufacture a grievance without good cause, to exaggerate, to see a situation only from her own narrow viewpoint and, in her own interest, to misrepresent events."

"[Ms N's] proclivity for drama and exaggeration …"

The MA used these three quotations from the High Court judgment to conclude that none of the medical evidence, dating back nine years to 2009, was reliable. This was on the basis that Ms N could not be trusted to have truthfully disclosed her medical state to her doctors and that this was done in her own interests.

- This is a perverse conclusion because it would mean that Ms N had given false reports to the doctors prior to her dispute with the Trust and before she knew she might need to rely on their notes to support her claim. For example, Ms N's GP records include a note dated 29 November 2010 which refers to stress at work and bullying from colleagues. Ms N did not apply for TIA until seven months later.

- In addition, Ms N has been under the care of her community mental health team and was still under their care when informed that her PIB had been withdrawn. During this time, she was unaware that there was any risk to her PIB. She cannot be said to have engaged with the mental health team for the purposes of obtaining the PIB because it had already been awarded.

- The three quotes relied upon by the MA were taken out of context. For example, in the first quote, they left out the words "In the text", which changed the meaning of the sentence.

- In the High Court judgment, the judge said:

  "… In my judgment, the real cause of such a condition was [Ms N's] burning sense of grievance at what can be called the management process that was instigated and was pursued from September 2010, … The incident on 10 November 2010, seen in the context that I have described, did not cause, or materially contribute to, her present mental condition … it was the management process itself, provoking a sense of grievance and fear, that caused the injury."

  There was, therefore, a finding by the Court that Ms N had sustained an injury in the course of her NHS employment which was wholly or mainly attributable to the employment. This should have been determinative of a positive finding from the MA. NHS BSA continues to ignore this.

- The MA said that the disciplinary proceedings against Ms N, which led to her dismissal, were a contributory factor to her impaired mental health. However, the disciplinary proceedings were not instigated until February 2012, when Ms N had already been on long term sickness absence for over a year.

- The disciplinary proceedings were undertaken under Ms N's contract of employment. It was an act done in the course of her employment. Therefore, if it contributed to her injury, the injury was caused by her NHS employment and this cannot be a reason to withdraw the PIB.

- The MA identified four factors as the likely causes for Ms N's depressive illness:

Her genetic heritage – it is not apparent where in the documents the MA had seen reference to genetic heritage. Genetic heritage will be a factor in any injury to a greater or lesser extent. It is not capable of being the basis of denying payment of an otherwise legitimate PIB application. No reason was given by the MA as to why genetic heritage would not apply to any depressive illness and, therefore, be a bar to any applicant suffering such a condition. This treatment of depressive conditions amounts to indirect discrimination under the Equality Act 2010.

Her anxiety over the review of her department – this would still be an injury sustained in the course of Ms N's NHS employment and wholly or mainly attributable to that employment.

Her perception of her co-workers – this would still be an injury sustained in the course of Ms N's NHS employment and wholly or mainly attributable to that employment.

The disciplinary proceedings – this would still be an injury sustained in the course of Ms N's NHS employment and wholly or mainly attributable to that employment.

- The IDRP stage two decision gave three reasons for the decision to withdraw Ms N's PIB:

  Ms N was overcome with a sense of injustice and there was no evidence of a campaign of bullying and harassment – this does not negate the fact that she sustained an injury in the course of her NHS employment. Even if her sense of injustice was misguided, this was not a reason to withdraw her PIB. It appears the MA understood this when he cited a previous Pensions Ombudsman's Determination[6]. The reference to there being no evidence of a campaign of bullying and harassment indicates that NHS BSA has confused its role in determining Ms N's entitlement to PIB with that of the Court in deciding her harassment claim.

  Ms N's account of events and her psychological state is unreliable – this does not justify withdrawing her PIB. It is a misapplication of the High Court judgment.

  Regulation 3(3) – there is no evidence that Ms N's injury is wholly or mainly due to, or seriously aggravated by, her own culpable negligence or misconduct. She had already been on long term sickness absence as a result of her injury when the disciplinary proceedings were instigated. If it was the MA's view that misconduct or negligence had a bearing on Ms N's injury, this should have been quantified.

- If the claimed events of November 2010 were perceived by Ms N, in good faith, to have happened as she perceived them, they would still be capable of causing an injury and justifying an award of PIB. The phrase "false, exaggerated and misinterpreted" is self-contradictory. If the events were misinterpreted, or even

[6] N01036 21 September 2015

exaggerated, they would not be false for the purposes of determining an award of PIB.

- NHS BSA has stated that subsequent events, such as Ms N's dismissal and the protracted litigation, are likely to have contributed to her present mental state. This would be Ms N's mental state in 2014; that is, some three years after she was found to satisfy the conditions for a TIA. The fact that subsequent events caused a deterioration in her health cannot change the state of her health at the date of dismissal.

- The Courts[7] have determined that NHS employment need only be an operative cause of the injury. That Ms N's injury subsequently deteriorated can, by definition, only demonstrate that the underlying workplace-related causes were operative.

- NHS BSA seeks to assert that Ms N's entitlement to PIB was lost because she was dismissed on the grounds of gross misconduct. There is an entitlement to PIB if an injury is caused in the course of NHS employment, which may include an injury caused by disciplinary proceedings or dismissal. If the disciplinary proceedings or dismissal were brought about fairly in response to culpable negligence or misconduct and it can be shown that the culpable negligence or misconduct was the whole or main cause of, or an aggravating factor in, the injury, then an award may not be made. This is the effect of Regulation 4(3) (*sic*) and it requires the award to be made to Ms N.

- The disciplinary proceedings against Ms N were not completed. Therefore, it is not possible to conclude that she had done any act which constituted culpable negligence or misconduct. NHS BSA has not tried to do so. It has simply noted that there were disciplinary proceedings on foot at one point. The mere fact of an un-concluded disciplinary procedure is not demonstrative of anything of relevance.

- Ms N was awarded a TIA prior to her dismissal and, therefore, was already suffering from the injury before her dismissal. Her injury was sufficient for this award. Therefore, her dismissal cannot have been a sufficiently significant cause of, or aggravating factor in, her injury.

- Ms N disputed the fairness of her dismissal and instituted ET proceedings. The ET proceedings were not concluded because Ms N had insufficient funds to do so.

- Correspondence from the Trust shows that it put pressure on NHS BSA to withdraw Ms N's PIB. Internal correspondence from NHS BSA implies that a decision not to withdraw Ms N's PIB would have to be explained to its chief executive. The implication was that the benefit should be withdrawn.

[7] *Young v NHS Business Services Authority* [2015] EWHC 2686 (Ch)

- Ms N is asking the Pensions Ombudsman to: (a) quash the decision to withdraw her PIB; (b) direct NHS BSA to permanently cease any attempt to recover the sums already paid to her; and (c) direct NHS BSA to reinstate her PIB.

NHS BSA's position

33. NHS BSA's submission is summarised as follows:-

- It refutes any allegation of injustice borne out of maladministration. It has correctly considered Ms N's application for PIB, using the correct test, taking relevant evidence into account and ignoring anything irrelevant. It has sought and accepted advice from its MAs.

- The fact that it has weighed the evidence differently or drawn a different conclusion to Ms N as to the cause of her ongoing incapacity is unfortunate but it is a finding it is able to make on the facts.

- Initially, it had no reason to believe that Ms N had ceased employment in the NHS other than for the reason provided by her. She had been granted a TIA by reason of the claimed injuries and the alleged incident. Her version of events was accepted as true and made in good faith.

- Ms N's PIB application was accepted on the basis that she had sustained an injury which was wholly or mainly attributable to her NHS employment. However, it was decided that there has been no PLOEA and no benefits were payable.

- Following the decision to commence payment of PIB, in 2015, it received additional evidence from the Trust. It became aware that: (a) Ms N had been dismissed on the grounds of gross misconduct; and (b) the alleged incidents upon which her PIB claim had been based had been proven to be false, exaggerated or misinterpreted by Ms N.

- It is a requirement of Regulation 4(2) that employment has ceased by reason of the claimed injury.

- The additional evidence made it clear that it had unwittingly erred in law and, in order to ensure that public funds were being paid lawfully, Ms N's application had to be reconsidered.

- Ms N's application had to be reconsidered under Regulation 4(3), which provides for applications by claimants who cease NHS employment for a reason other than the claimed injury.

- Whilst Regulation 4(3) provides for applications by claimants who cease NHS employment for a reason other than incapacity, Regulation 3(3) provides that the Regulations shall not apply to a person whose injury is wholly or mainly due to, or seriously aggravated by, their own culpable negligence or misconduct. Therefore, in Ms N's case, it had to determine whether the injury was wholly or mainly

attributable to her NHS employment or to the gross misconduct of which she had been found guilty and for which her contract of employment had been terminated.

- It is not the case that grievance or disciplinary proceedings relating to acts of gross misconduct undertaken in the course of the claimant's NHS employment are covered by the Regulations.

- It refers to the High Court judgment. In particular, it refers to comments by the judge to the effect that the account given by Ms N of the events of 10 November 2010 were more dramatic and different from those given by others. The judge did not accept that Ms N's family had been threatened or that there had been physical intimidation or false imprisonment. These events were what Ms N had claimed caused her PTSD and incapacity for work, and had been accepted for the award of PIB. However, they did not occur.

- The judge had referred to the report by Dr Broadhead and said his diagnosis had been conditioned by a fundamental misconception of relevant events. The decision to award PIB, in 2015, had relied heavily upon Dr Broadhead's report.

- The judge had accepted the evidence from Dr Faith that subsequent events, such as Ms N's dismissal and the protracted litigation on three fronts, were likely to have contributed substantially to her present mental state.

- Ms N's allegations of a campaign of bullying was found to have no substance; it either did not happen or it was greatly exaggerated.

- It did not accept the High Court judgment as a ruling that Ms N is not entitled to PIB; it determined that the evidence provided to it showed that the claimed injury is not wholly or mainly attributable to her NHS employment. It does not believe that a judge is entitled to determine whether a claimant should be awarded PIB; that is NHS BSA's role.

- The criterion for entitlement to PIB has not been met. There is no reliable contemporaneous evidence to show that the claimed medical condition was contracted by way of an injury which is wholly or mainly attributable to Ms N's NHS employment.

- Prior to the original application having been proven in Court to be false and a misrepresentation, it had no reason to doubt Ms N's claims as they appeared to be supported by the medical evidence. This medical evidence is now considered to be unreliable.

- It is of the opinion that Ms N, at most, suffered a temporary and brief period of distress.

- The Regulations require the injury, or disease, to be wholly or mainly attributable to the duties of the claimant's NHS employment. There must be a link to specific events. Whilst the applicant's perception of events must be considered, those

events must actually have occurred. Ms N's account of events is not accepted to be true.

- It has not withdrawn Ms N's PIB simply because the Trust refused to pay for it. The Regulations provide that the employer must pay for benefits which are due to those claimants who are entitled to them. It would, and does, use its full power to ensure that an employing authority fulfils its obligations.

- Ms N was not entitled to receive the benefits she was paid. These benefits were public funds totalling £171,849.58. It has a duty to recover these monies.

- It is of the view that Ms N presented herself to her medical specialists in a dramatised fashion. However, it has never stated that Ms N was trying to claim benefits fraudulently.

Adjudicator's Opinion

34. Ms N's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS BSA. The Adjudicator's findings are summarised below:-

- There were essentially two aspects to Ms N's complaint against NHS BSA: (i) it did not have authority to withdraw her PIB; and (ii) if it did have such authority, it had withdrawn the PIB on the basis of a review of her case which had not been undertaken in a proper manner. The question of whether Ms N had been overpaid injury benefit and could be required to repay any or all of the amount sought by NHS BSA only arose if her claim for an injury benefit failed.

- The Ombudsman would consider whether the decision-maker: (i) had gone about making the decision in the right way; and (ii) had made a decision which was supported by the evidence. The Ombudsman would look at whether the decision-maker had followed the scheme's regulations. If the Ombudsman thought the decision-maker had reached its decision in the wrong way he would usually direct it to make the decision again in the proper way, rather than make a decision of his own as to entitlement.

- The relevant regulations were Regulations 3 and 4. These provided that an injury benefit was payable if an individual had:-

  - Sustained an injury, or contracted a disease, in the course of their NHS employment which was wholly or mainly attributable to that employment; or

  - Sustained an injury, or contracted a disease, which was wholly or mainly attributable to the duties of their NHS employment; and

  - By reason of the injury or disease, their earning ability was permanently reduced by more than 10%.

- Ms N's solicitors had referred to the *Young* case. In that case, the judge had found that a qualifying injury need only be *an* operative cause of the person's PLOEA; not *the* operative cause.

- NHS BSA had decided that Ms N was not entitled to an injury benefit because she had not sustained an injury which was wholly or mainly attributable to her NHS employment or the duties of that employment. The term "wholly or mainly" was taken to mean a contribution of greater than 50% to the cause of Ms N's incapacitating condition.

- One of the specific obligations on decision-makers was to consider all relevant information which was available to them and to ignore all irrelevant information. In Ms N's case, her solicitors had argued that NHS BSA and its MAs did not properly consider the following information at the time that they made their decision:-

  - Transcripts of evidence from the High Court case.

  - Medical evidence submitted by Ms N.

- NHS BSA had based its decision largely upon the advice it had received from its own MAs. It would be appropriate, therefore, to consider this advice in some detail. However, it had to be acknowledged that the weight which NHS BSA attached to any of the evidence was for it to decide; including giving some evidence little or no weight[8]. It was entitled to rely upon the advice it received unless there was a cogent reason why it should not do so, or should not do so without seeking clarification. The Adjudicator said the kind of things she had in mind were errors or omissions of fact or a misunderstanding of the Regulations on the part of the MA.

- The Adjudicator also said that NHS BSA could only review the medical evidence from a lay perspective; as did the Ombudsman. It would not be expected to query a medical opinion as such. However, it could be expected to seek an explanation if there was a difference of opinion between its MAs and the claimant's own doctors; if one had not been provided. That being said, a difference of opinion between doctors, in and of itself, was not usually sufficient for the Ombudsman to find that a decision had not been made properly.

- The February 2016 report indicated that the MA who had prepared it was aware of and understood the requirements of Regulations 3 and 4. The questions which the MA said needed to be addressed captured the PIB eligibility conditions set out in Regulation 3.

- The Adjudicator referred to the summary of the MA's report in Appendix 2. In essence, the MA had said:-

[8] *Sampson v Hodgson* [2008] All ER (D) 395 (Apr)

- Ms N's allegations of bullying and harassment and false imprisonment had not been corroborated, with the exception of one incident, and this had to be taken into account when reviewing the medical evidence provided.

- Ms N might have had a perception of being bullied and harassed, but, for the purposes of a PIB award, the events complained of had to have occurred. They used the analogy of a physical injury; for which they would expect evidence of a reported event.

- One incident of unreasonable behaviour had been identified, but there was insufficient evidence to conclude that this had resulted in Ms N being too unwell to undertake her own role or any other role.

- Ms N had suffered a brief period of distress, lasting a morning, due to inappropriate behaviour by one individual. They did not accept that this was sufficient cause for Ms N's continued psychological symptoms.

- It was accepted that Ms N's symptoms were severe and disabling, but there were reasons not related to her NHS duties to explain them. These included the decision to terminate her employment, the negative impact of this on her reputation and self-esteem, the impact of multiple legal actions and the financial distress the failed actions had precipitated.

- NHS BSA had highlighted certain issues: difficulties in Ms N's relationship with her manager; concerns over job security; lack of support from senior managers; and the reason Ms N had left her employment.

- The first three of these issues had not been sufficient to cause Ms N psychological illness; other than temporary distress. The Court had found that Ms N's dismissal and subsequent legal proceedings had contributed to her distress. They did not regard these as injuries arising from the normal duties of her NHS employment.

- Ms N had taken action which was harmful to her employment and to her overall health and wellbeing; namely, unlawful access to work material.

- Events connected with Ms N's duties and events not connected with her duties had occurred more or less simultaneously and, therefore, their psychological impact would have occurred at the same time.

- The unlawful accessing of confidential material could not have been undertaken without causing Ms N anxiety and a fear of discovery.

- Raising false allegations against a manager or removing confidential material from work were not normal NHS duties from which an injury could be said to arise.

- They had chosen to prefer the contemporaneous medical records and the findings of the Court as to matters of fact because these had been cross-

examined under oath. Where the only evidence of an event was Ms N's personal testimony, including her statements to doctors, they considered this less likely to provide a true account of an event.

- The Adjudicator said, as she understood it, Ms N's solicitors were of the view that the MA had taken an incorrect approach to assessing Ms N's eligibility for a PIB because:-

  - The MA had relied upon the High Court judgment when the judgment related to a claim under the Protection from Harassment Act 1997.

  - Other documents from the Court case had been ignored. The transcripts of evidence from the Court case were relevant and material to whether Ms N should be granted a PIB.

  - There was no evidence to support the assertion that nothing Ms N had said was true. The Court had found that the event in November 2010 did not occur as pleaded by Ms N. It did not find that the campaign of bullying or threats did not occur.

  - There was no requirement, under the Regulations, for there to be a link between the qualifying injury and any specific events.

  - The Court had concluded that Ms N's perceptions were incorrect, which was sufficient to defeat her claim in litigation. The test for a PIB was different and Ms N's perceptions were material and relevant evidence for the purposes of assessing her entitlement to a PIB. They had referred to a previous Ombudsman's Determination.

  - The finding that Ms N had suffered, at most, a temporary and brief period of distress was contrary to the medical evidence.

- With regard to reliance upon the High Court judgment, the Adjudicator was of the view that it was not inappropriate for the MA to accept the Court's findings on the likelihood of certain events having occurred. It was not necessary for the MA to re-examine the evidence presented to the Court and come to conclusions of their own. The Adjudicator acknowledged that the Court proceedings had been brought for an entirely separate matter, but this did not mean that its findings of fact could or should have been set aside by NHS BSA or its MA. The application of those facts might differ under the Protection from Harassment Act 1997 and the Scheme Regulations, but the facts themselves would remain the same.

- The issue arose because the judge had taken a rather negative view of the reliability of Ms N's recollection of events. As a consequence, the MA had considered the opinions expressed by the doctors who had provided reports for the Court to be compromised because they relied heavily on Ms N's reporting of events. If the evidence upon which an opinion had been based was subject to doubt, for whatever reason, it was not improper for this to be taken into account.

The MA had said they had preferred contemporaneous medical records and the findings of the Court as to matters of fact because these had been cross-examined under oath. In the Adjudicator's view, this could not be described as an incorrect approach to take, but it had been appropriate for the MA to explain their approach so that NHS BSA, and Ms N, were aware of it.

- With regard to the requirement for there to be a link between the qualifying injury for which a PIB is claimed and a specific event or events, in the Adjudicator's view, the MA had taken the correct approach; inasmuch as they had sought to identify a cause for Ms N's injury which was related to her NHS employment. Regulation 3 applied when an individual had sustained an injury (or contracted a disease) which was "wholly or mainly attributable to" their NHS employment or the duties of that employment. This required there to be some link between the individual's injury and their NHS employment or their NHS duties. The Adjudicator accepted that there need not be a single specific "event", but causation needed to be established.

- Ms N had, herself, related her injury to certain events which she had said occurred in relation to her NHS employment. It was not inappropriate for the MA to consider causation in relation to the events identified by Ms N.

- With regard to Ms N's perceptions of the alleged events, the Adjudicator noted her solicitors' reference to a previous Ombudsman's Determination. That case had concerned a different injury benefit scheme, but the question of the individual's perception of events had been addressed. The claimant had linked the breakdown in his mental health to what he had perceived as being humiliated in a meeting. The then Ombudsman found that the eligibility test was a subjective one and noted that different people would react in different ways to events. He had said:

  "If, at the end of the day, Mr Gray's reaction to the events of the September meeting, was the sole[9] cause of his injury, then he is entitled to an award …

  … if the medical evidence is that Mr Gray's injury was as a result of his perception of events, the fact that his perception was wrong and that there is no evidence to suggest he was deliberately humiliated as he considers, is irrelevant."

- Where Ms N's case differed from Mr Gray's was that there had been no disagreement between the parties in that case that there had been a meeting, which he had attended, and that certain decisions had been taken in that meeting. In Ms N's case, there was no such agreement. In the circumstances, it was not improper for NHS BSA and its MA to start from a position of testing whether the events to which Ms N had linked her breakdown in mental health had occurred. If

[9] Under the relevant rule, a qualifying injury had to be solely attributable to the claimant's duty or an activity reasonably incidental to the duty.

those events had been shown to have occurred, Ms N's perception of, or reaction to, them would be material to her claim for a PIB.

- The MA concluded that, with the exception of one incident, the events claimed by Ms N had not been shown to have occurred. They based this conclusion on the findings in the High Court judgment, on the basis that the evidence had been examined under oath. In the Adjudicator's view, this was not an improper approach to take. The MA had then concluded that the incident in question had not caused Ms N more than temporary distress. This was a medical opinion which the MA was entitled to express.

- Ms N's solicitors had pointed out that the MA's view was at odds with the opinions expressed by the doctors who had provided reports in connection with the High Court case and her application for a PIB. Summaries of the reports are provided in Appendix 2. Briefly:-

  - Dr Faith had diagnosed an adjustment disorder, which had arisen as a result of matters in the workplace; namely, Ms N's belief that she was being unfairly treated by her employers. Dr Faith had expressed doubt that Ms N would recover while the disciplinary process was ongoing. She had also said that the prospects for rehabilitating Ms N back into the workplace were poor.

  - Dr Broadhead had described Ms N's reported experiences at the Trust and said such life events were powerful provoking agents for mood and anxiety disorder. Dr Broadbent had said Ms N had symptoms of a moderate to severe depressive disorder. He had referred to "post traumatic embitterment" and had said the prognosis was poor.

  - Dr Bennett had said Ms N had described difficulties in her previous employment dating back to 2009. She had said Ms N felt bullied, threatened, intimidated and harassed by her employer and this had caused her to feel distress.

  - In July 2013, Dr Montazeri had referred to a diagnosis of anxiety due to a stressful situation and had said Ms N described features of Post-Traumatic Stress Disorder (**PTSD**). She had commented that Ms N had described symptoms which she had not mentioned before. Dr Montazeri had mentioned that Ms N had described flashbacks to a situation when she had been held in an office. She had said Ms N had explained that she had not disclosed these symptoms previously because she had been concerned about being admitted to hospital.

  - In January 2015, Dr McWilliam had said he did not feel that Ms N now had a formal diagnosis of PTSD but she did have severe stress related anxiety and depression. He had expressed the view that Ms N's illness was being maintained by her experience of litigation and associated problems. He was of the view that Ms N would be subject to relapse and that her illness was permanent. Dr McWilliam had agreed with Dr

Broadhead that Ms N was unlikely to recover sufficiently to undertake employment with a similar degree of responsibility as she had had in her former employment.

- Of these, only Dr McWilliam's report post-dated the High Court judgment in October 2014. The reports by Dr Faith, Dr Broadhead and Dr Bennett had commented on causation and had attributed Ms N's ill health to work events to a greater or lesser degree. Dr McWilliam's report had focused on Ms N's future capacity for work, rather than causation. The MA had explained why they had taken a different view with regard to causation. The fact that the MA had taken a different view as to the cause of Ms N's ill health would not be sufficient, in and of itself, for the Ombudsman to find that it was maladministration for NHS BSA to rely on their advice.

- The Adjudicator was of the opinion that the Pensions Ombudsman would not remit the decision to NHS BSA.

- Ms N's solicitors had raised some additional concerns following the IDRP reviews and in their submission to the Pensions Ombudsman's Office. Although it was the Adjudicator's opinion that the Ombudsman would not require NHS BSA to retake its original decision, she considered it appropriate to address these additional points. Briefly, Ms N's solicitors had said:-

  - NHS BSA's MA had concluded that none of the medical evidence, dating back nine years to 2009, was reliable. This was a perverse conclusion because it would mean that Ms N had given false reports to the doctors prior to her dispute with the Trust and before she knew she might need to rely on their notes to support her claim.

  - Ms N had been under the care of her community mental health team and was still under their care when informed that her PIB had been withdrawn. During this time, she was unaware that there was any risk to her PIB. She could not be said to have engaged with the mental health team for the purposes of obtaining the PIB because it had already been awarded.

  - There had been a finding by the Court that Ms N had sustained an injury in the course of her NHS employment which was wholly or mainly attributable to the employment. This should have been determinative of a positive finding from the MA. NHS BSA had ignored this.

  - NHS BSA's MA had said that the disciplinary proceedings against Ms N were a contributory factor to her impaired mental health. The disciplinary proceedings were undertaken under Ms N's contract of employment. It was an act done in the course of her employment. Therefore, if it contributed to her injury, the injury had been caused by her NHS employment and this could not be a reason to withdraw the PIB.

- There was an entitlement to a PIB if an injury was caused in the course of NHS employment, which may include an injury caused by disciplinary proceedings or dismissal. If the disciplinary proceedings or dismissal were brought about fairly in response to culpable negligence or misconduct and it could be shown that the culpable negligence or misconduct was the whole or main cause of, or an aggravating factor in, the injury, then an award may not be made. This was the effect of Regulation 4(3) (*sic*) and it required the award to be made to Ms N.

- Ms N had disputed the fairness of her dismissal and instituted ET proceedings. The ET proceedings had not been concluded because Ms N had insufficient funds to do so.

- In addition to the disciplinary proceedings, NHS BSA's MA had identified the following factors as the likely causes for Ms N's depressive illness:-

    - Her genetic heritage – it was not apparent where in the documents the MA had seen reference to genetic heritage. Genetic heritage would be a factor in any injury to a greater or lesser extent. It was not capable of being the basis of denying payment of an otherwise legitimate PIB application. No reason had been given by the MA as to why genetic heritage would not apply to any depressive illness and, therefore, be a bar to any applicant suffering such a condition. This treatment of depressive conditions amounted to indirect discrimination under the Equality Act 2010.

    - Her anxiety over the review of her department – this would still be an injury sustained in the course of Ms N's NHS employment and wholly or mainly attributable to that employment.

    - Her perception of her co-workers – this would still be an injury sustained in the course of Ms N's NHS employment and wholly or mainly attributable to that employment.

- Ms N was awarded a TIA prior to her dismissal and, therefore, was already suffering from the injury before her dismissal. Her injury was sufficient for this award. Therefore, her dismissal cannot have been a sufficiently significant cause of, or aggravating factor in, her injury.

- In the Adjudicator's view, it was not entirely accurate to say that NHS BSA's MAs had concluded that none of the medical evidence dating back to 2009 was reliable. Having reviewed the commentaries provided by the MAs, it was her opinion that they each took the approach outlined above; namely, where an opinion relied on Ms N's recollection of events, it had been compromised because her recollections had been shown to be unreliable. The Adjudicator said she had not identified any suggestion on the part of NHS BSA or its MAs that Ms N had deliberately made false statements to her doctors or the community mental health team with a view to obtaining a PIB.

- The purpose of the High Court case had been to consider a claim under the Protection from Harassment Act 1997. Under the Regulations, a decision as to eligibility for a PIB was to be made by NHS BSA, acting on behalf of the Secretary of State. The statutory requirement for NHS BSA to make a decision regarding Ms N's eligibility for a PIB was not overridden by the High Court judgment. Nor was it fettered by the judgment.

- With regard to the disciplinary proceedings, Ms N's solicitors had suggested that the proceedings were undertaken under Ms N's contract of employment and, as such, amounted to an act done in the course of her employment. They argued, if the proceedings had contributed to her injury, then the injury had been caused by her NHS employment.

- Regulation 3 applied when an individual had sustained an injury "in the course of" their employment which was wholly or mainly attributable to their employment or had sustained an injury which was wholly or mainly attributable to the duties of their employment.

- The term "in the course of" was quite wide-ranging and could conceivably encompass matters such as a disciplinary procedure; particularly if an employer had a contractual disciplinary procedure in place. However, if the disciplinary procedure led to the employee being dismissed for gross misconduct, in the Adjudicator's view, Regulation 3(3) would be triggered. This provided that the Regulations shall not apply to a person in relation to any injury which was wholly or mainly due to their own misconduct. On the basis that the disciplinary proceedings arose because of the employee's misconduct, their effect upon the individual could not then qualify that individual for a PIB.

- The Adjudicator acknowledged the point made by Ms N's solicitors that she had disputed the fairness of her dismissal and had initiated ET proceedings. However, the Pensions Ombudsman's investigation of Ms N's complaint had to take the situation as it stood; that is, that Ms N had been dismissed for gross misconduct. It was not within the Pensions Ombudsman's remit to consider the fairness or otherwise of that decision. On that basis, it was the Adjudicator's opinion that Regulation 3(3) had been triggered in Ms N's case; insofar as the disciplinary proceedings could be said to have contributed to her injury.

- NHS BSA's MA had commented that the underlying pathophysiology of major depressive illness had not been defined and a specific cause was not known. They had said it was a multifactorial condition involving both genetic and environmental factors. The MA had expressed the view that it was likely that Ms N's depressive illness had arisen as a result of a combination of factors; including her genetic heritage, her anxiety about the Trust's review of her department, her perception of her co-workers' actions, and the disciplinary proceedings. They had said, given these multiple factors, it was not possible to conclude that Ms N's depressive illness was wholly or mainly attributable to her employment.

- In the Adjudicator's view, the MA was not suggesting that the mere fact there was a possible genetic element in the cause of Ms N's injury was a bar to her qualifying for a PIB. Rather, the MA's opinion appeared to have been that it was one of many possible factors; none of which satisfied the wholly or mainly test.

- With regard to Ms N's anxiety about job security, in the Adjudicator's view, this would have been related to the economic climate at the relevant time and her perceptions as to the ease with which she might find an alternative job. This was not a matter which was directly related to Ms N carrying out her NHS role. The position with regard to Ms N's perception of her co-workers had already been covered in the discussion around her perception of events leading up to the cessation of her employment at the Trust.

- It was acknowledged that Ms N had earlier been awarded a TIA. However, in the Adjudicator's view, that decision was not binding upon NHS BSA when it came to consider her entitlement to a PIB. If it was the intention that qualification for a TIA would automatically lead to qualification for a PIB, this would have been explicitly set out in the Regulations. There was no such provision. NHS BSA was entitled, and required, to come to an independent decision as to Ms N's entitlement to a PIB.

- Finally, Ms N's solicitors had suggested that NHS BSA's decision had been influenced by the Trust and they had submitted copies of internal documents indicating that the Trust had been communicating with senior executives at NHS BSA. The Trust was not a respondent to Ms N's complaint and the Adjudicator explained that it would not be appropriate for her to comment on its actions. The evidence did not support a finding that NHS BSA's decision had been unduly influenced by the Trust's view that payment of a PIB to Ms N was not appropriate. NHS BSA's decision had been based upon the advice it had received from its MAs.

- With regard to the question of NHS BSA's authority to cease paying Ms N a PIB, a PIB was payable if the claimant satisfied the conditions set out in Regulations 3 and 4. NHS BSA had initially paid Ms N a PIB under Regulation 4(2); that is, on the basis that she had ceased to be employed by reason of an injury to which Regulation 3 applied. It had subsequently been informed that Ms N's employment had been terminated on the grounds of gross misconduct. NHS BSA could not continue to pay Ms N's PIB under Regulation 4(2) because she clearly did not satisfy one of the conditions set out in that regulation.

- NHS BSA was then required to reconsider Ms N's eligibility for a PIB under Regulation 4(3). The circumstances of Ms N's case meant that NHS BSA was required to come to a fresh decision as to whether she satisfied the conditions for payment of a PIB. NHS BSA's decision had been that Ms N did not satisfy the conditions for payment of a PIB. In cases where a claimant had been unsuccessful, NHS BSA would not normally put a PIB into payment pending the outcome of any appeal. It would await the outcome of the appeal/IDRP and, if the

decision was changed, pay arrears of PIB at the end of the process. In the Adjudicator's view, it was not maladministration for NHS BSA to treat Ms N the same as any other unsuccessful claimant and not to pay her PIB going forward.

- Since Ms N was not entitled to a PIB, she had been overpaid for the period from October 2014 to June 2016. The overpayment amounted to £171,849.58.

- Any case involving an overpayment of benefits started from the position that monies paid in error may be recovered; regardless of the reason for the error. However, there were circumstances where the recipient of the incorrect payments might not be required to repay some or all of the monies received. These circumstances arose when one of the legal defences to recovery applied. Ms N would be required to repay the sum of £171,849.58 unless she could establish one these defences.

- Thus far, Ms N's case had been based upon her position that she satisfied the conditions for payment of a PIB. Neither she nor her solicitors had made any submissions, either to NHS BSA or the Pensions Ombudsman, relating to any possible defence to the recovery of the overpayment. In the circumstances, it would be appropriate for the parties to address this aspect of Ms N's case further.

35. Ms N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms N's solicitor provided further comments which are summarised below. I note the additional points raised by Ms N's solicitor, but I find that they do not change the outcome. I agree with the Adjudicator's Opinion.

Further comments on behalf of Ms N

36. It is submitted:-

- *Sampson v Hodgson* does not provide authority for NHS BSA to refuse to consider medical evidence in favour of a judgment, which is what has happened in Ms N's case.

- In *Sampson*, there was a range of medical opinion in either direction. In Ms N's case, all the medical evidence was that she could not work. The MAs refused to consider any of this.

- In *Sampson*, the scheme administrators asked the claimant to undertake a Blankenship test to assess his ability to work. No such test was carried out in Ms N's case.

- The judgment in *Sampson* expressly warns of the error of retrospectively assessing things said to physicians in the light of events which occur subsequently (at paragraphs 41 and 42). For this to have applied in Ms N's case, there would need to have been an assessment to determine if she was exaggerating her symptoms. There was nothing to suggest that this was the case;

merely, her evidence on the causation of her symptoms was not accepted in her harassment case.

- The judgment in *Sampson* concluded that the Ombudsman had been in error in confusing the question of what evidence should be taken into account with what weight should be given to that evidence. The Adjudicator fell into the same error.
- Only three statements in the High Court judgment were relied upon to question Ms N's reliability and whether certain events happened. These were selectively quoted and taken out of context.
- It is not for the MA to make or interpret findings of law, which is what they did in misinterpreting the High Court judgment.
- The MAs' errors were pointed out to NHS BSA, but it went on to adopt them and thus went about making the decision in the wrong way.
- Had it been the case that there was a material dispute between any of the relevant medical evidence, the role of the MA would have been to weigh the dispute and reach a conclusion. There was no such dispute because the medical evidence before the Court and before NHS BSA was of one voice; namely, that Ms N had suffered an injury at work.
- In order to conclude that the High Court's findings of fact could not be set aside, it is necessary to identify those findings of fact.
- The High Court judgment did not find that Ms N had given false evidence. It preferred her evidence over that of the management consultant on key issues. This is not the same as rendering anything said by Ms N as inherently unreliable; yet this is what the MAs and NHS BSA did.
- The MA should have considered whether Ms N's injury rendered her more likely to exaggerate; if so, it would be a facet of her injury. Refusing a PIB on the basis of this factor would be refusing the claim because of the injury which itself gave rise to the claim. This is potentially discriminatory in its own right.
- The MA should have considered whether the findings of exaggeration were limited to those matters under consideration in the High Court judgment or were capable of voiding all of the relevant medical evidence.
- The High Court judgment makes it clear that Ms N suffered a workplace injury. It recorded certain events occurred, all of which factor in Ms N's medical evidence as being contributory to her injury.
- The MA ignored the following:
  - Ms N's formal grievance dated 11 February 2011,
  - Occupational health reports dated 14 and 20 January and 20 October 2011,

- A report by a psychological therapist date 1 December 2011,
- A letter from a case administrator at NHS BSA dated 25 January 2012,
- Dr Montazeri's report dated 17 July 2013,
- An assessment by a CPN dated 2 December 2014.

The majority of this evidence was not before the High Court and cannot, therefore, be said to have been dismissed by the High Court.

- The High Court found:

"… the real cause of such a condition was [Ms N's] burning sense of grievance at what can be called the management process that was instigated and was pursued from September 2010, namely the executive review, the appointment of [the management consultant] … and the reduction in her own management autonomy, combined with her apprehensions for the outcome of that process, namely a failure to gain the putative new position … and the real risk that she might not even retain her present job."

- These are all workplace events which led to Ms N's injury and the MA should have considered this evidence.
- The High Court judge did not take a negative view of the reliability of Ms N's version of events. There were three discrete events on which he preferred the evidence of other witnesses. These events were not determinative of the PIB claim.
- The statement that the MA preferred contemporaneous medical records is incorrect. The contemporaneous medical records supported the assertion that Ms N had suffered an injury at work. These were rejected in favour of the High Court judgment.
- If the MA had wanted to use evidence provided under oath, the correct approach would have been to use the transcripts of witness evidence, but these were rejected by the MA and NHS BSA.
- The statement that Ms N had related her injury to certain events which she said had occurred in relation to her NHS employment refers to the way in which she put her Protection from Harassment claim. That claim required the particularisation of individual acts of harassment; whereas the PIB claim required the particularisation of individual acts causing injury. The fact that the two sets of particularisation are not duplicated is not sufficient to defeat the PIB claim. Neither is the failure of the harassment claim capable of de facto defeating the PIB claim. The two claims are not at odds because they require different legal tests. The High Court judgment, effectively, upholds the substance of Ms N's PIB claim.

- It is incorrect to say that there was no agreement that a meeting took place. It was recorded in the High Court judgment that a meeting took place.

- The MA's task was to determine whether events in Ms N's NHS employment had contributed 50% or more to the cause of her condition. This was not done.

- For the MA to conclude that the 50% threshold was not met, they were required to offer some alternative causation. The MA simply advanced other potential reasons and dismissed the claim because these existed without an attempt to quantify them.

- Ms N's anxiety about job security was related to comments made to her by the management consultant. These comments were found by the High Court to have been directly causative of Mr N's injury and were, therefore, not capable of defeating her PIB claim. They were a matter directly related to Ms N carrying out her NHS role.

- Ms N was employed as a senior member of the NHS and was, thus, insulated from the economic climate at the time. There is no evidence that, had she not been injured, Ms N would have had any difficulty securing alternative employment.

- Ms N's employment ceased on summary dismissal. There was no disciplinary process. Ms N's dismissal occurred after her injury had occurred and was incapable of justifying a refusal of a PIB. Even if this were not the case, the MA did not quantify the contribution which Ms N's dismissal made to her injury.

- The MA's conclusion that events claimed by Ms N had not been shown to have occurred was not supported by the High Court judgment. The High Court judgment expressly recorded that other events led to her injury being suffered.

- Even if Ms N relies only on the incident pleaded as part of her harassment claim, the evidence did not show that it had caused no more than temporary distress.

- The medical assessment of a psychological injury, particularly its causation, is necessarily based upon the patient's recollections. It is the nature of those injuries to cause unreliability in recollection. The approach taken amounts to indirect discrimination.

- During the period for which Ms N received a PIB, she was without any income. Her entitlement to benefits was denied solely by the payment of the PIB. If the overpayment of the PIB is claimed, it would deny Ms N entitlement to the benefits she would otherwise have been entitled to for that period.

- Ms N has now been out of her employment with the Trust for nearly 10 years and has been unable to secure employment on anything like the amounts she was able to earn prior to her injury. Nearly all of the work she has been able to secure has been on a voluntary basis. She is approaching retirement age and the amount proposed for repayment would destroy her financial security.

Ombudsman's decision

37. For the purposes of clarity, I will reiterate that my role is to consider the way in which NHS BSA has gone about making a decision as to Ms N's entitlement to a PIB; not to make a decision myself as to her entitlement. My Adjudicator explained that this meant considering whether the relevant decision-maker has: (i) gone about making the decision in the right way; and (ii) made a decision which is supported by the evidence.

38. In order to make a decision in the right way, NHS BSA was required to consider all the relevant available evidence. Ms N's argument is that it and its MAs ignored some of the evidence available to them; specifically, the medical evidence which she had provided.

39. The *Sampson* case referred to was an appeal against a Determination by a previous Deputy Pensions Ombudsman. In that case, the judge said:

> "… the Ombudsman here confused the question of what evidence or material should be taken into account by the Trustees in reaching their decision with the question of what weight should be given to that evidence or material.
>
> If the Trustees fail to take into account any relevant evidence or material, their decision can be set aside as having been improperly reached. But provided they take it into account, the weight to be given to that evidence or material is entirely a matter for the Trustees, not the Ombudsman or (on appeal) the Court. The Trustees may take evidence or material into account but give it very little weight. Indeed, they can take it into account but assign it no weight at all: see *Tesco Stores v Secretary of State for the Environment* [1995] 2 All ER 637 at 657 and 661."

40. In other words, there is a distinction to be drawn between ignoring, or refusing to consider, evidence and giving it little or no weight.

41. I do not find that either NHS BSA or its MAs refused to consider the evidence put forward by Ms N. The evidence considered by the MAs was referred to in the reports provided by them for NHS BSA. The MAs specifically referred to having considered occupational health reports, reports from Ms N's GP and various psychiatric reports. They also considered submissions by Ms N and her solicitors. The fact of the matter is that NHS BSA and its MAs gave little or no weight to the medical evidence relied upon by Ms N because they considered the physicians' opinions had been based on an unreliable account of events. This is entirely different from ignoring or refusing to consider the evidence.

42. Ms N's solicitor has referred to *Sampson* again on the question of retrospectively assessing things said to physicians in the light of events which occur subsequently. On this, the judge said:

> "If (as the Blankenship report unequivocally concluded) Mr Hodgson was exaggerating his pain and seeking to control or influence the evaluation to convey an impression of greater disability and impairment than was in fact the case, it would inevitably raise the question of whether he was doing the same when he visited his GP to obtain a doctor's letter. It is likely that the GP when forming his opinion and writing his letters would be influenced in part by what the patient tells him about his pain, and so on. If the patient has been exaggerating, the GP's letters may not be an accurate reflection of the true position (through no fault of the GP).
>
> Whether Mr Hodgson was exaggerating his symptoms and whether he was creating an impression of greater disability and impairment than actually existed was clearly an important issue. The Blankenship report concluded unequivocally that he was, but that in any event he was at a minimum capable of sedentary work. That would inevitably be highly relevant in evaluating the GP's letters."

43. In Ms N's case, it was not so much question of determining whether she was exaggerating her symptoms, rather, it was a question of determining causation. In other words, it was a question of deciding whether and to what extent the events which Ms N claimed that had led to her injury had occurred. In Ms N's case, the High Court judgment occupies a similar role to that of the Blankenship report in Mr Hodgson's case; inasmuch as Ms N's account of events would have influenced her doctors' opinions in much the same way as Mr Hodgson's account of his pain would have influenced his GP's opinion. Ms N's doctors' views that she had suffered an injury at work were based on her accounts of what had happened. If Ms N's accounts of events were subsequently shown to be unreliable, for whatever reason, this would be relevant in evaluating those doctors' opinions.

44. Ms N's solicitor has suggested that NHS BSA's MAs should have considered whether her condition rendered her more likely to exaggerate. He suggests this would be a facet of her injury and argues that refusing PIB on the basis of this would amount to refusing her claim because of the injury which itself gave rise to the claim. He argues that this is potentially discriminatory.

45. In determining causation for Ms N's injury, it was necessary for NHS BSA and its MAs to consider whether the events which Ms N claimed had resulted in her injury had actually happened or had happened in the way she had reported. This is an objective exercise; the events in question either happened or they did not. Any exaggeration of events by Ms N, for whatever reason, is relevant to determining how much weight to place on her evidence. If Ms N's account of events cannot be substantiated or differs from accounts given by others, this is relevant regardless of why she has given a different account. In this, Ms N is not being treated any less favourably than any other claimant.

46. Given that Ms N's account of events at the Trust, along with those of other individuals, had been tested in the High Court under oath, I do not find that it was

inappropriate for NHS BSA and its MAs to rely on the High Court judgment when considering causation. It does not amount to making or interpreting findings of law on the part of the MA, as Ms N's solicitor has suggested. I do not find that it was necessary for the MAs, or NHS BSA, to trawl through the transcripts of witness statements themselves.

47. Causation is central to Ms N's claim because a PIB is paid when an individual has: (i) sustained an injury, or contracted a disease, in the course of their NHS employment which is wholly or mainly attributable to that employment; or (ii) sustained an injury, or contracted a disease, which is wholly or mainly attributable to the duties of their NHS employment. The decision as to whether Ms N satisfies these conditions is for NHS BSA, on behalf of the Secretary of State, to make. I say this because Ms N's solicitor has referred me to the High Court judge's view that the cause of her condition was her "burning sense of grievance at the management process". Regardless of any view expressed by the High Court judge as to the cause of Mr N's condition, NHS BSA was required to come to an independent decision on whether she satisfied the conditions set out in Regulations 3 and 4.

48. In coming to a decision, NHS BSA sought advice from its own doctors, which it was entitled to do. Ms N's solicitor has suggested that the role of the NHS BSA MA is to weigh up any material dispute within the medical evidence and reach a conclusion. On the basis that he argues there was no dispute within the medical evidence presented to the MA that Ms N had suffered an injury at work, he seems to be saying that this position should simply have been adopted by the MA. I do not find that the role of the MA is restricted in this way; particularly when there may be some doubt about the underlying facts of a case. NHS BSA was entitled to look to its MAs to come to independent opinions based upon the facts of the case and the conditions set out in Regulations 3 and 4.

49. In order to qualify for a PIB, Ms N had to be able to show, not only that the events she had claimed had occurred as she had reported, but also that they had contributed a greater than 50% share in the cause of her condition. Her solicitor argues that the MAs failed to undertake such a quantitative exercise. I agree that the MAs did not set out their views on the likely contribution which events at the Trusts had made in the cause of Ms N's condition in quite these terms. However, it is clear that the MAs were aware that they were required to consider if Ms N's condition was wholly or mainly attributable to her NHS employment or the duties of that employment. They concluded that Ms N's condition had arisen as a result of a combination of factors, which they listed. They advised that, given the multiplicity of contributory factors, it was not possible to conclude that her illness was wholly or mainly attributable to her NHS employment. I am satisfied that, by this, the MA meant Ms N's NHS employment (specifically, events at the Trust) had not contributed more than 50% to her condition arising. I do not find that the MA needed to quantify matters any more precisely than this.

50. Ms N's solicitor takes issue with the statement that the MA had preferred contemporaneous medical records in deciding on the facts of the case. He argues

that the contemporaneous medical records support the assertion that Ms N had suffered an injury at work. In this, I find that he is confusing medical records with medical opinions.

51. Ms N's solicitor has suggested that a finding by my Adjudicator that Ms N had related her injury to certain events, which she had said had occurred in relation to her NHS employment, refers to the way in which she put her Protection from Harassment claim. I disagree. In her application form for a PIB, Ms N referred to a diagnosis of Post-traumatic Stress Disorder "caused by the incidents and events at [the Trust]". She referred NHS BSA to information she had supplied in connection with her TIA claim. This information contained a number of statements by Ms N setting out her version of events at the Trust. I think it is safe to say Ms N had indeed related her injury to certain events which she said had occurred at the Trust.

52. In conclusion, I find that NHS BSA reached a decision on Ms N's claim for a PIB in a proper manner and there are no grounds for me to remit the decision for review. Therefore, I do not uphold Ms N's complaint.

53. I note the submissions from Ms N's solicitor as to her financial position. As my Adjudicator said, thus far, Ms N's case had been based solely upon her position that she satisfies the conditions for payment of a PIB. Neither she nor her solicitors have made any submissions, either to NHS BSA or to me, relating to any possible defence to the recovery of the overpayment. In the circumstances, I suggest the parties now take steps to address this aspect of Ms N's case further.

Anthony Arter
Pensions Ombudsman

18 November 2021

Appendix 1

The National Health Service (Injury Benefits) Regulations 1995 (SI1995/866) (as amended)

54. Regulation 3 “Persons to whom the regulations apply” provides:

> “(1) Subject to paragraph (3), these Regulations apply to any person who, while he -
>
> (a) is in the paid employment of an employing authority; …
>
> (hereinafter referred to in this regulation as “his employment”), sustains an injury before 31st March 2013, or contracts a disease before that date, to which paragraph (2) applies.
>
> (2) This paragraph applies to an injury which is sustained and to a disease which is contracted in the course of the person's employment and which is wholly or mainly attributable to his employment and also to any other injury sustained and, similarly, to any other disease contracted, if -
>
> (a) it is wholly or mainly attributable to the duties of his employment; …
>
> (3) These Regulations shall not apply to a person -
>
> (a) in relation to any injury or disease wholly or mainly due to, or seriously aggravated by, his own culpable negligence or misconduct; …”

55. Regulation 4 “Scale of benefits” provides:

> (1) Benefits in accordance with this regulation shall be payable by the Secretary of State to any person to whom regulation 3(1) applies whose earning ability is permanently reduced by more than 10 per cent by reason of the injury or disease and who makes a claim in accordance with regulation 18A.
>
> (2) Where a person to whom regulation 3(1) applies ceases to be employed before 31st March 2018 as such a person by reason of the injury or disease and no allowance or lump sum, other than an allowance under paragraph (5) or (5A), has been paid under these Regulations in consequence of the injury or disease, there shall be payable, from the date of cessation of employment, an annual allowance of the amount, if any, which when added to the value, expressed as an annual amount, of any of the pensions and benefits specified in paragraph (6) will provide an income of the percentage of his average remuneration shown in whichever column of the table hereunder is appropriate to his service in relation to the degree by

which his earning ability is permanently reduced at the date that person ceases that employment …

(3) This paragraph applies to a person to whom regulation 3(1) applies who -

(a) ceases to be employed before 31st March 2018 other than by reason of the injury or disease,

(b) at the date of ceasing that employment has not attained normal benefit age,

(c) having ceased that employment, suffers a permanent reduction in earning ability by reason of that injury or disease, and

(d) has not been paid, other than under paragraph (5) or (5A), any allowance or lump sum under these Regulations in consequence of that injury or disease.

(3A) Where paragraph (3) applies the Secretary of State may pay from the date that the person attains normal benefit age or, as the Secretary of State may in any particular case allow, from the date that person suffers the reduction in earning ability referred to in paragraph (3)(c), an annual allowance of the amount referred to in paragraph (3B).

(3B) That amount is an amount, if any, which when added to the value of any of the pensions and benefits specified in paragraph (6) will provide an income of the percentage of the person's average remuneration shown in whichever column of the table in paragraph (2) is appropriate to that person's service in relation to the degree by which that person's earning ability is permanently reduced at the date referred to in paragraph (3A): for these purposes the value of any such pensions and benefits is to be expressed as an annual amount.

56. Regulation 4A “Recovery of costs” provides:

“(1) …

(2) … where, on or after 1st April 1997, a person is entitled to an allowance or lump sum under paragraphs (2), (2B), (3A), (3D), (4), (4B) or (9) of regulation 4 … that person's employing authority shall, on the payment by the Secretary of State of the allowance or any part of it, or, as the case may be, of the lump sum, be liable to pay a contribution to the Secretary of State in accordance with paragraph (5) representing -

(a) the total amount of such allowance or such part, or,

(b) the total amount of such lump sum,

together with the cost of providing increases to it under Part I of the Pensions (Increase) Act 1971 …

(5) Contributions payable to the Secretary of State under paragraph (2) shall be paid not later than one month from the end of the quarter in which the allowance or any part of it, or, as the case may be, the lump sum, referred to in that paragraph was paid …"

Appendix 2

Medical evidence

57. Dr Faith, consultant psychiatrist, 19 July 2011

Dr Faith prepared report at the request of solicitors acting for the Trust.

Dr Faith diagnosed an adjustment disorder. She noted that Ms N was receiving treatment, but expressed the view that Ms N would not recover whilst both the disciplinary investigation and the grievance procedure were ongoing. Dr Faith said Ms N's intellectual functioning might, at times, be temporarily impaired by anxiety symptoms, but otherwise her cognitive functioning was not impaired. She concluded:

> "It is my opinion that Adjustment Disorder has arisen as a result of matters in the workplace. [Ms N] has experienced other, distressing, issues in recent years. I have found nothing, however, to suggest that these are contributing to her current presentation. The matters in the workplace appear to be related to her belief that she is being unfairly treated by her employers, who wished her to leave her post …
>
> [Ms N] will not recover whilst the disciplinary process continues but she is unlikely, unless her grievance is upheld, to accept the outcome. She will remain in a state of distress …
>
> [Ms N] is capable, intellectually, of dealing with issues …
>
> The prospects of rehabilitating [Ms N] back into the workplace are poor. [Ms N's] belief about the background of her current circumstances is that they are based in a culture of fear that has existed for a long time and for which there is no organisational appetite to change …
>
> [Ms N's] condition is a self-limiting one. The time to recover may be several months but will only occur after her current circumstances are resolved one way or another. The antidepressant is being prescribed at a dose I consider to be probably excessive. A change to a different preparation may prove useful, but will not "cure" her condition which is an emotional response to distressing circumstances. Counselling may help in terms of providing her with support. It will not, however, hasten resolution."

58. Dr Faith, 13 August 2011

Dr Faith provided an addendum report having seen Ms N's GP records. She expressed the following opinion:

> "[Ms N] has a previous history of, stress related, mental disorder in 2007 … The disorder appears … to have been, largely, due to a sense of feeling victimised at work having uncovered a fraud …

I wish to alter my previous report, in which I stated that there was no indication, from [Ms N's] account, of a tendency to decompensate when under stress. There does, according to the general practitioner records, appear to be a tendency to, minor, psychological decompensation in situations of stress, seemingly work stress, rather than domestic stress, as it is clear from the records that [Ms N] has suffered significant stress, relating to the behaviour of her ex-husband, but does not appear to have become unwell in relation to such issues …

There is no indication from these records that she is, or has been, suffering from a major mental disorder. My opinion regarding the diagnosis of Adjustment Disorder, remains unchanged …"

59. Dr Broadhead, consultant psychiatrist, 31 January 2012

Dr Broadhead prepared a report at the request of solicitors acting for Ms N.

Dr Broadhead expressed the following opinion:

"From the history given by [Ms N] and from the independent sources, there is nothing to indicate that she has any disorder of personality or abnormal coping mechanisms.

In the General Practice record … there is only one episode of psychiatric disorder recorded before the index events at work …

From August 2010 changes to her role were made, which were poorly communicated, and the external reviewer appointed was harsh and abusive.

The meaning of these changes and treatment to [Ms N] were of her being: 1) undermined and humiliated (e.g. her role being reallocated to the external reviewer without warning, and her department being informed before her); 2) victimised and unsupported (e.g. the nature and content of the external reviewer's dealings with her (especially October and November 2010) and, for example, her ex-direct report offering her money to leave (November 2010) rather than supporting her position); and 3) having her career trajectory derailed (her role at [the Trust] directly threatened and potentially her reputation being tarnished wider afield in line with the external reviewer's threats).

Life events with such meaning are especially powerful provoking agents for mood and anxiety disorder.

There were no ongoing difficulties in other domains of her life …

[Ms N] communicated the effect of the work situation on her mental state to: 1) her new line manager, the external reviewer, as the reason for her two days sickness absence from 30th September 2010; and 2) her previous line

> manager … on 24th November 2010 (seeing doctor and so not at work) and probably at other times (information from text [message] transcripts).
>
> History from [Ms N], and supported by information from other sources, indicates that there was a pathological change of mood and high anxiety from September 2010. In July 2011 Dr Faith diagnosed an adjustment disorder, which reflects there still having been some variability of mood, which I think is reasonable. However, by the time of my examination (January 2012) [Ms N] had symptoms of a depressive disorder, moderate to severe, without psychotic symptoms … The letter from [Ms N's] clinical psychologist Dr Bennett from March 2012, supports this diagnosis.
>
> That disorder is being appropriately treated …
>
> Her depression is now complicated and perpetuated by anxiety and avoidance, and by her embitterment about how she has been treated. Such is referred to in some literature as "post traumatic embitterment", and the prognosis is poor."

60. Dr Bennett, clinical psychologist, 19 March 2012

In a letter to Ms N's GP, Dr Bennett said she had seen Ms N on five occasions. She said Ms N had described difficulties in her previous employment dating back to 2009. She said Ms N felt bullied, threatened, intimidated and harassed by her employer and this had caused her to feel distress. Having described Ms N's symptoms, Dr Bennett said Ms N appeared well-engaged and motivated to continue working with her. She said they had agreed to a further 16 sessions of psychological therapy.

61. Dr Bennett, 28 March 2012

In an open letter, Dr Bennett said she was writing in support of Ms N's application for PIB. She said Ms N was suffering from significant psychological difficulties. Dr Bennett said it was impossible to predict how long Ms N's recovery would take. She explained that she had arranged to meet with Ms N for a further 14 sessions of psychological therapy and would likely review progress over a three to six month period. Dr Bennett explained that the speed of recovery differed for each individual and stressors outside the individual's control could impact negatively on the speed of recovery. She said the speed of Ms N's recovery would be impeded by her ongoing Court case.

62. Dr Bennett, 11 July 2012

Dr Bennett wrote to NHS BSA providing similar information to that set out in her previous letter. She confirmed that Ms N continued to experience significant stress, pressure, anxiety and hopelessness in relation to the ongoing legal cases. Dr Bennett said it was likely that, whilst the legal cases remained unresolved, Ms N would find it difficult to make any significant gains from therapy. She said it was possible that Ms N

would benefit from further psychological therapy when the Court cases had been resolved.

63. Dr Jayakumar, GP, 19 July 2012

Dr Jayakumar said he had been seeing Ms N regularly since November 2010. He explained that Ms N had presented with stress and anxiety which had started after an incident at work.

64. Dr Kampers, consultant psychiatrist, 27 June 2013

Dr Kampers provided a capacity assessment at the request of the Court. He diagnosed post-traumatic stress disorder (**PTSD**).

65. Dr Montazeri, locum consultant psychiatrist, 17 July 2013

In a letter to Ms N's GP, Dr Montazeri referred to a diagnosis of anxiety due to a stressful situation and said Ms N described features of PTSD. She said she had seen Ms N and she had described symptoms which she had not mentioned before. Dr Montazeri said Ms N described flashbacks to a situation when she had been held in an office. She said Ms N had explained that she had not disclosed these symptoms previously because she was concerned about being admitted to hospital. Dr Montazeri then went on to describe the proposed treatment plan for Ms N.

66. Dr McWilliam, consultant psychiatrist, 6 January 2015

Dr McWilliams prepared his report for NHS Pensions Independent Panel in connection with Ms N's application for PIB. He provided the following opinion:

"[Ms N] has had several reviews by psychiatrists and psychologists both in a medico-legal context and in relation to her own treatment.

The reports are consistent in that they conclude that [Ms N] has severe symptoms of depression and anxiety with symptoms of post traumatic stress disorder and dissociative episodes.

I do not feel that she now has a formal diagnosis of PTSD but she does have severe stress related anxiety and depression as noted throughout the records and there is a significant overlap between depression, anxiety and PTSD, particularly where the former are severe …

There is a significant component of phobic anxiety and I believe her dissociative episodes are also anxiety related.

It is clear that her current illness is being maintained by her experience of litigation and associated problems which … serve to continually "re-traumatise" her.

> It is unlikely that she will progress to any form of recovery until this source of stress is removed and until then, therapy is supportive and for symptomatic relief only.
>
> I believe it would take two to three years for [Ms N] to progress to some form of recovery once her main source of stress is removed and she will require more intensive psychological therapy than she can currently cope with to aid her recovery …
>
> I believe the events experienced by [Ms N] leave her with a significant risk of relapse and vulnerability to further episodes of panic, anxiety and depression even in the event that she does recover.
>
> She will, therefore, always be vulnerable to relapse into depression and/or anxiety whether she returns to work or not but particularly if she were made to return to work in any environment where there would be a chance of her re-experiencing bullying or harassment.
>
> This is particularly relevant to [Ms N's] current assessment, as I believe that, her continued long term experience of, depression, anxiety and trauma related phobic avoidance [and] her permanent risk of relapse, indicate that her illness is a permanent one as defined in the PIB scheme regulations …
>
> In terms of future employment, and for the benefit of the panel, I can state that I agree with the view of Dr Broadhead that [Ms N] may well be capable of some low level work, perhaps in retail or in a small organisation, once she recovers.
>
> I agree with him that it will not be possible for [Ms N] to undertake employment with a degree of responsibility (and salary) as she had in her former employment.
>
> I believe that her condition meets the criteria for an injury award, as per PIB regulations i.e. the condition must result in a Permanent Loss of Earning Ability (PLOEA) in excess of 10%."

67. NHS BSA's MA, February 2016 (as quoted in NHS BSA's letter of 24 June 2016)

The MA referred to Regulation 4(3). They noted that, in her application form, Ms N had said that her psychologist had diagnosed a form of post-traumatic stress disorder (**PTSD**) caused by incidents and events at the Trust. The MA said it was necessary to consider what Ms N had claimed to be the cause of her psychological symptoms. They then summarised the consideration of Ms N's application for a TIA and PIB to date.

The MA said they had considered: occupational health, GP and psychiatric reports, information from Ms N and information from the Trust. They said they had been asked to review Ms N's case by NHS BSA and to consider the following additional documents:-

- Emails from the Trust dated 30 October and 8 November 2015 (*sic*)
- The High Court judgment
- A letter from Ms N's solicitors dated 24 November 2015
- Memoranda from NHS BSA dated 8 December 2015 and 13 January 2016
- An undated letter from Ms N to NHS BSA
- A letter from Ms N's local mental health services dated 11 November 2015

The MA said the questions to be addressed were:-

- Did the person sustain an injury or contract a disease whilst carrying out the duties of their employment?

- Did the person sustain an injury or contract a disease in the course of their employment?

The MA said that, in both cases, the injury or disease must be wholly or mainly attributable to the normal duties of the NHS employment and have arisen before 31 March 2013.

The reasoning provided by the MA is extensive and it would not be practical to reproduce it in full here. A summary of the main points is provided below:-

- The evidence presented by Ms N indicated that she believed that she had been subject to a period of bullying and harassment by one individual over the period August to November 2010. Whilst this might be Ms N's perception, there was no corroboration. Cross-examination of witnesses in the High Court indicated that Ms N had not raised a complaint prior to one incident when she had been sworn at and threatened by an external contractor.

- Ms N had alleged there had been an incident of false imprisonment. Cross-examination in the Court had not supported Ms N's allegation and the Court had found Ms N's version of events was prone to exaggeration and embellishment. Her stated perception of being imprisoned and fearful as a consequence was not, therefore, accepted at face value. It was necessary to consider if there was any corroboration from other sources. None had been identified.

- The Trust had stated that, subsequently, it had received a letter from Ms N's solicitors seeking termination of her employment on the basis of a settlement of £100,000. Ms N was, therefore, willing to leave the Trust and set down her terms for doing so. She did so prior to submitting a grievance.

- Dr Faith had found Ms N to be normally presented and interactive during their session. She had concluded that Ms N was suffering an adjustment reaction to events over a three month period and that she was avoidant of contact with work or reminders of work.

- Ms N had previously been involved in whistle-blowing and would have known how important it was to bring instances of unacceptable behaviour to the attention of

her employer at the earliest opportunity. The evidence presented to the Court indicated that Ms N had not done so. Dr Faith's view that Ms N had been bullied and harassed over a period of months was not supported by the Court's findings.

- They had concluded that Ms N had suffered, at most, a brief period of distress, lasting a morning only, due to the inappropriate behaviour of one individual. The evidence did not corroborate Ms N's allegation of false imprisonment or that she was the victim of a campaign of bullying and harassment. They had identified one communication by the Trust which had been poorly worded, but the words used were not bullying or harassing in tone.

- An award of PIB required that a specific injury or disease has been wholly or mainly incurred whilst carrying out the duties of the NHS employment or in the course of that employment. There must be a link to a specific event or events which occurred. Whilst the individual's perception of events had to be considered, those events had to have occurred.

- The Court had found Ms N to be an unreliable witness, who embellished events. This had to be considered in her self-reporting of the impact which events had had upon her to the doctors and in her submissions for PIB.

- The evidence indicated that Ms N had been subjected to unreasonable behaviour on one day. There was insufficient evidence to indicate that this had rendered Ms N too unwell to undertake her own role or any other.

- The Court had found that Ms N had a misguided and slanted view that she had been the victim of senior corporate wrongdoing. It did not find that such wrongdoing occurred, except for the one incident. They did not accept that injury could arise from events which were perceived to have occurred, but which probably did not. There had to be some corroboration of events. This was the normal approach taken for physical injuries, where the expectation would be that an event had been reported in injury reports, GP records or corroboration from colleagues.

- With regard to perception, the test had to be more than simply perception of injustice; there had to have been an injury sufficient to cause illness or disease. The evidence in Ms N's case indicated that she had been subject to a brief period of unacceptable behaviour but had been able to function well for the rest of the day. It did not, on the balance of probabilities, provide sufficient explanation for Ms N's subsequent psychological symptoms, which persisted to date.

- Ms N had conducted herself in such a way as to be dismissed on the grounds of gross misconduct. She had then initiated a number of legal actions. They did not accept that raising false allegations against a manager or removing confidential material from work were normal NHS duties from which an injury could be said to arise.

- The psychiatric assessments undertaken in Ms N's case were based upon her self-reported symptoms and her statements regarding bullying, harassment and false imprisonment. They did not accept that these assessments provided a reasonable basis upon which to determine whether Ms N had sustained a PLOEA due to injury. They were inextricably linked to the outcome of legal and other proceedings. The lack of evidence to support Ms N's allegations fundamentally undermined the findings of the doctors who had, in good faith, based their diagnoses and prognoses on information provided by Ms N.

- There were varying estimates of the extent of Ms N's psychological symptoms. Dr Faith's report did not appear to describe a severely depressed individual who was unable to leave their house. Dr Kampers had said Ms N was virtually housebound, but, by her own account, Ms N had continued to access work material to keep in touch with work. They had concluded that Ms N's current disability was due to depression. They accepted Dr McWilliam's view that Ms N's symptoms were severe and disabling. There were many reasons to explain Ms N's current symptoms, most of which were not directly linked to her NHS duties.

- NHS BSA had referred to a number of issues which it had suggested should be accepted as a matter of fact and which were wholly or mainly attributable to Ms N's NHS employment:-

  Difficulties with relationship with line manager

  They acknowledged that Ms N had not accepted the change in line management relationship, but there was no evidence of any specific injury; other than the one incident, which they could not conclude to be sufficient to cause illness or disease.

  They accepted that Ms N may have been shocked and upset after one telephone call, but the reason for this could not be known because the content of the call had not been corroborated. It had been shown that Ms N's account of this call was incorrect. This call, in addition to the other incident, was not considered sufficient to cause psychological illness.

  Concerns over job security

  This was an inevitable part of restructuring and this would have been known to Ms N with her knowledge of employment matters. Ms N had been able to accept this insecurity, apply for other posts and ask for a reference. The evidence presented in Court indicated that Ms N had been grateful on being told directly by her manager about the implications for her post. She had presented to a psychiatrist as aggrieved and upset, rather than permanently incapable of work.

  Concerns over job security were not accepted as a cause of permanent psychiatric illness cause loss of earnings capacity in Ms N's case. At most, they could be expected to cause an adjustment reaction, which was rarely permanent. They accepted that Ms N had suffered an adjustment reaction, but there were many other factors not related to her NHS duties involved.

Concerns over obtaining similar employment in the area applied to all staff subject to restructuring; particularly at higher levels where jobs were scarce. This would cause temporary mental health symptoms and they accepted that this was the case for Ms N. There was no evidence that this had caused illness or injury. Ms N's reputation was high at the time and there was no reason why she would not have taken the view that she would find it easy to obtain another job. She had subsequently been able to contribute to investigations undertaken by the Care Quality Commission (**CQC**) and the British Medical Association.

Lack of support from senior managers

Ms N had provided no evidence for this. It was not for any employee to choose their line manager or to object to line management by a contractor. There was no basis upon which to conclude that this would amount to a lack of support sufficient to cause a disease.

The judge had found Ms N to be unreliable, prone to drama and exaggeration, and immature. These findings were based upon evidence presented to the Court. This perception was not overturned by a previous good work record; which they did accept.

They had considered whether there was an alternative explanation for Ms N's presentation of events; for example, whether she was ill and, therefore, behaving unusually. Ms N had not attended her GP before November 2010, so it was not possible to corroborate whether she had been ill in the months prior to her sickness absence. It seemed unlikely that any psychological illness would explain Ms N's behaviour, such as raising a false allegation of imprisonment or engaging in gross misconduct.

They noted that there had been a dispute over Ms N taking sick leave, annual leave or time off in lieu at one point and that she had previously time off in response to stressful personal events. They accepted that her staff had noticed she was not coping well at work. The evidence given in Court did not amount to descriptions of specific medical symptoms or illness. It was normal to struggle emotionally during difficult periods at work, but this was not accepted as representing a specific illness. It was also common to minimise sick leave taken by using annual leave to avoid this being disclosed to future employers. They did not agree that this amounted to evidence of significant psychiatric illness.

The Court had found that Ms N's dismissal and subsequent legal proceedings had contributed to her distress. They did not regard these as injuries arising from the normal duties of her NHS employment.

The Court had found Ms N's "burning sense of grievance" to be the real cause of her distress. The Court had found that "the management process itself, provoking a sense of grievance and fear that caused the injury". It was accepted that the job insecurity must have been unsettling but they did not consider this was sufficient

to injure Ms N. They did not find that the condition claimed (PTSD) could be wholly or mainly attributed to these normal management processes.

Reason for leaving

The evidence indicated that Ms N took sick leave after falsely alleging she had been imprisoned and had been subject to a campaign of bullying and harassment. She had asked not to come into contact with the external consultant. Whilst this was being addressed by the Trust, Ms N took action which was harmful to her employment and to her overall health and wellbeing; namely, unlawful access to work material on four occasions between November 2010 and January 2011.

Events at work and connected with Ms N's duties, and events not connected with her duties occurred more or less simultaneously. Therefore, their psychological impact would have occurred at the same time.

Occupational health assessments in January 2011 found Ms N unfit for work or to attend meetings. Despite this, Ms N accessed work materials for an unknown purpose. She had said this was in order to keep up to date and was at the behest of her GP, but there was no evidence to substantiate this.

Evidence from the Trust indicated that Ms N's solicitors had requested termination of her employment on the basis of a substantial financial settlement. The fact that this was not agreed to would have been upsetting. They did not find that the request for voluntary severance arose from Ms N's normal NHS duties and this was linked to the false allegation of imprisonment.

Unlawful access to confidential material and the accusation of imprisonment must be taken into account in causing psychological symptoms. These actions could not have occurred without causing Ms N anxiety and fear of subsequent discovery.

The finding of gross misconduct stood because it had not been overturned by an ET. They did not accept that accessing work material in this way could be considered normal NHS duties.

- Ms N's response to one adverse event and her perception of negative work factors had been given the diagnosis of PTSD by Dr Kampers. In his assessment in January 2015, Dr McWilliam felt she no longer met the criteria for this illness. The diagnosis of PTSD was the basis for Ms N's application for PIB. She could not now be said to be permanently disabled for work due to a condition which she no longer had. It was normal for this condition to abate with time.

- Now that the facts surrounding Ms N's employment and its termination had been examined in Court, they had concluded that insufficient weight had previously been given to factors which were not related to her NHS duties. They had not concluded that Ms N's psychiatric symptoms had, at any point, arisen wholly or mainly from her NHS duties.

- They had been asked to confirm whether Ms N's current condition was wholly or mainly attributable to the decision to terminate her employment on the grounds of gross misconduct. They had to conclude that there were a multitude of factors which contributed to Ms N's current condition of major depressive disorder. These included the decision to terminate her employment, the negative impact on her reputation and self-esteem, the impact of multiple legal actions and the financial distress the failed actions had precipitated.

- They had chosen to prefer the contemporaneous medical records and the findings of the Court as to matters of fact because these had been cross-examined under oath. Where the only evidence of an event was Ms N's personal testimony, including her statements to doctors, they considered this less likely to provide a true account of an event.

- Ms N continued to harbour perceptions about her employment and dismissal which were not supported by the factual material provided. It was sometime the case that individuals remained fixed in their views of an event. It might not be possible for Ms N to change her perspective of events.

- Ms N's solicitors had highlighted her current financial plight, but this was not relevant to the consideration of the facts of the case and the medical evidence.

- They had considered material supplied by Ms N regarding the CQC, Monitor and the Trust. This material was not relevant to considering whether Ms N satisfied the criteria for PIB.

- Attribution had not been accepted, so there was no PLOEA.

68. NHS BSA's MA as quoted in NHS BSA's letter of 20 June 2017

The MA provided a comprehensive response to matters raised by Ms N's solicitors. What follows is, of necessity, a brief summary of the main points:-

- Their first duty was to determine whether the injury claimed by Ms N in her application for PIB had been caused by the events described by Ms N.

- The details provided by Ms N's then solicitors described a campaign of bullying and harassment which had culminated in an incident of false imprisonment. The events were later considered in the High Court judgment, which found that Ms N had not been subject to such a campaign or to false imprisonment. The Court had determined that there had been one incident of inappropriate behaviour of relatively short duration, which could not reasonably be expected to cause, or materially contribute to, a significant psychiatric illness.

- There was no evidence that Ms N had shown substantial, overt distress on the day of this incident and she attended work the following day. She had not attended her GP or required emergency psychiatric care. In a letter written the following day, she had not mentioned imprisonment. She had subsequently been

well enough to engage in dialogue relating to voluntary termination of her employment. This pointed to relatively good mental health at the time.

- The Court had found that it was the management process itself which had caused Ms N's injury. However, the Court was not required to determine, on the balance of probabilities, whether the injury for which Ms N was claiming PIB had been caused by the claimed events.

- It was accepted that the incident of poor conduct on the part of a manager caused Ms N a degree of distress. The evidence pointed to a minor degree of distress at most.

- Considering all of the material provided, it could not be accepted that Ms N's claim for "a form of post-traumatic stress disorder" was wholly or mainly attributable to a campaign of bullying and harassment which had culminated in an incident of false imprisonment.

- They were not required by the Regulations to provide a diagnosis. In Ms N's case, the psychiatric experts had not agreed on one diagnosis or the extent of her disability.

- They were not required to consider whether any other event caused an injury. It would be normal practice to draw NHS BSA's attention to all relevant factors which may have caused permanent injury so that it could make a fair decision.

- NHS BSA had not asked whether the management process itself was considered to have caused injury. This had not been claimed by Ms N to have caused her PTSD. They had considered this in the absence of a request to do so.

- The normal management process described in the High Court judgment did not result in Ms N attending her GP or any other doctor prior to the one specific event. It was not possible to reach a conclusion as to what symptoms may have been present as a consequence. It was probable that Ms N took time off work, but the details were not available.

- Ms N's solicitors had referred to an injury caused by perception of injustice. The High Court judgment had referred to a sense of injustice being the root cause of Ms N's problems. This was in contradiction to Ms N's initial application which had cited specific events as being the reason for her illness. If she had claimed that her condition was caused by the management process causing a sense of injustice, this would have been considered by the MAs for her TIA and PIB.

- The rationale already provided explained why the evidence was consistent with continuing psychological difficulties which were accepted to have been caused by Ms N's feeling of injustice regarding the role of an external consultant, the one incident of poor treatment and, most importantly, her subsequent dismissal for misconduct.

- Given her previous experience and managerial position, Ms N's misconduct must have caused her anxiety even before she was aware that she had been found out. She would have understood the seriousness of her actions and the natural consequences. Loss of career and severe financial distress occurred as a direct consequence. It was their view that these factors were the predominant cause of Ms N's long standing psychological ill health.

- The High Court judgment did not address the question of whether Ms N's PTSD was wholly of mainly attributable to her NHS employment, but it did provide evidence regarding specific events which she had claimed to have occurred.

- They were required to make their own judgment regarding causation for the purposes of PIB and they were not bound by the High Court judgment, which looked at a different legal question.

- It was accepted that Ms N may have been distressed and felt aggrieved by management processes, but these were not claimed by her to have caused her PTSD. She had not raised a grievance regarding such processes. She did not attend her GP or any other doctor, but she may have taken some time off work as a consequence.

- It was accepted that Ms N had a disease.

- In the High Court judgment, the judge had said that he had reservations about the severity of Ms N's symptoms, but was prepared to proceed on the basis of Dr Broadhead's description of the severity of her symptoms "for present purposes". They understood this to mean for the purposes of determining the specific legal case relating to harassment. It did not provide a binding view that Ms N's psychological condition was wholly or mainly attributable to her NHS employment.

- There was insufficient evidence to conclude that Ms N's condition was wholly or mainly due to the accepted incident or her wider sense of distress relating to management processes or the external consultant. It was accepted that there was likely to have been some distress due to these events and, in that regard, the High Court judgment was not contradicted.

- They had concluded that the mental health symptoms described in the medical records and by the specialists were not wholly or mainly due to Ms N's NHS duties. The decision to raise a false allegation of imprisonment, repeated misconduct, subsequent dismissal and litigation were far greater stressful factors. None of these could be considered to arise from Ms N's NHS duties.

- When considering disease and injury causation, it had to be considered whether the specific event or events alleged to be injurious were sufficient to cause the specific outcome, taking into account any individual variability in vulnerability to disease. The Court finding that there was one specific distressing incident only is relevant because Ms N had claimed a pattern of serious repeated bullying, threatening and imprisonment. Had the Court found that the events occurred as

described by Ms N, it might have been possible to conclude that her condition arose wholly or mainly due to these events.

- The High Court judgment specifically examined whether the events claimed by Ms N to have caused her illness occurred or not. It would be perverse not to consider the evidence which was presented.

- The Court found that only one, relatively minor, incident occurred. This did occur in the course of Ms N's employment, but the test for PIB went beyond this. They had concluded that Ms N's condition was not wholly or mainly due to this one minor incident or to her feeling of being generally aggrieved by the management process.

- It was accepted that Ms N suffered an injury due to one event. However, the test for PIB was whether the disease claimed by Ms N, which she termed PTSD but which had been labelled differently by specialists, was wholly or mainly caused by injury sustained whilst carrying out the duties of her NHS employment.

- For PIB, the disease had to be determined to arise from a specific event or events which occurred not merely in employment but arising from the duties of the NHS employment.

- They had used the word "harassment" in its normal sense; rather than in relation to the specific legal test.

- Ms N had claimed that her illness arose from specific events; not a perception of injustice. It was not disputed that she probably suffered psychological symptoms due to the management process itself, which caused her to feel fearful and unjustly treated. It was accepted that one cause of Ms N's psychological illness was probably the management process itself.

- The Court found that Ms N was not an accurate witness and that the external consultant had not been physically or verbally aggressive, as Ms N had claimed, except on one occasion. It was accepted that a "misguided and slanted" view of employment matters was not a bar to PIB. However, the finding that Ms N's testimony was inaccurate led to a need to ensure that events accepted as injurious for PIB were corroborated in some way.

- Ms N had claimed that she was injured by particular events. The evidence was insufficient to reach the conclusion, on the balance of probabilities, that most of these events occurred. They had concluded that most probably did not.

- The test was whether the disease arose from an injury; not from a perceived injury. For example, if a person injured their head on their way to work and suffered impaired memory such that they later claimed the injury happened when they were at work, it would not be correct to determine entitlement to PIB on the basis that they perceived their injury to have happened at work contrary to witness evidence.

- Ms N's solicitors had submitted a catalogue of events which, if true, would be regarded as seriously distressing events, including false imprisonment. However, Ms N had not been found to provide accurate testimony and corroboration was scant. They could not see how Ms N could be considered to have been injured, for example, by being falsely imprisoned when the evidence indicated that this did not occur.

- They took the view that, on their own, the distress arising from the duties of Ms N's NHS employment would be expected to cause no more than temporary symptoms.

- It was accepted that Ms N may have felt unwell prior to November 2010, but the fact that she did not seek medical advice or certification pointed to her symptoms not being substantial. Other factors, not related to Ms N's NHS duties, provided the majority of the stressors causing long term psychological illness.

69. NHS BSA's MA at stage one of the IDRP

The MA said NHS BSA had asked that the following questions be addressed:-

1. Was there an injury/contraction of a disease in the course of Ms N's NHS employment?

2. If so, was this injury wholly or mainly attributable to the duties of Ms N's NHS employment?

3. If so, had there been a PLOEA in excess of 10%?

The MA noted that Ms N had submitted a claim for PIB on the basis of PTSD caused by incidents and events at the Trust. They then set out a history of Ms N's case, including references to Ms N's descriptions of what had happened and related correspondence contained in her occupational health records. The MA referred to reports from Dr Faith, Ms Auchterlounie, Dr Bennett, Dr Broadhead, Dr McWilliams, Dr Kamper and Dr Montazeri.

In relation to the evidence submitted in support of Ms N's initial application, the MA said:

> "[Ms N] has been in events at work that have fractured her employment relationship and threatened her livelihood and esteem. She is seeking redress through legal means. She has developed an adjustment disorder as a consequence of everything that has happened and all of the medical and psychological advice is that these events have precipitated the condition …
>
> There is a difference in accounts between the employer and Ms N. Her account … was that she was subjected to the most severe workplace bullying and intimidation … In my experience such events would be at the extreme end of workplace bullying and would be highly likely to evoke the response that is claimed.

> The employer, on the other hand, admits to only one occasion on which they were aware that [Ms N] was bullied … they consider that her distress relates to the separate disciplinary process arising from the alleged breach [of the] Trust's policies on handling sensitive information …"

In relation to the evidence submitted in support of Ms N's first IDRP appeal, the MA said they could see that, by 2012, Ms N had severe depression.

In relation to the evidence submitted for a deterioration review, the MA said, based on the history provided by Ms N, the medical advisers agreed that the index events had precipitated a set of severe psychological reactions.

The MA then responded to the three questions they had been asked to address as follows:-

1. "In the course of her employment [Ms N] appears to have been undermined by the appointment of a management consultant who threatened her role and subsequently her person and family and on 10/11/2010 imprisoned her in a room and was threatening. This is not challenged by the employer; indeed the employer dismissed the consultant after investigating it.

   Her response to those events is consistent with someone subjected to serious assault."

2. "At the time of the index events [Ms N] was undertaking her role."

3. "The evidence is that the consequences have been very severe and altered her capacity for employment negatively; she is not only capable of a much reduced non-executive role, indeed at one stage she was found incapable of participating in a legal case under the Mental Capacity Act. Some improvement will occur once events have been settled."

The MA went on the discuss the High Court judgment and noted that NHS BSA legal advice was that it constituted high quality evidence because the case had provided an opportunity for the evidence to be tested and examined in Court.

The MA noted that Ms N had given the same history of events in Court as she had in her application for PIB and to her doctors. They said:

"For workplace stress and PTSD to occur there must be acutely stressful events, and if they did not occur, or did not occur to the extent claimed, or other significant factors were involved then we have to reconsider the plausibility and coherence of the evidence previously considered."

The MA referred to several comments by the judge in the High Court judgment. These comments related to the judge's assessment of Ms N's credibility as a witness. The MA then re-addressed the three questions posed by NHS BSA in light of the High Court judgment. They said:

1. “The answer to this question remains unchanged; [Ms N] developed an adjustment disorder with depression during the course of her employment.”

2. “The psychological construction for her claim for [PIB] was that she was subjected to severe stressful events on 10/11/2010 …

   When the evidence to support that version of events was tested in the High Court, the main claimed for stressors were not corroborated. The judgment was that there was a single short lived event where … was abusive but the event was short lived and they all proceeded to have an executive meeting …

   I accept that … [the judge] was referring to the employer’s duty to prevent harassment. But the evidence … that was submitted for that claim concerned the index events that also gave rise to the [PIB] claim. And if that judgment in regards the evidence supporting the harassment claim is correct then I do not see how I can reach a different conclusion about the significance of the index events in relation to this claim.

   I want to make clear that I am advising rejection of attribution because the examination of the index events in Court, led to a conclusion that they were far less significant than claimed, Taking what has been accepted in Court could not give rise wholly or mainly to any significant long term mental ill health. On the other hand being involved in an Organizational review that threatens your own role and in addition being dismissed for breaching the IT rules and losing a senior NHS role because of it, are more likely the causes of any significant mental ill health in this case.”

3. “There has been no PLOEA as attribution has not been accepted in this case.”

70. Dr Owen, trainee clinical psychologist, 10 January 2018

    Dr Owen said she was providing a summary of the psychological therapy which Ms N was receiving. She said Ms N had been referred for assessment of the suitability of psychological therapy to address difficulties associated with PTSD following a work-related incident, severe anxiety and low mood. Dr Owen said Ms N had described her difficulties and these included: limited ability to leave her house; distress; problems with sleep; and periods of dissociation. She described the therapy and said Ms N had completed seven out of 16 sessions. She said Ms N had shown commitment to the therapy.

71. CPN Kawome, 17 January 2018

    Mr Kawome confirmed that Ms N was receiving treatment for PTSD, depression and anxiety. He said she had been referred to her local mental health service prior to 26 October 2011 and had been treated by her GP in November 2010. Mr Kawome said their records showed that Ms N’s mental health issues stemmed from work-related trauma, stress and anxiety associated with her employment at the Trust.

72. NHS BSA's MA at stage two of the IDRP

The MA noted that Ms N had been awarded a PIB on the basis of a PLOEA of greater than 75%. They noted that the Trust had subsequently submitted the High Court judgment and had advised that Ms N had been dismissed on the grounds of gross misconduct. The MA noted that NHS BSA had received legal advice to the effect that the High Court judgment was material evidence in relation to the incidents for which Ms N had claimed a PIB. They said:

> "I note that I am required to disregard the transcript of the Court proceedings as the findings in Justice Parker's judgement provide sufficient information to determine whether the factual allegations made by [Ms N] were, on balance of probability, likely to have occurred or not."

The MA then referred to the questions which they were required to address:

1. Whether Ms N sustained an injury or contracted a disease and, if so;
2. Whether the injury was sustained, or the disease contracted, (a) in the course of Ms N's employment, and (b) whether it was wholly or mainly attributable to Ms N's employment.

The MA said, if they concluded that Ms N had sustained a qualifying injury, they would then consider if she had sustained a PLOEA of greater than 10%.

The MA said they had not read the advice provided by previous MAs in order to approach the case without preconceptions. They then listed the documents which they considered to be of particular relevance:

- The referral documents
- Ms N's statement dated 11 January 2012
- Ms N's sickness absence record
- The High Court judgment
- Reports from:
  - Dr Jayakumar 19 July 2012
  - GP records
  - Dr McWilliam 6 January 2015
  - Dr Montazeri 11 April 2014
  - Dr Kampers 27 June 2013
  - Dr Bennett 19 and 28 March 2012
  - Dr Broadhead 31 January 2012
  - Dr Faith 19 July and 13 August 2011
  - Dr Williamson 10 February 2012

In answer to Question 1, the MA said five psychiatrists, a clinical psychologist and Ms N's GP had diagnosed a mental illness, but there was some difference of opinion as to the appropriate diagnosis. They suggested that the most likely diagnosis was

depression with anxiety, as indicated by Dr McWilliam. The MA said they had given precedence to Dr McWilliam's opinion on the basis that he had had access to previous psychiatric reports and had been able to take the course of Ms N's ill health into account over the longest period of time.

The MA answered Question 2(a) in the affirmative. They noted that Dr Broadhead had said that Ms N's symptoms began in September/October 2010 and the GP records showed that Ms N consulted her GP in November 2010. The MA said Ms N had been employed in the NHS at this time. They said there did not appear to be any doubt that Ms N's relationship with her employer and co-workers was under strain in 2010.

The MA answered Question 2(b) in the negative. They referred to comments by Mr Justice Parker to the effect that the facts of what had taken place were contested and that Ms N's perceptions were likely to be incorrect. The MA referred to the wording of Regulation 3(2) and said that there did not appear to be any requirement for a claimant's perceptions to be accurate or reasonable. They said the accuracy or otherwise of Ms N's perceptions were not relevant to the question of whether she had sustained a qualifying injury. The MA said that the relevant matter was whether Ms N's impaired mental health was wholly or mainly attributable to her employment and that they had difficulty concluding that it was. They gave the following reasons:

- The doctors who had assessed Ms N would, to some extent, have based their opinions on the account given by her of events in 2010.
- Mr Justice Parker had cast doubt on the reliability of the information Ms N would have given to her doctors. In light of this, it was appropriate to question how much weight should be given to the doctors' opinions as to the likely cause of Ms N's mental illness.
- Regulation 3(3) stated that the regulations should not apply to a person in relation to any injury which was wholly or mainly due to or seriously aggravated by their own culpable negligence or misconduct. Disciplinary proceedings had been brought against Ms N and she was dismissed on the grounds of gross misconduct. Irrespective of the outcome of the proceedings, the fact that they were underway would have been a contributory factor to Ms N's impaired mental health.
- The underlying pathophysiology of major depressive illness had not been defined and a specific cause was not known. It was a multifactorial condition involving both genetic and environmental factors.
- It was likely that Ms N's depressive illness arose as a result of a combination of factors; including her genetic heritage, her anxiety about the Trust's review of her department, her perception of her co-workers' actions, and the disciplinary proceedings. Given these multiple factors, it was not possible to conclude that Ms N's depressive illness was wholly or mainly attributable to her employment.

73. The MA's supplementary report at IDRP stage two

The MA was provided with the reports from CPN Kawome, dated 17 January 2018, and Dr Owen, dated 10 January 2018, and asked to comment. They said Mr Kawome's report did not provide any new insight into the likely cause of Ms N's impaired mental health. The MA said they had already seen reports dating from 2011 to 2015 and Ms N's GP records and were inclined to give these greater weight because they were more contemporaneous. They said Mr Kawome had provided details of Ms N's treatment and confirmed that this was ongoing, but this was not relevant to the issue of causation. The MA said Dr Owen had summarised Ms N's current treatment and the impact of her impaired mental health on her daily life, but this did not add to their understanding of causation.

The MA confirmed that the new evidence did not change their opinion that Ms N had not sustained an injury or contracted a disease which was wholly or mainly attributable to her employment.