PO-23437

Ombudsman's Determination

Applicant	Mrs N
Scheme	NHS Pension Scheme (**the Scheme**)
Respondents	NHS Business Service Authority (**NHS BSA**) Plymouth Hospitals NHS Trust (**PHNT**)

Outcome

1. The complaint against NHS BSA is not upheld. Although, it did not take into account the complete information to which it had access when considering Mrs N's request, it was correct to conclude that she was not entitled to an IHRP.

2. The complaint against PHNT is partly upheld, because PHNT provided NHS BSA with incorrect information as to the reason why Mrs N's employment ended. PHNT shall pay Mrs N £500 for the significant distress and inconvenience it has caused her.

3. I make no findings in respect of Mrs N's claim that PHNT failed to inform her about the IHRP as this claim is out of time.

Complaint Summary

4. Mrs N's complaint against NHS BSA is that NHS BSA incorrectly refused her request to apply for an ill health retirement pension (**IHRP**) from active status.

5. Mrs N's complaints against PHNT are (1) that PHNT provided NHS BSA with incorrect information regarding the reason her employment ended, and (2) that PHNT did not provide her with any information or guidance to enable her to claim IHRP before she left employment.

Background information, including submissions from the Parties

Material facts

6. Mrs N worked for PHNT as a Senior Clinical Technologist from 1999. She was a member of the Scheme during her employment with PHNT. Regulation E2A of the

NHS Pension Scheme Regulations 1995 (as amended), (**the 1995 Regulations**) (SI1995/300), applied to Mrs N during her period of active membership of the Scheme. The relevant extract from Regulation E2A is set out in the Appendix.

7. In November 2007, Mrs N became ill and in July 2008, she was diagnosed with Systemic Lupus Erythematosus. At the time of her diagnosis, her role involved working in "ARP" and "DEXA" clinics and her hours were 33 and a half per week.

8. In November 2008, following an Occupational Health (**OH**) recommendation, Mrs N returned to work on a phased return basis. Her initial hours were two hours per day, twice a week on non-consecutive days with the expectation that she would eventually be able to build up to a maximum of 22 to 25 hours per week. Her duties changed to working solely in DEXA clinic.

9. On 11 December 2008, the OH advisor wrote to PHNT providing her opinion that said:

> "…I am now in receipt of a report from her consultant rheumatologist. This supports that a return to work on a gradual basis could now be considered and I would therefore recommend that plans be made to progress this…part-time work would certainly be within Mrs N's reach, but that return to work in a full-time capacity will be likely be difficult [sic]."

10. In January 2009, PHNT referred Mrs N to an OH advisor for assessments. The OH advisor concluded that:

> "…whilst I appreciate that staffing levels can present problems, the availability of assistance for the manual handling element of these cases is important to her successful employment rehabilitation as well as having potential health and safety implications for both Mrs N and her patients."

11. In February 2009, a workplace assessment was carried out in respect of Mrs N's workplace. The assessment concluded that manual risks in the clinical area should have been addressed and assessments were relevant to all staff.

12. On 19 February 2009, Mrs N raised a grievance with PHNT. The key points she raised in her grievance were:

- without additional assistance, she was unable to assist patients with mobility issues and she had to reschedule the appointments for these patients;
- she had repeatedly asked PHNT for assistance, but none had been provided to her and it seemed her requests had been ignored;
- she was forced to work alone and often felt unwell, with a lunch break being a luxury; and
- there was lack of respect and privacy regarding her illness on the part of PHNT and she believed she was being discriminated against because of her disability.

13. In August 2009, PHNT did not uphold Mrs N's grievance. It decided that she was not discriminated against because of her disability and she was not a victim of bullying. It said it would "continue to take [steps] to improve management and working relationships within [her] department."

14. On 30 September 2009, Mrs N wrote to PHNT saying that following the unsatisfactory outcome of the grievance, she had no choice but to resign with immediate effect. She said PHNT had failed to properly implement adjustments which were identified by the OH advisor in its January 2009 report.

15. Following her resignation, Mrs N referred her complaint to the Employment Tribunal (**ET**). In August 2010, the ET found that PHNT had discriminated against Mrs N on the grounds of disability by failing to make reasonable adjustments. The ET decided that Mrs N's resignation amounted to a constructive dismissal by reason of its failure to make reasonable adjustments, the manner in which the grievance procedure was conducted and in respect of the conclusions reached in the grievance process (**the ET judgment**)[1].

16. In April 2011, the ET awarded Mrs N £105,643.01 in compensation. The compensation included an award for injury to feelings and loss of pension rights namely, £14,130.53 for enhanced/accrued pension loss, £4,221.94 for past pension loss, and £14,475.22 for future pension loss.

17. Mrs N appealed the amount of compensation for pension loss the ET awarded to her, but there was no appeal in respect of the reasons for dismissal. In July 2015, the ET awarded Mrs N £103,950.27 in total in respect of pension loss, including its previous awards for pension loss.

18. On 23 September 2017, Mrs N's husband found information relating to IHRP on the NHS website. This prompted Mrs N to write to NHS BSA, the manager of the Scheme, requesting that it retrospectively consider her eligibility for an IHRP from active status. Mrs N said since leaving her NHS post, she had not been able to work, and she was in receipt of state benefits. She also said that she tried to work two mornings per week as a volunteer for a charity, but this was short lived because she was not able to cope physically. Mrs N did not mention the ET judgment at this stage.

19. In November 2017, NHS BSA contacted Mrs N, informing her that in order to be considered for an ill health pension she would need to complete form AW240 for early payment of deferred benefits on the grounds of ill health (**EPDB**). This was because she left her employment in September 2009 and she was a deferred member of the Scheme.

20. Dissatisfied with NHS BSA's response, Mrs N raised a formal complaint under the Scheme's two-stage Internal Dispute Resolution Procedure (**IDRP**). In her complaint, she said that she wanted NHS BSA to consider a retrospective application for an

[1] Reserved Judgment – Case 1701040/2009 dated 31 August 2010

IHRP dating back to the date when she left employment and not an application for deferred benefits.

21. On 2 February 2018, NHS BSA sent Mrs N a response stating that since she had lodged a complaint, it had been making enquiries with PHNT on the matter. NHS BSA subsequently tried to make contact with Mrs N but to no avail.

22. On 11 February 2018, Mrs N submitted her application for an EPDB.

23. On 15 March 2018, there was an email exchange between PHNT and NHS BSA regarding Mrs N's reason for leaving. PHNT subsequently confirmed to NHS BSA that Mrs N left employment by reason of "voluntary early retirement due to incompatible working relationships."

24. On 27 March 2018, NHS BSA sent Mrs N a stage o IDRP response. The main points were:-

- PHNT said that Mrs N left employment because of incompatible working relationships and not due to ill health;
- the NHS Pension Scheme Regulations only allowed for entitlement to an IHRP when the member's employment was terminated on the grounds of ill health; and
- as Mrs N's employment was not terminated on the grounds of ill health, it could not consider a retrospective application for an IHRP.

25. In April 2018, Mrs N appealed under IDRP stage two. In her appeal, Mrs N informed NHS BSA of the outcome of ET judgment. Mrs N informed NHS BSA that in the months after she left employment with PHNT, the ET had found PHNT guilty of disability discrimination for failing to provide reasonable adjustments. She confirmed that the ET had found that the reason for her leaving employment with PHNT was "constructive unfair dismissal on the grounds of failure to make reasonable adjustments." On that basis, she believed that NHS BSA should reconsider its decision.

Summary of Mrs N's position

- She did not know about an IHRP before she became ill and it was not mentioned in the first year she became ill or subsequently. She later discovered that PHNT's policies in effect in 2008 stated that the IHRP should have been fully discussed with her. PHNT had a policy for managing sickness absence (the sickness absence policy), which stated that:

> "….
>
> **13. Early Retirement on Ill Health Grounds**
>
> If you are eligible, consideration will be given to early retirement on the grounds of ill health and such possibility will be fully discussed with you…."

- If she had been made aware of an IHRP at the time, she would have investigated this option further, she would have discovered that she fulfilled the criteria for tier 2 IHRP, she would have applied for an IHRP and she would have taken all steps required to secure an IHRP. Instead, she was forced to take the distressing and daunting decision to resign as she could not continue working in her role due to ill health.

- She would not have resigned from her employment with PHNT had it not been for her ill health. Having been on sick leave, she returned to work on reduced hours in November 2008. However, by March 2009 she was incapable of performing her new role. The OH report of January 2009 said that her new role "exceeded her physical capacity" and following a three-stage grievance process, she had no option but to resign.

- Prior to her complaint to NHS BSA, it did not make an actual decision on her entitlement to an IHRP from active status. NHS BSA would not accept her attempts to make an application, and it repeatedly stated that she needed to apply for a deferred pension. This is what led to her stage one IDRP complaint.

- NHS BSA informed her that her employment was terminated by voluntary early retirement due to incompatible working relationships. This is incorrect because the only reason she resigned was due to her ill health.

- She does not necessarily fault NHS BSA's stage one IDRP response, since its conclusion at stage 1 IDRP was based on incorrect information supplied by PHNT. She is disappointed with the stage two IDRP response because NHS BSA took "a blinkered view and merely restated their stage one conclusion." NHS BSA did not consider, investigate, or respond to the new information she provided at IDRP stage two about PHNT's "incorrect claims, and they have reached a decision which can only be considered perverse in the light of the evidence."

- The compensation she received from the ET was only a "fraction" of what she would have received if she were in receipt of enhanced IHRP.

- She should be awarded an IHRP at tier 2 backdated to the date her employment terminated.

- While she was off work and following her diagnosis of Lupus, PHNT's OH Advisers had concluded that she could not return to her previous duties or work the same hours. It was repeated on many occasions, including in the ET judgment, that she was unable to return to her original role and unable to work her original hours. It was therefore clear that her prognosis prior to leaving PHNT's employment was one that fulfilled the criteria for IHRP, and PHNT ought to have discussed the option of applying for IHRP with her. However, PHNT only discussed the possibility of returning to a new role on reduced hours with her.

- The sickness absence policy is an internal PHNT Human Resources document that was not readily ascertainable by her prior to her departure from employment.

It came into her possession after she left employment, when evidence was being gathered for the ET. However, even if she had been able to access the policy document while she was ill, the policy was clear that she did not need to take any action for the initial discussion regarding IHRP to take place.

- PHNT did not require any further information to determine that IHRP was an option. It had the OH reports, grievance process decisions, ET judgments, the sickness management policy, and access to the relevant legislation. All of which was sufficient information for it to determine that IHRP was an option for her.

- Her employment with PHNT can be split into "job role 1" and "job role 2". Job role 1 is the Senior Clinical Technologist role that she was employed in prior to going on sick leave. Her hours of work in job role 1 were 33 and half hours per week. However, following the OH conclusions in November 2008, she could not continue in job role 1 and she returned to work on 27 November 2008 in job role 2. In job role 2, she returned to work on a phased return basis, working reduced hours and with reduced responsibilities. There are therefore 2 roles from which she would have applied for IHRP had PHNT discussed it with her. The first being job role 1, and the second being job role 2.

- Under the Limitation Act 1980 (the **Limitation Act**), the time limit for a claim in negligence starts to run three years from the date of knowledge. Even if she had access to the sickness absence policy, she would have had no reason to suspect negligence had occurred when her employment ended. It is impossible to identify negligence from the policy document alone, as detailed knowledge of the pensions legislation is also required. The negligence was only known to her in 2017 when her husband studied the legislation on the Government's legislation website and informed her about IHRP.

- She does not agree that NHS BSA should consider the pensions related compensation awarded to her by the ET when deciding the amount of any ill health benefit she may be entitled to. The pensions related compensation was awarded under employment law regulations, and NHS BSA cannot determine the actual amount of the ET award that would remain due because this is an employment law matter. A significant amount awarded by the ET under the head of "pension loss" was not in fact compensation for actual financial loss of pension, it was effectively a financial penalty on PHNT directly attributed to their incompetence in handling her situation, and it would not be correct that she effectively pay this penalty for PHNT. Furthermore, bringing the ET action came at vast financial cost to her and repayment of what would become wasted costs would also need to be considered.

Summary of NHS BSA's position

- On 7 September 2010, Mrs N requested an estimate of pension benefits at age 60 and it provided her with this information the following day. It also advised Mrs N

that additional information about the Scheme could be obtained from its website. No reference was made to IHRP at this time.

- Between September 2017 and February 2018, it corresponded with Mrs N regarding her request to apply for in-service IHRP. It asked Mrs N to arrange for the completion of form AW240 for EPDB. It informed Mrs N that it might be able to use this form to consider retrospective entitlement to IHRP once the necessary clarification was received from PHNT.

- The NHS employer is responsible for providing it with accurate information regarding the member.

- An application for in-service IHRP can only be considered if the sole reason for termination of employment is ill health. This information is provided by the NHS employer.

- An application for in-service IHRP is considered as at the date of severance (30 September 2009 in Mrs N's case). Such consideration would disregard any deterioration to the health condition or new medical condition diagnosed after the last day of employment.

- PHNT confirmed that Mrs N did not leave employment on the grounds of ill health. PHNT confirmed that the reason Mrs N left employment was "voluntary early retirement due to incompatible working relationships" and "not due to ill health".

- Mrs N explained within her stage two IDRP submissions that an ET had found PHNT liable for disability discrimination for failing to make the reasonable adjustments that the Occupational Health Department had identified as being required. Mrs N did not provide any further evidence in support of her claim that her contract of employment was terminated on the grounds of ill health.

- In the absence of any evidence to confirm that Mrs N left NHS employment solely on the grounds of ill health, it is not in a position to consider her retrospective entitlement to an IHRP.

- If Mrs N disputes the reason for the termination of her employment, she will need to take the matter up with PHNT as this is an employment matter.

- Mrs N is entitled to receive an EPDB on 22 February 2018, which is the date her GP completed her application form. The application for an EPDB on the grounds of ill health was considered as at the date the AW240 application was received (February 2018). It is not the case that because an EPDB on the grounds of ill health was granted that any retrospective application for tier 2 IHRP will be granted. The entitlement consideration for in-service benefits and EPDB is assessed at two entirely separate points in time.

- Based on the information provided, Mrs N has been granted entitlement to an EPDB on the grounds of ill health from 22 February 2018, but she has not claimed these benefits.

- Mrs N did not provide it with a copy of the ET judgment during IDRP. It has not had sight of the ET judgment and does not hold a copy of the judgment.

- If PHNT confirms that the correct reason for termination of employment is constructive dismissal by failing to make reasonable adjustments, NHS BSA may have to seek legal guidance as to whether these grounds for termination of employment fall under the provisions of regulation E2A.

- It will be unable to comply with a direction by the Ombudsman requiring it to "take into account the pensions-related compensation that Mrs N has already received to avoid Mrs N receiving, in total, more benefits than she is entitled to receive under the Regulations". This is because there are no provisions within the Regulations to take into account the pensions-related compensation.

Summary of PHNT's position

- Mrs N's letter of resignation confirmed that she resigned due to PHNT's failure to make reasonable adjustments for her to remain in her role.

- The reason for her employment ending was recorded on its payroll system as "voluntary resignation – incompatible relationships."

- The information previously provided to NHS BSA by its payroll department was incorrect as it referred to voluntary early retirement rather than resignation.

- It does not have access to any further documents from which to ascertain whether ill health retirement was an appropriate option to explore with Mrs N at the time. It does not have access to the information on an IHRP that would have been available at the time of Mrs N's employment. Having reviewed the correspondence relating to Mrs N's sickness absence, there is no reference to ill health retirement and the correspondence refers to supporting her return to work.

- It is unclear why the ET judgment was not passed to NHS BSA at the time it received note of the judgment.

- In May 2012, the ET awarded Mrs N £140,799.53 in compensation, which comprised of compensation for pension loss, loss of earnings, and injury to feelings. Mrs N appealed the compensation for pension loss and in July 2015, the ET awarded Mrs N £103,950.00 in total for pension loss.

26. Mrs N has raised a number of concerns, so I shall address what I consider to be the main complaints in turn. Any other points have been considered, but as they do not impact my decision, they will not be directly commented on.

Complaint against NHS BSA

27. Mrs N has complained that NHS BSA refused to award her an IHRP from active status. Mrs N believes that she is entitled to a tier 2 IHRP.

28. The key issue for me to determine is whether NHS BSA reached its decision correctly by considering all the relevant information made available to it, disregarding irrelevant information, asking the correct questions, and then reaching a reasonable decision.

29. The parties agree that Mrs N did not submit an application for an IHRP from active status and that, prior to the IDRP, NHS BSA did not make any decision in respect of Mrs N's entitlement to an IHRP. As part of the IDRP, NHS BSA informed Mrs N that it might be able to use the information it received in respect of her application for an EPDB to consider retrospective entitlement to an IHRP.

30. The relevant condition for an IHRP under Regulation E2A is that the member's employment is terminated "because of physical or mental infirmity as a result of which the member is … permanently incapable of efficiently discharging the duties of that employment"[2]. Therefore, to determine whether Mrs N was entitled to an IHRP, NHS BSA needed to establish the reason for her leaving employment.

31. NHS BSA said that PHNT informed it in March 2018 that Mrs N's employment was terminated by reason of voluntary early retirement due to incompatible working relationships, not due to ill health.

32. The reason for termination is primarily an employment issue between PHNT and Mrs N. PHNT is responsible for providing NHS BSA with this information. I find that it was reasonable for NHS BSA to rely on PHNT to confirm the reason Mrs N's employment ended, and to base its decision on the reason PHNT provided.

33. As part of the IDRP, Mrs N provided NHS BSA with details of the ET judgment, which concluded that the reason for termination was constructive dismissal by reason of PHNT's failure to make reasonable adjustments for Mrs N. NHS BSA did not investigate or take this into account when reaching its final decision under the IDRP. Accordingly, it did not consider the complete information to which it had access when determining Mrs N's complaint. This was maladministration.

34. In accordance with *Brooks v Civil Aviation Authority [2002] 44 PBLR*, I have reviewed the information submitted to this office by the parties and I have reached the view that, as held in the ET judgment, Mrs N's dismissal was because of discrimination in

[2] This is the "tier 1 condition", an additional requirement applies for the "tier 2 condition".

failing to make reasonable adjustments to accommodate Mrs N's disability. The facts as set out in section 3 of the ET judgment show that if adjustments had been made to her work environment Mrs N would have been able to return to work.

35. This finding of failure to adjust does not amount to termination of employment because of physical or mental infirmity, so the relevant condition in Regulation E2A is not met. Accordingly, even if NHS BSA had taken into account the ET judgment and made an informed decision about Mrs N's eligibility, it would still have concluded that she did not meet the criteria for an ill health pension.

36. Whether the relevant condition in Regulation E2A is met is an issue of fact rather than discretion. Therefore, rather than remit the decision to NHS BSA, I uphold its conclusion that Mrs N is not entitled to an ill health pension under Regulation E2A, but for the reasons explained above rather than those given under the IDRP.

37. In addition, I cannot ignore the fact that, while a complaint about NHS BSA's IDRP decision is in time to come to this office because that the complaint was brought within three years of the decision, the reason for Mrs N's dismissal considered by the Employment Tribunal is out of time, so is her claim for eligibility for an ill health pension at the time she left employment. I have also taken into account that the ET has compensated Mrs N for pension loss and on that basis I have made no directions against NHS BSA.

Complaints against PHNT

38. Mrs N's complaints against PHNT are: (1) PHNT provided NHS BSA with incorrect information in 2018 regarding the reason her employment ended; and (2) PHNT did not provide her with any information or guidance to enable her to claim an IHRP before she resigned from employment.

Incorrect information provided to NHS BSA

39. PHNT has admitted in its submissions to this office that the information its payroll department provided to NHS BSA was incorrect in its reference to voluntary early retirement rather than resignation.

40. As noted in paragraph 33 above, the ET found that the reason for the termination of Mrs N's employment was constructive dismissal by reason of PHNT's failure to make reasonable adjustments. PHNT did not refer to or provide details of the ET judgment to NHS BSA.

41. The ET judgment was legally binding on PHNT, the judgment contained relevant information as to the reason Mrs N's employment ended, and PHNT did not appeal the ET's findings on liability. Therefore, on receipt of the ET judgment and having satisfied itself that it was not going to appeal the judgment, PHNT ought to have updated Mrs N's records to reflect the reason for Mrs N's departure. This included

updating the information its payroll department held on Mrs N, and ensuring that it provided NHS BSA with the correct reason Mrs N's employment ended.

42. I find that PHNT provided NHS BSA with incorrect information regarding the reason Mrs N's employment ended, and this amounts to maladministration.

43. There was no actual loss caused to Mrs N as far as her eligibility for an IHRP was concerned, as she did not meet the ill health condition in Regulation E2A, as set out in paragraph 34 above. However, as a result of PHNT's maladministration, when Mrs N contacted NHS BSA in September 2017, NHS BSA did not have the correct information upon which to consider Mrs N's eligibility. I am satisfied that this maladministration contributed to the delay in the matter progressing and this caused Mrs N significant distress and inconvenience.

44. For these reasons, I uphold this aspect of Mrs N's complaint.

Failure to provide information about IHRP before leaving employment

45. The second element of Mrs N's complaint is that PHNT failed to provide her with information in respect of the IHRP as referenced in its sickness absence policy. I consider that this policy did place a contractual obligation on PHNT to discuss the IHRP with Mrs N before her resignation.

46. A claim for breach of contract has to be commenced in Court within six years from the date of the breach (section 5 of the Limitation Act). Having considered all the information that has been provided to me, it is my view that the relevant start date for the purposes of section 5 of the Limitation Act is 30 September 2009, which is the date of Mrs N's resignation and therefore the last date by which PHNT can have breached any contractual obligation to inform Mrs N about IHRP. This means that Mrs N had until September 2015 to commence a claim in contract. There is no evidence that Mrs N commenced such a claim by September 2015, which leads me to conclude that a claim in contract is now time-barred under the Limitation Act.

47. If Mrs N wished to pursue this element of her complaint through a claim of negligence in Court, she would need to have commenced her claim within six years from 30 September 2009 (section 2 Limitation Act), or (if later) within three years from the date she acquired knowledge of the relevant facts or might reasonably have been expected to acquire knowledge (section 14A Limitation Act).

48. Mrs N has submitted that she only became aware of PHNT's failure to provide the information in 2017, when her husband studied the legislation on the Government's legislation website and informed her about IHRP. She states that even if she had access to the sickness absence policy when her employment ended, she would have had no reason to suspect that negligence had occurred at that time.

49. The IHRP option is a feature of the NHS Pension Scheme and information in respect of the IHRP would have been readily available to her from NHS BSA through the scheme website, booklet or otherwise. I consider it reasonable to expect that Mrs N

would have acquired knowledge of the IHRP, and therefore, PHNT's negligence in failing to inform her about it around the time her employment ended in 2009, or during the preparation or hearing of the ET in 2010. For this reason, a claim in negligence would be time-barred under the Limitation Act.

50. Therefore, I find that whether framed as a breach of contract or as negligence, Mrs N's claim that PHNT failed to inform her about the IHRP is unenforceable due to the time limits set out in the Limitation Act. Accordingly, I would not be able to provide Mrs N with a substantive remedy even if I upheld this element of her complaint, so I make no further findings on this point.

Directions

51. Within 28 days of the date of the Determination, PHNT shall pay Mrs N £500 in recognition of the significant distress and inconvenience its maladministration has caused her.

Anthony Arter

Pensions Ombudsman
31 March 2021