

## Ombudsman's Determination

Applicant	Mrs S
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondents	NHS Business Services Authority ( <b>NHS BSA</b> )

## Outcome

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

## Complaint summary

3. Mrs S' complaint concerns NHS BSA 's decision to refuse her application for ill health early retirement (**IHER**) as an active Scheme member and its delay in informing her about its decision.

## Background information, including submissions from the parties

4. In August 2017, NHS BSA received Mrs S' application for IHER. The AW33E application form she completed showed that Mrs S' employment had terminated on 24 January 2017. On page 5 of the form Mrs S' employer at West London Mental Health NHS Trust (**the Trust**) said that ill health was not the reason for the termination of her employment and that Mrs S had resigned.
5. Regulation E2A of the NHS Pension Scheme Regulations 1995 (as amended). Regulation E2A(2) states:
 

"A member to whom this regulation applies who retires from pensionable employment before normal benefit age shall be entitled to a pension under this regulation if-

  - (a) The member has at least 2 years qualifying service or qualifies for a pension under regulation E1; and
  - (b) The member's employment is terminated because of physical or mental infirmity as a result of which the member is
    - (i) Permanently incapable of efficiently discharging the duties of that employment (the tier 1 condition) or

- (ii) Permanently incapable of regular employment of like duration (the tier 2 condition) in addition to meeting the tier 1 condition.

6. On 16 August 2017, NHS BSA contacted the Trust to confirm the reason for her resignation and to establish whether it was solely due to ill health.
7. On 11 October 2017, the Trust responded to NHS BSA confirming that it was a normal resignation and it was only after Mrs S had left employment that she went to Occupational Health (**OH**) to ask about IHER. Also on this day, Mrs S telephoned the NHS Pensions Customer Resolution Team (**CRT**) and was informed it was “waiting for a response from their EA.”
8. On 13 October 2017, NHS BSA informed Mrs S that it would be unable to consider her application because she had not left her NHS employment solely due to ill health and it is unable to change the reason for her leaving employment without the consent of the Trust. NHS BSA advised Mrs S that it would be able to consider an application for early payment of deferred pension benefits on the grounds of ill health using the information provided with form AW33E and upon completion of an AW240 application form.
9. On 26 October 2017, Mrs S contacted the CRT as she had not received a response to an email sent the week before. Mrs S explained that the CEO of the Trust had agreed to change the reason for the termination of her employment so that she could retire on ill health grounds. NHS BSA emailed the Trust requesting confirmation of this.
10. On 26 October 2017, Mrs S raised a complaint under stage 1 of the Scheme’s internal dispute resolution procedure (**IDRP**). Mrs S complained about the lack of communication from NHS BSA and her dissatisfaction with its decision concerning her application for IHER and the handling of her application.
11. On 30 October 2017, the Trust emailed NHS BSA confirming that there is no documentation from its CEO advising Mrs S that the Trust has agreed to change the reason for leaving her employment. It further confirmed Mrs S resigned from her post and applied for IHER after she left the Trust.
12. On 22 March 2018, NHS BSA issued its stage 1 IDRP response to Mrs S. NHS BSA confirmed to her that if a member’s NHS employment was terminated for reasons “not solely” due to ill health, then the member can submit an AW240 form; that is an application for early payment of deferred benefits due to ill health. As the Trust had confirmed that Mrs S resigned it was not prepared to support her IHER application. However, NHS BSA upheld Mrs S’ complaint in relation to NHS BSA’s lack of communication concerning the progress of her application after October 2017.
13. On 14 June 2018, NHS BSA issued its stage 2 IDRP response to Mrs S. The decision maker was satisfied that on 13 October 2017 NHS BSA had made it clear to Mrs S that her application could not be processed as her resignation was not solely due to ill health retirement. However, it was accepted that there was a lack of communication

from NHS BSA following receipt of the confirmation from the Trust on 30 October 2017, that the reason for termination of employment had not changed and therefore NHS BSA's position remained the same. The decision maker further held that it would have been appropriate for a response to have been provided to Mrs S outside of the IDRP following receipt of her complaint on 26 October 2017.

## **Adjudicator's Opinion**

14. Mrs 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 briefly below:-
  - To be eligible for IHER Mrs S' employment must have been terminated because of physical or mental infirmity. Mrs S argues that she had no choice but to resign and NHS BSA has taken a leaving code from her AW33E form over her OH report which confirmed she had tried to find ways to make her work life manageable. However, from the evidence provided it was the Adjudicator's opinion that Mrs S' IHER application was correctly assessed against the deferred ill health criteria and NHS BSA had correctly applied the Regulations.
  - The Ombudsman does not have the power to direct the Trust on how it terminates its employee's employment, it is up to the Trust to determine the grounds on which it makes that decision.
  - NHS BSA has accepted that there was a lack of communication from it concerning Mrs S' IHER application after October 2017 in that it could have informed her that the reason for her employment termination had not changed and therefore its position remained the same. However, the Adjudicator was of the view that this did not warrant an award for distress and inconvenience.
15. Mrs S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs S provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs S for completeness.

## **Ombudsman's decision**

16. Mrs S has said that she discussed her options with OH and was advised that resigning would not affect her chances of being considered for IHER from active status. However, the Regulations are clear in this regard. For a member to be eligible for IHER from active status she must have ceased employment due to ill health. NHS BSA is unable to change the reason for a member leaving its employment without the consent of the employer. Since Mrs S resigned from her position with the Trust, rather than being dismissed on the grounds of ill health, she is only entitled to apply for IHER as a deferred member under the Regulations.

**PO-25032**

17. If Mrs S wishes for her application to be reconsidered from active status and the reason for her resignation to be changed this is a matter to be raised with the Trust. Therefore, I do not direct NHS BSA to take any further action in this regard.
18. In submissions, Mrs S has criticised the management of her Scheme benefits by her employer, in this case the Trust. However, as NHS BSA is not Mrs S' employer there is no grounds for making a finding against it in this regard.
19. I normally make an award for non-financial injustice where there has been maladministration which has caused significant distress and inconvenience. However, I do not find that NHS BSA's failing in not updating to Mrs S following confirmation from the Trust on 30 October 2017 that she had resigned from her post amounts to significant maladministration.
20. Therefore, I do not uphold Mrs S' complaint.

**Karen Johnston**

Deputy Pensions Ombudsman  
20 May 2019