PO-25817

Ombudsman's Determination

Applicant	Dr T
Scheme	NHS Injury Benefit Scheme
Respondent	NHS Business Services Authority (**NHS BSA**)

Complaint Summary

Dr T has complained that his application for a Temporary Injury Allowance (**TIA**) was not considered correctly.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against NHS BSA because it reached a perverse decision as to whether Dr T had contracted a disease which was wholly or mainly attributable to his employment or the duties of his employment.

Detailed Determination

Material facts

1. Dr T was a Consultant Paediatric Intensivist at Central Manchester NHS Foundation Trust (**the Trust**). In November 2010, he attended a conference in paediatric critical care in Surat, India. The Trust approved professional leave to enable him to attend. Dr T spent a total of three weeks in India. The first week was spent at the conference. Dr T then took two weeks of annual leave, during which he travelled around India. Whilst he was in India, Dr T contracted Dengue Fever and Chikungunya as a result of an infected mosquito bite.

2. Consequently, Dr T had several periods of absence from work between December 2010 and December 2013 because of the long-term effects of these infections. He submitted a claim for TIA in October 2013.

3. The relevant regulations are the NHS Injury Benefit Regulations 1995 (SI1995/866) (as amended) (the **1995 Regulations**). As at the date of Dr T's application, regulation 3(2) provided:

> "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;
>
> (b) it is sustained while, as a volunteer at an accident or emergency, he is providing health services which his professional training and code of conduct would require him to volunteer; or
>
> (c) it is sustained while he is travelling as a passenger in a vehicle to or from his place of employment with the permission of the employing authority and if in addition -
>
> (i) he was under no obligation to the employing authority to travel in the vehicle but, if he had been, the injury would have been sustained in the course of, and have been wholly or mainly attributable to, his employment, and
>
> (ii) at the time of the injury the vehicle was being operated, otherwise than in the ordinary course of a public transport service, by or on behalf of the employing authority or by some other person by whom it was provided in pursuance of arrangements made with the authority."

4. Regulation 4 then set out the scale of benefits payable. It provided:

> "Where, on or after 1st April 1991 but before 31st March 2018, a person to whom regulation 3(1) of these Regulations applies … is or was on leave of absence from an employment mentioned in those regulations with reduced emoluments by reason of the injury or disease, there shall be payable by that person's employing authority on behalf of the Secretary of State, during or in respect of the period of such leave and without regard to any reduction in the person's earning ability, an annual allowance of the amount, if any, which when added to the aggregate of -
>
> (a) the emoluments payable to the person during his leave of absence, and
>
> (b) the value, expressed as an annual amount, of any of the pensions and benefits specified in paragraph (6) (including the value of any equivalent benefits payable under the enactments consolidated by the Social Security Contributions and Benefits Act 1992),
>
> will provide an income of 85 per cent of his average remuneration."

5. Dr T's application was declined by NHS BSA. He appealed but was unsuccessful. Dr T then applied to the Pensions Ombudsman. His complaint was not upheld and Dr T appealed to the High Court. His appeal was successful and his case was remitted to the Ombudsman to provide a new determination.

High Court Judgment

6. The judgment given in the case of *Dr David Stewart v NHS Business Services Authority* [2018] EWHC 2285 (Ch) is summarised below:-

    - Regulation 3(2) provided for two "gateways" to benefit: the "course of employment gateway" and the "duties of employment gateway".
    - NHS BSA had rejected Dr T's claim for one of two reasons: (a) that he had contracted the diseases in question whilst on holiday, rather than whilst at the conference; and (b) he had not attended the conference in the course of his employment. The judge referred to these as the "causation reason" and the "employment reason". They led, respectively, to the "causation issue" and the "employment issue".
    - Dr T was employed by the Trust. His contract of employment was formed of two documents: The document entitled "Terms and Condition – Consultants (England) 2003" (**2003 Consultants' Terms**) and an agreed "Job Plan".
    - The 2003 Consultants' Terms defined Contractual and Consequential Services as being: "the work that a consultant carries out by virtue of the duties and responsibilities set out in his or her Job Plan and any work reasonably incidental or consequential to those duties. These services may include: Direct Clinical Care; Supporting Professional Activities; Additional NHS Responsibilities; External Duties". These activities were then further defined.

Supporting Professional Activities were defined as: “activities that underpin Direct Clinical Care. This may include participation in training, medical education, continuing professional development, formal teaching, audit, job planning, appraisal, research, clinical management and local clinical governance activities”. Programmed Activity was defined as: “a scheduled period, nominally equivalent to four hours, during which a consultant undertakes Contractual and Consequential Services”.

- Schedule 2 to the 2003 Consultants’ Terms referred to a duty to maintain professional standards and obligations as required by the General Medical Council (**GMC**).

- Schedule 18 to the 2003 Consultants’ Terms contained details of leave and public holidays, including professional and study leave.

- Dr T had also referred to a “Study Leave Policy” produced by the Trust. This defined Study Leave as: “a period of leave of absence taken for the purpose of enhancing professional knowledge and skills”. It included “attending scientific and medical management courses and meetings … which contributes to CPD”. Professional leave was defined as “leave of absence taken for the purpose of using professional skills and experience for the wider benefit of the NHS”. It included “national lecture activity”.

- The Job Plan referred to a commitment to undertake “programmed activities”. These included teaching, training, outreach education, and audit and research.

- The GMC document “Good Medical Practice” contained an obligation for doctors to keep their professional knowledge and skills up to date. They were required to take part regularly in activities which maintained and developed their competence and performance.

The proper construction of regulation 3(2)

- For the course of employment gateway to be satisfied, a claimant had to establish that the disease in question: (a) was contracted in the course of his employment; and (b) was wholly or mainly attributable to his employment.

- For the duties of employment gateway to be satisfied, a claimant simply had to establish that the disease was wholly or mainly attributable to the duties of his employment.

- The words used in regulation 3(2) were not expressly defined in the 1995 Regulations. They should be read fairly and given their common and ordinary meaning in the context of the 1995 Regulations as a whole and regulation 3 in particular.

- It was significant that two separate requirements had to be satisfied in relation to the course of employment gateway; whereas only one had to be satisfied in

relation to the duties of employment gateway. The duties of employment gateway was intended to apply in circumstances where the disease was not contracted in the course of employment. The judge said:

"The course of employment gateway is intended to apply where there is a temporal connection between the contraction of the disease and the course of employment as well as a causal connection, whether in whole or in part, … whereas all that is required of the duties of employment gateway is that there should be a causal connection between the contraction of the disease and the duties of employment. … one can see for example that the duties of employment gateway would apply where a former employee contracts an industrial disease many years after exposure to a hazardous substance whilst at work, whereas the course of employment gateway would not, because the disease itself was not contracted in the course of employment even though it was wholly or mainly attributable to employment. This is consistent with what Hale L.J said in *re R. (WF: Paternity of Child)* [2003] 2 W.L.R. 1485 at [22] that: "The natural and ordinary meaning of the expression 'in the course of is 'during' or 'at a time when'".

It also suggests to me that the meaning of "course of employment" and "attributable to employment" should have a wider meaning than "attributable to duties of employment", since otherwise every case which fell within the duties of employment gateway would also fall within the course of employment gateway. Moreover, … there is no need to adopt a limited construction to avoid payment of benefit in undeserving cases, since that is covered by regulation 3(3) ..."

- The judge referred to *R v National Insurance Commissioner ex parte Michael* [1977] 1 WLR 109 and *Faulkner v the Chief Adjudication Officer* [1994] PIQR 244.

- The judge referred to the Working Time Regulations 1998 (**WTR**). Regulation 13 contains a provision for a minimum entitlement to annual leave. The definition of working time includes: (a) any period during which an employee is working, at his employer's disposal and carrying out his activity or duties, and (b) any period during which he is receiving relevant training. The judge concluded that the WTR did not assist him.

- The judge noted the judgment in *Edwards & Morgan v Encirc* [2015] IRLR 528. He did not consider it to have established any principle which assisted in deciding the employment issue. He also concluded that a number of cases relating to vicarious liability did not assist. Nor did a case concerning the Police Pensions Regulations 1987. He did, however, consider that an analysis of cases provided in *R v Kellam ex p South Wales Police Authority* [2000] ICR 632 was of assistance in relation to general principles.

- Two decisions of the Upper Tribunal (Administrative Appeals Chamber) relating to the meaning of "attributable" had been referenced: *JM v Secretary of State for Defence* [2016] AACR 3; and *JH v SSD* [2017] UKUT 0140 (AAC). The judge said:

  "It seems to me … that it would not be safe to import wholesale the approach adopted by the Upper Tribunal to the specific requirement of the AFCS in those cases to the attribution requirement of paragraph 3(2) of the Injury Benefit Regulations in relation to the course of employment gateway, since under the AFCS the "attribution" question is the sole question whereas under the course of employment gateway it is only one of two separate questions.

  On the basis of those authorities in my view the proper construction of and approach to regulation 3(2) in a case such as the present is as follows:

  (1) The first step is to identify the disease in question contracted by the employee (the "process cause" as described in *JM*).

  (2) The second step is to identify the employee's contractual duties by reference to his contract of employment.

  (3) The third step is to ask whether the disease was contracted in the course of his employment. That involves considering whether the disease was contracted at a time when the claimant was in the process of performance of activities which were part of his contractual duties, including activities reasonably incidental to those contractual duties.

  (4) If the answer to (3) is yes, then the fourth step is to ask whether the employment was the whole or main cause of the disease being contracted. This is an enquiry as to the reasons why the disease was contracted and whether the sole or predominant reason was a reason to do with the employment. The focus seems to me to be upon considering whether or not the disease, although contracted whilst in the course of employment, was contracted for a reason extraneous to his employment or unconnected to his employment. A reasonably straightforward example would be where an employee was permitted to bring and consume her own food at work and contracted a disease through eating infected food whilst working at her desk. There would be no causative link between the disease and the employment. ...

  (5) If the answer to (3) or (4) is no, then the fifth step is to ask whether the duties of employment were the whole or main cause

> of the disease being contracted. Again, this is an enquiry as to the reasons why the disease was contracted and whether the sole or predominant reason was a reason to do with the duties of employment. This is therefore at one level a wider enquiry, because there is no need to ask whether the disease was contracted at a time when the claimant was in the process of performance of activities which were part of his contractual duties or reasonably incidental to them, but at another level a narrower enquiry, because there is a need to ask whether the sole or predominant reason was a reason to do with the duties of employment, as opposed to employment in its wider sense."

The employment issue

- Dr T had raised and argued his case under both the course of employment gateway and the duties of employment gateway. Both should have been considered by the Ombudsman.

- Determining whether, because he had attended the conference on professional leave at his request, Dr T could not have been in the course of his employment involved a consideration of the terms of his employment and his duties under his employment. The judge decided:

  (1) Dr T's core contractual duties were as set out in his Job Description and Job Plan. He was required to undertake 10 programmed activities per week; one of which was a non-clinical programmed activity. The non-clinical programmed activity could include undertaking continuing medical education and could include complying with CPD obligations, as well as teaching and other non-clinical responsibilities. However, there was no contractual obligation for Dr T to ensure that he used the time allocated to this non-clinical programmed activity in any specific way, save as expressly identified in the duties of the post. In particular, there was no contractual obligation to structure his time so as to ensure that he complied with all of his CPD obligations within this allocated work time.

  (2) In addition to these core contractual duties there were other duties reasonably incidental or consequential to those duties, as recognised by the definition of "Contractual and Consequential Services". These included undertaking continuing medical education, including complying with CPD obligations, as well as teaching and other non-clinical responsibilities, insofar as not undertaken within the one non-clinical programmed activity.

  (3) It was recognised by the Trust that the performance of all non-clinical responsibilities might not be capable of performance within the one non-clinical programmed weekly activity. Hence, there was provision for study and professional leave relating to supporting professional activities. Whilst

there was no absolute contractual right to such professional or study leave, nonetheless consultants had an expectation of an entitlement to paid professional or study leave of up to 30 days every three years within the UK. They also had an expectation of a discretionary entitlement to further professional or study leave within or outside the UK, which might be on a fully paid, part-paid or wholly unpaid basis.

(4) Consultants would have to apply for professional and study leave and not take it without approval. Where professional or study leave was granted on a paid basis there was a restriction on what the consultant could do in terms of paid work within that period. In relation to the discretionary entitlement, the employer would be entitled to require part of any such leave to be counted against annual leave. Subject to this, however, there was no fundamental difference in principle between study or professional leave granted under paragraph 13 and that granted under paragraphs 14 or 15 of Schedule 18 to the 2003 Consultants' Terms.

(5) It was clear that a consultant could not be required to undertake professional or study leave against his will. It was equally clear, however, that, if a consultant did not do so and, therefore, did not comply with his contractual duties in relation to continuing medical education, he would be in breach of his duties of employment. Indeed, a consultant would need to undertake continuing medical education away from his normal place of employment in any event.

- In view of the above, it was incorrect to draw a distinction between professional leave and time spent working. In principle, there was no reason why a consultant should not be performing his contractual duties whilst taking professional leave to undertake continuing medical education; particularly if this was to fulfil CPD requirements. This would include attending a professional conference on a subject related to his clinical field. It did not matter that the consultant could not have been required to attend. It was sufficient that, on an objective analysis, his attendance was part of the performance of his contractual duties.

- It was doubtful if, on a strict contractual analysis, Dr T could have been asked by the Trust to give a speech as a regular part of his work role; except for the extent to which this fell within the teaching duties referred to in the Job Plan. It was doubtful that, if Dr T had been asked and agreed to give a speech and the Trust agreed to this, the time would not have been taken as professional or study leave.

- On the undisputed facts of the case, there was only one answer to the employment issue; namely, that Dr T was attending the conference in the course of his employment.

- Even if that was not the correct analysis of the circumstances, attendance at the conference was reasonably incidental to Dr T's contractual duties. This was on the basis that, under the terms of Dr T's employment, it was envisaged that non-clinical duties could be performed either as part of a programmed activity or outside of this, as study or professional leave. In the circumstances of the role of an NHS consultant, the ambit of what was reasonably incidental was far wider than, for example, a police constable.

- In Dr T's case, both the course of employment gateway and the duties of employment gateway were satisfied.

The attribution issue

- NHS BSA had raised an argument which had not been advanced before or relied upon by the Ombudsman. This was that, even if Dr T had contracted the infection whilst attending the conference, it was not "wholly or mainly attributable" either to the course of his employment or to the duties of his employment. This was because the predominant cause of the infection was a bite by an infected mosquito. This could have happened to anyone present in Surat at that time and, thus, it was not sufficiently linked to his employment. The judge referred to this as the "attribution issue".

- It was important to consider the factual context. Dr T had always said that he had been bitten at the conference. Sessions had taken place outside and Dr T had been bitten three times. The conference took place at a hotel and Dr T ate and slept at the same hotel. It was not open, on the evidence, to NHS BSA to argue that Dr T had not proven, on the balance of probabilities, that the infected mosquito bite had occurred during the conference or within the hotel grounds.

- NHS BSA's submission would mean that every injury suffered, or disease contracted, by an employee whilst working at his place of work, whether permanent or temporary, would not be wholly or mainly attributable to his employment, or the duties of his employment, unless there was some further and closer connection between the precise circumstances in which the injury was suffered, or disease contracted, and the employment or the employment duties. This could not be right.

- In order for injury benefit not to be payable where an injury is suffered, or disease contracted, whilst an employee is working at a place of work, where he was required or entitled to be, it would be necessary for there to be either no real connection between the work and the incident or some more significant cause which was unrelated to the work. The judge gave the examples of an employee who happened to choke on a piece of food whilst eating at her desk or a stroke whilst at work, the cause of which was unrelated to work.

- The evidence demonstrated, on the balance of probabilities, that the infected mosquito bite occurred whilst Dr T was at the hotel and, if it was necessary so to find, whilst participating at the conference. It was wholly or mainly attributable to his employment and to the duties of his employment.

The causation issue

- Dr T had stated consistently that he had been bitten whilst at the conference and that he first experienced symptoms two days after the conference. In correspondence with NHS BSA, Dr T had made three further points supporting his case that the disease was contracted during the conference: (a) both diseases were carried by mosquitoes which bite during the day; (b) every day of the conference the attendees were outside; and (c) mosquito bites were identified during the conference. He had also made the general point that it was impossible to provide absolute proof, beyond all doubt, that he contracted Dengue Fever and Chikungunya at the conference. However, he had made a number of specific points, each confirmed by the itinerary of his trip to India and by specific identified references, in support of his case that it was clear, on the balance of probabilities, that he had done so. These included the following: (a) there was an outbreak of both Dengue Fever and Chikungunya in Surat during the conference, with serotypes found including the one which he contracted; (b) apart from his visit to Surat, he did not visit any other areas in India where Chikungunya was common or where mosquitoes carrying and transmitting both viruses were common; (c) he sustained three mosquito bites during the conference and none subsequently; and (d) his wife, who accompanied him during the subsequent holiday but not the conference, only sustained one mosquito bite and did not contract any illness.

- NHS BSA's medical adviser, Dr Simpson, had been provided with Dr T's letters and had considered them. He had advised that it was not possible to say exactly where or when Dr T had sustained the infected mosquito bite. He had also said that, if Dr T had developed symptoms two days after the conference, it was likely, on balance, that he had sustained the bite during that time. Dr Simpson had not identified anything which cast doubt on Dr T's version of events. Nor did he state that Dr T's credibility or reliability was undermined by anything in the information which he had provided or by reference to any other material.

- Dr Simpson had made it clear that the critical question was whether or not Dr T had developed symptoms two days after the end of the conference. It was incumbent upon NHS BSA, as the primary decision-maker, to reach an opinion as to whether or not, on the balance of probabilities, Dr T had developed infective symptoms two days after the end of the conference.

- NHS BSA said it required contemporaneous corroborative evidence of Dr T having sustained a mosquito bite during the conference. There was no

requirement under the 1995 Regulations, or otherwise, for contemporaneous corroborative evidence to be provided as a precondition to establishing entitlement under regulation 3(2). Nor was there any evidence which justified concluding that Dr T might reasonably be expected to have been able to provide such evidence, such that its absence cast doubt on his credibility or reliability.

- NHS BSA could not have relied on Dr Simpson's opinion, that it was not possible to say where or when Dr T was bitten, when he was not purporting to reach an opinion on the balance of probabilities. Neither NHS BSA nor the Ombudsman could properly have regarded Dr Simpson's evidence as anything other than, at best, equivocal. It did not justify NHS BSA abrogating responsibility for deciding the question of the onset of Dr T's symptoms.

- The judge then considered whether he should decide the causation question himself. He took the view that the question for him to decide was whether or not, on the evidence before NHS BSA, there was only one answer to the causation question which could be made on the basis of a correct application of the law to the facts which would not have been perverse or outside a range of reasonable outcomes. The question was whether or not the Ombudsman had erred in law in failing: (i) to conclude that NHS BSA's decision was perverse; and (ii) in failing to conclude that the only legally and factually correct answer to the causation question was that Dr T had established on the balance of probabilities that the infected mosquito bite had happened at the conference.

- NHS BSA's decision was made solely on the basis of the written evidence which was before it and as to which there was no factual dispute. It was not a case where the primary decision maker, or the Ombudsman, had the benefit of an evaluation of oral evidence given by witnesses, whether of fact or of opinion. Nor had they purported to make a decision as to which evidence should be preferred in circumstances where that evaluation is pre-eminently a matter for NHS BSA as the primary decision-maker. Nor was the causation question one to which either NHS BSA or the Ombudsman could be expected to apply specialist knowledge or experience which the court does not have.

- Having considered the evidence which was before NHS BSA, the judge concluded that Dr T had established, on the balance of probabilities, that the infected mosquito bite had happened at the conference and that any other conclusion would have been perverse. He gave the following reasons:

  - There were only ever two possibilities; either the bite happened during the conference or it happened during the subsequent holiday. No-one had ever suggested, nor was there any sensible basis for a suggestion, that Dr T could have been bitten once by a dual infected mosquito during the conference and again whilst on holiday.

- Dr Simpson's opinion did not, in itself, provide an answer one way or another. However it was relevant in the following respects: (i) Dr Simpson's opinion was that, if Dr T was right in stating that he developed infective symptoms two days after the end of the conference, it was likely on balance that he sustained the infected mosquito bite during the conference; (ii) Dr Simpson accepted that it was likely that both infections were contracted at the same time; i.e. from the same infected mosquito bite; (iii) Dr Simpson recorded, without adverse comment from a medical perspective, Dr T's evidence regarding an outbreak of the infections in Surat whilst he was at the conference and the mosquito type, its distribution in India and the infections carried; all of which made it more likely that he was bitten and infected in Surat; (iv) Dr Simpson recorded, without adverse comment either from a medical or other perspective, Dr T's evidence that he had been bitten three times in Surat and not once subsequently and to having developed infective symptoms two days after the end of the conference period; (v) there was no suggestion from Dr Simpson, from a medical or other perspective, that it was unusual or worthy of comment, negative or otherwise, that there was no documentary medical corroboration to support Dr T's case as to when he was bitten and infected and first developed symptoms.

- NHS BSA accepted, undoubtedly correctly, that there was no reason to question Dr Stewart's veracity.

- NHS BSA had never expressed any adverse opinion as to Dr T's credibility or reliability as a historian. Nor had any evidence been provided from which any rational conclusion could be drawn other than that there was no reason to doubt Dr T's credibility or reliability.

- It could not rationally have been open to NHS BSA to decide the causation question against Dr T simply because he was making the claim, and hence bore the burden of proof, and had produced no contemporaneous corroborative evidence either of having suffered an infected mosquito bite during the conference or first suffering symptoms two days later. In the absence of any rational reason to consider that someone in his position ought to have been able to provide such evidence and in the absence of any rational reason to consider his credibility or reliability as a historian open to question, NHS BSA could not rationally have decided, on the balance of probabilities, that the infected mosquito bite did not occur at the conference. Unless there was some rational reason to doubt Dr T's account that he first suffered symptoms two days after the conference, NHS BSA was bound to accept that it followed from Dr Simpson's opinion that Dr T must have suffered the infected mosquito bite at the conference. It should be borne in mind that NHS BSA knew that Dr T had been medically examined both in India and on his return. Therefore, there was no intrinsic reason to doubt his

account and it would have been open to NHS BSA to ask him to provide records had it wished to do so.

- Furthermore, Dr T's credibility and reliability as to when and where he was bitten during his trip and when he first suffered symptoms was "powerfully buttressed" by the corroborative documentary evidence which he produced.

- Finally, there was nothing which NHS BSA did or could point to which tipped the balance in the other direction. There was no contrary evidence or argument.

7. It would have been open to the Judge to quash the determination and remit the matter to NHS BSA, with directions for payment or re-assessment of the application with specific instructions. However, instead, the matter was remitted to me with specific directions for re-determination and with no additional findings of fact to be made. NHS BSA has indicated it wishes to make no further representations and awaits a new final determination in accordance with the Court Order.

Conclusions

8. In accordance with the High Court's decision, I find that NHS BSA reached a perverse decision when it declined Dr T's application for a TIA. On the facts, he satisfied the requirements of regulation 3(2). His complaint is upheld.

Directions

9. Within 21 days of the date of my determination, NHS BSA shall review Dr T's application for a TIA and shall determine that Dr T has satisfied the requirements of regulation 3(2). NHS BSA shall determine Dr T's complaint accordingly. If appropriate, it is to include a determination in relation to back payment of TIA in such sum as ought to have been paid from the date the claim was first made, together with simple interest at the base rate quoted for the time being by the reference banks.

10. I have considered whether it would be appropriate to make a direction for Dr T to receive a payment for non-financial injustice. However, this was not raised with the High Court and does not form part of the Court Order upon which my determination is founded. I do not, therefore, find it appropriate to make such a direction.

Anthony Arter
Pensions Ombudsman

18 December 2018