

Ombudsman's Determination

Applicant	Mrs Susan Readman
Scheme	NHS Pension Scheme (the Scheme)
Respondent	Secretary of State for Health, Legacy Department (SoS)

Complaint Summary

1. Mrs Readman has complained that the SoS, on behalf of Devon Primary Care Trust (the **Trust**) - her former employer, refused to authorise the payment of unreduced early retirement benefits to her.

Summary of the Ombudsman's Determination and reasons

2. The complaint should be upheld against SoS because their decision refusing to authorise the payment of unreduced early retirement benefits to Mrs Readman was perverse.

Detailed Determination

The relevant regulations

3. Regulation E3 of the NHS Pension Scheme Regulations 1995 (the **1995 Regulations**) provides:

“Early retirement pension (redundancy etc additional provisions)

(1) This regulation shall apply to a member-

(a) who-

(i) was in pensionable employment on 1st December 2006...

(b) whose employment is terminated by his employing authority before 1st October 2011; and

(c) who satisfies the conditions specified in paragraph (2).

(2) Those conditions are that-

(a) He has at least 5 years' qualifying service and has attained normal minimum pension age or, where relevant, protected pension age;

(b)The Secretary of State certifies-

(i) That the member's employment is terminated by reason of redundancy, or

(ii) With the agreement of the employing authority, that the member's employment is terminated in the interests of efficiency of the service in which he is employed; and

(iii) His employing authority does not certify that he has unreasonably refused to seek suitable alternative employment or accept an offer of such employment.

(3) A member who satisfies the conditions in paragraph (2) shall be entitled to a pension calculated as described in regulation E1 (normal retirement pension).”

The Agenda for Change: the NHS Terms and Conditions of Service Handbook (*in force at the relevant time*, the “Agenda”)

4. Section 16 of the Agenda covers redundancy pay. Sections 16.18 and 16.19 which come under the heading of “Early retirement on grounds of redundancy for employees entitled to pension benefits” state:

“ 16.18 ‘Suitable alternative employment’, for the purposes of paragraph 16.17, should be determined by reference to sections 138 and 141 of the

Employment Rights Act 1996. In considering whether a post is suitable alternative employment, regard should be had to the personal circumstances of the employee. Employees will, however, be expected to show some flexibility.

16.19 For the purposes of this scheme any suitable alternative employment must be brought to the employee's notice in writing or by electronic means agreed with the employee before the date of termination of contract and with reasonable time for the employee to consider it. The employment should be available not later than four weeks from that date. Where this is done, but the employee fails to make any necessary application, the employee shall be deemed to have refused suitable alternative employment. Where an employee accepts suitable alternative employment the 'trial period' provisions in Section 138(3) of the Employment Rights Act 1996 will apply".

Relevant case law

5. In *Brooks v Civil Aviation Authority* [2002] 44 PBLR (the **Brooks Case**), the Court considered the role of the Ombudsman when there had been a previous related employment tribunal case and it was decided that "...it was entirely appropriate for the (Pension) Ombudsman to make that decision in this case on the basis of a review of the existing material. There is no question of the Ombudsman rubber-stamping any earlier decision. He reviewed the material, which included the reasons given by both the industrial tribunal and the arbitrator for the decisions they had reached...We are satisfied that it was within the powers of the Ombudsman to approach matters that way...".
6. In *Cambridge & District Co-Operative Society Ltd v Ruse* [1993] IRLR 156 EAT, the Employment Tribunal held that an employee may refuse an offer of employment which a Tribunal concludes was a suitable offer of employment, for reasons which relate to the employee's perception of what the offer amounts to, and still act reasonably.

Material facts

7. Mrs Readman became a nurse in November 1976. She says that she did not enjoy working in a hospital environment and so she transferred to district nursing from March 1985. She obtained the District Enrolled Nurse Certificate in 1987, qualified as a Registered Nurse in 1991, and achieved the District Nursing Certificate in 1992. In 2002 she obtained a diploma in health studies and, in 2004, a degree in the same subject.
8. In January 2006, Mrs Readman was promoted to the role of Community Modern Matron, Band 8A. Her office was in Teignmouth Hospital.

9. Mrs Readman took part in a reorganisation and redundancy exercise in 2007 and was placed at risk of redundancy in November 2007. She applied for a Band 8A role, but was unsuccessful. She was offered a Band 7 community nurse team manager role in May 2008, but she turned down the role. In July 2008, she was offered a Band 8A role as Modern Matron in Teignmouth Hospital. She turned down this role too.
10. In November 2008, Mrs Readman undertook a trial period as a Community Nurse Team Manager. This would have been a demotion and has been subsequently held by an Employment Tribunal (ET) not to be a suitable alternative employment.
11. Mrs Readman was made redundant on 28 November 2008. She subsequently requested a statutory redundancy payment. The Trust disputed her entitlement to the benefit because, in their view, she unreasonably refused offers of suitable alternative employment. The matter eventually went before an ET.
12. In December 2008, Mrs Readman applied to the Trust for the early payment of her benefits from the Scheme. Her application was rejected by the Trust because she had not been made redundant as she had been offered alternative employment and her reasons for turning down the offer were not reasonable.
13. The ET decided on 22 September 2009, that Mrs Readman had unreasonably refused the offer of suitable alternative employment as Modern Matron at Teignmouth Hospital. Consequently, it was found that she was not entitled to a statutory redundancy payment and dismissed her claim.
14. In late 2008 Mrs Readman was offered a district nursing position in Canada, which she accepted, and emigrated in 2009.
15. There were several appeals up to the Court of Appeal, in respect of Mrs Readman's claim for a statutory redundancy payment, who remitted the case back to the ET for reconsideration. On 6 February 2014, it recognised that Section 141 (2) of the Employment Rights Act 1996 (the **1996 Act**) provides that "...the employee is not entitled to a redundancy payment if he unreasonably refuses the offer". It held that it would not have been reasonable for Mrs Readman to have turned down the Teignmouth Hospital role on the basis of capability. However, she had undertaken hospital nursing duties at the beginning of her career and had concluded that it was not an appropriate career for her. She therefore changed and commenced an alternative career in community nursing, going on to obtain further qualifications in that area. It found that she had "not been unreasonable in refusing the Modern Matron role which would have led to her returning to a hospital environment". It concluded that she was therefore entitled to a statutory redundancy payment.
16. In February 2014, Mrs Readman requested, via NHS Pensions online, a quotation of her benefits under the Scheme. In response to an email from her, NHS Pensions said that they had not been informed by her employer that the termination of her service was due to redundancy and therefore could not provide an estimate of her entitlement. If redundancy was confirmed by her employer, her preserved benefits

would be paid in full without an actuarial reduction or enhancement. She was provided with quotations, but was informed that they were the basic amounts without pension increases as at the date she left service.

17. Following a telephone conversation on 19 March 2014, Linklaters LLP (**Linklaters**), Mrs Readman's solicitors, wrote to Bevan Brittan, the solicitors acting for SoS, saying:
 - 17.1. Notwithstanding the ET judgment, SoS did not accept that she was entitled to her contractual early retirement rights.
 - 17.2. Bevan Brittan asserted that the test for redundancy under the Scheme was materially different to the test set out in the statutory regime. In particular, Bevan Brittan relied on the wording in paragraph 16.18 of the Agenda.
 - 17.3. Her entitlement to pension benefits is governed by the 1995 Regulations and the Agenda is simply a layman's explanation of the provisions in those regulations. The requirement for an employee to demonstrate flexibility is not a requirement under regulation E3 of the 1995 Regulations, so in their view it is an irrelevant consideration.
 - 17.4. Paragraph 16.10 of the Agenda sets out the criteria that need to be met to qualify for early retirement. The definition of "*redundancy*" for the purpose of the Agenda is as per section 139 of the 1996 Act and this is one of a number of examples where the Scheme is inextricably linked to the relevant statutory provisions. The ET determined that their client was made redundant. As for the other conditions, she plainly met each of these criteria and this is not disputed.
 - 17.5. It is also not disputed that she met each of the conditions in paragraphs 16.3 to 16.6 of the Agenda. It is readily apparent therefore that their client fulfils all the qualifying criteria under the Scheme, and indeed the Agenda, to be entitled to an unreduced early retirement pension.
 - 17.6. Paragraph 16.16 of the Agenda sets out the only circumstances in which, even where the qualifying criteria are met, employees are not entitled to redundancy payments or early retirement on the grounds of redundancy. They understand that SoS purports to rely on Paragraph 16.16 bullet point three, to the effect that she unreasonably refused to accept suitable alternative employment with her employer.
 - 17.7. Suitable alternative employment is defined at paragraph 16.18 of the Agenda by reference to the relevant statutory provisions, namely sections 138 and 141 of the 1996 Act. Once again, the fact that the relevant statutory tests lie at the core of the Scheme is readily apparent.
 - 17.8. Paragraph 16.18 goes on to state that: "In considering whether a post...Employees will, however, be expected to show some flexibility". This

wording simply explains, in layman's terms for the benefit of NHS employees to whom the Scheme applied, how the statutory test under section 138 and 141 of the 1996 Act might be expected to work in practice, ie employees cannot unilaterally decide that a particular job does not represent "suitable alternative employment", and they must act reasonably in considering any such offer. The suggestion that the language used in the Agenda, objectively considered, was intended to or does materially amend the relevant statutory test so as to impose a greater burden on the claimant is fanciful.

- 17.9. The recent ET judgment determined that she acted reasonably in refusing to accept suitable alternative employment, not least in light of the fact that she was prepared to trial other roles, it is therefore clear that SoS's position is untenable.

18. On 8 April 2014, Bevan Brittan responded to Linklaters as follows:

- 18.1. They do not accept that the requirement for an employee to show "flexibility" in accepting suitable alternative employment is an irrelevant consideration. If it were irrelevant, the Agenda would not include it as an obligation before the entitlement to contractual redundancy benefits are triggered. It is completely understandable for a contractual redundancy scheme to contain such a provision. This is particularly the case given that the benefits available are very generous and the fact that the vast majority of employees would prefer to avoid being made redundant.
- 18.2. They agree that Mrs Readman did satisfy the eligibility criteria for redundancy/retirement benefits, but she did not show any flexibility as is specifically required under section 16.18 of the Agenda. If the statutory test was the sole test to be applied, there would be no need to include the requirement for flexibility. The statutory test is one of reasonableness. The contractual test is one of flexibility.
- 18.3. The ET rejected Mrs Readman's arguments that she was not capable of undertaking the Hospital Modern Matron role. It concluded that "she certainly had the facility to learn to do the work of a matron in a community hospital". It also concluded that her lack of desire to work in a hospital was insufficient to amount to a reasonable refusal and that she would have to undergo the necessary training to be able to do the job successfully.
- 18.4. She rejected other roles offered to her on the basis that they were Band 7 community roles and would result in a loss of status and, eventually, salary despite four years' pay protection being offered and despite a professed desire to stay in community nursing in Devon. When the Trust found her a Band 8A role at the same salary level, she rejected it too, "out of hand" as the original ET concluded.

Summary of Mrs Readman's position

19. Linklaters, on behalf of Mrs Readman, say:

- 19.1. She is a member of the 1995 section of the Scheme, therefore the relevant governing document is the 1995 Regulations.
- 19.2. She is entitled to unreduced early retirement benefits from the Scheme because she meets the criteria set out in regulation E3 of the 1995 Regulations.
- 19.3. The reference to flexibility in the Agenda is intended simply to assist the understanding of NHS employees. It is not a standalone legal requirement.
- 19.4. The 1995 Regulations confer benefits on her and can only be amended by a subsequent Act of Parliament, or by an instrument made under such an Act. The Agenda did not have effect to legally change the 1995 Regulations.
- 19.5. They do not consider that she refused to show flexibility because:
 - 19.5.1. She applied for a professional lead role, these being the only Band 8A jobs in the Trust's proposed new structure. She attended an interview in April 2008 for this role, but unfortunately her application was unsuccessful. Following this failed application, the Head of Professional Practice for Community Nursing wrote to her stating: "Thank you for your support and flexibility".
 - 19.5.2. In August 2008, having refused the Band 8A Modern Matron Hospital position, she made a further attempt to resolve the developing dispute by trying to engage constructively with the Trust through its formal grievance process. However, the Trust simply failed to implement several stages of its own process, and only held a hearing months after she was actually made redundant.
 - 19.5.3. She showed flexibility in undertaking a trial period in November 2008 as a Community Nurse Team Manager, the only other role offered as suitable alternative employment.
- 19.6. They consider the comments made by Bevan Brittan regarding suitable alternative employment to be misleading. Firstly, in respect of her refusal to accept the job offered to her, the phrase "she certainly had the facility to learn to do the work of a modern matron in a community hospital" was taken from the most recent ET decision. The ET concluded that while it would not have been reasonable for her to refuse the job offer on the basis of capability, it was reasonable for her to refuse the job offer on the basis of "not having worked in a hospital since 1985 and having no desire to return to such a setting".

- 19.7. Similarly, the quote “[her] lack of desire to work in a hospital was insufficient to amount to a reasonable refusal” comes from the most recent ET decision and was made in the context of the ET’s finding that this in itself was not sufficient to be reasonable refusal, but given the facts her refusal was reasonable.
- 19.8. The comments suggesting that she refused the Band 8A role “out of hand” and that her sole focus was to “take the money and run” are entirely irrelevant. Both these quotes have been taken from ET decisions which were later overruled.

Summary of SoS’s position

20. Bevan Brittan, on behalf of SoS, say:

- 20.1.1. Mrs Readman’s complaint should have been brought within three years of the event complained of – in this case the events were in November 2008. Therefore, the complaint is outside the three year period in which adjudication from the Ombudsman is possible.
- 20.1.2. They do not dispute that Mrs Readman’s employment was terminated by reason of redundancy. What is submitted is that she has not satisfied the contractual test as set out in section 16.18 of the Agenda which would entitle her to contractual benefits, including unreduced early retirement benefits. The employee has to show some flexibility in regard to suitable alternative employment before he or she becomes eligible for contractual redundancy benefits. This is what she failed to do and the ET judgment supports this position.
- 20.1.3. The statutory test does not include the requirement to show “flexibility”. It requires “reasonable” behaviour from the employee. This is a fundamental difference. The difference exists because the benefits differ. The contractual test is harder to satisfy because the benefits payable thereunder are much more generous.
- 20.1.4. It is clear that Mrs Readman showed no flexibility whatsoever regarding a role which was at the same Band as her previous role, which she had the capability to do and was equally capable of undergoing the necessary training in a short space of time. This is precisely what the contractual test is referring to when it requires the employee to show some flexibility. Her sole focus was, in her own words, “to take my money and run”.
- 20.1.5. Regulation E3 of the 1995 Regulations states that benefits are payable if the conditions in regulation E3(2) are satisfied. One of those conditions, regulation E3(2)(c), is that the employing authority does not certify that the employee has unreasonably refused to seek suitable

alternative employment or accept such an offer of alternative employment. This is exactly what is being certified in the context of section 16.18 of the Agenda.

- 20.1.6. They dispute that her entitlement to pension benefits is governed solely by the 1995 Regulations as this is to ignore elements of her contract.
- 20.1.7. Linklaters appear to be suggesting that the provisions of the Agenda are non-binding. The Agenda is a collectively agreed contractual document which represents terms and conditions of service for the vast majority of NHS staff, and to suggest that it is non-binding is a serious assertion.
- 20.1.8. Mrs Readman was not open throughout to exploring suitable potential alternatives. The original ET found that she rejected the Band 8A job “almost out of hand” making no attempt to find out more about it or to explore what limited training might be required to enable her to carry it out. At no stage did she profess to want to stay with the Trust. Although, she professed that she wanted to continue in community nursing, this desire did not extend to accepting a Band 7 community nursing job with four years’ pay protection.
- 20.1.9. Mrs Readman asserts that she has suffered “5 years of stress, anxiety and inconvenience” as a result of this matter and that she seeks a cash sum in recognition thereof. They refute any such liability and cannot see any basis for such a claim, and note in passing, that she has not produced any medical or indeed other evidence to support her position regarding the alleged effects of the matter on her.

Conclusions

- 21. SoS say that I should not consider Mrs Readman’s complaint because the matter she is complaining about happened in November 2008, and is therefore outside the three year time limit. Mrs Readman had applied for payment of her early retirement benefits in December 2008, but her application was refused by the Trust on the grounds that she had not been made redundant. In February 2014, the ET decided (the **2014 Decision**) that she was entitled to a statutory redundancy payment. Therefore, she could not have brought her complaint to me before February 2014, because prior to that date it had not been confirmed that she was made redundant in 2008. The act she now essentially complains about is the failure to authorise her benefits, even after the 2014 Decision. Consequently, her complaint is not outside the three year time limit.
- 22. In cases such as this, where a decision-maker exercises a discretion, it is not our role to agree or disagree with the decision-maker’s decision. In addition, unless the

decision-maker has reached a perverse decision, we cannot substitute our own decision for that of those properly appointed to reach a decision.

23. There are certain well-established principles that a decision-maker is expected to follow in making their decisions. Briefly, they must ask the right question, they must not misdirect themselves as to the law, they should not come to a perverse decision and should take account of all relevant matters but no irrelevant ones. In this context, a perverse decision is one which no reasonable decision maker, properly advising themselves, could come to in the circumstances.
24. SoS dispute that Mrs Readman's pension entitlement is solely governed by the 1995 Regulations. Their case is that she has not satisfied the contractual test in section 16.18 of the Agenda.
25. SoS say that Mrs Readman failed to show some flexibility in regard to suitable alternative employment and therefore failed to satisfy the criteria in section 16.18 of the Agenda. Linklaters argue that she did not refuse to show flexibility; the reference to it in the Agenda is to assist the understanding of NHS staff; it is not a standalone requirement; and there is no requirement to demonstrate it under regulation E3 of the 1995 Regulations.
26. I would agree that the 1995 Regulations can only be amended by a subsequent Act of Parliament and that the Agenda does not over-ride it. However, it is right to say that the flexibility aspect is part of Mrs Readman's employment contract and, because the 1995 Regulations give the employer a certification discretion, there would seem to be no reason why SoS cannot consider her flexibility, or lack thereof, in reaching their decision. But what is 'some flexibility'? It is not defined, as I would expect it to be if it was to take on the significance which is now being imported by the respondent. I note that Section 16 of the Agenda document has already been criticised in its wording by J Seymour at paragraph 21 of *Seamus Watson v Sussex NHS Foundation Trust* [2013] EWHC 4465 (QB) and it is difficult to disagree with those comments.
27. It might be argued that 'some flexibility' is then however the SoS assesses it, but that goes against any principle of certainty, and the intent of the Regulations. Also, in this particular case, SoS's decision appears to be flying in the face of the comments and findings of the 2014 Decision, which to my mind indicate that considerable flexibility was shown. It seems to me that if Mrs Readman has not shown sufficient flexibility to merit the certification despite the ET and Appeal Court's findings, and also the way in which flexibility is referred to in the NHS' own literature for employees when considering suitable alternatives, then there must be significant doubt as to how someone could fairly meet this certification standard.
28. In considering the issue of flexibility, the decision in the Brooks Case allows me to review and take into account the evidence and findings in the 2014 Decision. Under this case, I do not need investigate afresh matters which have been aired at length in

court provided I carefully review the decision, the reasons and consider the arguments and do not rubber stamp the earlier decision.

29. Having reviewed the 2014 Decision, while I accept that the ET was assessing a different test (unreasonable refusal), it is quite clear to me from the comments that, if asked, it would not have considered that Mrs Readman was inflexible in refusing the suitable alternative employment she had been offered.
30. Irrespective of that, I am also satisfied that the Grade 7 position offered to Mrs Readman was not suitable alternative employment under the 1996 Act (as held by the original tribunal), and the addition of 'expected to show some flexibility' as set out in the Agenda does not make it so. In any event, the Agenda maintains that suitable alternative employment is to be determined by reference to the 1996 Act. So the only potentially sustainable argument is in relation to the Grade 8 hospital nurse position which could be held to be a potentially suitable alternative employment. However, in my view, changing after 20 plus years from community to hospital nursing is more than 'some flexibility' in any fair consideration of the matter.
31. The requirement to show flexibility should not be used unreasonably by the employer to deny benefits where it is due. Flexibility is not defined in the Agenda and it would be unfair for SoS to define it as they see fit on each occasion. It should be given its usual meaning and be dependent on the particular circumstances of each case. I, therefore, disagree that Mrs Readman did not show flexibility because the jobs she were offered were either at the same pay band, or that she could have been re-trained for it. There were other considerations which it was reasonable for her to take into account. The test is a subjective one, ie her decision was reasonable in her circumstances.
32. For the reasons given above, I find that, given the 2014 Decision, the decision reached by SoS was perverse and therefore uphold the complaint against them.
33. I have considered whether to remit the matter for further consideration by SoS but, bearing in mind the history of this matter (the Court of Appeal was extremely reluctant to remit back to the ET), and my conclusion that their decision was perverse, I have decided that to do so is unlikely to result in a just decision being made and have instead made a direction that Mrs Readman's pension should be paid from the Scheme.

Directions

34. I direct that within 28 days of the date of this determination, SoS shall confirm to NHS Pensions that Mrs Readman left the service of the Trust in November 2008 on the grounds of redundancy. SoS will also instruct NHS Pensions to pay her unreduced early retirement benefits backdated to November 2008, which will include: a lump sum in respect of the backdated pension instalments; the lump sum due on retirement; and interest. Interest, to be calculated from November 2008 when she left

the Trust to the date payment is made, at the base rate for the time being quoted by the reference banks.

35. I also direct that within 28 days of the date of this determination SoS pay Mrs Readman £700 for the significant non-financial injustice she has suffered.

Anthony Arter

Pensions Ombudsman
9 December 2015