

Ombudsman's Determination

Applicant	Mr N
Scheme	BT Pension Scheme (the Scheme)
Respondents	BT Pension Scheme Management Limited (BTPSML), and BT Communications Plc (BT)

Outcome

1. I do not uphold Mr N's complaint and no further action is required by BT.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr N is unhappy because both BTPSML and BT have refused to grant him an enhanced level III Health Early Retirement (IHER). His application was refused by BT and, whilst it was accepted by BTPSML, he was only granted a standard level IHER and it was not backdated to his original application date with BT.
4. Mr N has also complained that he has not received the value of his shares under BT's Saveshare scheme.
5. For clarity, there are two respondents in this case. BT is Mr N's employer and considered his initial IHER application. BTPSML acts on behalf of the Trustee of the Scheme, and considered Mr N's later IHER application.

Background information, including submissions from the parties

6. On 18 July 1995, Mr N had an accident whilst driving a BT van and was sadly left with a back injury. Over the following years, he had continual problems and was eventually diagnosed with a degenerative disc disease.
7. On 31 October 2000, a report from Dr Beastall (appendix 1) confirmed that Mr N could no longer carry out many of the activities involved in his ordinary role. He also said there were grounds for consideration of IHER. Mr N says he was offered IHER shortly thereafter, but he chose to accept an alternative role and continue working. However, our Office has not been provided with evidence that he was in fact offered IHER at this stage.

8. On 17 May 2010, Mr N first applied for IHER. Under BT's medical retirement procedure criteria, this meant that he had to be "permanently incapable of giving regular and effective service in the duties of his position by virtue of ill health".
9. Following his application for IHER, Mr N was placed under the BT's Managing Changing Capabilities (**MCC**) scheme, to see if there were any other roles he could do. Around the same time, he met with RehabsWorks, an organisation who assessed him for a functional restoration programme. It was recommended he undergo a Pain Management Course (**PMC**). At this time, Mr N said he would need to check whether his doctors agreed with this, as previously he had been advised not to do any physiotherapy – which the course included. However, our Office has not been provided with evidence that Mr N was advised not to go on a PMC.
10. On the contrary, in 2011 Dr Chawla recommended a PMC (appendix 2), however, Mr N did not complete a PMC at this stage.
11. On 23 September 2011, Dr Macauley compiled a report in relation to Mr N's IHER application. She was satisfied that Mr N had exhausted the MCC scheme, but she also considered there were further treatment options which may improve his condition. As such, she did not advise he was eligible for IHER (appendix 3). On 18 January 2012, having requested a more recent report from a specialist, Dr Macauley confirmed that she maintained this position.
12. Mr N was unhappy and so further reports were obtained from Dr Sinha (appendix 4) and Dr Lister (appendix 5). Dr Sinha recommended a PMC and Dr Lister felt an office role may be suitable for Mr N. As a result, on 18 January 2012, BT rejected Mr N's application for IHER.
13. It is important to note that, by this time, Mr N's employment with BT had ceased. Mr N had also initiated an employment tribunal hearing. However, this was later cancelled because, on 23 November 2012, an Agreement in respect of an Actual or Potential Claim to the Employment Tribunal (**the Employment Dispute Agreement**) was signed by both parties.
14. Mr N was unhappy with the decision in relation to his IHER application. As a result, a further report was obtained from Dr Bell on 15 June 2012 (appendix 6). Overall, Dr Bell's opinion was that a PMC could help Mr N. BT subsequently confirmed that Mr N's appeal had been declined.
15. Mr N's appeal was rejected on 11 July 2012, and BT states Mr N had no further right of appeal with it after this point as he was no longer an employee. In particular, BT has highlighted that section 5 of the Scheme rules (appendix 7) covers its responsibility to assess active Scheme members for IHER. It states that, once a member ceases employment, they become a deferred member and therefore section 5 no longer applies. Applications from deferred members can be considered under section 6 of the Scheme rules (appendix 8). The trustees, or BTPSML, are

responsible for making a decision in relation to an application from a deferred member.

16. On 9 June 2014, BTPSML agreed to assess a further IHER application for Mr N and it subsequently granted him an IHER. However, BTPSML only backdated Mr N's benefits to his application in June 2014 and it did not offer Mr N an enhanced IHER.
17. BTPSML has confirmed that it could not backdate his application to when he initially applied for an IHER with BT and it has said there is no provision under the Scheme rules for it to offer different levels of IHER. Lastly, it said that Mr N's complaint regarding his shares was an employment issue and not one it could investigate.
18. In its response to the complaint, BT confirmed that BTPSML was correct. It emphasised the fact that there are two separate IHER application processes under the Scheme; one for active members and one for deferred members. It also confirmed that an enhanced level IHER can only be provided by BT under the IHER application process for active members. This is because a two level award is only mentioned in BT's Criteria for Medical Retirement Procedure. This is a separate resource but forms part of the Scheme rules under section 5.1, where the employer's medical retirement procedure is referred to (ibid).
19. Mr N said it had been part of the Employment Dispute Agreement, in November 2012, that BT would reconsider his IHER application. However, BT disputes this and no evidence has been provided to support Mr N's statement.
20. Since the complaint was escalated to our Office, Mr N has argued that he was never offered a PMC at a suitable location. In particular he highlights that he was referred to a Functional Restoration Programme in Manchester, but that the location was too far for him. He therefore states a PMC would have needed to be in Liverpool in order to be a viable option.
21. BT has confirmed that there was a PMC in Liverpool and provided a recording of a meeting with Mr N, from 24 August 2011, where this was discussed. During this meeting, Mr N told BT that he was not attending the PMC, despite being offered a place, because he did not have time. BT asked him whether this was because he was working, but he confirmed he was not able to work and was job searching instead. Mr N did not give any other reason during the meeting for not attending the PMC.

Adjudicator's Opinion

22. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by BT or BTPSML. The Adjudicator's findings are summarised briefly below:-
 - The Adjudicator considered that Mr N's complaint regarding his shares was an employment issue and as such it was not appropriate for our Office to consider.

- The Adjudicator noted that the Employment Dispute Agreement did not include provision for BT to reconsider Mr N's IHER again.
 - The Adjudicator was satisfied that the Scheme rules allow for two different IHER processes - one for active members under section 5 (where BT is responsible for making the decision), and one for deferred members under section 6 (where BTPSML is responsible for making the decision).
 - In consideration of the action taken by BTPSML the Adjudicator believed that BTPSML had done all it could under the Scheme rules. It had awarded Mr N an IHER and backdated his benefits to when it received his application. It could not backdate his benefits before that date, as he had not started the process with it before then. The Adjudicator also noted there is nothing in the Scheme rules to say BTPSML can award an enhanced level IHER.
 - The Adjudicator was also satisfied BT had not committed maladministration. In particular, the medical evidence it received indicated that there was still a treatment option available to Mr N. In particular, the medical evidence BT received had indicated a PMC may enable Mr N to continue work. BT had also allowed Mr N sufficient time to complete a PMC before reaching its decision.
23. Mr N has accepted the Adjudicator's Opinion in relation to the part of his complaint against BTPSML.
24. However, Mr N has not accepted the Adjudicator's Opinion in relation to his complaint against BT. Mr N has raised a number of additional points and sent a recent report from Dr Jayaseelan (appendix 9) to contest the Opinion. In summary, Mr N has stated that a PMC is not a treatment option as it will not cure him.

Ombudsman's decision

25. I have not determined whether BTPSML has committed maladministration in this matter, as this part of the complaint is no longer in dispute. My decision therefore relates to BT's actions only.
26. I have also not considered Mr N's complaint relating to his BT shares. I agree with the Adjudicator that this appears to be an employment issue and not one I should consider here.
27. Mr N believes that a PMC is not a treatment option and has highlighted that it cannot cure him. I agree that the evidence indicates a PMC will not cure him. However, this does not mean it is not a treatment option. The Scheme rules do not state that an IHER should be granted simply because a condition is incurable. Instead, what is relevant is whether Mr N is able to continue working and, in particular, whether there are any treatment options which may enable him to work.

28. The medical evidences indicates that a PMC was a suggested treatment option at the time, which could have enabled Mr N to continue working. There is uncertainty within the reports about how effective a PMC would be, but several doctors indicated Mr N may be able to return to work as a result and that further certainty about this could only be achieved through Mr N initiating a PMC. I therefore consider it reasonable that BT felt a PMC should be attempted.
29. A PMC at a suitable location was offered to Mr N a number of months before his employment came to an end. I am therefore satisfied that BT allowed him sufficient opportunity to complete it. As such, I do not consider it committed maladministration declining Mr N's application for IHER.
30. Therefore, I do not uphold Mr N's complaint against BT.

Anthony Arter

Pensions Ombudsman
24 March 2017

Appendix

Appendix 1

Extract from Dr Beastall's report, 31 October 2000:

"1. In my opinion, Mr [N] is unfit to return on a permanent basis to the full range of external engineering duties...I would regard him as permanently incapable of such duties.

2. Mr [N] is clearly unfulfilled by his present form of employment. If he can be found suitable alternative employment which meets operational requirement and it is acceptable to the employee in terms of his own aspirations, then I see no reason why he cannot continue...If an agreement cannot be reached on this basis, Mr [N] would wish to consider leaving BT to pursue an alternative career. In my opinion, there are grounds for consideration of medical retirement in these circumstances."

Appendix 2

Extract from Dr Chawla's report, 27 May 2011:

"Treatment plan:

I had a discussion with Mr [N] and think initial way ahead would be to have an approach of rehabilitation...I think the way ahead would be pain management programme to start with. I have introduced this idea and given him information leaflet to decide about it."

Appendix 3

Extract from Dr Macaulay's report, 23 September 2011:

"Although Mr [N] has long term back problems there are further treatment options, including interventions to address possible barriers acting on his condition that could possibly lead to improvement that may enable successful rehabilitation and return to work, either to adjusted normal duties or a suitable alternative role. As all treatment possible options have not been exhausted, further improvements cannot be ruled out and therefore it cannot be said that permanent incapacity has resulted...the BTPS medical retirement criteria for payment of ill-health related pension benefits are not met."

Appendix 4

Extracts from Dr Singh's report, 14 December 2011:

"Involvement in the pain management programme is the best option available to him...I agree with Dr Chawla's opinion in this regards."

"It is possible that there could be partial improvement in his condition with involvement in the pain management programme."

Appendix 5

Extract from Dr Lister's report, 15 December 2011:

"I certainly feel that he should be able to perform an office-based role provided he can stand up and move around fairly readily so that his back does not become too stiff."

Appendix 6

Extract from Dr Bell's report, 15 June 2012:

"Mr [N] is a young man. While degenerative spinal changes are likely to be progressive, the severity of the symptoms can fluctuate from time to time and be significantly affected by the psychological state. There is consensus in the notes and reports that severe pain behaviour and pain avoidance were at play. Additionally, medical notes contain reference to a symptoms of depression. The recommend pain management programme had not been accepted by the time of his assessment in December 2011, and Mr [N] chose not to accept the recommended rehabilitation programme on either a physical or a psychological basis.

...it is clear that all treatment options which have been considered to be appropriate have not been exhausted...without an assessment of the impact of these treatments, it will not be possible to determine Mr [N]'s long term functional limitations. Consequently it is not possible [to] confirm that he will be unable to undertake suitably adjusted work through till the normal pensionable age of 65. As such, the criteria for ill health retirement under the BT Pension Scheme are not, in my opinion, met, and it is my recommendation that the appeal should be DENIED."

Appendix 7

Scheme rules, section 5:

“5.1 Medical early retirement after 2 years’ Qualifying Service

A member who leaves Service before Normal Pension Age with at least 2 years’ Qualifying Service and who is certified by the *Employer* as having been retired under the *Employer’s medical retirement procedure* may choose an immediate pension (but not before Minimum Pension Age, unless the Member is suffering from Incapacity).” [emphasis added]

Appendix 8

Scheme rules, section 6:

“6.1 Preserved Pension

A Member who leaves Service before Normal Pension Age without becoming entitled to an immediate pension will receive a pension for life from Normal Pension Age.

6.2 Early Pension

A Member entitled to a preserved pension may choose to start receiving it before Normal Pension Age (but not before reaching Minimum Pension Age, unless the *Trustees* are satisfied that the Member is suffering from Incapacity.” [emphasis added]

Appendix 9

Content of report from Dr Jayaseelan:

Dear Dr Singh

Re: [Mr N]

I saw [Mr N] in Spire Liverpool Hospital as a private patient at his request. [Mr N] came to the Pain Clinic today seeking some answers to specific questions regarding his pain management in the past. This is the first time I am meeting [Mr N] but he has seen Dr Wells previously. He has had consultation followed

by injection treatment with Dr Wells at Spire and he has also been to the Pain Management Programme at the Walton centre [according to his history].

[Mr N] has been suffering from long standing low back pain and lower limb pains (19 years). He was initially seen by Mr Sinha (Neurosurgeon) and was subsequently seen by Dr Wells.

Essentially [Mr N] has chronic low back pain issues related to degenerative disease of the spine. He has failed to respond to injection treatment and also medication management. He mentioned that he has tried various medications and currently he is on Gabapentin three times a day and co-codamol. He is allergic to penicillin.

He mentioned that he has attended the Pain Management Programme in 2014 at The Walton Centre for 14 days.

He also mentioned to me today that his employers want him to attend the Functional Restoration Programme at Manchester. In fact, he has attended the initial assessment but found that it was difficult for him to travel every day to that programme.

He wanted to know my opinion on the following issues:

1) Difference between attending a Pain Management Programme and attending a Pain Management Clinic?

Pain management programme can be seen as extension of pain clinic. Whilst pain clinics are able to offer pharmacotherapy and injection treatments, they will also assess patients and consider referral for pain management programme [if one exists within their own trust] or to an external trust which offers a pain management programme depending on the patient's condition and response to previous treatments. Pain management programmes aim to reduce the impact of pain in a patient's life by equipping them with skills and knowledge to manage pain long term and also to have an improved quality of life despite chronic pain.

2) Are Pain Management injections into the lumbar spine a long term cure for back related problems?

The answer is no. Pain injections only offer short term symptomatic relief for pain and they are not the cure for the back problem.

3) If you already have a pre-existing long term back problem stemming back from 1995, would it make a difference if I had received injections into my back back [sic] in 2011 or for that matter in 2017?

Again, injections are the not cure for the back problem. Injections are given only for symptom relief and they usually work only for a short period of time. Sometimes injections do not work at all.

The answers to the above questions are my personal opinions as a pain clinician. I have not met [Mr N] before today and I do not have access to all his medical records.

Essentially [Mr N] is having problems with activities of daily living related to his pain issues. I will be grateful if you could support him by arranging a functional assessment if he has not had one before and also provide him with a summary of all the treatments that he has had towards managing his back pain.

I am discharging him from the Pain Clinic here. Meanwhile, if you need further information please do not hesitate to contact me at any time.

Yours sincerely

Electronically checked

Dr Senthil Jayaseelan
Consultant in Anaesthesia and Pain Management