

## Ombudsman's Determination

Applicant	Mr E
Scheme	BT Retirement Savings Scheme ( <b>the Scheme</b> )
Respondents	British Telecommunications PLC ( <b>BT</b> )

## Outcome

1. Mr E complaint is upheld and to put matters right BT should review the matter again in light of my comments within this Determination.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr E complains that BT, his former employer, refused to award him BT's medical retirement benefits.

## Background information, including submissions from the parties

4. Mr E was a member of BT's a group personal pension plan, a contract based scheme, which provides money purchase benefits to BT employees. The Scheme is operated and administered by Standard Life.
5. There are no medical retirement provisions stated within the terms and conditions of the Scheme. So where an employee is dismissed on grounds of ill health, they are eligible to be considered for BT's medical retirement benefits. The procedure involved in deciding to pay medical retirement benefits, is as follows:
  - Once an employee's employment ends on the grounds of ill health, a referral is made to the OHS.
  - The OHS will assess the matter and determine whether the employee meets the criteria for medical retirement benefits.
  - The OHS informs the BT manager on whether the criteria have been met and if the OHS can issue a certificate.
  - The BT manager informs the employee of the outcome and gives them the right of appeal if the application has been unsuccessful.

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- The employee has five working days to notify BT of his intention to appeal and whether the employee will be getting new medical evidence.
6. BT offers two types of medical retirement benefits, Standard and Enhanced. These are:
    - “Standard Level – permanently incapable of giving and effective service in the duties of his/her position by virtue of ill health.
    - Enhanced Level – permanently incapable of giving regular or effective service in any capacity by virtue of ill health.”
  7. The medical retirement benefits is payable to the Scheme from BT as a lump sum payment into the employee’s pension pot. It is a discretionary benefit and only paid if there is a certificate from the OHS. Once BT has paid the lump sum, it claims the amount back from its insurers. The lump sum is calculated as follows; for Standard level it is 15% of the employee’s salary for each year from date of certificate to normal pension age and for Enhanced level it is the same principle but 20% of the salary for each year.
  8. Once BT pays the lump sum into the pension pot, it is then up to Standard Life to decide whether the employee meets the criteria for the pension to be released early. There is no requirement for Standard Life to pay a pension once it has received the lump sum payment from BT.
  9. Mr E claims that the OHS did not reach a reasonable decision. He was dismissed on grounds of capability due to ill health on 14 October 2014. He took BT to the Employment Tribunal for unfair dismissal, disability discrimination and unlawful deductions of wages. The matter was settled with an agreement and BT paid him £106,750. The settlement agreement stated that the sum awarded was ‘in full and final settlement of his Employment Tribunal claims... and any other court or Tribunal claims he has or may have against the Respondent in connection with his employment and the termination of it’ and that ‘nothing within [the agreement] shall affect Mr E’s statutory rights under the PSA [1993].’
  10. BT referred the matter to the OHS on 12 November 2013 prior to when Mr E was dismissed. However due to employment issues Mr E had with BT this was put on hold until 2014. The OHS considered the matter and deemed Mr E was not suffering from ill health and that he was not permanently incapacitated as other treatments were not exhausted.
  11. Mr E appealed the BT manager’s decision and the Chief Medical Officer within the OHS considered the appeal in January 2015. The Chief Medical Officer’s view was that the perception of work on health was the issue that was causing Mr E health issues. Further he said that ill health was not the primary issue causing Mr E’s employment difficulties.

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12. The Chief Medical Officer considered the medical reports submitted before reaching his decision. The Chief Medical Officer stated that Mr E had not explored mental health treatments, but he did not state the likely prognosis of such a treatment and whether after undergoing such treatment, what would be the likely outcome based on the balance of probabilities.
13. BT's position is that it does not think this Service has jurisdiction to consider the complaint. It says that the Employment Tribunal settled all claims including the pension dispute. Further, BT says that the medical retirement benefits are a discretionary employment benefit. However, if this Office considers the matter is within its jurisdiction, then it has said that it believes that it has followed the correct procedures.
14. Mr E's response is that the matter is within this Office's jurisdiction, as this Office has considered similar complaints and Mr E says that without sight of the governing documents he is unable to say whether it is strictly an employment benefit.
15. Mr E says that the Employment Tribunal settlement did not include his pension rights and therefore he can bring a complaint to us.
16. Mr E says with regards to the medical retirement benefits – that BT has held the position that he was unable to handle his work, whereas BT has not accepted that its work pressures caused him ill health. He alleges that BT has been biased towards him by consistently holding the view that he was simply a “poor performer”.

## **Adjudicator's Opinion**

17. Mr E's complaint was considered by one of our Adjudicators who concluded that further action was required by BT. The Adjudicator's findings are summarised briefly below:
  - The complaints falls within this Office's jurisdiction by virtue of Part 1 Section 5 of the Pension Schemes Act 1993.
  - Whilst BT followed the correct processes, BT and the OHS did not ask the right questions before they reached their decision.
  - BT and OHS stated that alternative treatments were available but the OHS did not state what outcome, on the balance of probabilities, these treatments would produce for Mr E. BT did not ask their OHS this question.
  - BT were asked to reconsider the matter on the basis of what the likely outcome of alternative treatments would be for Mr E.
18. Mr E accepted the Opinion, but wanted BT to complete the review within a strict timescale.

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19. BT did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. BT provided their further comments which do not change the outcome. BT have said:
- The PO does not have jurisdiction under section 146 PSA 1993 to investigate and determine the complaint.
  - The complaint has already been settled under the Settlement Agreement.
  - BT considered the application for medical retirement in accordance with BT's medical retirement procedure.
  - The Adjudicator focussed only on one element of the test for medical retirement whereas their advisers had considered the full test. It is their view that Mr E was not incapacitated from working by reason of ill-health and Mr E was not permanently incapable of working.
  - BT say that Mr E could have returned to work, notwithstanding his mental illness and this position was supported by multiple physicians.
  - Further, it was OHS' opinion that Mr E was not permanently incapacitated from working.
  - Finally, BT said that the Chief Medical Officer did in their view express a view on the likely outcomes of alternative treatments that Mr E could undertake and considered that the likely outcome of such treatments would be positive. However, even if they had had a poor prognosis Mr E would nevertheless have failed to meet the criteria set out above.
20. [I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by BT for completeness.]

## **Ombudsman's decision**

21. Section 146 (1) provides that The Pensions Ombudsman may investigate and determine the following matters -
22. (a) a complaint made to him by or on behalf of an actual or potential beneficiary of an occupational or personal pension scheme who alleges that he has sustained injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of the scheme,

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23. BT has submitted that the key jurisdictional question is whether Mr E's complaint 'concerns an "occupational pension scheme" or "personal pension scheme", which are separately defined, for the purposes of section 146 PSA 1993 in sections 1 and 181(1) PSA 1993.
24. It is correct that section 146 refers to s.181(1) for its definitions. However, s.181(1)PSA 1993 states that the terms occupational and personal schemes have the meanings given in section 1, so for the purposes of establishing my jurisdiction the question remains does the arrangement being complained about fall within the definitions in section 1?
25. The Adjudicator considered that BT's medical retirement policy is 'an employee benefit paid on termination of service in an employment' for the purposes of section 1(5)(c) PSA 1993. BT did not dispute that it was such, but submits that section 1(5) is not relevant to the question of whether its medical retirement policy falls within my jurisdiction. It submits that section 1(5) does not apply to the categories used in section 1.
26. I do not agree with this view. Section 1(5) PSA 1993 does not say that it does not apply to the definition of "occupational pension scheme" or "personal pension scheme". It says it does not define what "pension scheme" 'means' in the phrase "occupational pension scheme" or "personal pension scheme".
27. Parliament presumably expressed it in such way to make it clear that the words "occupational pension scheme" and "personal pension scheme" should not be read as simply adding the ordinary meaning of the words 'occupational' and 'personal' (as relevant) to the definition of "pension scheme" when considering the categories established by section 1(1). The upshot of this is that section 1(5) (along with the rest of section (1)) is relevant to the definitions of "occupational pension scheme" and "personal pension scheme".
28. BT also submits that the employee benefit is not within jurisdiction because it is neither an "occupational pension scheme" nor a "personal pension scheme". I agree with BT's suggestion that BT's medical retirement policy is not within the Ombudsman's jurisdiction by virtue of any connection to the BTRSS. As it has asserted, the BT medical retirement policy is a discretionary employee benefit. I do, however, consider that BT's medical retirement policy should be considered an "occupational pension scheme" for the purposes of my jurisdiction. This is because it is an arrangement having or capable of having effect so as to provide benefits to or in respect of people on termination of service in an employment (in accordance with section 1(5)(c) PSA 1993) and it meets the criteria within the definition of "occupational pension scheme" in section 1(1) PSA 1993.[. ]
29. I turn now to BT's second argument about why I have no jurisdiction over the complaint, the argument that the subject matter of it forms part of the settlement agreement. I cannot see how this can be correct, since the terms of the agreement state that 'nothing within [the agreement] shall affect Mr E's statutory rights under the

PSA [1993].’ The right to bring a complaint to the Ombudsman, is a statutory right to complain to a body established by the PSA 1993, which seems to me to fall squarely within that exclusion.

30. This leads me to the key aspect of the medical retirement benefit application process. The issue I have to consider is whether BT adopted the correct procedures when it exercised its discretion, whether it reached a decision which was not perverse, i.e. was not a decision which, faced with the same facts, no reasonable decision maker could have reached, and whether it communicated the reasons for its decision with sufficient clarity for Mr E to understand the basis of it. It is not my role to say whether I personally would have made the same decision.
31. The policy requires BT to ask themselves the following that the member is, “Permanently incapable of giving regular and effective service in the duties of his/her position by virtue of ill health.” The definition of permanently incapable is that, “permanently means to the normal pensionable age for that person (currently usually 65).” Further incapable means, “unable to work despite the individual’s best efforts, which include co-operation with any reasonable proposal for medical or surgical treatment.”
32. For the reasons for refusal, BT relies on the findings of Dr Litchfield who gave the OHS’s decision on appeal on 9 January 2015. BT in their decision letter to Mr E said, “The Occupational Health Service has considered all the medical evidence and has advised me that your appeal has been rejected.” BT enclosed a copy of Dr Lichfield’s report.
33. Dr Lichfield considered the medical evidence from 2010 to 2014, including Occupational Health reports, Dr Macaulay’s report on the initial application, and Consultant Psychiatrist and additional submission from Mr E in the way of a personal statement. Dr Lichfield said in his report, as relevant:

“Mr [E] appears to have enjoyed good physical health throughout his life. There are no indications of any mental health problems until about 2009 when he began exhibiting symptoms consistent with anxiety and depression...

The appeal evidence ...defined his condition as an adjustment disorder and this is consistent with the OHS reports over the years, even if the exact term was not used...

Dr Macaulay made the point that Mr [E] appeared not to have undergone the full range of treatments for his condition and, in particular, that he had not seen a mental health specialist. The non-treating psychiatrist who undertook an assessment for the purposes of supporting [Mr E’s] medical appeal made the point that [Mr E] has only been partially treated...He opined that partial treatment had resulted in a continuance of symptoms and this may have been a factor in extending [Mr E’s] absences from work...

The two elements of the medical retirement criteria that appear most critical in this case are “by virtue of ill health” and “permanence”. Mr [E]’s performance problems appear to predate his ill health though the latter may then have contributed to his subsequent ability to render regular and effective service. There is however a consistent theme running through the case papers that ill health is not the primary issue causing his employment difficulties. Perhaps more critically, the nature of his health condition and opportunities for improved medical management do not suggest that he need be incapacitated from his normal type of work for the next four years.”

34. BT in response to the complaint said that for an individual to be incapacitated by reason of ill health, incapacity must be a direct consequence of a recognised clinical illness, disability or injury for which there is objective medical evidence. They say that Dr Litchfield found that ‘ill health is not the primary reason causing Mr E’s employment difficulties’ However, it is my view that whilst Dr Lichfield expressed this view he did not express any view on whether with medical intervention whether Mr E’s condition would deem him permanently incapacitated. Dr Lichfield made a general statement that improved medical management would not suggest that Mr E remains incapacitated, but no explanation has been given about the medical treatments that he had in mind which would make no difference to Mr E. Without such a finding, even on grounds of balance of probabilities, citing reasons for why specific treatment will not succeed makes the decision questionable.
35. Contrary to the view set out in the Opinion, they say that the OHS did comment on treatments. The inference which can be drawn from that discussion was that such treatments would assist in recovery i.e. would have a positive effect. They contend that it was not necessary for BT to request further information on that point because it was clear that the OHS considered the likely outcome would be positive, besides which other criteria were not met., I do not consider that an inference is sufficient to demonstrate that the OHS applied his mind to the question of whether any incapacity found was likely to be permanent.
36. To make that assessment the OHS needs to consider specific treatments and what the outcome of the treatment would be, based on OHS’ judgment. So while the OHS noted that Mr E had been partially treated, the OHS and BT need to establish what Mr E’s prognosis would be if he completed the entire course of available treatments.
37. For these reasons, the complaint should upheld and BT should reconsider the matter by asking OHS to explain what alternative treatments he had in mind and the prognosis of such treatments.
38. Therefore, I uphold Mr E’s complaint.

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**Directions**

39. Within 14 days of this Determination, BT will ask the OHS to re-consider the matter and decide based on their judgment whether Mr E meets the criteria for Standard or Enhanced level of ill health retirement benefits. The OHS will consider whether, on balance or probabilities, if the alternative and partial treatments were completed would Mr E be permanently incapacitated. .

**Karen Johnston**

Deputy Pensions Ombudsman  
13 January 2017