

Ombudsman's Determination

Applicant	Mr N
Scheme	Electricity Supply Pension Scheme (the Scheme)
Respondent	RWE Generation UK plc (RWE)

Outcome

1. I do not uphold Mr N's complaint and no further action is required by RWE.

Complaint summary

2. Mr N's complaint is that he was made redundant by his employer, RWE, rather than given an ill health retirement pension (**IHRP**). He believes he should have been able to apply for an IHRP.

Background information, including submissions from the parties

3. Mr N was employed by RWE as a maintenance supervisor and joined the Scheme on 1 April 2004. His Normal Pension Age (**NPA**) is 63.
4. In July 2016, RWE decided to restructure the operations at the power station where Mr N worked.
5. On 24 October 2016, Mr N went on sickness absence from work due to cervicalgia, a neck condition.
6. In January 2017, Mr N had a C5/6 and C6/7 cervical discectomy and cage plate fusion. He returned to work on 3 April 2017.
7. In July 2017, Mr N was involved in a road traffic accident, suffering further injury, and was signed off work until 25 September 2017.
8. On 28 September 2017, RWE started a consultation process with its maintenance team concerning proposed redundancies. The new structure meant that instead of two maintenance supervisors, only one would be required. The other maintenance

supervisor would be made redundant unless RWE could find the employee suitable alternative employment within the organisation.

9. In October 2017, following Mr N's return to work and a referral to Occupational Health (OH), Mr N was seen by Dr Mills, an Occupational Health doctor. In his report dated 9 October 2017, Dr Mills said:

“The extent to which any of the necessary adjustments are operationally reasonable is a management decision. It is important to understand that I cannot predict when these adjustments will no longer be necessary; they may need to be long term...If you felt that adjustments could not be accommodated, or if he was required to move to a more physically demanding role (such as mechanical maintenance), then we may need to see him again to consider other options, including redeployment or ill health retirement.”

10. On 26 October 2017, as part of the consultation process, Mr N was interviewed for the role of maintenance supervisor but was unsuccessful. RWE said it reviewed details of the new post and medical evidence on Mr N's health issues with OH. It said the post would have required no additional physical skill and would not have presented Mr N with any additional problems.
11. On 31 October 2017, Mr N was notified that he had been selected for redundancy. The following day, he went on gardening leave.
12. On 14 November 2017, Mr N was signed off with work-related stress, anxiety and depression.
13. On 17 November 2017, Mr N wrote to RWE. He asked for clarification on issues he had raised following the second redundancy consultation meeting. Mr N questioned whether RWE had considered making reasonable adjustments in view of his health conditions.
14. On 24 November 2017, at the request of RWE, Dr Mills provided a further medical report (**the November report**) following a telephone consultation with Mr N. In his report, dated 24 November 2017, Dr Mills said:

“[Mr N's] symptoms seem to be specifically work-related, in that he describes significant increases in anxiety if thinking about his work situation. To summarise:- He is not currently fit to return to work because of the difficulties he experiences driving the distance to Didcot, because of his chronic pain medication...I do not know when this situation will change...He may be able to undertake a role that involved much less driving (e.g. within 30 mins of his home), should such a role be available...If he felt physically able to attend work, then management would need to ensure they had sought to address any outstanding concerns that he has, in order to help resolve his work-related stress. I would be happy to undertake a review at any stage”.

15. On 15 December 2017, RWE wrote to Mr N and referred to the report. Based on the report, RWE said it was not evident that he would be eligible to apply for an IHRP.

16. On 19 December 2017, RWE notified Mr N that he would be made redundant with effect from 12 March 2018.
17. On 9 February 2018, Mr N raised a grievance concerning RWE's decision to make him redundant. In summary he said:-
 - The sole intention of the restructure was to make him redundant, rather than allow him to retire on ill health grounds. Throughout the process, RWE had failed to follow fair and objective procedures.
 - RWE had also failed to comply with the requirements under the Disability Discrimination Act 2005 and the Equality Act 2010, to make reasonable adjustments.
 - He suffered heightened anxiety and was off work due to work-related stress as a result of the mishandling and miscommunication of the restructure/redundancy process.
 - RWE failed to follow fair and objective procedures throughout the internal restructure processes and to make reasonable adjustments during the restructure process in line with the Disability Discrimination Act 2005 and the Equality Act 2010.
 - The option of an IHRP had not been considered despite this being discussed with Dr Mills at two separate OH consultations.
 - He had been subjected to victimisation because he highlighted Health and Safety issues. The issues he raised related to employees working by unguarded and exposed rotating shafts.
18. Mr N referred to sections 44 and 100 of the Employment Rights Act 1996 (as amended). Section 44 broadly provides that an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the grounds specified in section 44. Section 100 broadly provides that where an employee has been dismissed, and the sole or main reason for dismissal is that specified in section 100, the employee shall be regarded as being unfairly dismissed for the purposes of section 100.
19. On 7 March 2018, there was an appeal hearing during which RWE explained that an IHRP would not be considered in Mr N's case, for the reasons it had highlighted in its letter of 15 December 2017.
20. On 22 March 2018, RWE notified Mr N of the outcome of the hearing. It said that Dr Mills had been briefed on the restructured maintenance supervisor role. Dr Mills had confirmed that Mr N would be able to undertake the role, provided the reasonable adjustments he had recommended were implemented.
21. Mr N subsequently made a claim to an Employment Tribunal (**ET**), as he considered he had been unfairly dismissed and discriminated against on the grounds of disability.

22. On 4 March 2022, the ET concluded that Mr N's complaints of unfair dismissal and disability discrimination were not well founded.
23. Relevant extracts from the Scheme's ill health provisions are set out in Appendix 1.
24. Relevant extracts from the medical evidence are set out in Appendix 2.

Mr N's position

25. Mr N submits:-

- The "final medico legal report" was not the final report. There are other medical reports, including reports from radiology, and further medico-legal reports, that have yet to be finalised.
- The results of his spinal surgery were positive and he was told he should make a full recovery. However, it was expected to take at least 12 months for the spinal bones to join together.
- A return to work interview was not completed after his accident. On returning to work, he tried to have a meeting with the OH nurse. However, the OH nurse said that she could not conduct a meeting as no referral had been made by management. He completed the relevant documents on 13 September 2017, and returned the documents to RWE on 15 September 2017.
- The appointment with an OH doctor was not scheduled until 9 October 2017, which was after the start of the formal consultation process. Consequently, he did not have the opportunity to discuss at an earlier stage in the process whether it would be possible to take ill health retirement. The option to take IHRP, was brought to his attention by Dr Mills during their first meeting.
- The timeframe of the restructure prevented him from being able to evidence that he was unable to carry out his role, or any other role.
- He was medically assessed by the Department for Work and Pensions, after his redundancy notice period had ended, and his benefits were backdated. He is in receipt of Personal Independence Payment, which was awarded on 20 March 2018 and also Employment and Support Allowance, which was awarded on 11 June 2018. This demonstrates that he would have met the criteria for an IHRP but for the restructure.
- On 31 October 2017, he enquired about the option to take an IHRP. However, this information was not passed on to Human Resources until 6 November 2017.
- There were no discussions concerning the possibility of redeployment and RWE blocked his attempts to explore the option of an IHRP.

RWE's position

26. RWE submits:-

- Mr N's position is that he should have been offered IHRP. However, this option is only available to RWE employees who have been dismissed on the grounds of capability. The issue of whether Mr N was wrongfully dismissed was fully explored by the ET.
- The medical evidence available at the relevant point in time, indicated that Mr N was capable of continuing in employment. In the November Report, Dr Mills said Mr N would probably return to his pre-accident condition in 12-18 months but had a 20% chance of not making a full recovery.
- The final medico legal report indicated that his condition would not improve even with posterior cervical spine surgery. However, the author of the report said that he was reserving his views pending further MRI imaging.
- The ET accepted that RWE's obligations could not be affected if Mr N's prognosis worsened after his dismissal, as the decision was made to dismiss him on the grounds of redundancy.

Adjudicator's Opinion

27. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by RWE. The Adjudicator's findings are summarised below:-

- The relevant scheme rules or regulations will determine the circumstances in which members are eligible for ill-health benefits, the conditions which they must satisfy, and the way in which decisions about ill-health benefits must be taken.
- In Mr N's case, the relevant provisions are set out in rule B4.4 of Schedule 7 of the Scheme Rules.
- In September 2017, RWE started redundancy consultations with its maintenance team. Mr N's role was considered for redundancy.
- In October 2017, following Mr N's return to work, he was seen by Dr Mills. Dr Mills said if adjustments could not be made, or if Mr N had to move to a more physically demanding role, OH may need to see him again to consider other options, including redeployment or ill health retirement.
- Dr Mills saw Mr N again in November 2017. He acknowledged Mr N was currently unfit for work and he did not know when this situation would change. If Mr N was physically able to attend work, then management would need to address any outstanding concerns to help resolve his work-related stress.

- In December 2017, RWE informed Mr N that, based on Dr Mills' latest report, it was evident he would not be able to apply for an IHRP. Later that month, Mr N was informed he would be made redundant with effect from 12 March 2018.
 - The Adjudicator explained that redundancy was an employment matter. Consequently, it did not fall within the Pensions Ombudsman's jurisdiction.
 - In the Adjudicator's view, RWE had correctly interpreted Rule B4.4 of Schedule 7 of the Scheme Rules and had followed a correct process. As Mr N's employment ended due to redundancy, the Adjudicator's view was that he was not eligible to apply for an IHRP.
28. Mr N did not agree with the Adjudicator's Opinion and the complaint was passed to me to consider.
29. Mr N provided his further comments in response to the Opinion. In summary he said:-
- Further documentation from after his redundancy, was not considered by RWE.
 - Key documents provided by RWE were not accurate. RWE tried to use updated versions of policies to try and demonstrate that he had not followed its policies and procedures. An updated version of the capability procedure was included in the court bundle for the ET.
 - His membership of the Scheme was subject to the 2014 Scheme handbook and not the 2021 updated version.
 - It was acknowledged that his disability arose prior to the commencement of the redundancy process. Consequently, RWE should have allowed him to proceed with an application for an IHRP.
 - The Adjudicator considered that RWE had a legitimate business case for carrying out a redundancy exercise in respect of the maintenance supervisor role. In his view, there was no evidence to suggest that there was a planned restructure in 2016, that would involve a reduction in maintenance supervisors.
 - By refusing to acknowledge his disability, RWE failed to follow a proper process. Dr Mills provided medical services to RWE and had a contractual arrangement to provide these services. Consequently, he questioned whether Dr Mills had a conflict of interest.
30. I have considered the additional points raised by Mr N; however, they do not change the outcome, I agree with the Adjudicator's Opinion.

Ombudsman's decision

31. Mr N has alleged discrimination and unfair treatment in relation to the Scheme. Under Section 61 of the Equality Act 2010, a person responsible for an occupational

pension scheme must not discriminate against, harass, or victimise another person when carrying out its functions in relation to a scheme.

32. Section 146 of the Pension Schemes Act 1993, precludes The Pensions Ombudsman from investigating or determining a complaint or dispute where proceedings have commenced in any court in respect of that complaint or dispute. Consequently, I cannot consider this aspect of Mr N's complaint.
33. I also cannot consider whether the redundancy process was correctly carried out, as this is an employment matter and does not fall within my jurisdiction.
34. In cases such as these, my role is to consider whether the decision-maker correctly applied the scheme rules that were enforce at the time. I am satisfied the matter I am being asked to consider has not already been addressed by the ET.
35. The relevant rule in this case is B4.4 of the Scheme Rules, which provides that:

“A 60ths Member who leaves Service before Normal Pension Age because of Ill-Health may choose an immediate pension...”
36. Mr N considers that further documentation that he made available to RWE following his redundancy was not taken into consideration. As Mr N did not leave Service before his NPA because of ill health, under the Scheme Rules he was not eligible to apply for an IHRP. So, any documentation that RWE received after the date he was made redundant would not materially change the outcome of his complaint.
37. Mr N has referred to documents that were provided by RWE that he claims were inaccurate. He maintains that his pension benefits in the Scheme were subject to the 2014 Scheme handbook. However, the Scheme Rules override any information contained in the 2014 Scheme handbook.
38. Mr N considers that RWE should have proceeded with his application for an IHRP, as it was acknowledged at the time that his disablement occurred before RWE initiated the redundancy process. I do not agree.
39. Even if RWE acknowledged that Mr N was incapacitated, this does not mean that he would automatically have met the criteria for an IHRP, following a referral to OH. There are no requirements under the Scheme Rules for RWE to allow Mr N to proceed with an application for an IHRP solely on the basis that it had acknowledged he had a disabling condition. The Scheme Rules determine the conditions that a Member must satisfy to be eligible for payment of a pension on ill health grounds.
40. In cases such as these, it is open to the decision maker to prefer one medical view over the other. Moreover, the decision maker is entitled to give more weight to the opinion of its own medical adviser's.
41. Regarding Dr Mills' contractual relationship with RWE, I do not find that this had any bearing on RWE's decision to make Mr N redundant such that under the Scheme Rules he was not eligible to apply for an IHRP.

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42. I find that RWE followed the correct procedure in referring Mr N to OH and in making the decision as to whether or not he could apply for an IHRP.

43. I do not uphold Mr N's complaint.

Anthony Arter CBE

Deputy Pensions Ombudsman

5 June 2024

Appendix 1

The Electricity Supply Pension Scheme Rules

“B4.4 Ill-Health retirement

Conditions for payment of pension

A 60ths Member who leaves Service before Normal Pension Age (**NPA**) because of Ill-Health may choose an immediate pension if:

- (i) the 60ths Member had completed 5 years' Service or 5 years' 60ths Section Pensionable Service before leaving; or
- (ii) (a) the 2005 Member had completed 5 years' Service or 5 years' 2005 Section pensionable Service before leaving; or

(b) the Group Trustees consider that the Ill-Health of the 60ths Member is due to an accident or illness associated with his employment not falling within the scope of sub-paragraph (a); or

(c) the Group Trustees, in the exercise of their discretion, otherwise so determine.”

Appendix 2

Medical evidence

1. In his report dated 5 October 2017, Dr Hayward, a consultant neurosurgeon and spinal surgeon, said:

“[Mr N] has tried Gabapentin with some success. The arm symptoms are now 7/10 on the left and 4/10 on the right. The neck pain is 6/10.

We discussed again surgery by way of a posterior cervical foraminotomy. [Mr N] feels that he is able to cope with the symptoms on the Gabapentin and it's perfectly reasonable for him to continue for the foreseeable future in this way. We will arrange some physiotherapy for him to hopefully keep his symptoms under control. I have explained that surgery is certainly an option at any point in the future should he wish to re consider”.

2. In his report dated 9 October 2017, Dr Mills, an OHP said:

“[Mr N] has been back at work for about two weeks following about 10 weeks sickness due to a road accident. Unfortunately, [Mr N] has sustained further injury to the spine in the neck (having had this operated on in January of this year). This has resulted in ongoing upper limb symptoms (pain and tingling in the hands, pain in the arms, weakness of grip in the hands), pain in the shoulders and in the low back.

He has seen another specialist who has suggested trying medication to control the pain before considering surgery. [Mr N] is keen to avoid further surgery if at all possible, and I think this is quite a reasonable view to take, as further surgery would not be without its risks. He has experienced some improvement in his pain with the current medication. He is still not able to undertake manual handling of more than 2 or 3 Kg. He gets pain if on his feet for more than 30 – 45 minutes. He is not able to climb vertical ladders.

I understand he is working as Supervisor in the ECI role at present (and has been for four or five years because of the problems with his spine). His current limitations as noted above mean that he needs to be restricted from performing some aspects of his usual role (ladders, manual handling, prolonged periods of standing/walking).

[Mr N] raised concerns about a proposed new role which would require him to undertake mechanical maintenance (which I understand is potentially a more physical role). From his description of this role, I would agree that he will likely find it difficult to undertake such a role (given his current limitations).

What time period can we expect [Mr N's] recovery to take?

He has quite a complex spinal condition at this stage, as he has recurrent problems following one episode of spinal surgery earlier this year. I am not

able to advise when he will be able to return to an unrestricted role. He may need to remain on these restrictions for the longer term, or until his symptoms improve further, but predicting future improvement is difficult.

What impact is there likely to be on [Mr N's] normal duties on return to work?

He will not be able to undertake ladders, manual handling of more than 2 – 3 Kg, or confined spaces. He should avoid FLT driving (because of the need to turn the head frequently). He is not currently fit to undertake use of larger power tools or large hand tools (he may be able to use smaller tools such as a battery drill, but nothing larger than this). When driving on the roads (e.g. to and from work) he needs to take regular breaks and this means journeys will take longer. I understand he is currently allowed to drive down in work time and this is helpful.

What adjustments can be made?

See above. The extent to which any of the necessary adjustments are operationally reasonable is a management decision. It is important to understand that I cannot predict when these adjustments will no longer be necessary; they may need to be long term.

We could offer a review appointment to see if there is any evidence of an improvement in his work capabilities, but I would not expect a significant change before 2 months; a review before that time is unlikely to be helpful. If you felt that adjustments could not be accommodated, or if he was required to move to a more physically demanding role (such as mechanical maintenance), then we may need to see him again to consider other options, including redeployment or ill health retirement.”

3. In his report dated 24 November 2017, Dr Mills said:

“[Mr N] is now signed off work with work-related stress and anxiety/depression. In addition, he is taking a particular medication, which can cause drowsiness, to control his back pain...There does not appear to be any other treatment plan at present that would lead me to predict an improvement in his pain, such that he will be able to stop taking the current medication...It may be helpful if [Mr N] could be assessed by a pain management specialist, to see if there is a better way of managing his pain such that it does not limit him so significantly in terms of his ability to drive and access the workplace...His symptoms seem to be specifically work-related, in that he describes significant increases in anxiety if thinking about his work situation. To summarise: - He is not currently fit to return to work because of the difficulties he experiences driving the distance to Didcot, because of his chronic pain medication. - I do not know when this situation will change. - He may be able to undertake a role that involved much less driving (e.g. within 30 mins of his home), should such a role be available...If he felt physically able to attend work, then management would need to ensure they had sought to address any outstanding concerns

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that he has, in order to help resolve his work-related stress. I would be happy to undertake a review at any stage”.