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Neutral Citation Number: [2022] EWHC 2992 (Ch)

Case No: CH-2022-BRS-000003

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
CHANCERY APPEALS (ChD)
APPEAL UNDER S.151 PENSION SCHEMES ACT 1993
FROM THE DETERMINATION OF THE PENSION OMBUDSMAN DATED 17 DECEMBER 2021

Bristol Civil Justice Centre,
2 Redcliff Street, Bristol, BS1 6GR
Date: 28/11/2022

Before :

MR JUSTICE ZACAROLI

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Between:

MR LEE ANDREW	**Appellant**
- and -	
ROYAL DEVON AND EXETER NHS FOUNDATION TRUST	**Respondent**

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- -

Mr Tom Royston (instructed by **Watkins Solicitors**) for the **Appellant**
Mr Saul Margo (instructed by **Ashfords LLP**) for the **Respondent**

Hearing date: 17 November 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Zacaroli:

1. This is an appeal, brought with the permission of HHJ Matthews dated 10 March 2022, against a determination of the Pensions Ombudsman (the "Ombudsman") dated 17 December 2021 (the "Determination"), under section 151(4) of the Pension Schemes Act 1993 (the "1993 Act").

The Background

2. The appellant ("Mr Andrew") had, until his retirement on 18 February 2018, been employed for many years by the respondent (the "Trust") as a specialist orthotic technician. He was a member of two pension schemes (the "1995/2008 Scheme" and the "2015 Scheme").

3. Having developed significant health problems, in August 2017 Mr Andrew was considering taking ill-health retirement ("IHR"). He requested an estimate as to his pension entitlement under both Schemes. There is no issue about the estimate provided of the (very small) benefits under the 2015 Scheme. In relation to the 1995/2008 Scheme, the estimate provided by the Trust indicated that he was entitled to a lump sum of £18,506.83 and an annual pension of £6,168.83. This was based on pensionable pay of £31,229.17.

4. Mr Andrew's evidence was that he relied on this estimate in opting to take IHR. He said: "The whole decision to proceed with the [IHR] was based on the figures [the Trust employee] supplied and confirmed repeatedly were correct. I was dealing with declining physical health and decided the best course of action for myself and my family. I was going to be in deficit to the amount of £200 a month based on the figures supplied as opposed to my current wages at the time. I went away and did all my calculations – coming to the conclusion that if I used the lump sum to pay off debts I would be able to just survive."

5. Mr Andrew then applied for IHR. He applied for both "Tier 1" and "Tier 2" IHR. Tier 1 is awarded where the member who retires from permanent employment before normal retirement age is "permanently incapable of efficiently discharging the duties of that employment". Tier 2 is awarded where the member is "permanently incapable of regular employment of like duration … in addition to meeting the tier 1 condition."

6. This was approved on 28 December 2017 on the basis of Tier 1, but not Tier 2. Mr Andrew's employment terminated on 18 February 2018. When he was sent the final calculation of his pension entitlement, however, on 29 March 2018, his entitlement under the 1995/2008 Scheme was to a lump sum of £11,629.14 and an annual pension of £3,876.38. The estimate provided in August 2017 had been wrong, based on an inflated figure for pensionable pay, which should have been £19,650.94.

7. Mr Andrew complained to the Ombudsman. He sought compensation both for financial loss and for non-financial loss. The written submissions of the parties to the Ombudsman have not been found, aside from some correspondence, including that referred to below. According to the summary of Mr Andrew's case as set out in the Determination, his evidence was that he would have stayed in employment had he been provided with the correct IHR estimate. On that basis, he claimed financial loss

in the sum of £644,673.03, based on him continuing to work until he was 68 and then receiving his pension until aged 81.

8. In a response to the preliminary decision relating to his complaint, in a letter dated 12 March 2020, it was said on Mr Andrew's behalf that:

> "I think it is really important to stress that the decision to seek ill-health retirement was not driven by his employer – rather this matter was instigated by Mr Andrew after a series of accidents. At no point was it suggested by his employer he should seek ill-health retirement. Therefore, it stands to reason had Mr Andrew been in receipt of the true figures and therefore the true financial forecast he would NOT have made the decision to continue with the ill-health retirement. He would have stayed in employment potentially. This then throws up any number of variables and scenarios about what could have happened (more on this later).
>
> The financial loss suffered is substantial – a) because there is a short fall in the difference between the mis-stated figures and the actual figures of the pensionable pay and b) what would have been Mr Andrew's earning capacity and therefore retireable pension at the age of 68."

9. Later in the same letter, it was said that:

> "You suggest we need to quantify a financial loss. This would have to take into account a variety of possible scenarios and variables. As I have previously stated Mr Andrew's employer was not suggesting he take ill-health retirement, therefore, the likelihood is that he would have stayed employed (granted maybe not in the same job) but as per The Disability Act 1992 if Mr Andrew was no longer able to do his job effectively due to his disability, legally alternative arrangements would have had to have been made. By the same token, Mr Andrew after 20+ years of service with the NHS could have been promoted This would have meant Mr Andrew would have still been in employment and contributing towards his pension."

The Determination

10. Mr Andrew had requested an oral hearing, but that was refused by the Ombudsman on the basis that the evidence available to him was sufficient to determine the complaint.

11. The Ombudsman found that, although Mr Andrew was aware that his pensionable pay was overstated, and it was unlikely that he would have been told that his pensionable pay had been enhanced, nevertheless he concluded that Mr Andrew "does not have a sophisticated understanding of pensions and was reassured by the Trust that the IHR Estimate was correct."

12. Mr Andrew was awarded £1,000 for "serious distress and inconvenience", because of the Trust's provision of an incorrect IHR estimate and its subsequent failure to note that Mr Andrew's pensionable pay in the 1995/2008 Scheme had been erroneously inflated.

13. The Ombudsman concluded, however, that the claim for financial loss failed on reliance. He found that, although Mr Andrew said that, had he been given the correct figures, he would have remained in part-time NHS employment for a period and then returned to full-time employment until he was 68, that would not in fact have happened because he would have had to retire due to his ill-health anyway. That decision was based on the conclusion that the Trust would not have been willing to keep him on and would have been likely to take action to dismiss him on grounds of capability "at some point, certainly before he reached 68".

14. That, in turn, was based on the Ombudsman's conclusion that (1) the fact that Mr Andrew applied for IHR shows an acknowledgment on his part that he considered he was incapable of continuing with his job; and (2) the fact that he was awarded Tier 1 IHR means that he could not have continued in his job with the Trust. The Ombudsman concluded:

> "So Mr [Andrew] cannot say that he relied on the IHR Estimate as he would have had to have retired anyway. If Mr [Andrew] had been capable of remaining in his part-time employment or returning to full-time employment before age 68, as he suggests, he would not have qualified for Tier 1 IHR."

15. In those circumstances, the Ombudsman decided that he did not need to consider whether the medical evidence supported the Tier 1 decision "…as Tier 1 IHR is not in dispute".

16. The Ombudsman addressed the possibility of reasonable adjustments at §36 of the Determination, saying:

> "As Mr [Andrew] cannot qualify for Tier 1 IHR and argue that he could have remained in his employment with the Trust, I also do not need to consider reasonable adjustments. To do so would be to revisit the Tier 1 decision."

17. In context, it is clear that the Ombudsman was here considering reasonable adjustment within the confines of Mr Andrew's existing role, and not the possibility of redeployment to another role. He considered the latter possibility at §38:

> "Mr [Andrew] might have been able to undertake another role within the NHS. The fact that Mr [Andrew] was not awarded Tier 2 benefits acknowledges that he is capable of alternative part-time employment (of like duration). That option is, of course, still open to him."

The Statutory framework

18. The Ombudsman is established pursuant to s.145(1) of the 1993 Act. By s.146(1) the Ombudsman "may investigate and determine" various matters, including a complaint by a beneficiary of a pension scheme who alleges 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.

19. The powers granted to the Ombudsman for the purposes of an investigation include the power to require any person who, in the Ombudsman's opinion, is able to furnish information or produce documents relevant to the investigation, to do so: s.150(1). He has the same powers as a court in respect of the attendance and cross-examination of witnesses: s.150(2).

20. By s.151(4), an appeal on a point of law against the Determination lies to the High Court.

21. The Ombudsman's role differs from that of a court. His procedures are not trials, but are investigations in which he can pursue lines of inquiry until he is satisfied that he has sufficient information to resolve the complaint: *Webber v Department for Education* [2014] EWHC 4240 (Ch), per Nugee J at §46. One consequence is that the decision whether to hold an oral hearing is one that is susceptible to challenge on appeal only if the Ombudsman has "exceeded the generous ambit within which reasonable disagreement is possible": *Webber* (above) at §46.

22. There is no right of appeal against the Ombudsman's findings of fact. The only question on this appeal, therefore, is whether the Ombudsman made an error of law. In answering that question, "the appellate court should be astute not to entertain appeals on points of fact dressed up as points of law. A point of law is one which arises from the wrong application of legal principle, or from the misconstruction of a statutory provision or from a decision that no reasonable Ombudsman, properly directing himself on the facts and the law, could have reached … The findings of fact and the reasons should not be subjected to minute, meticulous or over elaborate critical analysis in an attempt to find a point of law on which the disappointed party to the reference can appeal": *Wakelin v Read* [2000] Pens LR 319, per Mummery LJ at §40.

23. Mr Margo, who appeared for the Trust, submitted that the only question, therefore, was whether the Ombudsman's decision was "perverse", in the sense that it was one that no reasonable Ombudsman could have reached. He suggested that it was no part of that enquiry to ask whether the Ombudsman took into account irrelevant matters, or failed to take into account relevant matters. Those matters, he said, were germane to an application for judicial review, but not to an appeal on a question of law.

24. However, as Mr Royston, who appeared for Mr Andrew, submitted, in *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430, a case concerned with an appeal on a point of law from a local authority housing officer, Lord Hoffmann (at §17) said that an appeal on a point of law enabled the appellant to complain of any "illegality, procedural impropriety or irrationality which could be relied upon in proceedings for judicial review." Moreover, on Mummery LJ's formulation in *Wakelin*, a self-misdirection on the facts is capable of giving rise to an error of law. Such a misdirection would, it seems to me, include taking into account matters that were irrelevant, or failing to take into account at all matters which were relevant. Where there is such a

misdirection, it would still need to be asked whether that error was material to the overall decision. If it was, however, then I consider it could constitute an error of law within the meaning of s.151(4) of the 1993 Act.

The grounds of appeal

25. Mr Andrew advances two main grounds of appeal. First, he contends that the Ombudsman fell into error on the question of reliance, by applying the wrong test, alternatively by conflating reliance and quantum. Second, he contends that the Ombudsman made an error of law in rejecting the possibility that Mr Andrew could have been redeployed to another role in the NHS, because he wrongly treated the possibility of redeployment pursuant to the employer's obligation to make reasonable adjustment with being entitled to apply on a competitive basis for another job within the NHS.

26. Additionally, Mr Andrew contends that the Ombudsman was wrong not to hold an oral hearing. That, however, was said by Mr Royston to be a fall-back position, in case I took the view that the Ombudsman had reached his decision by rejecting Mr Andrew's evidence as to reliance.

Ground 1: The test for reliance

27. Although the conclusion in the Determination is put in terms of reliance, it involves a mixture of reliance (did Mr Andrew rely by making a decision he would not have made if the correct IHR estimate had been given?) and causation (would Mr Andrew have been dismissed in any event because of his inability to work, such that the inaccurate IHR estimates caused no financial loss?).

28. As to reliance, at §31 of the Determination, the Ombudsman concluded that the fact that Mr Andrew applied for IHR shows an acknowledgment on his part that he was incapable of continuing with his job, which goes to the likelihood of him having *sought* to continue working.

29. As to causation, at §30 of the Determination, the Ombudsman, having recited Mr Andrew's evidence that he would not have retired had he received the correct information, rather than rejecting that evidence, said: "But this pre-supposes that the Trust would have been willing to keep him on its payroll."

30. Similarly, at §34, the Ombudsman said, "the fact that Mr [Andrew] was awarded Tier 1 IHR means that he could not have continued in his job with the Trust". And at §37, he said that although the Trust had not taken any action to dismiss Mr Andrew on the grounds of capability, "it is likely that it would have had to consider this at some point; certainly before he reached age 68".

31. Mr Royston submitted that the Ombudsman applied the wrong test because he asked only *whether* (had he been provided with a correct estimate) Mr Andrew would have retired, and not *when* he would have retired. The correct question, in order to establish whether Mr Andrew incurred *any* financial loss by reason of the incorrect estimate, is whether Mr Andrew would have retired *on the day that he did*. That is because, had Mr Andrew retired any later than he did, the financial consequences would have been, even if only marginally, more favourable.

32. Mr Royston then submitted that the possible outcomes fall within a wide range, once it is established that Mr Andrew would not have retired on the date that he did. He posited, at the conservative end of that range, that Mr Andrew would have decided to continue in employment until June 2018 and opted to take IHR at that point instead. In that event, (1) he would have continued to receive sick pay, albeit at half-rate, for a further four months; and (2) his pensionable pay would have slightly increased and, as a consequence, he would have been entitled to a slightly higher pension.

33. Alternatively, Mr Royston submitted that the Ombudsman conflated the questions of causation and quantum. By focusing on whether Mr Andrew would have continued – as the quantum of his claim indicated – in employment until he was 68, the Ombudsman was asking only whether Mr Andrew had suffered loss in the amount that he claimed. He should instead have asked, first, whether any loss was caused and, second, what was the quantum of that loss.

34. Mr Margo's principal response was that the Ombudsman's decision can only be impugned if there is no evidential foundation for his conclusion that Mr Andrew would still have retired, had the correct estimate been given to him. There is, he submitted, a sound evidential basis for that conclusion in the fact that Tier 1 IHR was awarded. That could only have been done if the decision maker was satisfied that Mr Andrew was incapable of continuing to work.

35. It is clear, in my view, that the Ombudsman did conclude that Mr Andrew would have retired at the same time, had the correct IHR assessment been given to him. That is because the conclusion that he would have retired, but later, would necessarily have led to at least *some* financial loss. I do not think it is realistic to suggest that the Ombudsman was not alive to that fact. Accordingly his rejection of any claim for financial loss on the grounds of reliance and causation implies the finding that Mr Andrew would have retired on the same date irrespective of the error.

36. The real criticism made by Mr Royston is that the Ombudsman's reasoning in reaching that conclusion was flawed. In particular, while not criticising the Ombudsman's finding (based on the application for, and award of, Tier 1 IHR) that Mr Andrew was incapable of, and knew that he was incapable of, returning to his job, Mr Royston submitted that the Ombudsman was wrong to conclude from this that Mr Andrew would inevitably have retired when he did. Even though he could not have returned to work, it was possible that he might have continued on sick leave, and thus not retired when he did. To amount to an error of law, it would be necessary to show either that the Ombudsman misdirected himself by failing to consider the possibility that Mr Andrew might retire on an intermediate date later than 18 February 2018, or that there was no evidential basis for the conclusion that he would have retired in any event on the same date.

37. I do not think it can be said that the Ombudsman failed to consider at all the possibility of an intermediate retirement date. Although the principal submission made to him (see §19 and §21 of the Determination) was that Mr Andrew would have returned to his employment and remained until retirement age, the Ombudsman also referenced (at §37 of the Determination) the contention that Mr Andrew could have remained on long-term sickness absence and pay. He rejected it because it was unlikely that the Trust would have been able to sustain the position of Mr Andrew remaining on long-term sickness absence and pay "indefinitely", and it was likely that

the Trust would have had to consider dismissing him "at some point". This demonstrates the Ombudsman was alive to the possibility that Mr Andrew could have sought to remain in employment, and been able to do so until such time (necessarily later than 18 February 2018) when the Trust took action to dismiss him.

38. That leaves the question whether the conclusion that Mr Andrew would have retired in any event on the same date was without evidential foundation or perverse.

39. It might be said that the Ombudsman's reasons at §37 of the Determination for rejecting the contention that Mr Andrew would have remained on long-term sickness absence and pay necessarily implied a retirement date later than 18 February 2018 (because he rejected it on the basis that the Trust would "at some point" – i.e. not necessarily immediately – have taken action to dismiss Mr Andrew), and that it was perverse not to follow that through to its logical conclusion.

40. That, however, would be to undertake the kind of detailed critical analysis of the Determination which is discouraged. The matters referred to at §37 were factors that it was appropriate to take into account, along with all the other evidence, to test the proposition that, even with the correct IHR estimate, Mr Andrew would have made the same decision. It is too simplistic an analysis to conclude that because Mr Andrew could at the very least have ensured a better financial outcome by not retiring on 18 February 2018 – because he could have remained on half sick-pay for a further four months – he would have done so, and would not have been dismissed, notwithstanding that (in light of the application for, and award of, Tier 1 IHR) he believed he was incapable of returning to work and he was in fact incapable of returning to work.

41. Delaying an application for IHR until sick pay stopped altogether risked leaving him in an uncertain position, with no income at all for a period, depending on when the IHR determination was made. Moreover, although it was true that the Trust had not taken steps to dismiss him, that had not been necessary while Mr Andrew was in discussion with them about taking IHR. By 18 February 2018, the date of his actual retirement he had already been on continuous sick leave since June 2017.

42. In my judgment, and in agreement with Mr Margo, while it was possible that Mr Andrew could have remained on sick leave for a longer period of time, it cannot be said that the available material pointed inexorably to that conclusion.

43. Mr Margo also objected that the possibility of delaying applying for IHR for a period to ensure that Mr Andrew received his full contractual entitlement in respect of sick pay was not canvassed at all before the Ombudsman. I accept, as Mr Royston submitted, that the investigatory role of the Ombudsman means that it is not necessarily an answer to an Ombudsman's failure to deal with an issue that it was not raised by the parties. On the other hand, questions as to what further investigations should be made, or what further evidence should be requested, are up to the discretion of the Ombudsman, in the same way that the decision to hold an oral hearing is a discretionary one. An appeal could only succeed, therefore, if the decision fell outside the generous ambit within which reasonable disagreement is possible (see *Webber*, above). I do not think that it can be said that the Ombudsman's decision to proceed on the basis of the evidence that had been made available to him constituted an error of law in that sense.

44. For the above reasons I consider that, on the basis of the evidence available to the Ombudsman, there was a sufficient evidential basis for his conclusion that had Mr Andrew been presented with a correct IHR estimate, he would nevertheless not have remained in his current employment beyond the date that he did in fact retire.

45. In relation to Mr Andrew's fall-back ground of appeal – that the Ombudsman erred in deciding not to hold a hearing – Mr Royston submitted that the decision was a wrongful exercise of discretion, in circumstances where the conclusion as to financial loss required the Ombudsman to reject Mr Andrew's evidence.

46. I do not accept this submission. The Ombudsman did not need to, and did not reject any evidence from Mr Andrew, in the sense of his recollection of events or of his state of mind at the time. To the extent that the Ombudsman's decision was based on causation, Mr Andrew's evidence did not go to that issue. To the extent that the decision was based on reliance, then it involved rejecting Mr Andrew's supposition (as opposed to evidence) as to what he would have done had he not been given an incorrect estimate. The supposition presented by Mr Andrew was that he would have remained in employment until aged 68. That was clearly untenable in light of the Tier 1 application and award (and Mr Royston did not suggest that the Ombudsman was unable to reject that possibility without hearing from Mr Andrew). Whether Mr Andrew might have adopted an intermediate position is not something on which Mr Andrew could give evidence, in the sense of giving his recollection of something that had happened or of his state of mind at the time. It necessarily involved a significant element of speculation. I do not think that the Ombudsman erred in law in deciding to determine that issue without hearing from Mr Andrew.

Ground 2: Redeployment

47. Mr Andrew's second ground of appeal turns on §38 of the Determination (quoted above). He submitted that in rejecting the relevance of redeployment on the grounds that the option of alternative part-time employment was still open to Mr Andrew, the Ombudsman erred in law. The error was to equate the possibility of Mr Andrew applying for an alternative job on a competitive basis with the possibility of his employer making available an alternative job pursuant to its duty to make reasonable adjustments.

48. It is common ground that the Trust had a duty pursuant to sections 20 and 21 of the Equality Act 2010 to make reasonable adjustments for Mr Andrew in view of his disability. That did not *entitle* him to be redeployed to a different role within the NHS, but it is accepted by the Trust that redeployment would have been at least a possible outcome of the Trust performing its duty to make reasonable adjustments. That is supported by the refusal to award Mr Andrew Tier 2 IHR, which implies that Mr Andrew was considered to be able to work in another role. As Mr Royston submitted, in an organisation as large as the NHS, there was a real possibility of another role being made available.

49. The question, therefore, is whether the reason the Ombudsman rejected the possibility of redeployment evinced an error of law. Mr Margo submitted that the Ombudsman rejected the possibility of redeployment because there was no evidence that Mr Andrew would have asked for it, or been offered it.

50. I do not accept this. There is no consideration given in the Determination to the possibility of Mr Andrew taking another role other than the statement that the option was still open to him. Far from rejecting the possibility as not being evidenced, this is an implicit acceptance that it was indeed a real possibility. In my judgment, the only possible reading of the Determination is that the Ombudsman rejected the relevance of redeployment on the basis that Mr Andrew could still apply for another role within the NHS.

51. Mr Royston referred me to the House of Lords' decision in *Archibald v Fife Council* [2004] ICR 954. In that case, a council employee became unable to walk, and thus unable to carry out her work as a road sweeper. The council retrained her for office work and placed her on the shortlist for all office vacancies for which she applied but, in accordance with its redeployment policy, required that she went through a competitive process. She applied for over 100 vacancies without success. She was then dismissed on the grounds of her incapability to carry out her employment as a road sweeper. The employee claimed unlawful discrimination within section 4(2) of the Disability Act 1995, in that the council had failed to make reasonable adjustments, in particular by requiring her to undergo competitive interviews. The employment tribunal dismissed her claim, holding that the employee could not claim discrimination in respect of the council's duty to make reasonable adjustments, because the adjustment she sought – the removal of competitive interviews – would have amounted to her being treated more favourably contrary to section 6(7) of the 1995 Act.

52. The employee's appeal was dismissed in the Employment Appeal Tribunal, and the Court of Appeal, but allowed by the House of Lords, who held that the duty to make reasonable adjustments was capable of extending to the placing of the employee in another post without competitive interview, if that was reasonable in all the circumstances.

53. In my judgment, and in light of *Archibold*, there is a material difference between the possibility of an employee with a disability being offered another role, pursuant to the employer's duty to make reasonable adjustments, and the possibility of such an employee obtaining another role through a process of competitive applications. Accordingly, the fact that Mr Andrew was able to apply for another job competitively with other applicants is not an answer to the question whether any loss was caused to Mr Andrew flowing from the Trust's error in providing inflated IHR estimates. In rejecting the relevance of redeployment on the basis that it remained open to Mr Andrew to apply for another job, therefore, I consider that the Ombudsman fell into an error of law.

54. Mr Margo also contended that, irrespective of the Ombudsman's reasons for his decision, there is in any event no evidence that Mr Andrew could have been redeployed. He noted that there is no evidence that Mr Andrew ever considered the possibility of another role or that any such role was available. Aside from the fact that the inaction of Mr Andrew in this respect can readily be explained by the fact he relied on the inflated IHR estimates to opt for IHR rather than considering any other role, the fact that the Ombudsman dismissed the relevance of redeployment on the basis that he did, meant that he did not take the necessary steps to investigate – and seek further evidence as appropriate – in relation to the point. As I have already

noted, at §38 of the Determination, the fact that Mr Andrew might have been able to undertake another role within the NHS was regarded as at least a possibility.

Conclusion

55. For the above reasons, I dismiss the appeal on ground 1 (and on the related ground that the Ombudsman erred in not holding a hearing), but allow the appeal on ground 2. Accordingly, I remit the matter to the Ombudsman for reconsideration of the question whether Mr Andrew suffered any financial loss by reason of the fact that in reliance on the inaccurate IHR estimate he refrained from taking steps to seek redeployment in another role.