

REPORT OF A REVIEW INTO ISSUES CONCERNING THE PHSO

Introduction

1. An Employment Tribunal judgment in a case brought against the Derbyshire Healthcare NHS Foundation Trust was handed down in June 2015. It contained some serious criticisms of Mr Mick Martin, who had been Senior Independent Director on the Trust Board and had then taken over as Interim Chairman. Mr Martin had, by the time the judgment was given, moved on to the Parliamentary and Health Service Ombudsman (PHSO), eventually becoming the Managing Director and Deputy Ombudsman.
2. The Tribunal criticisms of Mr Martin received widespread publicity in February 2016, bringing out his then current role with PHSO. The coverage included reports that the issue had previously been brought to the Ombudsman's attention in July 2015, but that no action had been taken then. Mr Martin agreed to take paid leave pending an independent investigation into the issues raised by the Tribunal's judgment. However, he resigned from PHSO on 31 March 2016 as he considered that his continued employment was no longer tenable. Therefore the investigation was no longer required.
3. In the light of these events, I was asked by the PHSO Board to review the adequacy of actions that PHSO had taken in relation to Mr Martin, including when appointing him as Executive Director of Operations and as Managing Director, and when the Employment Tribunal findings were brought to PHSO's attention. The full terms of reference are at Annex A.
4. In conducting this review, I have held interviews with those involved in PHSO, including the Ombudsman and Mr Martin, and have reviewed a large amount of documentation. I have received administrative support from an independent lawyer. As requested in the terms of reference, I am submitting this report to the Senior Non-Executive Director on the PHSO Board.
5. The Ombudsman has accepted that she made a mistake in 2015, detailed in paragraphs 39 to 55 below, when she received a letter drawing her attention to the Employment Tribunal criticisms of Mr Martin and simply sent a short acknowledgement without at the time asking for further investigation. She has been open to me about how this came about, and has accepted responsibility. She has taken steps to prevent it happening in the future. When attention was drawn to it in 2016, she recognised her earlier mistake and acted appropriately, including proposing to the Board the setting up of an independent review.

Background

6. Mr Martin was appointed as Executive Director for Operations at PHSO in 2013. He was subsequently promoted to Managing Director in 2014, and was given the title Deputy Ombudsman in 2015.
7. Before his appointment to PHSO, he had been Customer Services Director at Royal Mail, and had then become a partner in a specialist consulting company. He had also taken on a role as Senior Independent Director and Deputy Chair of the Derbyshire Healthcare NHS Foundation Trust.
8. While at the Derbyshire Healthcare Trust and at about the same time as he was applying for the post at PHSO, problems emerged at the Trust. The Director of HR, Mrs Marks, was suspended, allegedly for bullying, and subsequently made claims of inappropriate behaviour by the Chairman of the Trust. Mr Martin was asked to intervene with the Chairman. He did so, and the Chairman agreed to resign. Mr Martin then took over as interim Chair.

9. There followed some months of negotiations between Mrs Marks and the Trust, including with Mr Martin as the Interim Chair. Mr Martin initially took up his job at PHSO on a part-time basis, continuing with Derbyshire pending the recruitment of a new Trust chair, who was appointed in January 2014. The negotiations with Mrs Marks did not produce a resolution; she resigned from the Derbyshire Healthcare Trust in February 2014, and subsequently brought an Employment Tribunal action against the Trust for constructive dismissal, with claims of sex discrimination and of harassment by the former Chairman.
10. As part of the process of establishing the facts of what had occurred at the Derbyshire Trust, Mr Martin had brought in a former colleague of his from Royal Mail, Mr Lee O'Bryan on a short-term consultancy contract to conduct what was described in the Tribunal's judgment as a "desk-top assessment". Mr O'Bryan's role was also described to Mrs Marks as being an independent mediator, although it does not appear that Mr O'Bryan ever undertook any mediation role in relation to Mrs Marks. The Tribunal described Mr O'Bryan's review as "woefully inadequate" – see paragraph 40 below. He was subsequently appointed as Interim Director of Workforce and Organisational Development at the Trust.
11. Mr O'Bryan was a witness at the Tribunal; Mr Martin was not: he told me he had had discussions with the Trust's lawyers ahead of the Tribunal starting, and they had decided not to call him.
12. The Tribunal found in Mrs Marks's favour in June 2015, and awarded her damages of £830,000. The judgment included critical comments about Mr Martin and others, summarized below in paragraph 40. Mrs Marks wrote to the Ombudsman in July 2015 setting out many of the Tribunal's criticisms of Mr Martin and bringing them to the Ombudsman's attention; she raised concerns whether Mr Martin was a "fit and proper person" to be Deputy Ombudsman. Mrs Marks received a short acknowledgement in response (see paragraphs 39 to 53 below). The Ombudsman also received a letter from Monitor drawing her attention to the Employment Tribunal judgment.
13. In February 2016, the Health Service Journal published an article drawing attention to the criticisms of Mr Martin in the Employment Tribunal judgment and highlighting his then current role as Deputy Ombudsman. Subsequent articles brought out that the judgment had been drawn to the Ombudsman's attention the previous year. Mr Martin agreed to take paid leave as from 7 March 2016 pending an independent investigation into the matters raised. However, Mr Martin, recognizing the impact these events had on the organisation, subsequently decided to resign and left PHSO on 31 March 2016.

Appointment of Mr Martin as Executive Director of Operations at PHSO in 2013

14. Mr Martin applied for the job of Executive Director for Operations at PHSO and submitted a supporting statement on 12 August 2013. Shortly afterwards, he was approached by the solicitors acting for Derbyshire Healthcare Trust about issues concerned with the Chairman of the Trust's Board and the HR Director. I attach a chronology at Annex B.
15. Mr Martin had a preliminary interview with the recruitment consultants, Gatenby Sanderson, who recommended him as a strong candidate. On 10 September an assessment report was prepared by Beamans Management Consultants on Mr Martin's strengths against the competencies required for the role, drawing on an interview with Mr Martin. It found he had some considerable strengths relative to the demands of the role; it would be stretching, but he should be able to overcome the challenges presented. The Ombudsman had a preliminary meeting with Mr Martin on 12 September, as she did with the other candidates for the Executive Director post. On 26 September, Mr Martin was interviewed with other candidates by a panel consisting of the Ombudsman and two other members of the Executive. On the basis of the

interview with the panel, the external assessment and reports from referees (see paragraph 21 below), Mr Martin was offered the job.

16. Mr Martin said he had explained in his interview and in other conversations the difficulties he was facing at the Derbyshire Healthcare Trust. According to the Employment Tribunal judgment, Mrs Marks was suspended on 31 July. Mr Martin told me he was approached by the Trust's solicitors sometime after he returned from holiday in August. At that time, he says the issue facing the Trust was that Mrs Marks had been suspended because of allegations that she was bullying staff, and was mounting a robust response including counter-allegations of harassment against the Chief Executive and the Chairman, Mr Baines. Mr Martin had been shown two text messages from Mr Baines to Mrs Marks which were clearly inappropriate. Mr Martin had had two meetings with Mr Baines, at the second of which, on 19 September, Mr Baines had agreed to resign. Mrs Marks had copied a letter to Mr Martin on 17 September in which she said she had been sexually harassed by Mr Baines, though Mr Martin told me he had not seen it before Mr Baines resigned and that it was one of a number of allegations and counter-allegations being made, none of which had yet been investigated. Mr Baines's resignation was announced on 26 September, the same day as Mr Martin's interview at PHSO.
17. Mr Martin said to me that he had explained when he was interviewed that the Chairman had stepped down, and had described his role in bringing that about and the background to the case.
18. The Ombudsman told me she did not remember what Mr Martin had told her at the time of the interviews about the issues he was having to deal with at Derbyshire Healthcare Trust. She knew he was a Non-Executive Director, but if he had mentioned the issues facing him, they had not seemed significant at the time.
19. I have no reason to question the judgment of the interview panel that Mr Martin was considered to be the best candidate for the PHSO job, and that he met the competencies required, based on his previous experience and CV, his interview and the assessment report. Indeed, his subsequent promotion to Managing Director indicates he was able to perform well at Executive Director level.
20. I am not in a position to determine exactly what Mr Martin told the interview panel about events in Derbyshire. But I am satisfied that he would have presented the issues he was facing there in a way that did not cast doubts on his suitability for the job – as indeed he continues to maintain. In addition, several of the actions for which Mr Martin was criticised in the Employment Tribunal judgment took place after his interview at PHSO.
21. The referees Mr Martin nominated for his PHSO application were Mr Alan Baines, the then Chairman of the Derbyshire Healthcare Trust, and Mr Lee O'Bryan, a former colleague of Mr Martin's at Royal Mail, who (as outlined above) Mr Martin subsequently brought in to help him at the Derbyshire Trust. The reference provided by Mr Baines is dated 29 September, after Mr Martin had had his meeting with Mr Baines during which Mr Baines agreed to resign, and after his resignation had been announced. His reference was written from his home address rather than from Derbyshire Healthcare Trust.
22. Mr Martin wrote an email about his referees on 30 September in which he referred to Mr Baines as "The Chairman I have worked with for the last 5 years at Derbyshire Healthcare Foundation Trust." He did not explain in that email that Mr Baines had resigned shortly before, though he says PHSO should have been aware of this from what he had said in his interview.
23. It does not appear that PHSO made a connection between what Mr Martin had said about dealing with issues involving the Chairman and the fact that the Chairman was himself one of Mr Martin's referees. The Ombudsman told me that, as a former HR Director, had she heard of

issues about the Chair and then got a reference from him, she would have put two and two together and asked questions. She had not at the time realised the linkage.

24. As I noted above, I am not in a position to determine in what terms Mr Martin told the interview panel about events in Derbyshire. But it is unfortunate that the linkage was not spotted at the time, when questions about whether Mr Baines's suitability as a referee might have been raised. I accept that he was in a position to comment on Mr Martin's past performance at Derbyshire. But, given the continuing investigations into his conduct, and Mr Martin's role in those as Interim Chair, it might well have been felt that he had a vested interest in supporting Mr Martin's PHSO application.
25. Mr O'Bryan provided his reference in September (undated). He was not brought in to Derbyshire Healthcare Trust until October, and there was no reason at the time for PHSO to question his suitability as a referee, though the nature of his relationship with Mr Martin at Royal Mail was raised.
26. The Ombudsman told me she had seen the references, but had not thought they added much of value. As noted above, she had not made a link between Mr Baines being a referee and any issues involving him at the Trust. She had taken the initiative of contacting the former Chief Executive of the Royal Mail Group, whom she knew, to get a view on Mr Martin's performance there. However, due to the passage of time since working there and as he had no direct knowledge of Mr Martin's work, he did not consider it appropriate to comment specifically on Mr Martin's performance.
27. On balance, although the reference from Mr Baines might – and probably should – have been discounted because of his and Mr Martin's involvement in the events at Derbyshire, I do not believe it carried significant weight in the decision to offer Mr Martin the appointment.

Appointment as Managing Director in 2014

28. In February 2014, PHSO's Chief Operating Officer resigned. With the agreement of the PHSO Board, Mr Martin was asked to take on the role on an interim basis in addition to his responsibilities as Executive Director for Operations. This was to be reviewed after a year, with a view to separating the two roles again, and recruiting externally to whichever role became vacant.
29. In practice, the Board agreed in August 2014 that, for reasons of capacity and continuity, Mr Martin should be assessed against the Managing Director role with a view to appointing him permanently. The Ombudsman had assessed Mr Martin's performance against his objectives as strong in a formal appraisal in July. The external assessment by Beamans from September 2013 was updated by them to provide an assessment of his capabilities against the demands of the role of Managing Director. It found he had some key strengths relative to the demands of the Managing Director role, though with some development needs.
30. An interview panel chaired by a non-executive Board member was set up, with other members being the Ombudsman, another non-executive Board member, and an external member. The panel interviewed Mr Martin in depth, and were satisfied that he could perform at Managing Director level. Following discussion, the panel agreed Mr Martin's permanent appointment. This was announced on 28 August 2014 in an office notice.
31. I am satisfied that the process for Mr Martin's appointment as Managing Director was carried out appropriately. The issue of events in Derbyshire did not come up during the process, and I accept that there was no reason for those involved at PHSO to raise it or to question his actions there, given the way Mr Martin had previously explained his involvement. Nor do I find it

surprising that PHSO did not seek additional external references, given that the decision was based on Mr Martin's performance at PHSO.

Recruitment of replacement for Mr Martin as Executive Director for Operations in 2015

32. Once Mr Martin was confirmed in the post of Managing Director, it was necessary to recruit a new Executive Director for Operations. There was a competition for this, which failed to find an appointable candidate. It was agreed to appoint an Interim Director instead.
33. Two candidates were interviewed for the Interim Director post. One of them was Lee O'Bryan (see paragraph 10 above for his involvement in Derbyshire Healthcare Trust). Mr Martin had suggested to him that he might apply. Mr O'Bryan's background was in HR rather than operations, though the recruitment agency accepted that he had relevant experience. The interviews were originally scheduled to be conducted by Mr Martin and the HR Director, but one of the Non-Executive Directors was added to the panel in the light of Mr Martin's relationship with one of the candidates.
34. Mr Martin had revealed to others on the panel that he had worked with Mr O'Bryan at Royal Mail some time ago, but they had not discussed the Derbyshire Healthcare connection. Mr Martin told me that he had not covered with the other panel members the detail of his and Mr O'Bryan's work together because he did not want their assessment affected by his knowledge of Mr O'Bryan's suitability. He had not himself mentioned the Derbyshire Healthcare Trust link because at that time it had no prominence or particular significance, though he recalled that Mr O'Bryan had in his interview used examples of his work in Derbyshire as evidence of his experience and had included it in his CV.
35. The interview panel found both candidates appointable. The job was initially offered to Mr O'Bryan, but he subsequently withdrew for family reasons and because he and PHSO were not able to agree terms.
36. This process took place before the Employment Tribunal judgment had been handed down, and there was no reason why those on the interview panel (other than Mr Martin) should have been aware of the Derbyshire connection, or that Mr O'Bryan had been one of Mr Martin's referees when he had applied to PHSO. But I do believe Mr Martin should have explained these aspects of his relationship with Mr O'Bryan. Even though the Derbyshire connection might not have been prominent at the time, Mr Martin knew of the Employment Tribunal case that was underway.

Appointment as Deputy Ombudsman in 2015

37. Mr Martin's appointment as Deputy Ombudsman was announced in June 2015. The Ombudsman explained to me that this was a change of title, designed to reflect Mr Martin's responsibilities and the powers delegated to him. It did not indicate a change in his role. His title was in future to be Managing Director and Deputy Ombudsman. This was announced in an office notice on 12 June.
38. I do not consider there are any issues relevant to my review in this change.

Letter from Mrs Marks in 2015

39. The Employment Tribunal judgment in Mrs Marks's action against Derbyshire Healthcare Trust was issued in June 2015 and is in the public domain. It received national coverage in the media, focusing on the actions of the Chairman, Mr Baines, who was found to have sexually harassed and bullied Mrs Marks, called her a "whore", and engineered her suspension as HR Director. The press coverage at that time did not bring out Mr Martin's role in the Derbyshire Healthcare Trust or his subsequent position at PHSO.
40. The Tribunal judgment makes it clear that Mr Martin was closely involved in securing Mr Baines's resignation, and then, in his role as acting Chair of the Trust, in dealing with the allegations against Mrs Marks and her complaints. Among the points in the judgment:
- Mr Martin had had a meeting with the Deputy Chief Executive of the Trust shortly after Mr Baines's resignation during which concerns were expressed that it was Mr Baines who had originally brought the allegations regarding Mrs Marks, and that the charges could have been trumped up, fabricated or exaggerated. The Tribunal said there was, however, no subsequent investigation into the allegations and how they came about. And despite failing to investigate them, the Trust had maintained the position that there was some substance to those complaints.
 - At a meeting with Mrs Marks on 2 October, Mr Martin had agreed that a public apology to Mrs Marks should be made at the next Trust Board meeting. He had written a note following the meeting with Mrs Marks describing Mr Baines's actions as an "abuse of power – totally unacceptable". Mr Martin had then "reneged" on the agreement to make a public apology at the Trust Board meeting.
 - When Mr Baines's resignation was announced, Mr Martin, as acting Chair, had described how "Alan had decided that retirement beckons. He departs with our love, thanks and very best wishes".
 - Mr Martin had written to Mrs Marks complaining that she had caused delays in the process for resolving her position and dealing with her grievances. The Tribunal blamed the Trust for "months of prevarication and unreasonable delays".
 - Mr Martin had brought in Mr O'Bryan, a former colleague at Royal Mail to carry out a review. The Tribunal said that Mr O'Bryan was not independent, and had carried out a "woefully inadequate" assessment of Mrs Marks's grievance by reviewing the papers and having a cup of coffee with the Chief Executive. Mr Martin had written to Monitor on 15 January 2014 saying the Trust had commissioned an independent report which they had carefully considered, and that they were fully satisfied and confident in it.
 - Mr Martin and others had "assisted Mr Baines in covering the matter up and preventing any proper investigation into his behaviour". They had "allowed him to retire with his good name intact because he was a man". They had "treated Mrs Marks in the way that they did because she was a woman".
41. It is not within my terms of reference to investigate the accuracy or fairness of the criticisms made of Mr Martin summarized above, and I make no judgment about that. I recognise that Mr Martin was not a witness before the Tribunal and did not have an opportunity to rebut the criticisms, and says that he acted in accordance with legal advice throughout. My remit was to review the adequacy of the procedures and governance arrangements applied by PHSO when Mr Martin was appointed and when the Employment Tribunal findings were brought to PHSO's attention.

42. On 6 July 2015, Mrs Marks wrote to the Ombudsman enclosing a copy of the Employment Tribunal judgment. In her letter, she drew attention to the criticisms of Mr Martin in the judgment, in much the way outlined in paragraph 40 above, and concluded:

"I am very concerned that Mr. Martin now holds a very senior position in your organisation. I consider that if he were still a director in the NHS, there would be a significant question about whether he would be regarded as a "fit and proper person" under regulation 5 of the Health and Social Care Act."

A copy of Mrs Marks's letter is at Annex C.

43. The Ombudsman received the letter by email, and asked her office to print it out so that she could discuss it with Mr Martin. She spoke to Mr Martin at one of their regular one-on-one sessions. No record was kept of the discussion. The Ombudsman said her response to the letter was conditioned by what she had previously been told by Mr Martin about the circumstances in Derbyshire, with the overall picture being that he had been brought in to deal with issues concerning the Chair; he had secured the Chair's resignation; and had then been asked to stand in as interim Chair. The allegation of a cover-up was very far from what she had understood of the position from Mr Martin. From what he had told her, she had thought he had been part of the solution, not the problem.
44. Mr Martin told me that he had been in regular communication with the Ombudsman and others in PHSO (though not with Non-Executive Directors) about the continuing process in Derbyshire, including that there was going to be a case before the Employment Tribunal; that he had had discussions with the Trust's lawyers; that he was not going to be called to give evidence; and about the potential outcome. He had not expected the Tribunal to criticise his actions (though he now regretted his remark that Mr Baines was departing with "our love, thanks and very best wishes"). The Ombudsman told me she did not recall any conversation about the preparation for the Employment Tribunal. She confirmed that Mr Martin had over time told her more about the Chairman's inappropriate relationship and behaviour, though he had said he had not been aware of the details of the Chair's harassment of Mrs Marks until the Employment Tribunal judgment had been released¹.
45. Apart from one short meeting with her Principal Private Secretary and a member of staff, the Ombudsman did not consult the Non-Executive Directors or others within PHSO about the letter or the terms of her reply. She explained to me that at the time the letter from Mrs Marks had been received, PHSO had a process for dealing with correspondence alleging cover-up or collusion by staff in relation to casework. Given the nature of PHSO's work, such correspondence was received every week. There was a standard procedure for referring this correspondence for fact-checking and advice, and she had learnt to suspend judgement while the allegations were looked into. She had suspended judgment on Mrs Marks's letter, but since it did not relate to casework, there was at the time no procedure in place for it to be referred automatically for advice and checking.
46. In the event, the Ombudsman's Principal Private Secretary was asked to draft a short reply, expressing sympathy for Mrs Marks's experience and noting the points she made. He did this and the Ombudsman signed the reply. It said

¹ As noted in paragraph 16 above, Mr Martin told me he had been shown two text messages that were clearly inappropriate, and he had seen a copy of a letter from Mrs Marks alleging sexual harassment by the Chair. But I accept that he had not been aware of all the detailed text messages published in the Employment Tribunal judgment.

"Thank you for your letter dated 6 July regarding the PHSO's Managing Director and Deputy Ombudsman. I am sorry to hear of your experiences at Derbyshire Healthcare NHS Foundation Trust, and can confirm that I have noted your comments."

47. The Ombudsman told me it had been an oversight on her part not to seek advice on the letter. She had made a mistake, and accepted responsibility. She had subsequently put new procedures in place to make sure this could not happen again, with all correspondence automatically referred out for advice. Neither she nor anyone else in PHSO had read the Employment Tribunal judgment at the time, and she had not realised the individual points in the letter were drawn directly from the judgment. When she had subsequently read the Employment Tribunal judgment (see paragraph 57 below), she had immediately realised the need to get legal advice.
48. I put it to the Ombudsman that Mrs Marks's letter itself set out some serious allegations about Mr Martin's behaviour, explicitly referring to the judgment and in some cases in quotes. Mrs Marks's final point was:

"The Tribunal identified very clearly that all the senior men in the Trust [including Mr Martin] had colluded to cover up the wrongdoing of Alan Baines."

Other points in her letter included that Mr Martin had taken no steps to ascertain whether the charges against Mrs Marks were trumped up by Mr Baines; that Mr Martin had "reneged" on a promise of a public apology; and that Mr Martin had brought in Mr O'Bryan, a former colleague, who was not independent, and whose report was described by the Tribunal as "woefully inadequate".

49. The Ombudsman said that, in her discussion of the letter with Mr Martin, they had not gone through the letter point by point. He had reiterated what he had told her previously, which was that as the senior non-executive director he acted to secure the Chair's resignation when his position became untenable. He had said he had joined PHSO prior to Mrs Marks making her Employment Tribunal claim and that he had not known about things that had come out later in the Tribunal judgment. She read the letter in the context of these assurances. Her oversight, which she acknowledged, was not then to seek verification of the points in Mrs Marks' letter by ensuring the full Employment Tribunal judgment was read and considered carefully. She accepted that she should have spotted, and queried, why Mrs Marks's letter said Mr Martin had written to Monitor on 15 January 2014 on behalf of the Trust when he was by then working full time for PHSO.
50. In my view, the letter should have raised alarm bells that independent advice was needed. The allegations reproduced in the letter are stark and deeply troubling about someone whose standing and integrity needed to be above reproach. As noted above, the Ombudsman herself accepted that with hindsight she should have ensured that the Employment Tribunal judgment was read and independent advice sought.
51. I recognise that the Ombudsman gets a lot of correspondence, and that the procedures in place for dealing with allegations about casework did not cover this case. But because of the issues this letter raised, it should have commanded attention. I can understand the Ombudsman's approach of suspending judgement on allegations about casework pending fact-checking and advice. But in this instance, suspending judgement – with no investigation – meant accepting Mr Martin's version of events without probing or challenge.
52. Overall, I feel that a reply simply noting the points Mrs Marks had made, with no further action, was an inadequate response. I accept that Mr Martin had painted a rather different picture. But – as she now accepts – she should have realised that the allegations raised questions about Mr Martin's suitability for his role as Deputy Ombudsman and, at a minimum, required further checking and external advice. I can understand her not reading the full Tribunal judgment at the

time: it is long, and Mrs Marks's letter did not reference specific paragraphs. But she should have asked someone in her office to read it and check whether it supported the claims in the letter.

53. The view that further investigation was needed is reinforced by the action following the publication of the Health Service Journal's articles in 2016 (see below). Then, the Ombudsman read the Employment Tribunal judgment and immediately realised the need for external advice, which was quickly sought.

54. The Ombudsman had a further opportunity to ask for an investigation when Monitor wrote to her on 10 August 2015, drawing her attention to the Employment Tribunal judgment (Annex D) and saying they had opened an investigation into the Trust. The letter said:

"My reason for writing is to let you know, as a courtesy and in case you were not already aware, that Mr Mick Martin, the current Managing Director and Deputy Ombudsman at the PHSO, was named in the Employment Tribunal Judgement. This was in regard to his roles as the Senior Independent Director and Acting Chair at the Trust during some of the time covered by Mrs Marks' claim to the Tribunal. There were some concerns raised in relation to Mr Martin in the judgement."

55. In the event, no further action was taken by PHSO. The Ombudsman's office asked Monitor whether Mr Martin's role would be considered as part of the investigation, and whether he would be required to give evidence. They were told that Monitor's remit did not extend to former Board members of an NHS Foundation Trust.

Events in 2016

56. In February 2016, the Interim Chair of the Derbyshire Healthcare Trust revealed publicly the size of the award paid to Mrs Marks (£830,000, with the Trust incurring additional legal and other costs bringing the total bill to £1.4 million). This led to renewed national publicity. On 25 February, the Health Service Journal (HSJ) published an article which drew attention to the criticisms of Mr Martin in the Employment Tribunal judgment and that he was currently Deputy Ombudsman. The HSJ published a further article on 3 March quoting Mrs Marks and revealing that she had written to the Ombudsman in July 2015 drawing the Tribunal's comments about Mr Martin to her attention. The story was also picked up in the national press, The HSJ article was coupled with a leader calling for the Ombudsman and Deputy Ombudsman to stand down.

57. Following the publication of the first HSJ article, the Ombudsman asked her office to get a copy of the Employment Tribunal judgment, which she then read. She spoke on the phone with the Senior Non-Executive Director on the PHSO Board on 1 March, and forwarded him a copy of the judgment. Other NEDs were also informed. Later that day the Ombudsman and the Senior NED met and agreed that external legal advice was needed. The Ombudsman then asked the Legal Director to commission this.

58. The second HSJ article was published on 3 March. Discussions were held within PHSO about whether to respond but on balance it was felt nothing could be said until further information was available. Mr Martin told me he thought he should be allowed to respond narrowly on his personal position. The Ombudsman told me she was asked by Mr Martin to express confidence in him, but felt any response needed to await legal advice.

59. The Ombudsman set up an issues management group within PHSO which met on 4 March and regularly thereafter. It included appropriate senior staff in PHSO and the senior non-executive director.

60. Following receipt of the legal advice, the Ombudsman spoke to Mr Martin on 4 March and subsequently in the following week. The Ombudsman then briefed NEDs by phone on the latest position.
61. The legal advice is subject to professional privilege and has not been shared with me. However, the Ombudsman told me she felt that natural justice required Mr Martin to be given an opportunity to answer questions about events at the Derbyshire Trust (especially given that he had not been a witness before the Tribunal), and considered that there ought to be an independent investigation. The Board agreed.
62. On 7 March, Mr Martin agreed to take paid leave pending an independent investigation.
63. The Ombudsman briefed stakeholders on 7 March and following days, and subsequently provided updates. This included a previously scheduled session with the Permanent Secretary at Department of Health, who was the point of liaison between the Ombudsman service and permanent secretaries. The Department of Health made it clear that they recognised PHSO's independence and would not try to influence them.
64. In the event, the independent investigation to allow Mr Martin to answer questions about events at the Derbyshire Trust was not required since Mr Martin, recognizing the impact these events had on the organisation, decided to resign and left his employment at PHSO at the end of March 2016. In the light of the events, the Ombudsman proposed that there should be an independent review of lessons learnt; the Board discussed the precise nature and scope and decided to commission my review.
65. I believe PHSO acted appropriately when the issues were brought to its attention in 2016. Independent legal advice was obtained swiftly, and guided the actions taken. Board members were kept informed and endorsed the approach being taken. Considerations of natural justice meant that Mr Martin would have had the benefit of an independent investigation into the issues raised by the Employment Tribunal judgment, though in the event he decided to resign for reasons already stated.

Lessons learned

66. In my terms of reference, I was asked to include any lessons to be learnt and further actions that need to be taken.

(a) Governance

67. The commissioning of this review has highlighted some of the anomalies in the governance of PHSO. The role and functions were set out in the Parliamentary Commissioner Act 1967 and in the Health Service Commissioners Act 1993. The PHSO is headed by an office holder who combines the role of ombudsman, chief executive and chair – though some of her executive functions are delegated to others. This structure makes it awkward for the organisation to consider questions about the Ombudsman's own performance or behaviour, and does not represent current thinking about good corporate governance.
68. The Ombudsman is herself well aware of the issue of corporate governance. She undertook a governance review soon after her appointment, and set up a unitary Board, which she chairs, combining executive and non-executive members. She has appointed a Chief Operating Officer/Managing Director to take on the day-to-day management of PHSO. But the statutory position remains that she is the sole office holder.

69. The Government's plans to legislate in a Public Service Ombudsman Bill provides an opportunity to address the issue of governance. The Gordon Review on restructuring and reforming public service ombudsmen recommended that:

"the PSO should be established as a corporate entity, with a statutory Board. There should be a clear division of responsibility between such a Board with a non-executive Chair, responsible for the overall strategy and effective operation of the organisation, against agreed strategies, plans and performance targets and the office holder (the Chief Ombudsman) invested with statutory powers of investigation."

70. I fully support this and believe it should be included in the Public Service Ombudsman Bill, though it will of course take time before that completes its passage through Parliament and comes into effect.

(b) Organisation of the Ombudsman's office

71. As with any individual heading a significant organisation, the Ombudsman needs the support of a team in her private office. When she was appointed, her office consisted of an executive assistant and a PA. She had reviewed the fitness for purpose, and strengthened her office by appointing a principal private secretary, supported by an assistant private secretary and a diary secretary/PA. Her principal private secretary took up his post shortly before the letter from Mrs Marks was received.

Since he was appointed, there has been a conscious effort to formalise procedures, both in the Ombudsman's office and elsewhere. As noted in paragraph 47 above, the procedures in place now provide for advice to be sought on all correspondence rather than just those referring to casework. The new procedures set out that, for letters to the Ombudsman, the Principal Private Secretary must:

- Consult with the relevant department in the organisation upon receipt of the letter, before producing any response or acknowledgement; and
- Submit to the Ombudsman with cover note detailing intended approach, including any further advice being sought.

I welcome this approach, which should have ensured that advice was sought on Mrs Marks's letter before a reply was sent.

(c) Fit and Proper test for senior Ombudsman staff

72. In the NHS, staff employed at director level are required to pass a "fit and proper" test before they are appointed. The regulations provide that the individual must be of good character, have the necessary competencies, and not have been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement. The Financial Conduct Authority similarly has a "fit and proper" test for those in the financial sector, and there are examples in other areas too.
73. There are of course selection processes in place for assessing both the competence and suitability of candidates for senior appointments in PHSO. But there is no explicit "fit and proper" test. While the nature of PHSO means it would not be appropriate for such requirements to be subject to an external regulator, in the way that the Care Quality Commission regulates NHS bodies, I believe the line manager of senior recruits should formally sign off that they have carried out the necessary checks, and are satisfied that the candidate is "fit and proper". The PHSO's values are excellence, leadership, integrity and diversity, and it is important that senior staff are seen to embody those values. The checks need to be done in a

proportionate and sensible way, showing that the issues have been considered without imposing a major bureaucratic burden.

74. The checks that should be carried should include probing the relationship between the applicant and his or her referees, and whether individual referees are still in the post where they gained knowledge of the applicant's performance. Search agencies should be asked to satisfy themselves that referees are in a position to provide useful information about an applicant, and whether there are others who might be asked for a view. This is not just a reaction to this case, but reflects what should be best practice in recruitment.
75. The Ombudsman told me that, as a measure to ensure the continuing good standing of senior PHSO staff, she had now decided that they would be asked to provide information and certify that they were meeting the Nolan Principles of Public Life² each year. Any breach of those principles would be dealt with under PHSO's disciplinary procedures.

ALEX ALLAN

13 September 2016

² See <https://www.gov.uk/government/publications/the-7-principles-of-public-life/the-7-principles-of-public-life--2>

LIST OF ANNEXXES

- A: Terms of Reference
- B: Chronology
- C: Letter from Mrs Marks
- D: Letter from Monitor

PHSO STATEMENT ON COMMISSIONING THIS REVIEW³

In the light of the findings of the Employment Tribunal case which referred to Mr Martin in his former capacity as a non-executive director at Derbyshire Healthcare NHS Foundation Trust, the Board of PHSO has asked Sir Alex Allan former Chairman of the Joint Intelligence Committee, to lead the independent review looking into the adequacy of the procedures and governance arrangements that the organisation applied prior to the appointment of Mr Martin and during his employment.

PHSO will support Sir Alex in carrying out this review by making available any relevant information and documents required as well as providing access to all members of staff he wishes to speak to.

PHSO will be open and honest about the findings from this and will implement any lessons learnt from that review.

Terms of Reference:

- To review the adequacy of the actions that the PHSO, including the Ombudsman, have taken in relation to Mr Martin, including the adequacy of the procedures and governance arrangements that were applied when:
 - assessing Mr Martin's suitability and fitness for employment at PHSO as Executive Director of Operations and as Managing Director; and
 - the Employment Tribunal findings were brought to its attention.
- To submit the findings of the review – including any lessons to be learnt and further actions that need to be taken – to the senior non-executive director so that he can recommend to the board what needs to be done.

³ <http://www.ombudsman.org.uk/about-us/news-centre/our-statements/sir-alex-allan>

Chronology

2013

- 31 Jul Mrs Marks suspended as HR Director at Derbyshire Healthcare Foundation Trust (DHCFT)
- 12 Aug Mr Mick Martin (MM) applies for job as Executive Director Operations at PHSO; sends in supporting statement for application.
- 28 Aug Mrs Marks's solicitors write letter complaining about DHCFT CEO's (not Chair's) behaviour
- Sep MM returns from holiday and is approached by DHCFT's solicitors in his role as DHCFT senior Non-Executive Director
- 10 Sep Assessment report on MM prepared for PHSO
- 12 Sep MM has pre-interview meeting with Ombudsman
- 17 Sep Mrs Marks copies letter to MM alleging sexual harassment by DHCFT Chairman, Mr Baines
- 19 Sep MM meets Mr Baines. Mr Baines agrees to step down
- 20 Sep Mrs Marks writes further letter to MM
- 26 Sep MM is interviewed by PHSO panel for job of Executive Director Operations
- 26 Sep Mr Baines' resignation announced; MM succeeds him as Interim Chair
- 27 Sep PHSO call for references for MM
- 29 Sep Mr Baines writes reference for MM
- Sep Mr Lee O'Bryan writes reference for MM (undated)
- 1 Oct Mr Baines sends additional email supporting reference
- 2 Oct MM meets Mrs Marks and her husband
- Oct Mr O'Bryan appointed as mediator at DHCFT
- Oct Mr O'Bryan appointed as investigator at DHCFT
- Nov Mr O'Bryan appointed as Interim Director of Workforce and Organisational Development
- 11 Nov MM starts part-time at PHSO
- 1 Dec MM starts full time at PHSO as Executive Director Operations
- 5 Dec Mrs Marks presents claim to Employment Tribunal alleging sex discrimination

2014

- 7 Jan Mark Todd appointed as Chair of DHCFT in succession to MM
- 15 Jan MM writes to Monitor about Mr O'Bryan's report
- 19 Feb Mrs Marks tenders her resignation from DHCFT
- 27 May Mrs Marks applies to Tribunal to add Mr Baines as second respondent

23 Jun Mrs Marks amends claim to include constructive dismissal and direct sex discrimination

2014

Feb PSHO's Chief Operating Officer resigns. MM asked to take on Managing Director role

1 Mar MM starts as acting MD and continues as EDO

17 Jul Assessment report on MM from 2013 updated for MD role

4 Aug Ombudsman paper to Remuneration and Nomination Committee recommending assessment of MM as permanent MD appointment

26 Aug Panel interviews MM for MD post

28 Aug announcement that MM appointed permanent MD

2015

19 Feb Competition to recruit new Executive Director Operations fails to find appointable candidate

20 Mar Interviews for Interim Executive Director post

Apr Appointment of Interim Director announced

12 Jun MM announced as Deputy Ombudsman

22 Jun Employment Tribunal judgment issued

6 Jul Mrs Marks writes to Ombudsman enclosing Tribunal judgment

31 Jul Ombudsman replies

10 Aug Monitor write to Ombudsman alerting her to Tribunal judgment

2016

11 Feb size of payout to Mrs Marks revealed by Derbyshire Healthcare Trust

25 Feb first HSJ story mentions MM and position at PHSO

1 Mar Ombudsman and Senior NED meet. External legal advice commissioned by PHSO.

3 Mar HSJ story reveals Mrs Marks wrote to Ombudsman in July 2015

4 Mar Issues management group set up in PHSO

4 Mar Ombudsman meets MM

7 Mar Ombudsman meets MM. MM commences paid leave.

7/8 Mar Ombudsman briefs stakeholders

9 Mar Board briefed by Ombudsman and lawyers

10 Mar Board meeting

11 Mar Ombudsman provides updates to stakeholders (and over following days)

31 Mar MM resigns

6 July 2013

Dame Julie Mellor DBE
Parliamentary and Health Service Ombudsman
Parliamentary and Health Service Ombudsman
Millbank Tower
Millbank
London
SW1P 4QP

STRICTLY PRIVATE AND CONFIDENTIAL: ADDRESSEE ONLY

Dear Dame Julie Mellor

Re: Mr Mick Martin

I am writing to you to raise concerns about the actions and behaviours of the Managing Director of the Parliamentary and Health Service Ombudsman, Mr Mick Martin from September 2013 until January 2014 when he was Vice Chair and Senior Independent Director, and subsequently Acting Chair, of Derbyshire Healthcare NHS Foundation Trust. At that time I was Director of Workforce and OD at the Trust and my employment tribunal claim against the organisation was heard in April and May 2015. The Trust was found to be responsible for sexual harassment by its Chair, sex discrimination, victimisation and unfair constructive dismissal. As I had refused to have sex with Mr. Alan Baines, the Trust Chair, he engineered what the tribunal called "spurious and unfounded" allegations against me, leading to my suspension from work. Although Mr. Martin did not give evidence at the tribunal, the written judgment of the tribunal (attached) highlights his role, particularly in trying to cover up the actions of the former Chair, Mr. Alan Baines.

The key areas of Mr. Martin's involvement are as follows:

1. On 19 September 2013 as Acting Chair of the Trust after the resignation of Mr. Alan Baines, Mr. Martin met with Mr. Ifti Majid, Deputy Chief Executive, Mr. Graham Gillham, and the Trust's solicitors to discuss events in the wake of Mr. Baines' resignation. Mr. Majid's witness statement to the tribunal says that they were "extremely concerned that they could be dealing with trumped up charges that had been fabricated or exaggerated by Alan". Following this he took no steps to ascertain whether or not that was the case.
2. At meetings on 30 September 2013 and 2 October 2013 Mr. Martin promised that there would be a public apology to me, at a Board

- meeting. Later, to use the tribunal's word, he "reneged" on this promise.
3. In letters to me Mr. Martin blamed me for delays in the progress of the grievance I had raised. The tribunal was clear that the delays were the fault of the Trust.
 4. Mr. Martin brought in Mr. Lee O'Bryan, initially as a mediator and then as the investigator of my grievance. He claimed that Mr. O'Bryan was totally independent. He was not. Under oath in the tribunal Mr. O'Bryan accepted that he and Mr. Martin had been close colleagues in their former roles for Royal Mail.
 5. No documentation relating to the appointment of Mr. O'Bryan was disclosed by the Trust for the tribunal. Under oath Mr. O'Bryan stated that there was none. This raises issues about probity, with Mr. Martin appearing to appoint his former close colleague with no due process.
 6. According to a letter from Mr. Martin to Monitor dated 15 January 2014, Mr. Martin and the Non-Executive Directors discussed the report on my grievance that Mr. O'Bryan produced sometime in November 2013 and that they were confident in the report. The tribunal described the report as "woefully inadequate" and contradicted almost all of its findings. This discussion was inappropriate on two levels:
 - a. that Mr. Martin and the NEDs could have such flawed judgment about the report, and
 - b. the NEDs included Maura Teager, one of the people who had made "spurious and unfounded" allegations against me, and Tony Smith, who was to chair a subsequent grievance hearing. It is wholly inappropriate for the chair of a grievance hearing to be influenced by listening to the views of colleagues on the report, and to be influenced by a collective view of it.
 7. The Tribunal identified very clearly that all the senior men in the Trust, the Chief Executive, Steve Trenchard, the Acting Chair, Mick Martin and the Lead Governor, Lew Hall, colluded to cover up the wrongdoing of Alan Baines.

I am concerned that Mr. Martin now holds a very senior position in your organisation. I consider that if he were still a director in the NHS, there would be a significant question about whether he would be regarded as a "fit and proper person" under regulation 5 of the Health and Social Care Act. Monitor and the CQC are fully aware of the case and I have been invited to meet with Monitor on 9th July 2015 to discuss the matter further.

As you will no doubt recognise, the documentation for a three week hearing in tribunal is extensive, so at this stage I have only enclosed the written judgment. I would be happy to supply copies of any other documents that you may find helpful, or to discuss the issues further with yourself or other appropriate people.

Yours sincerely

Helen Marks

Dame Julie Mellor, MBE
Parliamentary and Health Service Ombudsman
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10 August 2015

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Dear Dame Julie

Derbyshire Healthcare NHS Foundation Trust ("the Trust"): Decision to Open a Formal Investigation into the Trust's Compliance with its Licence

Monitor recently opened an investigation into the Trust's compliance with its licence, following governance concerns identified from the judgement of the Employment Tribunal in relation to Mrs Helen Marks, former HR Director at the Trust, dated 18 June. The Employment Tribunal involved certain members of the Trust Board and other senior members of staff at the Trust. More information can be obtained from the press release that we issued when we opened the investigation

<https://www.gov.uk/government/news/regulator-to-investigate-derbyshire-healthcare-following-employment-tribunal>

My reason for writing is to let you know, as a courtesy and in case you were not already aware, that Mr Mick Martin, the current Managing Director and Deputy Ombudsman at the PHSO, was named in the Employment Tribunal Judgement. This was in regard to his roles as the Senior Independent Director and Acting Chair at the Trust during some of the time covered by Mrs Marks' claim to the Tribunal. There were some concerns raised in relation to Mr Martin in the judgement. The judgement can be obtained directly from the court.

If you have any questions, please contact

Yours sincerely



Alex Coull
Deputy Regional Director