

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	Mrs Susan Francis
Scheme	Local Government Pension Scheme (the Scheme)
Respondent	North Tyneside Council (the Council)

Subject

Mrs Francis has complained that the Council, the managers of the Scheme, have failed to grant her Tier 1 ill health benefits in a timely manner.

The Pensions Ombudsman's determination and short reasons

The complaint should be upheld against the Council because Mrs Francis could have been awarded her Tier 1 benefits considerably earlier than she was. The decision was improperly made twice in 2011.

DETAILED DETERMINATION

Material Facts

1. Mrs Francis worked for the Council and was a member of the LGPS.
2. There are several levels of pension payable on ill-health retirement from the LGPS. Relevant to this complaint is the difference between what is known as Tier 1 and Tier 2. Tier 1 benefits are payable where the employer determines that there is no reasonable prospect that the person is able to obtain gainful employment before age 65. Tier 2 benefits are payable where it is considered that the person, whilst unable to obtain gainful employment within three years, probably will be able after three years and before age 65. In each case the regulation states that it is for the employing authority to “determine” whether the criterion is met.
3. Before making a determination that a person meets one of the criteria, the employer must have an appropriate certificate from an “Independent Registered Medical Practitioner” (**IRMP**) as defined in the relevant LGPS regulations.
4. On 10 January 2011 Mrs Francis left employment on medical grounds and was referred for ill health retirement assessment. She was 56 at the time.
5. On 13 January consent was received by the Council’s Occupation Health Unit (**OHU**) from Mrs Francis to enable them to write to Mrs Francis’s GP. Mr Francis said that she wished to see the GP report before it was sent. On 11 March the GP’s report was received by the Council.
6. On 19 May an ill health retirement certificate dated 6 May 2011 from a Dr Phillips acting as IRMP was received by the OHU. It certified that Mrs Francis qualified for Tier 2 benefits. Dr Phillips said in his report that:

“In my opinion Mrs Francis is currently unfit for any work. The diagnosis is probably Chronic Fatigue Syndrome. It remains possible that her condition could improve to some extent. In my opinion it is doubtful that she will be able to return to her substantive post but it is premature to assume that she is permanently incapacitated for any gainful employment.”

7. On the same day the Council wrote to Mrs Francis saying:

“We had asked Serco [who the Council used to provide IRMPs] to consider your eligibility for ill health retirement under the Local Government Pension Scheme rules. They have sent back an ill health retirement certificate which entitles you to ill health retirement on Tier 2 of the LGPS. The independent medical examiner’s opinion is that you are permanently unfit for your own work but he would expect you to be able to undertake some gainful employment after three years and before age 65, as he feels it is too soon to assume that you are permanently incapacitated for any gainful employment.

I will arrange for the certification to be sent to South Tyneside Council who administer the LGPS scheme to arrange for the release of the pension benefits.”

8. Mrs Francis began the process of appealing at Stage 1 of the internal dispute resolution procedure.
9. As a result a further IRMP’s certificate was obtained from a Dr Rhodes on 11 October. She also certified that Mrs Francis qualified at Tier 2 rather than Tier 1. She said in her report:

“This is because Mrs Francis has not yet had the benefits of treatments that have been shown to improve work outcomes- CBT and GET (published NHS plus evidence based guidelines on the Occupational Aspects of Chronic Fatigue Syndrome). It is recommended that ill health retirement decisions should generally be deferred until such treatment has been explored.”

10. On 21 October the Council wrote to Mrs Francis setting out Dr Rhodes’ findings and saying:

“The Council therefore cannot agree to the release of your pension on Tier 1 of the LGPS.”

11. After this point there was further correspondence between Mrs Francis and the Council which I need not set out in full. In April 2012 the second stage of the internal dispute resolution procedure was dealt with by South Tyneside Council, as the administering authority. However, the decision to award Tier 2, not Tier 1 ill health benefits, remained unchanged.

12. Mrs Francis approached the Pensions Advisory Service for assistance. In October 2012, after additional medical information was received from a specialist and a further certificate had been obtained, it seemed that Mrs Francis was to be granted backdated Tier 1 benefits. There was, however, some uncertainty about the certificate which was not resolved until December 2012, when benefits were put into payment, with interest.

Conclusions

13. In my view the decision in May 2011 was defective in two ways.
14. First Dr Phillips said that it was “premature” to decide that Mrs Francis met the Tier 1 criterion as to permanence. But deferring the decision was not an option. What was needed was a decision one way or another, on the balance of probabilities, whether Mrs Francis would be unable to obtain gainful employment before age 65; not a statement that it was too early to say that she would be. I accept that might have been what Dr Phillips meant, or would have decided had the question been put to him again, but it is not what he said.
15. Second the Council was required under the regulations to determine which, if any, of the criteria Mrs Francis met. The letter of 19 May 2011 contains no hint of a decision. The Council merely say that they have the Tier 2 certificate which they are passing on the South Tyneside.
16. The decision at stage 1 of the dispute resolution procedure was also faulty. Dr Rhodes gave one reason as being that Mrs Francis had not yet had the benefit of two recommended treatments. She did not apparently have regard to whether those treatments were thought appropriate in Mrs Francis’ case by her treating physicians. More importantly she did not expressly consider whether, if Mrs Francis had those treatments (if they were thought appropriate), they would be likely to render her able to take up gainful employment before age 65, when she would not otherwise have been able to.
17. And again the Council did not make a determination in any real sense. The stage 1 decision letter said that the Council could not agree to release as a direct result of the certificate.

18. On the matter of the failure to make a determination, both in May and October 2011, I accept that the Council could not go against a certificate. But it is required to reach its own decision, which in this case should have included realising that the IRMP's reasoning was incomplete and undertaking further and proper consideration of Mrs Francis' circumstances.
19. In my judgment, had the matter been dealt with properly Mrs Francis could have been awarded her Tier 1 benefits as early as May 2011, but certainly much sooner than she eventually was.
20. Mrs Francis was put to the trouble and distress of having to pursue the matter for at least a year longer than she should have had to, and probably more than that. She should be compensated for the distress and inconvenience that not receiving benefits, to which it is accepted she would have been entitled, will have caused.

Directions

21. I therefore direct that within 28 days of this Determination the Council is to pay Mrs Francis £500.

Tony King
Pensions Ombudsman

16 October 2014