

Ombudsman's Determination

Applicant	Ms H
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	Cafcass City of Bradford Metropolitan District Council (the Council)

Outcome

1. I do not uphold Ms H's complaint and no further action is required by Cafcass or the Council.

Complaint summary

2. Ms H's complaint concerns the decision to award her ill health retirement benefits as a deferred, rather than an active, member of the Scheme.

Background information, including submissions from the parties

3. The relevant regulations are The Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended) (the **2013 Regulations**). Extracts from the 2013 Regulations are provided in Appendix 1.
4. Ms H was a Service Manager for Cafcass and was an active member in the West Yorkshire Pension Fund (**the Fund**), which is part of the Scheme. The administering authority for the Fund is the Council.
5. Following a period of sickness absence from 2 February 2021 to 1 April 2021, Ms H returned to work on a phased basis. Subsequently, Ms H had meetings with her line managers to discuss various options, including reduced hours, redeployment and seeking alternative employment.
6. On 28 May 2021, Ms H notified Cafcass that she had been offered a part-time job with the NSPCC.
7. On 4 June 2021, Ms H submitted her resignation. In an email she said:

"Please accept this email as my 3 months' notice to end my employment with Cafcass. My last day with the organisation will be Sunday 5th September 2021,

although due to existing annual leave booked, my last day in work will be Thursday 19th August...

As you are aware I have been offered a post where I will be able to work part - time, and also focus my attention on services to children and families outside of the court arena. A move to more preventative and restorative services is something I have been considering for a while now.

I would like to express my thanks to all my colleagues at Cafcass, and after more than 15 years in the organisation, this has not been an easy decision to arrive at. However, I do believe it is the right decision for me and potentially the organisation, to get a fresh perspective.

..."

8. Cafcass accepted Ms H's resignation and informed the Fund that her employment would be ending on 5 September 2021 due to voluntary resignation.
9. On 15 August 2021, Ms H suffered symptoms diagnosed as a stroke.
10. Following her discharge from hospital, on 23 August 2021, Ms H asked Cafcass to rescind her resignation or alternatively extend her notice period for three months to support her in a speedier and fuller recovery.
11. On 1 September 2021, Cafcass' Head of Practice notified Ms H by email that they were unable to agree to either request. The Head of Practice said:

"As a public body, I know that you are aware of the immense challenges that our budgets are under this year and given that we have already recruited and filled your post we do not have the budget available for you to return either on an extended notice basis or full time."
12. On 5 September 2021, Ms H's employment ended.
13. As part of raised employment grievances, Ms H queried that her post had been filled. A meeting to discuss her grievances was arranged but did not go ahead. Subsequently, it was agreed that Cafcass would provide a written response.
14. On 10 September 2021, Ms H's union representative enquired whether Ms H could access an unreduced pension on ill health grounds. Ms H made similar enquiries on 14 September 2021. The next day Ms H was provided with information about accessing her pension as a deferred member of the Fund. On 16 September 2021, Ms H queried ill health retirement as an active member.
15. On 21 September 2021, Ms H applied for ill health retirement from deferred status.
16. On 31 October 2021, Ms H underwent an MRI scan, which revealed a high-grade brain tumour. On 3 November 2021, Ms H informed Cafcass of the changed diagnosis.

17. On 4 November 2021, Cafcass' Assistant Director wrote to Ms H in reply to her raised employment grievances. As relevant the Assistant Director said:-

- On the filling of Ms H's post:

"There was a period earlier during 2021, when we had determined that there was budget for an additional Service Manager in ... to provide additional management capacity to...and... However, due to the immense challenges on our budget, it was subsequently determined that this post could no longer be funded, thus as I explained in my email to you on 22 June 2021, the successful candidate who had originally been appointed to this post would instead undertake the management of the ... team which you were leaving."

- On ill health retirement:

"In your chronology, you have raised that...did not discuss with you a referral to Occupational Health when you contacted her about rescinding your notice or extending your notice period. I think it was reasonable for...to be first considering your initial request at this stage to rescind or extend your notice and to consider how she could support you during this period. Our first consideration with all employees who are unwell is how we can support them to return to work.

I think that it is important to note, a referral to Occupational Health with a request to consider ill health retirement (which legally is a dismissal from employment), would only usually be considered for employees whose employment is ongoing and for whom we have been advised that there was no prospect of them being able to return to work. With your initial request being to rescind your resignation or extend your notice period to support you in a speedier and fuller recovery, it was reasonable for...to believe at that time that you wanted to return to your role as a Service Manager. I do not believe that it would have been appropriate for...to have been discussing with you the rescission of your notice, how she could support you return to work and at the same time the process for a determination of a lack of fitness to work to such a degree that ill-health retirement had to be considered.

...

As a former employee, you can write to Cafcass at any time to ask for consideration to be given to accessing your deferred benefits on the grounds of ill health. I am aware that you did this on 21 September 2021 (after you had left Cafcass) and that colleagues in Human Resources are currently progressing this request for you with a referral to Occupational Health."

18. On 7 January 2022, Dr Bastock, an independent registered medical practitioner (IRMP), certified that Ms H met the criteria for the early release of her deferred

pension on the grounds of ill health. An extract from Dr Bastock's report is provided in Appendix 2.

19. On 11 January 2022, Cafcass notified Ms H that based on Dr Bastock's opinion it was able to grant the release of her deferred pension and that it had informed the Fund of its decision and had instructed the Fund to pay her pension benefits with effect from 7 January 2022.
20. Ms H engaged in further correspondence with Cafcass about its decision and requested that it reconsider whether she should have been assessed for ill health retirement as an active member.
21. On 8 April 2022, Cafcass' Assistant Director replied to Ms H. The Assistant Director said:-
 - The difficulty was that Cafcass had not dismissed her, which was a requirement under the 2013 Regulations. She had handed in her notice because she had been offered a new role.
 - Regrettably she fell ill towards the end of her notice, and it was unable to support her request to rescind the notice or extend it by three months.
 - It was not until November 2021, after she had left Cafcass, that she received the diagnosis of a grade 4 brain tumour.
 - If the Fund informed her/Cafcass that it believed it could apply ill health retirement benefits from active status if a subsequent IRMP assessed that at the point she left Cafcass she met the criteria, Cafcass would be happy to request a further assessment.
22. The same month, Ms H invoked the Scheme's two-stage internal dispute resolution procedure (**IDRP**) on the grounds that she believed she should have been awarded ill health retirement as an active member from 5 September 2021.
23. The nominated person for Cafcass turned down Ms H's complaint. The nominated person said:-
 - While Ms H was an active member of the Scheme until she left Cafcass and had sufficient qualifying service, her employment was not terminated by Cafcass on the grounds of ill health or otherwise. Ms H's employment ended because she chose to accept an external offer of employment and resigned.
 - Consideration had been given to whether there was information available to Ms H's managers at the time that should have led to her dismissal on the grounds of ill health.
 - Previously, Ms H had had a period of sickness absence for hypertension. But they had seen no medical advice or assessment which would have triggered a process

to consider her capability to continue her employment, either when she returned to work in April 2021, or during May to July 2021.

- Ms H's further illness in August 2021 was initially diagnosed as a stroke. By then her resignation had already been accepted and she was serving her notice period. While Ms H requested that the notice be rescinded or the period extended, Cafcass declined her request for reasons to do with changes to the number of management roles in the service area and budgetary constraints. At that time, based on the evidence then available, the clear expectation was that with treatment Ms H would recover and return to work. Indeed, it appeared that Ms H subsequently received some sick pay benefits from her new employer presumably on the expectation that she would be taking up her new role. In short, there was no reason for Ms H's managers to rescind her resignation and end her employment on the grounds of ill health. So, regulation 35 of the 2013 Regulations was not triggered.
- To reach a different conclusion, there would need to be clear evidence that Ms H's health was the prevailing reason for the termination of her employment and that prior to her resignation there was some indication that in the foreseeable future Cafcass would need to consider her capability for work. While Ms H's health changed in August 2021, there was no evidence at that time that there would be a need for Cafcass to consider ending her employment on the grounds of ill health. Her managers were entitled to proceed on the basis that her employment was ending because she had resigned. They could not have reasonably known or foreseen that her diagnosed condition would be significantly changed.
- The changed diagnosis occurred almost two months after Ms H had left Cafcass. By then Ms H was a deferred member of the Scheme and her right to access her pension benefits on ill health grounds fell under regulation 38 of the 2013 Regulations.

24. Ms H appealed the stage one decision. She said:-

- If she had been able to access advice from Occupational Health and had been well enough, she would have sought ill health retirement as an active member.
- She had been unable to complete any work since 15 August 2021.
- Cafcass gave her no support from Occupational Health following her illness. She was not given any information about accessing her pension on the grounds of ill health as an active member of the Fund.
- There was some confusion about her diagnosis and initial treatment which may have contributed to Cafcass' misunderstanding of how long she had been ill. An MRI scan in August 2021 showed an abnormality which was then described as an infarction but was in fact a brain tumour. During her remaining notice period she suffered with tiredness, poor concentration and memory lapses.

- Dr Bastock's report confirmed that she was seriously ill from 15 August 2021 and that she continued to experience symptoms misattributed to a stroke that would preclude her from undertaking gainful employment.
- Cafcass' view that she should only be assessed as meeting the criteria for ill health retirement after she was diagnosed with a brain tumour was incorrect and did not consider her previous serious illness.

25. The appointed person for the Council turned down Ms H's appeal. The appointed person said:-

- Ms H had voluntarily resigned from her position prior to the true state of her health being known and before Cafcass would have reasonably been expected to engage in formal steps to consider terminating her employment on the grounds of ill health capability. In fact, Ms H had accepted employment elsewhere. It was also noted that Cafcass had already assimilated her role into another post via an internal restructure when Ms H requested that her resignation be rescinded.
- They could only review Cafcass' decision in relation to the operation of the Scheme Regulations. It was not within their remit to consider employment or contractual matters, such as how Ms H's resignation was handled and whether Cafcass should reconsider its decision to accept her resignation.
- The 2013 Regulations and guidance were clear that ill health retirement was only instigated on an employer's decision to terminate a member's contract of employment due to ill health capability. The employee could not make that decision.
- When Ms H resigned and when her resignation was accepted, Cafcass had no reason to suspect investigations as to her eligibility for ill health retirement as an active member would have taken place, or her employment terminated for that reason.
- They could only consider the facts at the date Ms H's employment ended and why it ended, and the decisions made regarding her pension entitlement. So, their decision was to turn down her appeal as Cafcass had acted in accordance with the Scheme Regulations.

26. On 2 November 2022, Ms H emailed Cafcass and the Council a letter from Dr Scott (Consultant Physician) dated 20 October 2022. In the letter Dr Scott confirmed the changed diagnosis resulted from the 31 October 2021 MRI scan. Ms H requested that the first instance and IDRPs be reviewed.

27. The Council notified Ms Y that as the stage two IDRPs had been concluded it was not possible for the appointed person to reconsider their decision.

28. Cafcass responded to Ms H that in its view Dr Scott's letter was not new information, as it was already known that the initial diagnosis of a stroke was changed following

further symptoms and the later scan. So, the facts and sequence of events were unchanged.

Ms H's position

29. Ms H submits the medical diagnosis made in August 2021, when she was employed by Cafcass was wrong. She already had a terminal brain tumour. If the correct diagnosis had been made, this would have triggered her full pension entitlements.

Cafcass' position

30. Cafcass submits:-

- Ms H is receiving the full value of her accrued pensions based on her contributions and pensionable service up until her employment ended. No reduction was applied. What she has not received is the enhanced benefits that would have been awarded had her employment been terminated by Cafcass on the grounds of ill health.
- Ms H's request to be provided with ill health retirement as an active member of the Scheme does not meet the conditions set out in regulation 35 of the 2013 Regulations because there was no dismissal by Cafcass as the employer.
- On 15 August 2021, Ms H experienced what was initially described as a seizure and later as a stroke. She was signed off work for four weeks, received medication and was referred for treatment at a Transient Ischaemic Attack (TIA) clinic. Shortly afterwards, Ms H requested either that her notice be rescinded or that the notice period be extended by three months. Her managers declined the request chiefly because the budget for her post had been re-allocated to support the ongoing employment of other existing staff (Ms H was not replaced).
- At that stage, Ms H's managers understood that she had secured other employment which was due to commence imminently. Crucially, there was no indication that Ms H's change of health would render her permanently incapable of further employment. So, there was no reason to trigger an ill health procedure. Moreover, Ms H was not dismissed. She resigned. Her employment ended as a result of a career decision she took some months prior to the change in her health.
- The 2013 Regulations do not require a Scheme employer to treat a resignation as a dismissal or to maintain someone in employment who has already resigned.
- The 2013 Regulations do not include a time period within which Scheme employers can choose to award benefits under active service or deferred membership.

- Ms H was a deferred member of the Scheme when the diagnosis of a brain tumour was made, and it became clear that she may be permanently incapable of employment. Prior to then there was no reason to trigger an IRMP assessment. Nonetheless, if an IRMP assessment had occurred before Ms H's resignation it is hard to see that there would have been any medical evidence to support a case for ill health retirement.
- Cafcass has no vested interest or financial liability for the decision to award ill health benefits. The additional cost of awarding ill health retirement benefits to active members is borne by the Scheme, it is not charged to the employer. So, there is no reason why it would not support a recommendation for ill health dismissal if it were in accord with the Scheme's Regulations.
- It has correctly provided Ms H with access to her pension benefits in line with regulation 38 of the 2013 Regulations.

The Council's position

31. The Council submits:-

- It is the member's employer that determines the reason for leaving and therefore whether the member is entitled to an ill health pension under regulation 35 of the 2013 Regulations. The role of the Fund is to calculate and pay members' pension benefits in accordance with decisions made by the member's employer and the Scheme Regulations.
- While the nominated person at stage 2 IDRP, and the Fund, sympathise with the change in Ms H's circumstances since she left her employment with Cafcass, the nominated person could only consider the facts at the date her employment ended with Cafcass and why it ended, and the pension decisions then made regarding her entitlement.

Adjudicator's Opinion

32. Ms H's complaint was considered by one of our Adjudicators who concluded that no further action was required by Cafcass or the Council. The Adjudicator's findings are set out below in paragraphs 33 to 45.
33. Cafcass' decision not to rescind Ms H's resignation or extend the notice period is an employment matter, which is not within the Ombudsman's jurisdiction to determine.
34. It is not disputed that Ms H is entitled to ill health retirement. The dispute is whether Cafcass should have considered Ms H for ill health retirement while she was an active member of the Scheme.
35. Members' entitlements to benefits when taking early retirement due to ill health are determined by the scheme rules or regulations. The scheme rules or regulations 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.

36. Regulation 35 (1) requires that an active member's employment is terminated by a Scheme employer on the grounds of ill-health or infirmity of mind or body.
37. Ms H's employment ended on the grounds of voluntary resignation.
38. If an employee resigns, there is no dismissal at law (that is an entitlement to bring a claim of unfair or wrongful dismissal or redundancy pay) unless the employee has resigned in response to the employer creating a hostile work environment (constructive dismissal) or has been forced to resign.
39. Neither constructive dismissal nor a forced resignation applies here.
40. As Ms H's employment did not end on the grounds of capability due to ill health, she is not entitled to be considered for ill health retirement as an active member.
41. Even so, it appears that when Ms H's employment ended the expectation was that with treatment she would recover and take-up employment with her new employer. More importantly, there was no indication that Ms H was permanently incapable of discharging efficiently the duties of her employment with Cafcass.
42. So, there was no reason for Cafcass to consider Ms H for ill health retirement prior to her resignation notice period ending.
43. Ms H submits that if the correct diagnosis had been made before her employment ended, this would have triggered her full pension entitlements¹.
44. But that is applying the benefit of hindsight. It was not until after Ms H had left Cafcass that the brain tumour was diagnosed. While the tumour existed prior to her employment ending, the true state of her health was not then known or suspected.
45. Cafcass has confirmed that Ms H is receiving the full value of her accrued pensions based on her contributions and pensionable service up until her employment ended.

Ombudsman's decision

46. Ms H has provided no comments on the Adjudicator's Opinion.
47. While I empathise with Ms H, I agree with the Adjudicator's Opinion for the reasons set out above in paragraphs 33 to 45.
48. I do not uphold Ms H's complaint.

¹ By 'full pension entitlements', I presume Ms H means enhanced benefits for ill health retirement as an active member.

CAS-100315-L7P0

Anthony Arter CBE

Deputy Pensions Ombudsman

31 October 2023

Appendix 1

The Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended)

1. At the time Ms H's employment ceased, regulation 35, 'Early payment of retirement pension on ill-health grounds: active members', provided:

- "(1) An active member who has qualifying service for a period of two years and whose employment is terminated by a Scheme employer on the grounds of ill-health or infirmity of mind or body before that member reaches normal pension age, is entitled to, and must take, early payment of a retirement pension if that member satisfies the conditions in paragraphs (3) and (4) of this regulation.
- (2) The amount of the retirement pension that a member who satisfies the conditions mentioned in paragraph (1) receives, is determined by which of the benefit tiers specified in paragraphs (5) to (7) that member qualifies for, calculated in accordance with regulation 39 (calculation of ill-health pension amounts).
- (3) The first condition is that the member is, as a result of ill-health or infirmity of mind or body, permanently incapable of discharging efficiently the duties of the employment the member was engaged in.
- (4) The second condition is that the member, as a result of ill-health or infirmity of mind or body, is not immediately capable of undertaking any gainful employment.
- (5) A member is entitled to Tier 1 benefits if that member is unlikely to be capable of undertaking gainful employment before normal pension age.
- (6) A member is entitled to Tier 2 benefits if that member -
 - (a) is not entitled to Tier 1 benefits; and
 - (b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment; but
 - (c) is likely to be able to undertake gainful employment before reaching normal pension age.
- (7) Subject to regulation 37 (special provision in respect of members receiving Tier 3 benefits), if the member is likely to be capable of undertaking gainful employment within three years of leaving the employment, or before normal pension age if earlier, that member is entitled to Tier 3 benefits for so long as the member is not in gainful employment, up to a maximum of three years from the date the member left the employment."

2. "Gainful employment" was defined as "paid employment for not less than 30 hours in each week for a period of not less than 12 months". "Permanently incapable" was defined as "more likely than not, be incapable until at the earliest, the member's normal pension age".
3. Regulation 36, 'Role of IRMP', provided:
 - "(1) A decision as to whether a member is entitled under regulation 35 (early payment of retirement pension on ill-health grounds: active members) to early payment of retirement pension on grounds of ill-health or infirmity of mind or body, and if so which tier of benefits the member qualifies for, shall be made by the member's Scheme employer after that authority has obtained a certificate from an IRMP as to -
 - (a) whether the member satisfies the conditions in regulation 35(3) and (4); and if so,
 - (b) how long the member is unlikely to be capable of undertaking gainful employment; and
 - (c) where a member has been working reduced contractual hours and had reduced pay as a consequence of the reduction in contractual hours, whether that member was in part time service wholly or partly as a result of the condition that caused or contributed to the member's ill-health retirement.
 - (2) An IRMP from whom a certificate is obtained under paragraph (1) must not have previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested.
 - (2A) For the purposes of paragraph (2) an IRMP is not to be treated as having advised, given an opinion on or otherwise been involved in a particular case merely because another practitioner from the same occupational health provider has advised, given an opinion on or otherwise been involved in that case.
 - (3) If the Scheme employer is not the member's appropriate administering authority, it must first obtain that authority's approval to its choice of IRMP.
 - (4) The Scheme employer and IRMP must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation and regulations 37 (special provision in respect of members receiving Tier 3 benefits) and 38 (early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members)."

4. Regulation 38, 'Early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members', provided:

"(1) A deferred member who, because of ill-health or infirmity of mind or body -

- (a) becomes permanently incapable of discharging efficiently the duties of the employment that member was engaged in at the date the member became a deferred member, and
- (b) is unlikely to be capable of undertaking gainful employment before normal pension age, or for at least three years, whichever is the sooner,

may ask to receive payment of a retirement pension whatever the member's age.

(2) A request under paragraph (1) must be made in writing to the deferred member's former Scheme employer or appropriate administering authority where the member's former Scheme employer has ceased to be a Scheme employer.

(3) Before determining whether or not to agree to a request under paragraph (1), the deferred member's former Scheme employer, or administering authority, as the case may be, must obtain a certificate from an IRMP as to whether the member is suffering from a condition that renders the member -

- (a) permanently incapable of discharging efficiently the duties of the employment the member was engaged in because of ill-health or infirmity of mind or body; and, if so,
- (b) whether as a result of that condition the member is unlikely to be capable of undertaking gainful employment before reaching normal pension age, or for at least three years, whichever is the sooner.

..."

5. As relevant, regulation 32 (10), provided:

"Where a member is entitled to early payment of pension due to ill-health under regulation 38., the first period for which retirement pension is payable begins on the date of the determination that the member is permanently incapable under that regulation."

Appendix 2

Extract from Dr Bastock's (IRMP) report, 7 January 2022

"[Ms H] attended hospital on 15th August 2021 after having a seizure and experiencing symptoms of a stroke. She underwent appropriate treatment in hospital. An MRI at that time showed a lesion. She was treated with appropriate medications and referred on to TIA clinic.

[Ms H] continued to experience symptoms of visual disturbance [sic], fatigue and difficulty with word finding. She did not feel well. She had a further MRI of her head due to ongoing symptoms. She was told the lesion was a tumour. [Ms H] continued to feel fatigued. She also has difficulty finding words, and she reports jumbling words. She finds it difficult to write as she misses words without realising. She has recently started experiencing headaches and takes paracetamol for them. [Ms H] has high blood pressure. Earlier in 2021 she had some time off work as very high blood pressure was attributed to stress. This condition improved with time away from work. [Ms H] cannot drive due to having a seizure. She prefers to have someone with her when she goes out. She will do the supermarket shop if her husband drives her to the shop. She walks her dog and does some light gardening, but she gets tired, so her activity levels are nothing like the level she was doing previously. [Ms H] takes regular rests due to fatigue. She does not sleep well, but this is longstanding. She feels her physical and cognitive abilities are reduced compared with previously. She feels anxious a lot, which affects her concentration. [Ms H] was diagnosed with a rapidly growing grade 4 glioblastoma brain tumour in October 2021. The life expectancy is very much reduced due to this condition. She did undergo surgery for this condition in November 2021. She has suffered with a number of symptoms including headaches, seizures, right sided weakness and difficulties with her speech. She has been advised that curative treatment is not available for her condition. Her condition and her symptoms have been deteriorating. There has been rapid growth of the tumour and the investigations have demonstrated that the tumour is a high grade. Further treatment options will be for palliative reasons only and will not be curative. The medical information confirms that unfortunately the condition will not improve and a steady deterioration in her condition will now be expected.

Rationale

Regarding the assessment for early payment of deferred pension benefits, I can confirm that [Ms H] has been diagnosed with a recognised medical condition. She has been diagnosed with a grade four glioblastoma brain tumour. This condition has rendered her incapable of her former duties as a service manager. She has undergone appropriate treatment but the treatment was not curative and so the resulting incapacity for her role will be permanent. Further treatment which will now take place will not be curative and will be aimed for palliative reasons only to control the symptoms. There is no prospect of any treatment taking place going forwards which would result in an improvement in her condition which would allow her to undertake her role as a service manager going forwards. Her condition will steadily

deteriorate going forwards and she does have a very much reduced life expectancy due to this high grade brain tumour. All of the medical documents sent to Health Management have fully confirmed this medical information. Therefore I can confirm that she is suffering from a condition that would render her permanently incapable for discharging efficiently the duties of her previous employment. She is not capable of undertaking gainful employment and this will be on a permanent basis. She will now remain on palliative treatment going forwards to control the symptoms and to remain supported by the medical services.”