CAS-29778-J8R1

Ombudsman's Determination

Applicant	Ms G
Scheme	Local Government Pension Scheme (**LGPS**) – London Borough of Waltham Forest Pension Fund (**the Fund**)
Respondents	Waltham Forest College (**the College**)
	London Borough of Waltham Forest (**the Council**)

Outcome

1. Ms G's complaint is upheld and to put matters right:-

   - The College shall reconsider Ms G's application for ill-health early retirement (**IHER**) benefits in the LGPS. In addition, it shall award her £1,000 for the serious distress and inconvenience which she has experienced because of its failure to consider her IHER application properly.

   - The Council shall award Ms G £500 for the additional significant distress and inconvenience which she has suffered because of its failure to consider her complaint at Stage Two of the Internal Dispute Resolution Procedure (**IDRP**) in a timely fashion.

Complaint summary

2. Ms G has complained that:-

   - The College improperly decided to decline her application for payment of IHER benefits in the LGPS from active member status.

   - The Council failed to consider her complaint at Stage Two of the IDRP in a timely manner.

Background information, including submissions from the parties

3. The LGPS is governed by the LGPS Regulations 2013 (as amended) (**the LGPS Regulations**). Prior to 1 April 2014, the LGPS was a final salary scheme. A new

Career Average Revalued Earnings (**CARE**) scheme was introduced from 1 April 2014.

4. Regulation 35 of the LGPS Regulations, provides for IHER from active member status. Active members who have at least two years' membership in the LGPS are entitled to IHER if they satisfy the following criteria:-

- They are "permanently incapable" of discharging efficiently the duties of their employment due to ill-health or infirmity of mind or body.

- As a result of the ill-health or infirmity of mind or body, they are not immediately capable of undertaking any "gainful employment".

5. For this purpose, "permanently incapable" means the employee will, more likely than not, be incapable until his/her Normal Pension Age (**NPA**) at the earliest. "Gainful employment" means paid employment for not less than 30 hours in each week for a period of not less than 12 months. "NPA" is defined as the employee's State Pension Age (**SPA**) at the time the employment ends, subject to a minimum age of 65.

6. If an employee satisfies the above test, there are three tiers of benefits depending on his/her level of incapacity for future employment as follows:-

- Tier One – the member is unlikely to be capable of undertaking gainful employment before NPA.

- Tier Two – the member is unlikely to be capable of undertaking any gainful employment within three years of leaving employment but is likely to be capable of such employment before NPA.

- Tier Three – the member is likely to be capable of undertaking gainful employment within three years of leaving employment (or before NPA if earlier).

7. Before an employer makes a decision on eligibility, a medical certificate must be obtained from an independent registered medical practitioner (**IRMP**) stating whether or not, in his/her professional opinion, the employee satisfies the conditions in the LGPS Regulations to qualify for IHER.

8. According to the LGPS guidance titled "Ill Health notes and certificates" (the June 2019 edition):-

- For the final salary scheme, it was necessary for an employer to obtain an IRMP certificate before deciding to terminate employment.

- An IRMP certificate was no longer a prerequisite for the CARE scheme but it was still advisable to obtain this before employment ended.

9. The College terminated Ms G's employment with effect from 15 February 2016, on the grounds of incapability due to ill-health. In its decision letter to Ms G, the College concluded that:

> "…it was highly unlikely that you would be able to resume your duties at the College, even on a phased return basis, in the foreseeable future."

10. The College did not commence the medical process to determine eligibility for IHER from active status in Ms G's case before ending her employment.

11. Ms G appealed against the decision to terminate her employment. The College replied in a letter dated 22 April 2016 that her appeal was unsuccessful and its decision to end her employment on the grounds of ill-health stood.

12. In August 2016, Ms G's solicitor (**the Solicitor**) submitted her request for IHER under the LGPS to the College.

13. The College replied in October 2016. It said it had contacted the LGPS for guidance on the appropriate process to follow when considering Ms G's IHER application and was told that it had to first obtain a report from an IRMP.

14. Ms G notified the College on 23 October 2016 that she had agreed to be medically examined by an IRMP. She subsequently contacted the College several times for details of the appointment but did not receive a reply.

15. In February 2017, the College apologised to Ms G for the delay in issuing a response and told her that it was still trying to find a suitable IRMP to carry out the examination.

16. On 24 February 2017, Petersfield Surgery sent its referral form to the College. It said that on receipt of the completed form, it would contact Ms G to arrange a medical assessment with an IRMP.

17. In its e-mail dated 6 March 2017 to Petersfield Surgery, the College wrote:

> "Please see attached Occupational Health referral for a previous employee, Ms G, along with some additional background information…including previous Occupational Health (**OH**) reports and correspondence.
>
> Ms G's employment was terminated with the College following long term ill-health in February 2016 (409 days absent during an 18 month period).
>
> …we have been advised to obtain a report from an IRMP…on Ms G's condition and the likelihood of her being able to engage in gainful employment. Our main question for this referral is whether in your opinion you think that Ms G should have been medically retired.
>
> The consent form attached to the referral is not signed by Ms G however both she and her solicitors are aware that we are referring her."

18. On the referral form, the College specified that it wanted the IRMP to answer the following questions:-

- "Is the employee fit for normal hours and duties required by his/her post?"
- "When will they be able to return to work/return to normal hours/duties?"
- "Is there an underlying medical condition affecting their ability to work?"
- "How does this condition affect the employee at present?"
- "Are they having appropriate treatment, will it aid their recovery and if so when?
- "Is this employee likely to be able to provide regular and effective service in the future?"
- "Advice with regard to possible adjustments(s) and support which the employer could consider."

19. Petersfield Surgery asked Ms G to attend an OH assessment with Dr Birch, an IRMP, on 30 March 2017.

20. Dr Birch sent copies of his medical report dated 31 March 2017 to both the College and Ms G. In the "Conclusions and recommendations" section, Dr Birch said that:

> "Ms G was dismissed from her job after prolonged sickness absence. She has a diagnoses of functional neurological disorder, anxiety and depression, and osteoarthritis of the hands.
>
> Ms G has longstanding difficulties with limb weakness, tremors, photophobia, chronic pain, severe fatigue, sleep disturbance, depression and anxiety. She walks with a stick and requires assistance for most activities of daily living.
>
> Ms G's depression and anxiety was further exacerbated by an incident at work in which she states that she was falsely accused of hitting a colleague, and then had to continue working with that same colleague.
>
> Ms G is not fit for her role, and is not expected to recover to the point that she will become so in the future. There are no recommended adjustments or adaptations in the workplace that might remedy this. There are no active interventions being considered by the neurology team. Therefore, depending on the wording of her pension policy, she is likely to qualify for early retirement on the grounds of chronic ill-health."

21. In an e-mail dated 20 April 2017, the College informed Ms G that it was currently liaising with the LGPS concerning the next steps after receiving Dr Birch's report.

22. On 25 April 2017, the Pensions Shared Service of Wandsworth Council (**the Pensions Shared Service**), the administrators of the Fund, sent a "Certificate of Permanent Incapacity for active members" (**Pen 15A**) to the College.

23. The College asked whether it had to complete this certificate for Ms G because she had already left employment. The Pensions Shared Service replied that if her reason for leaving was ill-health, then the certificate would need to be completed by both the College and IRMP.

24. Dr Birch completed part B of the certificate on 25 April 2017 to show that, in his view, Ms G satisfied the criteria to be awarded Tier One IHER benefits from the LGPS.

25. On 27 April 2017, the College sent the completed certificate and Dr Birch's report to the Pensions Shared Service. It also requested details of the IHER benefits available to Ms G from the LGPS and the capital cost of providing them.

26. In its e-mail dated 12 May 2017, the Pensions Shared Service informed the College that the capital cost of granting Ms G a Tier One IHER pension of £14,420.59 per annum, and a lump sum of £6,523.10, was £291,174.47. It also said:

> "Please confirm if this has been agreed and then I will send out the pension option forms to the member."

27. On 19 May 2017, the College asked the Council some questions about the capital cost of Ms G's benefits. The Council replied on 23 May 2017 that it did not have to pay the entire capital cost immediately and the payment (with interest) could be spread over a three year period starting the year following retirement. The College said that the capital cost seemed "staggeringly high".

28. From 19 May 2017, Ms G regularly contacted the College to find out when she would likely receive her IHER benefits from the LGPS. The College replied that it had obtained the relevant figures but was not yet in a position to answer her question.

29. In its e-mail dated 7 June 2017 to the College, the Pensions Shared Service said that:

> "I had a call from Ms G regarding her ill-health pension request. Please advise if this has been agreed and if the payment schedule has been set up…"

30. The College replied in its e-mail dated 12 June 2017 that:

> "As per our conversation this morning, I can confirm that the College has decided not to take Ms G's application any further due to financial obligations.
>
> We will write to her shortly to confirm the decision."

31. The College requested details of the calculations in respect of Ms G from the Pensions Shared Service and received these on 16 June 2017. At the top of the calculation sheet that was sent to the College, it was annotated "Awaiting HR confirmation".

32. After seeking legal advice on how to deal with Ms G's IHER application, the College asked Medigold Health on 6 July 2017 to act as a new IRMP. Medigold Health also provided the College with OH services.

33. Medigold Health said that its requirements to take on the IRMP role were as follows:-

- The College should fully complete and return its application form. It would then look at Ms G's application from the viewpoint of both "a current/active and a deferred member."

- The College should also provide a copy of Ms G's job description and any information which Ms G had submitted with her IHER application.

- Ms G should complete and return its consent form so that it could contact her GP and consultants for further medical information.

34. The College informed Ms G in its letter dated 6 July 2017 that:-

- Dr Birch had incorrectly provided his opinion on the state of her health at the date of the medical examination in March 2017 instead of on the date her employment ended in February 2016.

- As the correct process had not been followed, it was not yet in a position to make a decision on her IHER application from active status.

- It would therefore instruct a new IRMP to provide a medical opinion on her state of health and ability to work as at 15 February 2016.

- As the new IRMP might require information from her GP and specialists about her medical condition prior to 15 February 2016, she should complete and return the enclosed consent form from the IRMP.

- It would like to apologise to her for any distress and inconvenience caused by the delay in considering her IHER application.

35. Ms G informed the College on 17 July 2017 that she disagreed with what it had said in its letter. She subsequently agreed reluctantly to be medically examined by Medigold Health and returned the completed consent form in August 2017.

36. The College returned the fully completed application form with the requested information to Medigold Health. On the form, it asked Medigold Health to consider Ms G's IHER application from both active and deferred member status.

37. In its letter dated 15 August 2017, the College made it clear to Medigold Health that Ms G had applied for IHER from active status and her state of health should be assessed at the date on which her employment ended, that is, the "Relevant Date".

38. To assist Medigold Health carry out its medical review, the College also said that:

"I have summarised below the medical information the College has available from around the Relevant Date and the events leading up to her dismissal:

1. Letter from Medigold Health dated 17 December 2015 – This letter sets out Ms G's medical conditions following a referral for a review of Ms G's state of health. The OH physician saw Ms G on 14 December 2015. This letter refers to Ms G suffering from anxiety (which had increased since the previous 12 months) and weight loss. Her GP had started her on new medication, Sertraline, and she had been referred to more intensive therapy following a course of cognitive behaviour therapy. The OH physician concluded that, if her new medication is effective, Ms G could return to work after "two to three months or more of further incapacity".

2. On 11 January 2016, Ms G had her third absence review meeting with the College and she submitted another medical certificate covering her absence until 7 March 2016. The College sent Ms G a full list of the College's vacancies as a redeployment opportunity but Ms G considered none of these were suitable.

3. On 15 February 2016 the College wrote to Ms G to advise her employment would be terminated on the grounds of incapacity following long periods of absence over the previous 18 months. The sickness absence for this period was initially for "anxiety/stress", latterly for "depression".

4. On 17 February 2016, Ms G sent the College a letter of appeal in which she disagreed with the College's conclusion and felt that there would have been a "good chance" she would return to work if the College had been willing to wait 2-3 months for her to go through therapy. Ms G also considered a "large part of [her] conditions" relating to incidents that occurred in her role at the College. In her letter, she concluded: "I am keen to return to work and hopeful of a positive outcome from my new medication and on [sic] I have started intensive therapy."

5. A further referral was made to Medigold and the OH physician saw Ms G on 11 April 2016.The outcome is detailed in the letter from Medigold dated 14 April 2016. This letter states that the Sertraline had been helping Ms G to progress over the previous 3 to 4 months. The OH physician considered that there had been "significant improvement" since her last visit and she is "approaching the point where a graduated return to work" along the lines of the programme outlined in the October report (I assume this is referring to the report of 2 October 2015).

6. On 22 April 2016, the College wrote to Ms G and advised her that her appeal would not be upheld on the basis that she could not return to work and the significant impact it was having on the business (In this instance, the impact on the students with learning difficulties who require "consistent and uninterrupted support").

> In light of the above, I note that Ms G's illnesses were limited to stress, anxiety and depression around the Relevant Period based on the medical evidence we have provided and based on Ms G's own explanation of her illnesses/ symptoms. Ms G considered that she was able to return to work but the College felt that it could not sustain any further period of absence due to the impact on the business."

39. Medigold Health notified the College on 25 August 2017 that it was waiting for a report from Ms G's GP and it would advise whether a consultation with Ms G was necessary after reviewing the report.

40. On 15 September 2017, Medigold Health said that it had passed the GP's report to Dr Southam, one of its IRMPs, for reference when preparing his advice on Ms G's case.

41. In his medical report dated 20 September 2017 to the College, Dr Southam said that:

> "My understanding is that I have been asked to consider Ms G's application for early payment of preserved pension benefits.
>
> I do have access to a report from Ms G's GP, Dr S Ahmed, dated 22 August 2017, together with the relevant Specialist correspondence. I also have access to an Occupational Health report from Dr C Ashby dated 14 April 2016.
>
> Ms G's GP indicates that she suffers from osteoarthritis which has been assessed by the Rheumatologist and treatment involves painkilling medication. She has also been diagnosed as suffering from a functional disorder, the symptoms involve fatigue, poor sleep, episodes of numbness in the left leg, and difficulty with memory. She was originally investigated in 2009 with visual disturbances at that time. She has been followed up by the Neurologist and eventually discharged last year.
>
> Ms G suffers from anxiety and depression for which she takes antidepressant medication, has undergone input from the Psychiatrist last year, and has also undergone psychotherapy.
>
> I note that Dr Ashby in his report dated April 2016, indicates that the antidepressant medication at that time had led to improvement and that referral had been made for more intensive therapy in relation to panic attacks and sleeping difficulty. Noting the improvement in symptoms in relation to the anxiety and depression, Dr Ashby felt that graduated return to work was possible, and that provided Ms G continued to take the medication for an adequate period of time, she was expected to return to her full pre-illness competence and capability.
>
> On the basis of the medical evidence currently available, I would not consider Ms G permanently incapable of discharging the duties of her previous employment (including at the time of her dismissal in February 2016), and have completed the relevant documentation to this effect. I have no definitive

evidence that all treatment options have been considered for her conditions of anxiety and depression, and the functional disorder.

Additional treatment options might include adjustment to medication, more intensive psychological therapy, and also input from a Pain Management Clinic.

Ms G's GP refers to a complex picture of somatoform disorders, including the functional disorder diagnosed by the Neurologist. I remain to be persuaded that this condition has been fully and energetically treated thus so far, also noting that Ms G being aged 48, would normally have seventeen more years until normal retirement age."

42. On 13 September 2017, Dr Southam completed the medical certificate Pen 15D: "Certificate of Permanent Incapacity for deferred members who left the LGPS on and after 1 April 2008". It showed that, in his view, Ms G did not satisfy the criteria to be awarded IHER benefits from the LGPS.

43. The College notified Dr Southam in its letter dated 28 September 2017 that Ms G's IHER application was from active member status. It asked him to complete medical certificate Pen 15A to show whether, in his opinion, Ms G satisfied the test for IHER applicable to an active member so that it could be attached as an addendum to his letter of 20 September 2017.

44. In his letter dated 9 October 2017 to the College, Dr Southam wrote:

"Thank you for your letter dated 28 September 2017 regarding Ms G's application for ill-health retirement be considered as an Active Member.

Ms G is a member of the LGPS and for ill-health retirement to be applicable, she would need to be deemed permanently incapable of discharging efficiently the duties of her employment due to ill-health and also not be immediately capable of undertaking any gainful employment. Ms G, being aged 48, would normally have 17 more years until her NPA. Please refer to my report dated 20 September 2017, making reference to the nature of her medical conditions together with the treatment that has been undertaken.

I would not consider Ms G permanently incapable of undertaking the duties of her employment, Additional Learning Support Assistant, her contracted hours being 26 hours per week. My earlier report makes reference to additional treatment options relevant to her medical conditions, anxiety and depression, and the functional disorder. Such treatment might include adjustments to medication, more intensive psychotherapy and referral to a pain management clinic.

I have completed the relevant documentation to this effect.

> All recommendations contained in this report are recommendations only and it is the responsibility and decision of the employer to decide what is and is not a reasonable adjustment."

45. Dr Southam completed Pen 15A on 10 October 2017 to show that, in his opinion, Ms G did not satisfy the criteria to be awarded IHER benefits from the LGPS.

46. On 20 October 2017, the College sent the Pensions Shared Service copies of Dr Southam's medical report and the completed Pen 15A certificate.

47. The College informed Ms G in its letter dated 26 October 2017 that, after considering all the available evidence including the medical report and certificate received from Dr Southam, it had decided she was not entitled to IHER benefits from active member status in the LGPS.

48. Ms G was unhappy with this decision and requested clarification on how it was reached. The College responded to her questions on 30 November 2017.

49. Ms G remained dissatisfied with the College's decision and in April 2018, the Solicitor made a complaint on her behalf under the IDRP.

50. The College replied in its Stage One IDRP decision letter dated 17 July 2018 but did not uphold Ms G's complaint. It said that:

- It appeared that there was a lack of understanding of the LGPS ill-health retirement process on the part of the College.

- The College proceeded with Ms G's IHER application on the basis of Dr Birch's report. It was unaware at the time that he had incorrectly provided his opinion on Ms G's state of health as at the date of the medical examination in March 2017.

- It was reasonable for the College to request the relevant figures from the Pensions Shared Service.

- The e-mail dated 12 June 2017 from the College to the Pensions Shared Service did not set out the College's final decision not to award Ms G LGPS IHER benefits. It did not represent the "smoking gun" or the real reason for the College's decision, as alleged by Ms G, which is purely on financial grounds. Its final decision was only made much later after receiving the new medical certificate and report from Dr Southam.

- If the decision had been predetermined on or before 12 June 2017, the College would not have taken the time, and incurred the additional cost, to instruct Dr Southam to carry out a fresh medical review.

- Given the problems it had encountered, the College decided to check whether the correct decision making process had been followed up to that point and rectify any issues identified before continuing with the process.

- It was during this review that the problem with Dr Birch's report and certificate was discovered. It would have been inappropriate for the College to make a decision on Ms G's IHER application when a fundamental error had been found.

- In light of what had occurred, the College felt that it would be preferable to instruct a new IRMP to review matters rather than ask Dr Birch to reconsider them.

- At the time of providing its instructions to Dr Southam, it would not have known whether he would reach the same medical view as Dr Birch.

51. The Solicitor complained to the Pensions Shared Service on behalf of Ms G under Stage Two of the IDRP. The Pensions Shared Service referred the complaint to the Council. The Council acknowledged receipt of the complaint in its letter dated 22 November 2018 to the Solicitor.

52. The Council said that:-

- In accordance with regulation 77 of the LGPS Regulations, it expected to issue its decision within two months of receiving the complaint.

- If it took longer than this, it would send an interim letter explaining the reason for the delay and give a new expected date for issuing the decision.

53. On 31 January 2019, the Council informed the Solicitor that it was unable to make a decision within the original timescale because of the complexity of the case and the amount of paperwork to assimilate. It said that it now hoped to provide its decision in February 2019.

54. The Council notified the Solicitor in its letter dated 15 April 2019 that it had still not been able to reach a decision and would now try to respond by the end of April 2019.

55. In April 2019, Ms G made a complaint against both the College and the Council to The Pensions Ombudsman (**TPO**).

56. The Council belatedly completed Stage Two IDRP in May 2020. In its decision letter dated 4 May 2020 to the Solicitor, the Council said that:

> "I recommend that the College instruct a new IRMP to look at this case. They should look at whether Ms G would have met the requirements for IHER and clearly state at what date they are making the decision on. The correct forms should also be provided to indicate whether the decision is being made while the member was an active employee or a deferred member…

> Having looked at the paperwork I do not feel that the previous certificates are consistent as they do not all have backing papers to support the decision made.
>
> The medical certificate provided by Dr Birch (April 17) was backed up by a report setting out how he had arrived at his decision.
>
> The second set of certificates provided by Dr Southam (October 17) had no supporting paperwork to show how he had made his decision.
>
> As the two decisions were different and the supporting paperwork was not consistent, I feel this case should be started from scratch.
>
> A copy of this letter and a notification of my findings will be sent to the College."

57. The College informed the Council in its letter dated 18 January 2021 that it was unable to take any action because the Council had not provided a "clear basis or reasoning" for its decision.

58. In its e-mail dated 25 February 2021 to TPO, the Council said that it was willing to award Ms G £500 in recognition of the significant distress and inconvenience which she had suffered because of the delayed Stage Two IDRP decision letter.

59. During the investigation into Ms G's complaint, the legal adviser for the College, Eversheds Sutherland (International) LLP (**Eversheds**), said that:

> "In light of the (albeit brief and significantly delayed) Stage 2 decision from the Council, our client would be prepared to try and settle the member's complaint on an amicable basis by re-considering her application for ill-health retirement in the LGPS (as if she was an active member) after seeking the medical opinion of a third IRMP.
>
> In order to do so, we would suggest that:-
>
> - All parties need to be clear and agree that the decision will be based on the member's condition and prognosis at the time her employment was terminated by our client and that no subsequent medical evidence or reports (given the passage of time) will form part of or be taken into account in the instructions to…the third IRMP…
>
> - The Council needs to provide fully detailed reasons for its Stage 2 findings, together with details of what additional paperwork and/or medical evidence it believes should be obtained and provided to the third IRMP concerning the member's condition at the date of her dismissal, so that the third IRMP has the relevant documentation and evidence in order to provide the necessary certificate and report and any errors which the Council perceived from their Stage 2 findings are rectified.

- Once that certificate and report are received from the third IRMP, our client will then reconsider its decision in relation to the member's application for ill-health retirement.

- We presume that, as part of this amicable settlement and resolution process, the member and her legal representatives will want to review and agree both the letter of instruction to be sent to the third IRMP together with the accompanying medical evidence. Our client acknowledges that this would be for the benefit of both parties as it would ensure that both are clear on and accept the basis on which the third IRMP has been instructed and will therefore ultimately come to his or her decision in relation to the member. We would therefore suggest that, once the Council has dealt with the points outlined above, our client will share with the member's legal representatives for comment the draft instructions and the documents it proposes to provide. Our client will take on board any comments received. However, as our client would ultimately be the party instructing the IRMP, they would have the final say over the form and content of the instructions."

60. Eversheds also said that:

> "On the issue of distress and inconvenience, in the interests of trying to resolve the member's complaint on an amicable basis by the instruction of a fresh IRMP, the College would be prepared to offer a goodwill gesture to the member in the amount of £500.
>
> On the issue of the medical evidence, relevant contemporaneous documentation and evidence was provided to both the first and second IRMPs in relation to the member's condition at the time of her dismissal. Both the first and second IRMPs were able to opine on the basis of the evidence provided to them. Therefore, that medical evidence should also be sufficient for the purposes of instructing the fresh IRMP to reach a view…more recently obtained medical evidence which addresses Ms G's condition at the time of her dismissal should properly be approached with caution. The College therefore takes the view that such material should only be considered and provided to the third IRMP if it is necessary to enable a decision to be reached (i.e. because there are gaps in the extant medical evidence). We would suggest that this can be considered and dealt with as part of the instructions and bundle of medical evidence to be provided to the fresh IRMP."

61. In its e-mail dated 18 May 2021 to TPO, the Council said that:

> "I confirm that it is not my place to decide another employers decision on ill-health as they should ensure that they are following the correct processes.
>
> I have sent and verified our IDRP 2 decision recently, I stand by my decision and that it is a fact that the employer needs to ensure that they follow the correct processes. My response to this was that they undertake a further IRMP to ensure completeness of this process.

If not they need to re-evaluate if as an employer need to evaluate if they made the correct decision if the first place, by re-assessing this."

Ms G's position

62. The College failed to consider the possibility of IHER from active status in the LGPS at the time of her dismissal. This is despite having concluded that it was unlikely she would be able to resume her duties, even on a phased return basis, in the foreseeable future.

63. The e-mail dated 12 June 2017 is "a smoking gun" which set out the College's real reason for not awarding her an IHER pension from the LGPS. After receiving Dr Birch's report and certificate, the College decided to approve her application for Tier One IHER benefits and submitted it to the Pensions Shared Service for processing. However, when the College found out the capital cost to provide her with these benefits was more than what it wanted to pay, it tried to renege on its decision.

64. The College should not have taken the capital cost into account in its decision because it was not a relevant criterion. By doing so, its decision to decline her IHER application was consequently perverse.

65. The College's actions after 12 June 2017 were taken "in bad faith". It created an issue when there was none and used it as an excuse to "wriggle out" of its obligation to her.

66. The College misrepresented the true position in its letter dated 6 July 2017 by not informing her of the real reason for reversing its decision to award her IHER benefits.

67. Dr Birch did not refer to her ill-health being somehow materially different at the time of her examination at the date of dismissal in his report. The College did not give Dr Birch an opportunity "to confirm his view of capability at the date of dismissal".

68. In its letter dated 15 August 2017, the College improperly tried to steer Dr Southam away from the fact that, at the time of her dismissal, it had already come to a view that she was permanently incapable of performing her role.

69. Dr Southam did not speak with her or medically examine her. He also did not: (a) ask her consultant neurologist any questions, (b) request all of her medical records from her GP, in particular, those contemporaneous with her dismissal, and (c) ascertain what attempts had been made to treat her anxiety, depression and functional disorders.

70. Consequently, Dr Southam did not have all the relevant medical evidence prior to her dismissal for consideration when forming his opinion. Moreover, it would appear that he had taken into account medical evidence following her dismissal.

71. Dr Southam sought to justify his decision that her disorders had not been "fully and energetically treated" based on the medical evidence currently available. He did not, however, attempt to understand what treatments had been explored by speaking with

her, her GP or medical specialists. Consequently, he had formed his view without properly understanding her condition and the history of her medical treatment.

72. She is sceptical whether a report by a third IRMP will be handled fairly by the College. So, it is important her allegation that the College had improperly rejected her IHER application, purely on the grounds of cost, be dealt with formally by the Pensions Ombudsman.

The College's position

73. Its original instruction to Dr Birch was based on the incorrect belief that Ms G had applied for IHER from deferred status following the unsuccessful appeal against her dismissal.

74. The significant capital cost of Ms G's IHER benefits was not the basis on which it made its decision to decline her application.

75. The actions which it took between May 2017 and October 2017, were genuine attempts on its part to rectify the errors made in the IHER process. So its formal decision was reached only after taking into account a valid IRMP medical report and certificate assessing Ms G's condition at the date of her dismissal.

76. There was no requirement on Dr Southam to medically examine Ms G before providing his advice. It was for Dr Southam to decide whether or not to prepare his report based solely on the medical evidence and documentation supplied to him.

77. The fact that the College used Medigold Health for some of its OH services did not affect, or call into question, Dr Southam's independence as an IRMP.

Adjudicator's Opinion

78. Ms G's complaint was considered by one of our Adjudicators who concluded that further action was required by the College and the Council. The Adjudicator's findings are summarised below:-

79. It is not the role of the Ombudsman to review the medical evidence and come to a decision of his own on Ms G's eligibility for payment of IHER benefits under the LGPS. The Ombudsman would be primarily concerned with the decision making process. The medical (and other) evidence would be reviewed to determine whether it supported the decision. The issues considered include: (a) whether the relevant rules had been correctly applied, (b) whether appropriate evidence had been obtained and considered, and (c) whether the decision was supported by the available relevant evidence.

80. However, the weight which is attached to any of the medical evidence is for the College to decide (including giving some of it little or no weight). It is open to the College to prefer evidence from its own advisers unless there is a cogent reason why it should not do so without seeking clarification. For example, an error or omission of

fact or a misunderstanding of the relevant rules by the medical adviser. If the decision making process is found to be flawed, the appropriate course of action is for the decision to be remitted for the College to reconsider. The Ombudsman cannot overturn the decision made by the College solely on the basis that he might have reached a different conclusion.

81. Having carefully considered all the available evidence it was clear to the Adjudicator that there had been a lack of understanding on the College's part of the LGPS IHER process when dealing with Ms G's application. The Adjudicator noted that the College had to seek guidance from the Pensions Shared Service several times in October 2016 and April 2017, on the appropriate process.

82. Furthermore, if the College had been fully conversant with the IHER process, then it should have known that, in the circumstances under which it had decided to terminate Ms G's employment, it was required to obtain an IRMP certificate. Under Regulation 35, having decided to terminate Ms G's employment on the grounds of ill-health, the College was then required to decide if she satisfied the conditions for ill-health retirement. In order to do so, it was required to obtain a certificate from an IRMP. In the Adjudicator's view, its failure to do so constituted maladministration on the College's part and caused the subsequent confusion over whether Ms G's application should be considered from the viewpoint of an active or deferred member.

83. The Adjudicator noted the College had said that its original instruction to Dr Birch was on the wrong basis. Namely, that Ms G was applying for IHER from deferred member status. However, it was the Adjudicator's opinion that this assertion was not corroborated by the e-mail and completed referral form which it sent to Petersfield Surgery on 6 March 2017.

84. In the Adjudicator's view, if the College had mistakenly proceeded to undertake IHER process from deferred status for Ms G, it would not have asked whether she should have been medically retired. This question was irrelevant for a deferred member, and by asking this, would suggest that the College was trying to ascertain whether Ms G met the two conditions specified in regulation 35 of the LGPS Regulations for IHER from active member status.

85. On receipt of Dr Birch's medical report and certificate, it would seem that the College had simply accepted his opinion without question. If the College had read the report carefully to understand the rationale behind his advice, in the Adjudicator's view, it is reasonable to expect the College would have noticed that Dr Birch had provided his opinion on the state of Ms G's health at the wrong date. At this point, it could have sought clarification from him.

86. The Pensions Shared Service subsequently sent the College the correct certificate for ill-health from active status, Pen 15A, for completion and return. By enquiring whether this certificate was necessary, in the Adjudicator's view, further demonstrates the confusion the College caused by its failure to consider Ms G's for IHER from active member status in the LGPS prior to terminating her employment.

87. Dr Birch was given the correct certificate to complete by the College but his medical advice had been based on Ms G's condition at the wrong date. This invalidated his report and certificate for the purpose of the College deciding whether to accept Ms G's IHER application.

88. It is unfortunate that the College did not seek clarification at this point on how to deal with Ms G's application. If it had done so, the mistake made by Dr Birch would have been discovered and rectified by the College much earlier.

89. The available evidence would suggest that the College did not send its formal decision notice at the same time it sent Dr Birch's report and certificate to the Pensions Shared Service. If the College had done so, the Pensions Shared Service would not have had to ask on 12 May and 7 June 2017, whether it had accepted Ms G's IHER application. The College had also not yet formally notified Ms G of its decision or supplied her with details of the IHER benefits available to her in a notice letter.

90. When the College informed the Pensions Shared Service on 12 June 2017 that it would not be taking Ms G's application any further, the Adjudicator was satisfied that no formal decision had yet been reached. In the Adjudicator's opinion, only a preliminary decision had been made by the College and it was perfectly entitled to change its view after identifying the problem with Dr Birch's medical report as a result of further enquiries.

91. The College had been inclined to award Ms G IHER benefits from the LGPS, in line with the advice received from Dr Birch, but was deterred from doing so after learning of the considerable capital cost involved. As Ms G's IHER application was from active member status, cost considerations should not, however, have been taken into account by the College in its decision.

92. In the Adjudicator's view, the College was wrong to take into account the capital cost when forming its preliminary decision. If the College had subsequently notified Ms G formally in writing of its decision to decline her IHER application on the grounds of cost, then the Adjudicator would have agreed with Ms G that the College had improperly rejected her application based on a flawed decision making process.

93. However, the College did not do this because it had discovered Dr Birch's error beforehand and correctly chose to postpone making its formal decision until the mistake had been rectified.

94. The College chose Medigold Health, which also provided it with OH services, as the new IRMP. The Adjudicator said he could understand why Ms G would have reservations about this selection. In his view, it would have been better if the College had found a new IRMP which had no previous involvement in Ms G's case.

95. Medigold Health also seemed unclear on what it had been instructed to do in its role of IRMP. It said that it would look at Ms G's IHER application from both active and deferred member status when only the former scenario was required. Furthermore,

despite having subsequently been informed by the College that Ms G had applied for IHER from active status, Dr Southam of Medigold Health then incorrectly provided medical advice assuming Ms G's application had been from deferred status.

96. The College noticed the mistake made by Dr Southam in a timely manner and was able to give him the opportunity to correct it by amending his medical report and completing the correct medical certificate.

97. On receipt of Dr Southam's medical opinion and certificate, the College needed to understand his reasoning when making its decision and could not simply adopt the IRMP's opinion without question. In particular:-

- Where there is insufficient information or any uncertainty, the College must seek clarification from the IRMP.

- Where there is conflicting medical evidence and the IRMP's evidence is preferred over other medical evidence, the College must be clear that both have been considered, and why one has been given more weight than the other.

- The question of untried treatments must be addressed properly. It is not enough simply to say that treatment options exist or that it is premature to conclude that the condition is permanent. The IRMP must be asked to give a view as to their likely effect and whether, on the balance of probabilities, the condition renders the member permanently incapable of discharging the duties of the employment they were engaged in (along with the other criteria set out in the LGPS Regulations).

98. Having carefully examined Dr Southam's report, the Adjudicator was of the opinion that he had identified the treatments he had in mind. However, he failed to comment on their likely efficacy. In the Adjudicator's view, the College should have asked him to do so. The Adjudicator said that it is not sufficient simply to identify treatments unless it is likely to result in an improvement in Ms G's capacity for employment over the relevant period such that she can be expected to be able to undertake gainful employment, as defined. There also seemed to be some suggestion that Dr Southam did not: (a) have all the relevant medical evidence in his possession and (b) try to understand what treatments had been explored by speaking with Ms G, her GP and medical specialists before concluding that her disorders had not been "fully and energetically treated". In the Adjudicator's view, Ms G's assertion that Dr Southam had formed his opinion without properly understanding her condition and the history of her medical treatment did have some merit.

99. It was the Adjudicator's opinion that Ms G's IHER application from active member status had not been considered properly by the College and should be remitted back for reconsideration.

100. In light of what had occurred during the IHER process, the Adjudicator agreed with the Council's view that the College should reconsider its decision making process and seek a medical opinion from a third IRMP who has had no previous involvement in

Ms G's case. It would be for the third IRMP as to whether he/she needed to see Ms G before providing advice based on their professional judgment.

101. Changes in Ms G's health after she left employment were not relevant to the determination of whether she satisfied the criteria in Regulation 35 of the LGPS Regulations in order to receive an IHER pension. The College was only expected to make its decision based on the information which was available to it, or could have been available, at the time Ms G left employment. It would not have acted improperly by taking account of later medical evidence, when reviewing a decision, provided it was relevant to Ms G's condition at the time the original decision was made. However, caution needed to be taken when revisiting earlier decisions based on contemporary evidence at the time of reconsideration.

102. In the Adjudicator's view, the Ombudsman would more likely than not, agree that the proposal made by the College to: (a) reconsider Ms G's IHER application in the LGPS from active member status, and (b) award her £500 in recognition of the distress and inconvenience which she has suffered, was the correct approach for it to now take in order to put matters right.

103. The Adjudicator did not believe that the Ombudsman would direct the College to do more than what it had already offered.

104. The Council's failure to consider Ms G's complaint at Stage Two of the IDRP in a timely manner constituted maladministration that had caused Ms G additional distress and inconvenience. In recognition of this, the Council had offered Ms G a goodwill award of £500. In the Adjudicator's view, this was in line with what the Ombudsman would likely direct in similar circumstances. The Ombudsman's awards for non-financial injustice were modest and were not intended to punish a respondent.

105. Ms G did not fully accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms G provided her further comments through the Solicitor which do not change the outcome.

106. The Solicitor said that:-

- The College had made:

    a) either a formal decision prior to 12 June 2017 to grant Ms G IHER benefits from active member status in the LGPS which it then withdrew for an inappropriate financial reason; or

    b) a preliminary decision to award IHER benefits and a final decision not to do so on 12 June 2017 for the same reason.

- Dr Birch completed the correct medical certificate for ill-health retirement from active status for Ms G. According to Regulation 36 of the LGPS Regulations entitled "Role of the IRMP", the College only required this certificate to make its decision.

- There is no suggestion that Dr Birch's medical report was "ill-founded or somehow irrational". It should not matter that the report referred to the state of Ms G's health at the date of the medical examination in March 2017 and not the date on which her employment ended in February 2016, as this was dealt with by the certificate. The College did not ask Dr Birch whether his medical view also applied at the date on which Ms G's employment ended because it was unnecessary for it to do so.

- As Dr Birch's medical certificate was correct, he did not have to provide a further report. For the avoidance of any doubt, if one was required, all that the College needed to do was to obtain a letter from Dr Birch stating that his findings in March 2017 were also valid in February 2016.

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- The Pensions Shared Service informed Ms G during a telephone call on 15 May 2017 that: (a) it had calculated the capital cost of providing her with IHER benefits from the LGPS and had sent the details to the College on 12 May 2017, (b) the College was discussing a payment plan for this cost with the Council and (c) she should receive details of her IHER benefits by 26 May 2017.

- The e-mail dated 12 June 2017 showed that the College had communicated its final decision by telephone to the Pensions Shared Service and confirmed it subsequently in writing. Alternatively, it indicated that an inappropriate final decision was made to reverse an earlier (provisional) decision to grant Ms G IHER benefits in the LGPS.

- In response to a Subject Access Request made by Ms G, the College did not provide her with any pertinent contemporaneous evidence supporting its decision not to award her IHER benefits on the basis of Dr Birch's report. It also did not supply any details of the "communications, discussions and decisions" which had led to its e-mail of 12 June 2017.

- The College declined to divulge the legal advice which it received on how to deal with Ms G's IHER application, citing privilege. There should however be details of meetings and communications arising from that privileged advice which have not been disclosed by the College. It is implausible that there is no such evidence and suggests that the College may be withholding documents supporting Ms G's view that it had reached a decision not to grant her IHER benefits purely on the grounds of financial cost.

- Further investigation should be carried out to establish exactly what occurred between 27 April 2017 and 6 July 2017 before Ms G's complaint is determined by the Ombudsman.

- It is particularly important to understand what happened between 7 and 12 June 2017. It is difficult not to conclude that during this period the College decided to

revoke an earlier decision to award Ms G IHER benefits. Alternatively, it made a decision not to award on financial grounds.

- The only internal document disclosed by the College purporting to set out the basis for the decision, which it made on 6 July 2017, was the "Cover Note dated 17 April 2017". This note, which sets out the non-financial reasons to decline Ms G's IHER application, must be treated with caution. Its date is clearly incorrect as the note refers to later events and it is not a contemporaneous document.

- In contrast, there are plenty of e-mails which set out the College's concerns about the cost of Ms G's IHER benefits including the very clear statement it made on 12 June 2017. It does not make sense to conclude that a final decision, communicated to Ms G in the letter dated 6 July 2017, was based on Dr Birch's medical report when this "strange wrongly dated" note is the only evidence corroborating its decision.

- The Council should have dealt with the Stage Two IDRP complaint in two months but took 20 months before it produced its short letter which lacked a clear basis or reasoning for its decision. Given the circumstances, it would be more appropriate for the Council to award Ms G around £1,000 for the non-financial injustice she sustained.

- The failings on the part of the College are far more extensive than those of the Council. Ms G has suffered severe distress and inconvenience as a consequence of the College's maladministration. An apt award in recognition of this should be around £3,000 to £5,000.

- As of 15 February 2022, Mrs G had paid legal costs totalling £11,380 inclusive of VAT which she has reasonably incurred seeking his assistance with her complaint. This should be reimbursed by the Respondents.

107. Eversheds replied and said that:-

- The College did not accept the Solicitor's comments and refuted his allegations.

- Ms G and the Solicitor did not have any issues with the College's response to her Subject Access Request at the time. If they had considered that the reply was inadequate, it is reasonable to expect that they would have raised this matter with the College at the time of receiving it and not some three years later.

- The College did not actively withhold any documentation that was properly due to Ms G following her Subject Access Request.

- It would be inappropriate for the College to pay Ms G a non-financial injustice award at the level suggested by the Solicitor because it considerably exceeds those previously awarded by the Ombudsman in similar cases.

- It is rare for the Ombudsman to award legal costs. The underlying principle is that the parties involved in a complaint pay their own costs. The College has incurred significant costs in dealing with the Ms G's protracted complaint which has been prolonged unnecessarily by "the voluminous and continuous correspondence" from the Solicitor. Consequently, the College disagrees that it would be appropriate for Ms G's legal costs to be reimbursed.

108. I note the additional points raised by the Solicitor but I agree with the Adjudicator's Opinion, except the award recommended in respect of the College's maladministration for the way in which it handled the ill health application process. It undoubtedly has caused Ms G serious distress and inconvenience.

Ombudsman's decision

109. When someone complains that they have not been awarded the ill-health (or incapacity) pension they believe they should get, I review the way the decision has been reached.

110. I will not look at the medical evidence and make my own decision based on it, nor will I ask for more medical reports. I will consider whether the decision-maker has: (a) gone about making the decision in the right way; and (b) made a decision that makes sense based on the evidence.

111. I do not have to agree with the decision but I will not intervene just because I think the decision-maker could have reached a different decision.

112. I will look at whether the decision-maker has followed the scheme rules or regulations. Different pension arrangements have different rules or regulations about ill-health pensions. For example, the criteria may be different and in some cases the decision will be made by the employer, or by the scheme's trustees or managers, or by a combination of all of them. I will look to see whether the decision has been reached by the right person or entity.

113. If I find that the decision-maker has reached their decision in the wrong way, I will usually order them to make the decision again in the proper way. For example, I may ask them to obtain more evidence.

114. I can also look at whether there was any maladministration, such as unreasonable delays during the decision making process. If I find that there has been maladministration, I may award compensation for any non-financial injustice, the distress and inconvenience the member has suffered.

115. Ms G contends that the e-mail dated 12 June 2017, sets out the College's real reason for not awarding her an IHER pension from the LGPS. That is, the decision was made purely on grounds of cost.

116. The College said, in its e-mail, that it would be notifying Ms G it had declined her IHER application due to "financial obligations."

117. If the College had informed Ms G formally in writing of its final decision not to grant her IHER benefits on the grounds of cost, then I would agree with Ms G that the College had improperly rejected her IHER application on this basis.

118. Her IHER application was from active member status so cost considerations should not have been taken into account by the College when making its decision.

119. However, regardless of whether the e-mail conveyed the College's preliminary or final decision on Ms G's IHER application to the Pensions Shared Service, I consider that the College was entitled to review this decision by making further enquiries if it had identified any flaws in its decision making process.

120. Because the College discovered that Dr Birch had made a mistake in his report the College did not inform Ms G of its final decision on the grant of an ill health pension. I find that it acted correctly by choosing to defer making the decision until the mistake had been rectified.

121. The Solicitor said that the College provided Ms G with an unsatisfactory response to her Subject Access Request for information held in connection with her IHER application. He suggests that TPO should conduct further enquiries to fully establish the events that led to the College's decision to decline Ms G's application having previously been inclined to accept it following the advice received from Dr Birch.

122. The fact that the College did not provide Ms G with any contemporaneous evidence to support its decision not to award her IHER benefits, on the basis of Dr Birch's report, does not mean that there are no valid grounds for making its decision. The College sought legal advice on how to deal with Ms G's IHER application shortly after sending the e-mail of 12 June 2017. On receipt of this advice, on 6 July 2017, the College asked Medigold Health to act as a new IRMP. I find that there would be no reason for the College to have done this unless the obvious flaw in Dr Birch's report had been pointed out to it by its legal adviser. Consequently, I do not consider it necessary for me to carry out further investigation into Ms G's complaint before making my Determination.

123. The Solicitor contends that the College only required an ill-health from active status medical certificate from Dr Birch, in order to make its decision in accordance with the LGPS Regulations. I do not share the Solicitor's view. While the LGPS Regulations may be silent on the requirement of a medical report from an IRMP, the College could not simply adopt the IRMP's opinion on the certificate without question. In order for the College to take its decision properly it needed to understand the IRMP's

reasoning and the only way it could do this was by studying the accompanying medical report.

124. Consequently, I am satisfied that the actions the College took after 12 June 2017 were not taken simply as a means to avoid liability. Rather, they were genuine and necessary attempts to rectify errors which had occurred during the decision making process. They were intended to ensure that the College made its decision on the correct basis with a medical certificate and report from an IRMP assessing Ms G's condition at her date of leaving employment and not the date of the medical examination more than one year later, in March 2017.

125. It is regrettable that further errors were made by the College during its decision making process following the appointment of Medigold Health as the new IRMP. For the reasons given by the Adjudicator in his Opinion, I find that Ms G's IHER application from active member status was not considered properly by the College and should be remitted back to it for reconsideration as has been suggested by its legal adviser.

126. There is no doubt that Ms G has suffered distress and inconvenience because of the maladministration identified and attributable to the College and the Council. I note that during the Adjudicator's investigation both the College and also the Council offered Ms G a goodwill award of £500 in recognition of this.

127. My awards for non-financial injustice are modest and not intended to be punitive. However, the manner in which the College has handled the ill health process is bound to have caused Ms G serious distress and inconvenience so I am increasing the award in respect of the College's maladministration to £1,000.

128. I find the Council's offer of £500 to be appropriate in respect of the significant distress and inconvenience caused by the delays in the IDRP process.

129. I do not normally direct the payment of legal expenses incurred by an applicant in bringing a complaint to TPO, as my organisation offers a free service to the public and will help an applicant through the process of dealing with the complaint. However, where there has been fault on the part of the respondent, which has caused the applicant to incur costs, which would not otherwise have been incurred, then I would usually expect the respondent to reimburse the applicant for such costs. I do not consider in this case that it is appropriate for Ms G's legal costs to be reimbursed by the College.

130. I uphold Ms G's complaint and make the directions set out in paragraph 131 and 132 below.

Directions

131. Within 28 days of the date of this Determination:-

(i) The College shall: (a) commence its review of Ms G's application for IHER benefits in the LGPS and nominate a new IRMP who has had no involvement with the matter previously; and (b) pay her £1,000 for the serious distress and inconvenience which she has experienced by its failure to consider her IHER application properly.

(ii) The Council shall award Ms G £500, for the additional significant distress and inconvenience which she has suffered by its failure to consider her complaint at Stage Two of the IDRP in a timely fashion.

132. Within 28 days of receipt of the medical report and certificate from the new IRMP, the College shall reconsider Ms G's IHER application from active status, inform her of its new decision, and explain its reasons for reaching that decision.

Anthony Arter

Pensions Ombudsman
29 March 2022