

## Ombudsman's Determination

Applicant	Mr M
Scheme	West Yorkshire Pension Fund <b>(the Fund)</b>
Respondents	University of Bradford <b>(the University)</b> , City of Bradford Metropolitan District Council <b>(the Council)</b>

## Outcome

1. Mr M's complaint against the University is partly upheld. To put matters right, for the part that is upheld, the University shall pay Mr M £1,000 for his serious distress and inconvenience. Mr M's complaint against the Council is not upheld.

## Complaint summary

2. In summary, Mr M's complaint is that his application for ill health retirement has been unreasonably turned down. Mr M considers that a report from a medical practitioner, Dr Suleman, was not adequately considered in his employer's decision not to award him ill health retirement benefits.

## Background information, including submissions from the parties

3. In 1984 Mr M started working for the University. He became a member of the Fund, part of the Local Government Pension Scheme (**LGPS**). Under the Local Government Pension Scheme Regulations 2013 (the Regulations) the "appropriate administering authority" of the Fund is the Council.
4. Mr M was first diagnosed with spinal stenosis in 2004. He later developed a chronic knee condition.
5. On 31 August 2016, Mr M was signed off work due to ill health. He never returned to work at the University. He has said that he has not worked elsewhere since then.
6. When Mr M told the University's HR department that he wanted to receive an ill health early retirement pension (**IHERP**) under Regulation 35 (see Appendix), he was referred to Occupational Health (**OH**). Mr M had a meeting with OH on 9 November 2016. An OH report was issued by Dr Dann on 23 December 2016. Her report said

that the report from Mr M's GP stated that Mr M had declined to pursue any surgical options which could help him.

7. On 14 March 2017, Mrs W, a senior HR manager at the University, told the University's pension manager (**Mr P**) that in OH's view:

"it would be difficult for him to pursue a successful pension application because he has remaining treatment options which would have an excellent chance of offering him symptomatic benefit".

8. Mrs W asked Mr P whether Mr M could challenge the OH report or obtain an independent medical assessment.

9. Mr P replied that the decision whether to grant an IHERP was for the University to make, taking into account all the medical evidence available. OH would refer all the medical evidence to an independent registered medical practitioner (**IRMP**). The IRMP would be unlikely to support the application if the GP or specialist stated that treatments were still available. The employer's decision whether to grant an IHERP could subsequently be appealed under the Fund's internal dispute resolution procedure (**IDRP**).

10. Dr Dann received a supplementary report from Mr M's GP and a letter from Mr M's knee specialist. On 12 July 2017 Dr Dann provided an OH report which was sent to the University and Mr M. This was based on her latest consultation with Mr M on 17 May 2017. She commented that:

"I explained that the previous consultation had been somewhat compromised by his level of disability during the consultation being significantly greater than that I subsequently saw when I walked along the corridor when he was coming in the opposite direction. I also explained that his records showed that he was taking significantly less medication than he had been 3 years previously when he had been undertaking his current role.

...Mr M declined surgical treatment options...

Unfortunately, in this context it is not possible for me to recommend early retirement on the grounds of ill health.

I feel my examination findings were compromised by my subsequent experience of his mobility on the corridor and so I feel these findings can't be relied upon. I have received two reports stating that he has declined treatment options which would be expected to give him significant relief from his symptoms.

As a result, at present, I am unable to support his application for the early release of his pension on the grounds of ill health because it would seem that he has remaining treatment options which would have a good chance of offering him symptomatic benefit and which he has declined."

11. During the summer of 2017 the University announced a redundancy programme affecting Mr M's department. On 23 August 2017 Mr M met Mrs W with his trade union representative (**Mrs H**) at a formal individual consultation meeting. Mrs H later provided the following statement about what was said at that meeting:

“[Mr M] was informed that if he got a different report (from the OH Report dated 12 July 2017) then the redundancy offer would be rescinded in favour of ill health retirement. [Mrs W] handed [Mr M] an ill health certificate form... and said that if it was completed by a doctor (the conditions of which are outlined on the form) then the University would honour it. Indeed the minutes of the meeting held on 23 August provided by the University state ‘Mrs W said if the redundancy notice was issued but [Mr M] secured IHR before the termination date then the redundancy notice would be rescinded’.”
12. Mr M made an online search for a medical expert. He arranged for a local doctor, Dr Suleman of Olive Holistic Health, to examine him. In his subsequent report dated 5 October 2017, Dr Suleman recommended that Mr M was retired on ill-health grounds as:

“On the balance of probabilities you are unlikely to be in a position to undertake any form of gainful employment prior to your retirement age.”
13. Dr Suleman completed and signed the ill health certificate.
14. On 17 October 2017, an email from Mrs H to Mrs W said that Mr M had complied with what he had been told at the meeting on 23 August 2017; the certificate was signed by Dr Suleman, who was a doctor used by the Fund, so Mr M would like written confirmation that he would receive an IHERP.
15. Later that day, after consulting Mr P, Mrs W emailed Mrs H as follows:

“Unfortunately, we cannot accept this form as this Doctor isn't registered to provide this independent service for the University...Also, because OH haven't co-ordinated this we do not know that the [IMRP] has made that assessment using all the information made available. I have been advised that we must discard this form and ask OH to refer this case to an independent practitioner who is registered with WYPF (for UoB). I have already made the referral and have asked for it to be expedited...I don't have the authority to operate outside of the regulations of the pension scheme.”
16. Mrs W also sent a second email to Mrs H, saying

“I should have added that I also stated at the meeting that I am not the University expert on IHR and that [Mr M] should discuss his application with [Mr P] before taking any actions.”
17. On 19 October 2017, Mr P emailed Mrs W an extract from the Regulations. He pointed out that the IRMP requirement in Regulation 36(3) was not satisfied because the University had not registered Dr Suleman as an IRMP before his assessment of

Mr M. As a coincidence, Dr Suleman was already registered with the Fund by a different employer, but that did not change the position. Mr P attached a form that the University would need to register Dr Suleman as a new IRMP.

18. Mr M was told by the University that he would be referred back to OH for a further medical report because Dr Suleman was not currently on the University's list of approved IRMPs. The University HR department asked OH to arrange for an IRMP to examine Mr M before 15 November 2017, Mr M's proposed redundancy date.
19. OH arranged for an IRMP, Dr Hall-Smith, to examine Mr M in Bradford on 6 November 2017. Mr M did not reply to the appointment letter and the email that he received. OH was informed by the University HR department on 3 November 2017, after the confirmation deadline that OH had given, that as the appointment had not been confirmed it would not go ahead.
20. On 8 November 2017, OH complained to the University HR manager that Dr Hall-Smith had travelled from his home in South Devon to Bradford in order to examine Mr M, but his time was wasted as Mr M had not attended the consultation. OH asked if another meeting with a consultant should be arranged.
21. On 15 November 2017, Mr M's role at the University was made redundant. He left service on that date. He received statutory redundancy pay and became entitled to a deferred pension from the Fund.
22. On 21 November 2017, Mr M's trade union representative told the University's HR department that Mr M had decided not to pursue an IHERP, but he would appeal against his redundancy.
23. On 15 March 2018, the University wrote to Mr M to reiterate that it could not accept the certificate signed by Dr Suleman on 5 October 2017, because on that date he was not on the University's approved IRMP list.
24. On 12 May 2018, Mr M complained that Dr Dann's views were based on an out of date GP report; he said she should have sought up to date views; she did not consider whether surgery was reasonable; her view was contradicted by Dr Suleman, and his medical condition was getting worse.
25. On 4 July 2018, Mr P, as the nominated person under Regulation 74 of the Regulations, sent a letter to Mr M under stage 1 of the Fund's IDRP. This rejected Mr M's complaint. It said that Mr M was made redundant under a departmental restructuring, not dismissed for ill health reasons. It also said it did not need to comment on the findings of Dr Suleman's report because, as it had explained to Mr M previously, the University could not accept a certificate signed by Dr Suleman. It noted that Mr M had not attended the IRMP appointment that was scheduled for him in November 2017.
26. On 15 October 2018, Mr M appealed against the IDRP stage 1 decision, under regulations 76 and 77 of the Regulations. He claimed that the decision and process

were flawed and unfair, and that the University had made its decision against him because of formal grievances he had raised about his employment.

27. The IDRP stage 2 review was conducted by the Council's Chief Executive. Her letter, dated 22 January 2019, rejected Mr M's appeal. She said that Regulation 35 of the Regulations required the employment to be terminated before the employer decided whether the IHERP criteria had been met. The University could not have made that decision while Mr M remained employed. His employment was terminated due to redundancy, not on ill health grounds. As a deferred member, Mr M could apply to the University for his deferred pension to be paid early on ill health grounds (under Regulation 38).
28. In several phone calls to my Office, Mr M stressed the difficult financial position he was in due to the lack of income. We asked the University and the Council to send us their comments. The Council said that it was an employer decision whether to pay an IHERP; the termination of Mr M's employment was on redundancy grounds, not on ill health grounds, so an IHERP was not payable under the Regulations. The Council reiterated that when Dr Suleman provided his medical report he had not been registered as an IRMP by the University.
29. The University said that Mr M had been given the opportunity to be assessed by an IRMP, in accordance with the Regulations, but he chose not to attend the appointment scheduled. The University confirmed that IRMPs were not on the University's payroll. The termination of employment was on redundancy grounds, and this was not a decision that could be challenged under the Regulations. In later correspondence the University admitted that:

“the omission of any pensions professional (with LGPS knowledge) from the meetings held with [Mr M] has had a huge impact on this case. This certainly led to confusion and poor and incorrect information/guidance.”

## **Adjudicator's Opinion**

30. Mr M's complaint was considered by one of our Adjudicators who concluded that there had been maladministration on the part of the University. The Adjudicator's findings are summarised below:-

- Members' entitlements to benefits when taking early retirement due to ill-health are determined by the Regulations (see Appendix). These 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. The employer must apply the Regulations correctly. It can only do things which it has been given the power to do by the Regulations.

- The Regulations contain strict criteria for payment of an IHERP because it is an enhanced benefit, the cost of which puts a strain on the funding of the Fund. The additional cost is met entirely by the relevant employer.
- The decision on whether to provide ill-health benefits must be made by the employer. It is not required to obtain the consent of the “appropriate administering authority”.
- With regard to procedure, the IHERP must be requested by an active member whose employment is terminated by the employer on grounds of ill-health, the employer must obtain the appropriate administering authority’s approval to its choice of IRMP, then obtain a certificate from that IRMP as to whether the member satisfies the conditions in Regulation 35(3) and (4), for how long the member is unlikely to be capable of undertaking gainful employment, and whether the member was in part-time service due to his medical condition. The employer must consider the certificate and then make its decision whether or not the member is entitled to the IHERP.
- The Regulations require that the provision of benefits is simply a matter of whether or not the member satisfies the test and whether the other procedural requirements have been complied with. If they have, the member is entitled to benefits.
- For the decision to be made properly, it must be made by the employer after it has obtained a certificate from an IRMP. However, the employer must first obtain the Council’s approval to the employer’s choice of IRMP. That did not happen in this case.
- One of the specific obligations on decision-makers is to consider all relevant information available to them and ignore all irrelevant information.
- Mr M had argued that the employer did not properly consider Dr Suleman’s report. However, Dr Suleman’s report was not relevant to the decision which the employer needed to make because the University had not first obtained the Council’s approval to using Dr Suleman. The University could not have done so, because Mr M consulted Dr Suleman without the University’s prior knowledge.
- Under Regulation 36, a report from an approved IRMP was required. After the employer identified that Dr Suleman did not satisfy the criteria, it informed Mr M and arranged an appointment for him to be examined by Dr Hall-Smith, who did satisfy the University’s IRMP requirements. Mr M chose not to attend that appointment. That was his decision, but it meant that the process for awarding an IHERP was not completed in time.
- The employer must follow the proper procedure when making decisions about ill-health benefits. In this case, the proper procedure was to obtain the Council’s approval to the University’s choice of IRMP before arranging for the IRMP to examine the member. The employer followed the correct procedure because it

arranged for an examination by Dr Hall-Smith. Because Mr M did not attend the examination, it was not possible for Dr Hall-Smith to sign the ill health certificate for the University to consider.

- It was clear that Mr M's employment was terminated by the University on 15 November 2017, following the University's redundancy consultation process. The termination of employment was on grounds of redundancy. It was not on grounds of ill health. This means that with effect from 15 November 2017, Regulation 35(1) was not applicable to Mr M, as he had left service then due to redundancy, and therefore no IHERP was payable to him under that Regulation.
- Although the Adjudicator considered that Mr M's main complaint should not be upheld, he also considered whether the information that the University had given to Mr M amounted to maladministration.
- At the meeting on 23 August 2017, Mrs W had told Mr M that if he obtained his own IRMP report it would be acted upon. That information was inaccurate in several respects: Regulation 35(3) required the IRMP to have first been approved by the Council and registered by the relevant employer; under Regulation 35(1) the IHERP would be payable only if the employer made a decision that the member was entitled to the IHERP, and under Regulation 36(1) the IRMP's certificate had to be obtained by the employer, not the member. In later correspondence the University had admitted that it gave misleading information to Mr M. It was the Adjudicator's view that the misleading information amounted to maladministration.
- This information caused Mr M to waste time in consulting Dr Suleman. As the University had not previously registered Dr Suleman as an IRMP his report did not count. This meant that the process required under Regulations 35 and 36 was not completed. The University explained the issue to Mr M and arranged for Mr M to have an appointment with Dr Hall-Smith in November 2017, in order to complete the process before his redundancy, but Mr M chose not to attend. He had formed the view (incorrectly) that all the steps necessary for the University to pay him an IHERP had already been completed. However, that was not the case.
- Mr M had mentioned having severe financial problems because he had not worked since his role was made redundant in 2017. Although, for the reasons set out above, Mr M was not entitled to an IHERP under Regulation 35, he could as a deferred pensioner request the early payment of his deferred pension on ill health grounds under Regulation 38. Such a pension would not be as generous as an IHERP under Regulation 35, but it would be more generous than an "ordinary" (non ill health) early pension. It would be up to Mr M to decide whether he wished to pursue that option. It would also be for Mr M to decide whether he wished to seek any State benefits for his ongoing condition.

- Mr M had named the Council as a co-respondent to his complaint. The Council's role was to decide whether to approve the employer's choice of IRMP, and it was later the appointed decision maker for the purposes of stage 2 of the IDRP, but it was not otherwise involved in the process. The payment (or non-payment) of the IHERP was a matter for the University to decide, not the Council. The adjudicator was satisfied that the Council carried out its limited responsibilities correctly, so did not believe that there were grounds for the Pensions Ombudsman to uphold the complaint against the Council.

In conclusion, it was the adjudicator's opinion that this complaint should be partly upheld against the University: Mr M was not entitled to an IHERP under Regulation 35 because his employment was terminated due to redundancy, not ill health. However, the University should not have told Mr M that he should obtain his own medical report from an IRMP of his choice, and that its conclusions would be followed by the University. This misleading information caused Mr M an unnecessary waste of time. Having obtained Dr Suleman's report, Mr M assumed (incorrectly) that it would suffice. In the adjudicator's view the University's misinformation amounted to maladministration, and Mr M should be given an award of £1,000 by the University in recognition of the serious non-financial injustice it had caused him.

31. Mr M did not accept the Adjudicator's Opinion, and the complaint was passed to me to consider. Mr M, the University and the Council, provided their further comments, which do not change the outcome. I agree with the Adjudicator's Opinion and I will only respond to the main points made by Mr M for completeness.
32. In a verbal submission, which exceptionally we allowed because Mr M had had surgery on his writing hand, Mr M reiterated his complaint and stressed several points. He said that Dr Dann was biased in favour of the University; the findings of Dr Suleman's report should have been respected, but the University wanted to override his views because his findings did not suit the University, and the University had plenty of time to arrange for an assessment by an IRMP, but did not act with any sense of urgency until November 2017. Mr M thought it suspicious that the University had selected a doctor living in Devon rather than a local doctor. He also said that he had lost all trust and confidence in the University, but he would be willing to undergo another medical assessment if it would reconsider his case.

### **Ombudsman's decision**

33. Firstly, Mr M said that Dr Dann was biased in favour of the University. However, Dr Dann was entitled to come to a conclusion in her report that she could not recommend early retirement in July 2017 on ill health grounds. It was clear from the medical reports submitted that Mr M had refused surgical treatment options which would be expected to give him significant relief from his symptoms. Therefore, Mr M did not satisfy the "permanently incapable" requirement of regulation 35(3).



34. The University has explained to Mr M, on several occasions, why it could not accept the medical report of Dr Suleman: when he produced his report he was not an IRMP who was registered by the University, as required by Regulation 36(3).
35. The University arranged for an IRMP assessment to be made on 6 November 2017, before Mr M's expected date of redundancy, but he chose not to attend. That was not the fault of the University, as Mr M was already aware that Dr Suleman's report was not acceptable. The failure to complete the process before Mr M left service meant that an IHERP was not payable.
36. Mr M was suspicious that Dr Hall-Smith was not a local IRMP. In my view, the fact that Dr Hall-Smith was based in Devon (instead of West Yorkshire) is not a significant factor. Indeed, a Fund member might view an IRMP based a long way away as being more independent than a local doctor well known to the employer.
37. I note that Mr M would be willing to undergo another medical assessment by an IRMP. However, with the passage of time since Mr M's employment was terminated such a report would be for the purposes of Regulation 38 as Mr M is a deferred pensioner member. It is too late to make another application under Regulation 35 because Mr M's employment was terminated in November 2017, due to redundancy, not on ill health grounds.
38. Although I am unable to uphold Mr M's main complaint, I agree with the Adjudicator's Opinion that the information given to him by the University in the consultation meeting on 23 August 2017, was misleading. It ultimately led to him having false expectations about whether his application for an IHERP would be accepted. The misinformation amounts to maladministration, which has caused Mr M serious distress and inconvenience. The University shall compensate Mr M for this.
39. Therefore, I partly uphold Mr M's complaint against the University.
40. I do not uphold the complaint against the Council because, as set out in the Adjudicator's Opinion, it had a limited role to play in this matter: the decision whether or not to pay the IHERP was a matter for the University, not the Council.

## **Directions**

41. To put matters right, within 28 days of the date of this Determination, the University shall pay Mr M £1,000 for the serious distress and inconvenience which he has suffered.

**Anthony Arter**

Pensions Ombudsman  
17 March 2020

## **Appendix**

### The Local Government Pension Scheme Regulations 2013

#### Regulation 35: Early payment of retirement pension on ill-health grounds: active members

“(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.

...

(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.”

...

#### Regulation 36: Role of the IRMP

“(1) A decision as to whether a member is entitled under regulation 35 (early payment of retirement pension on ill-health grounds: active members)...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.

...

(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.”

#### Regulation 38: Early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members

“(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.”