

Ombudsman's Determination

Applicant	Mrs K
Scheme	Teachers' Pension Scheme
Respondent	Teachers' Pensions (TP)

Outcome

1. I do not uphold Mrs K's complaint and no further action is required by TP.

Complaint summary

2. Mrs K's complaint is that she has not been awarded enhanced ill health retirement benefits.

Background information, including submissions from the parties

3. Mrs K's pensionable employment ceased on 31 December 2015 following a period of long-term sickness absence.
4. In August 2018, Mrs K applied for ill health retirement (**IHR**).
5. The relevant regulations are The Teachers' Pensions Regulations 2010 (the **2010 Regulations**). Extracts from the 2010 Regulations are provided in the Appendix.
6. On appeal, the Medical Adviser (**MA**) for TP found that Mrs K was permanently incapable of teaching and her ability to carry out any work was permanently impaired by more than 90%.
7. TP awarded Mrs K ill health retirement with no enhancement. It informed Mrs K that as her application had been received more than two years after she had left pensionable employment it was designated as 'out of service'.
8. Mrs K appealed, invoking the Scheme's Internal Dispute Resolution Procedure (**IDRP**). Mrs K said while she understood that there was a two-year threshold, due to her mental health condition she had not had the capacity to consider, let alone apply, for ill health retirement prior to when she did. She requested that she be awarded enhanced IHR.
9. TP maintained its position and turned down Mrs K's appeal.

10. In her Stage Two IDRP appeal, Mrs K listed statements from “a variety of medical personnel”, which she said “would agree with this assessment of my inability” to apply for IHR within the two years window. Included was an open letter, dated 15 October 2018, from her GP in support of her application for IHR which said:-
- Mrs K had been suffering from debilitating anxiety dating back to 2013 and was undergoing regular counselling and consultant psychiatric care.
 - Mrs K had had some support from her union, but it did not appear that the possibility of IHR had been suggested to her.
 - It was doubtful that Mrs K would have been able to identify IHR as a possibility herself, nor would she have been able to proceed with the application.
11. A representative for the Department for Education (**DfE**) turned down Mrs K’s final appeal. He said:-
- IHR was an elective process and so it fell to the member to determine if and when to apply.
 - If a member was unable to personally make an application due to their health, it was open to the member to nominate a representative to make the application for them.
 - The Scheme allowed for an application to be made after the two years ‘in service’ period, up to the member’s normal pension age, albeit the award criteria differed, and benefits were not enhanced.
 - While it had discretion to extend the time within which any activity was required to take place under the regulations, the use of such discretion was exceptional and intended to correct a failing that would otherwise stop the relevant policy intention being applied.
 - For IHR, the policy intention was that the member decided if and when to apply for IHR, and if the member applied while still in service or within the period designated as ‘in service’ then the application was treated under the ‘in-service’ conditions.
 - Its process for deciding whether to allow an ‘out of service’ IHR application to be treated as ‘in service’ was to determine whether the member was prevented from making the application within the prescribed timeframe by something beyond their control.
 - Having reviewed the evidence submitted by Mrs K in support of her appeal it was clear that her health problems had been disabling and would have had an impact on her ability to organise and apply for IHR. Against this, the Scheme allowed two years to make an application after ceasing pensionable employment that would be considered on ‘in service’ conditions, and it was made clear in guidance that

applicants unable to make the application themselves could nominate a representative to take this forward for them.

- In Mrs K's case, while it would have been stressful for her to consider applying for IHR, he did not see that Mrs K was prevented from doing so, particularly with help and support. So, the exercise of discretion was not appropriate.

Mrs K's position

12. Mrs K says:

"Since starting the pensions application process we have known that the statutory requirements are such that the enhanced provision cannot be paid due to the time scale [sic]. However, as I was unable to comprehend or process any important information given to me, I feel that it is unfair that I have been penalised because of my condition which was brought on by the situation which lead to my early retirement."

TP' position

13. TP says:-

- It is unable to override the 2010 Regulations in this matter.
- The DfE concluded that enhanced benefits could not be paid as it (the DfE) did not have discretion over the provisions of the 2010 Regulations for Mrs K's application to be considered as an 'in service' application.
- Mrs K's employer should have provided her with Scheme information on her options on leaving pensionable employment.
- The notes accompanying the IHR application form explain that it is for the applicant to decide if and when to apply for IHR and it is the applicant's responsibility to obtain all the information necessary to confirm incapacity. Where the member is unable to make the application because of ill health, s/he may nominate a representative to apply for them. The notes and Teachers' Pensions website clearly explain the conditions for applying for both accrued and enhanced IHR benefits.
- As Mrs K applied for IHR more than two years after ceasing pensionable employment, the conditions of regulation 65 have not been met, so enhanced benefits cannot be paid.
- It has dealt with Mrs K's application in line with the 2010 Regulations.

Adjudicator's Opinion

14. Mrs K's complaint was considered by one of our Adjudicators who concluded that no further action was required by TP. The Adjudicator's findings are set out below:-

- The 2010 Regulations provide for a two-tier ill health pension based on the severity of a member's incapacity and whether the application is made 'in service' or 'out of service'.
- A member's IHR application is considered against the two-tier criteria if the application is made 'in service', that is within two years of a member ceasing pensionable employment. Tier 1 provides an ill health pension based on the member's accrued benefits if the member is assessed as permanently unable to teach because of their incapacity but is likely to be capable of other work prior to normal pension age. Tier 2 provides an enhancement, a 'Total incapacity benefit', if the member's ability to work is considered permanently impaired by more than 90%.
- A member's application is considered 'out of service' if:
 - it is submitted more than two years after the member left pensionable employment;
 - the member did not leave teaching on grounds of incapacity; or
 - their illness is not the same as or linked to the incapacity which caused them to leave teaching.
- As Mrs K's application was made more than two years after she left pensionable employment it was considered as 'out of service' and she was awarded IHR based on her accrued benefits; albeit she was assessed as permanently incapable of teaching and her ability to carry out any work was permanently impaired by more than 90%.
- TP said that the DfE concluded that enhanced benefits could not be paid to Mrs K as it (the DfE) did not have discretion over the provisions of the 2010 Regulations for Mrs K's application to be considered as an 'in service' application. That was incorrect.
- Under regulation 133 of the TPR 2010, the DfE, acting for the Secretary of State, "may in any particular case extend, or treat as extended, the time within which anything is required or authorised to be done under these Regulations."
- The fact that the DfE had discretion to allow an 'out of service' IHR application to be treated as 'in service' limited the extent to which I could interfere with the decision. If the DfE had followed certain well-established principles in reaching its

decision, neither the Courts nor I might interfere with the decision¹. Those principles were that the DfE must:-

- take all relevant matters into account and ignore any irrelevant matters;
- ask themselves the right questions;
- direct themselves correctly in law; in particular, they must interpret the Scheme rules correctly; and
- not come to a perverse decision.

In this context, 'perverse' meant a decision which no reasonable decision-maker could have come to, based on the facts of the case.

- The Adjudicator's view was that the DfE had properly exercised those principles.
- After considering the circumstances of Mrs K's case, including the medical evidence that Mrs K had submitted in support of her position, the DfE decided that her application should not be treated as 'in service'. The representative for the DfE recognised that it would have been stressful for Mrs K to consider applying for IHR but did not see that Mrs K was prevented from doing so, particularly with help and support. So, the exercise of discretion was not appropriate.
- While the DfE's decision might be considered harsh, it was within the range of decisions a decision-maker could reach in the circumstances. So, there were no grounds for me to refer the matter back to the DfE. In any case, as the discretion was for the DfE to exercise, Mrs K's complaint could not be upheld against TP.

15. Mrs K did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs K provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mrs K.

Ombudsman's decision

16. Mrs K says she does not believe that the DfE took all the relevant issues into consideration. She says she is suffering from a number of debilitating and diagnosed mental health issues and does not believe that the DfE appropriately considered this.
17. TP accepted the MA's opinion that Mrs K's health conditions meant that she was permanently incapable of teaching and her ability to carry out any work was permanently impaired by more than 90%. Nonetheless, the reason why TP awarded Mrs K accrued, rather than enhanced, benefits was because Mrs K's application for IHR was submitted more than two years after she had left pensionable employment. So, under the 2010 Regulations an enhanced award does not apply. TP has no discretion in this matter, only the DfE has, acting on behalf of the Secretary of State.

¹ *Edge v The Pensions Ombudsman* [1999] 4 All ER 546 and many other cases including *Sampson v Hodgson* [2009] 025 PBLR.

18. As the Adjudicator explained, the fact that the DfE has discretion to allow an 'out of service' IHR application to be treated as 'in service' limits the extent to which I can interfere with the decision.
19. Mrs K says her poor mental health and incapacitation stopped her from applying for IHR within two years of leaving teaching. Mrs K says she does not think the DfE understands or has given sufficient consideration to her level of incapacitation and refers to her GP's report of 15 October 2018. She says the DfE gave insufficient weight to this report and in fact ignored it. She says the DfE's decision is perverse.
20. There is a difference between ignoring evidence and considering evidence but giving it little or no weight. It is for the DfE to attach weight to the available evidence, including giving it no weight. I am satisfied that the DfE considered the relevant evidence.
21. The DfE recognised that Mrs E's health problems were disabling and would have had an impact on her ability to organise and apply for IHR. Against this, it noted that the 2010 Regulations allow two years for an application to be made to be considered 'in service' and that an application can be made by a nominated representative. On balance, the DfE decided that while it would have been stressful for Mrs K to apply, she could have done so, particularly with help and support.
22. DfE's decision is not perverse because it is within the range of decisions a decision-maker could reach in the circumstances. So, there are no grounds for me to remit the matter back to TP.
23. I do not uphold Mrs K's complaint against TP.

Anthony Arter

Pensions Ombudsman
23 November 2021

Appendix

Teachers' Pensions Regulations 2010

24. As relevant, paragraph 3, 'Ill-health retirement', of Schedule 7 provides:

"(1)...a person (P) falls within this paragraph if—

- (a) P was in pensionable employment at any time after 31st March 1972,
- (b) P ceases to be in pensionable employment,...
- (c) P satisfies either Conditions 1, 2 and 3 or Condition 4, and
- (d) P makes an application under regulation 107 for retirement benefits...

(2) Condition 1 is that P is incapacitated and is likely to be incapacitated permanently.

(3) Condition 2 is that immediately before satisfying Condition 1—

- (a) P was in pensionable employment,
- (b) or
- (c) P was, with the consent of P's employer, on non-pensionable sick leave, on non-pensionable family leave or on a career break which, in every case, followed on immediately after a period of pensionable employment.

(4) Condition 3 is that P's application under regulation 107—

- (a) is made within two years after the end of pensionable employment, and
- (b) is signed by P's employer.

(5) Condition 4 is that P's ability to carry out any work is impaired by more than 90% and is likely to be impaired by more than 90% permanently."

25. Schedule 2, 'Glossary of Expressions', defines:

'incapacitated' as:

"unfit by reason of illness or injury and despite appropriate medical treatment to serve as a teacher, organiser or supervisor."

26. Regulation 65, 'Total incapacity benefits' provides:

"(1) This regulation applies where—

- (a) an ill-health pension becomes payable to a person (P) because P satisfies Conditions 1, 2 and 3 set out in paragraph 3 of Schedule 7 (Case C: ill-health retirement), and

(b) P satisfies Conditions A and B.

(2) P satisfies Condition A if P's ability to carry out any work is impaired by more than 90% and is likely to be impaired by more than 90% permanently.

(3) P satisfies Condition B if immediately before satisfying Condition A—

(a) P was in pensionable employment,

(b) P was paying contributions under regulation C9 of TPR 1997 or regulation 19 (election to pay contributions by a person serving in a reserve force), or

(c) P was taking a period of non-pensionable sick leave, a period of non-pensionable family leave or a career break which, in every case, followed on immediately after a period of pensionable employment.

(4) A total incapacity pension is payable to P from the entitlement day.

(5) Except as otherwise provided in these Regulations, the total incapacity pension is payable for life.

(6) Where P is a pre-2007 entrant, a total incapacity lump sum is payable to P on the entitlement day.

(7) The annual rate of the pension and the amount of the lump sum are to be calculated in accordance with regulation 66 (annual rate of total incapacity pension and amount of total incapacity lump sum).

(8) The entitlement day is the date on which the ill-health pension mentioned in paragraph (1) becomes payable to P.”

27. As relevant, regulation 107, ‘Payment of benefits on application to Secretary of State’, provides:

“(1) Benefits under these Regulations are payable by the Secretary of State.

(2) Despite any provision of these Regulations according to which a benefit becomes payable at a certain time, no benefit is to be paid unless paragraphs (3) to (5) have been complied with.

(3) A written application for payment must be made to the Secretary of State.

(4) The applicant must provide the Secretary of State with such relevant information in the applicant's possession or which the applicant can reasonably be expected to obtain as the Secretary of State may specify in writing.

(5) An application for ill-health retirement benefits...must be accompanied by all the medical evidence necessary for the Secretary of State to determine that the applicant

is entitled to the benefit or benefits including, where applicable, evidence that the person's ability to carry out work is impaired by more than 90% and is likely permanently to be so.

...

28. Regulation 133, 'Extension of time', provides:

"The Secretary of State may in any particular case extend, or treat as extended, the time within which anything is required or authorised to be done under these Regulations."