

Ombudsman's Determination

Applicant	Mr L
Scheme	Local Government Pension Scheme (LGPS)
Respondent	Hampshire County Council (Hampshire)

Outcome

1. I do not uphold Mr L's complaint and no further action is required by Hampshire.

Complaint summary

2. Mr L has complained that Hampshire has declined to backdate the payment of his deferred benefits to August 2010.

Background information, including submissions from the parties

Background

3. Mr L was made redundant in August 2010. In October 2015, he applied for the early payment of his deferred benefits on the grounds of ill health.
4. The relevant regulations are The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended) (the **Benefits Regulations**) and The Local Government Pension Scheme (Administration) Regulations 2008 (SI2008/239) (as amended) (the **Administration Regulations**). Both the Benefits Regulations and the Administration Regulations were revoked by The Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014 (SI2014/525) (the **Transitional Regulations**). They continue to have effect so far as is necessary to preserve pension rights accrued prior to 1 April 2014.
5. As at the date Mr L's employment ceased, Regulation 31 of the Benefits Regulations provided:
 - "(1) Subject to paragraph (2), if a member who has left his employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-

health or infirmity of mind or body he may ask to receive payment of his retirement benefits immediately, whatever his age.

- (2) Before determining whether to agree to a request under paragraph (1), an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine as to whether in his opinion the member is permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether that condition is likely to prevent the member from obtaining gainful employment (whether in local government or otherwise) before reaching his normal retirement age, or for at least three years, whichever is the sooner.
- (3) In this regulation, “gainful employment”, “permanently incapable” and “qualified in occupational health medicine” have the same meaning as in regulation 20.”

6. “Gainful employment” is defined as paid employment for not less than 30 hours in each week for a period of not less than 12 months. “Permanently incapable” is defined as, more likely than not, incapable until, at the earliest, the member’s 65th birthday.

7. Regulation 50(4) of the Administration Regulations provided:

“The first period for which any retirement pension under regulation 31 (early payment of pension: ill-health) of the Benefits Regulations is payable begins on the date when the member became permanently incapable as determined under regulation 31 of those Regulations.”

8. Hampshire referred Mr L’s case to an independent registered medical practitioner (IRMP), Dr Thornton. He completed a certificate, on 1 October 2015, indicating that, in his opinion, Mr L was [sic] permanently incapable of discharging efficiently the duties of his former employment. He did not provide a date on which Mr L first became permanently incapable of discharging efficiently the duties of his former employment. In his covering report, however, Dr Thornton said none of the evidence he had been provided with led him to conclude that Mr L was currently unfit for his former employment. A summary of Dr Thornton’s covering report is provided in Appendix 1, together with summaries of and extracts from the other medical evidence relating to Mr L’s case.

9. On 2 November 2015, Hampshire wrote to Mr L apologising for having led him to believe he would be seen by the IRMP. It said that, under the LGPS Regulations, a member under the age of 55 could only access her/his benefits early if the Scheme employer received a certificate from an IRMP indicating that s/he met the eligibility criteria. It said that, on receipt of such a certificate, it would determine whether to exercise its discretion to allow access to the pension. Hampshire said, that since it had been decided that he was ineligible for ill health retirement, Mr L had two options: to appeal; or to ask for his application to be reassessed by an IRMP.

10. Mr L's case was subsequently referred to another IRMP. On 28 January 2016, Dr Ezan completed a certificate indicating that, in his opinion, Mr L was not permanently incapable of discharging efficiently the duties of his former employment.
11. On 26 February 2016, Hampshire wrote to Mr L reiterating that a member under the age of 55 could only access her/his benefits early if the Scheme employer received a certificate from an IRMP indicating that s/he met the eligibility criteria. Hampshire said, based on Dr Ezan's certificate, Mr L was not eligible for ill health retirement. It noted a letter from Mr L, dated 23 February 2016, and asked him to confirm that he wished to appeal.
12. In April 2017, Mr L asked to be re-assessed for the early payment of his deferred benefits on the grounds that his health had deteriorated.
13. On 30 June 2017, Dr Vivian completed a certificate indicating that, in his opinion, Mr L was not permanently incapable of discharging efficiently the duties of his former employment.
14. Mr L submitted an appeal under the Scheme's two-stage internal dispute resolution (IDR) procedure. Dr Vivian was asked for further comment. He responded on 2 October 2017.
15. Hampshire issued a stage one decision declining Mr L's appeal on 8 November 2017. It subsequently referred Mr L's case to another IRMP, Dr Shand.
16. On 28 November 2017, Dr Shand completed a certificate indicating that, in his opinion, Mr L was permanently incapable of discharging efficiently the duties of his former employment. He certified that the date on which Mr L first became permanently incapable of discharging efficiently the duties of his former employment was 28 April 2017. A note to the certificate stated that this date could be earlier than the date of the person's application for early payment of their benefits and would be used as the date from which the benefits would be brought into payment.
17. Mr L submitted a stage two appeal on 2 May 2018.
18. Hampshire acknowledged Mr L's stage two appeal on 14 June 2018. It said Mr L's letter related to the decision given in its letter of 8 November 2017; that is, the decision to decline his application for early payment of his benefits. Hampshire said Mr L was seeking to challenge Dr Shand's certificate and the extent to which his benefits had been backdated. It said his letter could not be treated as a stage two appeal against the earlier stage one decision because that decision had been overturned. Hampshire said Mr L's letter would be treated as a stage one appeal relating to the backdating of his benefits. It also said that it did not consider the IDR procedure the appropriate forum for Mr L's allegations of disability discrimination.
19. Hampshire issued a further stage one IDR decision on 19 July 2018. The IDR adjudicator's conclusions are summarised below:-

- Following the termination of his employment, Mr L had requested additional compensation and to apply his redundancy payment to enhancing his pension account. This request had been declined. He had been informed that it was not possible to apply his redundancy payment to enhance his pension account because he had already left. An appeal was now out of time.
 - Mr L had suggested that Hampshire's HR department had referred to the wrong set of regulations because he had been told an applicant under the age of 55 could only access their pension on the grounds of ill health. In broad terms, the position was that a member under the age of 55 could only access their pension on the grounds of ill health. This was true under both the pre and post 1 April 2014 regulations.
 - Each of the IRMP's certificates prior to Dr Shand's had concluded that Mr L did not meet the eligibility criteria for early payment of his benefits on the grounds of ill health.
 - Hampshire's position was that the IDR procedure was not the correct forum for Mr L's claim of disability discrimination. That being said, its view was that the claim lacked merit. Failure to be afforded early access to his benefits was unfavourable treatment but there was a lack of a causal connection between the treatment and Mr L's disability. The refusal to allow early access to Mr L's benefits was based on the fact that he did not meet the eligibility criteria in the LGPS Regulations.
 - Access to Mr L's benefits was at Hampshire's discretion. There was no lawful basis either enabling or compelling it to backdate access further. It was not compelled to backdate early access at all.
20. Mr L contacted Dr Shand and asked that he amend the date on his certificate. Dr Shand responded by saying he would be happy to revisit Mr L's case but would need to be instructed to do so by Hampshire.
21. Mr L submitted a further stage two appeal on 6 August 2018. He said Dr Shand had confirmed that his Autistic Spectrum Disorder (**ASD**) had been with him for the whole of his life. Mr L referred to Dr Shand's comment:
- "Although he has clearly performed the role in the past, despite his Autistic Spectrum Disorder, he appears to have struggled in this role and taking into account compounding factors including depressive disorder, I do not envisage his being [in] a position to return to this role."
22. Mr L also referred to a previous determination relating to the exercise of an employer's discretion under the LGPS Regulations (PO-9309, June 2016). In particular, he referred to the finding that, whilst the employer was entitled to take its own interests into account, it was not entitled to make a perverse decision. The determination had said this might be the case if the employer overrode a member's

legitimate expectations. It had said an employer may not exercise its powers so as to seriously damage the relationship of confidence between employer and employee.

23. Hampshire issued a stage two IDR decision on 18 October 2018. The decision maker's conclusions are summarised below:-

- The decision to treat Mr L's letter of 2 May 2018 as a stage one appeal in relation to the backdating of his benefits was correct. This was a distinct and separate complaint to his appeal against the decision not to allow him early access to his pension on the grounds of ill health. It was not a deliberate delaying tactic.
- Dr Shand's findings did not make the views of the other IRMPs largely insignificant. It was accepted that these IRMPs did not address Mr L's ASD but they had had access to his medical history and were able to comment on his eligibility under the LGPS Regulations.
- Dr Shand's conclusions were not inconsistent with the previous opinions. He had concluded that Mr L met the eligibility criteria not earlier than 28 April 2017. This conclusion benefitted from the passage of time. Dr Ezan's and Dr Vivian's reports were not obviously incorrect and there was no reason to find that decisions based on those reports were wrong.
- Early access to Mr L's benefits was entirely a matter for Hampshire. It was not bound to follow Dr Shand's recommendation. It would have been within its rights not to grant early access based on the earlier IRMP's views.
- The IDR procedure was not the appropriate arena for Mr L's complaint of indirect disability discrimination.
- The refusal to grant early access or to allow greater access was a matter of eligibility within the regulations. Early access on the grounds of ill health could only apply to members who met the eligibility criteria. The eligibility criteria meant that all those who were eligible would meet the definition of disability under the Equality Act 2010. However, not all disabled people would meet the eligibility criteria. The decision as to whether to allow early access or greater access was about eligibility and Hampshire's lawful exercise of its discretion. It was not treatment which had a disproportionately unfavourable impact on disabled people.

24. On 3 January 2019, Mr L wrote to Dr Shand asking him to complete another certificate indicating the date on which he became permanently incapable of discharging the duties of his former role was 23 August 2010. In response, Dr Shand said his involvement in Mr L's case had been as an IRMP and it had concluded with his submission of a report. He said he had not been advised of any errors or omissions in his report but he had reviewed it to satisfy himself that there had been no error. Dr Shand said he was satisfied that the date he had inserted on the certificate reflected his opinion. He said he did not agree that the medical evidence

available to him at the time of his assessment indicated that Mr L was permanently incapacitated at the time his employment ceased.

Mr L's position

25. Mr L has made comprehensive submissions in support of his case. It would not be practical to reproduce these in full, but the main points are summarised below:-

- Hampshire has failed to backdate his benefits to August 2010, despite having discretion to do so.
- Hampshire has relied on certificates provided by Drs Thornton, Ezan and Vivian. These need to be read with the reports provided by the IRMPs. The IRMPs would have been unaware of his diagnosis of ASD.
- He did not have the opportunity to meet Dr Thornton and Dr Vivian. They based their reports on a paper analysis of his medical records and occupational health file.
- Hampshire deliberately caused delay in 2018 by referring his stage two appeal back to stage one.
- Hampshire has relied on Regulations 35 to 39 of The Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended). He falls outside these provisions because he was made redundant in August 2010.
- His health difficulties started in 2008 when he was diagnosed with liver abnormality and glucose intolerance. Following his redundancy, his health deteriorated and he suffered from depression.
- It was his expectation, having contributed to the LGPS since 1990, that his membership would be increased on retirement on the grounds of ill health. He refers to an employee's guide published by Hampshire in 2007. This states that, if actual total membership is between 13½ and 33½ years, his total membership can be increased by 6½.
- Dr Shand informed him that he was required to make an assessment on the basis that he would be unable to perform his normal occupation for a period of 27 years. His normal retirement age is 65. At the time of his consultation with Dr Shand, he was aged 45. Therefore, he considers Dr Shand had been required to make an assessment over the period from 2010.
- Hampshire has tried to impose a certain amount of control over Dr Shand's findings. He refers to Dr Shand's comment that he was not in a position to review his case unless formally instructed to do so. Dr Shand was not given free rein to make findings with regard to the period from August 2010 to April 2017.

- Because Hampshire has failed to backdate his pension to 2010, it has failed to adhere to its Autism Strategy for Adults and the Autism Act 2009.
- He referred Hampshire to a previous determination which concerned the exercise of an employer's discretion under the LGPS Regulations (PO-9309).
- He referred Hampshire to LGPS guidance published in 2014, which stated that employers would still have to publish a policy in respect of discretions relating to post-March 2008/pre-April 2014 leavers. He contends that Hampshire does have discretion to backdate his benefits to 2010 because it has already applied its discretion in backdating the benefits to April 2017.
- He contends that Hampshire is in breach of the Equality Act 2010. Section 15 of the Equality Act 2010 states it is unlawful for Hampshire to discriminate against him as a vulnerable disabled person. It has failed to recognise him as a disabled person who is no longer able to work. It has actively denied him his LGPS benefits between August 2010 and April 2017.

Hampshire's position

26. Hampshire submits:-

- The decision to grant Mr L any access to his pension at all is an exercise of its discretion in a way which is favourable to him.
- Dr Shand's certificate does not, of itself, support early access. He certified that Mr L was permanently incapable of undertaking the duties of his former role and stated that this was the position as at April 2017. He also certified that Mr L has a reduced likelihood of gaining employment within three years of that date. However, Dr Shand certified that Mr L was not permanently incapable of undertaking any gainful employment.
- The certification entitled it to allow early access under Regulation 38(1) to (3)¹ but it was not bound to grant early access at all.
- It could have exercised its discretion in a way which was unfavourable to the deferred member without being at fault. It follows that, in exercising the discretion favourably, it is not at fault in any way.
- There was no reason for it to derogate from the certification, which bears up to scrutiny and is broadly consistent with the views of three other medical professionals.
- The process followed was in line with its published procedure and in accordance with the Regulations.

¹ The Local Government Pension Scheme Regulations 2013 (SI2013/2356)

- The allegation of deliberate delay is rejected. By the time Mr L's second stage appeal against the decision not to grant access to his pension was received, the pension had been put into payment as a result of the exercise of its discretion. There could be no appeal against granting access. It, therefore, treated Mr L's letter as a stage one appeal against the refusal to backdate payment any further than had been agreed.
- The stage one and two decisions are entirely justified on the facts. They followed an appropriate process and are in line with the lawful exercise of its prerogative.
- Mr L did seek to have Dr Shand change his certificate. Dr Shand declined to do so.
- It is perfectly acceptable for reports to be completed from the medical records. A face to face meeting with the IRMP is not a prerequisite.

Adjudicator's Opinion

27. Mr L's complaint was considered by one of our Adjudicators who concluded that the complaint should not be upheld. The Adjudicator's findings are summarised below:-

- The primary element of Mr L's complaint was the date from which his deferred benefits had been put into payment. He had argued that the pension should have been backdated to August 2010; essentially, on the basis that his ASD would have been present at that time because it was a life-long condition.
- Members' entitlements to benefits when taking early retirement due to ill health were determined by the relevant scheme rules or regulations. The scheme rules or regulations determined the circumstances in which members were eligible for ill health benefits, the conditions which they must satisfy, and the way in which decisions about ill health benefits must be taken.
- In Mr L's case, the relevant regulations were the Benefits Regulations and the Administration Regulations (see paragraphs 4 to 7 above). The Adjudicator noted that there had been references to the Local Government Pension Scheme Regulations 2013. In her view, this had not had any impact on the outcome of Mr L's case because the eligibility criteria were the same across the regulations.
- Under Regulation 31 of the Benefit Regulations, Hampshire had a discretionary power to agree to the early payment of Mr L's deferred benefits on the grounds of ill health. It had exercised its discretion in his favour. Once Hampshire had exercised its discretion to agree to the early payment of Mr L's benefits, it became necessary to determine the commencement date for the pension.

- Regulation 50(4) of the Administration Regulations provided that the pension was payable from “the date when the member became permanently incapable as determined under regulation 31 of those Regulations”. As the note to the IRMP’s certificate had said, this could be earlier than the date of the person’s application for early payment of their benefits. The certificate asked the IRMP to assess when the member became permanently incapable. Dr Shand had indicated that, in his opinion, Mr L became permanently incapable with effect from 28 April 2017.
- Determining when the member became permanently incapable, as determined under Regulation 31, was a finding of fact; albeit one which required an exercise of judgment. Hampshire did not have a discretion as to the date of payment of Mr L’s pension under Regulation 50(4). It had to pay the pension from the date on which he became permanently incapable as defined in Regulation 31.
- In view of the nature of the decision concerning the date of payment, it was appropriate for Hampshire to seek the advice of the IRMP. As far as their medical opinions were concerned, the IRMPs were not within the Ombudsman’s jurisdiction. They were answerable to their own professional bodies and the General Medical Council (**GMC**). The question for the Ombudsman was whether it was appropriate for Hampshire to accept the advice it received from Dr Shand as to the date from which Mr L’s pension should be paid.
- First instance decisions as to Mr L’s rights under the LGPS Regulations, fell to Hampshire, as the relevant Scheme employer, to make. It should not, therefore, blindly accept the advice it received from an IRMP. That being said, Hampshire could only be expected to review any medical advice it received from a lay perspective; it would not be expected to challenge a medical opinion. It would be expected to review the advice for any errors or omissions of fact or any misunderstanding of the relevant regulations on the part of the IRMP. If there was an obvious disagreement between medical advisers, Hampshire could be expected to seek clarification if this had not been explained by the IRMP.
- In the Adjudicator’s view, Hampshire had not simply accepted Dr Shand’s opinion as to the appropriate date of payment for Mr L’s pension. It had referred to the advice it had received from the previous IRMPs and concluded that Dr Shand’s advice was not inconsistent with these opinions. This indicated an active approach to its decision making.
- Dr Shand had expressed the view that Mr L became permanently incapable for the purposes of Regulation 31 on 28 April 2017. Mr L sought to argue that his permanent incapacity dated back to August 2010 on the basis that his ASD was a life-long condition. However, the question was not one of the commencement of this condition but when, as a result of this condition and

others, Mr L became permanently incapable of discharging his former duties. It was possible that a member might be suffering from a life-long condition but did not become permanently incapacitated by that condition until later or in combination with other conditions.

- Dr Shand had given the following reasons as to why he considered Mr L permanently incapable of discharging his former duties: the requirement for significant independent travel and the level of communication and interaction inherent in the role. He had noted that Mr L had performed the role in the past but had struggled. Dr Shand had said, "taking into account compounding factors including depressive disorder", he did not envisage Mr L being in a position to return to the role. It was clear from this that Mr L's ASD was not the only factor which had led Dr Shand to conclude that he was permanently incapable of discharging his former duties. In particular, Dr Shand had noted that Mr L had stopped driving because of reduced sensation in his feet.
- Having read Dr Shand's report, the Adjudicator's view was that his advice as to the date of permanent incapacity was not inconsistent with his findings. She said she had not identified any errors or omissions of fact by Dr Shand and he appeared to have had a clear understanding of what was required by the relevant regulations. The Adjudicator noted that Mr L had asked Dr Shand to review the date of permanent incapacity and Dr Shand had confirmed that he was satisfied with the date he had given. There was no evidence that Hampshire had interfered in any way with Dr Shand's review.
- It was the Adjudicator's opinion that there was no reason why Hampshire should not have accepted the advice it had received from Dr Shand as to the date at which Mr L became permanently incapable for the purposes of Regulation 31. There were no grounds on which Hampshire would be required to re-visit its decision to pay Mr L's pension with effect from 28 April 2017.
- Mr L had referred to the increase of membership on retirement on the grounds of ill health. However, this applied to members retiring from active service; not to the early payment of deferred benefits.
- Mr L had also complained that his case had been referred back to stage one of the IDR procedure in June 2018, instead of being progressed to stage two. He asserted that this had been a deliberate delay on Hampshire's part. Hampshire had explained that it had referred Mr L's case back to stage one because his appeal raised issues which had not been dealt with in the previous stage one decision. It had also pointed out that the stage one decision had been overturned by the decision to pay Mr L's deferred benefits early.
- By June 2018, the main thrust of Mr L's appeal was that he disagreed with the date chosen for payment of his pension. This was not a matter which had been addressed by the earlier stage one decision; not least because Dr Shand had not provided his certified opinion at that point. In the Adjudicator's view, it had

been appropriate for Hampshire to treat Mr L's May 2018 appeal as a fresh appeal against a different decision. It did not amount to a deliberate attempt to delay matters.

28. Mr L did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr L provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the main points made by Mr L for completeness.

Mr L's further comments

29. Mr L submits:-

- He is a protected pensioner, having contributed to the LGPS up to 23 August 2010.
- Regulation 3 of the Transitional Regulations concerns membership prior to 1 April 2014. Regulation 3(1)(a) clearly says that he is protected. It states:
“... so that membership accrued in the Earlier Schemes in respect of service before 1st April 2014, the pension rights accrued at that date, and any rights and obligations imposed on any person under those Schemes in relation to service before 1st April 2014, are preserved ...”
- Regulation 3(1)(b) states:
“so that benefits are payable in accordance with these Regulations.”
- Regulation 3(8) states:
“Where a person has not been an active member of the 2014 Scheme and has benefits under the Earlier Schemes, or has been an active member of the 2014 Scheme and has benefits under the Earlier Schemes which have not been aggregated with the benefits in the 2014 Scheme, the benefits payable as a consequence of paragraph (1) are payable in accordance with the Earlier Schemes as applied by this regulation.”
- The Earlier Scheme regulations which apply in his case are the Benefits Regulations; in particular, Regulations 20 and 7. These set out how his pension should have been calculated.
- Page 18 of Hampshire's 2007 Pensions Guide for Employees shows the length of service which should have been added to his LGPS benefits automatically.
- He has asked Dr Thornton, in his capacity as a previous IRMP, to review further medical evidence, which he provided in February 2020.
- He has concerns about the independence of the IRMPs. Dr Thornton appears to have written his report in a private capacity whilst holding a position with

Hampshire Constabulary. He contacted Dr Ezan who told him that he no longer works for Hampshire.

- He was informed that it was not usual for Hampshire to rely on reports from previous IRMPs.
- He suffered a number of stressful events between 2009 and April 2017. These events had a considerable negative effect on his mental health. He contends that Hampshire should appoint another IRMP to review the medical evidence he has submitted.

30. Mr L has also provided copies of correspondence he has had with Hampshire concerning additional pensionable service he contends should have been awarded when he was made redundant in 2010.

Ombudsman's decision

31. It may help if I begin by explaining the scope of my investigation and determination of Mr L's complaint.
32. In the course of his correspondence with The Pensions Ombudsman, Mr L has raised concerns relating to disability discrimination and Hampshire's public sector equality duty under the Equality Act 2010. My role is essentially to determine whether Mr L has sustained injustice as a consequence of any maladministration in connection with his pension rights². I do not have a more general remit to consider whether Hampshire is in breach of any of its non-pension related responsibilities under the Equality Act. This determination is, therefore, confined to Hampshire's handling of Mr L's case in its role as a Scheme Employer under the LGPS.
33. The complaint of maladministration brought to me concerns the date from which Mr L's deferred pension has been put into payment. Hampshire has exercised discretion to agree to the early payment of Mr L's deferred pension on the grounds of ill health. Mr L disagrees with the date of commencement of his pension payments.
34. It is important to be clear that Hampshire has agreed to the early payment of Mr L's deferred pension under Regulation 31 of the Benefits Regulations (see paragraph 5 above). Mr L has referred me to Regulation 20 of the Benefits Regulations (see Appendix 2), but this would only have applied if his employment had been terminated on the grounds of permanent ill health in 2010. Mr L's employment was terminated on the grounds of redundancy.
35. Mr L has explained that his redundancy coincided with a difficult period in his life and I can see that events in his personal life will have caused him considerable stress at this time and subsequently. However, the fact remains that Mr L's employment was not terminated on the grounds of permanent ill health in 2010. The decision to terminate a contract of employment is, in general, an employment matter and falls

² Section 146, Pension Schemes Act 1993

outside my jurisdiction. I rarely find grounds to go behind the decision, even when the decision results in a potential entitlement to pension benefits. I do not find that there are grounds for me to look behind the reason given for the termination of employment in Mr L's case. His employment was terminated on the grounds of redundancy and Regulation 20 does not apply in his case.

36. I note Mr L's reference to his being a protected pensioner because he contributed to the LGPS prior to August 2010. I take this to be a reference to a protected minimum pension age of 50. In 2006, the normal minimum pension age at which a member of a registered occupational pension scheme could take his/her benefits changed to 55. However, there is some protection available for individuals who were members of a registered occupational pension scheme prior to April 2006. Since the age restrictions do not apply when a pension is paid early on the grounds of ill health, the protection is not relevant in Mr L's case.
37. I will now consider the date from which Mr L's deferred pension should be paid.
38. Regulation 50(4) of the Administration Regulations is quite clear. It states:

"The first period for which any retirement pension under regulation 31 (early payment of pension: ill-health) of the Benefits Regulations is payable begins on the date when the member became permanently incapable as determined under regulation 31 of those Regulations."
39. The question is, therefore, on which date did Mr L become permanently incapable for the purposes of Regulation 31? Hampshire sought advice from an IRMP; Dr Shand. He expressed the view that Mr L first became permanently incapable of discharging efficiently the duties of his former employment with effect from 28 April 2017. Dr Shand confirmed this date when Mr L queried it with him.
40. Mr L is of the view that his pension should be payable with effect from August 2010; that is, it should be payable with effect from the termination of his employment. He has argued that Dr Shand concluded he was permanently incapable of discharging his former duties because he had been diagnosed with ASD. Mr L points out that this is a life-long condition and would have been present in 2010. I acknowledge that this would be the case. However, Mr L's ASD was not the only reason Dr Shand gave for concluding that he was permanently incapable of discharging his former duties. For example, Dr Shand mentioned Mr L's diabetic neuropathy and depressive disorder.
41. The question is not whether Mr L has a life-long condition, rather it is whether he is incapacitated by that condition; either on its own or in combination with other conditions. Dr Shand's view was that Mr L's incapacity was derived from a combination of conditions and that it became permanent with effect from April 2017.
42. In his role as IRMP, Dr Shand does not come under my jurisdiction. He is answerable to his own professional body and the GMC. My concern is whether there was any reason why Hampshire should not have relied on his advice when it put Mr L's pension into payment. My Adjudicator indicated the kind of reasons which I would

consider; namely, errors or omissions of fact or a misunderstanding of the LGPS Regulations. The reason would have to be obvious to a lay person. Hampshire would not be expected to challenge a medical opinion.

43. I find that there was no reason why Hampshire should not have accepted Dr Shand's advice as to when Mr L became permanently incapacitated for the purposes of Regulations 31 and 50(4). On the basis of that advice, Mr L's deferred pension is payable from April 2017.
44. Therefore, there has been no maladministration on Hampshire's part in paying Mr L's pension with effect from April 2017 and I do not uphold his complaint.
45. Mr L has provided me with copies of recent correspondence he has had with Hampshire concerning an award of additional pensionable service. This did not form part of Mr L's original complaint to me and I will not comment on it further; other than to confirm that the payment of his pension early under Regulation 31 does not qualify Mr L for any additional pensionable service.

Anthony Arter

Pensions Ombudsman
20 March 2020

Appendix 1

Medical evidence

Dr Tan, GP, 3 September 2015

46. In response to a request for information from Hampshire's occupational health adviser, Dr Tan said Mr L suffered from the following medical problems:-

- Depression

Dr Tan said Mr L had been depressed for several years and this had been aggravated by events in his personal life. He said Mr L had been started on medication in August 2013. Dr Tan mentioned an overdose in May 2015, which was thought to have been accidental.

- Type II Diabetes

Dr Tan said Mr L had a recent diagnosis of type II diabetes.

- Barratt's oesophagus

Dr Tan said Mr L had been diagnosed in March 2015 and continued to have follow-up gastroscopies.

- Non-alcoholic steatohepatitis

Dr Tan said Mr L had been diagnosed in 2010 but his recent liver function tests had been normal and no further treatment was required.

Dr Thornton, 1 October 2015

47. Dr Thornton said he was required to determine whether Mr L was permanently incapable of discharging efficiently his former job due to ill health. He referred to The Local Government Pension Scheme Regulations 2013 and said these defined permanently incapable as lasting until the member's 65th birthday. Dr Thornton also noted that he had to take account of guidance issued by the Department for Communities and Local Government (**DCLG**). He noted Mr L's conditions as: depression, type II diabetes and Barratt's oesophagus. Dr Thornton said:

"[Mr L] has suffered depression for several years. More recently it has been aggravated due to events in his personal life. He has been treated appropriately by his GP with an antidepressant. He has also been referred for counselling but has declined the option. He has not required specialist care.

I have no evidence that his diabetes affects his fitness for work.

He was diagnosed with Barratt's oesophagus in 2015. It has been confirmed by gastroscopy and treated conservatively with medication. He has been discharged from specialist care ...

The Local Government Pension Scheme defines two conditions for the early award of pensions on medical grounds ...

In order to satisfy the first condition, all appropriate treatment for the illness which could, on the balance of probabilities, be expected to improve the condition such that a return to work would be reasonable, must have been completed. None of the evidence I have been provided with leads me to conclude that he is currently unfit for his former employment. If his depression is severe enough to prevent him from working at present, then I would expect him to be moved onto the next level of treatment, for example changing to an alternative antidepressant, counselling or specialist referral. On balance of probability, this more intense treatment of his symptoms would result in sufficient recovery to return to his former employment. The first condition for ill health retirement is therefore not satisfied."

Dr Ezan, 28 January 2016

48. Dr Ezan's report followed much the same structure as Dr Thornton's. In his report, Dr Ezan referred to Dr Tan's report and listed Mr L's medical conditions as: depression, drug overdose, type 2 diabetes and non-alcoholic steatohepatitis. He noted that a diagnosis of personality disorder had been made and a recent diagnosis of Barret's oesophagus/Dysplasia.
49. Dr Ezan noted that Mr L was on medication for his depression and commented that this was less than the maximum dose. He noted that Mr L was not on any other NICE recognised treatment for his depression. Dr Ezan said Mr L controlled his diabetes by diet and there was no evidence of any end organ damage. He noted that Mr L was due to see his GP for re-assessment. Dr Ezan noted Mr L's liver function tests had normalised for his non-alcoholic steatohepatitis and that he was under specialist management for his Barret's oesophagus. He said Mr L had reported difficulties with incontinence but that the reason for this was unclear. Dr Ezan noted that Mr L was under investigation for some neurological conditions. He said no established conditions had been confirmed and that it would be premature to consider any current disability as permanent.
50. Dr Ezan concluded that, on the basis of the medical evidence at the time of his assessment, Mr L would not be deemed permanently unfit for his previous post.

Dr Vivian, 30 June 2017

51. Dr Vivian said Mr L had a number of medical conditions, but depression seemed to be the most disabling. He noted that Mr L was on medication but appeared to have only tried one antidepressant. He said Mr L had not undergone any talking therapy, which he viewed as critical if his depression was reactive to difficult life events. Dr Vivian said: "Perhaps more importantly, [Mr L] may not have worked since 2010, but he still has 20 years until his normal retirement age". He explained that, if he were to support permanence for someone such a long way off normal retirement, he would

expect to see very high levels of disability, including heavy involvement from a mental health team. Dr Vivian noted that this had not been required in Mr L's case.

52. Dr Vivian said:

"This isn't straightforward, as once an individual has been off sick for more than one year, the average duration of sickness is 9 years. An individual is more likely to retire than return to work. Thus, an argument can be built that he is permanently disabled. But my view is that active management of his depression is required, and that an average duration of 9 years would still allow him to return to work for over 10 years before his retirement.

I do not view his diabetes, Barratt's oesophagus or steatohepatitis as disabling him from his normal work. The easiest way to understand this is to reverse the question and ask whether any of these diagnoses would inevitably lead to him being viewed as permanently disabled, if he was desperate to return to work? My view is that I would be happy to support him working despite him having these conditions ...

There is some evidence of ongoing disability, but the evidence is very limited, and the most recent GP report confirms that his conditions are stable. In my opinion, there continues to be insufficient evidence to state that any of his conditions are permanently disabling ..."

Dr Vivian, 2 October 2017

53. In response to a request for further comment, Dr Vivian said he did not have access to the medical records he had reviewed in connection with Mr L's case. He noted that he appeared to have misquoted a date for one letter he had referred to and apologised for this. Dr Vivian noted that Mr L was of the view that he had not taken his various physical health complaints into account. He said he disagreed. He said he had considered them but deemed them not to be permanently disabling. Dr Vivian referred to Mr L's diagnosis of histrionic personality disorder and said this was likely to be long-term. He said Mr L had previously been able to work despite this condition and he would not deem it to be permanently disabling. Dr Vivian said he was not able to change his opinion but Mr L was entitled to appeal.

Dr Shand, 17 November 2017

54. Mr L was seen by Dr Shand on 17 November 2017 in connection with his appeal. In his report, Dr Shand listed Mr L's conditions as follows:-

- Depression, first diagnosed in 2009
- Type II Diabetes, poorly controlled
- Barrett's oesophagus, diagnosed in March 2015
- Painful left (dominant) wrist, reported since 2015

- Histrionic Personality Disorder, assessed in February 2013

55. Dr Shand included a summary of Mr L's current situation and noted that he had stopped driving three years previously due to a loss of confidence as a result of reduced sensation in his feet. Dr Shand noted that this had been confirmed by monofilament testing. He noted that Mr L continued to report problems with his left wrist, arm and shoulder and had been referred for physiotherapy, which had not been helpful.
56. Dr Shand said it was evident that Mr L had some communication issues and he had identified a long history of communication difficulties in the workplace. He expressed the view that Mr L fulfilled the diagnostic criteria for Autistic Spectrum Disorder (**ASD**). Dr Shand explained that this was likely to impede Mr L's ability to engage in talking therapies for his depressive disorder and was recognised as associated with a poor prognosis. He said the other important factor was the presence of diabetic neuropathy and the objective evidence of impaired sensation. Dr Shand said an inability to drive would make it very difficult for Mr L to return to his former role and it was unlikely that reasonable adjustments would be sufficient to overcome this. He concluded that Mr L's diabetic neuropathy appeared to represent a permanent incapacity to perform his former role. Dr Shand noted that there appeared to have been a history of Mr L having difficulties performing his role to the required standard. He suggested that this was likely to be linked to Mr L's ASD and depressive disorder.

57. Dr Shand concluded:

"On balance, I believe it is reasonable to conclude that [Mr L] is permanently incapacitated from performing the role of ... due to the requirement for significant independent travel in the role and the level of communication and interaction inherent in the role. Although he has clearly performed the role in the past, despite his Autistic Spectrum Disorder, he appears to have struggled in this role and taking into account compounding factors including depressive disorder, I do not envisage his being [in] a position to return to this role.

However, I believe [Mr L] remains capable of performing other gainful employment at some point prior to him attaining normal retirement age although, due to his combination of various medical issues he remains incapacitated for work, at the present time."

Appendix 2

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended)

58. As at the date Mr L's employment ceased, Regulation 20 provided:

- “(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5 -
- (a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and
 - (b) that he has a reduced likelihood of obtaining any gainful employment before his normal retirement age,
- they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2), (3) or (4), as the case may be.
- (2) If the authority determine that there is no reasonable prospect of his obtaining any gainful employment before his normal retirement age, his benefits are increased -
- (a) as if the date on which he leaves his employment were his normal retirement age; and
 - (b) by adding to his total membership at that date the whole of the period between that date and the date on which he would have retired at normal retirement age.
- (3) If the authority determine that, although he cannot obtain gainful employment within three years of leaving his employment, it is likely that he will be able to obtain any gainful employment before his normal retirement age, his benefits are increased -
- (a) as if the date on which he leaves his employment were his normal retirement age; and
 - (b) by adding to his total membership at that date 25% of the period between that date and the date on which he would have retired at normal retirement age.
- (4) If the authority determine that it is likely that he will be able to obtain any gainful employment within three years of leaving his employment, his benefits -

- (a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and
- (b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment ...”