CAS-39257-F1N1

Ombudsman's Determination

Applicant	Mr T
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondent	Westminster City Council (**the Council**)

Outcome

1. Mr T's complaint against the Council is partly upheld. To put matters right the Council shall reconsider Mr T's application for ill health early retirement.

Complaint summary

2. Mr T has complained that the Council has wrongly refused his application for early release of his pension on the grounds of ill health.

Background information, including submissions from the parties

1. Mr T became a deferred member of the Scheme after being made redundant in 2015.

2. Mr T applied for ill health early retirement (**IHER**) in December 2018.

3. The relevant regulations are the Local Government Pension Scheme Regulations 2013 (**the 2013 Regulations**). Regulation 38 provided:

> "38. (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."

4. The Regulations further state that:

> "3) Before determining whether or not to agree to a request under paragraph

(1), the deferred member's former Scheme employer, or administering authority, as the case may be, must obtain a certificate from an independent registered medical practitioner as to whether the member is suffering from a condition that renders the member-

(a) permanently incapable of discharging efficiently the duties of the employment the member was engaged in because of ill-health or infirmity of mind or body; and, if so,

(b) whether as a result of that condition the member is unlikely to be capable of undertaking gainful employment before reaching normal pension age, or for at least three years, whichever is the sooner."

5. Schedule 1 of the 2013 Regulations provides the following definitions:

"permanently incapable" as meaning "that the member will, more likely than not, be incapable until at the earliest, the member's normal pension age;"

"gainful employment" as paid employment for not less than 30 hours in each week for a period of not less than 12 months;"

"normal pension age" (**NPA**) as "the pensionable age of a person as specified from time to time in Schedule 4 to the Pensions Act 1995, or if higher, age 65."

6. On 25 February 2019, Mr T attended a medical assessment with Dr Cooper, an Independent Registered Medical Practitioner (**IRMP**).

7. The IRMP's report of 7 June 2019, (see Appendix) listed the medical evidence that had been reviewed; the report said:

"[Mr T] has provided evidence of dyslexia, anxiety and depression and an Achilles tendon injury. It is not clear whether dyslexia would be regarded as meeting the definition of 'ill-health or infirmity of mind or body'. The evidence regarding the impact of his dyslexia is inconsistent.

[Mr T] is currently receiving treatment for depression with a low dose of antidepressant medication that he is taking inconsistently. He is not currently under the care of a psychiatrist. Further treatment options include referral to a psychiatrist, increasing the dose of antidepressant medication, changing antidepressant medication, taking a combination of antidepressant medications, and further talking therapy. If required, [Mr T] could use his phone to remind him to take his medication or obtain help via his pharmacy or social services to improve compliance with treatment.

There is no evidence of treatment for [Mr T]'s Achilles tendon injury since 2016. Further treatment options would include referral to an orthopaedic specialist or to a physiotherapy service.

Until [Mr T] has completed recommended treatment options for his anxiety and depression and his Achilles tendon injury, I would consider it premature to say

he is permanently incapable of working as a Westminster Warden due to ill-health or infirmity of mind or body."

8. On 26 July 2019, the Council wrote to Mr T and confirmed that a panel had considered his application for IHER, and he did not meet the necessary criteria. The Council explained that the panel had considered Mr T's dyslexia, his mental health, and Achilles tendon injury. It said:-

- Dyslexia was something that Mr T was born with and should probably be regarded as a learning difficulty rather than a medical condition. Nevertheless, it had decided to continue with the discussion based on dyslexia also being regarded as "ill health or infirmity of body and mind".

- Two panel members thought that dyslexia may impact Mr T's ability to communicate and remember things and may have contributed to the difficult relationship with the Council prior to his exit in March 2015.

- Two panel members thought Mr T had worked for the Council for 15 years and managed to maintain the complex role. It considered that with adaptations, Mr T should be able to work in the same role at the Council.

- The panel unanimously thought Mr T could undertake gainful employment. Any future employment could be of a more straightforward nature where Mr T could interact with fewer people and perform more regular tasks that limited his being given different instructions. For example, the role of a warehouse operative.

9. On 31 July 2019, Mr T appealed the decision. He was unhappy with the IRMP's conduct and how his IHER application had been dealt with. He considered that the medical evidence he provided, along with the fact he was receiving Employment Support Allowance (**ESA**), should be enough to support his argument that he was unable to carry out any form of employment. He was unhappy that the IRMP had not considered the medical evidence that indicated that he would find it hard to provide a coherent verbal account of his difficulties. He pointed out that the IRMP report said he was not under a psychiatrist, and this was incorrect. He was frustrated at the lack of transparency of the IHER process, and he was finding the whole process difficult.

10. On 2 August 2019, the Council acknowledged Mr T's appeal and explained that it aimed to issue an outcome within two months but said that due to the complex nature of pensions, some cases may take longer.

11. On the same day Mr T emailed the Council and said:-

- There could be no question that the IRMP misunderstood the medical evidence as it was clear that he was in ill health and could not work.

- During the assessment he had pointed out to the IRMP that he had difficulties answering questions coherently regarding issues around his disability and how

this affected him. He explained he had been diagnosed with “severe stress, depression and anxiety.”

- The IRMP had “badgered” him for answers during the assessment.
- The IRMP’s comments on his Achilles tendon injury but does not mention that since the IRMP visit he had uncovered further documentation about his Achilles tendon injury.
- The IRMP report referred to his dyslexia not falling within the definition of ill health or infirmity of body and mind but also ignored the reports from qualified experts on his dyslexia.
- During the assessment he attempted to show the IRMP the medical reports relating his dyslexia on his mobile phone, but the IRMP refused to consult the reports.
- He was early for the appointment by more than two hours which is a characteristic of people with dyslexia, alongside forgetting his medication and misplacing personal items such as his keys or wallet.
- He was also assisted by a charity when he needed help.
- He had provided evidence that he had a legitimate complaint against the IRMP.
- He had provided additional medical evidence which he felt supported his IHER application.

12. On 5 August 2019, Mr T chased the Council for a reply.

13. On 5 September 2019, the Council advised Mr T that the IRMP was not an employee of the Council, and any complaint should be directed to the General Medical Council.

14. On 6 September 2019, the Council offered Mr T the opportunity to share his medical information with another IRMP to aid the Council’s decision, and to give Mr T the option of a second opinion.

15. On 7 September 2019, Mr T replied to the Council saying that he was concerned about the offer to seek a second medical opinion.

16. On 11 September 2019, the Council said that as Mr T did not wish to explore the option of a second medical opinion, the investigation would continue based on the original IRMP’s advice.

17. On 13 September 2019, Mr T said to the Council that he had not technically rejected or accepted the offer of a second medical assessment. He wanted further clarification as to why a second medical assessment would be needed; the IRMP did not work for the Council, so he did not understand why a second opinion was being offered.

18. On the same day the Council explained to Mr T that unless it received his permission for his medical information to be shared with a new IRMP by 17 September 2019, he would no longer be able to accept the offer of a second opinion.

19. On 23 September 2019, the Council wrote to Mr T under Stage One of the Internal Dispute Resolution Procedure (**IDRP**). It said:-

    - Any complaints about the IRMP's conduct should be directed to the General Medical Council.

    - Mr T has been offered the opportunity to attend another IRMP for a second assessment in London with the choice of two locations, but he had not given his permission for his medical information to be shared.

    - As Mr T considered that the IRMP's report was sufficient, the investigation of his complaint had continued.

    - The Council considered that the IHER process had been dealt with in a timely and sensitive manner. Mr T's application was received in January 2019, considered by a panel in July 2019, and he was advised of the outcome on 26 July 2019.

    - The panel that reviewed his IHER application agreed that with support Mr T could carry out a role which was the same as his previous one with the Council.

    - There was insufficient evidence to confirm whether or not Mr T would ever be able to work again, and the panel were undecided. Ultimately, the Council could not find that Mr T met the conditions showing he was permanently incapable of gainful employment before Normal Pension Age (**NPA**), so he did not meet the conditions for IHER.

    - Mr T had previously been successful in an employment tribunal with the Council. If he applied for the same role as his last role with the Council, any required adjustments would allow him to carry out that role. Therefore, it considered that the decision of the panel, not to award IHER, was correct.

    - It had taken on board Mr T's feedback about the lack of transparency and noted that it was improving its processes. It offered £250 for the inconvenience caused by the lack of transparency.

    - It provided a copy of the 2013 Regulations relating to IHER.

20. On 25 September 2019, Mr T appealed the Stage One decision.

21. On 30 September 2019, the Council wrote to Mr T providing a summary of its previous IDRP letter following a request from Mr T. It confirmed that his appeal would be considered under IDRP Stage Two.

22. There was a subsequent exchange of communications and the Council again offered Mr T the opportunity to attend a second assessment with a different IRMP. In

summary, Mr T agreed but the appointment fell through. He then agreed to attend a second appointment and the Council agreed to meet his transport costs. The second IRMP then withdrew his services and Mr T confirmed that he accepted no responsibility for this, and he was unhappy with the time lost due to the failed second IRMP appointment.

23. On 8 November 2019, the Council confirmed to Mr T that it was unable to progress his appeal to Stage Two without a second medical assessment.

24. On 26 November 2019, the Council said to Mr T:

> "The nominated officer that WCC [the Council] have asked to carry out the stage two appeal has reviewed your case and does not feel that they can give your appeal the consideration necessary without a second opinion from a suitably qualified medical professional.
>
> Without a second referral, the recommendation of the first occupational health doctor and the report produced will be the only medical information that the nominated officer can consider aside from your own comments on your health. If there is a stage two appeal it needs to be meaningful for you and for Westminster.
>
> The original external occupational health provider that had agreed to provide an assessment has now withdrawn the offer to review your case.
>
> We have spoken to another of our occupational health doctors as an alternative who is prepared to look at your case and give a second opinion.
>
> The decision is yours, to be clear you do not have to be referred to another doctor if you do not wish to be. It is not our intention to cause you any stress but simply to have all the necessary information available to make a fair decision in your case.
>
> If you do not wish to be referred by WCC [the Council] to another doctor. Westminster will not proceed with stage two of the IDRP appeal as we do not think it would be in your own or our interests.
>
> We will allow you to take your complaint directly to the Pension Ombudsman and we will confirm that it was our decision to cease the process due to your wish to not be referred for another medical opinion.
>
> If you are open to another referral, we can arrange this for you. Please be aware that the occupational health doctor who has agreed to review your case should you give consent, only works one day a month in Westminster. This doctor's next surgery is already full and whilst we may be able to negotiate an additional day for them to work in Westminster we cannot guarantee at the moment when that may be.

> If you give consent, then we will try and arrange a day for the doctor to review your file but note given the complexities of your case they will need time to read the file and digest the contents before taking the case further."

25. On 27 November 2019, Mr T replied to the Council and said: -

- The Council had not provided a reply to his appeal under Stage One within two months as set out in its own procedure for IHER.
- As the initial IRMP was a suitable medical professional, he did not consider it was necessary for a second medical consultation to take place. He considered it was a legitimate question as nowhere in the procedure outlining the step-by-step IHER process did it indicate anything about a second professional medical consultation being required. Therefore, the request was outside of stated procedural steps in relation to his application for IHER.
- He did previously give permission for a second medical consultation by a second IRMP. He had therefore complied with every step and request made of him.
- He believed the evidence he had submitted showed he was eligible for IHER.
- He was unhappy with the Council's handling of the matter.

26. Mr T's position is: -

- The IRMP report contradicted the significant medical evidence provided which clearly demonstrated that his condition of "severe dyslexia, and mental health impairment coupled with permanent damage to his Achille's tendon means he falls into the definition of "ill health and/or infirmity of mind and body."
- He was in receipt of ESA and the PIP since 2016. Therefore, as the Department of Work & Pensions (**DWP**) had accepted that he was unable to secure employment, so should the Council.
- He provided medical evidence which demonstrated that he required extensive psychotherapy and other intervention to deal with his "mental health impairment."
- He had won his employment tribunal in 2014 where it had been accepted that he was unable to perform his duties due to his dyslexia.
- During the medical assessment by the IRMP, he felt badgered by the process which caused him upset and anxiety. The IRMP was rude, combative, and uncooperative.
- The IDRP process was not transparent, and he was given no explanation as to why he was being asked to consent to a second assessment when it was not part of the Council's procedures.
- He then did agree to a second medical assessment and the second IRMP he was referred to then declined the Council's invitation to conduct the assessment.

- The IDRP process took too long.
- He was offered £250 as the Council agreed that the IHER process could have been made "clearer." He did not accept this as he was told that it was in full and final settlement of the complaint.
- He has been diagnosed with other conditions and provided further medical evidence.

27. The Council's position is: -

- The IHER application had been considered correctly against the IHER criteria as set out in the Regulations.
- It could not complete Stage Two of the IDRP without a further medical opinion as this was a key part of Mr T's complaint.
- Having exhausted all options, and despite offering Mr T additional support, it was happy for Mr T to liaise with The Pension Ombudsman's Office. It could not see that his IHER application was considered in anything other than a fair and reasonable manner.

28. Following Mr T's referral of the matter to The Pensions Ombudsman Office (**TPO's Office**) the Council unnecessarily delayed the investigation. It did not provide the requested medical information for a number of months. Eventually, in order to progress the matters, following a number of discussions, a member of the TPO's staff visited the offices of the Council in order to collect the required paperwork.

Adjudicator's Opinion

29. Mr T's complaint was considered by one of our Adjudicators who concluded that further action was required by the Council. The Adjudicator's findings are summarised below: -

- The decision as to whether Mr T met the criteria for IHER was for the Council to make, following receipt of a medical report from an IRMP. The IRMP had correctly applied the correct eligibility test and provided a reasonable summary of the Regulations.
- It was not clear whether the Council reviewed the medical evidence in detail, but it did say that Mr T's health conditions were discussed in full.
- It would have been good practice for the Council to review the medical evidence itself and not simply rely on the IRMP report, otherwise the Council would not know if the IRMP had missed something.
- Mr T did raise concerns about the conduct of the IRMP during the IHER assessment but IRMP's are accountable to their own professional bodies and the General Medical Council.

- Under Stage One of the IDRP the Council concluded that its decision was correct, but later offered Mr T the option of a second opinion by another IRMP. The Adjudicator considered the council was not required to consult a second IRMP, but neither was it precluded from doing so. So, whilst this was not part of the Council's normal procedure for IHER, the offer by the Council for a second assessment by another IRMP was reasonable.

- When a second assessment was offered, Mr T initially argued it was not necessary but then agreed. Then, through no fault of Mr T's, the appointment was not held so the matter could not be reviewed afresh by a separate IRMP. The Adjudicator considered that a second IRMP not connected to the case should review matters, taking into account that Mr T had said he was still under a psychiatrist, and that he said he had provided additional information on his Achilles tendon injury not taken into account in the original IRMP report.

- Mr T was receiving ESA and PIP and had argued that the Council should therefore award IHER. Whilst the payment of ESA and PIP was an indicator of Mr T's current health, the Council's decision was not bound by the State's decision to pay Mr T ESA and PIP. The Council had to follow the criteria set out in Regulation 38.

- There were no unreasonable delays in investigating Mr T's complaint as it was less than two months between Mr T's complaint and Stage One of the IDRP. Mr T then appealed the Stage One IDRP decision on 25 September 2019 and the Stage Two decision was not completed as a second IRMP report was required. This was explained to Mr T on 26 November 2019, and, as there was a lengthy exchange of correspondence between Mr T and the Council during this time, the Adjudicator did do not consider that the Council's delay amounted to maladministration.

- The Council agreed its IHER process was not completely transparent, and it apologised for its actions during the process and offered a goodwill payment of £250 to Mr T. The Adjudicator considered that, whilst there was ultimately a communication breakdown that resulted in the matter being referred to TPO's Office, the Council did try to engage with Mr T and provide him with the opportunity to present his case. If Mr T wished to accept the £250, he should contact the Council directly as the Adjudicator did not consider a higher award was due.

- The Adjudicator acknowledged that matters were difficult due to Mr T's dyslexia and other health conditions, but it is not the Ombudsman's role to make a decision on the issue of his IHER. It is for the Council to reach a decision, as set out in the Regulations.

- Mr T said he has been diagnosed with other health conditions since his IHER application and has further medical evidence about his ability to work. The

Adjudicator explained she was only considering the complaint about the refusal by the Council to grant the IHER requested in December 2018.

30. The Council did not accept the Adjudicator's Opinion and the complaint was passed to me to consider.

31. The Council said: -

- The decision to award IHER rested with the Council not the IRMP, and there were examples where the Council did not agree with the IRMP. However, no reasonable employer could ignore the opinion of a qualified IRMP and there needed to be clear reasons for doing so. Even if people are unwell, they may still not meet the criteria for IHER.

- The panel did have a comprehensive discussion with the IRMP and about Mr T's dyslexia before making a decision. However, the medical opinion was clear in this case and that was that Mr T did not fit the criteria for IHER.

- When Mr T appealed the decision the appointed person at Stage One did consider that, in order to address Mr T's concerns regarding the medical recommendation, a second medical opinion should be sought.

- Mr T did not wish to visit an IRMP that worked for the Council and so for an additional cost it arranged for Mr T to visit a private practice. However, Mr T called the medical practice ahead of the appointment and made it clear how unhappy he was with the previous IRMP and confirmed he had made a complaint to the General Medical Council about that IRMP. The IRMP then contacted the Council and advised that they were not prepared to review the case, given the risk that they would end up in a long process with the General Medical Council. Therefore, it was Mr T that was responsible for there being no second medical opinion.

- It did not consider it missed any reports, or that the IRMP ignored any relevant evidence.

- It questioned what would happen if Mr T contacted the IRMP again, and the assessment did not go ahead. It would also need more than 28 days to refer to an IRMP.

- It was willing reoffer a Stage Two appeal only.

32. Mr T provided an extensive response which included explaining, in detail, the issues with the Council when he was employed and the employment tribunal.

33. In summary, Mr T has said: -

- He found the whole process "extremely exhausting", and "emotionally draining".

- He was still in a fragile mental state.

- His disabilities meant he was covered by the Disability Discrimination Act as set out in his employment tribunal.
- The Council did not provide any reasonable adjustments to reduce or remove the substantial disadvantages caused to him as a dyslexic person. This included the request for him to complete the Health and Capability form, and the interview with the IRMP.
- The panel decided if he was permanently incapable of discharging the duties of his employment, but the role of Warden no longer existed, so he cannot see how the decision could be made on this basis.
- The Council admitted its process was not transparent.
- He does not believe in the application process where the Council have “utterly failed” to make reasonable adjustments. As the process was flawed then the outcome was flawed as a direct consequence.
- The IRMP’s report said he was not under psychiatric care, and this was incorrect and there was no evidence to support this statement.
- The findings in the report were a direct contradiction to the medical evidence regarding his disability.
- The IRMP’s report contained untrue statements and the IRMP “cherry picked” statements.
- The IRMP also ignored that he used the dictation feature on his computer to write emails. He considered that the IRMP made statements that were “bigotry” towards his disability. He was “bullied” into giving answers during the meeting when he was incapable of supplying answers.
- When he asked the IRMP to look at the reports on his phone Dr Cooper refused.
- When he left employment in 2015, he was on restricted duties due to his Achilles tendon injury. The treatment he received has failed to improve the condition.
- The Council acknowledged his concerns in its letter in response to the Adjudicator’s opinion. It said that the appointed person at Stage One felt that in order to address his concerns, a second medical opinion should be sought. He did not understand why the Council did not address his concerns at the time if there were considered legitimate.
- He is concerned by the Adjudicator’s suggestion that a second review is completed by another IRMP. The Council have blamed him for the second assessment not taking place. So, any assessment now would require a degree of trust which he considered the Council had already breached.

- He did make contact with the second IRMP to arrange an appointment. He was told by the IRMP in no uncertain terms that that there would be no consideration of the evidence. He did question by what means the IRMP were going to:

  "Come up with an objective assessment by refusing to review or consider the evidence. I believe this was a legitimate concern which required an explanation. Instead of explaining the rationale behind the decision, the [Council] shows a second independent assessor decided to notify [the Council] of the decision to decline [the Council's] invitation."

- The work assessment report from February 2013 supported his position that the Council did not communicate with him in a way that took account of his special needs. The report said that oral instructions should be confirmed in writing. He considered that the reverse was true and that someone should also telephone him to answer his questions if he did not understand the written communications.

- The Adjudicator makes no mention of the fact that the method of communication contradicts the reasonable adjustments outlined in the workplace assessment.

34. Mr T submitted a letter from Professor McLoughlin, an Educational and Occupational Psychologist dated 16 November 2021. The letter said that Dyslexia was listed in the international Classification of Diseases and diagnostic as well as the Statistical Manual of Mental Disorders.

35. Professor McLoughlin said "My diagnostic assessment showed that Mr [T] would meet the criteria outlined in both of the named schedules. In my opinion, therefore, Mr [T] should be considered to have a condition that constitutes "ill-health or infirmity of mind or body".

36. I note the additional points made by the Council and Mr T, which do not change the outcome.

Ombudsman's decision

37. Mr T has complained that he was not awarded IHER. He considers that the medical evidence provided clearly demonstrated that his dyslexia, mental health, and Achilles tendon injury mean he is in "ill health and/or infirmity of mind and body." He also considers that the IHER process was flawed, he had concerns about the IRMP report, and the Council did not make reasonable adjustments taking account of his disabilities.

38. Mr T has explained, at length, what happened with the Council when he was employed, which resulted in an employment tribunal. I appreciate that this was a difficult time for him, but these issues are employment matters. Therefore, these fall outside my remit, and I will not comment on them further.

39. As explained by the Adjudicator any matters relating to the IRMP's alleged conduct and/or professional judgment also falls outside my jurisdiction.

40. In this matter, it is not for me to review the medical evidence and decide whether Mr T is entitled to IHER benefits. I am primarily concerned with the decision-making process by which the Council decided whether or not Mr T was eligible for IHER. It is not relevant whether I agree or disagree with the actual decision made.

41. The Council was required to assess Mr T's eligibility for IHER in accordance with the 2013 Regulations. In summary, this meant it had to consider if Mr T was permanently incapable of discharging efficiently the duties of the employment that he was engaged in at the date he became a deferred member in 2015, and unlikely to be capable of undertaking gainful employment before NPA, or for at least three years.

42. Regulation 38 of the 2013 Regulations states that the Council should consider his role at the date he became a deferred member in 2015. Mr T objected to this as his former role of a Warden no longer exists. However, in order to meet the criteria as stated in the Regulation 38 Mr T must also not be capable of gainful employment. This is any gainful employment of at least 30 hours per week for a period of not less than 12 months. The Council considered, following the IRMP report, that Mr T could work in some form of employment that was of a more straightforward nature.

43. The Council has now confirmed that the appointed person at Stage One did consider that in order to address Mr T's concerns regarding the medical recommendation, a second medical opinion should be sought.

44. Before a second medical assessment took place there was a breakdown in communications and the matter was referred to my Office. The Council contends that it was only because of Mr T's actions that the second assessment was not completed. Mr T has said he did consent to the second assessment, and he did contact the second IRMP.

45. I acknowledge that Mr T was struggling to understand what a second assessment would achieve. In his opinion the evidence already presented demonstrated that he met the criteria for IHER, and he thought that the second IRMP would not be reconsidering the evidence. However, the second IRMP would be expected to review all the evidence again, including any submissions that related to Mr T's health when he applied for IHER in 2018. This should also have taken account of Mr T's point that he was under a psychiatrist. Mr T would have needed to provide evidence of this, as the only reports are from Dr Sutton, a psychologist. He would also need to provide any relevant further evidence about his Achilles tendon injury. This does not mean that I am saying that a second IRMP would have arrived at a different conclusion to the first IRMP, only that a second IRMP assessment would help the Council answer the concerns raised by Mr T after the first IRMP review.

46. The important point is that the Council considered a second assessment was required to address Mr T's concerns, and for whatever reason this did not take place. I do not find that this was as a result of maladministration because the Council did attempt to complete Stage Two of the IDRP, and the second IRMP only withdrew after being contacted by Mr T. I recognise that the Council made efforts to engage

with Mr T during the IDRP, but I find that the IHER application has not been considered appropriately. More could have been done to make the process clearer for Mr T.

47. I consider Mr T's case should be remitted back to the Council to allow it to be reviewed by a second IRMP not connected to the case. I acknowledge the difficulties between the Council and Mr T, so this will mean both the Council and Mr T will need to engage fully in that process in order to move matters forward.

48. Mr T has continued to submit further medical evidence including a November 2021 report from Professor McLoughlin but the Council and the IRMP are only able to consider the medical evidence that relates to Mr T's health in December 2018, at the time of his application for IHER.

49. Mr T also considers he was discriminated against because of his disabilities and that adjustments should have been made to the IHER process, which included being asked to complete a Health and Capability form and attend an interview with an IRMP.

50. Disability is defined in the Equality Act 2010 as any physical or mental ability which had a substantial and long-term adverse effect on a person's ability to carry out normal day to day activities. A decision that a member does not qualify for ill health retirement is not, in and of itself, evidence of discrimination. However, any reasonable adjustments that the Council considers Mr T requires should be taken into account when the second assessment is completed.

51. I consider that the Council were particularly obstructive when dealing with my Office as it did not provide the requested information in a timely manner. However, I do not consider there were any unreasonable delays when dealing with Mr T's IHER application or complaint. I note that the Council agreed its process was not transparent and it apologised for its actions during the IHER process and offered a goodwill payment of £250. Despite this I consider the Council did try to engage with Mr T and it is up to Mr T should he wish to accept the goodwill offer. I do not find a further award for non-financial loss is warranted in this case.

52. I uphold Mr T's complaint.

Directions

53. Within 56 days the Council shall nominate a new IRMP, who has had no involvement with the matter previously. I have exceptionally granted longer than is normal in this case for the Council to carry out the required actions following the Council's request that it may be difficult to find a suitable IRMP.

54. The Council shall instruct the IRMP to consider whether Mr T meets the criteria within the Regulations and provide a report. It should then consider the report and all the relevant medical evidence.

55. Any reasonable transport costs for Mr T to visit the second IRMP, shall also be met by the Council, as previously offered by the Council. Mr T should not contact the IRMP to question the process before the assessment unless it is in relation to making an appointment. This is so the IRMP can review the matter independently.

56. Within 21 days of receiving the IRMP's report, the Council shall inform Mr T of its IHER decision in writing and explain the reasoning behind it.

57. Given the breakdown in relations between both parties the panel making the IHER decision should include different members to those that made the initial decision. This will help to draw a line under what has gone before.

58. In the event that a decision is made to grant IHER benefits, the Council shall pay Mr T a lump sum, plus interest as set out in the Regulations back dated to the date he was determined to be permanently incapacitated, equal to the outstanding instalments of his pension. In this case the Council would effectively be replacing the initial determination, therefore, taking account of the time that has elapsed, the relevant date would still be the date of the Council's first determination.

Anthony Arter

Pensions Ombudsman
16 December 2021

Appendix

Extract from Dr Cooper's medical report of 7 June 2019

"Background.

I saw [Mr T] on 25 February 2019 following his application for early payment of deferred pension benefits on the grounds of permanent ill-health. I have also reviewed the content of [Mr T]'s occupational health file, the documentation forwarded to me by [Mr T] in support of his application and the additional information regarding [Mr T]'s health received from his GP.

In making my recommendations I am mindful of the guidance provided by the LGPS to doctors undertaking assessments in relation to pension benefits.

In addition to my assessment of [Mr T] on 25 February 2019, I have carefully considered all the information contained in [Mr T]'s occupational health file. I have taken particular note of the following:

- Emails from [Mr T]
- Health and Capability Form completed by [Mr T]
- [Mr T]'s job description
- Dyslexia assessment dated 19 August 2008
- Dyslexia assessment dated 22 May 2013.
- Report dated 2 October 2013 from SWABT Duty Team
- Employment tribunal judgement dated 23 June 2014
- Accident and emergency report dated 9 October 2014
- Care plan dated 19 January 2016 from Dr Nina Sutton
- Report dated 9 June 2016 from Aldo Russell de Boer, extended scope physiotherapist
- Letter addressed to whom it may concern dated 12 August 2016 from Prof David McLoughlin with copy of dyslexia assessment dated 22 May 2013
- Report dated 26 September 2016 from to Theresa Louis, Primary Care Plus Mental Health Service in relation to [Mr T]'s Personal Independence Payment appeal
- Letter dated 7 March 2017 to [Mr T] from Dr Nina Sutton
- Letter dated 11 May 2017 addressed to whom it may concern from Dr Nina Sutton
- Letter dated 6 July 2017 from Dr Nina Sutton clinical psychologist
- Letter dated 6 July 2017 addressed to whom it may concern from Dr Nina Sutton
- Letter dated 17 August 2017 to [Mr T] from Dr Nina Sutton
- Care plan dated 12 October 2017 from Dr Nina Sutton
- Letter dated 12 September 2018 to [Mr T] from Dr Nina Sutton

- GP consultation information sheet dated 19 February 2019
- GP patient summary printed 6 March 2019
- Report from GP, Dr DeSilva contained in an email dated 23 April 2019

[Mr T] told me that he has not worked since 2015 when his role with Westminster Council became redundant. He described his role of Westminster Warden as one of engaging with the public, solving problems, responding to complaints, contract monitoring & enforcement.

In considering [Mr T]'s application I have considered three main areas.

1. Dyslexia
2. Mental health difficulties including anxiety and depression
3. Achilles tendon injury

Dyslexia.

[Mr T] provided evidence of dyslexia. (Reports dated 19 August 2008 and 22 May 2013).

The occupational health unit asks all applicants for early release of pension benefits on the grounds of permanent ill health to complete a Health and Capability form. The purpose of the form is to gain information about the functional effects of the applicant's medical conditions, and is a helpful supplement to the clinical information contained in the occupational health file and the information provided by GPs and hospital specialists. [Mr T] stated that due to his dyslexia he was unable to complete the Health and Capability Form. It was suggested that he seek help from his GP if he felt unable to complete the form unaided. He elected to complete the Health and Capability Form himself, but provided no information about his health or capability, answering all questions about health and capability "please see GP summary provided" or "please see GP summary provided/also the doctor has that if contacted directly will answer any questions not covered by the summary provided". (sic)

At the outset of [Mr T]'s consultation with me he told me repeatedly that due to his dyslexia he was unable to describe his difficulties to me, asking me instead to refer to the reports he had provided. Although reports were held on his occupational health file, he asked me to look at copies on his phone and asked me to read aloud specific paragraphs. He referred with apparent ease to documents on his phone throughout the consultation.

With some encouragement [Mr T] was able to say that he had difficulty expressing himself, processing information, reading, writing, comprehending, sequencing, and organising daily living. He told me that he had difficulty engaging with others and communicating.

[Mr T] told me that he lives alone. He said that he feels vulnerable if he is away from home because he does 'not understand what is going on'. He said that he tends to spend the day in bed, leaving home only when necessary, for example going to the shops to buy a drink and a ready meal. He said that he drinks only water or bottled drinks. He told me that he does not eat every day. He told me that he is unable to make a shopping list or prepare

food or a drink to consume at home. He said that the supermarket in which he buys a ready meal, heats up the food for him and he eats it in the supermarket. He told me that when communicating in writing he uses dictation software. He said that he was upset that his application for PIP (personal independence payment) has been rejected so he has had to appeal. He told me that his difficulties due to dyslexia are worse when he is feeling stressed. He is hoping to obtain support to help him with the difficulties he is experiencing due to his dyslexia.

According to the report from Prof McLoughlin, [Mr T] has difficulty concentrating for longer than an hour, explaining things clearly to others, remembering messages, understanding operating instructions on household gadgets, filling in forms, keeping track of outstanding bills, following spoken instructions, remembering appointments, remembering where things have been put, looking up telephone numbers in directories, remembering telephone numbers correctly, reading official documents, following left right instructions, organising daily life, reading letters, reading a newspaper, making shopping lists, reading maps, writing letters, placing orders over the telephone and conducting enquiries over the telephone.

The information received from [Mr T]'s GP indicates that he has been referred for a social services assessment and to a memory clinic. [Mr T] has advised in a recent email that he has not yet received an appointment for the memory clinic or the social services assessment.

Achilles tendon injury.

[Mr T] reports a history of an Achilles tendon injury in 2014. He received a course of physiotherapy treatment in 2016 but despite the treatment in 2016 he reports ongoing pain and impaired mobility. He takes no medication for his Achilles tendon injury.

The report from the Extended Scope Physiotherapist dated 9 June 2016 outlines first-line treatment including physiotherapy. The report indicates that in 2016 [Mr T]'s symptoms were slowly improving. The Extended Scope Physiotherapist advised that he should be referred back to the Extended Scope Physiotherapy service if his symptoms deteriorate. There is no evidence of any further referral to the physiotherapy service or referral to an orthopaedic specialist. It would appear that treatment options to improve [Mr T]'s reported ongoing Achilles tendon symptoms have not been fully explored.

Anxiety and depression.

[Mr T] reports feeling depressed, stressed, angry, agitated and easily frustrated. He also said that he is forgetful and often forgets simple tasks such as brushing his teeth or taking the medication prescribed for his mental health difficulties. He reports an impairment in his sleep at night but catches up on sleep during the day. Although [Mr T] said he was unable to recall any information about his prescribed medication, his GP record indicates that he is prescribed a low dose of antidepressant medication.

The reports provided by Dr Nina Sutton, clinical psychologist, confirm [Mr T]'s history of severe anxiety and depression. He has received long-term therapy without any reported

improvement in his symptoms. He has 16 further sessions of psychotherapy outstanding. He has not been compliant with taking prescribed medication, which he attributes to his poor memory due to dyslexia. He told me that he was unable to do the tasks prescribed by the psychologist involved in his care because he is not organised enough due to his dyslexia.

[Mr T] reports an interaction between his dyslexia and his mental health difficulties. He reports that he is struggling to function with normal activities of daily living such as going out, shopping and cooking for himself.

Consideration.

In assessing [Mr T]'s application for early payment of deferred pension benefits on the grounds of permanent ill-health, I have considered whether his difficulties are due to ill-health or infirmity of mind or body as is required by the LGPS.

Dyslexia.

It is not clear whether the dyslexia would be regarded by the LGPS as falling within the definition 'ill-health or infirmity of mind or body'. As dyslexia is a learning difficulty, I would not regard it as falling within the definition 'ill-health or infirmity of mind or body'. Nevertheless in assessing this application I have considered the impact of [Mr T]'s dyslexia on his health and his functional capacity.

Dyslexia is a learning difficulty. Dyslexia is not amenable to treatment but the effects of dyslexia can be ameliorated with work adjustments. The effects of dyslexia would be expected to be fairly consistent through adult life. There are inconsistencies in the report [Mr T] has given of the effects of his dyslexia and the evidence. [Mr T] lives independently. Despite his report that he does not eat every day, he does not appear to be malnourished. Although he reports he has significant difficulty organising himself, he was able to organise himself to attend his appointment with me on time, use his phone during the consultation to highlight points he was making and to appeal the PIP decision. He has recently been able to send several emails regarding his pension application to the occupational health unit and other senior staff in Westminster Council including the Chief Executive. Although the effects of his anxiety and depression may be exacerbating the effects of his dyslexia (or vice versa), it is inconsistent that he was able to maintain continuous employment as a Westminster Warden for 15 years, yet now his dyslexia is having the substantial adverse effect on his ability to undertake normal activities of daily living that he reports.

Anxiety and depression.

[Mr T] is not currently under the care of psychiatrist. Further treatment options to assist [Mr T]'s anxiety and depression may be possible in the form of referral to a psychiatrist, further talking therapy, an increased dose of antidepressant medication, a change of medication, taking a combination of medications or compliance with the behavioural exercises prescribed by the psychologist, if necessary using his phone as a reminder. [Mr T] reports that his dyslexia impacts on his capacity to optimise medical treatment for his anxiety and depression because he forgets to take his medication and cannot organise himself

sufficiently to do the exercises prescribed by the psychologist. [Mr T] is skilled in using his phone as demonstrated in his consultation with me, so he could set a reminder on his phone to remind him to do the exercises prescribed by the psychologist and to remind him to take his medication. Alternatively the pharmacy he uses could provide his medication in a simple prepacked form in a dosette box. (A dosette box is a disposable plastic tray that separates medicines into individual compartments for different times of the day for each day of the week. Each box contains a week's medication labelled with days and times to help patients remember to take the correct medicines at the correct time of the day.) If it is deemed necessary, care could be provided by social services to include correct administration of medication and reminders to do the prescribed exercises.

Achilles tendon injury.

The consequences of [Mr T]'s Achilles tendon injury may well be amenable to further treatment via an orthopaedic surgeon and/or physiotherapist. These options have not been explored.

Summary.

[Mr T] has provided evidence of dyslexia, anxiety and depression and an Achilles tendon injury. It is not clear whether dyslexia would be regarded as meeting the definition of 'ill-health or infirmity of mind or body'. The evidence regarding the impact of his dyslexia is inconsistent.

[Mr T] is currently receiving treatment for depression with a low dose of antidepressant medication that he is taking inconsistently. He is not currently under the care of psychiatrist. Further treatment options include referral to a psychiatrist, increasing the dose of antidepressant medication, changing antidepressant medication, taking a combination of antidepressant medications, and further talking therapy. If required, [Mr T] could use his phone to remind him to take his medication or obtain help via his pharmacy or social services to improve compliance with treatment.

There is no evidence of treatment for [Mr T]'s Achilles tendon injury since 2016. Further treatment options would include referral to an orthopaedic specialist or to a physiotherapy service.

Until [Mr T] has completed recommended treatment options for his anxiety and depression and his Achilles tendon injury, I would consider it premature to say he is permanently incapable of working as a Westminster Warden due to ill-health or infirmity of mind or body."