

Ombudsman's Determination

Applicant	Mr N
Scheme	Local Government Pension Scheme (LGPS)
Respondents	Worcestershire County Council (WCC) Worcestershire Pension Fund (WPF)

Outcome

1. I do not uphold Mr N's complaint and no further action is required by WCC or WPF.

Complaint summary

2. Mr N's complaint concerns WCC's decision to award him Tier 3 Ill Health Retirement Pension (**IHRP**) benefits. Mr N believes that he should have been awarded Tier 1 IHRP benefits, backdated to the date his employment was terminated.

Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. As relevant, extracts from the LGPS Regulations 2013 are set out in the Appendix.
5. Briefly, the LGPS Regulations 2013, provide for three tiers of IHRP benefits depending upon the member's incapacity for future employment. In order to qualify for any IHRP benefits, the member must be deemed permanently incapable¹ of discharging the duties of their current employment and not immediately capable of undertaking any gainful employment². If the member satisfies these conditions, the tier of benefits awarded depends upon their level of future incapacity as follows:-

¹ Defined in the LGPS Regulations to mean "that the member will more likely than not, be incapable until, at the earliest, his/her [normal pension age]." Mr N's normal pension age is 66.

² Defined in the LGPS Regulations as paid employment for not less than 30 hours per week for at least 12 months.

- Tier 1 The member is considered unlikely to be capable of undertaking gainful employment before normal pension age (**NPA**).
- Tier 2 The member is considered unlikely to be capable of undertaking any gainful employment within three years of leaving employment, but will be capable of such before NPA.
- Tier 3 The member is considered likely to be capable of undertaking gainful employment within three years of leaving employment (or before NPA if this is earlier).
6. Mr N was employed by WCC and was a member of the LGPS, administered by WPF.
7. Mr N had a history of lower back pain and knee joint pain. Mr N says that his role involved walking continuously most days. WCC offered Mr N “light duties” to help with his knee pain, but this exacerbated his lower back pain.
8. In October 2018, Mr N was assessed by Dr Slavin, an Independent Registered Medical Practitioner (**IRMP**). Dr Slavin certified that, in his opinion, Mr N was permanently incapable of continuing in his normal role, but did not have a reduced likelihood of being capable of undertaking gainful employment.
9. On 29 March 2019, Mr N’s employment with WCC was terminated on ill health grounds and he began to receive a reduced pension from the LGPS.
10. In April 2019, Mr N’s General Practitioner (**GP**) provided WCC with further information about Mr N’s condition. The GP said Mr N had reported that sitting for prolonged periods caused pain in both legs, so he had issues with driving for long distances. The GP also referred to Mr N’s conditions as chronic and stable with no planned further medical intervention.
11. In August 2019, Dr Halliday-Bell, an IRMP, deemed Mr N permanently incapable of continuing in his normal role. She also certified that Mr N had a reduced likelihood of being capable of undertaking gainful employment immediately, but would be capable of doing so within three years of leaving employment, or his NPA.
12. On 13 September 2019, following an email exchange, and a complaint made to WCC by Mr N, WCC issued Mr N with a stage one decision under its Internal Dispute Resolution Procedure (**IDRP**). WCC said:-
- It had enclosed a copy of the medical certificate issued by Dr Halliday-Bell which said, in her opinion, that Mr N was permanently incapable of undertaking his role but would be likely to be capable of undertaking gainful employment within three years of leaving employment with WCC.
 - In accordance with Regulation 35 of the LGPS Regulations 2013, it had decided to award him Tier 3 IHRP benefits, backdated to the date that his employment was terminated.

- If he returned to gainful employment, he would have to notify WCC.
- In accordance with the LGPS Regulations 2013, WCC would review the Tier 3 IHRP benefits once they had been in payment for 18 months. At this point, WCC could decide to continue with the payments, award Tier 2 benefits if Mr N met the criteria, or cease payment of the Tier 3 IHRP benefits.

13. Mr N appealed the decision. In summary, he said:-

- He had attempted “light duties” with no success.
- His conditions were chronic, so he did not believe that they would improve.
- He understood that Tier 2 IHRP benefits were not considered because he was within three years of his NPA.
- He believed he should be awarded Tier 1 IHRP benefits based on his medical issues.

14. Stage two of the IDRP was undertaken by WPF as the administering authority.

15. On 15 November 2019, WPF issued its stage two IDRP response. In summary, it said:-

- WCC had followed the process set out in the LGPS Regulations. Its decision to dismiss Mr N, then award Tier 3 IHRP benefits was supported by an IRMP.
- The IRMP’s role was to give their opinion on whether or not Mr N met the necessary criteria to be awarded IHRP benefits, but it was WCC’s regulatory responsibility to decide his entitlement, based on the IRMP’s report or certificate.
- WCC received Dr Halliday-Bell’s completed medical certificate which confirmed that, in her opinion, Mr N was permanently incapable of returning to his current role, but likely to undertake gainful employment within three years of leaving employment and before his NPA.
- WCC had acted correctly, in accordance with Regulation 35 of the LGPS Regulations.
- It concluded that WCC had acted properly in its decision making.
- It upheld WCC’s decision to award Mr N’s benefits at Tier 3.

16. Mr N’s position:-

- He had attempted “light duties” and believed that a Tier 1 award was more suitable given his condition.
- He appealed the original decision not to grant him IHRP benefits when he left WCC because the IRMP wrote the report before they had received his GP’s report.

- Dr Halliday-Bell issued a medical certificate but did not have a consultation with him.
- He strongly disputed Dr Halliday-Bell's opinion that he could undertake gainful employment within three years of leaving WCC, or his NPA, because she was aware of his medical condition, and that his condition was chronic.
- His health had suffered as a result of the time taken for a decision to be made.

17. WPF's position:-

- WCC had to comply with the LGPS Regulations when awarding IHRP benefits.
- Under the LGPS Regulations:
 - to be eligible for Tier 1 benefits, the member had to be unlikely to be capable of undertaking gainful employment before NPA; and
 - a member is entitled to Tier 3 benefits, backdated to the date that they left employment, if they were likely to be capable of undertaking gainful employment within three years of leaving employment, or before their NPA, whichever was earlier.
- WCC had followed the correct process set out in the LGPS Regulations.
- Part one of the medical certificate assessed whether the employee was permanently incapable of undertaking their current employment. Parts two and three assessed the employee's ability to undertake gainful employment in the future and the timeframe.
- The IRMP's role was to consider the employee's medical records and give their opinion on whether or not they met the criteria for an IHRP. The LGPS employer then had a regulatory responsibility to decide the Tier based on the medical certificate and/or the IRMP's report.
- Mr N was granted IHRP benefits based on the medical certificate Dr Halliday-Bell completed. The level of entitlement, however, was determined by WCC.
- WCC had acted properly in reaching the decision at the time, based on the available evidence.
- While Mr N was not initially granted IHRP benefits when his employment was terminated, when he was later awarded Tier 3 IHRP benefits, the payment was backdated to the date he left employment.
- WCC is required to review Tier 3 IHRP once the benefits have been in payment for 18 months. In Mr N's case, the review led to the level of entitlement increasing to Tier 2.

Adjudicator's Opinion

18. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by WCC or WPF. The Adjudicator's findings are summarised below:-

- The complaint accepted for investigation was that Mr N was unhappy with WCC's decision to award him Tier 3 IHRP benefits. Since then, WCC had conducted an 18-month review which resulted in Mr N being awarded Tier 2 IHRP benefits, which Mr N appealed.
- A member's entitlement to benefits when taking early retirement due to ill health is determined by the scheme rules or regulations.
- The scheme rules or regulations also determine the circumstances in which a member is eligible for ill health benefits, the conditions which they must satisfy, and the way in which decisions about ill health benefits must be taken.
- Under the LGPS Regulations, WCC was required to determine whether Mr N met the criteria for IHRP benefits, and what tier of benefits was appropriate, having obtained a certificate from the IRMP. The LGPS Regulations also state that, in order to be eligible for Tier 1 IHRP benefits, a member must be unlikely to be capable of undertaking gainful employment before NPA.
- In October 2018, Dr Slavin determined that Mr N was permanently incapable of continuing in his normal role, but did not have a reduced likelihood of being capable of undertaking gainful employment before NPA. WCC's decision not to award Mr N IHRP benefits at this time was supported by the available evidence.
- In August 2019, Dr Halliday-Bell certified that Mr N was permanently incapable of continuing in his normal role, but would be capable of undertaking gainful employment within three years of leaving employment with WCC, or before his NPA. WCC's decision to award Mr N Tier 3 benefits at this time was supported by the available evidence and made in accordance with the LGPS Regulations.
- The LGPS Regulations do not specifically require WCC to seek medical evidence from a member's GP to reach a decision or for the IRMP to have a face-to-face consultation with the member. While both may have been good practice, not doing so did not amount to maladministration in Mr N's case
- Mr N disagreed with Dr Halliday-Bell's medical opinion that he could return to gainful employment within three years of leaving employment, or his NPA. The Adjudicator said consideration could only be given to whether the IRMP fulfilled their role in accordance with Regulation 36 of the LGPS Regulations which, in the Adjudicator's view, Dr Halliday-Bell had.
- WCC was only expected to review the medical evidence from a lay perspective and check for any errors or omissions of fact by the IRMP and any

misunderstandings of the LGPS Regulations. WCC was not expected to challenge the IRMP's medical opinion.

- The evidence did not support a finding that WCC should not have relied on Dr Halliday-Bell's certified opinion when it decided to award Mr N Tier 3 IHRP benefits.
 - While WCC and the IRMP were not required to seek Mr N's GP's opinion, the GP stated that Mr N's conditions were chronic and stable, with no further medical intervention planned. The GP did not provide a prognosis or details of how Mr N's conditions affected his ability to carry out "light duties" so, in the Adjudicator's view, there was no reason for WCC, or the IRMP, to have sought further clarification before reaching a decision.
 - Mr N was awarded Tier 2 IHRP benefits at the 18-month review, but this did not mean that the original decision to award Tier 3 IHRP benefits was incorrect. The expectation in 2018/19 was that Mr N would be capable of undertaking gainful employment within three years of leaving WCC. The fact that this did not come to fruition did not invalidate the decision to award Tier 3 IHRP benefits.
19. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his further comments which do not change the outcome. In summary, he said:-
- He had no disagreement with the way WCC followed its protocols.
 - He disputed Dr Slavin's opinion that he could undertake gainful employment before his NPA.
 - Had Dr Slavin requested his orthopaedic surgeon's opinion and undertaken "a more professional approach", he may have concluded that Mr N had a reduced likelihood of undertaking gainful employment before his NPA.
20. I note the additional points raised by Mr N but I agree with the Adjudicator's Opinion.

Ombudsman's decision

21. Mr N believes that he should have been awarded Tier 1 IHRP benefits and that Dr Slavin did not fully consider his GP's report or obtain his orthopaedic surgeon's opinion.
22. In this matter, it is not for me to review the medical evidence and decide whether Mr N is entitled to Tier 3 or Tier 1 IHRP benefits. I am primarily concerned with the decision-making process. It is not relevant whether I agree or disagree with the actual decision that was made.
23. WCC was required to assess Mr N's eligibility for IHRP benefits in accordance with the LGPS Regulations 2013, and the opinion of an IRMP. In Mr N's case, under

Regulation 36 of the LGPS Regulations 2013, Dr Slavin was required to give his opinion on whether Mr N satisfied Regulation 35 of the LGPS Regulations 2013, and the period for which he was unlikely to be capable of undertaking gainful employment.

24. It was for Dr Slavin to decide whether he had sufficient medical evidence to give his opinion or whether he required information from Mr N's orthopaedic surgeon or GP. It should also be noted that a difference of medical opinion between Mr N's treating doctors and Dr Slavin is not sufficient for me to be able to say that WCC's acceptance of Dr Slavin's opinion means that its original decision was not properly made.
25. WCC accepted Dr Halliday-Bell's August 2019 opinion and Mr N was subsequently awarded Tier 3 IHRP benefits from the termination date of his employment.
26. I am satisfied that the relevant LGPS Regulations 2013, have been correctly applied and that appropriate medical evidence was considered. I find no grounds to conclude that WCC erred in its decision.
27. I do not uphold Mr N's complaint.

Anthony Arter

Pensions Ombudsman
21 October 2021

Appendix

28. Regulation 35, “Early payment of retirement pension on ill-health grounds: active members” provides:

(1) An active member who has qualifying service for a period of two years and whose employment is terminated by a Scheme employer on the grounds of ill-health or infirmity of mind or body before that member reaches normal pension age, is entitled to, and must take, early payment of a retirement pension if that member satisfies the conditions in paragraphs (3) and (4) of this regulation.

(2) The amount of the retirement pension that a member who satisfies the conditions mentioned in paragraph (1) receives, is determined by which of the benefit tiers specified in paragraphs (5) to (7) that member qualifies for, calculated in accordance with regulation 39 (calculation of ill-health pension amounts).

(3) The first condition is that the member is, as a result of ill-health or infirmity of mind or body, permanently incapable of discharging efficiently the duties of the employment the member was engaged in.

(4) The second condition is that the member, as a result of ill-health or infirmity of mind or body, is not immediately capable of undertaking any gainful employment.

(5) A member is entitled to Tier 1 benefits if that member is unlikely to be capable of undertaking gainful employment before normal pension age.

(6) A member is entitled to Tier 2 benefits if that member—

(a) is not entitled to Tier 1 benefits; and

(b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment; but

(c) is likely to be able to undertake gainful employment before reaching normal pension age.

(7) Subject to regulation 37 (special provision in respect of members receiving Tier 3 benefits), if the member is likely to be capable of undertaking gainful employment within three years of leaving the employment, or before normal pension age if earlier, that member is entitled to Tier 3 benefits for so long as the member is not in gainful employment, up to a maximum of three years from the date the member left the employment.

29. Regulation 36, “Role of the IRMP” provides:

(1) A decision as to whether a member is entitled under regulation 35 (early payment of retirement pension on ill-health grounds: active members) to early payment of retirement pension on grounds of ill-health or infirmity of mind or body, and if so which tier of benefits the member qualifies for, shall be made by the member's Scheme employer after that authority has obtained a certificate from an IRMP as to—

(a) whether the member satisfies the conditions in regulation 35(3) and (4); and if so,

(b) how long the member is unlikely to be capable of undertaking gainful employment; and

(c) where a member has been working reduced contractual hours and had reduced pay as a consequence of the reduction in contractual hours, whether that member was in part time service wholly or partly as a result of the condition that caused or contributed to the member's ill-health retirement.³

(2) An IRMP from whom a certificate is obtained under paragraph (1) must not have previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested.

(2A) For the purposes of paragraph (2) an IRMP is not to be treated as having advised, given an opinion on or otherwise been involved in a particular case merely because another practitioner from the same occupational health provider has advised, given an opinion on or otherwise been involved in that case.⁴

(3) If the Scheme employer is not the member's appropriate administering authority, it must first obtain that authority's approval to its choice of IRMP.

(4) The Scheme employer and IRMP must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation and regulations 37 (special provision in respect of members receiving Tier 3 benefits) and 38 (early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members).

30. Regulation 37, "Special provision in respect of members receiving Tier 3 benefits", provides:

(1) A member in receipt of Tier 3 benefits who attains normal pension age continues to be entitled to receive retirement pension and ceases to be regarded as being in receipt of Tier 3 benefits from that date, and nothing in the remainder of this regulation applies to such a person.

(2) A member who receives Tier 3 benefits shall inform the former Scheme employer upon starting any employment while those benefits are in payment and shall answer any reasonable inquiries made by the authority about employment status including as to pay and hours worked.

(3) Payment of Tier 3 benefits shall cease if a member starts an employment which the Scheme employer determines to be gainful employment, or fails to answer inquiries made by the employer under paragraph (2), and the employer may recover

³ Reg. 36(1)(c) substituted (with effect in accordance with reg. 1(2)(b) of the amending S.I.) by The Local Government Pension Scheme (Amendment) Regulations 2015 (S.I. 2015/755), regs. 1(2), 13(a)

⁴ Reg. 36(2A) inserted (with effect in accordance with reg. 1(2)(b) of the amending S.I.) by The Local Government Pension Scheme (Amendment) Regulations 2015 (S.I. 2015/755), regs. 1(2), 13(b)

any payment made in respect of any period before discontinuance during which the member was in an employment it has determined to be gainful employment.

(4) A Scheme employer may determine that an employee has started gainful employment for the purposes of paragraph (3) if it forms the reasonable view that the employment is likely to endure for at least 12 months and it is immaterial whether the employment does in fact endure for 12 months.

(5) A Scheme employer must review payment of Tier 3 benefits after they have been in payment for 18 months.

(6) A Scheme employer carrying out a review under paragraph (5) must make a decision under paragraph (7) about the member's entitlement after obtaining a further certificate from an IRMP as to whether, and if so when, the member will be likely to be capable of undertaking gainful employment.

(7) The decisions available to a Scheme employer reviewing payment of Tier 3 benefits to a member under paragraph (5) are as follows—

(a) to continue payment of Tier 3 benefits for any period up to the maximum permitted by regulation 35(7) (early payment of retirement pension on ill-health grounds: active members);

(b) to award Tier 2 benefits to the member from the date of the review decision if the authority is satisfied that the member—

(i) is permanently incapable of discharging efficiently the duties of the employment the member was engaged in, and either

(ii) is unlikely to be capable of undertaking gainful employment before normal pension age, or

(iii) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment, but is likely to be able to undertake gainful employment before reaching normal pension age; or

(c) to cease payment of benefits to the member.

(8) A member whose Tier 3 benefits are discontinued under paragraph (3) or (7)(c) is a deferred pensioner member from the date benefits are discontinued and shall not be entitled to any Tier 3 benefits in the future.

(9) A Scheme employer which determines that it is appropriate to discontinue payment of Tier 3 benefits for any reason shall notify the appropriate administering authority of the determination.

(10) A Scheme employer may, following a request for a review from a member in receipt of Tier 3 benefits or within 3 years after payment of Tier 3 benefits to a member are discontinued, make a determination to award Tier 2 benefits to that member from the date of the determination, if the employer is satisfied after obtaining

a further certificate from an IRMP, that the member is permanently incapable of discharging efficiently the duties of the employment the member was engaged in, and either—

(a) is unlikely to be capable of undertaking gainful employment before normal pension age; or

(b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment, but is likely to be able to undertake gainful employment before reaching normal pension age.

(11) The IRMP who provides a further certificate under paragraphs (6) or (10) may be the same IRMP who provided the first certificate under regulation 36(1) (role of the IRMP).

(12) Where the member's former employer has ceased to be a Scheme employer, the references in paragraphs (5) to (7), (9) and (10) are to be read as references to the member's appropriate administering authority.