CAS-44132-Q4C5

Ombudsman's Determination

Applicant	Ms N
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondent	Northamptonshire County Council (**the Council**)

Outcome

1. I do not uphold Ms N's complaint and no further action is required by the Council.

Complaint summary

2. Ms N's complaint against the Council concerns its decision not to award her an ill health retirement pension (**IHRP**) from active status in the Scheme.

Background information, including submissions from the parties

3. Regulations 35 and 36 of the Local Government Pension Scheme 2013 (SI 2013/2356) (as amended) (**the Regulations**), apply to ill health retirement from active status. Relevant sections of the Regulations are set out in Appendix 1.

4. Ms N worked as a Night Care and Support Assistant at a residential home with the Council. From 7 July 2018, Ms N went on sickness absence due to Scheuermann's disease and a lower back condition.

5. In January 2019, the Council referred Ms N to Occupational Health (**OH**) for an assessment. In his report dated 11 January 2019, Dr Edet of OH concluded that Ms N was currently unfit for work, and it remained to be seen whether she would regain fitness with further interventions.

6. Ms N subsequently applied for an IHRP in May 2019 and was referred to an independent registered medical practitioner (**IRMP**) for an assessment. In his report dated 24 May 2019, an IRMP, Dr Charlson, concluded that Ms N, with available treatments and might be able to return to her role at some stage before normal retirement age. On that basis, Ms N's application was unsuccessful. Relevant sections of Dr Charlson's report are set out in Appendix 2.

7. Following an absence review meeting dated 8 July 2019, Ms N's employment was terminated with effect from 15 July 2019, on the grounds of capability.

8. In August 2019, Ms N raised an appeal under stage one of the Scheme's internal dispute resolution procedure (**IDRP**). In her submissions, she provided the results of MRI scans from September 2018 and August 2019, relevant sections of which are set out in Appendix 2. She said in summary:-

   - Her mental and physical health had been deteriorating since 7 July 2018. She had been in continuous pain and on strong pain killers.
   - She had to use a walking stick and needed help with daily activities. Her partner had to help her with dressing and bathing.
   - She felt she was unable to work due to bulging discs. She was unable to sit down for more than three minutes as her back would seize and get painful.
   - She let her employer know about the MRI results, but she felt it was not interested and wanted to get rid of her.
   - She wanted the Council to reconsider its decision to refuse her an IHRP.

9. On 17 October 2019, the Stage One decision maker on behalf of the Council sent Ms N his decision that said in summary:-

   - Before making a decision, the Council must obtain a certificate from an IRMP providing an opinion whether Ms N suffered from a condition that rendered her permanently incapable of discharging efficiently the duties of the relevant employment because of ill health or infirmity of mind or body.
   - The IRMP had considered all of Ms N's relevant evidence including reports from OH and her GP.
   - In his view, the IRMP's medical opinion "offered a sound basis for the employer to make an ill health retirement decision. The certificate and report was produced some six weeks before the employer's ill health retirement decision."
   - He also considered whether there was any new evidence provided during the IDRP. For instance, whether treatment had moved on since the decision was made, or that the IRMP did not have sufficient or correct information when the opinion was presented.
   - The information provided was in respect of two MRI results dated September 2018 and August 2019. These had been carefully considered, and his view was that they neither introduced new information regarding Ms N's condition nor had an impact on the original decision.
   - Having reviewed the complete set of paperwork, he could find no evidence to indicate that due process had not been followed in this case; or that the

Regulations had not been applied correctly. Therefore, Ms N's appeal was turned down.

10. On 22 October 2019, Ms N appealed further under stage two of the IDRP. In her submissions, Ms N did not provide additional medical evidence but said in summary:-

- Her back condition was of a chronic nature which caused her "orrific" pain.
- The medication she had been on did not help as she was still in pain.
- Her condition was progressive and would get worse, so she would like her appeal to be reconsidered.
- She was now extremely depressed.
- The Council's decision was unjustifiably wrong.

11. On 11 December 2019, the stage two IDRP decision maker on behalf of the Council, sent Ms N her decision that said in summary:-

- The criteria under the Regulations must be met in order to be eligible for an IHRP. Before making its decision, the Council must obtain a certificate from an IRMP.
- The IRMP, Dr Charlson, was of the opinion that based on all relevant medical evidence available at the time of Ms N leaving her employment, she was not permanently incapable of discharging efficiently the duties of her employment because of her ill health or infirmity of mind or body.
- She had considered the detailed stage one decision and found that the correct procedures were followed by the Council. Ms N had not provided any additional evidence at stage two which would persuade her to challenge the IRMP's opinion, which had been considered only a few months previously.
- The IRMP said there were further treatments available which might improve her condition over time. On that basis, Ms N's appeal had been turned down.

12. In her complaint submissions to The Pensions Ombudsman (**TPO**), Ms N referred to her current condition having not improved. She said that: (a) she has now been referred to an ophthalmologist and a neurologist; (b) she has lost peripheral vision; and (c) she has been told that she will need hearing aids in both ears which "has taken a toll".

Adjudicator's Opinion

13. Ms N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council. The Adjudicator's findings are summarised below.

14. Members' entitlement to benefits when taking early retirement due to ill-health are determined by the scheme rules or regulations. The scheme rules or regulations determine the circumstances in which members are eligible for ill-health benefits, the conditions they must satisfy and the way in which decisions about ill-health benefits must be taken.

15. In Ms N's case the relevant regulations are Regulation 35 and 36 of the Scheme (see Appendix 1). Regulation 36 states that: "A decision as to whether a member is entitled under Regulation 35…to early payment of a retirement pension…shall be made by the Scheme employer…" In this case, the Council, as Ms N's employer, was the decision-maker.

16. The Council, after obtaining a certificate from an IRMP, needed to consider Ms N's IHRP application in line with the Scheme's Regulations and properly explain why her application could, or could not, be approved. It must ask the right questions and consider only relevant information before reaching a reasonable decision.

17. Regulation 35(3) and (4) of the Regulations states that:

> "(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."

18. If Ms N met the two conditions, the Council could then consider which tier of benefits she should receive. The tier of benefits awarded depended upon the likelihood that Ms N would be capable of undertaking gainful employment at some time before her normal pension age.

19. The IRMP, Dr Charlson, was required to consider the medical evidence up to the date Ms N's employment ended, which was 15 July 2019. This was because she applied for an IHRP as an active member of the Scheme. So, all the medical evidence post-dating her employment could not be considered by Dr Charlson. Dr Charlson's opinion was that there remained considerable scope for further management of her condition which was compatible with the opinion of Ms N's GP. These were pain management and if necessary, referral to a pain management and orthopaedic intervention. Also, physiotherapy, a combined functional rehabilitation programme or physical therapies including hydrotherapy were available to Ms N which could improve her condition.

20. He concluded that Ms N would not have met the criteria for an IHRP. Although she was currently unfit to return to her post, with further treatments, on the balance of probabilities, she might return to her work before her pension age. In the Adjudicator's view, Dr Charlson's opinion was in line with Ms N's GP's opinion.

21. At the appeals, Ms N disagreed with the IRMP's assessment and provided MRI reports from September 2018 and August 2019 which confirmed her diagnosis. While the Adjudicator appreciated Ms N disagreed with the assessment, the Adjudicator considered Dr Charlson's report carefully and she was satisfied that he considered all the relevant medical evidence which was available at the time Ms N's employment was terminated.

22. The Council made its final decision based on the IRMP's report. While the Council could be expected to actively review Dr Charlson's report, it was only expected to do so from a lay perspective. It was not expected to challenge a medical opinion and the Adjudicator could see no reason for it to have queried the content of Dr Charlson's report.

23. In the Adjudicator's view, the Council had considered all the relevant evidence and abided by the Regulations. It had considered the relevant factors in arriving at its decision not to grant Ms N an ill health pension from active status. There were no grounds for the Adjudicator to say that the Council's decision was flawed or that the process it undertook in reaching its decision was incorrect.

24. The Adjudicator noted that Ms N referred to her current condition having deteriorated. However, the Council's decision can only be assessed by reference to the medical evidence which was, or could have been, available at the time the decision was taken. Ms N had to be able to satisfy the criteria set out in the Regulations at the time her employment ceased. Consequently, it was the Adjudicator's opinion that this complaint should not be upheld.

25. Ms N did not accept the Adjudicator's Opinion and, in response, provided further comments. In summary she said:-

    - She is not happy with the Council's decision not to award her an IHRP.
    - She referred to the employment matter in that she was "sacked due to incapability to do her job". She is not happy that the employer did not tick the relevant box in the application form to reflect this.
    - She is not happy that Dr Charlson did not have a face to face assessment with her as she had never met him.
    - She is left with the Council saying that she will be back at work in three years' time. But the reality is, she will not be and sadly there is nothing she can do about it.

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

Ombudsman's decision

27. Ms N is unhappy that the Council refused her application for an IHRP.

28. My role in this matter is not to look at the medical evidence and make my own decision based upon it, it is to consider whether the Council made its decision in the right way based on the available evidence. From the information provided by all parties to the complaint, I agree with the Adjudicator that the Council made its decision, concerning Ms N's IHRP application in the correct way, for broadly the same reasons as set out in paragraph 23 above.

29. I appreciate Ms N is not happy that the employer did not tick the relevant box in the application form regarding the reason her employment had been terminated. While it could have been helpful for the Council to tick the relevant box, I find the outcome of Ms N's case has not been adversely affected by this.

30. Ms N wanted to have a face to face assessment with Dr Charlson. There is no requirement under the Regulations for this to take place. It is for the IRMP, to decide, based on all available evidence, whether a face to face assessment is required. I consider that the absence of a face to face assessment does not mean that the Council's decision was made incorrectly.

31. I am satisfied that the relevant Regulations have been correctly applied and that the relevant medical evidence was considered. I find no grounds to remit the decision back to the Council for reconsideration.

32. Ms N may wish to contact the Council regarding an option to submit a new application for an IHRP from a deferred status.

33. I do not uphold Ms N's complaint.

Anthony Arter

Pensions Ombudsman
7 June 2022

Appendix 1

The Local Government Pension Scheme 2013 (SI 2013/2356) (as amended)

Regulations 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."

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.

(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.

(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)."

Appendix 2

34. MRI Spine Lumbar/Sacral dated 2 August 2019:

"44 F with acute on chronic back pain.

Conclusion

Spondylotic change in the lower thoracic and lower lumbar spine with suspected minor impingement on the exiting left L4 nerve root."

35. MRI Spine Lumbar/Sacral dated 17 September 2018:

> "Clinical information: No contra indications: back injury about 8 weeks ago not responding to typical measures.
>
> …
>
> Conclusion
>
> Disc space narrowing and vertebral endplate irregularity around the thoracolumbar junction suggesting lumbar Scheuermann's disease with no significant nerve root compression identified."

36. In his report dated 29 March 2019, GP, Dr Kochhar said:

> "She is on the full dose of tramadol. We are currently increasing Gabapentin. She was referred to physio but unfortunately there was a mix up with appointments. She has since been re referred.
>
> Physio is likely to be the mainstay of her treatment. We have some scope to increase her Gabapentin further or to try a different neuropathic agent.
>
> It is difficult to comment on progress but hopefully with both physio and optimisation of her analgesia she will hopefully improve.
>
> Currently I cannot see any end date to her medical certificates.
>
> She may benefit from a less active job."

37. In his report dated 24 May 2019, Dr Charlson said:

> "In your first referral you noted that Ms N initially reported pain in her shoulders which she has stated resulted from rolling a client in their bed. She subsequently developed pain in her low back when she was walking home from work.

…

Ms N reported that an MRI scan a few months ago had shown spondylolisthesis in her lower back and Scheuermann's disease. At the time of that consultation in January she was observed walking with a slow gait and had tenderness over the lower aspect of her back with a mild abnormality of her upper spine but no associated tenderness. Dr Edet advised that it was likely that the Scheuermann's disease was of long-standing. It was noted that the spondylolisthesis would also probably be of long-standing. It was noted that Ms N was unfit for work at that time but was awaiting further interventions.

The GP report from Dr Kochar notes that Ms N suffers from low back pain. Initially she was rolling a patient at work when she experienced some upper thoracic pain but this had settled. However she was experiencing considerable amount of pain with her low-back. An MRI scan was done which suggested Scheuermann's disease but no significant nerve root compression. Spondylolisthesis is not specifically mentioned in the GP's report. The GP notes that Ms N was on pain relief and had been referred to physiotherapy but unfortunately there was a mix up of appointments and she has had to be re-referred. The GP was hopeful that with both physiotherapy and optimisation of pain relief she would improve but was unable to give a likely end date to her current sickness absence and noted that she might benefit from a less active job.

The most recent advice from Dr Edet notes that Ms N has now seen a physiotherapist and has been told that she has a scoliosis; that is an abnormal curvature in her lower spine. As previously noted she is using pain relief. Unfortunately the physiotherapists were not able to provide any significant intervention due to the level of pain she was experiencing. Moreover she missed a physiotherapy appointment due to a family emergency and this is being rescheduled.

Ms N notes that she did not attend the cardiology appointment because she forgot. She admits to be reluctant to find out about the heart disease and reports she has not had any further fainting episodes since the initial one…

At the time of the consultation Ms N described spinal aches affecting the whole spine with intermittent pain in her leg. She feels that her muscles are very tight. She struggles with walking more than about six minutes and also struggles with stairs.

She apparently has support from her partner and older children with household chores. She reports that she has had a number of falls at home due to loss of balance. She reports she is not able to kneel or squat and was observed to walk very slowly.

She has had some x-rays of her hip organised by her GP recently but is awaiting results and is not aware of any pending hospital appointments.

Rationale

It would appear from Dr Edet's most recent report that she remains unfit to return to her role as a night care and support assistant at this time. However there remains considerable scope for further management of her condition. This may be both with optimising pain management and if necessary referral to a pain management clinic which will be available in her area. There may be scope for orthopaedic intervention. If it is deemed that the Scheuermann's disease itself is responsible for her ongoing back pain. Again physiotherapy may have a place as may a combined functional rehabilitation programme. Optimising pain relief may facilitate interventions from physical therapies including hydrotherapy.

…

At the moment then Ms N is unfit for work through back pain but noting both the GP's comments and Dr Edet's information permanence of incapacity does not yet appear to have been established because of the availability of treatments that may potentially help her and improve her symptoms sufficiently to return to her previous work.

On that basis whilst I am not able to give a likely date of return to work I am unable to confirm that Ms N will not, at some stage in the future before her normal retirement age, be able to return to work.

Opinion

Therefore having considered the application and the evidence there is in my opinion no reasonable medical evidence that Ms N is permanently prevented from performing her duties. On this occasion it is my opinion that the scheme's definition as outlined above is on the balance of probabilities unlikely to be met."