CAS-44294-Y8Z0

Ombudsman's Determination

Applicant	Mr F
Scheme	Local Government Pension Scheme (the **Scheme**)
Respondent	Manchester City Council (the **Council**)

Outcome

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

Complaint summary

2. Mr F says there were several procedural failures by the Council in processing his application for ill health retirement from active membership of the Scheme. Mr F also says the Council provided conflicting advice about the appeals process.

Background information, including submissions from the parties

3. Mr F is currently a deferred member of the Greater Manchester Pension Fund (the **Fund**), which is part of the Scheme.

4. Mr F was employed as a full-time Customer Services Officer.

5. In 2016, concerns were identified about Mr F's problem solving, decision making and analytical skills. In January 2017, he was placed on other duties as an alternative to suspension, pending investigation and hearing. Mr F commenced sickness absence on 3 May 2017. A sick note cited a stress related problem. The hearing was held on 16 May 2017 and Mr F was offered an alternative role, Customer Service Advisor, which he accepted. He remained on sickness absence and his GP prescribed anti-depressants. Mr F advised that he was experiencing chest pains and his GP was arranging tests. Mr F was referred to the Council's Occupational Health provider (**Healthworks**) who deemed him temporarily unfit for work. Counselling sessions were arranged to support Mr F with his anxiety. Mr F saw a cardiologist in September 2017. An ECG evidenced an extra beat which the cardiologist advised might be stress related. Further tests were arranged. Mr F attended Healthworks in October 2017, who concluded that Mr F remained unfit for work and recommended a further review should be arranged once the results of the cardiac investigations were known. Mr F remained on sickness absence.

6. On 2 February 2018, the Council wrote to Mr F confirming its decision to dismiss him on the grounds of medical capability due to ill health. The letter also confirmed the Council's decision to assess Mr F for ill health retirement from active status.

7. The relevant regulations are 'The Local Government Pension Scheme Regulations 2013' (SI2013/2356) (as amended) (the **2013 Regulations**). Regulation 35 provides for ill health retirement from active status. It provides for three tiers of benefits depending upon the member's level of incapacity for future employment. Briefly:-

   - Tier 1 The member is unlikely to be capable of undertaking gainful employment before normal pension age.

   - Tier 2 The member is unlikely to be capable of undertaking any gainful employment within three years of leaving employment but is likely to be capable of such employment before normal pension age.

   - Tier 3 The member is likely to be capable of undertaking gainful employment within three years of leaving employment (or before normal pension age if earlier).

8. Extracts from the relevant regulations are provided in Appendix 1.

9. Mr F was referred for assessment to Healthwork. Dr Kisnah, an independent registered medical practitioner (**IRMP**) gave his opinion that, while Mr F was currently unfit for his duties as a Customer Service Advisor, he was not, on the balance of probabilities, permanently incapable of discharging his duties. Extracts from Dr Kisnah's report are provided in Appendix 2.

10. The Council accepted Dr Kisnah's opinion. On 2 April 2018, the Council wrote to Mr F with its decision (the **first instance decision**) that he did not meet the criteria for ill health retirement from active status and detailed his right of appeal using the Scheme's internal dispute resolution procedure (**IDRP**).

11. Mr F's employment with the Council formally ended on 27 April 2018.

12. On 8 May 2018, Mr F wrote to the City Treasurer applying for the early release of his deferred pension on compassionate and financial grounds. Mr F said:-

    - Once he had new medical reports, he would either appeal the first instance decision or request a fresh ill health retirement application. In the meantime, his personal circumstances and hardship had compelled him to seek help.

    - His only source of income was Employment and Support Allowance (**ESA**). The DWP would not help him with paying mortgage interest, council tax, service charge and ground rent on his flat, as he still shared joint ownership of the family home with his ex-wife. He had moved out of the family home 12 years ago following the complete breakdown in their marriage. The family home had been adapted to meet the physical difficulties of their son.

- He would be 56 on 3 June 2018 and had around 31 years unbroken service. He wanted to request the early release of his pension under the rule of 85[1]. If this discretion could not be agreed quickly then he risked going further into debt and ultimately losing his flat. While the family home could be sold it would take time and the local authority would have to rehouse his ex-wife and son which would be very time consuming and distressful.

- His anxiety and depression had reached a peak.

13. On 7 June 2018, the City Treasurer wrote to Mr F declining his application. She said:-

- Under its current discretions policy, the Council did not exercise the discretion to switch on the rule of 85.

- She had considered his request on compassionate grounds.

- She noted that he had cited ill health but had not applied for his deferred benefits on those grounds and had said that early retirement would not be enough for him to live on.

- After careful consideration she was not willing to support the early release of his pension on compassionate or financial grounds. Releasing his pension early would result in a pension cost to the Council. He did not meet the compassionate criteria defined in its policy nor in terms of his financial position. She noted that he had equity in another property and was currently in receipt of ESA.

- If he was dissatisfied with the Council's decision[2], he could invoke the Scheme's two-stage IDRP. She summarised the process, provided the Fund's website address for more information and the Fund's helpline telephone number.

14. On 2 October 2018, Mr F appealed the City Treasurer's decision. There followed several communications between Mr F and the Council in October, November and December 2018, pertaining to it. An outcome letter declining Mr F's appeal was issued on 11 December 2018.

15. The same day Mr F telephoned the Council saying that he had had some bad news about his health. He said he would provide more information, following a health review with his GP.

[1] Age plus membership must add up to 85 years. The LGPS employer can choose to allow the rule of 85 to apply. This is a discretion. If a member chooses to voluntarily draw their pension on or after age 55 and before age 60 and their employer does not choose to allow the rule of 85 to apply, their benefits are reduced.

[2] The April 2018 first instance decision. This is confirmed by the City Treasurer in her subsequent Stage One decision (see paragraph 25).

16. On 13 December 2018, Mr F emailed the Council's pensions team enquiring about an ill health application from deferred status. The same day an application letter, application and consent form and ill health booklet were posted to Mr F.

17. On 8 January 2019, Mr F telephoned the Council asking if he could appeal the Council's first instance decision. He said he had been diagnosed with cerebral small vessel disease on 9 October 2018, within six months of the first instance decision. As the appeal deadline had passed, he wanted to know if he could still appeal. He was told that he could appeal.[3]

18. On 4 March 2019, the Council wrote to Mr F that, if it did not receive his completed application for ill health retirement from deferred status by 13 March 2019, it would close his current application and he would have to re-apply. The Council received no response from Mr F.

19. On 24 April 2019, Mr F saw Dr Tharaken (Consultant in Old Age Psychiatry). In a report dated 30 April 2019 to Mr F's GP, Dr Tharaken said:-

    - Mr F had been under Healthy Minds for cognitive behavioural therapy to address his depression and anxiety. There remained an element of low mood present even though he had been on S… for more than two months.

    - He had type two diabetes mellitus and hypertension and hypercholesterolemia.

    - He performed well on the Addenbrooke's scoring 87/100 with decent performance on his frontal lobe screen and his problem-solving tasks. ECG was essentially normal except for one ventricular ectopic. Blood tests were within the range for someone with diabetes. MRI brain scan showed multiple white matter lesions.

    - Mr F had vascular mild cognitive impairment which was further compounded by his mood. It was highly unlikely that his memory problems would improve, however the prognosis depended heavily on how well he managed and monitored his cardiovascular risk factors, which were primarily hypercholesterolemia, hypertension and diabetes.

    - He had also discussed with Mr F the possibility of how to approach mood and had again explained to him that, if the maintaining factor for his mood was ongoing concern about his future physical health, then there were limitations on how much the antidepressants would help. A change of antidepressant or approaching lifestyle changes and staying on the same treatment for now was also discussed. Mr F was keener on the latter option.

[3] It appears that Mr F first spoke with the Council's technical pensions team who were unaware that he had unsuccessfully applied for ill health retirement from active status. Mr F then spoke with HR. Mr F says HR told him that he could appeal.

- If there was a change in antidepressant treatment, he suggested that Mr F be weaned off S… and consider D… Bearing in mind Mr F's history of diabetes, it could also be helpful for peripheral neuropathy/neuropathic pain going forward.

- He had highlighted concerns raised about Mr F driving. Mr F had agreed to contact the DVLA. He had recommended that Mr F have a driving assessment and he was making a referral to the driving assessment centre.

- He was discharging Mr F from the Memory Clinic as it could not provide active treatment for his diagnosis.

20. On 15 May 2019, with the assistance of the Citizens Advice Bureau, Mr F wrote to the Council appealing its first instance decision. Mr F said:-

    - He had been too ill to appeal within six months of the Council's April 2018 decision.

    - A diagnosis of cerebral small vessel disease had been made within six months of the Council's decision but due to the nature of his illness he did not think he could appeal as he thought the Council's decision had been made in 2017. He had spoken to HR[4] who had informed him he could appeal because of his illness.

    - He received the diagnosis of cerebral small vessel disease on 9 October 2018. He had been told it was possibly due to diabetes. It was causing vascular mild cognitive impairment and could lead to dementia with age and time.

    - He also had diabetes type 2, high blood pressure, anxiety and depression, ectopic heartbeats and idiopathic dizziness.

    - Up to a year before his dismissal, his performance had been monitored as he was underperforming and making mistakes. Following suspension, he was demoted without referral to Occupational Health, when it was known he had diabetes/disability and it could have been the cause. If he had been referred to Occupational Health, "they might have come up with a way to support me".

    - When he was referred for ill health retirement there was no referral to Occupational Health or the Capability Review.

    - The Council's ill health retirement policy stated that the IRMP should have access to an Occupational Health Report.

21. With the letter was enclosed Dr Kisnah's 9 April 2018 report and a report from Dr Bizzi (Consultant Radiologist) dated 9 October 2018. Dr Bizzi detailed the results of an MRI IAM pertaining to Mr F's "ongoing dizziness/light headedness". Under 'CONCLUSION', Dr Bizzi said:

[4] See paragraph 17.

> "Normal brain. IAMs within normal limits. No signs to suspect retrocochlear pathology. Several scattered small foci with signal abnormality in the bilateral subcortical and periventricular white matter [Fazekas 1].
>
> The white matter lesions mentioned in the report are probably of ischaemic origin due to small vessel disease. Please evaluate if there are any vascular risk factors which explain this."

22. The Council's Appointed Person (the City Treasurer) decided that Mr F's appeal was out of time. She said:-

- Under the IDRP[5] Mr F had six months to submit his appeal. As the Stage One referee she could extend the deadline.
- The Council's first instance decision was confirmed to Mr F in its letter of 20 April 2018. Mr F's appeal was dated 15 May 2019. During the intervening period Mr F was in contact with the pensions team about accessing his deferred benefits. In her 7 June 2018 letter to Mr F, she had confirmed that it had not received an appeal of the first instance decision.
- She saw no mitigating circumstances for Mr F not to have submitted his appeal in time.

23. Mr F invoked Stage Two of the IDRP. The Appointed Person for the Fund informed Mr F that he was unable to consider Mr F's appeal as the Council had not considered his appeal at Stage One. The Stage Two referee said:-

- The Council's first instance decision letter explained Mr F's right of appeal. He did not appeal until 15 May 2019.
- The Stage One adjudicator chose not to extend the six months' time limit for appealing the Council's decision as she could see no mitigating circumstances that would have caused Mr F to delay making his appeal. In reaching her decision the adjudicator considered Mr F's medical reason for not submitting his appeal and noted that Mr F had been in regular contact with the Council throughout the process.
- He understood that Mr F felt that he had been given conflicting information about the appeals process as the Council's pension team had informed him in early 2019 that it did not have a record of his ill health retirement application and the HR team had advised him that he could still appeal on serious ill health grounds. He believed HR was correct to inform him that he could still appeal, but it should have been made it clear that any appeal made after the six months' time limit might not be accepted.
- He could not comment on the points raised by Mr F about how the Council had implemented its Capability Policy in his case as this was not a pension matter. He

[5] Relevant extracts from the 2013 Regulations on 'Decisions' are provided in Appendix 1.

suggested that Mr F direct this part of his appeal to the appropriate person at the Council.

- Mr F had informed him that his health had not improved. Mr F was able, at any point prior to his normal pension age, to make a fresh application for the early release of his deferred pension on ill health grounds. Alternatively, as Mr F was over age 55, he could draw his pension benefits at a reduced rate.

Mr F's position

24. In his application to the Pensions Ombudsman's Office, Mr F submits:-

- The City Treasurer at Stage One IDRP said it had been confirmed in her letter of 7 June 2018 that the Council had not received his appeal and that there were no mitigating circumstances as to why he had not submitted his appeal in time. He considers this misleading.

- When he spoke to the Council's pension team[6] it had no record of his application for ill health retirement or the first instance decision and therefore it was unable to advise him on appealing the first instance decision. He then spoke with HR who handled his application. It informed him that he could still appeal, even this late, on serious ill health grounds, which would be considered as special circumstances.

- He was having a lot of financial difficulties.

- All substantial contacts with the Council were made with a lot of help from friends, family and the Citizens Advice Bureau.

- He has worked all his life and planned to work to his retirement age. To fall ill and to have to stop work has caused him much distress and worsened his mental health. He has lost his independence and needs help and support from others to manage his affairs. His income has sharply fallen. He is receiving Employment Support Allowance.

- He unsuccessfully applied for his deferred benefits (on compassionate grounds) on advice from a friend. He had to sell his share in a property to make ends meet.

- His current financial situation is dire, he is borrowing from relatives to cover mortgage payments on his flat and some bills.

- The ongoing situation with the Council about his pension benefits has caused him much distress and inconvenience.

[6] On 8 January 2019.

- He does not have the mental capacity to deal with complex matters. Since leaving work he has been relying more on friends, family and the Citizens Advice Bureau to help with appeals, letters, the DWP, etc.

- At the time, he accepted the Council's decision on ill health retirement and the IRMP's recommendation and thought nothing more could be done. Having lost his job, with worsening health and cognitive problems, he was too stressed to know what was happening and was more concerned with getting better.

- On 9 October 2018, he was diagnosed with brain damage – cerebral small vessel disease. This explained why he had been experiencing mental health problems at work. Many weeks later, during a conversation with a friend, he realised at the time of the diagnosis he still had had 11 days left to appeal the first instance decision, but now had missed the deadline. If he had had the mental capacity in October 2018, he would have submitted his appeal in time.

- From January 2016 his work performance noticeably declined. He was disciplined for making mistakes, monitored under the Council's Capability Policy, and suspended in early January 2017. He took long-term sick leave from May 2017 and was dismissed on ill health grounds in April 2018. During the intervening period he was demoted.

- While the Council acknowledged that his diabetes might have played a part in his poor performance, he was not referred to Occupational Health for support and advice. This contravened the Council's Capability Policy. Consequently, there was no Occupational Health report, which impacted negatively on his application for ill health retirement.

- Following his demotion, he was referred to Occupational Health. It then became apparent that the Council had not made Occupational Health aware of his long-term poor performance and health leading to his demotion.

- The manager who was responsible for monitoring his performance from January 2016 attended all the HR meetings throughout the whole process and had full knowledge of his poor performance, ill health, demotion and dismissal on ill health grounds. There was no reason why this information could not have been shared with the IRMP or taken into consideration by the Council when it made its decision on his ill health application.

- The IRMP reported that he was too disabled to return to work but that his condition would improve within three to six months with medication. But the consultant at the memory clinic said there was no cure for his brain damage and that it will worsen with age. The consultant likened his brain MRI scan to that of an 80-year-old and said it would have taken many years to get to this state.

25. On the Council's position (see paragraph 29), Mr F submits:-

- The Council's appeal process specifically states to send any appeal to its technical pensions team. But when he telephoned the team its system indicated that he had been dismissed and it was not aware that he had applied for ill health retirement from active status. The team was not able or willing to provide advice. The Council's response confirms that the information was held in two different places. He considers that is what lead to the conflicting advice given.

- Due to his mental health and memory problems, he spends a lot of time on his own, finds it very difficult to ask for help and needs a lot of prompting. He lives on his own. Everything takes a long time to do. There was no other reason he did not appeal the Council's first instance decision within the last 11 days of the six months appeal period following the diagnosis of cerebral small vessel disease.

- He was in contact with the Council because he had no one reliably available to represent him. He has limited capacity but can hold brief telephone conversations with the aid of pre-written questions. At times someone sat with him when he called.

- The Citizens Advice Bureau helped him on his appeal in May 2019.

- His poor performance, which led to his demotion, was due to the onset of the decline in his cognitive abilities. His performance was monitored as part of the Council's capability policy, but he should have been referred to Occupational Health, to explore the underlying health reasons for his poor performance. Consequently, this was not shared with the IRMP or considered by the Council when reaching its April 2018 decision to refuse him ill health retirement.[7]

The Council's position

26. The Council submits:-

On Mr F's complaint that it provided conflicting advice about the appeals process.

- It disagrees that it provided conflicting advice about the appeals process.

- It acknowledges that its letter of 7 June 2018 did not mention that it had not received an appeal of its first instance decision[8]. But Mr F was given information about the appeals process, including the informal and formal stages, the appeal

[7] In support of this Mr F has submitted: a capability meeting note dated 16 January 2017, the Councils 'Capability Policy' and a Healthworks Occupational Health Report dated 5 June 2017 – the initial referral after his demotion.

[8] The 7 June 2018 letter does not mention that no appeal had been received to the first instance decision. But it does contain information about the IDRP, including the 6-month deadline and a guide to appealing was enclosed with the letter.

form from the pension fund's website, and the link to the fund's website to find out more information about the appeals process. So, on more than one occasion, he was informed of the six months deadline to appeal the April 2018 decision and the Stage One Referee's discretion to extend this in special circumstances.

- On 8 May 2018, Mr F emailed Human Resources requesting the early release of his pension benefits on compassionate grounds. In an attached letter he said that his health was worsening and "once I have new medical reports, I will either appeal or request a fresh IHR application. However, rather in the meantime my personal circumstances and hardship has compelled me to seek help promptly." This demonstrates Mr F's awareness of the appeals process.

- During the period between issuing the first instance decision in April 2018 and Mr F submitting his appeal of that Determination in May 2019, he was in regular contact with its pensions team.

- In September 2018, still within the six months deadline to appeal the first instance decision, Mr F asked how he could complain about the City Treasurer's decision not to allow the early release of his deferred pension on compassionate grounds. Within a week Mr F submitted an informal complaint demonstrating his understanding of the appeals process.

- While the first new medical report is dated 9 October 2018, Mr F did not submit it in the form of an appeal until May 2019. The second new medical report submitted with his appeal is dated 30 April 2019. Neither were available at the date of the first instance decision.

- Mr F says he has been supported by friends and family and the Citizens Advice Bureau throughout. He says during a conversation with a friend it was noted that he had 11 days remaining to appeal the first instance decision. But he did not appeal or nominate a representative to appeal on his behalf.

- It has followed the relevant processes and policies and kept Mr F informed at each stage. The Scheme criteria used to make the first instance decision and the IDRP were detailed in its 20 April 2018 letter sent to Mr F.

- Any dispute about the Council's Management of Attendance Policy and process is outside the scope of the pension appeal.

On Mr F's point that its pension team was not aware of his ill health retirement application when he contacted it on 8 January 2019.

- The Council's ill health retirement process sits with the Hearing Manager, supported by Human Resources officers, and the technical pensions team would not have been aware that he had been refused ill health retirement in April 2018.

After speaking to the pensions team, Mr F contacted Human Resources who should have explained that the pension rules state that the appeal should be submitted within six months of the first instance decision, and that it would be at the Stage One referee's discretion to extend this deadline. However, this was explained in the IDRP process sent to Mr F on several occasions.

On Mr F's statement that he was demoted and that his long-term ill health and poor performance was not shared with Occupational Health.

- In its referral to Healthworks of 2 October 2017, management referred to the attendance management process, Mr F's redeployment and provided the role profile (job description) for his new job.

- Mr F's health issues were well documented in all the referrals made to Healthworks from May 2017 onwards. In the referral made in November 2017, there was reference made to his conditions including, but not limited to, his anxiety/depression, chest pains and fatigue.

- Mr F would have had the opportunity to explore any relevant issues or concerns with Healthworks.

- The detail included within its referral, dated 4 January 2018, to Dr Kisnah confirms all the information known to it at that time.

- At the time of the assessment, Dr Kisnah had full knowledge of all Mr F's known medical conditions, past and present.

- The diagnosis of cerebral small vessel disease was made after Mr F's dismissal and its first instance decision. Given that, at the time of its first instance decision, Mr F's GP and Counsellor believed his symptoms were related to a psychological condition, neither Dr Kisnah nor the Council could have known that he had this underlying condition.

- After carefully consideration of all the information made available and Dr Kisnah's opinion, the Council determined that Mr F did not meet the Scheme's criteria for ill health retirement from active membership.

On the appeal process

- Mr F's appeal at Stage One of the IDRP was deemed out of time as it was received almost 13 months after the Council's first instance decision was sent to Mr F. The Stage One Referee was satisfied that Mr F knew about the appeal process and timeline and that he had been in regular contact with the pensions team including making an informal complaint. It was considered that this further evidenced Mr F's understanding of the appeal process. It was also noted that Mr F's new diagnosis of cerebral small vessel disease had been made in October

2018 (seven months before he submitted his appeal) and he had previously acknowledged that he would need to submit any new evidence in an appeal. On this basis the Referee considered that there were no mitigating circumstances to support an extension to the appeal deadline.

- Mr F was informed about the appeal process, he had acknowledged it, and he received more than one copy of the complaint form (both posted and emailed to him for ease, and explained to him over the phone), which was available to those supporting him. Following the first instance decision Mr F remained in contact with the Council about pension matters.

On Mr F's statement that all substantial contact with the Council was with a lot of help from friends, family and the Citizens Advice Bureau.

- Mr F personally contacted the Council about pension matters on numerous times following the Council's first instance decision up to the submission of his May 2019 appeal.

- Mr F was aware of the appeal process and timeline and it was available to those supporting him whom he was able to nominate to represent him.

- The IDRP was detailed in its letter of 20 April 2018 along with the full IDRP pack, which included the pension fund's complaint form.

- On 27 September 2018, Mr F spoke with a member of the pensions team and asked where he should write to complain about City Treasurer's decision not to allow the early release of his deferred pension on compassionate grounds. Mr F was referred to the City Treasurer's 7 June 2018 letter which contained the full appeal process including the pension fund's complaint form. Mr F asked if this could be hand delivered and he was advised that it could.

Adjudicator's Opinion

27. Mr F'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 noted as follows:-

- The Adjudicator put aside Mr F's comment that the Council had contravened its Capability Policy in his case, as this was an employment matter and therefore outside of my jurisdiction to comment on.

- Members' entitlements to benefits when taking early retirement due to ill health were determined by the Scheme's Regulations.

- In Mr F's case, the relevant regulations were the 2013 Regulations. Regulation 35 provided for the early payment of benefits on the grounds of ill health. Briefly, to receive his benefits under Regulation 35, Mr F had to be:

- permanently incapable of discharging efficiently the duties of the employment that he was engaged in, and

- immediately incapable of undertaking gainful employment.

Permanently incapable meant that Mr F was likely to be incapable at least until his normal pension age (**NPA**). Gainful employment meant paid employment for at least 30 hours a week for a period of not less than 12 months.

- The decision as to whether Mr F met the eligibility requirements of Regulation 35 was for the Council to make. This was a finding of fact; Mr F either met the conditions set out in Regulation 35 or he did not. Before making any decision under Regulation 35, the Council was required to obtain a certified opinion from an IRMP.

- Had the Council determined that Mr F met the requirements for early payment of his benefits, it would then have been required to decide which tier of benefits was appropriate depending upon the level of his incapacity for employment.

- To do so, the Council was expected to consider all relevant information which was available to it and ignore any irrelevant information. The weight which it attached to any of the available relevant information was for the Council to decide, including giving some of it little or no weight. It was open to the Council to prefer the advice it received from the IRMP unless there was a cogent reason why it should not have done or should not have done without seeking clarification.

- So far as their medical opinions were concerned, IRMPs were not within my jurisdiction. They were answerable to their own professional bodies and the General Medical Council. However, if there had been an error or omission of fact on the part of the IRMP, the Council, as the decision-maker, would be expected to seek clarification. It was, therefore, appropriate to review Dr Kisnah's report.

- Dr Kisnah noted Mr F's age, his last job role as a Customer Service Advisor, that he had not been able to attend work for nearly a year and his medical history. Dr Kisnah gave his opinion that while Mr F was currently unfit for his duties as a Customer Service Advisor, he was not, on the balance of probabilities, permanently incapable. Dr Kisnah said it was clear from the medical records that Mr F's diabetes and high blood pressure were under good control and recent investigations had not identified any significant abnormality in his heart. Based on this, Dr Kisnah concluded that Mr F's current functional disability was his psychological ill health. Dr Kisnah noted that Mr F had been referred for psychological therapy and gave his opinion that this was likely to improve Mr F's general health and functional capacity in the long term. Dr Kisnah noted Mr F's duties as a Customer Services Advisor[9] and said the main barrier to his return to

[9] Mr F accepted the new role prior to his referral to Dr Kisnah, albeit he appears to have remained off sick

work was his inability to motivate himself to travel to work because of his perception of his physical symptoms. Dr Kisnah said cognitive behavioural therapy for three to six months would help Mr F overcome this perception and there was every likelihood that he could then undertake a phased return to work.

- Dr Kisnah appeared to have considered the available medical evidence at the time of Mr F's application. Mr F said that Dr Kisnah did not have the benefit of a recent report from Occupational Health because he had not been referred for support and advice. However, Dr Kisnah had had access to Mr F's Occupational Health records and his GP records. It was the Adjudicator's view that Dr Kisnah had access to sufficient relevant medical evidence on which to base his opinion.

- The diagnosis of cerebral small vessel disease was made several months after Dr Kisnah gave his opinion and the Council issued its first instance decision.

- From its decision letter, the Council appeared to have done little more than rubber-stamp Dr Kisnah's view. It did not appear to have seen the medical evidence considered by the IRMP. Nonetheless, if it had, its decision would have been unchanged. Dr Kisnah's view did not appear to have been at odds with Mr F's GP or the view of Dr Gray. But even if it was, a difference of medical opinion was not normally sufficient for me to be able to say that by accepting Dr Kisnah's opinion the Council's decision was not properly made.

- Mr F's appeal of the Council's first instance decision was made seven months after the six months deadline had expired. After considering all the circumstances of Mr F's appeal, the City Treasurer decided not to exercise discretion and allow the appeal. The decision was one that the City Treasurer could reasonably make.

- It was therefore the Adjudicator's opinion that Mr F's complaint should not be upheld.

- Mr F had the option before his normal pension age of applying for the early release of his deferred pension on the grounds of ill health.

28. Mr F did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. On behalf of his father, Mr F's son says:-

- The Council has largely based its case on the amount of contact Mr F had with it, which is inconsiderate.

- The Council appear to show contempt for the idea that Mr F was trying to apply for pension benefits on compassionate grounds. Mr F was desperate, about to lose his home due to lack of money to maintain mortgage payments. This was on top of mental health issues and cognitive impairment. Mr F was attending weekly

until his dismissal. Prior to Mr F commencing sickness absence his title was Customer Services Officer. This appears to have been a more senior role. Nonetheless, Dr Kisnah's opinion was likely to have been the same based on the medical evidence available at the time of the ill health retirement assessment.

Counselling, seeing his GP at least once a week and various Consultants quite frequently. It was absurd to assume a healthy person would have so much contact with doctors and medical professionals unless they were seriously ill.

- Even if Mr F had found someone to contact the Council on his behalf, the Council would likely have behaved in the same way.
- The Council monitored Mr F's cognitive decline from 5 January 2016 to his dismissal on ill health grounds on 2 February 2018, but still treated him as having normal capabilities when writing to my Office, even though Dr Kisnah stated that he was still quite disabled.
- Mr F was demoted to Customer Service Advisor due to his cognitive decline.
- The City Treasure at Stage One IDRP said it had been confirmed in her letter of 7 June 2018 that the Council had not received Mr F's appeal and that there were no mitigating circumstances why he had not. Mr F considered this misleading. There was no mention in the City Treasurer's 7 June 2018 letter that the Council had not received Mr F's appeal.
- The Council has not followed the correct process and gone about making its decision in accordance with its 'Ill Health Retirement Policy Statement' (the **Policy Statement**). This says, in section 5, 'Criteria for Ill Health Retirement':

  "…For the purpose of this policy statement, dismissal on ground of ill health should be imminent. The IHR needs to take place prior to the last meeting of the MOA[10] process…"

  Mr F's ill health application was put through after his dismissal date. Evidently the Council did not follow the rules for ill health retirement correctly. If they had followed the rules, the ill health retirement process should have started much earlier.
- In addition, the Fund's members' guide 'Retiring on the grounds of ill health' (the **Fund's Guide**) says "…and any non-medical factors that will affect your ability to carry out gainful employment" must also be taken into consideration by the Council when deciding ill health early retirement[11].

[10] Management of Attendance.

[11] The Fund's Guide says: "Once the approved doctor has formed an opinion, they will write to your employer with a medical certificate. It is your employer who must then decide whether or not to release your pension benefits early - and normally they will go along with the approved doctor's findings, as long as they are satisfied the approved doctor has applied the criteria for retiring on ill health correctly. Please note, your employer can give more weight to some pieces of evidence than others - for example preferring the approved doctor's opinion to that of your own GP/consultant. They should also take note of the Statutory Guidance issued by the Department for Communities and Local Government (DCLG**) and any non-medical factors that will affect your ability to carry out gainful employment.**" (my emphasis)

- The Council simply rubber-stamped Dr Kisnah's decision and failed to consider any non-medical factors.

- Cognitive decline was a major factor in Mr F's demotion, ill health and dismissal. This was not shared with Occupational Health or Dr Kisnah. The Council failed to provide the IRMP with the context of Mr F's situation surrounding his cognitive decline, which meant the IRMP's report was not fully accurate. It was perverse for the Council to suggest that Mr F should have discussed this with Occupational Health and with the IRMP.

- The Council simply rubber stamped the IRMP's decision and non-medical and contextual factors were not considered. There was no discussion with the IRMP and it did not see the medical evidence reviewed by the IRMP.

- Mr F strongly believes in justice and fairness. All the material facts he has provided are letters and documents he received from the Council. He has kept all their letters and e-mails which can provide further evidence if required.

- The Adjudicator says that Dr Kisnah's view does not appear to have been at odds with Mr F's GP or the view of Dr Gray. But Dr Kisnah did not seek the GP's view. Dr Kisnah simply used GP records that were over 3 months out of date at the time of his decision. Dr Kisnah should have sought more information about ongoing tests from his GP and his views before deciding. It is evident that Dr Kisnah had insufficient medical information to form an accurate view.

- All material facts show that the Council has treated Mr F's ill health retirement process as merely a paper exercise.

- Mr F finds the Adjudicator's opinion quite astonishing and had expected a thorough investigation of his complaint with documentary evidence provided rather than mostly relying on the Council's opinion.

- Mr F has not been able to work since his dismissal as his health has not improved. His cognitive decline has not improved since and is projected to worsen with age. He is in receipt of DWP benefits.

- Mr F has paid into the Scheme for over 32 years and feels he has been unfairly denied the early payment of his pension benefits.

29. I have noted Mr F's further comments, but they do not change the outcome, I agree with the Adjudicator's Opinion.

Ombudsman's decision

30. Mr F's son says the Council appear to show contempt for the idea that Mr F was trying to apply for pension benefits on compassionate grounds. As the Council's decision on Mr F's application for the early release of his deferred benefits on compassionate grounds is not part of the complaint that my Office accepted for

investigation, I have set the comment aside. Mr F may submit a separate complaint to my Office if he considers the Council's decision in this regard was not properly made.

31. Mr F's view that the Council contravened its Capability Policy is an employment matter and not within my remit.

32. Turning now to Mr F's ill health retirement application from active membership of the Scheme.

33. Under Regulation 36, before making its decision, the Council was required to obtain the certified opinion of an IRMP on Mr F's ill health retirement application. The Council duly obtained the opinion of Dr Kisnah (IRMP).

34. Mr F's son says that the Council failed to provide Dr Kisnah with the context of Mr F's situation surrounding his cognitive decline, which meant Dr Kisnha's report was not fully accurate.

35. But Dr Kisnah had access to Mr F's Occupational Health records, GP records and reports from treating specialists: Drs Gray and Khan. Dr Kisnah noted Mr F's age, that he had been employed by the Council for over 25 years and his last role was as a Customer Service Advisor, but he had not been able to attend work for nearly one year. Dr Kisnah gave his opinion that while Mr F was currently unfit for the duties of a Customer Service Advisor, he was not, on the balance of probabilities, permanently incapable.

36. It is not clear from Dr Kisnah's report that he was aware that Mr F had been demoted from Customer Service Officer to Customer Service Adviser, albeit he did not commence the duties of the latter as he remained on sick leave up to the date of his dismissal. Nonetheless, I agree with the Adjudicator that Dr Kisnah's opinion was likely to have been the same based on the medical evidence available at the time of the ill health retirement assessment. The change in job role would have confirmed Mr F's cognitive difficulties at that time, but this information was available to Dr Kisnah from other sources. At the time, Mr F's cognitive difficulties were thought to be mainly the result of his poor psychological health, which Dr Kisnah referenced. The diagnosis of cerebral small vessel disease had not been made at this time.

37. Mr F's son says that Dr Kisnah failed to obtain up to date medical evidence from Mr F's GP. But it was for Dr Kisnah to decide whether he had sufficient medical evidence to give his recommendation to the Council. Clearly, Dr Kisnah considered that he had sufficient medical evidence. The GP records covered the period up to January 2018 and the cardiologist's report was dated February 2018. I do not find that this evidence can be said to be significantly out of date at the time of Dr Kisnah's assessment.

38. Dr Kisnah's opinion and the Council's decision was based on Mr F's known medical condition at the time of his dismissal. The diagnosis of cerebral small vessel disease was made several months after Dr Kisnah gave his opinion and the Council issued its first instance decision.

39. Mr F's son says the Council failed to follow the correct process. He says the Council failed to follow its Policy Statement and commence the ill health process before Mr F was dismissed and, referring to the Fund's Guide, it did not consider any non-medical factors. Mr F's son says the Council failed to consult with Dr Kisnah and its decision amounted to no more than rubber-stamping Dr Kisnah's opinion.

40. The processing of Mr F's ill health application may have been less than ideal. However, for me to uphold a complaint, it is not simply the case that I must identify maladministration; I must also be satisfied that the individual has, as a result, sustained injustice. The outcome of Mr F's case has not been adversely affected by the sometimes less than perfect approach taken by the Council and consequently he has not sustained injustice.

41. Mr F appealed the Council's first instance decision seven months after the six months deadline had expired. After considering all the circumstances of Mr F's appeal, the City Treasurer decided not to exercise discretion and allow the appeal. I agree that the decision was one that the City Treasurer could reasonably make.

42. I do not uphold Mr F's complaint.

43. Mr F may apply for ill health retirement from deferred status.

Anthony Arter

Pensions Ombudsman
29 April 2021

Appendix 1

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

44. As at the date Mr F's employment ceased, Regulation 35 provided:

> "(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."

45. Regulation 36 provided:

> (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).”

46. “Gainful employment” was defined as: “paid employment for not less than 30 hours in each week for a period of not less than 12 months”. “Permanently incapable” was defined as: “the member will, more likely than not, be incapable until at the earliest, the member's normal pension age”.

47. On decisions:

- As relevant regulation 73, ‘Notification of first instance decisions’, provides:

  “(1) Every person whose rights or liabilities are affected by a decision under regulation 72 (first instance decisions) must be notified of it in writing by the body which made it as soon as is reasonably practicable after the decision is made.

  (2) A notification of a decision that the person is not entitled to a benefit must contain the grounds for the decision.

  …

  (4) Every notification must contain a conspicuous statement giving the address from which further information about the decision may be obtained.

  (5) Every notification must also—

  (a) specify the rights available under regulations 74 (applications for adjudication of disagreements) and 76 (references of adjudications to administering authority);

  (b) specify the time limits within which the rights under those regulations may be exercised; and

  (c) specify the job title and the address of the person appointed under regulation 74(1) to whom an application may be made.”

48. On appealing first instance decisions, Regulation 74 ‘Applications for adjudication of disagreements’, provides:

  “(1) Each Scheme employer and administering authority must appoint a person (**“the adjudicator”**) to consider applications from any person whose rights or liabilities under the Scheme are affected by—

  (a) a decision under **regulation 72** (first instance decisions);

  …

  and to make a decision on such applications.

  (2) An applicant under paragraph (1)(a) may apply to the adjudicator appointed by the body making the decision, within six months of the date notification of the decision is given under regulation 73 (notification of first instance decisions).

  …

  (4) The adjudicator may extend the time for making an application under paragraph (2)…”

Appendix 2

Medical evidence

Dr Kisnah (IRMP), 9 April 2018

49. In his report Dr Kisnah noted the sources of information as:-

- Mr F's GP records up until 9 January 2018.
- Mr F's occupational health records.
- Dr Gray's (Consultant Cardiologist) report of 21 February 2018 and other medical reports from Dr Khan (Consultant Cardiologist) enclosed with Dr Gray's report.

50. Dr Kisnah noted:-

- Mr F's age, that he had been employed by the Council for over 25 years and his last role was as a Customer Service Advisor, but he had not been able to attend work for nearly one year.
- Mr F had a long history of multiple underlying medical conditions, including bowel surgery, high blood pressure, type 2 diabetes, and palpitations. More recently he had developed psychological ill health which had impacted on his mental wellbeing and cognitive function.
- Mr F had received treatment for his psychological ill health, but he had noticed little improvement.
- More recently, Mr F had been intensely investigated because of his cardiac symptoms: palpitations, chest pain and dizzy spells. Dr Gray was of the opinion that there was no cardiac reason why Mr F could not return to work. While Mr F had a mild abnormality in his heartbeat this should not cause him any disabling symptoms and Dr Gray stated that the abnormality carried a good prognosis.

51. Dr Kisnah said Mr F informed him that he was very disabled because of dizzy spells and anxiety about going out. He spent most of his time indoors due to his concern that any physical activity may make him dizzy. While he was relieved that no significant abnormality had been found in his heart, he was still very worried about his health which made him very anxious. Occasionally he had intrusive thoughts about people around him and some thoughts of self-harm. He was very keen to improve his health and had agreed to commence psychological therapy arranged by his GP.

52. Dr Kisnah continued:

> "It is clear that [Mr F] is currently quite disabled because of his psychological symptoms. He is very concerned that he may experience severe ill health in the future and this makes him very anxious and unwilling to increase his physical activity. He spends most of his time indoors and only goes out for short periods of time with his girlfriend.

It is clear from the medical records that his diabetes and high blood pressure is under good control and recent investigations have not identified any significant abnormality in his heart. Hence in my opinion, the main cause of his current functional disability is his psychological ill health.

[Mr F] has been referred for psychological therapy and at this stage he has not been able to avail himself of this therapy. He intends to start this treatment as soon as possible. In my opinion, psychological therapy is likely to improve his general health and hence improve his functional capacity in the long term.

I note [Mr F's] duties as a Customer Services Advisor and in my opinion the main barrier to his return to work is his inability to motivate himself to travel to work because of his perception of his physical symptoms. Evidence based psychological treatment in the form of cognitive behavioural therapy will help him overcome this perception and enable him to go out more, socialise and eventually travel to work. He will need treatment for the next three to six months and there is every likelihood that he could undertake a phased return to work at that stage.

Having carefully considered all the evidence available to me, it is my opinion that whilst [Mr F] is currently unfit for his duties as a Customer Service Advisor he is not, on the balance of probabilities, permanently incapable of discharging these duties."