

Ombudsman's Determination

Applicant	Mr S
Scheme	Local Government Pension Scheme (LGPS)
Respondent	Torfaen County Borough Council (the Council)

Outcome

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

Complaint summary

2. Mr S' complaint is that the Council failed to properly consider his 2019 application for ill health retirement from deferred status.

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. The Council is the Scheme Employer and Administering Authority for the Greater Gwent (Torfaen) Pension Fund (the **Fund**). The Fund is part of the Scheme.
5. Mr S was employed by the Council as a full-time Street Scene Operative. His employment was terminated in September 2017.
6. In March 2019, Mr S requested the early release of his deferred pension on the grounds of ill health. Mr S was then age 52. His normal pension age (**NPA**) is 67.
7. The relevant regulations are The Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended) (the **2013 Regulations**). Extracts from the 2013 Regulations are provided in the Appendix.
8. On 2 July 2019, Mr S' GP wrote to Occupational Health. Dr Conway said:-
 - 8.1. Mr S had been diagnosed with anxiety and depression.
 - 8.2. Mr S was first reviewed by a colleague in April 2016 and started on Citalopram. He was reviewed again in December 2016 and switched to Sertraline and referred to the Primary Care Mental Health Team.

- 8.3. He first saw Mr S in December 2016 and then monthly. Disciplinary proceedings at work had exacerbated Mr S' mental health problems. He was suffering with low mood and anxiety, poor motivation, appetite and sleep and was having fleeting suicidal thoughts. He was occasionally very tearful. He was not fit for work at that time.
 - 8.4. In March 2017, the prescribed dose of Sertraline was increased
 - 8.5. In May 2017, Mr S' mood picked up slightly. He was receiving counselling which he found helpful.
 - 8.6. In June 2017, Mr S informed him that he had a disciplinary hearing and was extremely anxious about it.
 - 8.7. In September 2017, Mr S was started on Amitriptyline.
 - 8.8. Mr S was referred back to the Primary Care Mental Health Team in July 2018 for cognitive behavioural therapy (**CBT**), but he (Dr Conway) was unsure if Mr S had attended.
 - 8.9. Things then seemed to improve. However, they had recently exacerbated again, and he had referred Mr S back to the Primary Care Metal Health Team.
 - 8.10. Currently, Mr S was on the maximum daily dose of Sertraline. He hoped CBT would improve Mr S' anxiety and depression.
9. Mr S' case was referred to an independent registered medical practitioner (**IRMP**), Dr Mansouri. After seeing Mr S, Dr Mansouri certified that Mr S was not permanently incapable of his former duties with the Council. In his August 2019 report, Dr Mansouri said:
- "[Mr S] reports a mental 'breakdown' about 20 years ago, but his ongoing mental health problems started about 4 years ago. He has been treated for anxiety and depression since. [Mr S] believes that his difficulties in the workplace had a negative effect on his mental health condition, which has been associated with poor appetite, sleep disturbance, poor motivation and low mood which has led to suicidal thoughts. [Mr S] tried an antidepressant medication with little help and his GP changed that tablet to his current medication that he is presently taking at the highest dose. [Mr S] confirms that he has accessed counselling through his work and GP. I understand that his family doctor has referred him to the mental health team for CBT (cognitive behavioural therapy) which is likely to improve his ongoing mental health problems.

In the consultation, I had a long discussion in relation to [Mr S'] symptoms. He appears to experience periods of low mood and episodes of high mood, for example when he spends a lot of money purchasing unnecessary items on eBay.

[Mr S] tells me that his wife stopped him buying a car that they did not need. As I explained to [Mr S], I suspect that he has bipolar disorder. I advised him to discuss further with his GP or the mental health team.

Opinion

[Mr S] describes significant mental health problems which have affected his mood, motivation and concentration and also his capacity. In my opinion, he is presently unfit for work. Whilst he has tried 2 different antidepressants, there are other medications that could improve his condition. Also, cognitive behavioural therapy is likely to have a positive effect too. I am therefore unable to conclude that [Mr S'] incapacity is permanent. He has not yet exhausted all evidence-based treatment modalities that are likely to control his mental health problems."

10. The same month, the Council informed Mr S that based on Dr Mansouri's assessment it was unable to meet his request for the early release of his pension benefit.
11. In December 2019, Mr S invoked stage one of the Fund's two-stage Internal Dispute Resolution Procedure (**IDRP**). Mr S said:-
 - 11.1. He did not believe Dr Mansouri was fully qualified to assess his mental health wellbeing.
 - 11.2. He struggled with day-to-day tasks and was currently working part-time.
 - 11.3. He suffered depression and panic attacks and could not control his emotions and had had two hospital appointments with the mental health team.
 - 11.4. He had lost his job at Tesco, working eight hours per week, because of his outbursts.
 - 11.5. He was on Quetiapine, which made him tired all the time.
 - 11.6. Appealing the Council's decision had had a massive impact on his mental wellbeing. He had worked for the Council for 34 years and was totally dismayed by its decision.
 - 11.7. If it was not for his family, he would not be here.
 - 11.8. It took all his mental strength to leave the house, never mind work.
 - 11.9. If his appeal was successful, it would remove a lot of mental and financial

pressure on him.

11.10. He was attending counselling once a week.

12. Mr S enclosed with his appeal details of his medication.

13. The stage one IDRP decision-maker (the Council's Head of Strategic HR and Asset Management) upheld the decision not to grant Mr S ill health retirement. He said:

"I have reviewed the information that you have supplied in support of your appeal and also the report provided by Dr Mansouri. In his report, Dr Mansouri concluded that you hadn't exhausted all medical and therapeutic options at the time of your consultation with him and that as a consequence, he could not confirm that your incapacity was permanent. His view was therefore that you were ineligible for ill health retirement. I have reviewed the statement that you have provided in support of your appeal and cannot identify any evidence that challenges this position. Your statement indicates that you are now in employment, which suggests an improvement in your health since the consultation with Dr Mansouri in August. On the basis of the evidence provided, I therefore uphold the decision not to grant you ill health retirement."

14. At stage two IDRP, Mr S said:-

14.1. The stage one IDRP decision was flawed and wrong.

14.2. How had he not exhausted all treatment? He had explained in his stage one IDRP appeal that he had attended two hospital appointments with the mental health team.

14.3. How could the stage one IDRP decision-maker identify no new evidence? He had new medication for mood swings which left him tired, with cramps in his muscles and headaches on top of his depression and anxiety. He had lost his job with Tesco due to his outbursts and panic attacks. He was seeing a counsellor fortnightly. A previous period of counselling had lasted approximately four months.

14.4. On what basis had there been improvements in his health? He was working part-time. He was not in gainful employment. He needed medication to control his condition. He struggled to work.

14.5. At no time had the stage one IDRP decision-maker asked for or requested latest medical notes from his GP or his counsellor.

14.6. Dr Mansouri's August 2019 report was no longer valid.

14.7. His medication was Sertraline (200mg a day for the last three years) and Quetiapine (25mg three times daily).

15. On 14 February 2020, Ms Neagle (Member of the Senedd – **(MS)**) emailed the Council. She said:-
- 15.5. She had been contacted by Mr S regarding his request for early access to his pension on ill health grounds.
 - 15.6. She was aware of Mr S' employment history with the local authority and the circumstances that led to his dismissal.
 - 15.7. Mr S had outlined to her the nervous breakdown that had followed the loss of his job and the serious attempt he took to take his own life. He had told her:-
 - He now took strong doses of anti-depressant and anti-psychotic medication for his mood swings and frequent suicidal thoughts.
 - He also had regular sessions with a counsellor.
 - He had taken part-time employment as a delivery driver as he was the guardian for his teenage grandsons but the side effects from the anti-psychotic medication had led to health issues.
 - 15.8. She understood that Mr S had submitted a final appeal.
 - 15.9. Mr S felt his mental health difficulties had been minimised and dismissed by the Council.
 - 15.10. Mr S continued to deal with very serious mental health difficulties, and she was concerned for his welfare going forward.
 - 15.11. Mr S had said that early access to his pension would give him the freedom to scale back his current employment so he could focus on his mental health.
16. On 4 March 2020, the Council received an email from Mr S typed by his daughter. Mr S asked for confirmation that Dr Mansouri had full access to his medical records. He said Dr Mansouri's report mentioned looking at letters from his GP until 2 July 2019. He said he had attended numerous GP appointments and counselling to date and had attended two hospital appointments. Mr S similarly asked if the stage one decision-maker had had access to his current medical records. Mr S reiterated that he was not in gainful employment. He said he had exhausted all medical avenues and was currently taking medication for his bipolar. He said he believed he met the criteria for ill health retirement. He said over three years his life had become a living nightmare, suffering extreme mood swings, unable to control his emotions, suffering major panic attacks and depression. The medication he was on had severe side effects.
17. The next day:-
- 17.1. The Pensions Manager for the Fund replied to Mr S. She said:-

- Dr Mansouri was provided with all the medical records that Occupational Health had obtained when he assessed his application in August 2019.
- The stage one IDRP decision-maker had had access to the same documentation as Dr Mansouri.
- According to its records no new medical evidence had been submitted to support his stage one IDRP appeal. If this was incorrect, please provide a copy.
- She could not find any correspondence in the paperwork about his hospital assessments. According to his appeal letter, this took place after his appointment with Dr Mansouri. So, it would not have been included in Dr Mansouri's report. If he wished this or any other medical information to be considered, please provide a copy.

17.2. Mr S informed the Council that letters from his counsellor and GP would be Submitted.

17.3. Ms Wohlgemuth (Registered Mental Health Nurse - **RMHN**) emailed the Council that she was writing at the request of Mr S. She said:

"I am seeing [Mr S] for 1:1 support currently for his mental health. If he is able to obtain his pension now, he would be able to cut his current work hours which would be advantageous to his mental health and well-being."

17.4. Dr Conway wrote an open letter. He said:

"I understand [Mr S] has applied for his local government pension. He has been struggling with work. He has a history of mental health problems. He was seen by a psychiatrist in October who diagnosed with [sic] emotionally unstable personality traits. He struggles with his moods and spends a lot of time feeling low. His behaviour sometimes can be a little erratic and he tells me this can lead to difficulties with social interactions at work. He feels his mental health is exacerbated when in work and feels mentally drained.

His current medication includes Sertraline 200mg and we have recently added in Quetiapine 75mg.

I would be grateful if you would take this into consideration."

18. The Council as the Administering Authority asked Dr Mansouri if the new evidence changed his original opinion. In a letter dated 1 April 2020 to Occupational Health, Dr Mansouri said:

"The email from [Ms] Wohlgemuth states that if [Mr S] is able to access his pension now, he would be able to cut his working hours which would be advantageous to his mental health and wellbeing. The GP letter confirms that [Mr S] experiences ongoing mental health problems but does not provide any additional information in relation to his prognosis. Dr Conway also states that the treatment has recently been modified.

I do not disagree with the statements from Ms Wohlgemuth and Dr Conway. I also reviewed the medical evidence supplied to me prior to [Mr S'] appointment with me on 15th August 2019. Based on the information available I advise that [Mr S] is presently unfit for work. The question is whether, considering the benefits of treatments available, his incapacity is likely to be 'permanent'.

Given the additional information from his GP and the mental health nurse, there is no evidence to suggest that [Mr S] will be permanently incapable of undertaking his duties despite the treatment methods available. Hence, my opinion in my report dated 15th August 2019 remains unchanged."

19. Subsequently, the stage two IDRP decision-maker (the Pensions Manager for the Fund) turned down Mr S' final appeal. In an undated letter to Mr S, she said:

"The medical conclusions available at the time you requested payment of your deferred pension indicate that you were unfit for work, however, in the view of the IRMP, your incapacity is not permanent.

...I have reached the following conclusions:

- The most recent opinion of the IRMP is based on the currently available medical information and report.
- The assessment has therefore been made on information that was current at the time the decision was made.
- Your employer [the Council] is required to act taking into account the advice and recommendation of the IRMP
- The IRMP has clearly set out his reasons for his opinion in the report dated 15th August 2019 and the 1st April 2020
- [the Council] has acted in accordance with prevailing LGPS Regulations.

I would therefore have to conclude that the Council's decision is based on the advice of the IRMP and was undertaken on timely and available information, was reasonable in the context of the evidence considered and was undertaken in accordance with the LGPS Regulations. I therefore can find no grounds to overturn the original decision of your Employer, [the Council]."

Mr S' position

20. Mr S says:-

- 20.1. The Council did not help him with his application.
- 20.2. The Council totally disregarded his mental health. His GP and counsellor each wrote to the Council, yet this fell on deaf ears.
- 20.3. All this process has had a massive impact on his mental health.
- 20.4. He works part-time but struggles sometimes to get out of bed. He lost his last part-time job with Tesco due his mood swings and outbursts.
- 20.5. Medication makes him tired and ache all over.
- 20.6. His GP is shocked by Dr Mansouri's 1 April 2020 letter.
- 20.7. He feels the Council are calling him a liar and a cheat after 34 years of service.

The Council's position

21. The Council says:-

- 21.1. Based on the evidence available at the time of Mr S' initial request for ill health retirement and at stage one and two IDRP, Mr S does not meet the criteria for the early release of his deferred pension.
- 21.2. All medical evidence at that time was considered and the right process was followed, and sufficient advice and help was given.
- 21.3. Dr Mansouri had access to Mr S' Occupational Health records, including letters from his GP. Dr Mansouri also considered the information provided by Mr S during the consultation.
- 21.4. At stage one IDRP, Mr S provided a letter, and information about the current medication he was taking. The stage one decision-maker reviewed the case and the additional evidence provided.
- 21.5. At stage two IDRP, Dr Mansouri was asked if the new evidence (Ms Wohlgemuth's email and Dr Conway's letter, both of 4 March 2020) changed his opinion. Dr Mansouri said his August 2019 opinion remained unchanged.
- 21.6. The Fund communicated with Mr S on a weekly basis, gave him the opportunity to provide additional evidence to support his stage two IDRP appeal and provided Mr S with information that he requested, including further information on the Scheme rules and the ill health retirement process from deferred status.

Adjudicator's Opinion

22. Mr 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 set out below:-

- 22.1. Members' entitlements to benefits when taking early retirement due to ill health were determined by the scheme rules or regulations. The scheme rules or regulations determined the circumstances in which members were eligible for ill health benefits, the conditions which they must satisfy, and sometimes the way in which decisions about ill health benefits must be taken.
- 22.2. In Mr S' case, the relevant regulations were the 2013 Regulations. Regulation 38 provided for the early payment of deferred benefits on the grounds of ill health. Briefly, in order to receive his benefits under Regulation 38, Mr S had to be:
- permanently incapable of discharging efficiently the duties of the employment that he was engaged in at the date he became a deferred member, and
 - unlikely to be capable of undertaking gainful employment before his normal pension age, or for at least three years, whichever was the sooner.

Permanently incapable meant that Mr S was likely to be incapable at least until his NPA of 67. Gainful employment meant paid employment for at least 30 hours a week for a period of not less than 12 months.

- 22.3. The decision as to whether Mr S met the eligibility requirements of Regulation 38 was for the Council to make. This was a finding of fact; Mr S either met the conditions set out in Regulation 38 or he did not. Had the Council determined that Mr S met the requirements for early payment of his benefits, it would then have been required to decide whether or not to agree to his request. This was a discretionary power exercisable by the Council.
- 22.4. Before making any decision under Regulation 38, the Council was required to obtain a certified opinion from an IRMP. The 2013 Regulations set out the specific qualifications required of an IRMP. These were qualifications in occupational health medicine. The Adjudicator mentioned this because Mr S said that Dr Mansouri was not qualified to assess his mental health wellbeing. But Dr Mansouri was qualified to act as an IRMP for the purposes of the 2013 Regulations.
- 22.5. While the Council was required to seek a certified opinion from an IRMP, it

was also required to come to a decision itself as to Mr S's eligibility for benefits under Regulation 38¹. To do so, the Council could be 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 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 Dr Mansouri unless there was a cogent reason why it should not have done or should not have done without seeking clarification. The Adjudicator said the kind of reasons he had in mind were errors or omissions of fact or a misunderstanding of the relevant regulations on the part of Dr Mansouri.

- 22.6. Dr Mansouri appeared to have understood the Scheme's criteria for the early release of a deferred pension on the grounds of ill health and to have considered all the relevant medical evidence.
- 22.7. Dr Mansouri's opinion did not appear to be inconsistent with Dr Conway's letters of 2 July 2019 and 4 March 2020, and Ms Wohlgemuth's email of 4 March 2020. Dr Mansouri considered that Mr S was presently unfit for work, but the likely efficacy of available treatments meant that this was unlikely to be the case until Mr S' NPA.
- 22.8. In support of Mr S' stage two IDRP appeal, Ms Wohlgemuth said it would be advantageous for him to access his pension so that he could reduce his current work hours. This was a current assessment and not an opinion on the longer-term prospects for Mr S' treatment. Similarly, Dr Conway had commented on Mr S' current situation and not on his longer-term prospects. It was the Adjudicator's view that neither report could be said to suggest that the Council's reliance on Dr Mansouri's opinion was flawed.
- 22.9. Mr S said that the stage one IDRP decision-maker did not request copies of his medical notes. While the decision-maker was required to review relevant evidence, that was confined to recent reports from any specialists and Mr S' GP; not to trawl through Mr S' medical notes themselves. The decision-maker's role was to look at the evidence from a lay perspective and identify omissions or errors of fact. The Adjudicator said this was the role that I also take. Dr Mansouri confirmed that he had seen Mr S' occupational health records and letters from his GP. The Adjudicator had not identified any information missed or error of fact by Dr Mansouri.
- 22.10. The stage one IDRP decision-maker said, Dr Mansouri had concluded that Mr S had not exhausted all treatments, consequently he could not confirm his incapacity was permanent. While there was no requirement to exhaust all treatments, Dr Mansouri was of the opinion that the efficacy of available

¹ Regulation 72(4)

treatment was likely to mean that Mr S was not permanently incapable of discharging efficiently his former duties with the Council.

- 22.11. Mr S had also suggested that Dr Mansouri's report was no longer valid because he had since attended numerous GP appointments and counselling to date and has attended two hospital appointments. He also said he had exhausted all medical avenues. But the essential purpose of the IDRP was to look at the original 2019 decision.
- 22.12. If Mr S was saying that his situation had changed since Dr Mansouri saw him, he might make a fresh application to the Council for the early release of his deferred pension on the grounds of ill health. Consideration would then be given to his current health.
- 22.13. The Adjudicator's view was that there were no grounds for me to remit the matter back to the Council to reconsider its decision on Mr S' 2019 application. However, Mr S might reapply for ill health retirement at any time before his NPA.
23. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments via the Office of Ms Neagle MS which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mr S.

Mr S' further comments

24. The Office of Ms Neagle MS reported that, Mr S has said that during the time of his second stage IDRP appeal he asked for the pension officer's support in accessing up-to-date medical records from the hospital treating him. He says the medical records would have reflected a recent change in medication and a marked deterioration in his mental health. The officer declined to assist with helping Mr S obtain the records (as this would be his responsibility to arrange). Mr S was particularly unwell at the time with suicidal thoughts, so he found the thought of this task overwhelming.

Ombudsman's decision

25. My role in this matter is not to look at the medical evidence and make my own decision based upon it, but to consider whether the Council made its decision in the right way based on the available evidence. I agree with the Adjudicator that the Council did that for the reasons set out in paragraph 22 above.
26. Mr S says that the pension officer at stage two IDRP, declined to assist him in obtaining up-to-date medical records from the hospital treating him. As the Adjudicator said the essential purpose of the IDRP was to look at the original 2019

decision. The IDRP decision-makers were not required to consider if Mr S' condition had worsened since Dr Mansouri gave his opinion.

27. If Mr S considers that his health has worsened since Dr Mansouri assessed him, he may make a fresh application to the Council for the early release of his deferred pension on the grounds of ill health.

28. I do not uphold Mr S' complaint.

Anthony Arter

Pensions Ombudsman
31 March 2022

Appendix

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

29. At the time Ms N's employment ceased Regulation 38 provided:

“(1) A deferred member who, because of ill-health or infirmity of mind or body -

(a) becomes permanently incapable of discharging efficiently the duties of the employment that member was engaged in at the date the member became a deferred member, and

(b) is unlikely to be capable of undertaking gainful employment before normal pension age, or for at least three years, whichever is the sooner,

may ask to receive payment of a retirement pension whatever the member's age.

(2) A request under paragraph (1) must be made in writing to the deferred member's former Scheme employer or appropriate administering authority where the member's former Scheme employer has ceased to be a Scheme employer.

(3) Before determining whether or not to agree to a request under paragraph (1), the deferred member's former Scheme employer, or administering authority, as the case may be, must obtain a certificate from an IRMP as to whether the member is suffering from a condition that renders the member -

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

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

30. “IRMP” means:

“an independent registered medical practitioner who is registered with the General Medical Council and—

(a) holds a diploma in occupational health medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA state; and for the purposes of this definition, “competent authority” has the meaning given by section 55(1) of the Medical Act 1983; or

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(b) is an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA state;"