

## Ombudsman's Determination

Applicant	Mr R
Scheme	Local Government Pension Scheme (the <b>Scheme</b> )
Respondent	Denbighshire County Council ( <b>Denbighshire</b> )

## Outcome

1. Mr R's complaint against Denbighshire is partly upheld. To put matters right, Denbighshire shall pay Mr R £1,000 for the serious distress and inconvenience caused to him.

## Complaint summary

2. Mr R has complained that his application for the early payment of his benefits from active status on the grounds of ill health has not been considered in a proper manner.
3. He also says that Denbighshire acted unreasonably in the time it has taken to respond to his appeals and to reach a decision.

## Background information, including submissions from the parties

4. 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.
5. The relevant regulations are contained in the Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended) (the **2013 Regulations**). Regulation 35 provides for three tiers of benefits for ill health retirement 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).

Extracts from the relevant regulations are provided in Appendix 2.

6. A member may receive Tier 3 benefits for as long as s/he is not in gainful employment up to a maximum period of three years. Regulation 37(5) requires Denbighshire to review payment of Tier 3 benefits after they have been in payment for 18 months (**the 18-month review**). It is then required to decide between: (a) continuing payment for a period up to the maximum three years; (b) awarding Tier 2 benefits from the date of the review decision; or (c) ceasing payment of benefits.
7. Before making a decision under either Regulation 35 or Regulation 37, Denbighshire is required to obtain a certificate from an independent registered medical practitioner (**IRMP**). The IRMP is to be asked whether, and if so when, the member is likely to be capable of undertaking gainful employment. "Gainful employment" is defined as: "paid employment for not less than 30 hours in each week for a period of not less than 12 months". (Further extracts from the 2013 Regulations are provided in Appendix 2).
8. Mr R was born in 1958 and was employed by Denbighshire as a Senior Social Worker from 30 December 2002 until 31 December 2017 when his employment was terminated on ill health grounds. For the duration of his employment he was a member of the Scheme administered by Clwyd Pension Fund (**CPF**).
9. Following a period of ill health absence, on 7 November 2017, Denbighshire obtained a medical report regarding Mr R from Dr Pemberton on behalf of Occupational Health (**OH**). Details from the report can be found in Appendix 1.
10. In an email dated 20 November 2017, Denbighshire emailed OH to clarify an item in Dr Pemberton's report. It said that the second sentence referred to Mr R's medical condition not having an impact on activities of daily living whereas the third sentence said his health problems would meet the criteria of disability. Dr Pemberton responded to confirm that Mr R's problems did not meet the criteria of disability. He continued by saying:

"However, the condition fluctuates at times and can have an impact on this specific definition and a court may think that he is covered at times."
11. On 16 January 2018, Denbighshire wrote to Mr R to confirm the discussion and outcomes from an 'Attendance at Work' meeting that it had held with him on 13 December 2017. Its letter noted the following:-

"You were also asked if there was any further support that could be provided which would facilitate you returning to work. You responded that you could not suggest any adjustments that would allow you to return to work and added that occupational health had not been able to offer any suggestions either.

At the meeting you had some questions regarding the ill health retirement process and it was agreed to provide the advice that had been sent to you previously.

However you also indicated that you believed that this was not an option for you given your own GP's view.

At the previous meeting you had asked if there would be 'a deal' offered to you and you raised this question again. I explained that this was not possible apart from the option of applying for ill health retirement which was entirely a matter for yourself."

12. Denbighshire confirmed that Mr R's contract "will be" terminated on 31 December 2017 with payment in lieu of 12 weeks' notice (**PILON**). Any accrued holiday entitlement would also be payable.
13. Mr R has provided a largely redacted transcript of the 13 December 2017 meeting which he says shows that he was told that if he applied for Ill Health Early Retirement (**IHER**) while he was employed, he would receive an unreduced pension, but that if Denbighshire took the decision to dismiss him and he later chose to apply for IHER he would not get unreduced pension. (The relevant extract from the transcript is provided in Appendix 3)
14. On 4 November 2018, Mr R wrote to CPF to apply for IHER. It responded on 28 November 2018 to advise him that this was a decision for Denbighshire, as his former employer. It confirmed that Mr R was recorded as having his employment terminated as a Health Dismissal and that if he wished to appeal the decision, he could do so by completing a pack it had enclosed.
15. It appears that Mr R subsequently applied to Denbighshire for IHER from active status and his application was refused. On 8 January 2019, Mr R raised a complaint. He said that as the date of his termination of service was retrospective, he was unable to apply for IHER as he had to do this within the 12 weeks' notice period.
16. Regulation 74 of the 2013 Regulations (**Regulation 74**) sets out how such complaints are to be dealt with. It states:

"Applications for adjudication of disagreements

(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); or

(b) any other act or omission by a Scheme employer or administering authority,

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).

(3) An applicant under paragraph (1)(b) may apply to the adjudicator appointed by the body responsible for the act or omission, within six months of the date of the act or omission which is the cause of the disagreement, or, if there is more than one, the last of them.

(4) The adjudicator may extend the time for making an application under paragraph (2) or (3).

(5) An application under paragraph (2) or (3) must—

(a) set out the applicant's name, address and date of birth;

(b) if the applicant is not a member of the Scheme, set out the applicant's relationship to any relevant member of the Scheme and give that member's full name, address, date of birth, national insurance number and the name of the member's Scheme employer;

(c) include a statement giving details of the nature of the disagreement and the reasons why the applicant is aggrieved;

(d) be accompanied by a copy of any written notification under regulation 73 (notification of first instance decision); and

(e) be signed by or on behalf of the applicant.

(6) The adjudicator must determine—

(a) the procedure to be followed when exercising functions under this regulation; and

(b) the manner in which those functions are to be exercised.”

17. The appointed adjudicator for decisions made by Denbighshire was West Yorkshire Pension Fund (**WYPF**).
18. On 8 February 2019, WYPF wrote to the Human Resources (**HR**) Department at Denbighshire to say that it had received an appeal from Mr R, under Regulation 74, concerning Denbighshire's decision not to consider him for IHER. It requested a copy of all the non-medical and medical evidence Denbighshire had considered in making its decision.
19. On 25 March 2019, WYPF issued its decision. In its conclusion it said that there was no evidence that Denbighshire had made the decision as required by Regulation 35. Furthermore, it found that the onus was not on Mr R to have applied for ill health retirement when his employment was terminated. It therefore remitted the case back to Denbighshire to obtain medical reports from Mr R's GP and treating specialists, taking into consideration his medical condition when his employment had terminated and then to obtain a medical opinion from an IRMP who had had no prior involvement with the case. Once Denbighshire had obtained the opinion it would need to make a

decision whether Mr R met the criteria for ill health benefits at the date his employment terminated and notify Mr R accordingly.

20. Following this, in May 2019, Denbighshire agreed to allow Mr R to apply for IHER as an active member.
21. On 4 June 2019, Denbighshire wrote to Dr Hamilton. It said that it understood she had not had any previous involvement in the case and asked for her to act as IRMP and advise whether Mr R met the criteria for IHER on the date his employment was terminated, 31 December 2017 and for which of the three tiers Mr R may qualify.
22. Dr Hamilton completed her report on 19 June 2019. In it she certified that, in her opinion, Mr R was not immediately capable of undertaking any gainful employment as a result of his ill health. However, she considered that Mr R was likely to be capable of undertaking gainful employment within the next three years or before his normal pension age (**NPA**) if earlier. Details from Dr Hamilton's full report can be found in Appendix 1.
23. On 16 July 2019, Denbighshire wrote to Mr R to confirm that it had received the medical certificate from Dr Hamilton and considered his application for IHER as an active member. It had decided to award him Tier 3 IHER. It said that it was required to review his circumstances 18 months after the point from which his benefits were brought into payment. It also said that if, after three years, he was still incapable of gainful employment his case could be reviewed by an IRMP who could advise whether the benefits in payment could be upgraded to Tier 2.
24. On 1 August 2019, Mr R issued an appeal under Stage 1 of the Scheme's Internal Dispute Resolution Procedure (**IDRP**). In his appeal Mr R said that Denbighshire had not responded to WYPF's decision for more than a month, and only after he had contacted its legal department. It had taken Denbighshire almost four months to conclude its response and in its award decision it provided no explanation as to how it had reached its decision. He believed it had failed to seek appropriate clarification from the IRMP regarding what he described as a number of unquantified statements in her report. He considered the decision to award him Tier 3 was perverse and inconsistent with the opinion expressed by the senior manager at the time of his dismissal that he would be eligible for a Tier 1 Ill Health Retirement Pension (**IHRP**).
25. On 27 August 2019, WYPF again referred Mr R's complaint to Denbighshire in a similar letter to the one it had written on 8 February 2019. Again, it asked for a copy of all the non-medical and medical evidence Denbighshire had considered in reaching its decision.
26. On 7 October 2019, WYPF wrote to Mr R to confirm the outcome of his IDRP Stage 1 Appeal. It concluded that Denbighshire had not properly considered whether he would be capable of undertaking gainful employment when his employment was terminated, or the period of time that might elapse in which he might be capable of doing so. It said that while the IRMP had certified that a Tier 3 IHER may be appropriate, there was no evidence to show that she had assessed this against the

criteria for gainful employment contained in the 2013 Regulations. WYPF said it would have expected Denbighshire to have asked the IRMP to expand on the comments in her report as to whether he would be capable of gainful employment in the future and the timescales for doing so. It felt this was particularly relevant given that at the time of his dismissal Mr R was about six years from Normal Pension Age. WYPF said it would also have expected Denbighshire to have considered contacting Mr R's GP and specialist to obtain up to date information in regard to his medical condition.

27. In view of this it again referred the case back to Denbighshire to obtain additional information together with a report from another IRMP who had had no prior involvement in Mr R's case. Once Denbighshire had obtained the IRMP's opinion it would need to make a decision, based on all the relevant evidence, as to whether Mr R met the criteria for IHER at the date his employment was terminated and write to him with the outcome.
28. On the same date, Denbighshire wrote to Mr R. It said that it had been advised by CPF that his IHER had reached its 18 month review allowing for his appeal outcome being backdated to April 2018.
29. On 4 November 2019, Denbighshire wrote to Mr R's GP, Dr Tanner, to request an up to date report from him on Mr R's condition in connection with the 18 month review.
30. On 13 November 2019, Denbighshire responded to WYPF's letter of 7 October 2019. It queried WYPF's finding that it should have considered contacting Mr R's GP and specialist to obtain up to date information when in its previous finding on 25 March 2019 it said that it should consider Mr R's medical condition when his employment had terminated. It said that it had written to Mr R's GP at that time but had not received a report as requested. It had however received a copy of Mr R's medical records which provided up to date information regarding his condition. It said it had also asked Mr R for details of any information he would like to have considered, such as specialist reports or contact details of specialists, but none had been provided.
31. Denbighshire said that while it understood it was ultimately its decision what tier of IHER to award, it did this based on the medical advice given and that it was rare that it would make a decision that was in direct contradiction of that advice.
32. WYPF responded to Denbighshire on 22 November 2019. It said that it felt the onus was on Denbighshire, as employer, to ensure the evidence was sufficient to lay before the IRMP so that a balanced decision could be made on the basis of it. If the position had been adequately considered at the date of termination, it would have expected Denbighshire to have diligently obtained medical evidence as part of Mr R's attendance management process and subsequent consideration of IHER. Simply because there was a delay in making that assessment did not mean the process should be any less thorough.

33. With regards to the submission of evidence, it accepted that in Mr R's case there was going to be a question over the eligibility of the evidence given that it had been obtained after Mr R's employment had been terminated. It agreed that evidence that was available when Mr R's employment was terminated would need to be considered, and not any evidence which would only demonstrably have been available sometime after the event. However, it felt that Denbighshire should also have considered information that could have been made available had the right questions been asked and the correct procedure followed at the time. It expected Denbighshire to not only obtain evidence but to also ask the right questions.
34. On 23 December 2019, Mr R emailed Denbighshire in response to it sending him its draft referral to a new IRMP, Dr Oliver. He said that the letter was not an accurate or complete chronology of events as it failed to make clear that the Tier 3 IHRP was only granted after his appeals had been upheld. He also believed it conflated the requirement for Denbighshire to obtain a new IRMP opinion with the 18 month review. He considered that Dr Oliver's role was therefore not to review the Tier 3 award but to provide an entirely new opinion as to which tier was appropriate at the time his employment was terminated.
35. In January 2020, Denbighshire wrote to Dr Oliver. It said that it understood he had not had any previous involvement in the case and asked for him to act as IRMP. It explained that Mr R had been awarded a Tier 3 pension which required an 18 month review. It also said that Mr R had appealed the decision to award him Tier 3 and asked that Dr Oliver review the original assessment of Mr R's capability to obtain gainful employment in the future and the likely timescales for doing so, particularly given his age at the time. It enclosed a copy of a report from Mr R's GP dated 10 December 2019 (See Appendix 1).
36. Dr Oliver submitted his report on 5 February 2020. Details from the report can be found in Appendix 1. His conclusions were as follows:

"Now addressing the question of Tier 3 review; although it does not appear that [Mr R] has been referred to a specialist post-viral/chronic fatigue centre his symptoms appear to have not significantly improved despite ongoing treatment from his General Practitioner. [Mr R] indicates that he has seen a second neurologist in August 2019 at the Walton Centre who in turn has advised [his] General Practitioner that future improvement may be limited. On this basis I would advise that on balance, [Mr R] is unlikely to return to gainful employment within three years of his initial application.

Therefore in summary on balance it was reasonable to expect or presume that with further ongoing treatment [Mr R's] symptoms may have improved to such an extent that he could undertake gainful employment within three years of his initial assessment in late 2017 irrespective of his age and before his normal retirement age of 65. Based on further updates of [Mr R's] progress he appears to have made little progress over the past two years despite treatment and further neurological

assessment. On this basis it now appears unlikely that [Mr R] will return to gainful employment within three years of his initial application.”

37. Dr Oliver provided a Certificate (the **Certificate**) which stated that Mr R was unlikely to be capable of undertaking gainful employment within three years of the date of leaving but was likely to be able to undertake gainful employment at some point thereafter and was permanently incapable of discharging efficiently the duties of his previous employment.
38. On 28 February 2020, Denbighshire wrote to Mr R with the outcome of the 18 month review. It said that as a result of Dr Oliver’s report it had been agreed that Mr R’s IHRP would be uplifted to Tier 2 with effect from the date Dr Oliver had signed the Certificate, which was 5 February 2020. However, having considered Mr R’s appeal against the decision to award Tier 3 IHRP from 31 December 2017, Dr Oliver had upheld the medical recommendation made by the original IRMP.
39. On 18 May 2020, CPF wrote to confirm that Mr R’s pension payments were being uplifted to Tier 2 backdated to 5 February 2020.
40. On 18 June 2020, Mr R appealed Denbighshire’s decision to uphold its original decision to award Tier 3 IHRP. He said that neither Denbighshire nor the IRMP had properly addressed the instruction given by WYPF at the Stage 1 appeal. He also considered it unreasonable that Denbighshire had taken seven months since registering his appeal on 2 August 2019 before notifying him of its decision on 2 March 2020.
41. Mr R raised the following specific points:-
  - The IRMP report had stated that it would be reasonable to presume that some improvement could be expected that would allow him to return to gainful employment. The lack of evidence for this presumption was contrary to WYPF’s instructions for evidence of such statements to be provided. The report did not explain why it would be reasonable to presume such improvements, when in fact the overwhelming evidence was that recovery rates were poor.
  - In relation to the effect of his age and proximity to Normal Pension Age, the IRMP report provided no evidence other than that it was reasonable to expect or presume that proper consideration had been given to the effect on recovery due to age or the proximity to NPA. The term ‘presume’ provided no evidence for such a conclusion which was contrary to the evidence provided by a range of medical research relating to chronic fatigue recovery.
  - The IRMP Report stated that the progress of recovery could be variable over time. However, the decision appeared to be made based on a presumption of recovery in a short period of time. If recovery were variable, it would suggest that the factors that affect recovery should be explored, that is, the nature of the initial virus infection, the following viral encephalitis, age, gender, availability of



treatments. There was no evidence that any of these significant issues were considered or weighed by the IRMP.

- There was no evidence of either the IRMP or Denbighshire taking into account the WYPF's instruction relating to other treatment plans and the effect on gainful employment. The IRMP stated that he would be referred to a multi-disciplinary team including physiotherapists, occupational therapists and psychologists. The IRMP had said that he could be referred to a specialist centre dealing with post viral and chronic fatigue and that, as a result, some improvement would be expected that would allow him to return to gainful employment. However, he was never referred or received any such specialist treatment, which the IRMP would have known when he drafted his report on 5 February 2020. It seemed that the IRMP had an unrealistic view of the services that were available on the NHS for this type of illness. He believed the IRMP's opinion of the effectiveness of such treatments was also over optimistic when compared to the evidence provided by medical research.
- There was no evidence that Denbighshire requested further information or clarification on any of these issues before it reached a decision regarding the level of benefit award. It appeared that Denbighshire had merely followed the opinion of the IRMP without proper consideration, abdicating its responsibility as final Decision Maker.
- Any decision not to award a Tier 1 benefit was at odds with the opinion given both verbally and in writing by Denbighshire's Head of Service, immediately prior to Mr R's dismissal, that if he were dismissed on grounds of ill health, he would receive an ill health pension.
- With regard to the length of time his appeal had taken, WYPF had communicated its decision on 5 October 2019. As by 29 February 2020 no outcome had been communicated, Mr R had asked CPF if it had any information regarding progress. CPF advised him that on 15 January 2020 Denbighshire had stated that it was waiting for information from his GP. This statement was false, evidenced by the fact that on 23 December 2019 Denbighshire confirmed in an email that it had received the GP report.
- On 3 March 2020, a letter from Denbighshire was received confirming the outcome of the Appeal and also of its review of a Tier 3 award. Unusually, the letter was not dated, although the envelope confirmed it had been franked by Denbighshire's post room on 2 March 2020. The letter enclosed a copy of the IRMP report which was dated 5 February 2020. On 5 March 2020 CPF confirmed Denbighshire's response to the request for information. In its response Denbighshire said that a letter had been sent to him to confirm the outcome on 28 February 2020. This inferred that Denbighshire had provided a response prior to his request for information on 29 February. However the letter being franked 2 March contradicted this claim.

- These factors formed a consistent and recurring pattern of delay and obfuscation by Denbighshire throughout the process. His first IDRPs appeal in January 2019 took six months and the second appeal had taken seven months for Denbighshire to conclude. It was now 26 months from the notice of dismissal on grounds of ill health and there was still not an adequate resolution to his ill-health pension claim. Mr R considered these were unreasonable timescales in any circumstances but were particularly problematic as the ongoing worry and stress had a negative effect on his symptoms.
42. On 19 August 2020, the outcome of the IDRPs Stage 2 appeal was issued by FCC in a letter to Denbighshire and Mr R. It said that at the 18 month review the decision to award him Tier 3 was upheld but that at the review it had been increased to Tier 2. This gave rise to a concern that the original decision may not have been the correct one and that if Mr R was now regarded as meeting the criteria for Tier 2 it gave reasonable doubt that he should have been awarded that originally. Therefore, Mr R's appeal was upheld and Denbighshire was instructed to reconsider its decision to award Tier 3 benefits from the date of Mr R leaving employment to the date of the 18 month review.
43. In accordance with the IDRPs Stage 2 outcome, Denbighshire reviewed its decision to award Tier 3 IHER. It wrote to Mr R on 19 October 2020 to say that it had concluded that its original decision to award Tier 3 was correct at the time. It quoted from Dr Oliver's letter of 5 February 2020, as set out in Paragraph 36 above, " ... on balance it was reasonable to expect or presume that with further ongoing treatment [Mr R's] symptoms may have improved to such an extent that he could undertake gainful employment within three years of his initial assessment in late 2017 irrespective of his age and before his normal retirement age of 65".
44. Denbighshire said that it was not incorrect for it to award Tier 3 and then later to uplift to a Tier 2 as it asked the IRMP to review Mr R's condition at different points in time. It considered this was the point of having a review process in place.

**Denbighshire's position:-**

- Mr R was dismissed for Ill Health Capability effective from 31 December 2017 and was asked if he wished to apply for IHER. He declined at this point. Denbighshire offered Mr R the opportunity to apply for IHER on the basis of several health issues, but Mr R declined to apply for IHER himself at the time. Denbighshire was able to apply for IHER on behalf of Mr R, however Mr R refused to give consent for Denbighshire to apply for IHER for him. As a consequence of this, Mr R was dismissed from employment, on the grounds of medical incapability, without access to his pension due to his refusal to give consent.
- Mr R alleges that Denbighshire has provided no explanation as to how it finally reached its decisions on his ill health pension awards in July 2018. However, the decision on IHER pension is made once medical advice has been received, in

accordance with the requirement of the 2013 Regulations. There is no obligation for Denbighshire to explain its decision making process to Mr R.

- Mr R further alleges that Denbighshire acted unreasonably in delaying payment of an ill health pension from the time it confirmed his dismissal in January 2018 until July 2019 when it confirmed its decision to award a Tier 3 pension, which caused him considerable financial difficulties. But Denbighshire was unable to apply for IHER for Mr R as he did not provide his consent. Once it received consent, Denbighshire applied for IHER for Mr R as an active member, in accordance with the outcome of the IDRP Stage 1 decision.
- As a result of the outcome of Mr R's first appeal, Denbighshire needed to review its internal process to ensure that it automatically applied for IHER for those employees who were being dismissed for ill health capability. This had an impact on Mr R's situation and this was rectified as part of this outcome work.
- Mr R's IDRP stage 2 appeal was received by Denbighshire on 27 August 2019. WYPF requested all information as to how Denbighshire had reached its decision to award Tier 3. This was sent timeously and an outcome letter dated 7 October 2019 was sent to Denbighshire, but this was not received by Denbighshire until the end of October. Denbighshire wrote to Mr R on 1 November 2019 for consent to obtain a report from his GP and any additional medical information. Mr R provided consent and Denbighshire wrote to the GP on 7 November 2019 and received his response on 10 December 2019. As Mr R did not provide additional medical information, Denbighshire wrote again to Mr R on 17 December 2019 but nothing further was received. On 13 January 2020, all evidence was sent to the IRMP and a response was received on 5 February 2020. Denbighshire reviewed this and on 28 February 2020, an outcome was sent to Mr R.
- Mr R alleges that rather than making its own decision regarding his ill health pension award Denbighshire appears to have merely accepted the opinion of the IRMP, contrary to the 2013 Regulations. Regulation 36 of the 2013 Regulations sets out the role of the IRMP, which Denbighshire has regard to in every occasion. As is appropriate in the circumstances and in accordance with the 2013 Regulations, Denbighshire considered the advice of the IRMP and reached its decision accordingly.
- Mr R says that Denbighshire has not kept to its word, in that it awarded a Tier 3 pension in July 2019 contrary to having stated immediately prior to dismissing him on grounds of ill health in December 2017 that he would be entitled to a full unreduced ill health pension. Denbighshire denies that it ever made a statement to Mr R that he would be entitled to a full unreduced IHRP. Denbighshire would not have the knowledge to make such a statement given that Mr R had not been assessed by a medical professional as is required under the IHER process.

- Mr R also alleges that Denbighshire has not followed WYPF's directions when making its decision regarding ill-health retirement entitlement. Denbighshire says it has understood the outcome and complied with its requirements and the requirements of the 2013 Regulations at all times.

**On Denbighshire's position Mr R submits:-**

- He received retrospective notification that he had been dismissed on 17 January 2018. At the point he received notification of his dismissal he was not asked if he wished to apply for IHER, nor does he consider it was his responsibility to apply for IHER. As identified by WYPF the onus was on Denbighshire to apply for IHER prior to dismissal.
- Denbighshire's letter of dismissal did not provide any information regarding its responsibility to apply for his IHER nor did it seek any consent from him. So it is not the case that he declined at this point. In addition, the letter of dismissal said Denbighshire would provide the advice that had been sent to him previously. But no such advice or information regarding IHER was ever sent subsequently by Denbighshire.
- While there may be no regulatory obligation to provide an explanation of how a decision has been reached, the process should always be transparent and reasonable. It seems reasonable for him to request clarification due to the long term financial impact of the decision and particularly as the decision contradicts the opinion previously stated by Denbighshire's Head of Service on 13 December 2017 that he would access his pension on an unreduced level.
- Denbighshire infers that he caused a delay following its correspondence of 17 December 2019. This is incorrect as he replied to Denbighshire via email on 23 December 2019, which was acknowledged by Denbighshire in an email the same day in which it thanked him for getting back so quickly and that it would be sending his medical information to Dr Oliver for assessment.
- Denbighshire cannot deny that it made a statement about the payment of an unreduced pension as it is documented in the minutes of meeting held with Mr R, Denbighshire's Head of Service, HR manager and Mr R's line manager on 17 December 2017.
- Denbighshire has not provided any transparency regarding how it reached its decision. Denbighshire merely repeats that its decision was correct on the basis of reports by IRMPs who never assessed Mr R face to face and who never evidenced their recommendations.
- Although it is acknowledged that the IRMP is independent, Denbighshire had the opportunity, if not the obligation, to request clarification and evidence from the IRMPs rather than merely accept their recommendations. Denbighshire has provided no evidence that such clarification or evidence was sought.

## **Adjudicator's Opinion**

45. Mr R's complaint was considered by one of our Adjudicators who concluded that further action was required by Denbighshire. The Adjudicator's findings are summarised in paragraphs 46 to 80 below.
46. Members' entitlements 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 which they must satisfy, and the way in which decisions about ill health benefits must be taken.
47. In Mr R's case, the relevant regulations were the 2013 Regulations. Regulation 35 provides for the early payment of benefits on the grounds of ill health. Briefly, in order to receive his benefits under Regulation 35, Mr R 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.
48. Permanently incapable meant that Mr R was likely to be incapable at least until his NPA. Gainful employment meant paid employment for at least 30 hours a week for a period of not less than 12 months.
49. The decision as to whether Mr R met the eligibility requirements of Regulation 35 was for Denbighshire to make. This was a finding of fact; Mr R either met the conditions set out in Regulation 35 or he did not. Before making any decision under Regulation 35, Denbighshire was required to obtain a certified opinion from an IRMP.
50. From the outset there appeared to have been some inconsistency over Mr R's eligibility for IHER. The notes of the 13 December 2017 meeting inferred that he was told that if he applied for IHER while he was employed, he would receive an unreduced pension. But this was not a decision that could be made at that stage as Denbighshire had not obtained a certified opinion from an IRMP. It could be that the intention was to suggest this was a possibility, but the word used was 'would' and not 'could.' Furthermore, there was no indication that Denbighshire sought to clarify this statement during the meeting. The Adjudicator acknowledged that the status of these notes was unclear as they appeared to be incomplete and there was no evidence to show that they had been signed as a true record of what was said.
51. The letter of 16 January 2018 did clarify matters to an extent. Denbighshire said it had explained that the only option of a 'deal' was for Mr R to apply for IHER which was entirely a matter for him to decide. The letter also indicated that this had been discussed at a previous meeting and that Denbighshire had agreed to provide the advice that had been sent to him previously. Mr R said that he did not receive this. But Mr R also indicated that he believed that this was not an option for him given his GP's view. This appeared to suggest that Mr R believed his GP did not consider that he was permanently incapable of working at that time. The letter also indicated that

this was a dismissal on grounds of ill health and not any form of mutual agreement involving the payment of IHER, a fact later confirmed by CPF in its letter of 28 November 2018.

52. The Adjudicator's view was that it did appear that at the meeting on 13 December 2017, Mr R was given misleading statements that if he applied for IHER he would receive an unreduced pension without any clarification as to the process or the possibility that his application would be refused. While he had some doubts as to what exactly was said, it did appear to be ambiguous.
53. The Adjudicator said that while he did not consider that this, in and of itself, had caused Mr R a financial loss, it was important that managers understood the IHER process and, in his view, this lack of clarity amounted to maladministration.
54. Mr R maintained it was for Denbighshire to pursue the application for IHER on his behalf. The Adjudicator agreed that Denbighshire was required to initiate the IHER process where it was terminating employment on the grounds of ill health. It did not require Mr R's consent to do this because it had a statutory duty to consider his entitlement to an IHRP. However, it would require his consent to obtain medical records, something which it said Mr R did not provide. It also did not require consent to ask an IRMP for an opinion but the process would be stymied if the member did not give wider consent. In these circumstances, the employer and IRMP would just have to consider whatever evidence they had.
55. In Mr R's case, the Adjudicator's view was that because Denbighshire told Mr R that he could apply for an IHER pension, it provided a route by which he could have easily remedied its inaction. Therefore, while he considered that its failure to instigate the process amounted to maladministration, he concluded that this in itself had not caused Mr R an injustice.
56. Furthermore, he considered that Mr R's comment regarding the fact that he believed that IHER was not an option for him given his GP's view suggested that he saw no point in applying as it would not be supported by his GP.
57. The Adjudicator did not accept Mr R's implication that by the time he received the 16 January 2018 letter it was too late. This was because Mr R was entitled to 12 weeks' notice, albeit he was not asked to work it, plus some outstanding leave, both of which would count as pensionable service. Regulation 5(3) stated "...an active member who gives notice under paragraph (2) specifying ... a date earlier than the date the notice is given, ceases to be an active member in that employment at the end of the payment period during which the notice is given". While PILON and leave had been made in advance, the payment period to which it related was unchanged. Consequently, had Mr R applied for IHER soon after receiving the letter he would have been treated as an active member, but he did not do so.

58. Mr R eventually applied for IHER on 4 November 2018, an application that was refused.
59. Mr R appealed this decision and WYPF, as the appointed adjudicator for decisions made by Denbighshire, concluded on 25 March 2019 that there was no evidence that Denbighshire had made the decision as required by Regulation 35. It therefore remitted the case back to Denbighshire to obtain medical reports and to obtain a medical opinion from an IRMP who had had no prior involvement with the case. Once Denbighshire had obtained the opinion it needed to make a decision whether Mr R met the criteria for ill health benefits at the date his employment terminated and notify Mr R.
60. At some point in May 2019, Denbighshire had agreed to allow Mr R to apply for IHER from active status. It said that this took some time as it had to review its processes. The Adjudicator was not persuaded by this. He concluded that WYPF had reviewed Denbighshire's actions and instructed it to review Mr R's case. He could see no reason why it could not have started this activity immediately at the same time as reviewing its processes. It appeared to have treated Mr R's case with no sense of urgency which he considered amounted to maladministration.
61. Once Denbighshire had determined that Mr R met the requirements for early payment of his benefits, it was then required to decide which tier of benefits was appropriate depending upon the level of his incapacity for employment.
62. The SMA, Dr Hamilton, had submitted her report on 19 June 2019. In it she certified that in her opinion Mr R was not immediately capable of undertaking any gainful employment as a result of his ill health. However, she considered that Mr R was likely to be capable of undertaking gainful employment within the next three years or before his normal pension age if earlier.
63. On 16 July 2019, Denbighshire wrote to Mr R to confirm that it had considered his case as an active member. It had decided to award him Tier 3 IHER but gave no indication of the reasons for reaching this decision. The Adjudicator considered that this failure amounted to maladministration.
64. Mr R appealed Denbighshire's decision on 1 August 2019. This was again considered by WYPF and upheld. In its letter dated 7 October 2019, WYPF set out its conclusion that Denbighshire had not properly considered whether Mr R would be capable of undertaking gainful employment when his employment was terminated, or the period of time that might elapse in which he might be capable of doing so.
65. At the same time, Mr R's claim became due for its 18-month review under Regulation 37(5). Denbighshire wrote to Mr R to advise him of this on 7 October 2019.
66. On 13 November 2019, Denbighshire raised a query with WYPF regarding its conclusion. This was more than five weeks after WYPF's letter which the Adjudicator considered to be an unnecessary delay. WYPF responded on 22 November 2019.

67. Denbighshire wrote to Dr Oliver in January 2020 to ask him to act as IRMP. Although there appeared to have been some delay in reaching this stage, the Adjudicator recognised that this was not of Denbighshire's making. It was waiting on a report from Mr R's GP which it had requested on 4 November 2019, but which was not completed until 10 December 2019.
68. In its letter to Dr Oliver, Denbighshire had made clear that it required him to provide an opinion on the original decision to grant Tier 3 IHRP, based on the evidence that would have been available at that time. It also asked him to consider the current position based on the up-to-date evidence provided by Mr R's GP, Dr Tanner.
69. Regulation 37 (11) states: "The IRMP who provides a further certificate under paragraphs (6) or (10) may be the same IRMP who provided the first certificate under regulation 36(1) (role of the IRMP)". It was therefore reasonable for Denbighshire to ask Dr Oliver to provide his opinion on both scenarios.
70. On 5 February 2020, Dr Oliver submitted his report. In this he certified that Mr R was currently unlikely to be capable of undertaking gainful employment within three years of the date of leaving but was likely to be able to undertake gainful employment at some point thereafter and was permanently incapable of discharging efficiently the duties of his previous employment. However, in his report, Dr Oliver confirmed that, at the time of the original decision, it was reasonable to expect that, with further ongoing treatment, Mr R's symptoms may have improved to such an extent that he could undertake gainful employment within three years.
71. Denbighshire confirmed its decision to Mr R on 28 February 2020. Based on the IRMP's report, it had decided to uprate his pension to Tier 2 from 5 February 2020, but his pension from 31 December 2017 was to remain at Tier 3.
72. Mr R appealed this decision on 18 June 2020. This time it was considered by Flint County Council (**FCC**) as the appointed officer under Stage 2 of the Scheme's appeal process.
73. FCC issued its conclusion on 19 August 2020. It upheld Mr R's complaint on the basis that the decision to increase his pension to Tier 2 at the 18-month review cast doubt on the original decision to award Tier 3. It remitted the case back to Denbighshire to reconsider.
74. Denbighshire reviewed its decision and concluded it was correct. It wrote to Mr R on 19 October 2020, two months after FCC's letter. While the Adjudicator acknowledged that some delay may have been caused by the COVID pandemic, he considered this to be an unreasonable delay which amounted to maladministration.
75. The decision to award ill health retirement benefits and at which tier under Regulation 35 was for Denbighshire to make. It was required to obtain a certificate from an IRMP before making such a decision in the first instance and had agreed to do so for its reconsideration of Mr R's case. Denbighshire was not, however, bound by the opinion expressed by the IRMP and should come to a properly considered decision of its



own. That being said, the weight which is attached to any of the evidence was for Denbighshire to decide, including giving some of it little or no weight<sup>1</sup>. It was open to Denbighshire to accept the advice it received from the IRMP unless there was a good reason why it should not do so or should not do so without seeking clarification. The reason would have to be obvious to a lay person. Denbighshire would not be expected to challenge a medical opinion.

76. Having reviewed the advice provided by the IRMPs, the Adjudicator had seen no evidence of any misunderstanding of the Regulations, nor was there any evidence of an error or omission of fact on the part of the IRMPs. In addition, the views expressed by the IRMPs were consistent and not at odds with the opinion given by Dr Pemberton in November 2017.
77. The Adjudicator recognised that Mr R does not agree with the views expressed by the IRMPs and the decisions reached by Denbighshire. He acknowledged that Mr R was still experiencing issues with his health, but he did not believe that there were grounds for finding that Denbighshire should not have accepted the advice it received from the IRMPs in reaching its decisions.
78. Denbighshire had to follow the proper procedure when making decisions about ill-health benefits and there were clearly failings and delays in this case. However, not all procedural defects meant that the decision could not be allowed to stand.
79. That said, there were certain aspects of the way in which his claim had been dealt with which would have caused Mr R significant distress and inconvenience. In the Adjudicator's view Mr R's complaint should be upheld in part due to the unreasonable delays Denbighshire had caused in dealing with his claim.
80. Denbighshire accepted the Adjudicator's Opinion but Mr R did not and the complaint was passed to me to consider. He provided his further comments which do not change the outcome except in respect of the distress and inconvenience award. I agree with the Adjudicator's Opinion and note the additional points raised by Mr R.

### **Mr R's further comments**

81. Mr R does not consider that the Adjudicator's findings identify the full extent of maladministration, nor does he consider that £500 is adequate compensation for the degree of anxiety and distress resulting from Denbighshire's failures and delays over a prolonged period of time. He says this would cause anxiety and distress to a well person, but throughout this period he was experiencing symptoms of post viral debility and so the consequences were far greater.
82. Mr R says Denbighshire's approach to the rules, transparency and response times continued repeatedly throughout the process despite ACAS, Employment Tribunal and IDRPs Appeals.

---

<sup>1</sup> Sampson v Hodgson [2008] All ER (D) 395 (Apr)

83. Mr R suggests that the entire process of identifying his eligibility for IHER was flawed from the outset. He says Denbighshire failed to refer to an IRMP to obtain a certificate, failed to ensure a face-to-face medical assessment with any IRMP, failed to raise appropriate questions when IRMP opinions contradicted Denbighshire's own opinion regarding eligibility to a full unreduced pension, repeatedly failed to ensure a reasonable and timely response to Appeals, and provided no transparency or evidence that it had done anything other than merely follow the opinion of the IRMP rather than make its own decision.
84. Mr R believes his financial loss is considerable, not just a one-off loss but a loss of future pension income. Due to Denbighshire's actions he was without any pension income from January 2018 to July 2019. Denbighshire also withheld pay-in-lieu of notice and holiday pay until 5 September 2018, two days prior to an Employment Tribunal hearing.
85. Mr R notes that Denbighshire said that while it understood it was ultimately its decision which tier of IHER to award it was rare that it would make a decision that was in direct contradiction of that advice. While this statement acknowledges that Denbighshire may make a contradictory decision it provides no clarification as to the basis on which it would make such a decision. Nor why it did not make such a decision in his case, bearing in mind the IRMP's opinion contradicted the GP's opinion that he would be unable to return to work prior to pensionable age and Denbighshire's previously expressed opinion that a full unreduced pension was appropriate.
86. Mr R notes that on 5 February 2020, Dr Oliver reviewed the 2017 eligibility decision. He says no face-to-face medical assessment was carried out prior to this review. In his report Dr Oliver stated, "with ongoing treatment symptoms may have improved to such an extent that he could undertake gainful employment." Dr Oliver identified the treatment referred to was "physiotherapists, occupational therapists and psychologists who provide advice on pacing activity and discuss coping strategies with the individuals to help them come to terms with their symptoms and also hopefully support an improvement in their activity both physically and cognitive." Denbighshire failed to identify if such treatment had been given or was even available. Mr R says that such treatment had not been given nor was it available, making Dr Oliver's basis for recovery irrelevant. Had this been properly explored by Denbighshire at the time of Dr Oliver's opinion or indeed at the time of dismissal the outcome is likely to have been a different decision.
87. Mr R notes, in his 7 November 2017 report Dr Pemberton stated "given the fact that he has currently been off for a prolonged period of time of 18 months, it is difficult to give a specific time as to when his symptoms (if ever) will improve". However, in the clarification Dr Pemberton subsequently provided he stated: "the condition fluctuates at times and can have an impact on this specific definition and a court may think that he is covered at times." Mr R says there is no provision in the Regulations for fluctuating capability for undertaking gainful employment. If the criteria are met 'at times' then it should be considered to be met in full for the purpose of IHER.

88. Mr R says, with regard to the meeting of 13 December 2017, this was crucial to his pension income as it was the final meeting before Denbighshire dismissed him on the grounds of ill health. It should have been the meeting where Denbighshire fully and accurately explained to him the process of IHER including Denbighshire's responsibilities to apply for IHER, the need to obtain an IRMP certificate, and a request for Mr R's consent to obtain medical records. As Denbighshire failed in all these requirements the entire process was flawed from this point forward.
89. Mr R says Denbighshire claims that he did not provide consent and refused to give consent are incorrect. Denbighshire never asked him for his consent to apply on his behalf and never asked him for consent to provide medical records necessary for such an assessment prior to his dismissal. Had the process been properly explained and had his consent been requested he would have provided it, as indeed he subsequently provided consent to share medical details in all instances where it was requested.
90. Mr R says he was not able to remedy the situation himself as it is the employer's, not the employee's responsibility to apply. Indeed, when he did try to apply for IHER on 4 November 2018, his application was rejected by CPF on the basis that it was Denbighshire's responsibility to apply and not his.
91. Mr R says the statement that PILON and leave had been made in advance is incorrect. Denbighshire did not make any payments to him for PILON or leave until 5 September 2018.
92. Mr R says Dr Hamilton's opinion was that he was likely to be capable of undertaking gainful employment within the next three years. However, this opinion was gained without any face-to-face examination or assessment, nor did it take into account the opinion of Mr R's GP.
93. Mr R says that although Denbighshire reviewed its decision and concluded it was correct it provided no evidence as to how it reached such a conclusion. Merely repeating an opinion provides no transparency or evidence as to how that opinion was reached.
94. Mr R notes that it is open to Denbighshire to accept the advice it receives from an IRMP unless there is a good reason why it should not do so, and that the reason would have to be obvious to a lay person. However, Mr R contends there were good reasons to ask more questions about the IRMP's decisions, particularly as the opinion contradicted Denbighshire's previous opinion of eligibility to an unreduced pension. Denbighshire had clearly made an assessment and decision regarding this matter when it made its original decision to dismiss him rather than delay a decision or redeploy him to another role.

95. Mr R says that there are significant differences between the view expressed by Dr Pemberton and the conclusions of the IRMPs. Dr Pemberton's opinion was at best ambiguous when he stated:

“given the fact that he has currently been off for a prolonged period of time of 18 months, it is difficult to give a specific time as to when his symptoms (if ever) will improve... the condition fluctuates at times and can have an impact on this specific definition and a court may think that he is covered at times”.

These comments provide some doubt that he was likely to recover and, as previously referred to in paragraph 88 above, if the criteria are met 'at times' then it should be considered to be met in full for the purpose of determining gainful employment potential and IHER.

### **Ombudsman's decision**

96. Mr R has referred to ACAS and Employment tribunals plus he has pointed out that he did not receive PILON and payment for leave until September. These are employment matters outside my remit and I will not comment on them except to the extent, if any, that they impact on his claim for IHER.
97. My role is not to look at the medical evidence and make my own decision based on it, it is to consider whether the decision-maker has approached making the decision in the right way and made a decision that makes sense based on the evidence.
98. I acknowledge that elements of Mr R's complaint have been considered by WYPF and FCC under the Scheme's IDRP. However, I am not bound by the decisions of previous adjudicators.
99. There is no question that Denbighshire failed to be absolutely clear about the application process for IHER and its responsibilities at the outset. That said, it is apparent that the question had been discussed previously and was still on the table at the time of the 13 December 2017 meeting. In other words, at that time there is nothing to indicate that Denbighshire had refused, or intended to refuse, to consider Mr R for IHER.
100. While it is difficult to be certain what was discussed, it does appear that Mr R was not sure that any application for IHER would be successful at that time. Denbighshire's letter of 15 January 2018 recorded that at the meeting on 13 December 2017 Mr R had indicated that he believed that IHER was not an option given his own GP's view. I can only interpret this as meaning that he believed his GP would not support an application for IHER at that time.
101. Regardless of Denbighshire's shortcomings, Mr R appears to have been content to leave the matter at that time. It was not until 4 November 2018 that he wrote to CPF to enquire about IHER.

102. Mr R disputes Denbighshire's assertion that he had refused to give consent to access his medical records. He says it never asked for consent. Whether that is the case is somewhat immaterial as no action was taken by either party to progress the matter. I do not understand why Mr R did not do so bearing in mind he was apparently pursuing Denbighshire regarding other employment matters through ACAS and an Employment Tribunal. At the very least he could have ensured that the question of IHER was kept 'live' and yet he appears not to have done so.
103. Mr R's subsequent application for IHER was rejected on the basis that he had not applied in time. Given the delay since his dismissal this is not altogether surprising. As a consequence of that delay, he was no longer classed as an Active Member so the provisions of Regulations 35 and 36, including the requirement to refer to an IRMP, fell away.
104. This was addressed by WYPF which considered that Denbighshire's approach was flawed on the basis the onus had been on Denbighshire to apply for IHER in circumstances where a member's employment is terminated on grounds of ill health. As a result of this finding, in May 2019, Denbighshire agreed to consider Mr R's application for IHER from Active Member status as at the date of his dismissal some 16 months earlier.
105. Denbighshire subsequently referred his case to an IRMP, Dr Hamilton, and included the Certificate for her to complete. Mr R has referred to the fact that Denbighshire failed to ensure that Dr Hamilton, and indeed subsequently Dr Oliver, examined him, but there is no requirement under the Regulations for it to do so. It is for the IRMP to determine what evidence he/she requires in order to complete the Certificate and give their recommendation. Their assessments were based on notes prepared by professional colleagues who had treated Mr R. Although Dr Hamilton and Dr Oliver did not personally examine him this does not mean that their views should be given less weight than the opinions of the doctors who had. Clearly, they both considered that they had sufficient medical evidence.
106. Dr Hamilton's assessment was largely based on Dr Pemberton's examination of Mr R and report dated 7 November 2017, as being the most relevant review produced shortly before Mr R was dismissed. This showed that Mr R was receiving treatment, that his GP had tried him on numerous medications and that he was hoping to see a Neurologist. Following a query from Denbighshire, Dr Pemberton confirmed that in his view Mr R's health problems did not meet the criteria of disability.
107. Although Dr Hamilton commented that she had no correspondence since January 2019, the decision she was to make had to be based on the position at the time of Mr R's dismissal so it was unlikely that any later reports would be relevant. Her conclusion was that Mr R's diagnosis of post viral debility/chronic fatigue syndrome was a condition that could 'burn out' in many individuals with appropriate rest and support and that at the time of his dismissal she believed that it would be reasonable to assume Mr R may make a recovery to a point where he would be fit again for employment. Her opinion was that many individuals with such a diagnosis can

improve to the point where they will be fit again for employment in the future. Also that these are conditions which often have no specific treatment.

108. I consider it was reasonable for Denbighshire to have accepted Dr Hamilton's opinion that at the time of his dismissal there was every possibility that Mr R's condition might improve. It was consistent with the contemporaneous findings of Dr Pemberton. It was not for Denbighshire to question Dr Hamilton's medical assessment but to ensure that it understood the findings and ask questions if it did not.
109. Following Dr Hamilton's report, Denbighshire issued its decision to award Mr R a Tier 3 pension. In its decision letter of 16 July 2019, it set out the conditions for a Tier 3 award and enclosed a copy of Dr Hamilton's report. It gave no indication of the reasons for reaching this decision in the letter itself. Given this was Denbighshire's decision I would have expected it to explain its rationale. I do not consider that merely enclosing the IRMP's report was sufficient.
110. Mr R appealed the decision which was again considered by WYPF and upheld. In its letter dated 7 October 2019, WYPF set out its conclusion that Denbighshire had not properly considered whether Mr R would be capable of undertaking gainful employment when his employment was terminated, or the period of time that might elapse in which he might be capable of doing so.
111. Dr Hamilton had certified that at the time of his dismissal Mr R was incapable of carrying out his duties but was likely to be capable of undertaking gainful employment within the next three years. Given her conclusion that Mr R's diagnosis was a condition that could 'burn out' with appropriate rest and support and that these are conditions which often have no specific treatment it is difficult to see what more consideration would have gleaned.
112. As the Adjudicator said in his Opinion, Denbighshire had to follow the proper procedure when making decisions about ill-health benefits. However, not all procedural defects will mean that the decision cannot be allowed to stand. So, while WYPF again remitted the case back to Denbighshire to reconsider that did not mean that its decision was flawed, something that was later confirmed by Dr Oliver.
113. Mr R refers to the extreme level of emotional distress and the inconvenience he has been caused. But it is clear from his own account that this has been contributed to by the fact Denbighshire withheld PILON and holiday pay until 5 September 2018 which he has had to pursue through ACAS and an employment tribunal. As I have said in paragraph 97 above these matters are outside of my jurisdiction and I cannot take account of them in my Determination.
114. That said, I find that had Denbighshire been clearer at the outset as to its responsibilities what followed may have been less stressful for Mr R, even though I consider that Denbighshire's decision was properly made. I also agree with the Adjudicator that Denbighshire did leave the door open for Mr R to pursue his claim but he failed to do so, thereby contributing to the delay.

CAS-58407-X1H0

115. However, I note that there have been five occasions on which there has been maladministration on the part of Denbighshire, as noted by my Adjudicator (see paragraphs 53, 55, 60, 63, and 74 above, which I find has caused Mr R serious distress and inconvenience.

116. I uphold Mr R's complaint in part.

## **Directions**

117. Within 28 days of the date of this Determination, Denbighshire shall pay Mr R £1,000 for the serious distress and inconvenience he has suffered.

**Anthony Arter**

Pensions Ombudsman  
31 October 2022

## Appendix 1

### Medical Evidence

#### Dr Pemberton's report dated 7 November 2017

"[Mr R]...has been off work since 30th June 2016. This followed a Norovirus infection which initially resulted in viral Encephalitis, then leaving him with a diagnosis confirmed by his GP of Post Viral Debility...

His GP has tried him on numerous medications, including Propranolol, Naproxen and Topiramate. He is currently on an increasing dose of a medication called Clonazepam to see if that may have some improvement on his fatigue. He had an initial improvement but this was very short-lived. He remains on that medication. He also tells me he has become more impulsive and irrational since having this post-viral fatigue. He tells me he had a trial return to work in 2016 but failed after a couple of hours on day one.

#### Current Position

[Mr R] is able to wash, clean, shop and self-hygiene but only for limited periods of time with a maximum of 2 hours only. Within that time he notices that his head becomes sensitive and his focus reduce significantly. There is no relevant past medical history to his current symptoms...

During the consultation today he wanted to rest his head against the wall and had his eyes closed for part of the consultation also. This is clearly quite significant in terms of the impact it is having on him.

#### Specific Questions

*On what basis would you recommend a return to work?*

This is not applicable at present. I have discussed a reduction in hours with regular breaks, but I am unable to find any particular restrictions or adjustments which might be reasonably practical at present.

*If he is not fit to return to work, when would a return be anticipated and on what basis?*

He is currently not fit to return to work, and given the fact that he has currently been off for a prolonged period of time of 18 months, it is difficult to give a specific time as to when his symptoms (if ever) will improve.

*When would you intend to review his position if [Mr R] is not currently fit to return to work, or is the condition still long term to form any view on a potential return?*

I would suggest a review in approximately 3 months, but it is likely that I am unable to form any view on a potential return to work, given the longstanding nature of his condition so far.



*Is the employee currently fit to carry out the duties outlined in the job description?*

No

...

*What is the likely timescale for recovery and/or when do you anticipate a return to work?*

Not known currently

*Is there future requirement for medical support or intervention?*

[Mr R] tells me he is currently seeking the possibility of a private referral to see a Neurologist with an interest in head pains and fatigue, although does not know if this is yet possible.

*Is the health problem likely to recur or affect future attendance?*

At present it is likely to affect future attendance.

#### **Dr Hamilton's report dated 19 June 2019**

"I have been asked to undertake a read only assessment of [Mr R's] Occupational Health records with a purpose of providing an opinion as to whether I felt he fulfilled the criteria of early receipt of his pension benefits. I understand from reading the associated paperwork that I am being asked to make a decision if his case met the criteria for ill health retirement on the date of his employment was terminated (sic) of 31<sup>st</sup> December 2017.

#### Reports Reviewed

- Occupational health report from Dr Richard Pemberton November 2017.
- Dr Denman in May 2016.
- A copy of GP records from January 2019.
- Letter from the GP May 2017.

#### Diagnosis

[Mr R] appears to have a diagnosis of post viral debility or more likely chronic fatigue syndrome. This gives rise to a pleather (sic) of symptoms but the main symptoms known from reviewing the records are those of a chronic debilitating headache and profound fatigue. With regards to his headache he has seen a specialist previously and has been on a number of medications with little benefit. He is currently waiting to see a neurologist regarding the headaches. I have no correspondence from January onwards and as such I am unable to comment as to what has occurred between then and now.

### Prognosis

From reviewing the Occupational Health records it is clear that [Mr R] has struggled for some time with his symptoms. I understand that has (sic) been absent from work since 30<sup>th</sup> June 2016. He has (sic) his contract terminated in December 2017. Throughout this period he had shown little improvement in his symptoms. The diagnosis for post viral debility/chronic fatigue syndrome is a condition that can burn out in many individuals with appropriate rest and support. At the time of this termination I believe that it would be reasonable to assume he may make a recovery to a point where he would be fit again for employment. This is what I am being asked to review today.

### Summary

In my opinion many individuals with this diagnosis can improve to the point where they will be fit again for employment in the future. These are conditions which often have no specific treatment. Certain medications, appropriate diet and exercise can result in improvement in symptoms to the point where an individual is able to return to successful employment. It is my opinion looking at the Occupational Health records that [Mr R] will be permanently incapable of undertaking his role. It is clear that he was struggling with his role for some considerable time prior to his prolonged sickness absence. At the time of his termination I do feel that it would be reasonable to assume that he would make some recovery and as such I have indicated this on the pension form. Please be aware that this is my opinion base (sic) on the information provided to me. The last relevant documentation was from January of this year and I accept that things may have changed between now and then.”

### **Dr Tanner’s report dated 10 December 2019**

“[Mr R] continues to experience fatigue and daily headaches. Overall, I have observed that his symptoms have remained unchanged since they started. In other words, he remains on a debilitated plateau. He has seen two consultant neurologists for his symptoms and attempts at various medications, as recommended by them, which have not improved matters. He gets some symptomatic relief when necessary from clonazepam.

For my part as his GP, I think that it seems implausible now that [Mr R] will be able to undertake gainful employment anywhere before the age of 65. This not through want of a desire to work on the part of [Mr R], but instead reflects a most unfortunate illness which my consultant colleagues and I have been unable to alleviate.”

### **Dr Oliver’s report dated 5 February 2020**

“I have examined the evidence bundle that you have kindly sent to me which includes a copy of [Mr R’s] occupational health records and this in turn includes a copy of his job description, reports from his General Practitioner Dr R Tanner dated 26/05/17 and most recently 10/12/19. There are also reports from Dr M Doran Consultant Neurologist dated 06/03/17, an Occupational Report to the employer from Dr R Pemberton Occupational Health Physician dated 07/11/17 and finally most recently an e.mail from

[Mr R] dated 17/12/19 outlining the outcome of a second neurological opinion. I do consider the evidence you have provided sufficient for me to provide advice to you regarding the two questions that you have posed...

[Mr R's] initial absence was due to norovirus infection which developed into viral encephalitis. It appears that once the encephalitis was treated [Mr R] was left with a variety of neurological symptoms including shooting pains predominantly on the left side of his head, generalised head pain, sensitivity to extremes of temperature on his head, roaring sounds in the ears, a feeling of pressure behind the eyes, recurrent swelling of the neck and throat glands and feeling generally fatigued both physically and cognitively after only short periods of activity during the day.

These symptoms did not appear to respond to several treatments from [Mr R's] General Practitioner as evidenced in Dr Tanner's report dated 26/05/17.

Consequently [Mr R] was referred for neurological opinion and following his assessment Dr Doran advised that symptoms were probably attributable to post-viral fatigue. The progress of patients diagnosed with post-viral fatigue can be very variable over time and with varying treatments. Often support can include referral to a multi-disciplinary team including physiotherapists, occupational therapists and psychologists who provide advice on pacing activity and discuss coping strategies with the individuals to help them come to terms with their symptoms and also hopefully support an improvement in their activity both physically and cognitively. Given that [Mr R's] symptoms were diagnosed as post-viral fatigue early in 2017, was it reasonable to presume that following 6-9 months of treatment, albeit with little improvement, that there could be a further improvement with time? In order to be eligible for ill health retirement [Mr R] would on balance of probabilities, from a medical standpoint, have to be considered both permanently incapacitated from undertaking his substantive role as a Senior Social Worker and also be immediately incapable of undertaking any gainful employment. Given the information to hand at the end of 2017 and given that [Mr R] had been diagnosed and treated for post-viral fatigue for several months it was on balance reasonable to presume that he was permanently incapacitated from undertaking his demanding role as a Senior Social Worker until his normal retirement age of 65, and also that he was immediately incapable of undertaking gainful employment. However it would also be reasonable to presume that from a medical standpoint, with possible further treatment and referral to a specialist centre dealing with post-viral and chronic fatigue that some improvement could be expected that would allow [Mr R] to return to gainful employment, that is to work for 30 hours a week for a period of 12 months. The type of work [Mr R] might have been expected to undertake would be part-time administrative type activity which would be office based and without demanding deadlines.

Now addressing the question of Tier 3 review; although it does not appear that [Mr R] has been referred to a specialist post-viral/chronic fatigue centre his symptoms appear to have not significantly improved despite ongoing treatment from his General Practitioner. [Mr R] indicates that he has seen a second neurologist in August 2019 at the Walton Centre who in turn has advised [his] General Practitioner that future

improvement may be limited. On this basis I would advise that on balance, [Mr R] is unlikely to return to gainful employment within three years of his initial application.

Therefore in summary on balance it was reasonable to expect or presume that with further ongoing treatment [Mr R's] symptoms may have improved to such an extent that he could undertake gainful employment within three years of his initial assessment in late 2017 irrespective of his age and before his normal retirement age of 65. Based on further updates of [Mr R's] progress he appears to have made little progress over the past two years despite treatment and further neurological assessment. On this basis it now appears unlikely that [Mr R] will return to gainful employment within three years of his initial application.”

## Appendix 2

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

Regulation 35 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 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)."

Regulation 37 provides:

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

- (2) A member who receives Tier 3 benefits shall inform the former Scheme employer upon starting any employment while those benefits are in payment and shall answer any reasonable inquiries made by the authority about employment status including as to pay and hours worked.
- (3) Payment of Tier 3 benefits shall cease if a member starts an employment which the Scheme employer determines to be gainful employment, or fails to answer inquiries made by the employer under paragraph (2), and the employer may recover any payment made in respect of any period before discontinuance during which the member was in an employment it has determined to be gainful employment.
- (4) A Scheme employer may determine that an employee has started gainful employment for the purposes of paragraph (3) if it forms the reasonable view that the employment is likely to endure for at least 12 months and it is immaterial whether the employment does in fact endure for 12 months.
- (5) A Scheme employer must review payment of Tier 3 benefits after they have been in payment for 18 months.
- (6) A Scheme employer carrying out a review under paragraph (5) must make a decision under paragraph (7) about the member's entitlement after obtaining a further certificate from an IRMP as to whether, and if so when, the member will be likely to be capable of undertaking gainful employment.
- (7) The decisions available to a Scheme employer reviewing payment of Tier 3 benefits to a member under paragraph (5) are as follows -
  - (a) to continue payment of Tier 3 benefits for any period up to the maximum permitted by regulation 35(7) (early payment of retirement pension on ill-health grounds: active members);
  - (b) to award Tier 2 benefits to the member from the date of the review decision if the authority is satisfied that the member -
    - (i) is permanently incapable of discharging efficiently the duties of the employment the member was engaged in, and either
    - (ii) is unlikely to be capable of undertaking gainful employment before normal pension age, or
    - (iii) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment, but is likely to be able to undertake gainful employment before reaching normal pension age; or

- (c) to cease payment of benefits to the member.
- (8) A member whose Tier 3 benefits are discontinued under paragraph (3) or (7)(c) is a deferred pensioner member from the date benefits are discontinued and shall not be entitled to any Tier 3 benefits in the future.
- (9) A Scheme employer which determines that it is appropriate to discontinue payment of Tier 3 benefits for any reason shall notify the appropriate administering authority of the determination.
- (10) A Scheme employer may, following a request for a review from a member in receipt of Tier 3 benefits or within 3 years after payment of Tier 3 benefits to a member are discontinued, make a determination to award Tier 2 benefits to that member from the date of the determination, if the employer is satisfied after obtaining a further certificate from an IRMP, that the member is permanently incapable of discharging efficiently the duties of the employment the member was engaged in, and either -
  - (a) is unlikely to be capable of undertaking gainful employment before normal pension age; or
  - (b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment, but is likely to be able to undertake gainful employment before reaching normal pension age.
- (11) The IRMP who provides a further certificate under paragraphs (6) or (10) may be the same IRMP who provided the first certificate under regulation 36(1) (role of the IRMP).
- (12) Where the member's former employer has ceased to be a Scheme employer, the references in paragraphs (5) to (7), (9) and (10) are to be read as references to the member's appropriate administering authority."



**Appendix 3****Extract from transcript of the 13 December 2017 meeting between Mr R, Denbighshire's Head of Service, HR manager and Mr R's line manager**

PG		And obviously then you would leave with a full pension. If we took the decision to dismiss you because we were unable to cope with the level of sickness absence and you chose to apply afterwards you would not get that ill(?) (un)reduced benefit, your elements(?) would be reduced on your pension as I understand it, so.
[Mr R]		Sorry, run that by me again.
PG		So if you apply for ill health retirement while in employment you would access your pension successful on an unreduced level, so. I don't know exactly in terms of... basically it's protected on what your final pension would be at the age of 68?
PG		Thank you. Based on your contributions to date. If I left tomorrow then they would take something like 40% of my pension off me. But if you leave on ill health retirement they don't take 40% off you.