

Ombudsman's Determination

Applicant	Mrs K
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	London Borough of Waltham Forest (the Council)

Outcome

1. Mrs K's complaint is upheld and to put matters right the Council should consider Mrs K's ill-health pension application again.
2. The Council shall also pay Mrs K £500 in recognition of the distress and inconvenience caused by not following the procedure correctly and the consequential delay.
3. My reasons for reaching this decision are explained in more detail below.

Complaint summary

4. Mrs K's complaint is about the decision of the Council to award her ill-health retirement pension (**IHRP**) at Tier 3 rather than Tier 1 in November 2011, when Mrs K left her employment.

Background information, including submissions from the parties

5. The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (**the Regulations**) and the Administration Regulations 2008, are set out in the Appendix.
6. Mrs K was employed as a Senior Nursery Officer at the Churchill Nursery School. She was absent from work due to a laryngological condition.
7. On 24 June 2011 she was referred to Dr Grabicka, an occupational health specialist, who produced a report dated 10 July 2011. Dr Grabicka considered evidence from her treating ENT specialist (Dr Koury 24 June 2011) and concluded that her condition was long term and no significant improvement can be anticipated in the foreseeable future and 'in my opinion it is unlikely that her symptoms will sufficiently improve to enable her to return to work in the future.'

8. Mrs K was awarded Tier 3 IHRP in November 2011. This was following the report by an independent registered medical practitioner, (**IRMP**), Dr Shepherd, who issued his medical opinion in October 2011. Dr Shepherd concluded that Mrs K was permanently unfit for her usual job but 'consideration could be given to employment where minimal voice usage was required...'. He noted that Mrs K may not have the skills for such a role. When he completed the certificate he ticked a box to say that she was likely to be able to obtain alternative work within three years.
9. It is unclear how the Council had reached the decision to award Mrs K a Tier 3 IHRP in November 2011, as no decision letter was sent to Mrs K by the Council. On 7 November 2011, Mrs K was told the outcome verbally by her employer. On 23 November 2011 the employer confirmed this in writing and told Mrs K that to appeal she needed to provide additional medical evidence. Mrs K did so.
10. On 19 January 2012 Dr Murphy produced a medical report which said Mrs K had asked for Dr Shepherd's tier 3 advice to be reviewed. He said 'from a medical perspective there is no clear reason why she should be not be capable of obtaining gainful employment within the next three years ie I share the opinion that the medical information points to a Tier 3 decision'.
11. Consistent with this report, it appears from subsequent correspondence that Mrs K's appeal was not upheld. No record of the IDRPs decision has been produced and it was later admitted by the scheme administrator that Mrs K was not told about her right to invoke stage 2 of IDRPs. By the time Mrs K understood that she had a right to invoke stage 2, the IDRPs process had been overtaken by the 18 month statutory review of the original decision. The Council obtained a report from Dr Cole who provided a written opinion that Mrs K qualified for tier 1 benefits. He said, based on the report from the Speech Therapy service, he would have some concerns about whether she could actually sustain work of at least 30 hours per week and for a continuous period of at least twelve months. 'Therefore the balance of probability in my opinion is against her being able to undertake the degree of work which is implied in a recommendation for Tier 3 under the LGPS Regulations. The only alternative is that she meets Tier 1 as clearly Tier 2 would not be applicable because her condition is permanent and she is not going to become any more capable after a period of three years'. A copy was sent to Mrs K.
12. On 2 August 2013 the Council wrote to Mrs K to tell her that 'unfortunately Medigold were unaware that under the LGPS Regulations anyone, like yourself, initially awarded Tier 3 ill health retirement cannot then be uplifted to Tier 1' and they were consequently requesting the reissue of the appropriate medical certificate so that her benefits could be uplifted to Tier 2.
13. The Council has produced a tier 3 review certificate dated 6 August 2013 completed by Dr Coles stating that Mrs K is unlikely to find work in the following three years.
14. On 9 August 2013, the Council told Mrs K that her benefits had been uplifted to tier 2.

15. Mrs K continued to pursue her appeal the original decision made in November 2011.
16. On 27 August 2013 Dr Williams provided a report which he said was in the context of an appeal of the original decision to award Tier 1 benefits in 2011. It noted the contents of the 2 August 2013 letter, which characterised his colleague Dr Cole's advice as 'inappropriate'. He said 'on the evidence available back in 2011 I would have to concur with both Shepherd and Murphy that there was every possibility that she would be capable of undertaking some form of other employment as long as the use of her voice was minimised.' He acknowledged a report dated 26 October 2012 from a treating specialist which said that the treating team could not identify any suitable alternative employment where no voicing would be routinely required and that was assuming Mrs K could successfully complete any formal interview. He observed that Dr Cole had taken evidence provided in 2012 into account and reiterated his opinion that the test for Tier 1 benefit was not satisfied in 2011. He concluded 'all recommendations in this report are recommendations only and it is the responsibility and decision of the employer to decide what is and is not a reasonable adjustment'. This report was also sent to Mrs K.
17. On 17 September 2013 the Council wrote to Mrs K to tell her Dr Williams had 'confirmed the original decision to award you Tier 3 and the fact that Tier 1 should not be awarded. I write to inform you that in these circumstances we are only able to uplift the decision to Tier 2'.
18. In March 2014 the Council informed Mrs K that their decision under Stage 2 of the IDRP was to uphold the original decision to award tier 3 ill health in November 2011. They referenced the opinions of Dr Murphy and Dr Williams and said 'you have received copies of all reports from Medigold prior to them being forwarded to us. Therefore you have been informed of the decisions throughout the referral process. The Council informed Mrs K that it had reviewed all the documents available to it and taken into consideration the medical and specialist/professional advice given to them by Dr Williams The Council went on to explain to Mrs K that the Regulations do not allow for an uplift from Tier 3 to Tier 1, but from Tier 3 to Tier 2 which had been applied from October 2012. It was therefore the Council's decision under stage 2 to uphold the original decision to award Tier 3 in November 2011.

Adjudicator's Opinion

19. Mrs K's complaint was considered by one of our Adjudicators who concluded that further action was required by the Council. The Adjudicator's findings are summarised briefly below:-
 - The Council has not provided this Office with a full file after numerous requests, therefore the Adjudicator's Opinion was based on the information available. There was a delay in receiving the incomplete information. This no doubt caused Mrs K further distress and inconvenience.

- The Adjudicator's view was that the Council did not properly consider Mrs K's eligibility for an IHRP.
 - The Council has not asked its IRMP to assess the criteria for IHRP in line with the Regulations. The medical reports supplied by the Council did not include completed IRMP certificates.
 - The Regulations lay the responsibility to check whether a member meets the criteria on the employing authority, i.e. the Council. It seemed that the decision had been made by the IRMPs and the Council just accepted it without properly considering it or other relevant factors.
 - It was unclear whether the IRMPs did include certificates with their reports. It is also unclear whether IRMPs assessed Mrs K prior to her employment terminating.
 - Furthermore, it was unclear how the Council had reached the decision to award Mrs K a Tier 3 IHRP in November 2011, as no decision letter was sent by the Council to Mrs K.
 - So, the Council arrived at a perverse decision because it did not do what it was required to do under the Regulations.
20. The Council partly accepted the Adjudicator's Opinion but disagreed with paying £500 in recognition for the distress and inconvenience Mrs K suffered. The Council provided its further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by the Council for completeness. The Council did not think a payment of £500 for distress and inconvenience was appropriate, as it does not accept it had not followed the procedures correctly.
21. The Council accepted the Adjudicator's recommendation to nominate a new IRMP, who has had no previous involvement in Mrs K's case.

Ombudsman's decision

22. Following receipt of the Adjudicator's Opinion the Council produced certificates from Drs Shepherd and Coles and a copy of the letter notifying Mrs K of the outcome of her 18 month review. From this it is clear that a relevant certificate was completed in 2011 and that the 18 month review process was completed properly. However, I do not consider that the original decision or appeal process was satisfactory. The Council failed to reach its own decision on what Tier of IHRP Mrs K was to be awarded. It simply relied on the opinion of the IRMP. Under the Regulations, the employing authority i.e. the Council is required to take advice on capability from an IRMP but it, not the IRMP, must determine, which tier should be paid to Mrs K. In the absence of such a decision the Council failed to follow the Regulations, as it was required to do. The process followed by the Council on appeal remains unclear. But from the correspondence to Mrs K it appears that the appeal and 18 month review processes became confused/joined together. It was consequently unclear to the

IRMP which statutory criteria they were being asked to give an opinion on. The Council is also unable to show that it addressed its mind to the correct statutory test under Regulation 20.

23. The Council chose not to consider Dr Coles' original evidence in the context of the IDRP process or to reinstruct him. I have seen no evidence that Dr Williams was directed to the test under Regulation 20 but he was provided with the letter criticising Dr Coles' approach. This placed Dr Williams in a difficult position and created confusion about the scope of his instructions, in particular the extent to which he was permitted to consider medical evidence post-dating the 2011 decision. I consider that Dr Williams' and therefore the Council's approach to assessment of the available medical evidence at IDRP stage 2 was flawed in that it excluded consideration of some of Mrs K's relevant medical evidence. The decision which the Council was reviewing was that made in 2011 and while its decision had to be based on the understanding of Mrs K's condition and prognosis as at 2011, that was not a reason to exclude relevant evidence from her treating clinicians which she had submitted in support of her appeal. The medical evidence dating from 2012 was relevant because it spoke to her condition as it was understood in 2011. It should therefore have been considered by Dr Williams and the Council.
24. The IDRP process adopted was confusing, decisions were not notified as required and reasons were not explained to Mrs K properly. Further, the time taken by the Council in dealing with Mrs K's case under IDRP no doubt caused her significant distress and inconvenience. Therefore, I uphold Mrs K's complaint and I find that the case is to be remitted back to the Council to reconsider afresh. I also find that the Council should pay Mrs K compensation for the distress and inconvenience she suffered.

Directions

25. Within 21 days of this Determination, the Council will nominate a new IRMP, who has had no dealing with the matter before, shall provide him or her with all of the available evidence from Mrs K's treating clinicians and ask the IRMP to consider whether as a result of her condition she has a reduced likelihood of being capable of undertaking any gainful employment before reaching her normal retirement age, that assessment to be made in light of her condition as at November 2011. The IRMP shall be asked to provide his or her report and a certificate as required under Regulation 20(5) of the Regulations.
26. Within 14 days of receiving the IRMP's certificate, the Council will provide Mrs K with its decision under Regulation 20 (2) (3) or (4) as per Regulation 57 of the Administration Regulations.

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27. Within 21 days of this Determination, the Council will pay Mrs K £500 compensation to reflect the distress and inconvenience caused.

Karen Johnston

Deputy Pensions Ombudsman
18 September 2017

Appendix

As relevant; regulation 20 states:

(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5-

(a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and

(b) that he has a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age, they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2), (3) or (4), as the case may be.

(2) If the authority determine that there is no reasonable prospect of his being capable of undertaking any gainful employment before his normal retirement age, his benefits are increased-

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date the whole of the period between that date and the date on which he would have retired at normal retirement age.

(3) If the authority determine that, although he is not capable of undertaking gainful employment within three years of leaving his employment, it is likely that he will be capable of undertaking any gainful employment before his normal retirement age, his benefits are increased-

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date 25% of the period between that date and the date on which he would have retired at normal retirement age.

(4) If the authority determine that it is likely that he will be capable of undertaking gainful employment within three years of leaving his employment, or before reaching normal retirement age if earlier, his benefits-

(a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and

(b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(5) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine ("IRMP") as to whether in his opinion the member is suffering from a condition that renders him permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so,

whether as a result of that condition he has a reduced likelihood of being capable of undertaking any gainful employment before reaching his normal retirement age.

As relevant; regulation 56 states:

(1) Subject to paragraph (1A), an independent registered medical practitioner ("IRMP") from whom a certificate is obtained under regulation 20(5) of the Benefits Regulations in respect of a determination under paragraph (2), (3) or (4) of that regulation (early leavers: ill-health) must be in a position to declare that-

(a) he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested; and

(b) he is not acting, and has not at any time acted, as the representative of the member, the employing authority or any other party in relation to the same case,

and he must include a statement to that effect in his certificate.

(1A) Paragraph (1)(a) does not apply where a further certificate is requested for the purposes of regulation 20(7) of the Benefits Regulations.

(2) If the employing authority is not the member's appropriate administering authority, it must first obtain that authority's approval to its choice of registered medical practitioner for the purposes of regulation 20 and 31 of the Benefits Regulations.

(3) The employing authority and the IRMP must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation, and-

(a) in the case of the employing authority, when making a determination under regulation 20 of the Benefits Regulations; or

(b) in the case of the IRMP, when expressing an opinion as to the matters set out in regulation 20(5) and regulation 31(2) (early payment of pension: ill health) of those Regulations.

As relevant; regulation 57 states:

(1) Every person whose rights or liabilities are affected by a decision under regulation 55 must be notified of it in writing by the body which made it as soon as is reasonably practicable.

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

(3) A notification of a decision about the amount of a benefit must contain a statement showing how it is calculated.

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

(5)Every notification must also-

(a)refer to the rights available under regulations 58 and 60;

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

(c)specify the job title and the address of the person to whom applications under regulation 58 may be made.