PO-13059

# Ombudsman's Determination

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| **Applicant** | Mr Y |
| **Scheme** | NGF Europe Pension Fund |
| **Respondent** | NGF Europe Limited |

## Complaint Summary

1. Mr Y has complained that he was improperly refused a total incapacity pension.

## Summary of the Ombudsman's Determination and reasons

2. The complaint should be upheld against NGF Europe Limited (**NGF**) because it misdirected itself when making its decision.

## Detailed Determination

### Material Facts

3. Mr Y was employed by NGF and was a member of the NGF Europe Pension Fund (**the Fund**). Mr Y had chemotherapy and several operations from 2011 onwards. He returned from sick leave on 22 April 2013, and a note written by his manager dated 15 April 2013, records concern about Mr Y having to do full hours after two weeks.

4. On 21 October 2013, Mr Y requested early retirement on ill health grounds. NGF said that it could not consider Mr Y's request, as he was carrying out his duties. NGF suggested a referral to Dr Mullett, its occupational health physician, if Mr Y was having difficulty in coping with his job, with a view to making any adjustments that might be necessary.

5. Rule 8 of the Fund says:

> "In this Rule:
>
> "Partial Incapacity" means physical or mental deterioration which, in the Principal Employer's opinion, prevents the Member (and will continue to do so) from carrying on his normal employment, or any other job which he could be required to do for the Employer in accordance with his Terms and Conditions of Employment.
>
> "Total Incapacity" means physical or mental deterioration which, in the Principal Employer's opinion, permanently and totally destroys the Member's earnings capacity.
>
> Provided that no pension will be paid under Rule 8 as a result of Partial or Total Incapacity unless the Trustees are satisfied that the ill health condition set out in Paragraph 1 of Part 1 of Schedule 28 to the Finance Act 2004 has been met.
>
> In determining whether a Member is suffering from partial or total incapacity, the Principal Employer's decision is final."

6. The ill health condition in the Finance Act 2004 requires:

> "medical evidence from a registered medical practitioner that the member is (and will continue to be) incapable of carrying on the member's occupation because of physical or mental impairment."

7. Mr Y says that a senior manager warned him against applying for a total incapacity pension.

8. Mr Y went on sick leave on 27 October 2013, and NGF sought advice from Dr Mullett. She saw Mr Y on 21 November 2013. Mr Y gave her copies of reports from his GP

Dr Topping, and Mr Scott, a consultant general surgeon and clinical director of general surgery. Dr Topping's report dated 16 October 2013, said:

> "I can confirm he has … required surgery and chemotherapy treatment. He unfortunately has to open his bowels extremely frequently throughout the day due to the nature of his surgery and his chemotherapy has resulted in him developing vibration neuropathy in his hands and feet."

9. Mr Scott's report dated 1 November 2013, said:

> "Mr Y is now a 44 year old gentleman. When I first met him over two years ago he was presented to me as a man with a cancer ... The initial treatment … means that he had chemotherapy and radiotherapy in order to shrink his tumour so that it would be more possible to operate on it. He subsequently had surgery … just before Christmas two years ago. ...
>
> Mr Y has two residual medical problems as a consequence of his various treatments.
>
> As a consequence of the chemotherapy that he received he has loss of sensation in his fingers and hands. This makes dealing with machinery potentially hazardous and very difficult. The chances of this loss of sensation returning are very slim. It does make it difficult for him to do any form of occupation, particularly anything requiring strength or fine touch.
>
> The second residual defect that he has is as a consequence of his surgery. … he can need to go to the toilet urgently with very little warning. ...
>
> As of all his recent assessments he is clear of disease and doing extremely well otherwise.
>
> It would seem reasonable for this man to be considered as having a real medical disability and these facts should be taken into account looking at his long-term employment."

10. Dr Mullett's report to NGF dated 26 November 2013, said:

> "Mr Y was seen here again as requested on 21 November 2013.
>
> I understand that he has been off work again over the past three weeks. Although he had returned to work following treatment for his … cancer he has clearly struggled with his ongoing symptoms and admitted that he had not previously reported the extent and severity of his ongoing problems.
>
> …
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> Based on the extent of Mr Y's symptoms which are unlikely to change for the foreseeable future I believe he remains unfit to return to work and I do not

believe there are any particular adjustments which could be made to allow him to return.

I have discussed Mr Y's case with my colleague Dr Gidlow and we both agree that Mr Y would meet the partial incapacity criteria for early ill health retirement of the NGF Europe Pension Fund."

11. NGF wrote to Mr Y on 20 February 2014, saying that if he was unable to return to work for the foreseeable future and that no reasonable adjustments would enable him to return, consideration had to be given to terminating his employment on incapacity grounds. The letter said that NGF would not consent to a total incapacity pension and:

"The Company's decision in these circumstances is final and there is no formal dispute procedure to follow when an individual disagrees with the Company Medical Adviser's assessment."

12. Mr Y's trade union representative says he asked NGF how to appeal against the decision and was told there was no appeal mechanism. He says he then obtained a Fund booklet, which provided information on how to make a complaint to my office.

13. On 26 February 2014, Mr Y and his trade union representative met with NGF and it was agreed that he would retire on 31 March 2014. Mr Y disagreed with the decision to pay him a partial incapacity pension and at a further meeting on 7 March 2014, Mr Y and his trade union representative asked NGF to consider further reports from Dr Topping and Mr Scott. Mr Y and his representative were told to send the reports to Dr Mullett, which they did.

14. Dr Topping's report repeated what he had said previously. Mr Scott's report was dated 4 March 2014, and said:

"This man is incapable of manual work due to his peripheral neuropathy caused by the chemotherapy. He is unable to use a keyboard and he is unable to safely hold instruments. As a consequence of his … cancer surgery he … always needs to be within reach of a toilet ...

I therefore believe that he satisfies all of the appropriate criteria considered to have total incapacity and therefore he should be considered for total incapacity health retirement by his employers."

15. Dr Mullett considered these reports and said that her opinion was unchanged.

16. In a letter to the Pensions Advisory Service dated 27 January 2015, NGF said:

"…

Whilst the consultant is no doubt an expert on the condition itself, Dr Mullett, as an occupational health specialist, is an expert on the impact and management of conditions and their effect on an individual in the work context,

> and what can be achieved with the right support and in the right environment depending on the frame of mind of the individual.
>
> …
>
> No employee has a right to ill health retirement benefits under the Scheme, even where they meet the incapacity criteria. Therefore, even if Mr Y had satisfied the criteria for total incapacity he would not have had a right to ill health early retirement benefits under the Scheme on this basis."

17. NGF wrote to Mr Y on 11 March 2015, saying:

> "Under the terms of the Pension Fund's rules, the Trustee will contact you from time to time prior to your normal retirement date (but no more frequently than annually), to seek evidence of your continued state of health such that you remain eligible both under the Fund Rules and the Finance Act 2004 to receive the ill health early retirement pension. However, the Pension Fund rules do not include a procedure for reviewing whether an individual's medical condition post retirement has deteriorated."

18. Mr Y says he was told by NGF's HR Support Manager, in the presence of his manager and trade union representative, that Dr Mullett felt he had mental health issues.

19. Mr Y complained to my office and the findings of an Adjudicator's Opinion dated 10 March 2016, were:

- NGF did not distinguish between Dr Mullett's role as adviser and its role as the decision maker.
- Mr Y was not given reasons for the decision.
- "Some form of paid employment" was too vague, as was a reference to Mr Y's "frame of mind."
- NGF's statement that, Mr Y would not have had a right to benefits even if he satisfied the criteria for them, did little to dispel Mr Y's view that he had been treated unfairly.

20. NGF agreed to take its decision afresh. It obtained a further report from Dr Gidlow, dated 12 April 2016. The report said:

> "Thank you for your e-mails about this case and the adjudication from the Pensions Ombudsman Service. I, of course, have never seen Mr Y although I had discussed the case with Dr Mullett in the past. As you know Dr Mullett is seriously ill and is unlikely to return to work. However, I have had a conversation with her and she clearly remembers the issues surrounding the case of Mr Y. I think there are three important issues involved in this case and I will discuss each one separately.

Firstly, of course, the Occupational Physician is only in a position to give advice to the company pension fund. It is the responsibility of the Company to determine whether the person is eligible for an ill health early retirement pension and thereafter provide approval in accordance with the pension fund rules, further to which the trustees must be satisfied that the person satisfies the requirements of the Finance Act before an ill health early retirement pension is administered (*sic*). As always the position of the Occupational Physician merely remains advisory, based on the medical evidence available to them from time to time.

Secondly, the terms of the NGF Pension Fund are extremely restrictive in that in order to qualify for full ill health retirement the individual must be "incapable of any work". This is somewhat different to other pension funds such as the Local Authority Pension Fund where a full incapacity pension may be available if the person is incapable of gainful employment which means working for 30 hours a week. It is interesting that Mr Y returned to work following his treatment for his cancer. He was clearly struggling but it was Dr Mullett's clear opinion that although he would continue to struggle in his current role there were several other avenues which could be explored. I realise that these were not explored in any great detail at the time as they were outside the remit of the Occupational Physician. However, one would consider retraining, the use of voice activated software if he found keyboard work difficult, reception duties where again headphones and voice activated software could be used, homeworking and so on. It is very difficult without a full assessment to give clear guidance on suitable work but I find it very difficult in a man of 47 years of age to say that for the next 20 years he will be incapable of any sort of work whatsoever. He does have two problems, the peripheral neuropathy due to damage from the chemotherapy - this is unlikely to improve but the second problem is the frequency of bowel action which should be treatable and certainly reasonable adjustments could be made in an occupation to enable him to cope with this issue.

Finally, there is the issue alluded to in point 23 of the Senior Adjudicator's findings. Following discussions with Dr Mullett it was her opinion that Mr Y had a very negative approach to returning to work, obviously clouded by his concerns over his diagnosis. However, an unwillingness to return to work does not necessarily correlate with an inability to work. From Dr Mullett's recollections of discussions Mr Y was offered counselling to help him to improve his frame of mind and certainly cognitive behaviour therapy can be of benefit in a situation such as this. It is my understanding that Mr Y declined any counselling support.

I therefore still find it extremely difficult to say that Mr Y will be permanently incapable of any form of work - psychotherapy has not been explored and he

has not as far as I understand sought any advice on retraining or suitable alternative employment."

21. NGF wrote to Mr Y on 26 May 2016, saying:

"…

Having considered this matter afresh the company has now decided that on your retirement from employment on 31 March 2014, you fell within the definition of "partial incapacity" under the Rules of the Scheme and not within the definition of "total incapacity"…The Company has noted that, in order to be satisfied in your case, the definition of "partial incapacity" requires that you be prevented from carrying out your normal employment or any other job for the Company, whereas the Rules of the Scheme impose a stringent requirement for you to meet in order to satisfy the definition of "total incapacity", which entails that the relevant condition both permanently and totally destroys your earnings capacity.

The Company has concluded from the medical reports which it has received that, whilst your condition prevented you as your retirement date of 31 March 2014 from carrying out your normal employment with the Company or any other job which you could be required to do for the company, that condition did not then permanently and totally destroy your earnings capacity.

The Company has taken into account your age at the date of your retirement, which was 45. The requirement for a permanent, as well as a total, destruction of earnings capacity entails that, in order for you to have fallen at your retirement date within the definition of "total incapacity" under the Scheme Rules, your condition would need to have then prevented you from being capable of carrying out any paid employment of any kind for a period of approximately 20 years (up to your normal retirement age under the Scheme which is 65).

The Company has concluded from the medical reports received that at some point over the next 20 years it is likely that you would be capable of carrying out some form of paid employment, taking into account the possibility of retraining, or least that the contrary could not be concluded. Such work could involve part time work, homeworking, the use of voice activated software where keyboard work is found to be difficult, reception duties using headphones and voice activated software. These possibilities are suggested in Dr Gidlow's report dated 12 April 2016.

That report also comments that, so far as your capability to do paid employment in future is affected by frequency of bowel action, that should be treatable and reasonable adjustments could be made in an occupation to

enable you to cope with this issue. Further, in so far as your capability to do paid employment in future is affected by your "frame of mind", in terms of the psychological effect of your illness and treatment for it, Dr Gidlow's report dated 12 April 2016 comments that this could also be addressed by counselling and cognitive behavioural therapy.

Consequently, even if you were at the date of your retirement on 31 March 2014, or are currently, incapable of doing any paid employment, it is likely that at some point over the next 20 years you would be capable of doing some form of paid employment.

In so far as there is any conflict between medical reports received from the Company's occupational health advisers, Dr Mullett and Dr Gidlow, and your GP and Consultant as to whether or not you are within the definition of "total incapacity", the Company has ultimately decided to follow the advice received from its own occupational health advisers, for the following reasons:

The issue here is one of capacity to carry out paid employment, rather than diagnosis or treatment of your condition. The Company's occupational health advisers are specialists in the field of capacity to carry out paid employment. They have also advised the Company for several years in relation to questions of Total Incapacity and Partial Incapacity and are familiar with the terms of the Scheme Rules and the past practice under the Scheme. Dr Topping and Mr Scott have been involved with your diagnosis and treatment and it is not their role as such to advise on occupational health issues, including your capacity to carry out paid employment.

The reports received from Dr Mullett and Dr Gidlow provide greater analysis of whether you fell, at the date of your retirement in 2014, within the definition of "total incapacity" or "partial incapacity" under the Rules of the Scheme. It is not clear that either Dr Topping or Mr Scott were aware of the definition of "partial incapacity" under the Scheme Rules, which provides for an alternative basis of calculation of ill-health early retirement pension to "total incapacity". Neither Dr Topping nor Mr Scott referred to that alternative definition of "partial incapacity" in any of their reports…without a knowledge of the Rules of the Scheme, Mr Scott and Dr Topping would not appreciate the restrictive criteria applying to the definition of "total incapacity" under the Rules of this Scheme, which involve both a permanent and a total inability to do any paid employment.

In certain cases the reports received from Dr Topping and Mr Scott relate to your capacity to do paid employment after your retirement on 31 March 2014 rather than as at that date. Your capacity to do any paid employment as your retirement on 31 March 2014 is the relevant test, because otherwise you could not be said to have "retired because of total incapacity", as required by Scheme Rule 8(2)."

22. An appendix to NGF's letter includes extracts from previous medical reports. Dr Mullett and Dr Gidlow said that there was insufficient evidence that Mr Y "would be prevented from ever being able to undertake some form of paid employment although this may well be restricted and limited in scope" and "I would be very guarded in giving an opinion that he was permanently unfit for any sort of gainful employment."

23. The appendix emphasises that Mr Y's GP and Consultant referred to "early retirement on the grounds of ill health" and "permanently destroyed his earning capability" and concludes that the doctors treating Mr Y were unaware of the precise definitions, and it was unclear if the Consultant knew what the precise definition was when he referred to Mr Y's "total incapacity".

24. The appendix points to the Consultant's opinion that Mr Y was clear of disease and was "doing extremely well otherwise" and "these facts should be taken into account when looking at his long term employment."

25. A JobCentre Plus decision dated 29 August 2014, was quoted which said:

> "You reported no difficulties with cooking a simple meal and eating/drinking…you reported no difficulties with washing/bathing, dressing/undressing, communicating, reading and making decisions about money…I have decided you can stand and then move more than 50 metres but no more than 200 metres, either aided or unaided."

26. The appendix concludes that Mr Y has "some capability to carry out ordinary day to day activities, which would tend to indicate his capability of carrying out some form of paid employment in future."

**Summary of Mr Y's position**

27. Mr Y made a second application to my office. He says:-

- His case should have been referred to different medical advisers, rather than the same doctors who defended their previous decisions.
- Occupational health physicians were experts in employment health matters, but they were not experts in the conditions he suffered from and more weight should have been given to the views of the doctors treating him.
- NGF and its medical advisers had imposed a more severe test than the Fund's Rules demanded.
- His wife has to help him with personal tasks such as toileting and dressing.
- He was unable to attend a course of cognitive behavioural therapy due to pain and insufficient control of his bowels.

**Summary of NGF's position**

28. NGF says:-

- The decision was taken afresh by directors of the company who had not been directly involved previously.
- Only reports relating to Mr Y's eligibility on 31 March 2014, are relevant, and so a medical examination of him now would be inappropriate.
- It is obliged and entitled to prefer the opinions of some doctors to those of others, and in particular where there are conflicting views it is entitled to prefer the opinions of Dr Mullett and Dr Gidlow to those of Dr Topping and Mr Scott.
- Dr Topping and Mr Scott did not confirm clearly and specifically that Mr Y met the criteria for total incapacity.
- The total incapacity criteria requires the applicant to be incapable of any form of paid employment as at the date of retirement, and to be so incapable at any time up to his normal retirement date.
- The decision took into account that Mr Y had been a Team Leader before his illness, which was a job requiring communication and leadership skills.
- No comments had been made about Mr Y's mental health. Reference was made to his understandable unwillingness to work, which was treatable.

**Conclusions**

29. In cases such as this, my role is not to agree or disagree with the decision maker's decision or the doctors' opinions. My role is to consider whether the decision maker took all relevant matters and no irrelevant ones into account, asked itself the correct questions and directed itself correctly in law. I will only interfere if I decide that the decision is flawed.

30. I see no good reason to question NGF's use of the same medical advisers. They were appropriately qualified doctors who could be expected to understand the Fund's incapacity criteria. However, it is important that the function of a medical adviser is not misunderstood. The medical adviser's role is to enable the decision maker to understand the medical issues and to evaluate for itself the expert evidence placed before it.

31. NGF was entitled to determine the weight it attached to each piece of medical evidence. However, NGF's view that it is entitled to prefer its medical advisers' opinions when there is a conflict of opinion between them and those of Mr Y's GP and the consultant treating him, demonstrates that NGF saw its medical advisers' own opinions of Mr Y's state of health as at least equal to those of a specialist in a particular field of medicine.

32. Chapter 9 of the British Medical Association's publication "The Occupational Physician" deals with ill health retirement. It says:

> "…
>
> The occupational physician can only be asked to provide advice on the impact of the individual's health on their ability to do their current job. Occupational physicians should not be asked to assess patients' ability to obtain work in the future. The GMC maintains the position that doctors should only deal with matters, and express opinions, that fall within the limits of their professional competence. The patient's ability to obtain work in the future may, for example, be affected by the person's mental, physical, social and educational capabilities in the absence of the illness, the availability of work and the economic circumstances, none of which can be foreseen by the occupational physician."

NGF's medical advisers went beyond this guidance, giving their views on Mr Y's future work prospects. It is clear that NGF expected them to do so.

33. I do not disagree with NGF's statement that it had to confine itself to evidence relevant to Mr Y's state of health when he retired in 2014. However, whilst applying this restriction to the reports provided by Dr Topping and Mr Scott, NGF was content to take into account its medical advisers' opinions on what Mr Y was fit to do now, and predictions of what Mr Y might be able to do at some point in the future.

34. NGF's decision letter dated 26 May 2016, says "so far as your capability to do paid employment in future is affected by your "frame of mind", in terms of the psychological effect of your illness and the treatment for it, Dr Gidlow's report of 12 April 2016, comments that this could also be addressed by counselling and cognitive behavioural therapy." NGF accepted what was, in effect, a diagnosis of psychological problems which had not been made by a doctor treating Mr Y, but one who had never examined him.

35. Mr Y's earnings capacity depended on what work he could reasonably be expected to be capable of doing, taking into account his qualifications and work experience. NGF's decision letter dated 26 May 2016, stated that the test was that "your condition would need to have [at retirement] prevented you from being capable of carrying out any paid employment of any kind for a period of approximately 20 years (up to your normal retirement age under the Scheme, which is 65)." Dr Gidlow went even further in his report dated 12 April 2016, and said the test was "permanently incapable of any form of work". NGF and its medical advisers interpreted the criteria for total incapacity in different ways.

36. NGF's decision was based in part on the medical advisers' opinions about Mr Y being able to do part time work such as reception duties, although Dr Gidlow said that "these were not explored in any great detail" because such opinions were beyond the remit of the occupational physician. I have difficulty with NGF's view that it was

rational to give considerable weight to a prediction that had not been fully explored and was outside the adviser's remit.

37. NGF was understandably concerned about whether Dr Topping and Mr Scott understood the definition of total incapacity. It would not have been difficult to ask them, but this was not done; it should have been as it was a relevant question given NGF's concern on this aspect. These were important reports and NGF's dismissive view that it had enough evidence already and clarification was unnecessary even though it was relied upon when justifying NGF's decision, conveys the impression that the decision not to award a Total Incapacity pension had already been made.

38. Given Mr Scott's expertise concerning Mr Y's condition, his understanding of the definition of total incapacity is obviously relevant in NGF determining whether Mr Y was eligible for this benefit. Instead NGF relied on a further report by Dr Gidlow, not an expert in Mr Y's condition, who did not examine Mr Y but relied instead on the report and recollections of his colleague Dr Mullett.

39. I recognise that decisions on ill health pensions can be among the most difficult to take and. NGF clearly tried to deal with Mr Y's case as best it could. However, there were relevant questions which NGF should have asked and there were irrelevant considerations taken into account. Therefore, NGF's decision dated 26 May 2016, is flawed. The only safe course is for NGF to take its decision afresh, having regard to my findings.

**Directions**

40. NGF shall, within 28 days, obtain any further medical evidence and professional advice it requires. NGF shall then take its decision afresh and convey it to Mr Y, giving reasons for the decision.

**Anthony Arter**

Pensions Ombudsman
21 September 2016