

## Ombudsman's Determination

Applicant	Mrs Y
Scheme	Local Government Pension Scheme ( <b>the Scheme</b> )
Respondents	Oxfordshire County Council ( <b>the Council</b> )

## Outcome

1. Mrs Y's complaint is upheld and to put matters right the Council shall review its original decision to award Mrs Y Tier 3 ill-health pension benefits.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs Y's complaint against the Council is that its decision to refuse to pay her a Tier 1 ill-health retirement pension (**IHRP**), was flawed.

## Background information, including submissions from the parties

4. The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 and administration Regulations, (**the Regulations**), are set out in the Appendix.
5. Mrs Y was diagnosed with chronic fatigue syndrome (**CFS**) in 1993, but continued working until 15 February 2013. Following Mrs Y's termination of employment, the Council considered her application for IHRP.
6. On 20 April 2013, an independent registered medical practitioner (**IRMP**), Dr Sorrell considered Mrs Y's medical evidence and said in his report that:

"I have reviewed all of the medical evidence submitted to me and feel that on the balance of probability Mrs Y is permanently incapable of discharging efficiently the duties of her employment as an Employment Adviser with Oxford County Council because of ill health or infirmity of mind or body. It is my opinion however that Mrs Y is likely to be capable of undertaking gainful employment within the next 3 years (Tier 3)".

7. On 24 May 2013, the Council sent a letter to Mrs Y informing her of its decision. It awarded Mrs Y a Tier 3 IHRP. It also explained that a review must be carried out at 18 months of an IHRP being agreed and she will be contacted again by its Occupational Health at that time.
8. Mrs Y appealed against the decision by invoking the two stage internal dispute resolution procedure (**IDRP**).
9. On 30 September 2013, the Council sent a response to Mrs Y under stage 1 of the IDRP. It agreed to arrange for a second opinion from another IRMP. This was because Mrs Y said that Dr Sorrell failed to obtain all the available evidence about her health. It asked Mrs Y to provide all her medical evidence.
10. On 5 October 2013, Mrs Y informed the Council that she will be contacting the Pensions Advisory Service (**TPAS**) to get advice on how she should proceed with her complaint.
11. TPAS adviser told Mrs Y that the offer by the Council to seek a second opinion is reasonable. Mrs Y decided to proceed on that basis.
12. On 28 March 2014, TPAS sent a chaser to the Council for the second opinion, informing it that Mrs Y was being inconvenienced.
13. On 15 April 2014, a new IRMP, Dr Fernandes, wrote a report that said:

“I am of the opinion that Dr Sorrell’s opinion was not incorrect at the time he provided his opinion given the information he had at that time. My opinion has been based on the additional information provided recently by Mrs Y together with further information available from her occupational health records subsequent to Dr Sorrell’s opinion and the fact that a year has elapsed since Mrs Y left her employment...My conclusion is that with CFS/ME there is still a small possibility of recovery at some stage sufficient to find gainful employment BUT the time scale is unknown and thus in my opinion Mrs Y qualifies for Tier 2”.
14. On 7 May 2014, the Council sent a letter to Mrs Y informing her of its second decision. It said that Mrs Y now qualifies for Tier 2. It also apologised for the time that it has taken to obtain a second opinion.
15. Mrs Y appealed against the decision by invoking stage 2 of the IDRP.
16. On 16 September 2014, the Council sent a response to Mrs Y, under stage 2 of the IDRP, that said:

“...I confirm my decision to uphold the initial decision of the Council to award a Tier 3 pension, (as supported by the opinion received from Dr Sorrell, which in turn was found reasonable by the Council at Stage 1, as supported by the statement of Dr Fernandes). As such there is no provision to award a Tier 1 pension. I also found the decision to award Mrs Y a Tier 2 pension following

the 18 month review, to be appropriate, and consistent with the opinion received from Dr Fernandes”.

17. Mrs Y brought the complaint to this Office in June 2016.
18. On 6 June 2016, this Office received a formal response from the Council that upheld the previous decision and further added:

“I do not find it unreasonable that the Council did not seek to back date the Tier 2 decision to February 2013, but chose to award it with effect from the date of the review”.

### **Adjudicator’s Opinion**

19. Mrs Y’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 Adjudicator’s view was that the Council did not properly consider Mrs Y’s eligibility for an IHRP.
- Having read Dr Sorrell’s opinion, the Adjudicator was not satisfied that it goes far enough. He appears to have taken a general approach when reviewing medical research. His conclusions say ‘this study confirms that recovery from CFS is possible, and that CBT and GET are the therapies most likely to lead to recovery’. Dr Sorrell’s conclusions do not specifically apply to Mrs Y’s condition and the prognosis of her recovery for her specific condition at the time of writing this report.
- In the letter dated 30 September 2013, the Council had agreed to arrange for a second opinion on the basis that Dr Sorrell failed to obtain all Mrs Y’s medical evidence about her health problems. So, it is clear that Dr Sorrell’s report was flawed because it did not consider all the relevant medical evidence.
- On that basis, the Council should have treated Mrs Y’s complaint as an appeal of the Tier 3 award rather than a review of that Tier 3. Dr Fernandes’ opinion uplifted Mrs Y’s Tier 3 to Tier 2, which the Council also agreed with. So, I am of the view that if Dr Sorrell reviewed the whole medical evidence, he may have provided an opinion that Tier 2 was suitable rather than Tier 3. Whilst there is doubt, the Adjudicator saw no other option but to recommend that the Council’s decision be remitted back for it to reconsider the matter afresh.
- Further, the Council will need to decide, if it concludes that Tier 2 was appropriate, from when it ought to have been paid. In the Adjudicator’s opinion, it should be paid from when the Tier 3 award was paid i.e. May 2013.
- Although the Council’s decision to bring the 18 month review forward was not perverse, it was not sensible as it should have considered Mrs Y’s application

wholly afresh given that Mrs Y was appealing against its original decision rather than asking for the 18 month review to be brought forward.

- The fact that the Council considered the appeal as a 18 month review, left Mrs Y with uncertainty as to whether Tier 3 should have been paid from when she left or whether a higher Tier should have been considered. The fact that she was left with this uncertainty, no doubt caused her significant distress and inconvenience, which the Adjudicator believed warrants an award of £500. The amount is in line with what the Ombudsman would direct in this instance.
  - It was therefore the Adjudicator's opinion that this complaint should be upheld.
20. The Council did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Council provided its further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by the Council for completeness.
21. The Council maintains that it followed the process of dealing with the complaint as an appeal of the Tier 3 award as the second IRMP, Dr Fernandes, did not regard Dr Sorrell's initial opinion as flawed.
22. The Council's assertion is that bringing the 18 month review forward worked to Mrs Y's advantage in that, it brought forward her entitlement to a Tier 2 pension benefits.
23. The Council is also satisfied that Dr Sorrell's report is not flawed as it relied on Dr Fernandes' judgment because he was specifically asked to review that report and give opinion on it. The Council also said that Dr Sorrell considered Mrs Y's circumstances and drew correct conclusions.

### **Ombudsman's decision**

24. I do not agree that the Council properly followed the process of appeal. The process of appeal permitted the complainant to bring forward further medical evidence during IDRP. The second IRMP should have been instructed to consider that evidence in so far as it speaks to the medical condition and prognosis as at the date of the original decision. The fact that the evidence was not available to the original IRMP cannot of itself be a reason to consider the original conclusion sound. That would defeat the point of allowing the complainant to bring additional evidence forward. I appreciate that the need to make a retrospective assessment presents difficulties, but I am also conscious that there was a delay in obtaining the second IRMP's opinion and do not consider that Mrs Y's position should be compromised by that.
25. I accept that the Council's stage 1 decision maker did try to establish whether there were reasons to backdate the award. However the question put to Dr Fernandes asked him to justify the difference between his opinion and that of Dr Sorrell. It did not ask him to provide his own opinion of Mrs Y's prognosis as at 24 May 2013 in light of the new evidence submitted.

26. The Council's assertion is that bringing the 18 month review forward worked to Mrs Y's advantage. I would tend to agree if that had been the only way of considering the new medical evidence which she had brought forward, but I have already found that it was not. I therefore disagree, because the Council were obliged to consider Mrs Y's prognosis in light of all the evidence relevant to her condition as it was understood at the date of the original decision, whether or not that evidence was before the IRMP who originally provided an opinion. They were then obliged to consider whether she should awarded Tier 2 from that time rather than receiving it in June 2014.
27. Clearly, this whole matter has caused Mrs Y significant distress and inconvenience. I agree with the Adjudicator that a payment of £500 is appropriate.
28. Therefore, I uphold Mrs Y's complaint.

## **Directions**

29. To put matters right the Council shall:
- Within 14 days of this Determination pay Mrs Y £500 and request a medical report and certification from another IRMP (not previously involved) as to whether, in light of all the medical evidence which was before Dr Fernandes, Mrs Y satisfied the criteria for Tier 1 or 2 pension benefits as at 24 May 2013.
  - Within 21 days of receiving the IRMP's opinion the Council shall decide and inform Mrs Y of its decision, together with its reasons.

**Karen Johnston**

Deputy Pensions Ombudsman  
27 September 2017

## Appendix

### **The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007**

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.

Regulation 31 states:

(1)This regulation applies to-

(a)a member who has left his or her employment before he or she is entitled to the immediate payment of retirement benefits (apart from this regulation), or

(b)a member who has left his or her employment and is a pensioner member with deferred benefits under regulation 20(9).

(2)Subject to paragraphs (3) and (4), if a member to whom paragraph (1)(a) applies becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body, the member may ask to receive payment of their retirement benefits whatever the member's age.

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

(4)Before determining whether to agree to a request under paragraph (2), the member's former employing authority or appropriate administering authority as the case may be, must obtain a certificate from an IRMP as to whether in the IRMP's opinion the member is suffering from a condition that renders the member permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition the member has a reduced likelihood of being capable of undertaking any gainful employment before reaching normal retirement age, or for at least three years, whichever is the sooner.

(5)In the case of a member to whom paragraph (1)(b) applies, if the member becomes permanently incapable of undertaking any gainful employment, the member may ask to receive payment of their retirement benefits, whatever the member's age.

(6)A request under paragraph (5) must be made to the member's former employing authority, or appropriate administering authority where the member's former employing authority has ceased to be a Scheme employer.

(7)Before determining whether to agree to a request under paragraph (5), the member's former employing authority, or appropriate administering authority as the case may be, must obtain a certificate from an IRMP as to whether in the IRMP's opinion the member is

**PO-13071**

suffering from a condition that renders the member permanently incapable of undertaking any gainful employment.(8)In this regulation, "gainful employment", "IRMP" and "permanently incapable" have the same meaning as given to those expressions by regulation 20(14).