

## Ombudsman's Determination

Applicant	Mrs S
Scheme	Local Government Pension Scheme ( <b>the Scheme</b> )
Respondents	Aberdeenshire Council ( <b>the Council</b> )

## Outcome

1. I do not uphold Mrs S' complaint and no further action is required by the Council.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs S' complaint is that she has been refused Tier 1 ill health early retirement (**IHER**).

## Background information, including submissions from the parties

4. In March 2013, following a period of sickness absence, Mrs S was diagnosed with fibromyalgia and the decision was taken by the Council to see if she would be able to return to work.
5. On 6 June 2013, Mrs S' case was referred to Dr Fenwick, an independent registered medical practitioner (**IRMP**) who stated that Mrs S remained unfit for work and that it was not possible to offer a definitive timeframe in which she may be able to return. Dr Fenwick forwarded all the medical information to an independent pension scheme medical advisor to provide an opinion on the suitability of IHER.
6. On 20 June 2013, Dr Watt considered Dr Fenwick's previous report, along with Mr S' general practitioner (**GP**) records and specialist reports. Dr Watt certified that, in his opinion, Mrs S did meet the criteria for IHER because the underlying diagnosis of fibromyalgia and reactive depression meant she would be unable to return to her current role. He also said that, although Mrs S was unable to return to her current role, she did have a reasonable prospect of obtaining gainful employment before normal retirement age (**NRA**) under the Scheme, which is age 65. He certified that in his opinion Tier 2 IHER should be awarded.

7. On 22 July 2013, the Council invited Mrs S to a meeting to discuss the content of Dr Watt's report and the options available to her. Mrs S was advised of the following options:
  - accept the recommendation and retire on ill health grounds; or
  - seek an alternative medical opinion as to fitness to work; or
  - suggest a reasonable alternative course of action.
8. Mrs S initially accepted Tier 2 IHER but, on 11 October 2013, she appealed the decision made by the Council.
9. On 21 October 2013, the Council referred the matter to a new IRMP, Dr Adejoro. On 26 November 2013, Dr Adejoro considered all the information contained within Mrs S' occupational health file including her GP's note dated 16 April 2013. Dr Adejoro's opinion was, having reviewed the evidence submitted, that there was insufficient medical evidence to suggest Mrs S would be unable to obtain gainful employment before age 65. Based on this, the Council did not uphold Mrs S' appeal and it maintained that Tier 2 IHER was appropriate.
10. On 18 September 2014, Mrs S appealed under stage 2 of the internal disputes resolution procedure, (**IDRP**). Scottish Public Pensions Agency (**SPPA**) was responsible for reviewing this appeal, and it referred the case to a new IRMP, Dr Wladyslawska, for reassessment.
11. On 19 January 2015, Dr Wladyslawska met with Mrs S and subsequently submitted a report to SPPA on 21 January 2015. Dr Wladyslawska took into account Dr Adejoro's, Dr Watt's, and Dr Fenwick's previous reports, letters from Mrs S' GP and other information provided. She found that Mrs S was permanently incapable of discharging efficiently the duties of her employment. However, she certified that, in her opinion, Mrs S did have a reasonable prospect of obtaining gainful employment before age 65.
12. On 27 January 2015, SPPA issued its stage 2 IDRP response to Mrs S. The decision maker held that the decision to award Mrs S Tier 2 IHER was reasonable given all the medical evidence to support the award, and he was satisfied that the relevant Scheme regulations had been applied correctly.

### **Adjudicator's Opinion**

13. Mrs S complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council. The Adjudicator's findings are summarised briefly below:-
  - To be eligible for Tier 1 IHER under the regulations, Mrs S must be unlikely to be capable of undertaking gainful employment before NRA.

- The Ombudsman's role is not to decide whether Mrs S is eligible for Tier 1 IHER; that is a matter for the Council to decide after obtaining requisite certification from an IRMP.
  - The Ombudsman's role is to decide whether the Council has abided by the regulations, asked relevant questions, considered all relevant evidence and explained the reason(s) for its decision in a transparent way. The Ombudsman can require the Council to look at Mrs S' case again should he find flaws in the decision making process. The medical evidence is reviewed in order to determine whether it is appropriate and supports the decision made. However, it is up to the Council to decide which evidence it wishes to attach any weight. The Council can prefer the advice of its own medical advisers unless there is a cogent reason why it should not.
  - Mrs S says her GP's opinion seems to have been ignored. However, it is for the Council to attach weight (if any) to the relevant medical evidence. The Council made its final decision based on Dr Wladyslawska's report, which made reference to her GP's report. As such, the Adjudicator was satisfied that the Council had considered all the relevant information.
  - Dr Wladyslawska certified that Mrs S is unlikely to be capable of undertaking any gainful employment within the next three years, but is likely to be capable of undertaking gainful employment at some time thereafter and before her NRA.
  - Mrs S disagreed with Dr Adejoro's and Dr Wladyslawska's assessment and reiterated that her GP supports her application. However, the Adjudicator was of the view that this is not sufficient for the Ombudsman to say that the Councils' preference for Dr Adejoro's and Dr Wladyslawska's opinion was flawed.
  - Mrs S says that the Council has failed to give reasons for its decision. However, the Adjudicator was satisfied that SPPA, in its IDRP stage 2 response, has clearly explained its reasons for concluding why Tier 2 IHER remains appropriate for Mrs S in line with the Council's previous decision.
  - Mrs S asserts that she has been discriminated against for having a health disability. The Adjudicator on reviewing all the evidence available to her, did not consider there are any grounds to conclude that Mrs S' assertion is justified.
14. Mrs S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs S provided her 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 Mrs S for completeness.

## **Ombudsman's decision**

15. Mrs S says it was never explained to her prior to the meeting on 22 July 2013 that the Council would be looking at IHER. She also states that, during the meeting on 22 July 2013, she was not advised of her options but was told that as she was unfit to return to work there was no alternative option available to her. However, I note that on 12 July 2013, the Council had sent her a letter confirming that it is considering the termination of her employment on the grounds of ill health. The Council further notified Mrs S of the options that would be available to her at the meeting. Therefore, I am not persuaded that the Council had not properly notified Mrs S of the IHER process.
16. Mrs S questions how a decision can be made that she would be unfit for work for three years but would be able to work thereafter. However, as explained by the Adjudicator in the Opinion my role is not to review the medical evidence and come to a decision of my own but to consider the decision making process. In this particular case, looking at the whole process from the time Mrs S challenged the Tier 1 pension award to when the Council issued its IDRP stage 2 response, I find that it has considered all the relevant facts and followed the procedure correctly. As such there are no justifiable grounds for me to find that the Council's decision was perverse or that the process it undertook in reaching its decision was flawed.
17. Therefore, I do not uphold Mrs S' complaint.

**Anthony Arter**

Pensions Ombudsman  
15 November 2017