

## Ombudsman's Determination

Applicant	Mrs T
Scheme	Local Government Pension Scheme ( <b>LGPS</b> )
Respondents	City of Wolverhampton Council ( <b>the Council</b> ), West Midlands Pension Fund ( <b>the Fund</b> )

## Outcome

1. Mrs T's complaint is upheld and to put matters right the Council shall reconsider her early retirement claim. It shall also pay Mrs T £500 for the significant distress and inconvenience she has experienced.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs T's complaint is about the tier of ill health early retirement (**IHER**) pension she has been awarded.

## Background information, including submissions from the parties

### Background

4. Mrs T was previously employed by the Council in the Social Services department as a Community Care Assessor. Unfortunately Mrs T has spondylosis of the spine, a permanent and degenerative condition which limits her mobility. As a consequence of her health problems, Mrs T successfully applied for IHER.
5. From 5 January 2004, until her employment with the Council ended, Mrs T was a member of the Fund which is part of the LGPS. The normal retirement age of the LGPS is age 65.
6. The LGPS is subject to the Local Government Pension Scheme Regulations 2013 (**the Regulations**). Relevant extracts from the Regulations, which have been referred to in this Determination, are set out the Appendix. For the purposes of interpreting the Regulations, the Council is the scheme employer and the Fund is the appropriate administering authority.

7. There are three different tiers of IHER benefits available from the LGPS. The pension payable depends on the member's ability to carry out gainful employment after retiring. The three tiers are set out in Regulation 35.
8. Regulation 72(4) specifies that it is the Council that has, in the first instance, to make the decision as to what level of ill health benefits to award (if any). The Fund can reconsider the decision made by the Council on appeal [Regulation 76(1)]. The Regulations provide that in making this decision, the Council, or the Fund on reconsideration, must obtain the opinion of an Independent Registered Medical Practitioner (**IRMP**) [Regulation 36(1)].
9. On 25 April 2016, Mrs T was referred to Dr Richards, an IRMP. Dr Richards' opinion was that Mrs T was, "permanently incapable of discharging efficiently the duties of her current role." However Dr Richards did consider it likely that Mrs T would be capable of undertaking gainful employment within the next three years. Dr Richards provided a 'Form M1' medical certificate to this effect.
10. On 24 May 2016, Mrs T's IHER was granted and she was awarded Tier 3 ill health retirement benefits. Mrs T was aged 51.
11. Mrs T's Tier 3 status is due to be reviewed on 16 February 2018.
12. On 28 June 2016, Mrs T appealed the Council's decision to award her Tier 3 ill health benefits. This was dealt with under the LGPS's two stage internal dispute resolution procedure (**IDRP**).
13. As part of the stage two IDRP investigation, a further report from Dr Cathcart, another IRMP not previously involved with the case, was sought. Dr Cathcart's report says, amongst other things:-

"...I understand arrangements were made for Dr Richards to be in receipt of an additional report from the treating pain management specialist of 12<sup>th</sup> April 2016 – Dr Richards does refer to this report but it is not quite clear if he actually saw it or relied on [Mrs T] to tell him about it.

This is relevant because the report of 12<sup>th</sup> April gives additional medical detail not on previous reports.

Based on the information available to him, Dr Richards concluded [Mrs T] was suffering from Mechanical Back Pain...

...Dr Richards correctly draws attention to the difficulty of establishing permanence of incapacity in people suffering from Mechanical Back Pain and quotes the widely accepted guidance of the Association of Local Authority Medical Advisers.

However, the report of the pain management specialist of 12<sup>th</sup> April goes into more detail than had previously been available about [Mrs T's] spinal condition...

...The significance of this information is that it indicates [Mrs T's] symptoms may not relate solely to Mechanical Back Pain but may also be due in part to other spinal conditions. This might be expected to complicate her treatment and to reduce the likelihood of a successful outcome..."

14. The pain management specialist's report dated 12 April 2016, which was referred to by Dr Cathcart, was authored by Dr Wali, a consultant in Anaesthetics and the lead clinician for chronic pain management. The report included the following statement:-

"I do believe, that it would be appropriate if this lady applies for ill health based retirement, however it should be acknowledged and appreciated, that I am not a disability assessment doctor, and generally refrain to comment on such situations..."

...To conclude, I would like to reiterate that there are no further interventional procedures through Pain Clinic that can reverse this lady's long term chronic condition, and in my professional view, I do not believe that even through another speciality it would be possible to achieve a reversal of her degenerative spinal condition."

15. On 16 August 2016, when she was aged 52, and therefore before her normal retirement age, Mrs T's employment with the Council was terminated.

### **The Council's position**

16. The Council declined Mrs T's stage one IDRPs complaint on the basis that Dr Richards, the IRMP, was suitably qualified to advise the Council in cases of IHER, and that it was his opinion that Mrs T was entitled to Tier 3 benefits.

### **The Fund's position**

17. On appeal, the Fund, as the appropriate administering authority to the LGPS, issued the stage two IDRPs response. This was again to reject the complaint on the basis that the opinion of Dr Cathcart did not differ from that of Dr Richards, in that Mrs T satisfied the requirement for Tier 3 benefits.

### **Mrs T's position**

18. Mrs T says Dr Richards appears to have prejudged her medical state as injury based, and therefore recoverable, rather than a chronic illness. Further, the fact that Dr Richards did not have all of the medical records allowed him to, "err on the side of caution and not confirm permanency" by making a diagnosis of Mechanical Back Pain.
19. Doctors Richards and Cathcart have failed to consider her bladder problems. Mrs T has said the pain and weakness she experiences, along with her limited ability to bend, means that she is no longer able to self-catheterise.

20. The Department for Work and Pensions (**DWP**) has confirmed that Mrs T meets the criteria for support group employment support allowance (**ESA**). This, she says, means that she has been assessed as being permanently unable to work. Further, many of the multimodal therapies suggested by her doctors have been tried, but only provide temporary pain relief.
21. Mrs T suggests the Fund's decision has primarily been made to save the LGPS money.

## **Adjudicator's Opinion**

22. Mrs T'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 eligibility test for IHER from the LGPS is different when compared to ESA. It does not automatically follow that the receipt of ESA means that Mrs T would automatically qualify for IHER from the LGPS.
- Dr Richards' report makes reference to the specialist report authored by Dr Wali, but it is unclear whether Dr Richards actually had sight of the report since Dr Richards omits to report that Dr Wali had concluded that Mrs T is:-

“...a lady who suffers with both cervical and lumbar level degenerative changes in her spine including, disc bulges in the cervical spine and spondylolisthesis in the lower lumbar level. She has additional disc bulges at lower 5 lumbar levels, which are indeed causing foraminal and lateral recess narrowing... It is worth noting that in addition to the lumbar spine, she also has mild disc bulges at C4/5 and C6/7 levels, however these disc bulges do abut the anterior cord and cause mild to moderate lateral foraminal narrowing.”

- This is significant insofar as Dr Richards made a diagnosis of Mechanical Back Pain and reported:-

“According to evidence from ALAMA [Association of Local Authority Medical Advisers] on back pain, non-specific mechanical back pain should not normally justify retirement due to ill health or permanent restrictions of a particular type of work. This may be necessary however for multiple disc prolapses, spinal stenosis, and serious spinal pathology or if degenerative disease is more advanced than expected for the age of the patient and if the response to treatment has been unsatisfactory.”

- Dr Richards' report indicated that he had not considered all of the relevant evidence. If Dr Richards had seen the information in Dr Wali's report, he is likely to have correctly identified that Mrs T also has spondylolisthesis and two slipped discs.

- As the decision maker, the Council has a responsibility to investigate any discrepancies in the medical opinion it receives from the IRMP. The Council had sufficient information to be able to identify that Dr Richards may not have actually seen Dr Wali's report, so it ought to have questioned this further.
- The Council failed to direct itself properly and has blindly accepted Dr Richards' assessment rather than reaching a decision for itself. This amounts to maladministration.
- As part of the stage two IDR review, Dr Cathcart identified that contrary to Dr Richards' report, "[Mrs T's] symptoms may not relate solely to Mechanical Back Pain but may also in part be due to other spinal conditions." Dr Cathcart concluded:-

"Dr Richards draws attention to the good prognosis in spinal pain if multimodal treatment is used, including medication both orally and with local injections, physiotherapy and exercise therapy, and psychological support. With low back pain Hazard 1989 reports 81% of patients returned to work, Vendrig 1999 87% and Haldosen 1998 77%. For neck pain there is less evidence, but Buchner 2006 reports equally good results for patients with neck and back pain with a return to work rate of 67%.

If [Mrs T] had only Mechanical Back Pain then it is my opinion based on the available medical evidence a recommendation for a Tier 3 award is entirely correct. I accept that she has additional spinal conditions which fall outside of the definition of Mechanical Back Pain and that the presence of these conditions is likely to lead to a reduced response to multimodal therapy. On balance, however, I am not of the opinion the balance of probability is shifted sufficiently to support a Tier 1 or Tier 2 award at this time."

- Mrs T's medical notes, which were available to Dr Cathcart, confirm that surgery had been discounted in Mrs T's case. The notes also detail the range of medications Mrs T had been prescribed for analgesia, the exercise therapy she was undertaking and her history of local injections to the spine.
- It is not disputed that Mrs T's degenerative spinal condition could not be reversed and it was also accepted that Mrs T's spondylolisthesis and slipped discs may, "lead to a reduced response to multimodal therapy." However Dr Cathcart did not give any indication as to the extent to which Mrs T's additional spinal conditions would reduce the response to treatment. Nor did the Fund investigate the long term efficacy of the multimodal treatment that had been suggested, bearing in mind the treatments Mrs T had already undertaken.
- The efficacy of the available treatment is a key consideration as it is generally held that spinal injections, the main treatment Mrs T was undergoing, are not advocated as long-term management for patients with back pain and tend only to provide short term pain relief.

- Dr Cathcart reported that he was, “not of the opinion the balance of probability is shifted sufficiently to support a Tier 1 or Tier 2 award at this time.” However he provided no justification as to why the balance had not shifted. There is no evidence that the Fund sought clarification from Dr Cathcart on this point.
  - Dr Richards’ reported several clinical studies which showed a good prognosis for multimodal treatment on back pain and cited a six month assessment period for one of the studies he referred to. However, Mrs T had been suffering from back problems for several years, so there is some question as to the relevance of the studies mentioned. The Fund did not question the weight which should be applied to the findings of the clinical studies, if as in Mrs T’s case, the patient’s recovery was not sufficient to allow them to return to work within the timeframe in which the study was over.
  - Neither the Council, nor the Fund on reconsideration, have demonstrated any independent decision making, both have blindly accepted the opinion of their respective IRMPs.
23. The Adjudicator recommended that the complaint should be upheld and that the Council should reconsider Mrs T’s IHER claim. The Adjudicator also recommended that the Council pay Mrs T £500 for the significant distress and inconvenience she has experienced.
24. Mrs T and the Fund accepted the Adjudicator’s Opinion. The Council did not and the complaint was passed to me to consider. The Council provided its further comments, summarised below, which do not change the outcome:-
- One of the boxes ticked by Dr Richards on the Form M1 medical certificate is for HMRC purposes only. It is not relevant for the purpose of determining the tier of ill health pension to award.
  - The Council has a robust attendance management procedure which has been followed in Mrs T’s case.
  - All information is gathered and taken into consideration in addition to the IRMP’s recommendation. On this point the Council said, “...we obtain a medical opinion on whether ill health retirement is appropriate. The only medical advice we accept without too much question is the tier.”
  - The Council’s occupational health unit ensures that the IRMP is provided with all up-to-date medical evidence. In this case Mrs T’s GP reports, the report by Dr Wali, hospital discharge letters and a copy of Mrs T’s job description were provided to the IRMP.
  - The IRMP opinion obtained by the Fund supports Dr Richards’ recommendation that Mrs T should be awarded Tier 3 benefits.

25. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by the Council for completeness.

### **Ombudsman's decision**

26. My role is not to replace the Council as the decision maker and decide whether Mrs T is eligible for IHER. My role is to decide whether the correct process has been followed resulting in a reasonable decision.
27. I accept that nothing turns on the ticking of the two boxes on the M1 certificate. The Council has said that Dr Wali's report was sent to Dr Richards. On this basis the Council ought to have identified that Dr Richards made a diagnosis of Mechanical Back Pain, whilst Dr Wali reported that Mrs T also has spondylolisthesis and two slipped disks. As decision maker, the Council should have interrogated this discrepancy in the diagnosis made by its IRMP and Mrs T's own physician. I find no evidence it did so. In its response at stage 1 of the IDR process there is also no indication that it gave any consideration to the question of whether and when Mrs T could be expected to make a recovery sufficient to undertake gainful employment.
28. This maladministration, the failure to direct itself properly by asking the right questions, is significant. I say this because Dr Richards concluded, "non-specific mechanical back pain should not normally justify retirement due to ill health" but that, "This may be necessary however for multiple disc prolapses, spinal stenosis, and serious spinal pathology."
29. It therefore follows that had a different, or more complete, diagnosis been made by Dr Richards, his prognosis for Mrs T's recovery, and consequently his opinion on her ability to carry out gainful employment in the future, may also have been different. In order to make a decision about appropriate tier the Council needs to satisfy itself about the timeframe within which she is likely to be able to return to gainful employment or whether there is no reasonable prospect that she will do so before retirement age. To make that decision fairly they require appropriate medical opinion addressing the likely effect of available future treatments on Mrs T and the timeframe within which any improvements could be expected.
30. Therefore, I uphold Mrs T's complaint.

### **Directions**

31. Within 14 days of the date of this Determination the Council shall request a medical report and certification, from another IRMP who has not previously been involved, as to whether Mrs T satisfied the criteria as stated under Regulation 35 based on all of the medical evidence available at the time of the initial application.
32. Within 28 days of receiving the IRMPs certification and report the Council shall decide and notify Mrs T which tier of pension benefits she is entitled to under Regulation 35.

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33. If the Council decides that Mrs T is eligible for a higher tier IHER benefit than that currently in payment, this benefit shall be paid to Mrs T, backdated to the date her IHER claim was originally accepted.
34. Within 14 days of the date of this Determination the Council shall pay Mrs T £500 for the significant distress and inconvenience that she has experienced as a result of the failure to consider her eligibility for ill health retirement properly.

**Karen Johnston**

Deputy Pensions Ombudsman  
19 October 2017



## **Appendix - The Local Government Pension Scheme Regulations 2013**

### **Part 1 – Membership, Contributions and Benefits**

#### **35 Early payment of retirement pension on ill-health grounds: active members**

- (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.

#### **36 Role of the IRMP**

- (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).

### 37 Special provision in respect of members receiving Tier 3 benefits

- (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.

## **Part 2 – Administration**

### **72 First instance decisions**

(1) Any question concerning the rights or liabilities under the Scheme of any person other than a Scheme employer must be decided in the first instance by the person specified in this regulation.

...

(3) The appropriate administering authority must decide any question concerning-

(a) a person's previous service or employment;

(b) the crediting of additional pension under regulation 16 (additional pension); and

(c) the amount of any benefit, or return of contributions, a person is or may become entitled to out of a pension fund.

(4) A person's Scheme employer must decide any question concerning any other matter relating to the person's rights or liabilities under the Scheme.