

Ombudsman's Determination

Applicant	Mr E
Scheme	Local Government Pension Scheme (LGPS)
Respondent	Hampshire County Council (the Council)

Outcome

1. Mr E's complaint is upheld and to put matters right the Council should reconsider Mr E's application for an ill health retirement pension (**IHRP**).
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr E's complaint against the Council is that it failed to consider him for an IHRP when he was dismissed from his employment on the grounds of ill health. Mr E would like his deferred ill health pension, that he was awarded in 2015, to be backdated to 2009, when his employment was terminated.

Background information, including submissions from the parties

4. Mr E's IHRP falls under Regulation 20 of The LGPS (Benefits, Membership and Contributions) Regulations 2007, which is set out in the Appendix.
5. The Council has not been able to provide this Office with a full file, therefore my Determination is based on a limited amount of information. The Council contends that it made a decision in 2009 to reject Mr E's IHRP application and subsequently sent a decision letter to Mr H on 6 April 2009.
6. Mr E refutes receiving the Council's decision letter or any other information with regard to an option to apply for an IHRP.
7. In the formal response to this Office, dated 3 March 2017, the Council raised a jurisdiction issue in relation to the three year time limit. It made an assertion that the decision letter was sent to Mr E on 6 April 2009, explaining the reasons for the rejection of his IHRP application, therefore Mr E's application is outside of our time limits. This Office has accepted the complaint on the basis that Mr E, on the balance of probabilities, had not received the Council's decision letter.

8. The Council also provided a copy of the decision letter which is the key document on which the Adjudicator based her decision.
9. Mr E was referred to Occupational Health (**OH**) specialist, Dr Stoot who issued a report, dated 21 January 2009 that said:

“As you are aware this gentleman was originally diagnosed as suffering from depression with associated anxiety in July 2008...His condition remains untreated and therefore not surprisingly overall he has failed to make any significant progress. This gentleman remains unfit for work, remains unwell and there is a likelihood that he will be not able to resume his full occupational role for the foreseeable future. I look forward to liaising further”.
10. A letter dated 6 April 2009, was sent to Mr E by Andy Coulbeck, Senior IT Consultant. The letter said that:

“I am writing to confirm our conversation when we meet [sic] on 02 April 2009 to discuss the outcome of your recent referral to the Occupational Health Unit. Jo Hurst from Human Resources also attended. I gave you a copy of the report from Dr Stoot and explained that it confirms you are not currently fit for your contractual post as IT Consultant with IT Services and will not be fit to return in the foreseeable future. The physician could not, however, recommend that you should retire on the grounds of permanent ill health because he did not consider your medical condition to be permanent but neither could he indicate when you might be fit to return to your post...It is with regret therefore, that this letter confirms that your present employment is to be brought to an end on the grounds of medical capability with effect from 02 April 2009”.
11. It was not until September 2015 that Mr E applied for an IHRP from deferred status and he was subsequently awarded it in February 2016. The benefits were backdated to September 2015, the date of Mr E’s original application.
12. In September 2016, the Council sent a response to Mr E’s complaint under stage two of the internal dispute resolution (**IDRP**) that said:

“I write further to your Stage 2 Appeal received on the 6th July 2016. Your Stage 2 Appeal requests a review of the Employer Stage 1 Appeal conducted by the Hampshire County Council...this is not unusual and the County Council was not under any obligation to obtain a formal certificate at that stage. If you had exercised your right of appeal then the County Council would have been able to obtain that certificate from Dr Stoot because he had previously been involved in your case. However, as you did not appeal there was no further need for the County Council to seek further formal certificate”.
13. In January 2017, Mr E brought the complaint to this Office. In his submission, he provided a letter dated 24 November 2008 which sets out official guidance sent to all the employers participating the LGPS, appointed independent registered medical

practitioners (**IRMPs**), and other parties who needed to use this guidance. The letter said:

“Employers, administering authorities and IRMPs must have regard to this guidance when carrying out their functions under Regulation 20 of the LGPS (Benefits, Membership and Contributions) Regulations 2007 (SI 2007/1166), as amended by the LGPS (Amendment) Regulations 2008 (SI 2008/1083), and Regulation 56 of the LGPS (Administration) Regulations 2008. This guidance includes details of the relevant statutory provisions and an explanation of the operation of the new ill-health retirement benefit provisions as they apply from 1 April 2008 (set out in the Appendix)”.

14. In its submission to this Office, the Council maintained its stance and added the following further comments:

“Even if the position is that a certificate is required whenever a member of staff is dismissed on health grounds and IHR is not being granted; then such a certificate in this case would have been in terms of Dr Stoot’s less formal opinion, namely that the condition lacked the permanence that any inability to perform the Complainant’s role must have before IHR can be granted. Thus it is submitted the outcome would have been the same”.

15. In the telephone call to this Office, on 10 January 2018, Tim Spender, acting on behalf of the Council, confirmed that Dr Stoot was an OH specialist and did not act in the capacity of an IRMP when issuing a medical opinion in respect of Mr E.

Adjudicator’s Opinion

16. Mr E’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 Mr E’s eligibility for an IHRP.
 - Essentially, Regulation 20 lays the responsibility on the employing authority, i.e. the Council, to decide whether a member meets the criteria. It appears that the Council dismissed Mr E on the grounds of ill health without consideration being given to awarding him an ill health pension.
 - Mr E was referred to Dr Stoot, an OH specialist, who issued a report with regard to Mr E’s health condition. Based on this report, the Council made a decision to dismiss Mr E on the grounds of ill health. However, Regulation 20 requires that an ill health assessment is made before an employment is ended. The Council should have referred Mr E to an IRMP for assessment and obtained a certificate from them. However, Dr Stoot was not acting in the capacity of an IRMP, as required by Regulation 20. At the time the Council should have decided whether Mr E satisfied

the criteria for receiving an ill health pension and provided reasons for its decision. So, the Adjudicator was not satisfied that the Council had complied with the LGPS Regulations and that all relevant evidence was considered.

- Furthermore, the letter, dated 24 November 2008, sets out the official guidance for the Council to follow. The guidance explains the change in process for the employer, in this case the Council; “The ill health provisions in Regulation 20 now require the employer to commence medical processes prior to any termination of employment on ill health grounds... But an employer cannot make a determination under Regulation 20 unless they have obtained a certificate from an independent registered medical practitioner qualified in occupational health medicine...”. So, the Adjudicator disagreed with the Council when it says it is not a requirement to obtain a certificate from an IRMP before it dismisses a member on the grounds of ill health.
 - It was therefore the Adjudicator’s opinion that this complaint should be upheld.
17. 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.
18. The Council has asserted that the Adjudicator’s Opinion is based on an erroneous interpretation of Regulation 20. It says that an employer can decide to terminate a member’s employment on grounds of ill health, or infirmity of mind or body, where that ill health does not render him permanently incapable of discharging efficiently the duties of his current employment, without having to give access to his pension under Regulation 20. The Council is of the view that this applies to Mr E as he does not have a reduced likelihood of being capable of undertaking employment before retirement.

Ombudsman’s decision

19. The Council is correct in saying that a member’s employment may be terminated on ill health grounds without necessarily meeting the criteria required for the payment of an IHP under Regulation 20. However, what the Council failed to do was to implement a proper process, in accordance with the Regulations, in order to make that decision. Decisions as to eligibility are taken by the Council, having obtained a medical opinion from its IRMP.
20. Having considered the 2008 ill health provisions that fall under 1997 Scheme regulations, it is clear that the employer, the Council in this case, is expected to commence ‘medical processes’ prior to any termination of employment on ill health grounds.
21. I find that the Council’s decision was improper to dismiss Mr E on grounds of ill health, without considering his eligibility for an IHP by following the requirements of

Regulation 20. The interpretation of Regulation 20 and the 2008 guidance have already been considered by the Adjudicator in her Opinion and I agree with her findings. So, I find that the Council has made an administrative error in this case by their incorrect interpretation of the Regulations.

22. Therefore, I uphold Mr E's complaint.

Directions

23. Within 21 days of the date of this Determination, the Council shall request a medical report and certification from a new IRMP, not previously involved in the case, to determine whether Mr E satisfies the criteria for an IHRP from the date his employment was terminated on 2 April 2009.
24. Within 28 days of receiving the IRMP's certificate and report the Council shall decide and notify Mr E whether he is entitled to an IHRP from 2 April 2009.

Anthony Arter

Pensions Ombudsman
21 February 2018

Appendix 1

Regulation 20

(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 obtaining 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 obtaining 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 cannot obtain gainful employment within three years of leaving his employment, it is likely that he will be able to obtain 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 able to obtain any gainful employment within three years of leaving his employment, 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 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 obtaining any gainful employment before reaching his normal retirement age.

Appendix 2

Change in process for the employer in the 2008 ill health provisions

10. Under the 1997 Scheme regulations, any question concerning entitlement to an ill-health retirement benefit could only be decided when a member had left local government employment on the grounds of permanent ill health. Whilst this did not prevent an employer and medical advisers from looking into the question of entitlement to an ill health pension and grant beforehand, in regulatory terms, the actual decision about entitlement and any appeal arising from the determination of that question could only have been made on or after the member left employment. Concerns have been raised in the past about the effect that certain decisions made by the Courts and the Pensions Ombudsman might have on this separation between the “leaving employment” and the “entitlement to pension benefit” question that has been part of the scheme’s regulations for a considerable time. The ill health provisions in Regulation 20 now require the employer to commence medical processes prior to any termination of employment on ill health grounds.

11. Responsibility for deciding the grounds on which the employment of a scheme member has been terminated rests solely with the employer (Regulation 20 (1)). But an employer cannot make a determination under Regulation 20 unless they have obtained a certificate from an independent registered medical practitioner qualified in occupational health medicine (Regulation 20 (5) and (14) (a) and (b)).

12. It is also important to note that all the regulations referred to in this guidance are subject to the civil law burden of proof. As such, the determination of questions is based on the “balance of probabilities” test and not on the stricter criminal law test of “beyond reasonable doubt”.

Part II - Questions for the employer to determine

13. Under Regulation 20, the appropriate employer is required to consider and decide a number of questions before entitlement to an ill health retirement benefit under that regulation can be awarded. These include:-

- a) is the length of total membership at least three months, or has a transfer value been credited to the member, or does the member already hold a Local Government Pension Scheme deferred benefit in the Local Government Pension Scheme in England and Wales? (Benefits Regulations 5 (1) and 20(1)); and
- b) does an independent registered medical practitioner consider that the member’s ill health or infirmity of mind or body render him permanently incapable of discharging efficiently the duties of his current employment? (Regulation 20(1)(a) and 20 (5)); and

- c) does the member have a reduced likelihood of undertaking gainful employment (whether in local government or elsewhere) before his normal retirement age? (Regulation 20(1)(b)).

(Note: see explanations concerning 'gainful employment' and 'reduced likelihood' at paragraphs 24 and 28 below)

14. If the answers to all three questions are in the affirmative, there is a prima facie entitlement to payment of an ill-health benefit under Regulation 20. To decide the level of benefit, the employer must further decide which of the following three situations applies:-

- a) is there no reasonable prospect of the member being capable of undertaking any gainful employment before reaching his normal retirement age. In these circumstances, the member receives benefits based on his accrued rights up to the date of termination and enhancement equal to all his prospective service from that date to his normal retirement age. (Regulation 20(2)); or
- b) is the member judged to be incapable of undertaking gainful employment within three years of leaving local government employment, but is thought likely to be able to do so before reaching his normal retirement age? In these circumstances benefits equal to his accrued rights and an enhancement of 25% of his prospective service to normal retirement age will be awarded, (Regulation 20(3)); or
- c) Is the member likely to recover sufficiently from his incapacity to enable him to be capable of undertaking gainful employment within three years of leaving local government employment or before reaching normal retirement age if earlier? In these circumstances, benefits equal to his accrued rights, with no enhancement, will be awarded. (Regulation 20(4)).

15. Additional questions concerning part time employment and the protection of rights of certain members fall to be considered by virtue of Regulations 20(12), (13) and (15) respectively.