

Ombudsman's Determination

Applicant	Mr S
Scheme	The GKN Group Pension Scheme 2012 (the Scheme)
Respondents	Jardine Lloyd Thompson (JLT) The Trustees of the GKN Group Pension Scheme 2012 (the Trustees)

Outcome

1. Mr S' complaint is upheld against the Trustees and to put matters right the Trustees will remit Mr S' case to a new Occupational Health Physician (**OHP**) for further consideration.
2. In addition, the Trustees should pay Mr S £500 in recognition of the significant distress and inconvenience caused.
3. The complaint against JLT is not upheld and no further action is required.
4. My reasons for reaching this decision are explained in more detail below.

Complaint summary

5. Mr S has complained that the Trustees and JLT have failed to correctly apply the Scheme Rules to his application for ill-health early retirement (**IHER**),

Background information, including submissions from the parties

6. In February 2014, Mr S was made redundant from GKN. On redundancy Mr S became a deferred member of the Scheme. He was aged 56, and entitled to take his deferred benefits from the Scheme on a reduced basis. IHER from deferred status would allow Mr S to take benefits without reduction.
7. In September 2015, Mr S applied for IHER. This application was declined in October 2015.
8. Between October 2015 and September 2016, Mr S made further submissions for IHER which were declined.

9. In September 2016, Mr S raised a complaint about the process, under the internal dispute resolution procedure (**IDRP**).
10. In November 2016, the Scheme's IDRP committee met and considered the complaint. It concluded that there had been failures in the handling of Mr S' previous two applications and offered £500 in recognition of the distress and inconvenience caused to Mr S. The Trustees also identified uncertainty as to whether the Scheme rules had been correctly interpreted by the OHP. To remedy this, the Trustees submitted Mr S' application for consideration by an OHP with no prior involvement in the case: Dr McCrea. The Trustees wrote to Mr S to confirm this on 22 November 2016.
11. On 1 December 2016, Mr S spoke with the Trustees. The call note states that he was invited to have his medical records reviewed by either Dr McCrea or the previous OHP. However, Mr S has said that at this time he was informed he had no option but to consent to a new review.
12. On 2 December 2016, Mr S signed a consent form confirming his medical records could be provided to Dr McCrea.
13. On 6 December 2016, the Trustees instructed Dr McCrea and met with him on 13 December 2016 to discuss the background to the case. Included with the instructions was the relevant Scheme Rules and a Trustee Policy Statement (**the Statement**) which stated a loss of earnings of at least 50% was required in order for the IHER criteria to be met.
14. On 16 December 2016, Dr McCrea issued his report. The report did not support Mr S' application he concluded Mr S did not meet the criteria for IHER. The report detailed each piece of evidence reviewed, but also noted that certain pages of a document entitled ER Rider 1 were omitted.
15. On 20 December 2016, having considered the report, the Trustees informed Mr S' application had been declined.
16. Dissatisfied with the way the decision had been reached, Mr S referred the complaint to this Office for independent review. He highlighted the following concerns which I have summarised:-
 - The Trustees' and OHPs' decisions, conclusions and opinions, are wrong and cannot be justified under the Scheme Rules. To date they have failed to adhere to or aligned their conclusions to the Scheme Rules.
 - The OHPs undermine and contradict the objective medical evidence provided by healthcare professionals he is under the care of.
 - The Trustees have deliberately attempted to avoid adhering to the Scheme Rules by introducing the Statement, which is outside the Scheme Rules prior to Dr McCrea's

report. In addition, the Statement was not considered or commented upon by Dr McCrea.

- The Trustees and JLT have acted deceptively, failed to answer relevant and specific questions, and delayed the application throughout.

Adjudicator's Opinion

17. Mr S' complaint was considered by one of our Adjudicators who concluded that further action was required by the Trustees, but not JLT. The Adjudicator's findings are summarised briefly below:-

- The Adjudicator's focus was the most recent medical review. The Trustees have already acknowledged that the earlier reviews were flawed. Given that, the Adjudicator considered it was appropriate that they be set aside, which the Trustees had done prior to appointing Dr McCrea.
- At the time of the most recent review, Mr S had been given the option to accept or decline the offer of a new OHP and he had accepted the Trustees' offer.
- The rule relevant to Mr S' application is Rule 11 (D) (i) (c), as set out in the attached Appendix. The fundamental criterion for the application to be successful is that, on the basis of medical evidence, the Trustees must determine that Mr S' earning capacity had been severely impaired for the foreseeable future.
- Dr McCrea, when making his assessment, applied the correct question. Although Mr S thinks the wider definition of Ill-health should have been considered by Dr McCrea, the Adjudicator took the view that the absence of those conditions in the Trustee's instructions meant that the Trustees accepted, on the face of it, that those conditions had been met. The remaining point for consideration was the whether Mr S' earning capacity had been severely impaired for the foreseeable future. It is this final point that Dr McCrea addressed.
- Mr S had also questioned the introduction of the Statement. The Adjudicator did not think it was relevant to Dr McCrea's assessment as it was a secondary test, and Mr S had not met the primary test of his earnings being severely impaired for the foreseeable future.
- Mr S' argument that the loss of earnings test should be applied in the context of his normal or former employment was incorrect. The correct test was whether his earning capacity had been impaired for the foreseeable future by the medical condition, not necessarily in the context of his normal or former employment. Dr McCrea had made an assessment on the basis of Mr S' future earning capacity, which was the correct approach.
- Whilst the Adjudicator considered the correct question had been addressed by Dr McCrea, he was not persuaded that all of the relevant evidence had been seen, and

certain conclusions made by Dr McCrea appeared to contradict that missing evidence. In particular, the Adjudicator noted that Dr McCrea had attributed Mr S' absences from work because of a breakdown in relationship with his employer. But the missing evidence within the ET Rider 1 document demonstrated a more complex situation, showing the impact of Mr S' symptoms on his ability to undertake his work.

- The Adjudicator concluded that because of this missed relevant evidence, Dr McCrea's assessment cannot be viewed as complete, and therefore the matter should be reconsidered with the full body of evidence provided to a new OHP.
 - The Adjudicator also noted that this would be the fourth time the matter was to be reconsidered by an OHP, and because of the continuing flaws, a further £500 for distress and inconvenience was appropriate.
 - In respect of JLT, the Adjudicator took the view that it was not directly involved in the decision making process and was reliant on the Trustees to decide the correct course of action. The Adjudicator could find no errors on the part of JLT in its handling of Mr S' applications.
18. The Trustees and JLT accepted the Adjudicator's conclusions. The Trustees offered to appoint a new OHP from a wholly unconnected provider and put forward any additional evidence Mr S wished to submit for consideration.
19. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his 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 Mr S for completeness.

Ombudsman's decision

20. The Trustees have accepted the Adjudicator's Opinion and acknowledge the failings within Dr McCrea's assessment. I do think it necessary for me to repeat the failings identified by the Adjudicator. In these circumstances the typical resolution in the majority of cases which reach this Office is for the matter to be remitted back to the Trustees for the errors to be put right. The Trustees have agreed with that recommendation, but Mr S has concerns. I will look to address Mr S' concerns.
21. Mr S considers that any OHP appointed by the Trustees would be prejudiced as they have a conflict of interest, having been appointed by the Trustees, with a vested interest to continue their business relationship with the Trustees. I do not agree that because an OHP is appointed by the Trustees they are prejudiced or have a conflict of interest. OHPs are required to be registered and follow good medical practice. One of the tenets of good medical practice is to act with honesty and integrity. I see no reason to doubt that this would not be case if Mr S' application was reconsidered by another OHP.

22. Mr S is particularly concerned about the potential appointment of an OHP who worked for the same provider as the previous OHPs, however those concerns are mitigated by the Trustees' offer to appoint a wholly unconnected OHP.
23. Mr S asserts that the Trustees should not remit the matter to another OHP, but make a decision on the basis of the medical evidence it already has access to. I do not agree that this would be appropriate. The medical evidence provided by Mr S in the past, whilst provided by registered medical practitioners as the Scheme Rules require, does not consider Mr S' condition in the context of the criteria within the Scheme Rules. The Trustees are right to seek a medical opinion on this point, and to not do so would be inconsistent with other members as well as requiring the Trustees to make a judgment outside of their expertise.
24. Mr S suggests that a new assessment should address and seemingly comment on the flaws in the previous assessments. I think this would be unnecessary. The previous assessments have been set aside. It would not be necessary for the new OHP to comment on the previous assessments when reaching their independent view on the matter.
25. I have considered Mr S' points about the likelihood of him being able to return to work but it is not my role to determine whether he meets the criteria for IHER. These arguments need to be put to the new OHP for consideration of his medical position in the context of the Scheme Rules.
26. I appreciate Mr S has had his application considered three times, and on each occasion the process has been flawed. I have no doubt that this will have been an extremely frustrating process for Mr S. There are rare occasions where I conclude that it is necessary for the decision maker to be replaced, and I note Mr S thinks that would be appropriate here, but the motivation behind such a direction must be to circumvent Trustee decision making which is fundamentally flawed. It is not to replace a decision maker which has made errors on technicalities, as I find in this case. Although errors have occurred, there is no reason for me to think the Trustees could not make an objective decision to accept Mr S' application if the OHP's evidence supported this outcome.
27. Often this Office will make a direction for an IHER application to be remitted for reconsideration and a subsequent complaint is made in respect of the reconsideration. If Mr S was to find himself in that situation, and further flaws were identified by this Office whilst investigating the complaint, I would give close consideration to whether the Trustees should be replaced as decision-makers. However, at this time I am not persuaded it would be appropriate for me to take that course of action.
28. Mr S also asserts that the Trustees have applied a policy statement retrospectively to his application. However the Trustees confirm that this had been in place since the inception of the Scheme and was copied over from the previous scheme. Mr S may consider that this should not be valid, however it is appropriate and typical for

Trustees to rely on a statement such as this in order to aid with consistency when making discretionary and subjective decisions.

29. Mr S accuses the Trustees of stalling and delaying his application by providing incorrect information to the OHP's over the course of his applications. The Trustees have previously paid Mr S £500 for the distress and inconvenience prior to Dr McCrea's consideration, and following the Adjudicators Opinion have agreed to pay a further £500. I consider that appropriate given the delays and errors to date.
30. In respect of the complaint against JLT, Mr S has highlighted a letter from it which incorrectly states the criteria for IHER. I agree that this was an error by JLT, but that complaint was upheld by the Trustees in November 2016, and addressed along with the previous OHP's errors by way of appointing a new OHP and payment of £500 for the distress and inconvenience caused. Other than that error, which has already been corrected by the Trustees and resolved under the previous complaint, I cannot see any other failing by JLT and I do not uphold the complaint against it.
31. Therefore, I uphold Mr S' complaint against the Trustees, but not the complaint against JLT.

Directions

32. The Trustees shall arrange for a new OHP report on whether Mr S is eligible for IHER under the Scheme and reconsider the matter. It should do this within 28 days of Mr S confirming that he has submitted all the evidence he believes to be relevant.
33. In addition, in recognition of the significant distress and inconvenience caused, the Trustees should pay Mr S £500.

Anthony Arter

Pensions Ombudsman
26 February 2018

Appendix

Definitive Trust Deed and Rules 2012

Rule 11 (d) (1) (c)

“...provided that the Trustees may determine...where satisfactory evidence is produced to them of the Member’s ill-health...”

Provided that:

- (i) Where the physical or mental condition of the Member is accepted by the Trustees in light of medical evidence produced in respect of the Member as severely impairing his earning capacity for the foreseeable future, the deferred pension shall not be subject to discount and provisos (a) and (b) to (C)(1) of this Rule shall apply as if the Member had retired on account of ill-health;”

Ill-health is defined as:

“”ill-health” in relation to a Member means physical or mental deterioration of health since commencing service with the Employers to a degree which

- (i) In the opinion of the Employers prevents the Member from following his normal employment;
- (ii) Is accepted by the Trustees in the light of medical evidence produced in respect of the Member as severely impairing his earning capacity for the foreseeable future; and
- (iii) The Trustees have established, based on medical evidence from a registered medical practitioner (for the purpose of the ill-health condition under the Finance Act 2004), that the Member is/and will continue to be incapable of carrying on his occupation because of mental impairment , and the member has in fact ceased to carry on that occupation.