

Ombudsman's Determination

Applicant	Mrs T
Scheme	Local Government Pension Scheme (the Scheme)
Respondent	Cornwall Council (the Council)

Outcome

1. I do not uphold Mrs T'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 T's complaint is that she has been refused Tier 1 ill health early retirement (**IHER**).

Background information, including submissions from the parties

4. In January 2013, Mrs T was diagnosed with throat cancer and signed off from work.
5. Mrs T's case was referred to Dr Tellam, an independent registered medical practitioner (**IRMP**). On 28 January 2014, Dr Tellam certified that, in his opinion, Mrs T is permanently incapable of discharging efficiently her employed duties. He further said that she 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 normal retirement age (**NRA**). He said that Tier 2 IHER was appropriate.
6. On 3 February 2014, the Council told Mrs T that she had met the criteria for Tier 2 IHER.
7. On 16 April 2014, Mrs T's contract was terminated on the grounds of capability due to continued ill health.
8. On 22 April 2014, Mrs T appealed the decision made by the Council and enclosed further evidence including a letter from her GP. The Council subsequently agreed that Mrs T's case would be referred to another IRMP, Dr Yarnley, for a further medical opinion.

9. Mrs T did not consent to the disclosure of Dr Yarnley's report and as such the Council has not seen it.
10. On 16 December 2014, Mrs T invoked the Scheme's two stage internal dispute resolution procedure (**IDRP**). In her IDRP stage 1 letter she said:-
 - Dr Tellam and Dr Yarnley were not independent from the Council.
 - Dr Tellam had insufficient information available to him, and as he did not meet or speak to her an unfair decision was reached.
 - The Council failed to reach its own independent decision.
 - A further opinion should be obtained from an IRMP.
11. On 26 March 2015, the Council referred the matter back to a new IRMP, for reassessment. His opinion was that, after having reviewed the evidence submitted, on the balance of probabilities Mrs T was permanently incapable of carrying out the duties of her previous employment. However, he also said she is likely to be capable of undertaking some form of gainful employment before her NRA. He certified that in his opinion Tier 2 IHER should be awarded.
12. On 17 April 2015, the Specified Person for the Council turned down Mrs T's stage 1 appeal and said that Tier 2 IHER remained appropriate. After considering the available evidence he concluded that the Council had not followed the correct process. However he stated that he found no evidence Dr Tellam was not independent and he took into account all relevant material available to him as part of the review. He stated that Dr Tellam undertook his assessment in accordance with the regulatory requirements and there is no need for Mrs T to be reassessed.
13. On 21 May 2015, Mrs T appealed under stage 2 of the IDRP. She enclosed a report from Dr Shaw, Occupational Health Physician, who said that in his opinion Mrs T is permanently incapable of discharging efficiently the duties of her employment because of ill health before NRA. He further stated that if suitable adjustments were made Mrs T would only be capable of part time work before NRA and that Tier 1 IHER is appropriate.
14. On 7 December 2015, the Council issued its stage 2 IDRP response to Mrs T. The decision maker said that the Council had not handled Mrs T's case correctly and as such upheld her complaint. The decision maker instructed the Council to re-run the process from the beginning, and in particular request a new IRMP opinion.
15. On 6 July 2016, Dr Nightingale considered the occupational health notes and Mrs T's general practitioner (**GP**) records. Dr Nightingale certified that Tier 2 IHER remains appropriate. He stated that there was still further therapies available to Mrs T that may enable her to undertake employment prior to her NRA.
16. In August 2016, the Council held that the original decision of awarding Mrs T a Tier 2 IHER was correct.

Adjudicator's Opinion

17. Mrs T'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:-

- Mrs T contends that the Council assessed her claim for IHER under the wrong regulations. In particular, she believes her claim ought to have been assessed under the Local Government Pension Scheme 2007, whereas it was considered under the Local Government Pensions Scheme Regulations 2013. However, the Adjudicator was of the view that, in any event, the wording was effectively the same and as such it would not impact Mrs T's claim regardless of under which regulation it was considered.
- The Ombudsman's role is not to decide whether Mrs T is eligible for Tier 1 IHER; that is a matter for the Council to decide after obtaining the requisite certification from an IRMP.
- The Ombudsman's role is to decide whether the Council had 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 request that the Council look at Mrs T'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 to. The Council can prefer the advice of its own medical advisers unless there is a cogent reason why it should not.
- Mrs T says that she received no explanation as to how, or on what basis, Dr Tellam had carried out his assessment. However, the Adjudicator noted that, following the stage 2 IDRPs decision, the Council had decided to seek a second opinion and it was clear from Dr Nightingale's report that he had taken account of all Mrs T's medical evidence. As such, the Council was able to consider all the relevant facts and the Adjudicator found no reason to remit the matter back for further consideration.
- Mrs T says Dr Shaw's opinion seems to have been ignored and should be accepted over Dr Tellam's report as it is truly independent. 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 Nightingale's report, who made reference to Dr Shaw's report. As such, the Adjudicator was satisfied that the Council had considered all the relevant information.
- Dr Nightingale certified that Mrs T 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 normal pension age.

- Mrs T disagreed with Dr Nightingale's assessment and reiterated that Dr Shaw 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 Nightingale's opinion was perverse.
18. Mrs T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs T has reaffirmed her position and has no further information to provide. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs T for completeness.

Ombudsman's decision

19. It is my view that Dr Nightingale's report was sufficient and provided the Council with a comprehensive opinion in order for it to reach a decision. I have not seen any evidence to show that the Council did not review any aspect of Mrs T's concerns or condition. Dr Nightingale's opinion took into account relevant evidence and referred to appropriate medical research. I appreciate that Mrs T disagrees with the conclusions reached, and presented her counter arguments, but while I recognise that Mrs T disagrees with Dr Nightingale's report, that is not a sufficient reason for me to remit the matter back to the Council for the application to be reconsidered.
20. I find that based on the evidence that has been presented to the Council, it has considered the relevant factors in arriving at its decision not to grant Mrs T a Tier 1 IHER. 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.
21. Therefore, I do not uphold Mrs T's complaint.

Anthony Arter

Pensions Ombudsman
23 October 2017