

Ombudsman's Determination

Applicant	Mrs N
Scheme	Local Government Pension Scheme (LGPS)
Respondent	Sunderland City Council (the Council)

Outcome

1. Mrs N's complaint is upheld and to put matters right the Council shall consider Mrs N's ill health retirement pension (**IHRP**) application again.
2. The Council shall also pay Mrs N £500 in recognition of the distress and inconvenience caused by not following the procedure correctly.
3. My reasons for reaching this decision are explained in more detail below.

Complaint summary

4. Mrs N's complaint against the Council is that she has been refused IHRP from deferred status.

Background information, including submissions from the parties

5. Mrs N worked as a Team Leader for the Council. She left her employment in November 2013 and became a deferred member.
6. On 17 December 2014, Mrs N applied for an IHRP due to the deterioration in her ear condition which caused dizziness and hearing loss. Mrs N's IHRP application falls under Regulation 31 of the LGPS 2008, which is set out in the Appendix.
7. Mrs N was 53 at the time of application with 12 years left until retirement age.
8. Following Mrs N's application, she was referred to the LGPS' independent registered medical practitioner (**IRMP**), Dr Wong, for assessment.
9. Mrs N's treating ENT specialist sent a report dated 13 February 2015 to Dr Wong which confirmed that treatment options were available, they "may improve her condition at some future date if indicated" but "all these options risk making hearing worse" and "the condition is for it to be a chronic lifetime problem, but with periods of remission".

10. On 16 March 2015 Dr Wong completed and IRMP certificate and stated:

“...although not presently fit to return to work as her symptoms are still significant and affecting her level of function, in my opinion, at this stage, Mrs N was not at the date of application for early payment of deferred benefits and on the balance of probabilities permanently incapable because of ill health or infirmity of mind or body of discharging efficiently the duties of her former employment which gave rise to the deferred benefits in the Local Government Pension Scheme.”

11. On 26 March 2015, the Council sent a decision letter to Mrs N that said:

“Having carefully considered all of the information available to me, including advice from Sunderland City Council Independent Medical Adviser, I regret to inform you that your application has been declined. Your application has been considered individually and a decision made on the merits of your case. When making this decision, all material information available to was considered along with the relevant...regulations”.

12. Mrs N appealed the Council's decision and invoked the two-stage internal dispute resolution procedure (**IDRP**). In support of her appeal she stated that her treating consultant agreed that it would not be reasonable for Mrs N to undertake the additional treatment options which were available because they were 'a last resort as it destroys all hearing and vestibular function'. Mrs N included a letter dated 9 June 2015 from Mrs N's treating specialist confirming that Mrs N was 'not happy to have any further treatment for her Meniere's disease which might result in worsening hearing, which is entirely reasonable'.

13. On 15 September 2015, the IDRP decision maker sent Mrs N a response under stage two of the IDRP which upheld her appeal and said:

“I do not consider it enough simply to say there are treatment options that have not been explored for a person not to be regarded as permanently incapable...A decision maker needs to go further than that. Dr Wong did not really indicate what treatments remained truly available nor did he provide any indication as to how effective such treatment(s) might be..., especially weighing up the actual impact the available treatments could have on your hearing. The Council appear not to have queried this information with Dr Wong. I therefore refer the matter back to the Council to review their decision”.

14. Following the stage two IDRP decision, the Council discussed next steps with Dr Wong. On 7 October 2015, Dr Wong provided further comments. He said taking into account Mrs N's significant debilitation due to her symptoms it would be reasonable for her to undergo treatments including surgery with risk of further hearing loss 'if they were offered'. He considered that there was no need for him to write to Mrs N's specialist as 'the expectation of such treatments if they were offered' would be to improve the level of Mrs N's function. He would 'expect that a consultant ENT

surgeon would not consider such options if they did not have a chance of some success.'

15. On 18 November 2015 the Council sent a decision letter refusing grant of benefit out of active status. This letter said:

“Dr Wong has considered the whole ENT Surgeons report and not just the one paragraph quoted in the appeal outcome letter...Dr Wong has provided clarification of the issues raised in the appeal and is still of the opinion that whilst Mrs N is presently unfit to return to work, she was not at the date of application for early payment of deferred benefits, on the balance of probability, permanently incapable...Taking into consideration all of the information received, the Council is of the view that when making its decision the greatest weight has to be given to the opinion of the IRMP and therefore declines the application...”.
16. The Council considered whether it should have regard to the consultant report dated 9 June 2015 and refused to do so on the grounds that it provided a view at a date later than the original application for benefit and could therefore only be considered as part of a new application, not as part of a review of the decision regarding her December 2015 application.
17. In March 2016, Mrs N contacted the Pensions Advisory Service (**TPAS**) for assistance. With TPAS' intervention, Mrs N's complaint was referred back to be considered under stage one of the IDR. WYPF accepted that jurisdiction despite the Council's representations that both stages of the IDR process had already been exhausted.
18. On 16 August 2016, Mrs N's second stage 1 IDR application was upheld. . The decision maker said: “Taking account of your complex health problems and comments from Dr Wong in regards to the risks of treatment to reducing your hearing. I would have expected that Sunderland City Council to have sought further information from your treating specialists before it made its decision in your case. The Council should have asked your specialists their opinion on the likelihood of treatment being successful taking into account your specific health issues and what the likelihood would be of you suffering side effects, such as further deteriorating of your hearing. Once this information was received the Council could then determine if was reasonable for you to undergo the treatments outlined by Dr Wong. Whilst it is up to the Council to decide what weight to give each medical opinion, the Council must clearly demonstrate that it has fully investigated your case before it makes its decision”.
19. The Council discussed these findings with Dr Wong. On 20 September 2016, Dr Wong provided further comment. In these he disputed the IDR findings on the basis that he had previously obtained the relevant specialist opinion and asking whether another IRMP needed to be involved 'as requested by the appeal'. A handwritten note records 'confirmed not required'.

20. On 4 November 2016, the Council sent a decision letter that said:

“I have considered further information received by the Council from IRMP...in response to the issues raised...and the opinion... given. I consider that your consultant does not need to be asked for further information.....Until the treatment options are explored it is not possible to consider you as permanently unfit”.

21. Mrs N invoked stage 2 of IDRP for a second time. On 31 January 2017, a different Stage 2 decision maker upheld the Council's 4 November 2016 decision stating that:

- The Council sought additional advice from Dr Wong which included a request for clarification as to whether he had information from Mrs N's treating consultant on the likelihood that treatment would be successful and also taking into account side effects and the risks of her hearing deteriorating further.
- On 20 September Dr Wong replied confirming he was in possession of the specified information and that this was mainly contained in the consultant's letter of 13 February 2015 which was appended to his reply.
- It was difficult to say whether the Council had previously seen the report of 13 February 2015, but it was plainly in possession of the 13 February 2015 report when it made its decision on 4 November 2016.
- In the circumstances the decision maker could find no substantive errors that justified referring the matter back to the Council.

22. In February 2017, Mrs N brought the complaint to this Office.

Adjudicator's Opinion

23. Mrs N'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:-

- In the Adjudicator's view, the evidence does not support the finding that the Council reviewed Mrs N's application in an appropriate manner. A decision maker must ask the right questions before reaching its decision.
- In a letter dated 16 August 2016, WYPF upheld Mrs N's appeal. He found that the Council's decision is flawed because the Council should have asked Mrs N's ENT Specialists their opinion on the likelihood of any treatment being successful taking account her specific health issues and what the likelihood would be of Mrs N suffering side effects, such as further deteriorating of her hearing. Once this information was received the Council could then determine if it was reasonable for her to undergo the treatments outlined by Dr Wong. WYPF added that “whilst it is up to the Council to decide what weight to give to each medical opinion, the

Council must clearly demonstrate that it has fully investigated your case before it makes its decision". The Adjudicator agreed with this outcome.

- In his report dated 7 October 2015, Dr Wong details further treatments were available and said that it was likely to improve Mrs N's condition but had the risk of worsening her hearing. Dr Wong concluded that these complications would not prevent Mrs N from undertaking a regular employment and that it was reasonable to undergo these treatments given her significant debilitation due to her symptoms.
 - In the Adjudicator's view, due to the complex nature of Mrs N's ear condition, the Council should have sought further advice from Mrs N's ENT Specialist before asking Dr Wong whether Mrs N should have undergone the available treatments. This is because, as stated in ENT Specialist's report dated 13 February 2015, Mrs N's condition is "a chronic lifelong problem, but with periods of remission". So, the Adjudicator would have expected the Council to ask the right question instead of relying only on Dr Wong's opinion, who is not an accredited ENT Specialist. So, the right question should have been, in the specialist's opinion, what would be the likelihood of Mrs N suffering side effects, such as further deterioration of her hearing.
 - Whilst it is for the Council to decide what weight to give to each medical opinion, it must demonstrate that it fully considered whether Mrs N's health condition was likely to be permanent or not and her ability to undertake a gainful employment before age 65 or for at least three years, whichever is the sooner. The Adjudicator noted that the Council referred questions to Dr Wong, at the appeal stage. It would have been prudent for the Council to nominate a new IRMP to get a pair of 'fresh eyes' at that stage however the Council chose not to do it. So, the Council did not ask the right question, hence it did not follow the principles correctly and subsequently reached a perverse decision.
 - As the Adjudicator believed that the whole process has undoubtedly caused Mrs N significant distress and inconvenience, the Council should pay £500 in recognition of the distress and inconvenience caused by its actions and upheld Mrs N's complaint.
24. The Council did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Council provided its further comments:
25. The Council considered Dr Wong's medical opinion of 16 March 2015 and completed medical certificate when making its decision that Mrs N did not meet the criteria.
26. Following the stage 2 IDRP decision the Council asked Dr Wong to review his opinion asking as at date of application 17 December 2014:
- what treatment options remained truly available for Mrs N
 - Is it reasonable for her to undergo these treatments?

- What is the timescale that she would see benefits?
- his opinion on whether they would improve her function such that she could undertake gainful employment, weighing up the impact on her hearing
- is her ill health likely to be permanent in the absence of these treatments?
- Whether on the balance of probabilities she was permanently disabled on 17 December 2014
- Could she resume her duties?
- The reason for his opinion
- Information taken into consideration when giving the opinion.

27. Following the second stage 1 IDR decision the Council asked him:

28. To confirm whether he had information from Mrs N's treating specialist on prospects of treatments being successful taking account her specific health issues and what the likelihood would be of her suffering side effects, such as further deteriorating hearing;

29. If the information was available to send it to the Council. The Council clarified that it had not previously had sight of that Specialist report because it was considered to be medically sensitive information and therefore not appropriate to share.

30. The Council contends that:

- the correct questions were asked and information provided by Dr Wong in his original memo dated 16 March 2015 and his clarifying memo of 7 October 2015 along with the treating specialist's report supported the Council in making its decision that Mrs N did not meet the criteria because treatment options were still being considered.
- In response to Mr Wong's request for a report from her treating consultant, that consultant provided a report that stated that there were treatments which may improve her condition but risk making her hearing worse. As the report was specifically about Mrs N, the Council consider it is appropriate to assume that the treatment options stated considered the nature of her condition and that the treatments would not be being considered if they were not suitable and would not have been quoted if they had not been valid treatment options available to Mrs N at the time of writing the report. Dr Wong gave the opinion that the aim of the treatments being considered at the time of her application were to improve her functional abilities and adjustments could be put in place if needed to support a return to work due to any hearing deficiencies.
- The treating specialist had 'adequate opportunity' to give any pertinent details regarding condition and treatments.

- It was the dizziness and its side effects which prevented Mrs N from working, the medical evidence showed there were treatments available for that. They considered the potential side effects.
- The Council sought clarification from the Pension Fund about whether a different IRMP needed to be involved and was told they did not.
- They considered the report of 13 February 2105 contained sufficient information from the specialist regarding Mrs N's condition at date of application, including available treatments and whether it would be reasonable to undergo them.
- The details of the treatment options available provided by Mrs N's consultant therefore it is reasonable for the Council to expect her to undergo such treatment and that improvement would be expected.
- The Council place weight on the Opinion of Dr Wong, the IRMP, and therefore there is no need to seek clarification from the consultant.

Ombudsman's decision

31. It is not for me to substitute my own opinion for that of those properly appointed to reach a decision. The matter I need to consider is whether the decision has been reached in a proper manner, as provided by law.
32. The reason given by the Council for rejecting Mrs N's was because there were further possible treatment options available to her. I accept that the Council examined the basis for Dr Wong's opinion, but do not consider that it completed the necessary enquiries before coming to a decision.
33. I accept that they asked the correct questions of Dr Wong. However I cannot see any evidence that they considered the specialist opinion on those same questions. In particular, the specialist report of 13 February 2015 did not contain any evidence whether further treatment was indicated for Mrs N. It stated only treatments which may be available and implications for prognosis if indicated. I do not agree that the logical inference to be drawn from that report was the treatments were in fact available or indicated for Mrs N or that it would be reasonable to expect her to undertake them, particularly given the report highlighted serious possible side effects. Granted Dr Wong provided evidence that these need not be a bar to work, but that is a different question entirely to whether it is reasonable for Mrs N to be expected to undertake the treatment. That is a question on which Mr Wong did provide his own opinion, but it was not based on any view expressed by Mrs N's treating consultant. I consider that the question of whether a person should reasonably be expected to undergo a treatment which has such serious potential complications as deafness should be supported by evidence from a specialist in the field. Dr Wong is an expert in occupational health but is not an ENT specialist.

34. Mrs N's consultant did provide her opinion on that question in June 2015, but neither Dr Wong nor the Council considered it. I note that Dr Wong appends only the 13 February 2011 opinion to his reasons and the Council expressed its view that the later report could not be considered because it post dated the application in question. I do not consider that the Council properly assessed the relevance of the 9 June 2015 report. A medical report can itself post date an application but still contain an opinion about the prognosis of a condition as at that earlier date. In any event, having excluded the opinion contained in the 9 June 2015 report, the Council had no evidence at all from her treating specialist about Mrs N's preferences and the reasonableness or otherwise of her position as at the date of her application. I agree that the Council asked the right questions about this issue, but I have seen no evidence that they got back the answers which they needed from Mrs N's treating specialist.
35. In the circumstances I consider that they should have asked for clarification about this issue from the treating specialist rather than relying on the unsupported opinion of Dr Wong.
36. The process undergone by Mrs N has been protracted and is not yet over. She suffers from anxiety related to her condition and I am satisfied that she will have suffered significant distress and inconvenience as a result.
37. Therefore, I uphold Mrs N's complaint against the Council and remit the decision to them for further consideration.

Directions

38. Within 21 days from the date of this Determination, the Council shall obtain information from an ENT Specialist on Mrs N's condition as at the date of her application, December 2014, asking specifically what effect available treatments were likely to have had on her condition and whether it was reasonable to expect her to undergo them.
39. The Council shall then nominate a new IRMP, who has had no dealing with the matter before, from whom a certificate should be obtained under Regulation 31 of the LGPS Regulations.
40. The Council then shall ask the IRMP to consider whether she meets the criteria within the Regulations and provide his report. It shall then consider all the relevant medical evidence.
41. Within 21 days of receiving an IRMP certificate, the Council shall inform Mrs N of the decision in writing and explain the reasoning behind it.
42. If Mrs N is due a pension, then such a pension shall be paid from the date of her original application, and any retrospective pension paid as a lump sum with interest at

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the rate quoted by reference banks at the time from date of application to date of payment.

43. Within 21 days from the date of this Determination, the Council shall pay Mrs N £500 for the distress and inconvenience caused by its actions.

Karen Johnston

Deputy Pensions Ombudsman
28 February 2018

Appendix

Regulation 31

(1) This regulation applies to-

(a) a member who has left his or her employment before he or she is entitled to the immediate payment of retirement benefits (apart from this regulation), or

(b) a member who has left his or her employment and is a pensioner member with deferred benefits under regulation 20(9).

(2) Subject to paragraphs (3) and (4), if a member to whom paragraph (1)(a) applies becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body, the member may ask to receive payment of their retirement benefits whatever the member's age.

(3) A request under paragraph (2) must be made to the member's former employing authority or appropriate administering authority where the member's former employing authority has ceased to be a Scheme employer.

(4) Before determining whether to agree to a request under paragraph (2), the member's former employing authority or appropriate administering authority as the case may be, must obtain a certificate from an IRMP as to whether in the IRMP's opinion the member is suffering from a condition that renders the member permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition the member has a reduced likelihood of being capable of undertaking any gainful employment before reaching normal retirement age, or for at least three years, whichever is the sooner.

(5) In the case of a member to whom paragraph (1)(b) applies, if the member becomes permanently incapable of undertaking any gainful employment, the member may ask to receive payment of their retirement benefits, whatever the member's age.

(6) A request under paragraph (5) must be made to the member's former employing authority, or appropriate administering authority where the member's former employing authority has ceased to be a Scheme employer.

(7) Before determining whether to agree to a request under paragraph (5), the member's former employing authority, or appropriate administering authority as the case may be, must obtain a certificate from an IRMP as to whether in the IRMP's opinion the member is suffering from a condition that renders the member permanently incapable of undertaking any gainful employment.

(8) In this regulation, "gainful employment", "IRMP" and "permanently incapable" have the same meaning as given to those expressions by regulation 20(14).