

Ombudsman's Determination

Applicant	Miss R
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	Derbyshire County Council (the Council)

Outcome

1. I do not uphold Miss R'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. There are two parts to Miss R's complaint:
 - (i) The first is that around the time of her dismissal, on grounds of capability due to ill health, she was not considered for ill health retirement or made aware of the possibility of ill health retirement.
 - (ii) The second is that the decision to award her ill health retirement from preserved status in 2015 was not backdated to 2007.

Background information, including submissions from the parties

4. The Council is the administering authority for the Derbyshire Pension Fund. The Fund is part of the Scheme.
5. Miss R was employed by Derbyshire City Council as a Senior Building Surveyor.
6. Miss R went on sickness absence in July 2005 suffering from bipolar disorder.
7. On 8 May 2007, Dr Blisset (Occupational Health Physician) wrote to Derby City Council:

"I do not feel [Miss R] is currently fit to return to work at the moment but agree with her other doctors that her condition and hence capacity to return will eventually allow her to do so.

...I strongly urge [Miss R] to reconsider the option of redeployment when the time for return comes rather than risk a further relapse being provoked.”

8. In the same report Dr Blisset said he had recently received further correspondence from Dr Gillespie [Miss R’s Consultant Psychiatrist]:

“[Miss R] is quite well settled now from a mental health point of view and I think her bipolar illness is reasonable [sic] stable. Unfortunately, she is extremely keen to consider going back to her previous occupation and not to be redeployed to a different section. Although [the Cognitive Psychiatric Nurse] and myself feel that this may be difficult and may ultimately cause problems with her mental health, I feel that there may be no other way but for [Miss R] to give this a try and for her to find out for herself that it is not going to work.

I think the best way forward would be to try and organise a meeting between myself, [Miss R], the Cognitive Psychiatric Nurse and Occupational Health to see what we can put in place for this lady.”

9. Dr Blisset said the Cognitive Psychiatric Nurse was contacting Dr Gillespie to arrange a meeting to discuss strategies to support Miss R’s return to work once her GP had signed her as fit again.
10. On 19 June 2007 Miss R and her Unison representative attended a meeting under the Council’s ill health procedure. The purpose of the meeting was to determine whether Miss R was likely to return to work in the near future, whether redeployment was an option, whether any adjustments could be made to her job to assist her return to work or whether her employment should be terminated.

11. Notes of the meeting say:-

- Miss R said she loved her job and knew that she was good at it. She therefore saw it as an injustice to have to leave her job and move elsewhere, albeit she accepted that it could be harmful to her to return to her substantive post if management still had the same attitude. She believed the root cause of her stress related to her concerns about the way she was managed and her relationship with her managers. She felt following the June meeting with Dr Gillespie (Miss R’s Consultant Psychiatrist) her GP was likely to initiate a return to work, possibly on a phased or staggered basis.
- The Unison representative concluded Miss R’s case by saying that Miss R had indicated that she was prepared to accept the redeployment option if there was no other course of action available. He asked the Council “not to dispense with the services of this passionate, knowledgeable, socially aware member of staff who was clearly an asset to the Authority.”
- The Chair of the meeting explained his decision. While Miss R felt she was ready to return to work Occupational Health’s (Dr Blisset’s) May 2007 report and the medical certificate of 4 June 2007 (signing Miss R off work for a further 13 weeks)

strongly suggested that was not the case. All the medical opinions presented (from Dr Blisset, Dr Gillespie and Miss R's Community Psychiatric Nurse) clearly stated that a return to her substantive post would be unwise given that Miss R's current absence had arisen solely out of issues she had with her current management. Occupational Health had identified regular supervision and discussion about Miss R's workload expectation following a return to work as reasonable adjustments. On the face of it redeployment seemed an appropriate option, given that it would remove the main source of Miss R's stress, albeit medical advice was that this itself could cause its own stress. He was reluctant to go down the route of contract termination until the issue of redeployment and the possible adverse effects on Miss R's health had been fully explored. If the medical advice was that redeployment was a viable option that Miss R would be given full access to the Council's redeployment procedure. However, if the medical advice indicated that it would not be appropriate to offer redeployment then the notice of termination would be confirmed, and Miss R would have the right of appeal against the decision.

12. On 28 June 2007 Dr Blisset wrote to the Council:

"...on balance, it is my opinion that redeployment rather than [Miss R] returning to her current post, is likely to be less harmful to her mental health in the long term. However, the redeployment process is itself stressful and not without risk.

Which of these options or whether to terminate [Miss R's] employment is a management decision."

13. The Council subsequently gave Miss R access to the 'Corporate Redeployment Policy' for 12 weeks and notified her that at the end of that period if suitable alternative employment had not been found her contract with the Council would be terminated.
14. On 14 August 2007 Miss R attended a meeting at Occupational Health to discuss what support strategies could be put in place during the redeployment process. Miss R's Community Psychiatric Nurse attended the meeting. Dr Gillespie was unable to attend but subsequently wrote to Miss R on 30 August 2007:
- "I have read through the letter from....and I think it would be useful for you to try and find some employment elsewhere in Derby City Council. I know this is not ideal but I think that there seem to be few other options."
15. During the redeployment process Miss R made six unsuccessful applications for different posts within the Council, including Housing Development Manager and Temporary Housing Development and Strategy Manager.
16. On 11 November 2007 Miss R's contract of employment was terminated on grounds of capability due to ill health and she became a preserved pensioner in the Scheme. Miss R was then aged 45.

17. Miss R unsuccessfully appealed against the dismissal. She was also unsuccessful with a separate claim that during the redeployment period Derby City Council had failed to properly discharge its obligations to her under the Disability Discrimination Act.
18. Annually the Council issued to Miss R a preserved pensioner benefit statement which showed the current value of her preserved benefits. Copy statements have been submitted for years 2010, 2013, 2014 and 2015. The Notes on the back of each statement include the possibility of early payment of preserved benefits on health grounds and provide the Council's website address for further information and a telephone number for enquiries
19. On 22 September 2015 Miss R applied for the early release of her preserved pension on grounds of ill health. Derby City Council, after obtaining the certified opinion of an IRMP that Miss R was permanently incapable of discharging efficiently the duties of her former employment, awarded Miss R ill health retirement payable from the date of her application.

The relevant regulations

20. As Miss R's employment ended in 2007, 'The Local Government Pension Scheme Regulations 1997' (the 1997 Regulations), apply to decisions concerning Miss R's entitlement to an ill health pension from active or preserved (also known as deferred) status. They are set out below:-

- Regulation 27, 'Ill-health':

"(1) Where a member leaves a local government employment by reason of being permanently incapable of discharging efficiently the duties of that employment or any other comparable employment with his employing authority because of ill-health or infirmity of mind or body, he is entitled to an ill-health pension and grant.

(2) The pension and grant are payable immediately."

"comparable employment" means: "employment in which, when compared with the member's employment—

- the contractual provisions as to capacity either are the same or differ only to an extent that is reasonable given the nature of the member's ill-health or infirmity of mind or body; and
- (b) the contractual provisions as to place, remuneration, hours of work, holiday entitlement, sickness or injury entitlement and other material terms do not differ substantially from those of the member's employment."

"permanently incapable" means:

" that the member will, more likely than not, be incapable, until, at the earliest, his 65th birthday."

- Regulation 31, 'Other early leavers: deferred retirement benefits and elections for early payment':

“(6) If a member who has left a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body—

(a) he may elect to receive payment of the retirement benefits immediately, whatever his age...”
- Regulation 93, 'Commencement of pensions':

“(1) The first period for which any retirement pension which is payable immediately on a member leaving any employment is payable begins with the day after the date with which his employment ends.

(2) The first period for which any retirement pension under regulation 31 is payable begins—

(a) in a case where he elects under paragraph (1) of that regulation, with the day on which he elects..”
- Regulation 97, 'First instance decisions':

“(9) Before making a decision as to whether a member may be entitled under regulation 27 or under regulation 31 on the ground of ill-health or infirmity of mind or body, the Scheme employer must obtain a certificate from an independent registered medical practitioner [IRMP] who is qualified in occupational health medicine as to whether in his opinion the member is permanently incapable of discharging efficiently the duties of the relevant local government employment because of ill-health or infirmity of mind or body.”

Miss R's position

21. Miss R says:-

- She first realised the possibility of ill health retirement from preserved status in September 2015 when she read on the reverse side of her preserved pension statement an “explanation of ill health deferred pension entitlement/possibility upon application”.
- Her loss is an enhanced ill health pension from November 2007 less the deferred ill health pension she was awarded upon application in September 2015.

The Council's position

22. The Council says:-

- Miss R was placed on the Council's Redeployment Register in August 2007. She remained on the register until 23 December 2007, six weeks after her employment ended. This evidences that Miss R was actively seeking a return to work and as such ill health retirement was not considered at that time.
- Derby City Council's November 2007 dismissal letter provided Miss R with the opportunity to appeal the decision.
- Letters relating to earlier meetings and hearings also support the fact that Miss R was seeking a return to work.
- Miss R applied for the early release of her preserved pension in 2015. The approval of her application was based on her condition at the time of the application and cannot be applied retrospectively.

Adjudicator's Opinion

23. Miss R'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 below:-

- Miss R says she was not considered for ill health retirement when her employment was terminated in November 2007.
- Usually an application to The Pensions Ombudsman (**TPO**) needs to be made within three years of when the event being complained about happened or, if later, within three years of when the applicant first knew about it (or ought to have known about it).
- Putting to one side whether this aspect of Miss R's complaint is timed-out, it appears unlikely that she would have qualified for ill health retirement based on the medical evidence available around the time of her dismissal.
- There does not appear to have been any difference of opinion between the Council's medical advisers and Miss R's treating doctors, specifically Dr Gillespie. Both shared the view that Miss R was currently not fit to return to work and that redeployment within the Council was preferable to her return to her substantive position.
- Miss R actually wanted to return to her substantive position. Subsequently, she agreed to be considered for redeployment and made a number of applications for positions within the Council, albeit unsuccessfully. Following the termination of her employment she contested her dismissal.
- Miss R says she was not informed of the possibility of ill health retirement in 2007 and that she was not aware of the possibility of ill health retirement from preserved status until September 2015.

- However, it is reasonable to take the view that Miss R should have been expected to be aware of the term without it having to be drawn to her attention by the Council. While Miss R might not have known the specific details, and would not have known if she qualified for, the benefit, information about ill health retirement was readily available to her and she could have enquired about the benefit. She also had union representation in 2007.
- Following her dismissal Miss R was issued with an annual preserved pensioner statement. TPO has been provided with a copy of statements issued to Miss R for years 2010, 2013, 2014 and 2015. Notes on the back of each statement refer to ill health retirement from preserved status and provide the Council's website address and a telephone number to call for further information about the Scheme.
- In 2015 Miss R successfully applied for the early release of her preserved pension on grounds of ill health. Under regulations 31(6) and 93(2) of the 1997 Regulations, ill health retirement is payable from the date a successful application is made. There is no provision for retrospective backdating of the award.

24. Miss R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Miss R has provided further comments via a representative, Miss T, 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 Miss R for completeness.

Ombudsman's decision

25. Miss R says:-

- She was strongly urged to take the option of redeployment. Her Solicitor informed Derby City Council that she did not want redeployment. He then said she had no other choice unless another option was available. Her psychiatrist also informed her that redeployment may be the only option. But there was another option which her employer wilfully ignored and her union representative failed to mention.
- Dr Blisset failed to offer her ill health retirement, despite stating that with redeployment there was a risk of harm. Her Psychiatrist agreed with Dr Blisset's view.
- Human Resources supported redeployment on the basis that it was only fair to offer it to her in respect of her years of service. But age and years of service are not relevant in a consideration of ill health retirement.
- In December 2007 she was admitted to hospital with a full manic episode. This was within the extension period of the redeployment application time. She should then have been offered the option of ill health retirement.
- Derby City Council's response form to the tribunal asked if it had explained ill health retirement to her. This was ticked 'yes'. But nobody had explained ill health retirement to her.

- Prior to receiving the 2015 statement she had no idea that ill health retirement meant a pension and the possibility of a lump sum. This was why she contacted the Council at that time.
26. I agree with the Adjudicator that it is unlikely that Miss R would have qualified for ill health retirement based on the medical evidence available around the time of her dismissal. The employer's and her own doctors shared the same opinion that redeployment was preferable to Miss R returning to her substantive position, albeit Miss R clearly wished to return to her post.
27. I am satisfied that following the termination of Miss R's employment information concerning ill health retirement from preserved status was readily available to Miss R. Annual statements issued to Miss R prior to 2015, clearly refer to it and provide a website address for information and a contact number for queries.
28. Under the 1997 Regulations ill health retirement from preserved status is payable from the date a successful application is made. There is no provision to retrospectively backdate the award.
29. Therefore, I do not uphold Miss R's complaint.

Anthony Arter

Pensions Ombudsman
28 May 2019