

Ombudsman's Determination

Applicant	Miss G
Scheme	Local Government Pension Scheme (LGPS)
Respondent	Falkirk Council (the Council)

Outcome

1. I do not uphold Miss G'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. Miss G complains that the Council, her former employer, has wrongly declined her application for payment of her pension on the grounds of ill health early retirement from the LGPS.

Background information, including submissions from the parties

4. Miss G was employed by the Council as an Extended Personal Carer.
5. She suffers from a long term chronic condition which causes discomfort of her joints and affects her mobility.
6. In January 2015, she fractured her wrist in a fall and went on long term sick leave.
7. During her period of absence, Miss G developed more widespread body discomfort which has been attributable to fibromyalgia and also troublesome psychological symptoms including low mood.
8. The Council terminated her employment on the grounds of incapability due to ill health on 3 December 2015.
9. Prior to her dismissal, Miss G had applied in September 2015 for ill health early retirement from active service.
10. Regulation 35 of the Local Government Pension Scheme (Scotland) Regulations 2014 (**the Regulations**) stipulates that before a scheme employer can reach a

decision on a member's eligibility for ill health retirement, they must request a certificate to that effect from an Independent Registered Medical Practitioner.

11. The Council rejected Miss G's application in February 2016 after accepting the conclusion made by an Independent Consultant Occupational Physician, Dr Watt, in his medical report that, on the balance of probabilities, she was likely to be fit to undertake the duties of her own post in the future and did not therefore meet the criteria for award of an ill health pension from LGPS. Dr Watt provided the Council with a certificate confirming this in order for the Council to reach a decision on Miss G's eligibility for ill health retirement in accordance with the Regulations.
12. In his report Dr Watt wrote that:-
 - he had based his conclusions on Miss G's Occupational Health Records which comprised of her job description, her GP's (Dr Crowe) report dated 19 October 2015, eleven occupational health reports prepared on various dates between February 2009 and January 2016 and a specialist's (Dr Semple) report dated 17 January 2016;
 - Miss G's ability to undertake the exercises that normally kept her chronic joint condition under control had been, in the short term, adversely affected by her other ongoing health problems which were expected to improve with time;
 - Miss G was currently being treated conservatively for her right wrist symptoms but surgery remained available if this was unsuccessful;
 - as treatment options remain available which would expect to resolve this health problem, he could not conclude at this time that this condition would likely render her permanently incapable of undertaking her normal role;
 - her joint pain would also not be expected to present a long term barrier to her undertaking her normal role as this condition generally has a good prognosis;
 - she was able to undertake her normal role despite having this condition for many years and in March 2014, had been deemed fit to undertake the core duties of her job by an Occupational Health Physician;
 - her symptoms of fibromyalgia can be treated by graded and progressive increase in physical activity and ultimately the reintroduction of normal day activities over a prolonged period in a structured way;
 - there were many other treatment options for fibromyalgia available to Miss G which have not yet been tried;
 - Miss G has only been treated with one type of antidepressant medication;
 - there is no evidence that other recommended psychological therapies for mood disorders have been explored;

- in time, it is expected that Miss G would develop the necessary coping strategies to enable her to manage her symptoms more effectively and ultimately return to work;
- there is often an overlap between psychological symptoms and fibromyalgia and successful treatment of her low mood may also lead to an improvement in some of the physical symptoms she was experiencing; and
- until all treatment strategies, which would be expected to improve her physical and psychological symptoms have been fully explored, to enable Miss G to discharge efficiently the duties of her current employment before she reaches NRA, he could not conclude that her symptoms were likely to render her permanently incapable of undertaking her normal role.

13. Miss G's appeal against this decision was accompanied by additional medical evidence from her GP, Dr Crowe who in his report dated 7 March 2016, said:

- Miss G suffers from hypermobility resulting in multiple joint pains and muscle pains which have been complicated by the onset of fibromyalgia;
- she has had intensive physiotherapy for these conditions without any significant improvement and is understandably frustrated with low mood;
- the condition affecting her mobility is long term and gradually deteriorating;
- limited management of her fibromyalgia is also likely to be long term;
- she also sustained an injury to her right hand with impaired neurological function and is awaiting nerve conduction studies;
- the diagnosis of her right hand dysfunction was not yet known but likely to be a long term disability and she would be unable to work on this basis; and
- her application should therefore be dealt with "sympathetically, empathetically and expeditiously"

14. Her appeal was unsuccessful at Stage One of the Scheme Internal Dispute Resolution Procedure (**IDRP**). In its decision letter sent in June 2016, the Council informed Miss G that:

- it was not its role to question the opinion of a properly qualified medical doctor whose report has been relied upon in reaching its decision;
- the provisions of the LGPS for entitlement to payment of benefits on ill health grounds from active service are covered by Regulation 34 and 35 of the Regulations (further details may be found in the Appendix); and
- by requesting the opinion of a suitably qualified medical adviser and obtaining certification that she did not meet the criteria for early retirement on the grounds of ill health, it had complied with the Regulations in deciding not to award her payment of her benefits on ill health grounds.

15. In her medical report dated 28 September 2016 commissioned by the Scottish Public Pension Agency (**SPPA**), Dr Blatchford, Consultant Occupational Physician, also concluded that Miss G was not suffering from a condition that would, more likely than not, render her permanently incapable of discharging efficiently the duties of her employment because of ill health.
16. SPPA informed Miss G in its Stage Two IDRP decision letter dated 30 September 2016 that:
 - on the basis of all the medical evidence available to SPPA including a medical report from Dr B, it was its opinion that she was not permanently incapacitated of discharging efficiently the duties of her former employment before her normal pension age of 67; and
 - she was consequently not entitled to receive ill health benefits from LGPS
17. Miss G says that:
 - Dr Watt did not medically examine her before preparing his report;
 - before deciding to dismiss her on the grounds of ill health, the Council would have assessed her ability to carry out her duties in the future;
 - in her view, its decision therefore contradicts Dr Watt's statement that she would probably be fit to undertake such duties in the future;
 - the Council has considered her application on the basis that her condition is "expected to improve" and not on her ability to efficiently discharge her duties;
 - there will be at times when she can discharge her duties of her employment to some degree but it will never be done efficiently due to the recognised nature of her condition; and
 - treatments for fibromyalgia may ease some of her symptoms and improve her quality of life but there is currently no cure for it

Adjudicator's Opinion

18. Miss G'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:-
 - It is not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to Miss G's eligibility for payment of benefits under the Regulations.
 - The Ombudsman is primarily concerned with the decision making process. The issues considered include whether the correct questions have been asked, the

applicable scheme rules or regulations have been correctly interpreted and all relevant but no irrelevant factors have been taken into account.

- The Ombudsman will not generally interfere in the decision process unless he considers it was in some way flawed or the decision reached was unsupported by the evidence. He cannot overturn the decision made by the Council just because he might have acted differently.
- The Council reached its decision for Miss G's early retirement application on the grounds of ill health correctly in accordance with the above principles and its decision was therefore within the bounds of reasonableness.

19. Miss G did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Miss G provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Miss G for completeness.

Ombudsman's decision

20. The decision made by the Council to decline Miss G's application for ill health early retirement benefits from the LGPS in February 2016 was taken only after seeking the view of an Independent Consultant Occupational Physician, Dr Watt on all the available evidence at the time.
21. On the basis of the conflicting medical evidence that was actually before the Council I consider that it was reasonable for the Council to have decided that Miss G's condition was not such as to permanently incapacitate her from discharging the duties of her former employment before her normal pension age 67, and that the criterion for ill health early retirement in the Regulations had not been met. When faced with a divergence of medical opinions from the experts consulted at the various stages of her ill health early retirement application, the Council may reasonably prefer one medical view over the other.
22. Miss G has referred to the fact that Dr Watt has never examined her but his assessment was based on notes prepared by his professional colleagues who have treated her. Although, Dr Watt did not personally examine her this does not mean that his view should be given less weight than the opinions of the doctors who had.
23. Miss G contends that the Council's decision to dismiss her on the grounds of ill health contradicts Dr Watt's statement that she would probably be fit to undertake such duties in the future. I do not share Miss G's view because the Council used a different criterion to decide whether her employment should be terminated for health reasons, concerning whether there was any evidence that she would be able to return to her "substantive post or any redeployed post in the foreseeable future". In Miss G's case there was none. It does not however necessarily follow that if this criterion is satisfied that she will be permanently incapable of discharging efficiently the duties of her former employment before her normal pension age. This cannot be said until all

treatment strategies which might lead to an improvement in her physical and psychological symptoms have been fully explored.

24. In Miss G's case, Dr Watt, certified that she did not satisfy the criteria for medical retirement. Dr Watt set out his reasons in some detail and listed other medical evidence he had considered. He weighed the evidence before him and considered that Miss G's incapacity would not continue until her normal retirement age, which is a factor required for ill health early retirement. Other factors taken into account would have been her age, the likelihood of her health improving in the future and, possibly, better-managed treatments, so that Miss G would be capable again of taking up employment.
25. The fact that Miss G's GP has subsequently provided further medical evidence showing that she is still suffering from the same condition does not impact upon the validity of the original decision. The Council was only expected to make its decision on the basis of information available to them at the time. But there is nothing improper in taking account of later medical evidence when reviewing a decision in so far as it bears on what Miss G's condition was at the time when the original decision was made. Caution needs to be taken however in revisiting earlier decisions made on the basis of contemporary material at the time of reconsideration but I consider that the Council was aware of this during both stages of the IDRPs.
26. By requesting the opinion of a suitably qualified medical adviser and obtaining certification that she did not meet the criteria for early retirement on the grounds of ill health, the Council has in my opinion complied with the Regulations in deciding not to award Miss G payment of her benefits on ill health grounds.
27. I am satisfied that the Council gave proper consideration to Miss G's application by assessing all the medical evidence available and acted in accordance with the Regulations.
28. I therefore agree with the Adjudicator that the Council has reached its decision in accordance with the correct principles and its decision was within the bounds of reasonableness.
29. I do not therefore uphold Ms G's complaint

Anthony Arter

Pensions Ombudsman
15 June 2017