

## Ombudsman's Determination

Applicant	Mr I
Scheme	Local Government Pension Scheme ( <b>LGPS</b> )
Respondents	Torfaen County Borough Council ( <b>the Council</b> )

## Outcome

1. Mr I's complaint is upheld and to put matters right the Council shall consider backdating Mr I's ill health retirement pension (**IHRP**) to May 2011.
2. The Council shall also pay Mr I £1,000 for the serious distress and inconvenience caused by its actions when dealing with his IHRP application.
3. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

4. Mr I's complaint against the Council is twofold: -
  - The delay between 2011 and 2016 in the Council dealing with his ill health pension application from deferred status, due to the request for Mr I to pay for the cost of a specialist report.
  - His pension that he was awarded in 2016, was only backdated to 2015 and not 2011, which was when he had originally requested it.

## Background information, including submissions from the parties

5. Mr I was employed by the Council as a third-tier manager until he left his employment due to ill health in February 2006 and became a deferred member of the LGPS.
6. Mr I first enquired about an IHRP in 2007. In May 2011, Mr I contacted the Council's pensions team, to apply for an IHRP. His email was forwarded to the Human Resources (**HR**) manager. In her reply dated 12 May 2011, she advised Mr I that, in order for the Council to process his application, it would be necessary to access his medical reports, which comes at a fee payable by Mr I. In response to this, Mr I informed the HR manager that he was currently homeless living abroad and unable to meet the cost of it. He also said that this was discriminatory of the Council and asked

whether he could obtain medical reports from abroad or if he would need to return to the UK in order to do so.

7. On 20 May 2011, the HR manager replied to Mr I saying:

“I am afraid it is down to the fact that the local authority budgets are not able to meet the cost. The medical reports can be done from where you are, if you agree to meet the cost our Occupational Health Adviser will send you a consent form and ask you for details of your medical advisor...if you are not able to pay for the required reports from your medical advisors we are unable to proceed.”

8. On 2 June 2011, Mr I emailed the HR manager to let her know that the specialist who had been treating him did not do medical reports. He explained that this was the same issue he had had in 2007, when he first enquired about an IHRP, hence he did not apply then.

9. On 6 June 2011, Mr I sent a chaser email to the HR manager as he had not had a response. She passed Mr I's enquiry to an OH adviser who responded to Mr I on 8 June 2011 saying:

“Once we have a report, it needs to be translated into English...To assess your eligibility under the LGA [LGPS] pension fund criteria you will need to be seen by one of their nominated Occ [Occupational] Health [OH] Dr's. This means you will have to attend a consultation in the UK, most likely with our OH Dr...all costs have to be met by the ex employee.”

10. On 8 June 2011, Mr I sent a further email to the HR manager to inform her that he had spoken to his specialist. He said the specialist had agreed to provide a medical certificate and a statement signed by three other colleagues, supporting his incapacity for work and his health condition turning for the worse.

11. On 9 June 2011, Mr I replied to the Council's 8 June 2011 email saying:

“You are telling me that I have to travel 20000 km (return trip) to attend an appointment with the Occ. Health? Have they changed the rules as last time...this was not necessary...it sounds crazy that a sick person is made to travel all that way, please note that I have a degenerative problem with my spine as well as the other medical conditions that you are aware of.10 hrs in a plane is not exactly what the doctor order [sic] me.”

12. On the same day, the OH adviser replied to Mr I saying:

“I have spoken to Pensions, they have advised that on receipt of the specialist medical report, to initially try to undertake a paper work procedure with an appointed Pensions medical officer.”

13. On 22 December 2011, Mr I emailed the pensions team to confirm his last day of employment. On 3 January 2012, the pensions team emailed Mr I back confirming

the date of his last day of employment as 3 February 2006. He then emailed the HR manager enquiring about his IHRP application again.

14. On 3 January 2012, the HR manager emailed Mr I explaining that she had previously emailed him with regard to his query and said that this would depend on his assessment by an OH adviser. She also reminded him about the cost of any GP, medical reports, being his responsibility to meet. In response, Mr I asked her to arrange an appointment for him with an OH.
15. On 24 May 2012, Mr I emailed the HR manager asking her to contact his specialist and request a medical report. He also provided contact details for his Consultant Orthopaedic Spinal Surgeon, Mr Mehta.
16. On the same day, the HR manager replied advising Mr I that it was him who must contact his specialist to obtain a report and not HR.
17. On 24 September 2012, Mr I emailed the HR manager apologising that he did not come back to her earlier due to his ill health. He also confirmed that he was prepared to pay for the consultation. He also advised that the referral to the specialist should come from HR.
18. On 22 November 2012, the OH adviser emailed Mr I saying:

“I have received medical report from your GP but no new information from your consultant. We cannot progress unless we have updated information from a consultant. Early release of benefits depends on specialist reports that are recent. GP alone [sic] reports are not enough for early release of pension benefits.”
19. On the same day, Mr I emailed the OH adviser explaining that he was under the understanding that she was going to contact his specialist to arrange a report. He attached a report, that said “surgical option has been deemed to be unsuitable”. He asked the OH adviser to clarify the next steps as he said he was confused by the process. The OH adviser subsequently emailed the HR manager asking her to chase up for the specialist’s report.
20. On 26 November 2012, the OH adviser emailed Mr I thanking him for sending his GP report, however it was dated January 2012, and referred to surgical options. She said that up to date, she had still not received a report from Dr Mehta whose details he had provided. She explained that unfortunately they have no specialist report to provide to the OH doctor for an IHRP assessment.
21. On 28 November 2012, Mr I replied to the OH adviser and explained that he had checked with Dr Nagrani’s secretary who confirmed that if the OH adviser requests a report from them, they would be happy to send it to her. On the same day, the OH adviser emailed Mr I saying that he only gave consent for his GP and Dr Mehta and not Dr Nagrani so she asked for Dr Nagrani’s details. Mr I subsequently provided this information to her.

22. On 17 December 2012, Mr I emailed the OH adviser for an update. She replied the same day saying:
- “We were packing and moving location last week. Today was still unpacking your notes included. I have 220 active cases of current employees, as soon as I have received up to date medical reports from your consultants I will be in touch.”
23. On the same day and 18 December 2012, Mr I emailed the OH adviser to query if she had requested a report from Dr Nagrani.
24. On 24 January 2013, Mr I emailed the OH adviser chasing up for a response to his 18 December 2012 email. He also expressed his dissatisfaction that it had been two years since he tried to pursue his IHRP application. On the same day, he received a confirmation from the OH adviser that she had requested a report from Dr Nagrani.
25. On 1 February 2013, Mr I emailed the HR manager informing her that the only way to speed up the process would be for him to officially raise a complaint against the OH adviser. On the same day, the HR manager replied to Mr I and explained that she had confirmation from the OH adviser that she had written to Dr Nagrani but that she had still not received a report from him. However, if he still wished to raise a formal complaint, he could do so and provided him with the details for such.
26. On 19 February 2013, the OH adviser emailed Mr I informing him that she had now received a report from Dr Nagrani and that Dr Devlin would look into his medical evidence to ensure they had enough before his assessment.
27. On 21 February 2013, the OH adviser sent an email to the HR manager and Mr I saying that their OH doctor, Dr Devlin, concluded that there was not sufficient medical evidence for Mr I to fit the criteria under LGPS Rules for an ill health pension. She further said:
- “Not all treatment options have been exhausted, e.g. no conclusion from the pain clinic;
  - No detail of your functional capability;
  - No detail of your current medication regime;
  - No mention of the effects of your other medical problems.”
28. The OH adviser also said that due to the above reasons she had not arranged another consultation with the OH doctor. She confirmed that there were now overseas OH doctors who are registered with LGPS.
29. On 22 February 2013, the HR manager, emailed Mr I requesting the required information as stated by the OH adviser.

30. On 23 February 2013, Mr I replied saying that he would like to proceed with obtaining further medical evidence to support his application however he was not sure that the right questions were asked of his specialist and added:

“I am under Dr Turtle at Glasgow hospital, he prescribed ago [sic] puncture last year which unfortunately did not work, I was due to see him again last month but was unable due to the snow, seeing him again on 7<sup>th</sup> March, this is only to try and managed [sic] the pain, not to resolve the health issues...I do live and reside in Wales...I need clear guidelines of what do they need and to ensure that the right questions are asked to specialist. It took 2 years for [the OH adviser] to agree to send the form out, six months after she agreed for the form to reach the specialists.”

31. On 26 February 2013, the HR manager emailed Mr I requesting the names of all the consultants that he had been treated by, within the last twelve months.

32. Mr I raised a formal complaint about the delay in dealing with his IHRP application in February 2013, by invoking the LGPS' two-stage internal dispute resolution procedure (**IDRP**).

33. On 4 March 2013, the same HR manager sent Mr I a response under stage one of the IDRP not upholding his complaint and concluding that:

“I am assured that there was no intention to treat you unfairly, as we can see from the emails the correspondence has been intermittent and it is only recently that we have started receiving medical information to use to assess your case. From my investigation I cannot see any evidence of [the OH adviser] ignoring any of your requests...In order to progress your case can I refer you to my email dated 26<sup>th</sup> February 2013.”

34. Mr I did not respond to the 26 February 2013 email until 20 March 2015, when he emailed HR requesting to apply for his IHRP again. He also said that he had previously made an application but had had to give up due to his health condition and the lack of support from the Council.

35. On 17 April 2015, Mr I sent a chaser email to HR as he had not received a reply. He received an “out of office” email and heard nothing further from the Council.

36. In March 2016, Mr I's MP wrote to the Chief Executive (**CE**) of the Council saying:

“Mr I contacted [the Council] in 2010 to ask if he could gain early access to his...pension scheme due to his illness. I understand that the Council informed him he would need to sign an underwriting to pay approximately £1000 for an occupational therapist report before seeing an occupational therapist, which is prohibitive to my constituent to access his own money that he has accumulated in his 30-year career in local authorities. I would be very grateful if you could investigate his case and set up a meeting with [the OH] ...to

determine whether he can gain early access to his...pension scheme without £1000 cost.”

37. On 9 April 2016, the CE emailed Mr I's MP saying that as Mr I suffered from more than one health condition, reports were required on each condition but had not been provided by him earlier. She said that his complaint had already been investigated previously under stage one of the IDRP and fully addressed. She also confirmed that his consent form had been received by the OH and that his application would be dealt with.

38. On 25 April 2016, the CE emailed Mr I explaining:

“I understand that you have attempted several times to secure an early release of your deferred pension benefits, and can confirm receipt of your medical documentation, however...at the time of receipt they were at least a year old so not current enough in terms of the criteria to be able to make a determination on your case...you were not able to travel to Pontypool, therefore presenting a further difficulty in progressing matters for you. The HR team were advised by the Greater Gwent Pension Section of the change in the arrangements for paying for reports in February of this year.”

39. On 11 May 2016, the CE emailed Mr I saying that his complaint had been dealt with by the Council's complaints officer and not a member of the HR team. She also reassured him that his application was now being processed.

36. On 30 June 2016, an independent registered medical practitioner (**IRMP**) assessed Mr I's IHRP application and concluded that Mr I met the criteria for ill health benefits. Consequently, his benefits were backdated to 15 June 2015, the date of his application.

37. On 9 August 2016, Mr I emailed the CE raising further issues with regard to the cost of the report and the way his application had been mishandled. Again, on 25 August 2016, Mr I's MP sent a letter to the CE saying:

“I am informed that you replied that there was a change of policy in February 2016. Mr I would be very grateful if he could receive a copy of that policy.”

38. On 7 September 2016, the CE sent a letter to Mr I's MP saying:

“...in January of this year we received updated advice from the Greater Gwent Pension's Team to say that there had been an Ombudsman ruling and that we were no longer able to pass the cost of medical reports back to the Pension member. Mr I was informed that he would need to attend an appointment with our Independent Registered Medical Practitioner, however this proved difficult as at one point he was living in Spain...other options were explored by [the OH] to identify an IRMP in his locality...I can therefore confirm access to [the OH] was never denied. A complaint was received and investigated as you state in 2013, and a response sent to Mr I, the response advised that if he

remained unhappy he would be able to initiate stage 2 of the Complaints procedure, this he has never done.”

39. In July 2017, Mr I brought his complaint to The Pensions Ombudsman.

40. On 10 January 2019, the Council provided its formal response that maintained its previous stance and added:

“I am also advised by our [OH] team that over a period of time they were not made aware of all the Consultants that were treating Mr I which added to the difficulty of obtaining up to date information to assist the IRMP to assess Mr I’s case...Mr I again applied for access to his pension on the 15<sup>th</sup> June 2015, and following further difficulty in obtaining up to date medical information for the IRMP to be able to assess his case on the 30<sup>th</sup> June 2016 it was determined that he met the criteria, and his application was duly processed and backdated to the 15<sup>th</sup> June 2015. It is also my understanding that a number of months, went by I believe almost a year before his pension was accessed despite the best efforts by the Pensions Team to make contact. I can confirm that it was our policy for individuals applying for deferred pension benefits to pay for there [sic] own medical reports...Mr I was never refused an appointment with [the OH] it was just explained that at that time he would need to meet the cost of any medical reports.”

## **Adjudicator’s Opinion**

41. Mr I’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 below: -

- The Adjudicator first addressed the matter of the Council asking Mr I to cover the cost of obtaining medical reports. This subject was subject to a determination issued by the previous Pensions Ombudsman in PO-5101, dated 31 March 2015. The Ombudsman concluded that whilst the LGPS Regulations are silent on the matter, under Regulation 31, the Council is required to obtain a certificate from an IRMP before making its decision. So, regardless of the outcome of Mr I’s request for the release of his pension, whether it be from active or deferred status, he was under no obligation to pay the fee/cost for the medical reports.
- The Adjudicator noted that it was May 2011 when Mr I first contacted the Council to apply for an IHRP and he was then advised by the Council, in its email of 12 May 2011, that it was for him to meet the cost of the medical reports. Although Mr I informed the Council that he was homeless and could not afford to meet the cost, in a further email dated 20 May 2011, the Council reiterated that Mr I needed to pay the fee. In the Adjudicator’s view, the Council’s action amounts to maladministration because it should not have asked Mr I to pay the fee. The Council has stated that it was its policy for individuals applying for IHRP to pay for their own medical reports. However, that policy had no foundation in the LGPS Regulations. Under those

regulations, it was for the Council to come to a decision as to Mr I's eligibility for early payment of his deferred benefits. In order to do so, it was required to obtain an opinion from an IRMP. It could not decline to fulfil its statutory obligation to consider Mr I's application on the grounds that he had failed to provide reports from his doctors. If the IRMP required information from Mr I's doctors, the Council should have taken steps to facilitate this. It had no statutory authority to charge Mr I for these reports.

- The Council has stated that Mr I was never refused an appointment with its OH. However, it is clear that the fact that he was told to pay for the medical reports would have been a deterrent to applying for an ill health pension, because he had no provision to meet this cost.
- The Adjudicator noted that Mr I was living in Spain at the time, and was of poor health, however, the Council insisted on him attending an assessment with an IRMP. It is unclear why the Council insisted on Mr I attending the assessment in person as it is not a requirement of the LGPS regulations for a member to attend. It is down to the IRMP's professional judgment to decide, based on Mr I's health condition, whether he should have to attend or not. It would have been appropriate for the Council to accommodate Mr I and make the process as smooth as possible. Instead, in the Adjudicator's opinion, it failed to take the appropriate steps to consider Mr I's application, including making reasonable allowances for his circumstances. This would have been another factor in delaying his application until he made another attempt in November 2012 when he agreed to cover the cost.
- In February 2013, the OH finally considered Mr I's medical evidence and concluded that there was insufficient evidence to refer Mr I for an assessment with an IRMP, it also advised him that there were now registered IRMPs in Spain. However, instead of again requesting the list of Mr I's specialists, the Council should have referred Mr I to one of the overseas IRMPs for assessment. It is for an IRMP and not for an OH adviser to assess his application under LGPS Regulations, and then for the Council, after obtaining a certificate from its IRMP, to make a decision.
- Undeniably, Mr I has been unwell since 2011. The Adjudicator has identified a few shorter and longer periods (two years), of inactivity when Mr I did not contact the Council. This is unlikely to be because he was being obstructive and not responsive to the Council's requests, but most likely due to the Council's lack of support and accommodation with his application and last but not least his poor health.
- Not surprisingly, Mr I asked his MP to intervene. Only with his MP's intervention was Mr I's application finally processed. It was the Adjudicator's view that, the Council's lack of support and unreasonable delay will have caused Mr I serious distress and inconvenience for which he should receive an award of £1,000. This is in line with the Ombudsman's guidance on awards for non-financial injustice.



- Finally, the Adjudicator noted that the Council awarded Mr I an IHRP backdated to 15 June 2015, when he made his last application. Based on the maladministration identified above, it was the Adjudicator's view that the Council should consider backdating Mr I's benefit to May 2011, as this is the date he initially wanted to apply for his IHRP therefore the Adjudicator was of the view that this complaint should be upheld.
42. The Council did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Council provided its 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 the Council for completeness.
43. The key points made by the Council are: -
- Mr I's employment was not terminated on the grounds of ill health, but he was dismissed for gross misconduct.
  - The Ombudsman's 2015 Determination about this subject was made two years after the Council's first decision about Mr I's entitlement to an IHRP, in February 2013. As the LGPS Regulations are silent on the matter of charging the fee, it was reasonable for the Council to have had such policy in place at the time.
  - The Council disagrees with the fact that Mr I was unable to meet the cost of the medical report as he eventually agreed to meet the cost.
  - It is completely normal to expect an applicant to attend a meeting with an IRMP who considers it to be a standard practice.
  - The decision was reached by an OH adviser in February 2013.
  - The Council refutes there was a lack of support on its side. The lack of contact was more attributable to Mr I's behaviour and the fact that he lived abroad at the time.
  - There is no justifiable reason to backdate Mr I's ill health pension to May 2011 as his application was first refused in February 2013.
44. Mr I provided his comments in response to the Council's comments disagreeing with its points.

### **Ombudsman's decision**

45. I find that the reason for Mr I's termination of employment is not relevant to his application for an ill health pension as he applied for it as a deferred member of the LGPS and not from active status.
46. As found by my predecessor in PO-5101, the Council's policy had no foundation in the LGPS Regulations. Under LGPS Regulations, it was for the Council to come to a decision as to Mr I's eligibility for early payment of his deferred benefits. In order to do so, it was required to obtain an opinion from an IRMP. It could not decline to fulfil its

statutory obligation to consider Mr I's application on the grounds that he had failed to provide reports from his doctors. As concluded by the previous Ombudsman, it had no statutory authority to charge Mr I for these reports. The fact the Ombudsman's Determination post-dates Mr I's application date is irrelevant. My conclusions are not affected by the fact that Mr I eventually agreed to cover the cost of the medical reports.

47. There is no provision under the LGPS Regulations that requires an applicant to attend an assessment with an IRMP. However, it is for an IRMP to make that judgment depending on the applicant's health condition. I consider it to be unreasonable for the Council to have put pressure on Mr I to fly from Spain to the UK even though his GP advised him not to. The Council should have honoured Mr I's GP's recommendation and arranged an assessment without him being present in the UK or arrange an assessment in Spain.
48. The Council said that the decision was made by an OH adviser in February 2013. Under LGPS Regulations the Council, being the decision maker, is required to obtain an IRMP certification before deciding whether or not to grant ill health retirement. It is not for an OH adviser to make that decision but for the Council in consultation with its IRMP.
49. I have considered all the events leading up to the 2016 decision about Mr I's ill health pension and I find the Council should have provided Mr I with more support and understanding for his health condition. It is unreasonable that it has taken Mr I around five years for his ill health pension application to be concluded. I agree with the Council that Mr I did not always respond to its emails in a timely manner, but this does not seem to me to be the reason that his application was delayed. I find that had Mr I not been asked to cover the cost of medical reports, he would probably have applied for his IHRP in May 2011 which was when he first made a concerted effort to access the necessary medical reports.
50. Therefore, I uphold Mr I's complaint.

## **Directions**

51. To put matters right, within 28 days of the date of this Determination, the Council shall consider backdating Mr I's ill health pension to May 2011, when he first intended to apply. In order to do so, it will require further advice from its IRMP.
52. If the Council determines that Mr I's deferred benefits should be paid with effect from May 2011 or any earlier date than that on which they were in fact put into payment, interest shall be paid in accordance with Regulation 81 of the LGPS 2013 Regulations.

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53. Within 14 days of the date of this Determination, the Council shall pay Mr I £1,000 for the serious distress and inconvenience caused.

**Karen Johnston**

Deputy Pensions Ombudsman  
1 August 2019