

PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Miss K Gallon
Scheme	Local Government Pension Scheme: Tyne and Wear Pension Fund
Respondent(s)	North Tyneside Council, Stephenson Memorial Primary School

Subject

Miss Gallon has complained that the respondents have refused her request for payment from service (as opposed to from deferment) of her pension on the grounds of ill health and, in particular, that following her medical on 4 May 2010 for ill-health retirement she was not put on any tier in accordance with the Council's pension policy.

Although Miss Gallon was given a pension on ill health grounds from deferred status some 18 months after first applying (and 11 months after leaving); she is seeking a pension being given on ill-health retirement (tier one) and backdated to when she first applied.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should be upheld against the School because they failed to obtain the information they needed to reach a properly informed decision and did not provide the independent registered medical practitioner ("**IRMP**") with information about Miss Gallon's duties as a Teaching Assistant.

The complaint should also be upheld against the Council for failing to identify the flaws in the procedure during the first stage of the Scheme's internal dispute resolution ("**IDR**") procedure.

DETAILED DETERMINATION

Material Facts

1. Miss Gallon was originally employed from 1976 by North Tyneside Council (“**the Council**”), and had worked at Stephenson Memorial Primary School (“**the School**”) since 31 January 1983. Her contract of employment was later transferred to the School where she worked 32 ½ hours per week. She was initially employed as a Nursery Nurse and later as a Teaching Assistant.
2. Correspondence has been submitted from 1999 to mid-2000s in respect of a number of medical conditions / problems. Letters from her Dietician and hospital Consultant from June / July 1999 stated, among other things, that Miss Gallon complained of abdominal pain and fatigue/tiredness at that time. Further correspondence from the hospital records that Miss Gallon undertook further tests in 2002 and 2003 for her abdominal pain. She had psychological problems from 2004 after the death of her mother and the breakdown in her relationship with her sister, and there are letters from Miss Gallon’s specialists from 2005. Notes made by Miss Gallon from her diary covering the period from 2005 to 2010 indicate that in 2006 she had back (disc) problems but the 2006 correspondence submitted to my office relates to two letters from her Psychologist. Further, correspondence has indicated she had neck and shoulder pain in early 2007 and headaches between February and May 2008. Her medical notes also record that she suffered from headaches / migraines from December 2007.
3. Miss Gallon initially went off sick from 11 February 2008.
4. Miss Gallon’s NHS Consultant Neurologist wrote to her General Practitioner (“**GP**”) on 27 February 2008 about her migraines and tension headaches. He noted she had had migraine as a teenager (every 1-2 months) but over the past six months the frequency had increased to 2-5 per week. She also suffered severe headaches after a course of Erythromycin which had caused recurrent vomiting. He confirmed the medication he had prescribed and also said,

“Her migraine is a more severe headache associated with disorientation, dizziness, nausea and vomiting, photophobia, phonophobia, and aggravated by activity. She has been under increased pressure in her job over the last six months. She is sleeping poorly. She is recurrently disturbed during the night. ... She is otherwise well”

Neurological examination was normal

... I stressed to her that these measures are intended to reduce the positive cycle of the headaches causing increased stress and poor sleep, but that she must take the opportunity once control is improved to address dealing with the lifestyle factors that worsened her headaches in the first place. ...”.

5. On 12 March 2008 the then Head Teacher at the School made a medical referral via the Council. The referral was accompanied by a job description (as at November 2002) for a Nursery Nurse along with her absence sickness record up to February 2008. In early April 2008 Miss Gallon met with her employer’s occupational health unit (“**OH**”) supplied by Serco. OH told the School that Miss Gallon had said she originally was absent due to a medical condition affecting her respiratory system but this had now been treated by her GP. However, she had developed symptoms of headaches, the treatment and medication for which was ongoing. OH said there was also a second medical condition affecting her psychological health which had been ongoing for four years. Nevertheless, it reported that Miss Gallon felt ‘recent issues at work’ were also impacting on her psychological health. Miss Gallon says she had previously experienced bullying from another member of staff.
6. OH stated Miss Gallon was presently unfit for work and noted her GP had signed her off work for a short period. Further, as there may be issues at work affecting Miss Gallon’s health they recommended Miss Gallon discuss these with the Head Teacher. It noted that on a return to work Miss Gallon may be susceptible to a recurrence of her symptoms particularly if placed in stressful situations.
7. After a second review OH (Dr Barz) wrote again to the Head Teacher on 17 April 2008. Dr Barz said it had become apparent during their meeting that being off sick may have aggravated a second health condition causing Miss Gallon a reduced state of mental wellbeing. Given the time for referral via NHS, it was suggested by OH that private counselling (6-10 sessions) was arranged with the possibility that Miss Gallon would receive short term Cognitive Behaviour Therapy (“**CBT**”) to improve her condition and teach Miss Gallon coping strategies – which the School later agreed to. Dr Barz noted there seemed to be work-related and home-related problems, and said the main barrier to her return to work seemed to be a long standing work issue and the aggravation of

her headaches. It was felt Miss Gallon's condition had made some improvement and prolonging her return to work would not do her any good. School management were encouraged to contact Miss Gallon to discuss the workplace issues and to resolve them, but Miss Gallon says this did not happen. A phased return to work on 50% of contracted hours was suggested by OH.

8. Miss Gallon wrote to OH saying she was not made aware that her notes would be sent to her Head Teacher. On sight of this report she said that despite the reports from her Psychologist and Neurologist, Dr Barz did not seem to have a full understanding of her problems which had been unnecessarily exacerbated by the events in her work place. She was concerned that the recommendations contradicted those of her GP.
9. Following a further review of Miss Gallon on 16 June, OH sent a letter to the Head Teacher noting Miss Gallon continued to experience some of the symptoms associated with a reduced state of mental well being caused by personal and work related stressors. They urged line management to open and maintain dialogue with Miss Gallon and recommended that a HSE stress risk assessment was performed. It was suggested that a phased return to work should be implemented from July 2008. Miss Gallon says the phased return to work involved being placed back in the stressful situation where she had previously experienced bullying and she should have been placed elsewhere in the School since a supply Nursery Nurse was also employed.
10. On 17 September 2008, following another review, OH reported to the Head Teacher that Miss Gallon continued to experience some symptoms associated with a reduced state of mental well being, though she showed significant signs of improvement. It was reported Miss Gallon had said she had received ongoing support from the School and, in particular, the regular one-to-one meetings with the Deputy Head had been useful in aiding her initial return to work. It was also reported that she was having difficulty achieving a regular and consistent sleep pattern causing fatiguing at times. OH said a lack of sleep or sustained sleep could be the result of heightened anxiety.
11. On 5 October 2009 Miss Gallon went on long-term sick leave having torn her Achilles tendon in her left calf. She did not return to work thereafter, as a result of a combination of medical circumstances including widespread musculoskeletal symptoms and psychological ill health. A referral to the Council's OH unit was

made and Miss Gallon's first appointment was on 19 November 2009. OH's notes record four conditions, one of which was low mood. CBT is noted in the notes as well as a comment that Miss Gallon felt the assessment for CBT was negative. OH subsequently wrote to her GP for a report.

12. Miss Gallon's GP replied on 19 January 2010 and provided copies of recent consultations with her NHS specialists. This included letters from a Staff Grade Urologist dated 17 November 2009 (following her appointment with them on 13 November) and a Trainee Cognitive Therapist dated 9 December 2009 (following an assessment on 3 December). The GP also said Miss Gallon had been seen several times at the surgery with a history of backache, calf and leg pain.

13. The Urologist's letter set out the results of her bladder assessments and examination but also said,

"I have advised her that she should make an appointment to see you for her tingling sensation and pain in the left buttock, left groin, medial aspect of the left thigh and genital region and as it may be due to nerve pain because of her previous problem with the lumbar disc."

14. The Trainee Cognitive Therapist wrote,

"I note in your referral letter you feel that Psychotherapy would be most appropriate for [Miss Gallon] and in summary I am inclined to agree that this is likely to be the most appropriate therapy for her.

On 3 December 2009 [Miss Gallon] scored 21/27 on the PHQ-9, 18/21 on the CAD-7 and she says that she always avoids social situations and certain situations such as supermarkets. She scored 23/40 on the IAPT Work & Social Adjustment Scale indicating moderate impairment. ...

...

[Miss Gallon] feels the bereavement of her mother ...; in addition, the loss of her relationship with her sister and niece and nephew is the cause of her low mood. She states she was also bullied at work. It would seem that there are multiple relationship issues. ...

I explained to [Miss Gallon] what CBT involves and my impression is that she would struggle with the structure of CBT. Having discussed [Miss Gallon]'s case with Dr ... Wilkinson, we are in agreement that a referral to Claremont House for Psychotherapy is the most

appropriate option and I have sent a copy of this letter to them to this end.”

15. Another appointment to see OH was made on 10 February 2010. A Consultant Occupational Physician, Dr Harker, sent a letter on 11 February 2010 addressed to Miss Gallon’s line manager at the School. He noted musculoskeletal disorders and bladder difficulties, as well as the psychological symptoms. It was reported that Miss Gallon had ongoing difficulty with mobility affecting her lower back and general walking ability. It was also noted she was anxious about her job and coping going forward, and so it was suggested Miss Gallon be invited into school to meet colleagues. Advice was given to the School and a view was expressed that *if* the expected improvements with continued treatments continued then a return to work was expected in four weeks’ time again using a programme of rehabilitation (i.e. phased return).
16. Miss Gallon says that though a meeting was arranged for 3 March for her to meet with a Link Human Resources (“**HR**”) Adviser (Mrs W) from the Council, the Head Teacher of the School and her line manager, the meeting never actually took place, which was contrary to OH’s advice.
17. On 18 March the Council’s Link HR Adviser emailed OH. Extracts from the accompanying ‘updated information / re-referral’ said that they had sent a letter to Miss Gallon following the last OH report and based on that advice they were keen to arrange a meeting with Miss Gallon to discuss her phased return to work. However, upon receiving this letter Miss Gallon had contacted them and expressed her distress at the possibility of having to attend a meeting to discuss a return which she did not feel at all ready for. It was reported that she felt she was really struggling to cope with everything and could not envisage a return to work in the immediate future. The note went on to say that a meeting with Miss Gallon, her union representative and HR was held but Miss Gallon advised that she felt in no position, either physically or mentally, to return to work in the next couple of months. It had been agreed for HR to refer her back to OH for an update as her current mental and physical health had deteriorated since her appointment with OH. The note concluded by saying “The school are now wishing to consider if [Miss Gallon] is able to apply for Ill Health retirement and wish for Occupational Health to consider this”.

18. The Council wrote to Miss Gallon on 23 March to say that her full salary would cease on 31 March, with half pay being applicable from 1 April 2010.
19. An appointment was made for Miss Gallon to see OH again on 4 May 2010. After that assessment with OH, Miss Gallon says she attended a further meeting later that morning with the Head Teacher, her Line Manager, a representative from the Council, Dr Almond from OH and her union representative.
20. Dr Almond also wrote to Miss Gallon's GP on 4 May. Her GP was asked to give an update on her current condition and impact upon functional capacity; details of relevant diagnoses and current treatment; details of the response to treatment; future planned treatment; details of specialists involved; results of any investigations and copies of any correspondence from her specialists.
21. Information on Miss Gallon's current condition was obtained from her GP on 11 May 2010. The GP referred to a history of backache and pain in Miss Gallon's legs, and following a visit by Miss Gallon on 5 May he said she had told him she was getting aches and pains everywhere in her body. He stated she could not concentrate, her sleep was poor and she got pins and needles in both legs shooting up to her ribs and arms. He said he had tried her on various medications (and listed them) but without much success and so he was referring her to the Pain Clinic. Accompanying the GP's letter was her GP medical notes and a letter dated 29 January 2010 from Miss Gallon's Clinical Specialist in Physiotherapy which gave a diagnosis of suspected early to moderate spondylosis of the lumbar spine which resulted in hypermobility of the lower lumbar region and intermittent neural irritation.
22. Dr Almond subsequently sent her report to Miss Gallon on 11 May as she had exercised her right to see the report. Dr Almond stated that the factors Miss Gallon had raised were identified within their file and would be available to Dr Phillips when considering the medical aspects of ill-health retirement. In her report Dr Almond set out the current position and answered the employer's specific questions about Miss Gallon's ongoing employability. It was stated Miss Gallon's medical conditions were long-term but expected to be amenable to modification with treatment. However, the timescales would be lengthy. Miss Gallon would at that time have difficulty sustaining regular and effective service in any employment role, and a phased return to work was not appropriate to her current health circumstances. Dr Almond opined that, based on the information available, that it was premature to presume a permanent incapacity for future

regular and effective service within her substantive role. Further she said, treatment continued and additional pain management opportunities were yet to be explored. Under the heading of “Future Plans” Dr Almond concluded:

“Miss Gallon’s conditions are long-term and future exacerbations impacting upon fitness for work cannot be excluded. Nonetheless, as indicated, it remains in my opinion premature to presume a permanent incapacity for regular and effective service within her substantive role or other suited gainful employment”.

23. On 9 June 2010 Dr Almond wrote to Dr Phillips (also of Serco) summarizing the information available within the employer’s OH file (including previous assessments from 2008 to February 2010, and her report of 4 May 2010) and provided two reports from Miss Gallon’s GP dated 19 January and 11 May 2010. Dr Almond told Dr Phillips that Miss Gallon was currently unfit for any work and she could not confidently predict a timescale within which to expect a return, and gave a summary and conclusion as follows:

“Miss Gallon has a complex combination of medical circumstances impacting upon her physical and mental well-being that are long term, poorly responsive to treatment to date and currently significantly impacting upon normal day-to-day activities. There is a substantial biopsychosocial component.

Despite the current impact upon normal day-to-day activities, it is my opinion that modification of her health conditions within acceptable limits remains achievable. Treatment is ongoing and there are treatment opportunities yet to be tried and found wanting.

Whilst some continued restriction with regard to activities involving excessive physical exertion and manual handling cannot be excluded a return to work with a supportive rehabilitation sometime in the future cannot, in my opinion, be excluded.

The medical documentation is enclosed for your consideration and provision of finite advice as to whether or not the medical criteria for ill-health retirement are met.”

24. Miss Gallon was a member of the union “UNISON” and having had sight of Dr Almond’s report to comment on, her union representative wrote to the Council on 15 June highlighting that her physiotherapy had ceased three weeks earlier and she had had treatment from Dr Stephenson on 4 May prior to seeing Dr Almond. UNISON indicated that Miss Gallon wanted to submit a report from

Dr Stephenson and supply a letter on her GP's file from the hospital's urology department which had been omitted by her GP.

25. Miss Gallon was seeking treatment privately from Dr Stevenson, a Musculoskeletal and Sports Medicine Specialist and registered Osteopath. In a letter marked "To Whom It May Concern", which OH received on 17 June 2010, Dr Stevenson stated Miss Gallon had been receiving treatment for persisting constant pain affecting the neck, left shoulder and lower back with associated generalized muscle aches and pains and paraesthesia. She had attended five times between 12 March and 21 May 2010. He set out the treatment undertaken and said she had been advised that she was unlikely to be suffering actual structural pathological defect and that symptom and dysfunction was a result of complex biopsychosocial factors all of which needed to be addressed. He noted Miss Gallon continued to suffer significant symptom and dysfunction.
26. The findings of a spinal examination were set out in a letter to Miss Gallon from Dr Sharkey, Miss Gallon's Chiropractor, dated 23 June 2010. He opined that she should have a more thorough examination including X-ray and MRI scan to determine the structural integrity of her disc and spinal canal.
27. On 29 June the Council faxed additional information they had received from Miss Gallon to OH and requested Dr Phillips take that information into account.
28. Dr Phillips, acting as an IRMP, wrote to the Council on 30 June 2010 and provided the appropriate certificate in connection with regulation 20 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 ("**the 2007 Regulations**"). The certificate certified that, in Dr Phillip's opinion, Miss Gallon was not permanently incapable of discharging efficiently the duties of her employment with her employer because of ill health or infirmity of mind or body. In his covering letter, he noted Miss Gallon had symptoms of neck and back pain and the chiropractor's comments for further investigation. He also said,

"She has a complex combination of medical conditions that impacts upon her physical and mental well being which is long-term and has not responded to treatment. However, further investigation and treatment options remain available, which, in combination with a supportive rehabilitation process may lead to a return to work."

29. Dr Phillips' report was received by OH on 6 July. On 13 July 2010 the Link HR Adviser emailed OH saying she had received Dr Phillips' report and he had advised that Miss Gallon was not permanently incapable of returning to work. She said she needed some clarification on how that outcome would be advised to the employee and if it was possible to have this done at a case conference with the School and herself present as well as Miss Gallon and her union representative.
30. Miss Gallon was invited to attend another meeting on 24 August 2010 by the Council's Link HR Adviser to discuss the outcome of her ill health retirement application (a subsequent meeting that same day would be for a sickness absence review). At Miss Gallon's request school management were not present at the first meeting when discussing the outcome of her ill health retirement application. Those present were the Link HR Adviser, Miss Gallon and her union representative. Miss Gallon says that Dr Phillip's report was not discussed with her until that meeting. At that meeting she was told her application for ill-health retirement had been unsuccessful and she was given a copy of Serco's/Dr Phillip's report. Miss Gallon says she queried with the HR Adviser why her application had not been dealt with in accordance with the Council's pension policy, i.e. the tiered system as notified by South Shields Pension Office. Miss Gallon contends the HR Adviser had no knowledge of this system. Miss Gallon says she was also told that a recommendation was being made to the governing body of the School to terminate her employment.
31. Notes taken by Miss Gallon of the meeting mentioned the following:
- At the time the report was written Dr Almond had no access to GP notes or letters from other consultants. Dr Almond had declined the offer of a copy of her medical notes and Miss Gallon's diary entries which she had presented to her;
 - She had been notified of an appointment on 15 September 2010 with the Pain Clinic but had not yet attended that appointment. Further, she was waiting for MRI and bone density scans.
 - Physiotherapy had stopped in May 2010 and her Psychotherapy appointments at Claremont House had also now finished. Tens machine did not alleviate pain and the trial was unsuccessful. She was still in pain with no clear diagnoses and medication to date had been unsuccessful, and she had had several allergic reactions to treatment.

32. Notes taken by the School of the Sickness Absence Review Meeting (i.e. the second meeting that day) record that a discussion had taken place on the OH report and outcome of Miss Gallon's ill health retirement application and based on that report from the IMRP that,

“it has been determined that [Miss Gallon]'s pension will not be released, as the report and Independent Doctor are not able to provide us with a Certificate to confirm that [Miss Gallon] is permanently incapable of returning to work”.
33. The School's notes also record that the level of Miss Gallon's absence was not sustainable moving forward and the governing body would consider terminating her employment.
34. On the following day the Council's Link HR Adviser wrote to Miss Gallon confirming her application for ill-health retirement was unsuccessful and that she had a right to reapply. This letter gave no reason(s) for the decision but merely stated that during their meeting a copy of the certificate indicating that outcome had been provided to Miss Gallon. The letter also made no mention of any appeal rights that Miss Gallon had under the Local Government Pension Scheme (“**LGPS**”).
35. In a letter dated 27 August 2010 to Miss Gallon, the Council stated that her employment with the Council would automatically transfer to the School on 3 September 2010 as a result of the School becoming a Trust School.
36. On 3 September 2010 UNISON's local union representative emailed the Council's Link HR Adviser saying Miss Gallon had asked if ‘the offer’ made to him orally could be put in writing. The union representative also thanked the Link HR Adviser for confirming that acceptance of any offer would have no impact on Miss Gallon's ability to either appeal against the decision for ill-health or to re-apply for it. He also said Miss Gallon had asked if her request for ill-health retirement could be considered by another IRMP and to confirm what HR's position was on that.
37. In response, the Link HR Adviser emailed to say ‘the offer’ in writing would be done in the form of a compromise agreement provided the School were happy to do so. With regard to ill-health retirement, the HR Adviser said she was not sure what he wanted clarified in relation to HR's position.

38. The Council says it has attempted to find out where it has actually been asked the specific question from the local union representative about the pension rights of Miss Gallon for appeal or re-application, and although being able to find the email of 3 September, there is not actually any email it can find where it was asked the question or answered it.
39. On 8 September 2010 the new Head Teacher at the School issued a 'Management Report to the Governing Body Panel'. It was reported that Miss Gallon's application for ill health retirement had been declined and they had met with her on 24 August and the next stages for managing her absence. Comments from Miss Gallon and OH were highlighted. As a return to work in the foreseeable future was unlikely, the Head Teacher recommended the governing body consider terminating Miss Gallon's employment.
40. Miss Gallon undertook further treatment with the pain management department at her local hospital on 15 September 2010. Dr Jones' report of 2 October 2010 to her GP said, among other things,

"Her problem seems to be of pain in her neck and shoulders and lower back and she also describes pins and needles sensations affecting her arms, legs and face. She also describes frequent headaches which seem to originate from her neck. She feels that the problems originally began following a neck injury 30 years ago. ...

Her past medical history includes irritable bowel syndrome, bladder problems and migraines. She has seen a number of practitioners including ... who have suggested that cervical spondylosis and disc degeneration may be the causes of her pain.

She had tried a number of medications including Gabapentin which caused a severe rash, Tramadol and Amitriptyline which did not help and gave her side effects and Codeine, after which she couldn't pass urine.

The only medication she takes at the moment is for her migraines.

On examination there was no joint or muscle tenderness to palpation. A SLUMP test was negative and there was no sensory loss to light touch or pinprick over her upper limbs of spinal degeneration or nerve root compression and her symptoms seem more consistent with a generalised pain syndrome like fibromyalgia where the mechanism of action is likely to be a disturbance of pain processing within the central nervous system.

[Miss] Gallon did feel that her symptoms had not been sufficiently investigated and to this end I have agreed to arrange an MRI scan of her lumbar spine and neck although I have explained that any changes from these scans tend to correlate poorly with symptoms.

Other options which may be worth considering would be a trial of a centrally acting analgesic such as Pregabalin and I think this would be safe in spite of her reaction to Gabapentin which I suspect is more of a specific drug reaction than a class of drug reaction. Pregabalin could be prescribed according to the macro below.

Another option would be try Duloxetine which could be started in a dose of 60 mg and could be increased up to 120 mg depending upon tolerance and response.

Alternatively I think the approach for helping this lady should be a multidisciplinary Pain Management Programme to help develop long lasting strategies for coping with her pain and I will discuss this when we next meet.

Please start Pregabalin at 75 mg and increase to 150 mg after one week. After a further week it can be increased further to 300 mg. If there are any difficulties tolerating the initial dose please start the medicine at 25 mg and increase by 25 mg every week to the maximum tolerated dose.”

41. Miss Gallon says her GP started her on Pregabalin at 125 mg but she could not tolerate it and came out in blisters. The medication was therefore stopped very quickly.
42. UNISON says Miss Gallon completed a case form on 24 September and provided them with a letter dated 26 September 2010 giving UNISON authority to act on her behalf.
43. A MRI scan of Miss Gallon’s cervical and lumbar spine was undertaken on 5 October 2010. The findings of Dr Morris were contained in a report of 13 October which said,

“There are mild lower cervical degenerative changes with small non-compressive disc bars at C4/5 and C5/6, and chronic endplate degenerative changes with reduced disc height at C6/7. Minimal low lumbar degenerative changes with minimal disc bulges and minor facet hypertrophy at the lower 3 lumbar levels.

Normal spinal canal diameter. All neural foramina are widely patent.
No paravertebral soft tissue abnormality. Normal appearance of spinal cord, conus and cauda equina.

Opinion: Minimal lower cervical and lower lumbar degenerative changes. No neural compromise.”

44. Miss Gallon’s employment ceased with effect from 30 November 2010.
45. The Council says to begin with there were discussions with Miss Gallon and UNISON about a compromise agreement but this subsequently changed to a COT3 agreement because the Council’s legal department had concerns regarding the strength of a compromise agreement following the Equality Act 2010.
46. According to the Council, a COT3 agreement was discussed with UNISON and the Advisory, Conciliation and Arbitration Service (“**ACAS**”) in November 2010. The Council says ACAS and UNISON had several discussions with Miss Gallon about the document.
47. A COT3 agreement was signed later in January 2011 (excluding any claims in relation to Miss Gallon’s accrued pension entitlements) which was overseen by ACAS. Having reached a settlement on 24 January, two versions of the COT3 have been supplied; one was signed solely by Miss Gallon on 25 January 2011 (i.e. it has not been counter-signed by the School) and another one signed on behalf of Miss Gallon by UNISON on 25 January and counter-signed on 28 January 2011 by the Chair of the Governors of the School. UNISON says ACAS wanted them to sign the COT3 as well as Miss Gallon.
48. UNISON says it understood Miss Gallon’s employer was going to dismiss her on ill health capability grounds due to her sickness which is on record. They say, by the signing of a COT3 it allowed Miss Gallon some financial benefits whilst still allowing her to continue to fight for her ill health retirement. UNISON also says they are aware of the difference between an ‘active’ and ‘deferred’ member ill-health pension application and consider Miss Gallon’s claim to be that covered by Regulation 20 (i.e. active). Further, they say her employment was effectively and for all practical purposes terminated on medical capability grounds.
49. Miss Gallon’s GP, Dr Thompson, issued a “To whom it may concern” letter on 18 December 2010 to Miss Gallon listing her current conditions, which included fatigue related to Chronic Fatigue Syndrome (“**CFS**”) and multiple aches and pains related to probable Fibromyalgia. Dr Thompson said that Miss Gallon’s

symptoms had worsened over the last few years but had been present to some degree over the last ten years according to the patient and her records.

50. UNISON drafted an appeal against the decision of her ill-health retirement and sent that to her on 7 January 2001.
51. On 10 January 2011 Dr Payne, Specialist Registrar in Infectious Diseases & Tropical Medicine to Dr Price at (NHS) Royal Victoria Infirmary, wrote to Miss Gallon's GP (to which Dr Jones and Miss Gallon were copied in). His letter gave a diagnosis of Fibromyalgia syndrome with some chronic fatigue syndrome overlap features. He commented on her symptoms, lifestyle and medication before saying,

"... She has suffered for about the last six or seven years with pains affecting multiple body areas in association with broken and unrefreshing sleep. These symptoms are markedly increased in the last one to two years. There was no clear trigger event, although I note a worsening after an Achilles tendon or calf muscle injury ...

...

Of note, the Gabapentin and Pregabalin caused quite a florid rash in keeping with a true hypersensitivity reaction whereas the other drugs seemed to cause a worsening of her symptoms. ...

My impression is that she has a diagnosis of fibromyalgia syndrome which seems to be at the severe end of the spectrum. I understand this diagnosis is in keeping with Dr Jones' impression from the pain management team. She does have some features which fit with chronic fatigue syndrome and we would consider this to be one the same disease spectrum as FMS. In her case however, the FMS symptoms predominate and the pain is clearly so overwhelming that she would not be able to engage with any of the physical or psychological therapies that we use for CFS.

She is due to see the pain management service again this month and I have recommended that she should explore other drug treatments for her pain in the first instance. ... If her pain can be somewhat reduced pharmacologically then she may be able to engage with a multidisciplinary management approach. ... It would not be appropriate to refer her to the chronic fatigue therapy service at this point in time for the reasons outlined above".

52. Miss Gallon's appeal was dated 21 February 2010 (though it should be dated 2011) and submitted by UNISON with a compliments slip on 24 February 2011. In essence, her main grounds of appeal were:
- OH did not pick up on the evidence that she was suffering from Fibromyalgia.
 - She had since been diagnosed with Fibromyalgia, ME/CFS and Arthritis. Her Fibromyalgia and ME/CFS were at the severe end of the scale and her Arthritis was chronic and deteriorating (i.e. degenerative and lifelong). All attempts at treatment had failed due to allergic reaction and she had been informed by Dr Payne that she was not able to engage with any of the physical and psychological therapies for CFS as her condition was not currently manageable. This view was supported in November 2010 by Dr Jones.
 - The IRMP has not demonstrably taken any note of (i) her GP's comments that she was 'not fit for work in the foreseeable future' and (ii) the OH Physician's report that she could not 'predict a timescale within which to expect a return'. The IRMP has only taken a note of where the OH Physician said 'a return to work ... cannot ... be excluded' and then concluded that 'investigations and treatment options ... may lead to a return to work'.
 - Contrary to the OH Physician and the IRMP her conditions had proved not to be responsive to treatments, either in terms of reduction or management: there had been no positive change and significant worsening – as set out in Dr Jones' report of 2 October 2010.
 - OH had omitted reference in her report to the IRMP to an earlier report where Miss Gallon had stated at her medical appointment that her headaches related to someone 'having a go' at her at work and so was able to state that "there was no indication of any direct causal relationship between Miss Gallon's medical conditions and her work".
 - She had just received confirmation that she was able to receive incapacity benefit from the Department for Work and Pensions ("DWP") due to the severity of her conditions.
 - She had had to have mobility aids fitted to her home and was using crutches.
 - There was a delay in passing on the advice of the IRMP of early July 2010. Stress is a contributing factor for Fibromyalgia and the ongoing uncertainty surrounding her employment and inability to access her pension was causing great distress.
53. In an email dated 22 February 2011 from the Council to OH, the Link HR Adviser stated that Miss Gallon was appealing against the decision not to grant ill-health retirement, and queried who would need the information for her appeal.
54. On 1 March 2011 Dr Almond wrote to Dr Dar (also of Serco) about Miss Gallon's appeal. She said Miss Gallon's health considerations were enclosed within their file and so did not repeat them in her letter. She stated that Miss

Gallon had provided copies of specialist correspondence but did not specifically state in her letter what these were.

55. Dr Dar's letter to Miss Gallon of 18 March 2011, in which he provided a copy of his report to the Council, stated he had been asked to review her case in connection with her application for early payment of deferred pension benefits on the grounds of ill-health (as opposed to dealing with her appeal against the decision for ill health early retirement from service). However, Dr Dar's letter/report to the Council of the same date said that he understood Miss Gallon was appealing the initial decision which indicated that she did not meet the criteria of the LGPS but failed to state to them precisely what criteria he was using to measure ill-health early retirement (i.e. ill-health retirement from service or release of deferred benefits).
56. Dr Dar's letter of 18 March 2011 to the Council confirmed that he had reviewed her OH file and additionally set out the new documents/evidence presented by Miss Gallon for her appeal. He concluded by saying,

“Ms Gallon has been diagnosed with fibromyalgia with elements of Chronic Fatigue Syndrome (CFS). In addition she has been found to have some degenerative changes in her cervical spine. She also has a number of underlying medical conditions for which she takes medication. ...

These symptoms clearly impact on her physical and psychological wellbeing and prevent her from attending work in any capacity.

Due to the extent of Ms Gallon's symptomatology, she has not been able to engage with any of the therapies recognised in treating CFS or fibromyalgia. She has also experienced problems with the medication she has been prescribed in the past to help control her pain.

However, there is still scope for her pain to become more effectively managed by various pharmacological means under the care of the pain management service. If this is achieved, then she should be able to engage with other evidence-based treatments for her fibromyalgia/CFS which may lead to return to work”.
57. Dr Dar completed a certificate on 18 March 2011 for regulation 20 of the 2007 Regulations and stated therein that in his opinion Miss Gallon was, on the balance of probabilities, not permanently incapable of discharging efficiently the duties of her employment with her employer because of ill health or infirmity of mind or body.

58. A HR Advisor (Mrs M) of the Council wrote to UNISON on 25 March 2011 with the outcome of the first stage (of two) of the LGPS's IDR procedure, which was stated to have been undertaken by a named person within the Council. The writer stated that a second assessment by an IRMP had been obtained, and she had sought to make a determination on whether the decision had been taken within the pension scheme regulations and that all the relevant evidence had been taken into account. The HR Advisor stated that the opinion given was against the criteria for release of deferred benefits under the LGPS. The HR Advisor also stated,

"In reaching this opinion the consultant occupational health physician has taken account of additional medical evidence that you have provided. Further, they have taken account of additional treatment or medical management opportunities yet to be tried via the pain management service.

Having reviewed the decision ... I have found that the Council made its decision having obtained an opinion from an independent medical practitioner, who was not previously involved in your case, and who has confirmed their opinion that the medical evidence is not sufficient to conclude or find on the balance of probabilities that you are permanently incapable of discharging effectively the duties of your former employment"

59. Though the Council's letter did include a guide about the next step to take if Miss Gallon wanted to continue with her appeal, it did not stipulate the relevant regulations about appealing and any timescale for doing so under stage two.
60. On 17 May 2011, Mr Daymond, a Consultant Rheumatologist, prepared a report for UNISON. Mr Daymond was in receipt of Miss Gallon's GP records (from February 2005 to August 2010), her hospital records (from June 1999), OH records and correspondence about her ill-health retirement application. He reviewed all this correspondence in his lengthy report before summarizing his consultation and examination with Miss Gallon on 9 May 2011. He noted the five diagnoses (Fibromyalgia, Chronic Fatigue Syndrome, Irritable Bowel Syndrome, Cervical Spondylosis and angle / tendo-achilles damage). When giving his opinion, he noted that Miss Gallon had had symptoms for many years and in particular more severe symptoms since damaging her 'ankle' in 2008. Further, he noted she had had a wide variety of treatments including analgesics, anti-depressants, psychological treatment and physiotherapy, which were standard

treatments for Fibromyalgia. He commented on studies of these treatments and their effectiveness which was generally a poor outcome. He noted there had been no improvement with treatment and in fact Miss Gallon had deteriorated. On the basis of his examination and her history Mr Daymond stated that on the balance of probabilities Miss Gallon would be unfit for work until the age of retirement.

61. A Clinical Nurse Specialist in Pain Management wrote to Miss Gallon's GP on 26 May 2011 following an appointment the day before. Further, the ME North East Group provided a 'To Whom it may concern' letter on 7 September 2011 covering both ME/CFS and Miss Gallon's condition.
62. On 8 August 2011 Miss Gallon signed a disclosure form authorizing South Tyneside Council, as the Administering Authority of the Tyne and Wear Pension Fund ("**the Fund**"), for the purpose of regulation 54 (*rather than regulation 60*) of the Local Government Pension Scheme (Administration) Regulations 2008 ("**the Administration Regulations**") to obtain and consider all relevant information held by the Council (or any agent employed by the Council) relating to Miss Gallon's application to reconsider the determination made by the HR Advisor (Mrs M) under regulation 58 of the Administration Regulations.
63. Miss Gallon invoked the second stage of the IDR procedure ("**IDRP2**") on 25 July 2011 (which I have not seen). The Administering Authority wrote to the Council on 17 August seeking all information relating to the decisions, initially and at stage one of the IDR procedure ("**IDRP1**"), and the Council responded on 31 August.
64. An IDRP2 decision was issued by the Administering Authority on 26 September 2011. The decision maker of South Tyneside Council did not focus on the initial decision, and indeed said that they did not have sight of the Council's letter of 25 August 2010. But they said that as stage-two decision-maker they would review the decision of the Appointed Person (i.e. IDRP1) given under Regulation 59 of the Administration Regulations. It was also stressed that "*the decision as to whether or not Miss Gallon was to be awarded early release of her pension benefits was for the Council to decide as Scheme Employer, not a decision for the Trustees of the TWPF*".

65. The IDRP2 decision-maker found that the Appointed Person had not made their decision at IDRPI in accordance with the appropriate regulations. In particular, it was stated that the actual decision at IDRPI had not been communicated in line with the Administration Regulations, had not mentioned whether or not the Council had referred to the 2007 Regulations and had not told her of the timescale for bringing an appeal under stage two.
66. Nevertheless, the IDRP2 decision-maker went on to say that the points she had noticed were with regard to the actual communication of the decision and it may be that the actual decision of the Council was not affected and does not change when the Appointed Person rectifies these points. The IDRP2 decision-maker subsequently stated that in her opinion the decision of the Council was made in accordance with the 2007 Regulations. Further, the decision of the IDRPI decision-maker had correctly established that the decision of the Council had been made in accordance with the Certificate provided by the IRMP (Dr Dar), who had taken all relevant evidence and information into account that was available at that time. The IDRP2 decision-maker noted that the Council had arranged initially for an IRMP (Dr Phillips) to examine this case and observed his findings. However, the Appointed Person appeared not to have considered the Certificate from Dr Phillips and had instead instructed a further review and had relied on Dr Dar's report. The IDRP2 decision-maker stated that her decision confirmed in part that of the Appointed Person at IDRPI – though she said Miss Gallon may wish to consider making a fresh application given Miss Gallon felt her condition had deteriorated.
67. On 18 October 2011 the HR Advisor from the Council wrote to UNISON regarding Miss Gallon and said,
- “As per the outcome of the Stage 2 decision conducted by the Pension Fund Team of South Tyneside Council, September 2011, I am writing to reconfirm the Stage 1 decision of March 2011”.
68. The Council re-issued its decision letter. The re-issued letter is (rather confusingly) also dated 25 March 2011 but is longer in length. It still refers to the criteria being for the release of deferred benefits under the LGPS but includes a reference to regulation 20 (as opposed to regulation 31) following criticism by South Tyneside Council during IDRP2 that it did not state the regulations the Council were using. This re-issued letter was an attempt to correct its previous communication flaws.

69. On 20 October 2011 Dr Coe, a Consultant in Anaesthesia & Pain Management, wrote to Miss Gallon's GP surgery. He noted that Miss Gallon had tried all the usual anti neuropathic agents but she had not managed to tolerate any of these. Though two other drug infusions (Ketamine and Lignocaine) had been suggested at one stage, Miss Gallon had concerns and Dr Coe considered that it was unlikely that they would make any difference to her pain any way.
70. Dr Coe was subsequently asked for a letter of support regarding the difficulties Miss Gallon had encountered in getting her pension. In his 'To Whom It May Concern' letter dated 9 November 2011 Dr Coe said he had seen Mr Daymond's report and did not have anything further to add as he did not have all of her medical notes. However, he noted Mr Daymond's conclusion that on the balance of probability Miss Gallon would be unfit to work until the age of retirement. He concurred with that view, both in terms of her pain and her fatigue symptoms.
71. Dr Makepeace, from the employer's OH unit, wrote to Dr Stuckey of Serco on 15 December 2011 saying that Miss Gallon had applied for release of her pension benefits on ill health. Reference was made to the fact that Miss Gallon had previously applied in 2010 and had been going through the appeals process up to October 2011. As well as briefly summarising Dr Almond's, Dr Phillips' and Dr Dars' views, it was noted that Miss Gallon had undergone further medical evaluation and had received a new diagnoses to explain her long-standing and ongoing symptoms. Additional evidence was listed as follows:
- Letters from the advocacy/ support worker from ME North East group dated 31 January, 21 March and 7 September 2011;
 - Dr Daymond's report of 17 May 2011;
 - Dr Coe's letter of 9 November 2011;
 - A letter from DWP about a decision in respect of disability living allowance;
 - A copy of medications (dated June 2011) to which Miss Gallon had adverse reactions;
 - Various leaflets about Fibromyalgia and a statement from Miss Gallon outlining her symptoms and the impact that they have upon her.
72. Dr Makepeace opined that Miss Gallon remained medically unfit for work because of her health conditions. She stated these had been long-standing and had impacted on attendance over several years before the last spell of absence. She had been seen and treated by appropriate specialists but her condition was no better. Dr Makepeace considered it unlikely that Miss Gallon would recover

sufficiently to return to her previous role which required a high degree of physical and mental robustness.

73. Dr Stuckey wrote to the Council on 19 January 2012 (having previously sent a copy of his report to Miss Gallon on 11 January). He noted the role of Teaching Assistant was likely to require the individual to be physically capable, mentally alert and be able to respond to rapidly changing situations. He listed the 'important medical documents', but not every piece of evidence in the file otherwise the list would be unreasonably long. He noted that Miss Gallon had appeared to experience a range of symptoms from 2004/05 and her primary cause of her current incapacity was Fibromyalgia with over lapping symptoms of CFS. This had been diagnosed in autumn 2010 but the condition appeared to have presented in autumn 2009.
74. Dr Stuckey set out the variety of treatments she had had, including a certain amount of counselling, but noted she had not been deemed suitable to attend a multi-disciplinary pain programme. However, he said that mere fact that an evidence based treatment had not been used did not necessarily mean that an application could not be supported. He noted that there were several adverse prognostic indicators present in her case and rather than improving despite treatment over the past couple of years her symptoms had become more substantial. Further the presence of psychological ill health and the presence of such co-morbidity usually led to a less good long-term outlook, and Miss Gallon appeared to have been symptomatic with impaired mental well being during the four years or so before the Fibromyalgia presented. He also noted the Fibromyalgia had presented when Miss Gallon was in excess of 50 years of age.
75. Dr Stuckey's assessment was that, whilst there were some limited remaining treatment options that these treatments were unlikely to create sufficient improvement to enable Miss Gallon to return to any form of work. A certificate dated 5 January 2012 was completed in accordance with regulation 20 of the 2007 Regulations.
76. An email of 23 January 2012 from the Council to OH stated that Dr Stuckey had completed the incorrect form / certificate as the one completed by him was for current employees (under regulation 20) whereas Miss Gallon had left employment. A correct medical certificate (under regulation 31) for ex-

employees would be sent as it was needed before 'pensions' would authorise the benefits.

77. A replacement certificate for a deferred beneficiary was signed by Dr Stuckey on 24 January 2012. Effectively the certificate was completed for regulation 31 of the 2007 Regulations, though the certificate itself makes no reference to this particular regulation.
78. The Council wrote to UNISON on 27 January 2012 saying that the medical opinion was given against the criteria for release of deferred benefits under the LGPS. A decision was made to grant Miss Gallon her ill health retirement benefits, which were backdated to 3 November 2011 and corresponded to UNISON's letter/application. The Fund subsequently wrote to Miss Gallon setting out details of her benefits.
79. Miss Gallon wrote to the Head of HR at the Council on 14 February 2012 expressing concern at the amounts quoted. She stated her condition was diagnosed on 15 September 2010 and was critical of Dr Dar's contradictions. Further, Mr Daymond's report and also Dr Coe's report stated, on the balance of probabilities, that she was incapable of employment up to the age of retirement. Miss Gallon alleged that at IDRP2 these findings were disregarded and contended Dr Almond overstepped her role given Dr Makepeace's comments. She pointed out that during her appeals she had been awarded Disability Living Allowance with Higher Mobility Allowance and Middle Rate Care from March 2010. Also, Incapacity Benefit from November 2009.
80. Miss Gallon stated that all the medical evidence showed that her conditions predated the actual diagnosis and requested her ill-health early retirement ("**IHER**") entitlement be backdated to when she was still an employee as referred to in Dr Stuckey's report. She requested the Council review her case again.
81. In response to a separate request from Miss Gallon the Fund provided on 27 February 2012 hypothetical IHER figures based on the grounds of ill-health tier one with a leaving date of 30 November 2010. These were more than the pension that had been put into payment as an ill-health enhancement was included.

82. On 23 March 2012 the Council's HR Business Partner sent a letter to Miss Gallon reviewing her case. It was decided that,
- At June 2010 the decision was taken by the Link HR Adviser at the Council and all relevant information was reviewed appropriately at that stage in accordance with the Regulations. Hence the decision would not be changed, and they would not be backdating Miss Gallon's pension to the end of November 2010.
 - At March 2011 the Appointed Person took into consideration all of the additional information and a further report from the IRMP. The Appointed Person decided not to award a pension and that was communicated.
 - At August 2011 the IDRP2 decision maker concluded that the communication of IDRP1 did not comply with the Regulations, as they did not set out the specific criteria, which was later rectified by the Appointed Person issuing another letter. Nevertheless, the IDRP2 decision maker concluded the Appointed Person had reached a decision in accordance with the Regulations.
 - At November 2011 a new application was received and the covering letter from UNISON stated "since the first rejection, [Miss Gallon]'s conditions have been more fully diagnosed". This application was successful and backdated to November 2011.
83. It was decided that the decisions not to release Miss Gallon's pension at June 2010 and March 2011 were appropriate based on the information presented to the individuals making these decisions and that they adhered to the relevant regulation (regulation 20) when making these decisions.
84. Extracts from the relevant Scheme Regulations are not in dispute but have been referred to. For completeness they are contained in an appendix to this determination.

Summary of Miss Gallon's position

85. Miss Gallon refers to a brochure explaining about the ill health rules from 1 April 2008 which explained that benefits were now split into three tiers. The conditions for Tier One were "*no prospect of gainful employment before age 65. Benefits based on the membership built up so far, plus all of the membership you would have built up by age 65*".
86. An information booklet from Fibromyalgia Association UK indicates that causes may be attributable to the central nervous system, endocrine system (hormones) and the immune system. Research suggests trauma to the neck area can lead to a high risk of developing Fibromyalgia. Further, the symptoms typically occurring with Fibromyalgia include, amongst others, muscular pain; fatigue, disturbed sleep; anxiety/depression; irritable bladder / bowel; headaches/migraines; dry

eyes/mouth and numbness/tingling sensation. All her symptoms going back many years can be associated / related to her Fibromyalgia. Miss Gallon contends that she should receive her ill health retirement benefits from when she left service and based on Tier One as per the Council' policy.

87. At no time was it made clear to her that the Head Teacher of the School would make the final decision about her pension.
88. They do not appear to have taken any notice of any advice from reports of consultants and other professionals who are experts in their own field.
89. Her last salary payment covered the period up to 30 November 2010 which is perhaps why her employment finished on that day even though the COT3 agreement was not signed until the end of January 2011. She was not aware the agreement had been changed from a compromise agreement to an ACAS COT3 agreement.
90. She signed the COT3 agreement under duress as the Job Centre would not allow her to 'sign-on' for State benefits as she was still under contract. It has since come to light that her P45 was not done / issued until May 2013.

Summary of the Respondents' position

91. The key points from the response from the Council and the School to Miss Gallon's complaint are summarised below:
 - The Council is also responding on behalf of the School under its Service Level Agreement ("**SLA**"). The claims of maladministration are opposed.
 - Under 'The Education Reform Act 1988' the Local Management of Schools ("**LMS**") was introduced and this Act moved all the Council's schools out of the direct financial control of local authorities and gave a significant amount of autonomy to the Governing Bodies of the Schools. Whilst the Council's schools operating under LMS are maintained by the local authority, financial and managerial control within the schools is undertaken by the Head Teacher and Governors of those schools.
 - Despite the staff employed at schools remaining employees of the Local Authority, LMS also provides that all day to day management of employment issues are undertaken by the schools (the Head Teacher in consultation with the Governing Body) including the release of pensions or any other benefits that have cost implications for the school and the Governing Body.
 - Notwithstanding the above, pursuant to the Education and Inspections Act 2006 the School undertook a further change to its status on 3

September 2010 and converted from a community school to a trust school. At that time the School became Miss Gallon's employer.

- Whilst pre-trust (30 September 2010) the Council was technically Miss Gallon's employer management decisions were carried out by the Head Teacher and reported back to the Governing Body. In essence any decisions regarding Miss Gallon and her employment were made by the School's management and not by the Council. Under LMS the delegation of employment and financial decisions were taken by the Head Teacher as the person responsible for managing the school, its budget and staff. But the School buys in its HR, legal, OH and Health and Safety advice through a SLA with the Council.
- Services provided by HR to the School are in an advisory capacity and no decisions are made by HR or the Council.
- Other than the letter from Dr Almond there were no further additional instructions or guidance issued to the IRMP when the application was first considered.
- It is not normal or usual practice, or even a legal requirement to have and maintain signed job descriptions. They submit an unsigned job description for a Teaching Assistant / Supporting Delivering Learning (Level 3) – Grade 5.
- The only information provided back to the Link HR Adviser and then, in turn, to the Head Teacher is the outcome report from the IRMP. The other papers were not permitted to be reviewed by the Link HR Adviser or the School due to data protection.
- The Link HR Adviser met with the Head Teacher on 24 August 2010. The decision was made in accordance with regulation 20(6) of the 2007 Regulations and Dr Phillips' report. The report received clearly indicated that "... *further investigation and treatment options remain available, which in combination with a supportive rehabilitation process may lead to a return to work*". There were no queries raised in relation to this report or its content by the decision-maker.
- There are no policies or guidance notes issued to decision makers or medical advisers from the employer in how to take decisions on its behalf in relation to applications for ill health retirement under the Scheme.
- Following advice and discussion with the Council's Link HR Adviser regarding Dr Phillips' report the then Head Teacher (Mr E) decided that the pension would not be released as per the regulations. This decision was, in the first instance, taken by the Head Teacher (prior to his retirement on 31 August) who had delegated authority to do so as part of the LMS status of the School. The outcome of this decision was communicated and reported by the new Head Teacher to the Governing Body on 8 September 2010.

- Similarly, in March 2011 the HR Advisor (Mrs M) provided advice to the School and communicated with the School's new and current Head Teacher (Mrs O) at that time. According to the HR Advisor's diary she had discussions on the telephone with the Head Teacher on 25 March 2011 about Miss Gallon's ill health retirement application, but there are no specific detailed notes of this discussion.
- In that discussion the HR Advisor advised the Head Teacher of the regulations which stipulate the requirements which would need to be satisfied to agree to release a pension through ill health.
- The Head Teacher (Mrs O) then made the decision based on this advice and the report from the IRMP (Dr Dar). As Miss Gallon was no longer employed by the School or the Governing Body at that time the HR Advisor agreed, as part of the SLA, that she would communicate the outcome on behalf of the Governing Body in writing rather than in a meeting.
- It has been acknowledged during the second stage of the IDR procedure that Miss Gallon was not provided with the correct information when being advised of the outcome of her pension application. The HR Advisor did further review and an amended version of her letter was subsequently issued post IDR2. It is acknowledged / conceded by the School / Council that the administration aspects of Miss Gallon's IHER pension application did not meet the criteria laid down within the pension administration regulations of 2008 e.g. communication in writing. That is regrettable and measures put in place to ensure it does not happen in future. But at every point they stand by the fact that they consider the decisions made in relation to Miss Gallon have been made in line with the 2007 Regulations and they disagree that Miss Gallon's IHER pension application was not considered properly.
- Though they acknowledge that correspondence to Miss Gallon did not contain the correct reference to the regulations, at both times the decision taken was in accordance with the appropriate regulations after obtaining opinions from IRMPs. Further the decisions were taken by the appropriate bodies which had responsibility delegated or otherwise to make those decisions.
- This matter has been investigated by South Tyneside Council and by two senior officers at the Council and on all three occasions it was found that the decision making process was in accordance with the regulations and that they were reached using all appropriate information.
- They do not consider that saying Miss Gallon's employment was 'terminated' is factually correct. Her employment with the School was mutually ended through a COT3 arrangement and this was reached by both parties agreeing that there was no employment situation to continue

with. Therefore, there was no termination and the situation is comparable with a resignation being tendered.

- With regard to the email of 3 September 2010, Miss Gallon did reapply for her pension which was subsequently released in November 2011. They did not believe the COT3 agreement would prevent Miss Gallon from applying or appealing any decisions. So their response of 3 September to UNISON's email of the same date would remain the same now as it was then.
- It is their view that it is the responsibility of UNISON to provide appropriate advice and guidance to their members when asking them to agree a compromise agreement or COT3. Miss Gallon signed the COT3 agreement after taking advice from UNISON and ACAS. They can ascertain from emails that there were several discussions chasing up Miss Gallon about signing the COT3 document so it was not something that was signed in haste. Though it is not stated from whom Miss Gallon was 'under duress' from, it is strongly refuted that this document was signed by Miss Gallon under duress from either the Council or the School.
- The Administering Authority has brought to their attention in another, separate, case that they are only able to retrospectively release a member's benefits because of ill-health retirement with effect from the leaving date if the member's employment was originally terminated because of permanent ill-health. Miss Gallon's employment was not terminated but was mutually ended and so any release of her pension now from 30 November 2010 may be in direct conflict with the Regulation 20.
- Miss Gallon felt she could not return to work but advice from OH was that her conditions could be expected to be amenable to treatment but the timescales could be lengthy. It wishes to stress the School could not sustain her ongoing absence and this lead to the mutual agreement.
- They have not made any intentional moves to try and prevent Miss Gallon from accessing her pension. When the decision was made earlier in 2010 about the pension possibly being released it was done so in accordance with the appropriate regulations, having sought an opinion from an IRMP and making (as they understood it) an informed decision. There has never been an agenda to mislead Miss Gallon, in any manner, either through the COT3 process or pension process. They are therefore not arguing any point about whether or not the pension can subsequently be released following her employment ending. However, whilst it is not their intention to identify clauses or parts of the regulations that would prevent them from releasing Miss Gallon's pension, they seek some further information about the regulations in order to avoid being in a position where someone may later challenge any subsequent decision made. They are only trying to ensure that by complying with any

directions to correct one error they are not creating another by contradicting the regulations.

- They consider they cannot change the way Miss Gallon left employment. The COT3 agreement cannot be revoked and Miss Gallon's employment cannot be reinstated in order to then dismiss her for being incapable of discharging her duties. It would be improper (if it were actually possible) for the School to do so.
- They believe reviewing Miss Gallon's IHER pension application as at her leaving date (i.e. 30 November 2010) with her possibly repaying the settlement sum paid as part of the COT3 agreement if she qualifies for IHER from active service and is treated as leaving employment of the grounds of being permanently incapable of discharging her duties, is not legally viable.

Conclusions

92. Miss Gallon's complaint concerns the respondents' refusal to grant her ill-health retirement from service and so I will firstly consider how that matter was handled, before covering other issues that have been raised as part of these proceedings.
93. Under regulation 20, it is for the employing authority to determine whether Miss Gallon's employment terminated on the grounds that her ill-health or infirmity of mind or body render her permanently incapable of discharging efficiently the duties of her current employment and then, additionally, that she had a reduced likelihood of being capable of undertaking any gainful employment before her normal retirement age. This is a matter of fact to be determined. There is no room for discretion or to describe the reason for her departure as anything other than the true reason. When Miss Gallon's employment terminated she was employed by the School and so this decision was for the School to take.
94. A decision was taken about ill-health retirement some months before Miss Gallon's employment ended. Before that decision was made, the employing authority had to obtain a certificate from an IRMP. Whilst Dr Phillips could satisfy the 'independence' condition required by Regulation 56(1) of the 2008 Regulations, I am critical of the fact that the OH Adviser, Dr Almond, (who could not satisfy that condition) expressed a view to him that it was "premature to presume a permanent incapacity for future regular and effective service within her [Miss Gallon's] substantive role" since this may have influenced Dr Phillips.

95. The process of whether Miss Gallon might qualify for ill-health retirement began in March 2010, some eight months before her (eventual) leaving date. At the time when the decision about Miss Gallon's ill-health retirement application was made in August 2010 (based on evidence at June 2010), which the Council says was taken by the School, Miss Gallon was still employed by the Council though she later became employed by the School. But for the reasons that follow I consider this aspect of whether the correct body made the decision becomes academic as there are other process issues that were flawed.
96. In reaching their decision, the employing authority ought to have correctly applied the Scheme's Regulations, asked the right questions, considered all relevant information (and ignored irrelevant information) and reached a decision which is not perverse. By inference they also needed to be confident that the IRMP had abided by the same principles in giving his opinion before relying on it.
97. Reference has been made to regulation 20(6) and the need to obtain a certificate from an IRMP when considering Miss Gallon's ill-health retirement application. In essence that particular regulation prior to 1 April 2008 became regulation 20(5) when regulation 20 was substituted for a new regulation 20 effective from 1 April 2008. Though a certificate was obtained from an IRMP it is a concern that the Council are not quoting the correct regulations for the correct time period.
98. As noted above, under regulation 20(5) the employing authority were required to obtain a certificate from an appropriately qualified IRMP setting out his opinion on the matter of Miss Gallon's eligibility under regulation 20 before making a determination. The Council / School are not, however, bound by the IRMP's opinion. That said, there ought to be a compelling reason why the Council / School might depart from it and decide that Miss Gallon should receive her benefits if they received a negative certificate.
99. I observe that in March 2008 the School provided OH with a copy of Miss Gallon's main duties in the form of a job description for a Nursery Nurse as at November 2002 which was available to the IRMP but it is unclear to me whether Dr Phillips knew Miss Gallon's duties that applied in 2010 given that her role had changed from Nursery Nurse to Teaching Assistant. During my office's investigation the Council has provided a job description for a Teaching Assistant and says it is not normal / usual practice or even a legal requirement to have and maintain signed job descriptions. Nonetheless, the IRMP needs to form a view

about the duties of her *current* employment (as opposed to any former past duties). There is however no evidence that that job description for a Teaching Assistant, albeit unsigned, was provided to the IRMP to enable him to opine over whether Miss Gallon could fulfil her current duties as required by the 2007 Regulations.

- I00. The Courts are quite clear that it is for the decision maker (in this case, the Head Teacher acting with delegated authority on behalf of the School) to consider the evidence before them and determine how much weight to give each piece. It was, therefore, open to the Head Teacher to give greater weight to Dr Phillips' opinion than to, say, comments offered by Miss Gallon's GP. However, I do not find that this means that they can accept Dr Phillips' opinion blindly and without seeing any of the other evidence that Dr Phillips had seen.
- I01. It has been stated that due to data protection the Council and the School did not have sight of the other evidence. But without seeing all the evidence, the decision maker could not ask the right questions or apportion any weight (if any) to any evidence that it was unaware of. It has been confirmed that the Head Teacher (acting for the School) only had Dr Phillips' report/certificate and advice from the Council about the 2007 Regulations. So in Miss Gallon's case the Head Teacher, on behalf of the School, did not have sufficient information before him in August 2010 in order to determine what weight (which may include no weight) should be given to each piece of evidence.
- I02. As an aside, I note the Council says it has obtained Miss Gallon's consent to obtain all the medical evidence in order to deal with her complaint that my office is investigating. It would therefore have been possible to do so in 2010 in order for the decision maker to deal with her application for ill health retirement so that a proper informed decision could be taken.
- I03. I note that Dr Almond also expressed an opinion to Dr Phillips that there were untried treatments that were yet to be found wanting. However, it is not enough simply to say there are untried treatments and until they have been found not to work a person cannot be regarded as permanently incapable of discharging efficiently the duties of their current employment. A decision maker needs to go further than that.
- I04. Dr Phillips commented that Miss Gallon had a complex combination of medical conditions impacting on her physical and mental well being which were long term

and had not responded to treatment so far. He went on to say that further investigations and treatment options remained available but did not indicate what those further investigations and treatment options would be. Though the IRMP says that such untried treatments *may* lead to a return to work, equally they may not. Dr Phillips neither indicated what treatments remained available nor did he provide any indication as to how effective such treatment(s) might be in Miss Gallon's case. It has been stated that the decision maker did not query any information with Dr Phillips and so the Head Teacher on behalf of the School could not possibly have known what future treatment(s) Miss Gallon may undergo and how successful any such treatment, on a balance of probability, might be.

105. There is a further concern in this case. An employee should be considered for ill-health retirement at the point when their employment is terminated. Indeed Regulation 55(7) states that decisions should, as reasonably practicable, be taken after the employment (or notice) ends. In this instance, the decision maker took the decision some three months before (and using medical evidence at least five months before) the employment had ended. They therefore deprived themselves and Miss Gallon of considering any medical evidence, such as Dr Jones' report of 2 October 2010, in the run up to Miss Gallon's termination. Dr Phillips' opinion was expressed some five months before Miss Gallon's employment ended and was based on the employer's OH's file as well as reports from Miss Gallon's GP and hospital specialists up to May 2010. However, I observe that in between Dr Phillips' opinion in June 2010 and Miss Gallon's employment terminating at the end of November 2010, Dr Jones suggested that Miss Gallon's symptoms were more consistent with a generalised pain syndrome like Fibromyalgia following a consultation with her on 15 September 2010. This was the first time that Fibromyalgia had been suggested as a diagnosis of Miss Gallon's condition and that diagnosis was later confirmed. It would therefore now be unsafe to use Dr Phillips' opinion of June 2010 to determine whether Miss Gallon qualifies for ill-health retirement as at 30 November 2010 when a new diagnosis of her medical condition became apparent from September 2010.

106. For the aforementioned reasons, there have been flaws in both the process and procedures followed when considering Miss Gallon for ill-health retirement while in service and such flaws amount to maladministration. The incorrect handling of this matter will also have created an injustice to Miss Gallon.
107. The Scheme's IDRPs provides an appellant mechanism for decisions to be reviewed. I note the Administering Authority at the second stage of the Scheme's IDRPs were critical of the procedures for communicating the decision (rather than the process). The Council's letter of 25 August 2010 to Miss Gallon only stated that her application for ill-health retirement had been unsuccessful and that a copy of the IRMP's certificate had been given to her during the meeting the day before. It seems the Council were oblivious to regulation 57 of the Administration Regulations which require grounds (i.e. reasons) for the decision to be given as well as details / notification of Miss Gallon's appeal rights. That failure also amounts to maladministration.
108. The Council appear to have been under the impression that (or had a preference for) decisions about ill health retirement could be communicated in meetings. In fact in the submissions from the Council to my office they say that the HR Advisor communicated the outcome of the first stage of the IDR procedure (which I will discuss in more detail below) in writing rather than in a meeting because Miss Gallon had left employment. Whilst a decision may be conveyed orally during a meeting, this does not dispense with the requirements to confirm the decision in writing giving adequate reasons for the decision. This shows unfamiliarity with the requirements of the Administration Regulations and, in particular, regulation 57 (and regulation 59 about notice of decisions on disagreements being given in writing).
109. Miss Gallon's complaint has also been aimed at the Council. The Council were involved at the first stage of the Scheme's IDRPs and so I will consider its role in these affairs.
110. Despite the omission of any notification of appeal rights, Miss Gallon did make an appeal in February 2011 with the assistance of her union, UNISON. There is a possible argument that had she been told of her appeal rights when the decision was first made / communicated then Miss Gallon may have appealed sooner than she did.

111. Strictly the purpose of an appeal is to review the original decision (as opposed to making a new, second, decision over her ill-health retirement application) and decide whether or not the original decision was correctly made. The Appointed Person at the first stage of an appeal would normally, but not necessarily, base their decision using the same evidence that was available to the decision-maker. However, new evidence is invariably submitted as part of an appeal. It may therefore be appropriate to consider such new evidence, if it existed at the relevant time, as part of the appeal but which the decision maker failed to obtain. There should also be consideration of whether such existing but unseen evidence might provoke further enquiries / evidence having been sought as part of any consideration of that application at that time. (If evidence did not exist (or be reasonably obtained) at the relevant time, it may be necessary to deal with the appeal in tandem with a new application in respect of any new, later, evidence). If the Appointed Person did find that matters had not been dealt with appropriately, then the Appointed Person may need to remit the matter back to the decision maker for a fresh decision to be taken.
112. As I have concluded above, Miss Gallon's IHER pension application was not dealt with properly. The Council has not noticed any of the above issues when completing the first stage of the IDR procedure and that is further maladministration.
113. Indeed, it seems to me that the Council has treated Miss Gallon's appeal more like a new application rather than as an appeal and requested a new opinion from another IRMP. That approach would follow its letter of 25 August 2010 which failed to even mention Miss Gallon's appeal rights.
114. The Council contends that this second opinion from another IRMP was considered by the School, though South Tyneside Council at the second stage of the IDR procedure appear to be under the impression that it was the Council (and not the School) that took that (second) decision. That is understandable as the original letter of 25 March 2011 giving the decision under IDRPI states "the Council made its decision" and makes no reference at all of the School making the decision.
115. Dr Dar completed a 'regulation 20' certificate on 18 March 2011 but when writing to Miss Gallon on that day the IRMP clearly stated that s/he was reviewing "your case in connection with your application for early payment of

deferred pension benefits on the grounds of ill health” (my emphasis). Though Dr Dar’s report which was sent to the Council does not state this within the report itself, and I accept it would have been difficult for the Council to have become aware of what Dr Dar had told Miss Gallon, there is now doubt as to whether or not Dr Dar has applied the regulations correctly, either as part of an appeal for ill health retirement from service under regulation 20 or as part of a new application for early payment of deferred pension benefits on grounds of ill health under regulation 31. There is also no evidence that Dr Dar knew of Miss Gallon’s duties as a Teaching Assistant (as opposed to her former duties from 2002 as a Nursery Nurse).

- I 16. I also observe that in its re-issued letter of 25 March 2011 when communicating the decision under stage one of the IDR procedure to Miss Gallon that the HR Advisor refers to the release of deferred benefits in spite of receiving a certificate from Dr Dar under regulation 20. The release of deferred benefits is governed by regulation 31 of the 2007 Regulations (not regulation 20). So the Council continue to be confused over the criteria used for this appeal / second application assessment which they assisted the School with.
- I 17. Dr Dar noted in his report that Miss Gallon experienced problems with medication. Indeed, I observe Miss Gallon’s medical notes show that since 2006 she is allergic to all Penicillans and these notes list half a dozen other drugs between 2009 and 2010 which she has had adverse reactions to. Dr Dar opines that there is scope for her pain to be effectively managed by various pharmacological means and says ‘if’ this is achieved then other evidence-based treatments may lead to a return to work. Dr Dar does not, however, say how much scope there is and the School has not asked this question. When considering matters on the balance of probabilities Miss Gallon’s own circumstances needed to be taken into account rather than a general perspective.
- I 18. Further, Dr Dar does not state what evidence-based treatment he is referring to, but the Trainee Cognitive Therapist and Dr Payne indicated in December 2009 and January 2011 respectively that CBT and chronic fatigue therapy (which may include CBT) was not appropriate for Miss Gallon at that time. So in order to undertake treatment, Miss Gallon’s pain firstly needs to be controlled by medication. The word ‘if’ creates some uncertainty or doubt and again the decision maker (i.e. the School) would need to form a view as to how likely it

might be for Miss Gallon to find a suitable drug that she could tolerate that could help her manage her pain in order to undergo treatment. If the School were able to form a view of what medication could be prescribed to Miss Gallon to control her pain without adverse effect, the decision maker would then need to consider the evidence-based treatments and how effective they might be in Miss Gallon's case (rather than generically). There is no indication that the School did this when it discussed Miss Gallon's case with the Council on 25 March 2011.

- 119. South Tyneside Council are not a party to these proceedings and so I make no comment in relation to the second stage of the Scheme's IDR procedure.
- 120. As identified above, there have been a number of matters which have been poorly handled and resulted in the process being flawed. My role when awarding compensation is to place Miss Gallon as far as possible in the same position as she would have been in had there been no maladministration.
- 121. The proper remedy for such maladministration and injustice is to remit the application back to the decision-maker to make a fresh decision correcting any previous flaws. Since the original maladministration occurred events have moved on and the Council has now queried how the way Miss Gallon left employment may impact on such a remedy given the Scheme's regulations.
- 122. Even if Miss Gallon's employment was ended by 'mutual agreement', that is not in my view completely decisive. Miss Gallon was previously told she did not qualify for ill health retirement, but that application was not considered by the School properly. There is an argument that Miss Gallon raises, and which I accept, that the failure to properly assess her led her to decide to sign the COT3 agreement in January 2011 after she left. So if, as a result of maladministration, Miss Gallon's application did not receive full and proper consideration at the point when her employment ended, then she may be entitled to a remedy.
- 123. It is worth noting that, if instead of agreeing for her employment to cease, she had left for reasons that would entitle her to an ill-health pension then that was her entitlement – regardless of any subsequent agreement.
- 124. My jurisdiction is to deal with Miss Gallon's complaint about her pension and it does not extend to intervening with all employment matters; only to consider those employment aspects that impact on her pension rights.

125. The respondents say the employer did not decide to end Miss Gallon's employment on grounds of ill health, but that the two parties (Miss Gallon and the School) mutually agreed for her employment to come to an end. I note the Council / School argue Miss Gallon's employment ended by 'mutual agreement' and an ACAS COT3 agreement is evidence of this – though Miss Gallon says she had no choice. The fact the COT3 Agreement was signed afterwards does not affect that historic maladministration.
126. The argument raised by the respondents that Miss Gallon did not leave due to ill health cannot stand because they themselves clarify they never considered her state of health correctly at the point of leaving.
127. Effectively, the cessation of Miss Gallon's employment would appear to have been backdated to 30 November 2010 since the COT3 Agreement was not reached until the end of January 2011. It seems that that approach may have been a convenient way to end the employment relationship in the perceived absence of Miss Gallon not qualifying for ill health retirement some months before she left employment and the School's reluctance to dismiss her on capability grounds even though the real, underlying, reason was due to Miss Gallon's ill-health and her inability to currently perform her duties. The last report from OH of 11 May 2010 stated Miss Gallon's health conditions meant she could not sustain regular and effective service in *any* employment role at that time and the timescales were likely to be lengthy. The departure on the terms of the COT3 agreement was itself in substance on the grounds of ill health, even if the School did not recognise it as such. So whilst Miss Gallon's leaving may have been called / labelled by the parties as 'mutually agreed' the real underlying reason may still be regarded as her leaving on ill-health grounds.
128. The COT3 agreement is headed as being an agreement in respect of an actual or potential claim to the Employment Tribunal. It states that, subject to the School paying a certain sum Miss Gallon agrees to accept that sum in full and final settlement of all claims apart from a few exclusions; one such exclusion being any claim in relation to the employee's accrued pension rights. I observe, though, that the COT3 agreement does not explicitly state within it the reason for leaving or why the employment ended.

129. But the issue is not that the COT3 Agreement stops Miss Gallon making a claim –neither the School nor the Council argue this. In fact, the respondents say they have not made any intentional moves to prevent Miss Gallon from accessing her pension and they are not arguing any point about whether or not the pension can be subsequently released following her employment ending. As an aside, this is a private agreement and the parties to it can always choose not to enforce it or parts of it, or choose to amend/modify it. And, as the COT3 Agreement is not being relied upon, there is no need for me to consider any detrimental reliance claim surrounding the email of 3 September 2010 and the intimation of what the Council might have said about the COT3 Agreement not affecting Miss Gallon’s appeal of her ill-health retirement.
130. So the argument concerns whether because Miss Gallon left by ‘mutual agreement’ a determination by the employer of ill health was unnecessary. In my view, the employer did fail to carry out any assessment of her ill health or thus her pension rights when she was deemed to have left on 30 November 2010. I say deemed to have left employment on 30 November 2010 because there must have been a period of time between 30 November 2010 and 24 January 2011 when Mrs Gallon was, in fact, still under contract and subsequently agreed to be treated as having left as at 30 November 2010.
131. It seems the COT3 Agreement adds to the argument because it, in fact, evidences there was not any determination about her ill health when she left as at November 2010. It seems the COT3 compensation was to resolve other differences, not the pension dispute. I say this because there is no evidence the COT3 compensation covers pension rights as it is not explicitly mentioned within it. Further, nothing has been submitted to us that it did and the sum involved would suggest it was not. The respondents (though the School is the only party to the COT3) are both happy to continue to reconsider pension rights which presumably they would not be if their records showed they had already paid out for them.
132. Under the Scheme’s regulations, ill-health retirement from active service is dependent on the employer deciding to terminate Miss Gallon’s employment on the basis that she is permanently incapable (to age 65) of discharging efficiently the duties of her current employment and also taking a view of her reduced likelihood of being capable of undertaking any gainful employment – with three

different tiers measuring whether gainful employment can be done over 3 months, 3 years and to retirement age. The qualifying criteria for an ill-health retirement from service set out in the pension regulations is a far stricter test though and not the same criteria that would ordinarily apply in reality for terminating a person's employment due to capability on grounds of ill health. For instance, 'permanence' is not a requirement when an employer dismisses an employee due to capability on grounds of ill health. But, as I have said, the employer did not consider Miss Gallon's health and the stricter definition under the pension scheme regulations at the point of her leaving.

133. The COT3 is a private agreement between the employee and employer, and Miss Gallon had representation, in the form of her union (UNISON), when she considered entering into that agreement. Nonetheless, the respondents do not appear to be arguing for its enforcement. This agreement mentions Miss Gallon can pursue a claim for her accrued pension rights, though I do not believe ill-health retirement from active service could be entirely regarded "an accrued right" since those pension rights are dependent on the employer making a decision albeit a finding of fact. Also, there is some allowance for prospective service rights if granted. Even though a COT3 agreement was signed, the parties continued to deal with Miss Gallon's appeal for ill health retirement (as opposed to Miss Gallon applying for the early release of her deferred pension), even if the Council may not have been clear about how evidence should be treated for an appeal compared to a fresh application. Whether the employer simply did not tell the Council that a COT3 existed and thus the Council ploughed on with the appeal is unlikely. The Council were heavily involved, including the switch from a Compromise Agreement to a COT3 Agreement, so I find it difficult to accept that the Council did not know how Miss Gallon had left particularly since it provides HR Services (and other services) to the School. So the respondents' conduct when dealing with the appeals was not compatible with the COT3 agreement or the concerns raised now.
134. So I find that the School failed to properly consider Miss Gallon's eligibility under regulation 20 both initially and on her subsequent appeal. That amounts to maladministration on their part. The previous decisions reached in respect of her application for ill health benefits under regulation 20 should now be set aside. It is not open to me to come to a decision of my own as to her eligibility; the

School remains the decision maker under the 2007 Regulations. I am, therefore, remitting the decision for reconsideration.

- I35. The School still needs to consider whether or not at the time Miss Gallon left their employ her ill-health or infirmity of mind or body render her permanently (to age 65) incapable of discharging efficiently the duties of her current employment and that she had a reduced likelihood of being capable of undertaking any gainful employment on any of the three tiers. The decision that the School now needs to reach may be taken with some benefit of hindsight of the actual outcome of any tried treatment options that it would not have had had it taken the decision in early December 2010. It may also need to consider any untried treatments.
- I36. Undoubtedly Miss Gallon has been inconvenienced. I also find that the failure to consider Miss Gallon's case properly will have caused her considerable distress at an already difficult time. I consider it appropriate that she should receive some recompense for this and I have made directions accordingly.
- I37. Further, the Council, whilst not responsible for first instance decision, is responsible for the first stage of the IDR procedure and their failure to correct the flaws identified has delayed and added to Miss Gallon's distress and inconvenience. That constitutes further maladministration and in that regard I also make a further direction.

Directions

- I38. I direct that, within 6 weeks of the date of this determination, the School will reconsider Miss Gallon's eligibility as at 30 November 2010 under regulation 20 of the 2007 Regulations, having first taken steps to obtain an appropriate certified opinion from an IRMP of their choice. When giving their decision they will need to take heed of the Administration Regulations too.
- I39. The School should convey their decision in writing to her with reasons, within 10 days of reaching their decision.
- I40. If the decision reached is that Miss Gallon would have qualified for ill health retirement and could have left employment in this way, then payment of the resulting benefits may be made subject to Miss Gallon repaying to the employer the sum received under the COT3 agreement.

141. I further direct that within the 21 days of the date of this determination, the School and the Council shall pay the sums of £400 and £150 respectively (i.e. £550 in total) to Miss Gallon for the distress and inconvenience caused by the maladministration I have identified above.

Jane Irvine

Deputy Pensions Ombudsman

31 October 2014

Appendix

Local Government Pension Scheme Regulations

At the time Miss Gallon's employment was terminated the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI 2007/1166) (as amended) stated the following:

Regulation 5 (Benefits) provided,

“(1) Membership of the Scheme only entitles the member to benefits under these Regulations if –

- (a) his total membership is at least three months;
- (b) a transfer value is credited to him; or
- (c) **regulation 88** (bulk transfers in) or **the Administration Regulations** applies to him.

...”

Regulation 20¹ (Early leavers: ill-health) provided,

“(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in **regulation 5** –

- (a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and
- (b) that he has a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age,

they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2), (3) or (4), as the case may be.

...

- (5) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine (“IRMP”) as to whether in his opinion the member is suffering from a condition that renders him permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition he has a reduced likelihood of being capable of undertaking any gainful employment before reaching his normal retirement age.

...

¹ Regulation 20 was substituted for the original regulation 20 from 7 May 2008 but with effect from 1 April 2008 by the Local Government Pension Scheme (Amendment) Regulations 2008 [Statutory Instrument: 2008 / 1083]

(14) In this regulation –

“**gainful employment**” means paid employment for not less than 30 hours in each week for a period of not less than 12 months;

“**permanently incapable**” means that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday; and

“**qualified in occupational health medicine**” means an independent registered medical practitioner qualified in occupational health medicine (“IRMP”).”

The Local Government Pension Scheme (Administration) Regulations 2008 (SI 2008/239) (as amended) stated the following:

Regulation 55 (First instance decisions – general) provided,

“ ...

- (6) Any question whether a person is entitled to a benefit under the Scheme must be decided by the employing authority which last employed him.
- (7) That decision must be made as soon as practicable after the earlier of –
 - (a) the date the employment ends, or
 - (b) the date specified in the notification mentioned in **regulation 14(4)**.

Regulation 56 (First instance determinations: ill-health) provided,

“(1) Subject to paragraph (1A), an independent registered medical practitioner (“IRMP”) from whom a certificate is obtained under **regulation 20(5) of the Benefits Regulations** in respect of a determination under **paragraph (2), (3) or (4) of that regulation** (early leavers: ill-health) must be in a position to declare that –

- (a) he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested; and
- (b) he is not acting, and has not at any time acted, as the representative of the member, the employing authority or any other party in relation to the same case,

and he must include a statement to that effect in his certificate.

...

- (3) The employing authority and the IRMP must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation, and

- (a) in the case of the employing authority, when making a determination under **regulation 20 of the Benefits Regulations**; or
- (b) in the case of the IRMP, when expressing an opinion as to the matters set out in **regulation 20(5) and regulation 31(2)** (early payment of pension: ill health) of those Regulations.”

Regulation 57 (Notification of first instance decisions) provided,

- “(1) Every person whose rights and liabilities are affected by a decision under **regulation 55** must be notified of it in writing by the body which made it as soon as is reasonably practicable.
- (2) A notification of a decision that the person is not entitled to a benefit must contain the grounds for the decision.
- ...
- (4) Every notification must contain a conspicuous statement giving the address from which further information about the decision may be obtained.
- (5) Every notification must also –
 - (a) refer to the rights available under **regulations 58 and 60**.
 - (b) specify the time limits within which the rights under those regulations may be exercised; and
 - (c) specify the job title and the address of the person to whom applications under **regulation 58** may be made.