PO-17829

Ombudsman's Determination

Applicant	Ms S
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondents	Royal Borough of Windsor & Maidenhead (**RBWM**) Wokingham Borough Council (**WBC**)

Outcome

1. I do not uphold Ms S' complaint and no further action is required by RBWM or WBC.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Ms S' complaint is that jointly the Councils have refused the early release of her deferred pension benefits on the grounds of ill health.

Background information, including submissions from the parties

4. Ms S is a deferred member of the Scheme. She has two periods of pensionable service in the Berkshire Pension Fund (**the Fund**). The first, with RBWM, from 2 May 1995 to 22 May 2005 and the second, with WBC, from 21 July 2008 to 31 January 2010. The two periods of pensionable service were not combined.

5. With both Councils Ms S was employed as a Social Worker.

6. In June 2015, Boyett Mayes & Associates (**BM&A**), Ms S' financial advisor, wrote to the Fund to apply for Ms S early retirement on the grounds of ill health. It said Ms S was suffering from four health issues: fibromyalgia, osteoporosis, arthritis and high blood pressure. No medical evidence was submitted with the request.

7. As relevant, extracts from The Local Government Pension Scheme Regulations 1997 **(the 1997 Regulations)** and The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 **(the 2007 Regulations)**, are provided in Appendix 1. A summary of the medical evidence is provided in Appendix 2.

8. Ms S' date of birth is 7 July 1956. Her normal pension date in respect of her first period of pensionable service is 23 May 2018 and for her second period of

pensionable service is 7 July 2020. When the application was submitted Ms S was just under one month short of her 59th birthday.

9. It was agreed with Ms S that her claim would be assessed by one Council taking the lead, with the other Council agreeing to stand by the decision taken.

10. Dr Strudley, an independent registered medical practitioner (**IRMP**), reviewed Ms S' GP records and had a face to face consultation with her. He certified that Ms S was, on the balance of probabilities, permanently incapable of efficiently discharging the duties of her former employment with WBC, but did not have a reduced likelihood of being capable of undertaking other gainful employment. A copy of Dr Strudley's report was sent to Ms S.

11. On 23 November 2015 an HR Consultant for WBC wrote to Ms S informing her that Dr Strudley's report and certification had been received. Enclosing a copy of the latter, the HR Consultant notified Ms S of Dr Strudley's opinion and said:

> "In light of this decision you may wish to contact the Berkshire Pension Fund to discuss this outcome and alternative solutions that may be open to you."

12. On behalf of Ms S, BM&A invoked the Fund's two stage internal dispute resolution (**IDR**) procedure. At IDR stage 1 it said:-

- If, as stated by Dr Strudley, Ms S was unable to undertake a substantive part of her work role it was hardly likely she could maintain gainful employment with her existing employer or indeed with any employer.

- Given the nature of her work this would apply regardless of any work role that she might be judged capable, or suitable, of undertaking.

- Generally 35 hours constituted a normal working week. An employee incapable of doing the substantive part of their work would clearly find it difficult to sustain gainful employment of 30 hours per week. Dr Strudley had been made aware that Ms S was currently, and for the past year, working 28 hours per week because of her ill health.

- From 1 January 2016 Ms S' working week was to be reduced to 26 hours. This took into consideration the employer's need to retain Ms S and that it was in her best interests to continue working as long as she could.

- Dr Strudley's opinion was based solely on the effect of the medical condition, but the material evidence did not support it, bearing in mind the definition of gainful employment.

- Without Ms S' willingness to support her existing employer and the efforts the employer was making to accommodate her, Ms S would be unable to sustain her current commitment. At best she would be working only 18 hours per week.

- At the consultation Dr Strudley left Ms S with the opinion that nothing further would come from her application and any further action would be pointless. But it was not for the IRMP to give an opinion on whether an award would or would not be made. It was for the Council to determine.

13. The Head of Governance at WBC turned down the IDR stage 1 appeal:-

- Dr Strudley's advice had been used for both employments as Ms S' job role at each Council was very similar.
- It was not the practice of either Council to substitute an IRMP's opinion on fitness for gainful employment with its own opinion.
- The appeal did not appear to contain any medical evidence that was not available to Dr Strudley, or indicate a substantive deterioration in Ms S' health since the opinion was given. Consequently a further IRMP assessment was not warranted.
- Dr Strudley's opinion was accepted and no further action would be taken by either Council at the present time to review that assessment.
- The decision of the IRMP was an assessment of Ms S' capability to undertake gainful employment, not of the work Ms S may or may not be undertaking at that time.
- If Ms S' health significantly deteriorated at some future point in time she could reapply for the early release of her deferred pension benefits.

14. In April 2016 BM&A invoked IDR stage 2:-

- Dr Strudley's opinion was perverse. For more than the past 12 months Ms S had not been capable of gainful employment, working less than 30 hours per week.
- Her current employment was materially the same as that she had fulfilled for both Councils. This constituted material evidence not opinion.
- Neither the decision maker nor the IRMP had provided any material evidence that would suggest that Ms S did not satisfy the criteria. In fact the IRMP had acknowledged that Ms S was unable to undertake the substantive part of all aspects of her work role. It therefore required an explanation of the evidence that was being relied on to say that Ms S was able to sustain gainful employment before reaching her normal retirement age.

15. The opinion of another IRMP, Dr Williams, was sought.

16. In August 2016 the Department for Work & Pensions (**DWP**) awarded Ms S a Personal Independence Payment (**PIP**), from 22 August 2016 to 21 July 2021, to assist her with her daily living needs. A copy of the PIP assessment was sent to Dr Williams.

17. In September 2016, Dr Williams, certified that Ms S was not permanently incapable of efficiently discharging her former duties with RBWM. A copy of Dr Williams' report was sent to Ms S.

18. In February 2017 BM&A wrote to the Fund. In addition to the points it had previously raised it said:-

    - Dr Strudley appeared to have overlooked the requirement that Ms S should immediately be able to obtain gainful employment or take into account Ms S' proximity to either of her normal pension dates or to age 65.

    - Similarly Dr Williams appeared not to have taken into account the time available. In his report he referred to around 75% of fibromyalgia patients reaching a point in a few years where their symptoms no longer significantly affected their ability to undertake normal daily activities including work. In the summary he said the evidence for fibromyalgia clearly showed that, on the balance of probabilities, Ms S should recover to the point where she could work in her full role within a few years, well before she was due to reach age 65. But based on the date of Dr Williams' report Ms S was at worst 3 years 7 months away from her normal pension age, albeit in reality the material proportion of her pension benefits (that is in respect of Ms S' first period of pensionable service) were payable within 17 months.

    - Ms S' current employment as a Social Worker was office based with no field work. She had a disabled badge and had benefits following a PIP assessment. She now worked 18.5 hours per week. The reduced hours were representative of a deterioration in the outlook not an improvement.

    - Dr Williams said that Ms S had not had full and appropriate treatment for her condition. This was disputed by Ms S. Her GP was not responsible for all of her treatments. Some were effected privately. But no effort had been made to enquire about, or take into account, these treatments.

    - What was truly perverse was Dr Williams' statement that he did not know the reason(s) for Dr Strudley opinion. If that was the case, firstly, the claim should have been settled immediately and, secondly, his statement suggested that the requirements of the report and the subsequent rejection of the claim had not been dealt with properly. It might have been appropriate if the reason(s) for Dr Strudley's opinion had been sought. Otherwise it might be deemed that Dr Williams had not taken into account all the relevant information.

19. On 28 April 2017 the Deputy Director & Head of Finance at RBWM turned down the IDR stage 2 appeal on behalf of both Councils.

The position of both Councils as represented by RBWM

20. RBWM say:-

- Appropriate steps were taken throughout the appeal process which meet the statutory requirements set out in the LGPS Regulations.
- Ms S was assessed by two IRMPs who separately certified that she did not satisfy the criteria for the early release of her deferred pension benefits on the grounds of ill health.
- While it was the responsibility of the Councils to make the decision it would have been perverse for the Councils to take a decision which contradicted the opinion of both IRMPs.

Ms S' position as represented by BM&A

BM&A say:-

- The Councils approach to Ms S' claim has been dismissive.
- To date no response has been provided to show which LGPS Regulations, or what interpretation of them, the Councils are relying on to decline Ms S' claim.
- The documentary evidence and physical circumstances do not support the opinions offered by Dr Strudley and Dr Williams. Their respective conclusions are contradictory and RBWM has not sought to establish why or how this may impact its decision.
- Dr Williams' opinion did not properly address the time it would take Ms S to recover to be able to work, in relation to her retirement date, and eligibility for benefits, or the three year rule employed in the LGPS Regulations. His statement of Ms S returning to work at some point in the future is too vague and his opinion is based on the assumption that not all available treatments have been tried. It was subsequently found that Dr Herman (Ms S' GP) only reported the treatments that he had undertaken. Dr Herman did not mention private treatments that Ms S had taken as he did not see them as appropriate. This was pointed out, but no request for further information / explanation was made. The obligation to obtain all the relevant facts rested with Dr Williams.
- There is no evidence to suggest that Dr Williams gave consideration to Ms S' current employment, which clearly provides evidence of other identifiable objective issues that prevent her from returning to her role as a Social Worker before age 65.

Adjudicator's Opinion

21. Ms S' complaint was considered by one of our Adjudicators who concluded that no further/further action was required by RBWM or WBC. Adjudicator's findings are summarised briefly below:-

- The 1997 Regulations allow Ms S to elect early retirement if she meets the eligibility criterion. Under the 2007 Regulations she may request early retirement and

RBWM/WBC has discretion to agree it after obtaining the IRMP's opinion on her eligibility.

- Both Council's practice is to accept the opinion of the IRMP. But neither should do so blindly.

- Dr Strudley's November 2015 opinion was that Ms S was unfit for all aspects of her substantive role on a permanent basis, but was fit for an adjusted role of up to 30 hours per week. On that basis Ms S satisfied the criterion for ill health retirement applicable to her first period of pensionable service, but she did not satisfy the criteria for ill health retirement in respect of her second period of pensionable service. However, Dr Strudley certified that Ms S did not qualify for ill health retirement, incorrectly applying the 2007 Regulations to both periods of her pensionable service.

- WBC informed Ms S of Dr Strudley's opinion. But it made no decision. This amounts to maladministration by WBC.

- In his September 2016 report Dr Williams said, to be considered eligible for the early release of pension benefits, an applicant must be considered permanently unfit for their current role. That is not quite correct. As a deferred member of the Fund the first part of the test is whether Ms S is permanently incapable of efficiently discharging her former duties with both Councils. As it happens that does not appear to be of significance as Ms S' current employment as a Social Worker, albeit on less hours, seems to be substantively the same as her Social Worker role with both Councils.

- BM&A say Ms S disputes Dr Williams' view that she has not undergone all appropriate treatments for fibromyalgia. It says she has received private treatment, but this was not recorded in Dr Herman's provision of information as the treatment was considered inappropriate for her condition.

- But no evidence of private treatment was presented with the application or IDR appeals. Neither does Ms S appear to have specified the private treatment she had or provided the contact details for the medical practitioner(s) who delivered the treatment(s). If Ms S wanted this considered, she should have provided the information or the means for the IRMP to obtain it. Dr Williams could therefore only base his opinion on the available evidence.

- BM&A say Dr Williams did not properly address the time left to Ms S' 65th birthday. To support its claim it has focused on Dr Williams' reference to Ms S' recovery to the point where she could work in her full role within a few years, well before she was due to reach age 65.

- At the date of the original application Ms S was 59. At the date of Dr Williams' report she was just over age 60. Ms S' date of birth was noted on the front of Dr Williams report and clearly Dr Williams was aware of the significance of age 65 with regard

to the definition of permanently incapable. Therefore, on balance, I am satisfied that Dr Williams factored in the remaining time that Ms S had to age 65 before giving his opinion that she was not permanently incapable.

- BM&A say there is no evidence to suggest that Dr Williams gave consideration to Ms S' current employment, which clearly provides evidence of other identifiable objective issues that prevent her from returning to her role as a Social Worker before age 65. But that is the current position. Dr Williams' opinion is that with suggested treatments Ms S would be capable of efficiently discharging her former employment before age 65.

- BM&A highlight that Dr Williams did not know why Dr Strudley was of the opinion that Ms S was permanently unfit. While Dr Williams might have asked Dr Strudley for his reason(s) he was not obligated to do so. Clearly he considered that he had sufficient medical evidence to decide that Ms S was not permanently incapable.

- Whilst it is not clear that RBWM did more than just accept Dr Williams' opinion, there are insufficient grounds to say that it should not have accepted the IRMP's opinion.

- WBC's maladministration was therefore corrected at IDR stage 2.

22. BM&A on behalf of Ms S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. BM&A has provided its further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by BM&A for completeness.

Ombudsman's decision

23. BM&A say the definition of disability, or the ability to work the requisite hours, should be based on the employment undertaken by the individual when accruing pension benefits. It says it would be concerned if the interpretation of 'gainful employment' was to be anything other than the role the individual had at that time.

24. However, regulation 20(14) of the 2007 Regulations specifically defines 'gainful employment' as paid employment for not less than 30 hours in each week for a period of not less than 12 months. Therefore, any paid employment for 30 hours or more per week for a period of 12 months or more amounts to gainful employment.

25. BM&A refer to the case of *Trustees of the Safill Pension Scheme v Curzon (2005)*. This related to a non-discretionary benefit. While the circumstances are similar to those under the 1997 regulations I have not identified any grounds for finding that RBWM should not have relied on Dr Williams' (the second IRMP's) certified opinion. Therefore it was not a perverse decision. Under the 2007 Regulations the former employer has to exercise its discretion.

26. BM&A say that Ms S, as a matter of record, and visibly so with her current employer, had for the last 12 months and concurrently with the application met all the requirements for the payment of early retirement benefits. But that is not sufficient to qualify for the early release of her pension benefits on grounds of ill health under the 1997 and 2007 Regulations.

27. Ms S has two periods of pensionable employment in the Scheme. The first period is subject to the 1997 Regulations and the second period is subject to the 2007 Regulations. The qualification for the early release of a deferred pension on the grounds of ill health is less stringent under the 1997 Regulations. Regulation 31(6) of the 1997 regulations requires, on the balance of probabilities, that Ms S is permanently (to age 65) incapable of discharging efficiently the duties of her former relevant employment. For her second period of pensionable employment she must pass a two part test. Firstly, she must be deemed, on the balance of probabilities, permanently (to age 65) incapable of discharging efficiently the duties of her former relevant employment and, secondly, have a reduced likelihood of obtaining any gainful employment before her normal retirement age, or for at least three years, whichever is sooner.

28. Dr Strudley (the first IRMP) was of the opinion that Ms S was permanently incapable of undertaking all aspects of her substantive work role, but was fit for an adjusted role of up to 30 hours per week. He certified that Ms S did not qualify for ill health retirement. However, he applied the 2007 Regulations to both periods of her pensionable employment. WBC merely informed Ms S of Dr Strudley's opinion. Consequently, Ms S' application was not properly considered.

29. At IDR stage 2, Dr Williams was of the opinion that with treatment Ms S was not permanently incapable. That is Ms S did not satisfy the criterion for the early release of her pension in respect of her first period of pensionable service and failed the first part of the two part test for the early release of her pension in respect of her second period of pensionable employment.

30. BM&A say her former employers ignored the difference between the opinions of Dr Strudley and Dr Williams. But as I have previously said I can find no reason why RBWM should not have accepted Dr Williams' opinion, which was quite comprehensive with reasoning. In effect Dr Williams' report overrode Dr Strudley's opinion.

31. Therefore, I do not uphold Ms S' complaint.

Anthony Arter

Pensions Ombudsman
7 February 2018

Appendix 1

The Local Government Pension Scheme Regulations 1997

32. As relevant regulation 31, 'Other early leavers: deferred retirement benefits and elections for early payment' says:

> "…
>
> (6)If a member who has left a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body-
>
> (a)he may elect to receive payment of the retirement benefits immediately, whatever his age…"

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

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007

34. As relevant Regulation 31 says:-

> "(1) Subject to paragraph (2), if a member who has left his employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body he may ask to receive payment of his retirement benefits immediately, whatever his age.
>
> (2) Before determining whether to agree to a request under paragraph (1), an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine as to whether in his opinion the member is 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 that condition is likely to prevent the member from obtaining gainful employment (whether in local government or otherwise) before reaching his normal retirement age, or for at least three years, whichever is the sooner.
>
> (3) In this regulation, "gainful employment", "permanently incapable" and "qualified in occupational health medicine" have the same meaning as in regulation 20."

35. As relevant regulation 20(14) says:-

> ""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."

Appendix 2

Medical Evidence

Dr Strudley, IRMP, report dated 16 November 2015

36. Ms S reported a history of four conditions. Namely, fibromyalgia (diagnosed in 2011), depression (diagnosed in 2015), osteoporosis (diagnosed several years ago) and high blood pressure (diagnosed in 2014)

37. Dr Strudley noted:-

- Ms S had recently returned to her current employment following a short absence due to depression, which Ms S attributed to the disabilities resulting from her medical conditions, recent bereavements and house issues. Her GP had provided Ms S with medical interventions, including antidepressant medication, but she had not undergone any psychological intervention. Ms S reported significant improvement but ongoing depression symptoms, albeit not impacting on her day to day activities.

- The fibromyalgia condition caused Ms S to suffer multiple muscle/joint pains, diminished cognitive function and reduced memory. She had been prescribed medication for the condition but over time had stopped taking it due to lack of effect, albeit she took pain killers for the pain symptoms which were unpredictable and variable. Ms S reported ongoing restrictions of day-to-day activities: walking (from 0 to 30 minutes), standing (from 0 to 15 minutes), driving (30 minutes), sitting tolerance (60 minutes), light sensitivity, intermittent diminished cognitive function, fatigue (requiring frequent mini breaks/rests each day) and recurrent low back pain.

- The diagnosed osteoporosis did not currently cause Ms S any restrictions or symptoms.

- Ms S had a history of high blood pressure which was controlled by medication with no side effects. It caused her no specific symptoms or restrictions.

- Ms S was currently employed as a Social Worker. For the past four years a number of workplace adjustments had been in place, including: all office based, repositioned desk (quieter, darker and cooler), a special chair and footstool. Since April 2015 she had reduced working to 28 hours per week.

38. Dr Strudley gave his opinion that Ms S was permanently unfit to undertake all aspects of her substantive role, but was fit to undertake an alternative role up to 30 hours per week with specific adjustments:-

- The employer continue to provide the current adjustments.

- Frequent mini breaks to help Ms S manage her fatigue and joint/muscle pain symptoms.

- Use of memo notes or specific task list software and the avoidance of fast paced work activities to reduce the effects of likely occasional concentration/memory lapses.

Dr Herman's report dated 31 August 2016

39. Dr Herman noted that Ms S had several conditions. She had been diagnosed with osteopaenia in 2003, but this was stable with medication. She had been given a diagnosis of fibromyalgia in 2012 after a year's history of aches and pains with a feeling of muscle weakness. She also had had a number of falls but nothing was found on investigation. She was being treated for mixed anxiety and depression which had persisted since early 2011. In May 2016 she had reported that she was struggling with work and life, feeling exhausted and wanting to sleep a lot, with poor concentration and memory. All blood tests were normal.

Dr Williams (IRMP), report dated 17 September 2016

40. The assessment report noted Ms S' date of birth, that she had been a Social Worker with RBWM and that the medical evidence comprised: a job description, occupational health notes, Dr Strudley's report of 17 November 2015 and a report from Dr Herman (Ms S' GP) dated 31 August 2016.

41. Summarising the medical evidence Dr Williams noted:-

- Ms S current work was office based and she did no field work. She held a disabled badge, received benefits following a PIP assessment and her working hours were 18.5 hours per week.

- Ms S' conditions as respectively described in Dr Strudley's report and Dr Herman's report.

42. In his discussion of the case Dr Williams said:-

- He had very limited information but this was not surprising in the circumstances.

- Dr Herman agreed with three of Ms S' four stated conditions, albeit the exact diagnosis was not the same.

- Ms S was diagnosed with osteopaenia in 2003, not osteoporosis. But this had not been a problem in any way in relation to either work or non-work and therefore was not relevant to her claim.

- Ms S stated she had high blood pressure (hypertension) treated with medication. Dr Herman had not mentioned it in his report, maybe because the condition was common and because Ms S had no symptoms from it. Ms S acknowledged she had no symptoms and it did not affect her ability to work or in any other aspects of her daily life. Therefore, it too was not relevant to her claim.

- Ms S had had symptoms of fibromyalgia since 2011, formally diagnosed in 2012. The diagnosis was based on what the patient told the physician, and was usually made after all investigations undertaken had been negative or normal. The condition had no underlying pathology. The symptoms arose in the brain so conventional treatment for pain was rarely effective, although the placebo effect could be effective. Treating clinicians tended to select medication that acted on the brain rather than acting on joints or muscles or general inflammation. Tramadol could be effective, but two more usual medication types were tricyclic antidepressants and antiepileptic medication. Ms S did not appear to have tried these.

- More importantly, fibromyalgia arose as a result of inappropriate beliefs and maladaptive behaviours. The most important clinical approach to address these was through cognitive behavioural therapy (**CBT**). Physical activity was also appropriate.

- Specialist treatment for fibromyalgia therefore usually encompassed some appropriate medication, psychotherapy and graded exercise therapy. There was no evidence that Ms S had had this multidisciplinary approach. It was a common approach available throughout the UK so there was no reason why she could not be referred to a suitable treatment centre.

- Ms S' depressive symptoms were being appropriately treated with an antidepressant, although it was quite possible that there was an alternative which would be more affective.

43. Dr Williams then went on to say,

"In order to be considered eligible for early release of pension benefits, an applicant must be considered permanently unfit for their current role. In this case, I will consider the generic role of [a] social worker which includes field work, working long hours at time, but without any significant physical demands such as manual handling. [Ms S] appears unable to cope with this role at present because of her symptoms although she has no underlying pathology that would prevent her from fulfilling this role.

The evidence base for fibromyalgia shows that, probably because of the way the symptoms arise, and the way patients address them long-term, the symptoms rend to persist. Only around 10-20% of patients state after a number of years that they have been completely cured with absolutely no symptoms. Patients therefore tend to argue that the condition 'cannot be cured' and is therefore permanent. That is an inappropriate view, Studies show that around half of patients go through periods where although thy have symptoms, these do not always meet the criteria for fibromyalgia, and around 75% of patients reach the point after a few years where they have developed coping strategies and they say that although they still have symptoms, these symptoms no longer significantly affect their ability to undertake normal daily activities including work.

Employees with fibromyalgia are therefore expected, in the long-term, to recover sufficiently to return to their full role whatever it is…

It is also important to appreciate that recovery depends on the patient developing coping strategies. While many will achieve this on their own without any external treatment, they will only do so if they want to do so. Furthermore not all patients want to engage with treatment…

In [Ms S'] case, there is no additional underlying pathological process of relevance, and no other identifiable objective issue that would prevent her from recovering and returning to her role as a social worker. The evidence for fibromyalgia clearly shows that on balance the probabilities she should recover to the point where she can work in her full role within a few years, well before she is due to reach normal pension age of 65. She may well not wish to return to work as a social worker; this is a potentially challenging role that many decide to leave before retirement age. This is however not a factor that should be relevant to a decision on eligibility for early payment pf pension benefits. Overall, I cannot state that she is permanently unfit. In particular, she has not even had full and appropriate treatment for her condition.

I note that Dr Strudley was of the opinion that she was permanently unfit. I do not know why and he has not provided any reason for this decision or any evidence to support his opinion.

I do not therefore support her application."