

## Ombudsman's Determination

Applicant	Mrs R
Scheme	Local Government Pension Scheme ( <b>LGPS</b> )
Respondents	Essex County Council ( <b>ECC</b> ) Hedingham School and Sixth Form ( <b>Hedingham School</b> )

## Outcome

1. Mrs R's complaint is upheld and to put matters right, Hedingham School shall:
  - ask an IRMP who has not previously advised on Mrs R's IHER application to seek information from her treating physicians on all her symptoms and conditions and all planned treatments, including any prospects for recovery, before deciding whether she would be able to achieve gainful employment before the normal retirement age and prepare the relevant certificate accordingly;
  - then review its decision not to award tier one IHER pension from the LGPS to Mrs R; and
  - inform Mrs R of its decision with reasons
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs R complains that Hedingham School and ECC wrongly decided to award her a tier two instead of a tier one IHER pension from the LGPS.

## Background information, including submissions from the parties

4. Mrs R was employed by Hedingham School on a part time basis as a Cover Supervisor from November 2010.
5. In September 2013, she went on long term sick leave and regularly attended appointments with ECC Occupational Health (**OH**) at the request of Hedingham School.

6. Dr Rost, Specialist Occupational Health Physician, wrote to Hedingham School on 8 May 2014 as follows:

“Mrs R has complex health issues...She has seen several specialists since she was last referred to OH and more investigations are outstanding. She has been unable to work since September and I do not feel she will be able to return to her role...

I think she is permanently unfit to undertake any gainful employment.

She would struggle even with adjustments and I do not think redeployment will facilitate a return to work.”

7. Dr Holden, Mrs R's General Practitioner (**GP**), wrote to Dr Rost on 17 June 2014 as follows:

“She has Hypermobility Syndrome which seems to be the underlying trigger for a number of other problems: recurrent joint subluxation; multiple tendonopathy including Rotator Cuff Tendinitis; Carpal Tunnel Syndrome...; pes planus; chronic musculoskeletal pain and a Fibromyalgia-type syndrome (fatigue/sleep disturbance); and premature joint degeneration and osteoarthritis.

She has also been treated for Vitamin D deficiency and more recently found to have Osteopenia...;

She has been assessed by Endocrinology and had more formal tests for possible Cushing's Syndrome or Disease but I have not received any results or correspondence about these recent tests/results as yet.

Initially, whilst Mrs R's diagnosis was uncertain, there was some hope that she may have a rheumatological condition that might be amenable to disease-modifying therapies, but it appears now that this is not the case.

I think Mrs R is going to continue to be markedly limited functionality by her Hypermobility and related problems and will not be able to continue in gainful employment. I would concur with your opinion that she should be retired on the grounds of ill health.”

8. Mrs R's IHER application was referred to Dr Challen, an IRMP, who in July 2014 issued a certificate of incapacity for tier two IHER in accordance with the LGPS Regulations 2013 (**the Regulations**). In his covering letter, Dr Challen said that he had examined all the available medical evidence and concluded that:

“I note that Mrs R is undergoing further investigation for Cushing's Syndrome or Disease, these results are not available, and so no treatment has been given.

I conclude there is no realistic chance of Mrs R returning to her present role in the near future; also the wide range of her medical problems is an adverse prognostic factor. However looking ahead there is a possibility Mrs R might achieve gainful employment in the future but this future maybe some distance away there being a need to treat her Cushing's Syndrome or Disease, her musculoskeletal syndromes as well as her Fibromyalgia."

9. On 21 August 2014, Mr P, the head teacher at Hedingham School informed Mrs R that her employment had been terminated on the grounds of permanent incapacity due to ill health and that she had been awarded a tier two IHER pension in the LGPS.
10. Mrs R appealed the decision and in October 2014, Hedingham School sought a medical opinion from a different IRMP, Dr Kelly, who also completed a tier two certificate of incapacity. In her covering letter dated 26 October 2014, Dr Kelly wrote:

"In my opinion Mrs R is not fit to undertake any role at the present time due to generalised pain and fatigue. She may be able to consider working in a sedentary role before retirement age.

In my opinion the criteria for permanence are met: she is permanently incapable of undertaking her own role.

In my opinion the criteria for reduced likelihood of any gainful employment is met.

In my opinion there is a reduced likelihood of her being capable of undertaking gainful employment within three years but there is a reasonable prospect of her being capable of undertaking gainful employment before normal retirement age.

The criteria for serious ill health are not met.

Mrs R has ongoing symptoms that prevent her undertaking her role including ongoing pain and discomfort in a number of joints due to hypermobility syndrome and related problems. It was noted that Mrs R reports difficulty walking and performing heavier manual handling activities. Mrs R also has symptoms of a fibromyalgia type syndrome (sleep disturbance/fatigue).

The report from Dr Holden dated 17 June 2014 stated that Mrs R has had physiotherapy and more recently hydrotherapy, neither of which has been subjectively beneficial. In the report dated 26 March 2014 Dr Walton advised that a referral to the pain clinic could be considered.

In my opinion even with further treatment for pain it is likely that she will continue have difficulty mobilising and performing heavier manual handling duties.

On current evidence due to fatigue and generalised joint pain in my opinion it is unlikely that Mrs R will be able to work in any role for greater than 30 hours

per week. Investigations into her symptoms are ongoing. With further treatment her symptoms of pain and fatigue may improve allowing her to return to work in a sedentary role greater than 30 hours per week before her normal pension age.”

11. In November 2014, the head teacher wrote to Mrs R to inform her that her appeal had not been upheld.
12. In September 2015, having been awarded Employment and Support Allowance (**ESA**) by the Department for Work and Pensions (**DWP**), Mrs R appealed the decision to only award her tier two IHER benefits under the LGPS Internal Dispute Resolution Procedure (**IDRP**).
13. On 23 December 2015, the Stage One adjudicator concluded that Hedingham School did not ask Mrs R’s medical professionals the correct questions and referred the case back to it for review.
14. The Stage One adjudicator also informed Mrs R that:

“Having studied all the evidence made available to me, I am satisfied that Hedingham School followed the correct process and regulatory requirements. However whilst I note that Hedingham School obtained another medical opinion and requested you to provide further medical evidence to which you confirmed that you did not wish to add any further evidence, I am not satisfied that Hedingham School has asked the correct questions to your medical professionals. I would have expected the IRMP/Hedingham School to have contacted your GP/treating specialists and probed into the outcome of the relevant investigations with regard to Cushing’s Syndrome or Disease, the treatment that you are undergoing and any planned treatment for all of your medical conditions that would on balance of probabilities improve your medical conditions for you to enable to obtain gainful employment in a sedentary role before the age of 65. I am therefore referring your case back to Hedingham School for it to review its decision after obtaining the additional evidence as outlined above and obtaining another medical opinion from an IRMP who has not advised in your case before.”

15. In January 2016, Hedingham School sent Mrs R a letter to inform her that its decision was unchanged and it would not be seeking another medical opinion.
16. Mrs R’s appeal was declined at Stage Two IDRP. The summary of the Stage Two IDRP letter dated 24 June 2016 said that:

“To qualify for retirement at tier one, the IRMP would need to determine that you have a condition that renders you permanently incapable of discharging efficiently the duties of your current employment and because of that condition you have a reduced likelihood of undertaking any gainful employment before normal retirement age. On the basis of your medical evidence neither Dr Challen nor Dr Kelly accepted that you meet this threshold and has stated

that, on the balance of probability, you should be able to return to working in a sedentary role greater than 30 hours per week before your normal retirement age.

Your case was assessed by the IRMPs three and five months respectively after your initial referral from Dr Rost...The IRMPs based their decisions purely on the evidence presented to them at the time. In accordance with the regulations it is the decision of the IRMP that is determinative in respect of an application for the early release of pension benefits on the grounds of ill health and not that of Occupational Health or a GP...the IRMPs were entitled to form opinions they did based on the evidence before them.

Whilst under the regulations the Stage One adjudicator may make recommendations; these must be within the remit of the regulations. Mr G, as adjudicator at Stage One, was not empowered under the regulations to instruct Hedingham School to obtain additional medical evidence and a further IRMP opinion. Hedingham School demonstrated that it had followed the correct procedure under the regulations and therefore it was entitled to ignore the recommendation.

...I find that the regulations were correctly followed and that Hedingham School were correct to decide, based upon the information available at the time, to agree to the early release of your pension benefits on ill health grounds at tier two. I can find no evidence that would render that decision invalid."

17. Mrs R commented on one of our Adjudicator's Opinion of her complaint as follows:

"The school should...be required to ask an IRMP to seek information from my treating physicians regarding **all** my symptoms and conditions and **all** planned treatments, **including any prospects for recovery**, before deciding whether I would be able to achieve gainful employment before the normal retirement age. There has never been a request to my GP etc enquiring as to what treatments may be possible, what the outcome might be and what has worked or not worked thus far. Neither has there been any justification for deciding on what basis I will recover from these chronic and progressive conditions, despite several requests from me...

Nevertheless, without the results of the Cushing's tests, both my GP and ECC own Occupational Health Service concluded that I was going to continue to be markedly limited functionally due to my Hypermobility Syndrome/Ehlers-Danlos Syndrome and related problems and not capable of gainful employment. The only people who disagreed (IRMPs) had never met me...Given the wide spectrum of disability associated with all my medical conditions, they could not possibly have known to what extent these would affect my ability to work at that time or in the future. This is why they should have sought advice from those who were aware of the severity of my

conditions, how they affected my ability to function, the limited range of “treatments” available and their potential efficacy.

I believe that evidence is and was available to support a different decision, but that selective use of that evidence (disregarding my treating physicians and ECC Occupational Health Service, but accepting the view of IRMPs who have never seen me and did not request evidence as to the severity of my conditions or prognosis for recovery) has been used to fit a decision that was already made, rather than using the evidence to guide the decision.

I would also welcome them considering contemporary medical evidence since we are now four years forward in this matter and I should therefore, by their judgement, be capable of gainful employment. Instead as predicted, my situation has deteriorated. I am now under the care of a different GP who has expertise in Ehlers-Danlos Syndrome/Joint Hypermobility Syndrome (EDS/JHS)...I am also currently seeing two Trauma and Orthopaedic Consultants that are both recommending surgery on one hip and a shoulder, with a MRI of the other shoulder pending. The hip consultant has serious concerns that, because of EDS, I will not recover well and may become worse so is deferring surgery. I have also been diagnosed with tinnitus caused by nerve damage associated with EDS, referred to a new rheumatologist and am receiving more physiotherapy, this time for both knees due to mal-tracking caused by EDS and subsequent weakening and subluxation (partial and temporary dislocations).

These are just a selection of current issues that have all stemmed from the conditions with which **I had already been diagnosed at the time of the original decision/my dismissal**...The degenerative progression of these conditions was predictable and therefore “likely” to prevent me achieving gainful employment in the future. None of this has been helped by the fact that I appear to have adverse reactions to various pain-relief medications such that I cannot take them to relieve the pain associated with many of these conditions.”

18. Hedingham School say that it considers the amendments Mrs R is requesting to the recommendations made by one of our Adjudicators in his Opinion to be reasonable.

## Adjudicator’s Opinion

19. Mrs R’s complaint was considered by one of our Adjudicators who concluded that further action was required by Hedingham School. The Adjudicator’s findings are summarised briefly below:
  - It is not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to Mrs R’s eligibility for payment of benefits under the Regulations. The Ombudsman is primarily concerned with the decision making

process. Medical (and other) evidence is reviewed in order to determine whether it supported the decision made. The issues considered include: whether the relevant regulations have been correctly applied; whether appropriate evidence has been obtained and considered; whether the correct questions have been asked; and whether the decision is supported by the available relevant evidence. However, the weight which is attached to any of the evidence is for Hedingham School to decide (including giving some of it little or no weight). It is open to Hedingham School to prefer evidence from its own advisers; unless there is a cogent reason why it should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant regulations by the medical adviser. If the decision making process is found to be flawed, the appropriate course of action is for the decision to be remitted for Hedingham School to reconsider.

- The Pensions Ombudsman will not generally interfere in the decision process unless he considers it was in some way flawed or the decision reached was unsupported by the evidence. He cannot overturn the decision made by Hedingham School just because he might have acted differently.
- The decision of Hedingham School to refuse Mrs R's IHER application was taken only after seeking the view of two IRMPs, Dr Challen and Dr Kelly, on all the available medical evidence at the time, including reports from her GP and Dr Rost.
- Hedingham School's decision was heavily influenced by the opinions given by the IRMPs. It was, therefore, appropriate to consider these in some detail. The questions the IRMPs were required to address were, firstly whether Mrs R was permanently incapable of efficiently discharging her school duties, if so, secondly whether her capacity for any gainful employment was impaired, and if so, thirdly to what extent it was likely to remain so.
- The conclusions made by the Stage One adjudicator in December 2015 were sound. Although Hedingham School might have followed its procedure and regulatory requirements when considering Mrs R's IHER application, it did not ask all the correct questions before making its decision. With the results of the formal tests for Cushing's Syndrome or Disease still outstanding, Hedingham School were not in a position yet to make its decision properly. It should have asked for the results of these tests before considering whether any planned treatments for all her medical conditions would, on the balance of probabilities, improve them to enable her to obtain gainful employment in a sedentary role before age 65.
- On the basis of the medical evidence that was actually before it at that time, it could not be said that it was reasonable for Hedingham School to have decided that Mrs R's condition was not such as to preclude her from being capable of undertaking gainful employment before normal pension age.

## **Ombudsman's decision**

20. All the parties involved in this complaint have generally accepted the Adjudicator's Opinion but Mrs R did not agree with the requirements placed upon Hedingham School to put matters right. The complaint was therefore passed to me to consider. Mrs R and the Respondents have now provided their further comments which I have carefully considered.
21. I agree with Hedingham School that the amendments which Mrs R has requested are reasonable and should be made to the recommendations made by one of our Adjudicators in his Opinion. I therefore uphold Mrs R's complaint and make the appropriate directions below.

## **Directions**

22. Within 60 days of the date of this Determination, Hedingham School should:
- ask an IRMP who has not previously advised on Mrs R's IHER application to seek information from her treating physicians on all her symptoms and conditions and all planned treatments, including any prospects for recovery, before deciding whether she would be able to achieve gainful employment before the normal retirement age and prepare the relevant certificate accordingly;
  - then review its decision not to award tier one IHER pension from the LGPS to Mrs R; and
  - inform Mrs R of its decision with reasons

**Karen Johnston**

Deputy Pensions Ombudsman  
23 March 2018



## Appendix

### **Regulation 35 (Early payment of retirement pension on ill health grounds: active members) and 36 (Role of the IRMP) of the Local Government Pension Scheme Regulations 2013 (as amended)**

35 (1) An active member who has qualifying service for a period of two years and whose employment is terminated by a Scheme employer on the grounds of ill health or infirmity of mind or body before that member reaches normal pension age (**NPA**), is entitled to, and must take, early payment of a retirement pension if that member satisfies the conditions in paragraphs (3) and (4) of this regulation.

(2) The amount of the retirement pension that a member who satisfies the conditions mentioned in paragraph (1) receives, is determined by which of the benefit tiers specified in paragraphs (5) to (7) that member qualifies for, calculated in accordance with regulation 39 (calculation of ill health pension amounts).

(3) The first condition is that the member is, as a result of ill health or infirmity of mind or body, permanently incapable of discharging efficiently the duties of the employment the member was engaged in.

(4) The second condition is that the member as a result of ill health or infirmity of mind or body, is not immediately capable of undertaking any gainful employment.

(5) A member is entitled to Tier 1 benefits if that member is unlikely to be capable of undertaking gainful employment before normal pension age.

(6) A member is entitled to Tier 2 benefits if that member (a) is not entitled to Tier 1 benefits; and

36 (1) A decision as to whether a member is entitled under regulation 35...to early payment of retirement pension on grounds of ill health or infirmity of mind and body, and if so which tier of benefits the member qualifies for, shall be made by the member's Scheme employer after that authority has obtained a certificate from an IRMP as to:

(a) whether the member satisfies the conditions in regulation 35(3) and (4) and if so,

(b) how long the member is unlikely to be capable of undertaking gainful employment;

(2) An IRMP from whom a certification is obtained under paragraph (1) must not have previously advised or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested.

For the purposes of the Regulations, "gainful employment" is defined as paid employment for not less than 30 hours per week for a period of not less than 12 months. Such employment does not have to be commensurate in terms of pay and terms of conditions of the individual's current employment being considered for ill health retirement.