

## Ombudsman's Determination

Applicant	Mrs D
Scheme	Local Government Pension Scheme ( <b>LGPS</b> )
Respondent	Salford City Council ( <b>the Council</b> )

## Outcome

1. Mrs D's complaint is upheld and to put matters right the Council shall:
  - ask Dr Hadland to clarify his opinion on the extent he considered treatments would improve Mrs D's condition with reasons;
  - then review its decision not to award ill health early retirement benefits to Mrs D;
  - inform Mrs D of its fresh decision with reasons; and
  - pay Mrs D £500 for the significant non-financial injustice which she has suffered.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs D complains that the Council, her former employer, has wrongly declined her application for payment of her pension on the grounds of ill health early retirement (**IHER**) from the LGPS.

## Background information, including submissions from the parties

4. Mrs D has a history of breast cancer for which in 2014 she required several types of treatment including surgery. The cancer spread to the lymph nodes under her right armpit which were removed surgically. She subsequently developed lymphedema, a chronic medical condition that causes her right arm to painfully swell for which she is receiving ongoing medical treatment. She also suffered from skin cancer and required surgery to remove a malignant melanoma on her left arm and a skin lesion on her back in 2014 and 2016 respectively. Mrs D needed surgery to remove a bladder papilloma in 1999 and underwent another urological procedure in 2016. She has a history of low back pain and right side hip/buttock pain which is currently being treated with physiotherapy. She also now suffers from mental health problems.

5. Mrs D worked as a part time teaching assistant for the Council. She went on long term sick leave in January 2014. The Council terminated Mrs D's employment in May 2017 on incapacity grounds.
6. In March 2016, she applied for an IHER pension from the LGPS. The Council arranged for her to be medically examined by an Independent Registered Medical Practitioner (**IRMP**), Dr Gidlow, in August 2016.
7. In his letter dated 31 August 2016, Dr Gidlow concluded that:

“This lady has clearly had multiple problems, including two malignancies and a possible recurrence of a bladder tumour. However, I do not believe there is currently sufficient evidence to say that she is unfit to return to her role...Obviously if the results of the recent bladder cystoscopy show a further problem, we would have to reconsider.”
8. The Council rejected Mrs D's application in its letter dated 6 September 2016 after accepting the conclusion made by Dr Gidlow. Mrs D appealed the Council's decision and also complained about Dr Gidlow's conduct during the examination. The Council rejected her appeal in December 2016 at Stage One of the LGPS Internal Dispute Resolution Procedure (**IDRP**), because she had not supplied any new medical evidence for consideration as part of her appeal.
9. Mrs D was unhappy with this decision and provided the Council with new medical evidence for consideration. The Council subsequently appointed a different IRMP, Dr Hadland, to assess Mrs D's IHER application.
10. After reviewing all the available medical evidence at the time, Dr Hadland concluded in his report dated 1 March 2017 that:

“It is my opinion that Mrs D is currently experiencing ongoing physical and psychological symptoms. She has had a number of significant medical issues over the years...I currently consider Mrs D unfit for any work and this is likely to remain the case in the foreseeable future.

However the judgement I am required to make is in reference to the LGPS, and I have reviewed the LGPS criteria. In my opinion, there are further treatment options in this case. Mrs D may benefit from seeing a pain specialist and may also be helped by the ongoing physiotherapy treatment. In my opinion, she would also benefit from some psychological support and may also benefit from seeing a mental health specialist in view of her current psychological symptoms, including low mood and sleep disturbance.

Based on my assessment of this case, there are prospects of improvement and, in my opinion, on the balance of probabilities, Mrs D is not suffering from a condition that, more likely than not, renders her permanently incapable of discharging efficiently the duties of her role.

Therefore I see no reason to disagree with the opinion given by Dr Gidlow in August 2016.

I have completed the Greater Manchester Pension Fund (**GMPF**) P72 form accordingly.”

11. Having considered Dr Hadland’s report and all the available medical evidence, the Council informed Mrs D in its letter dated 8 March 2017 that her appeal had been rejected and if she disagreed with the decision, she could ask for it to be reconsidered under Stage Two IDRP.
12. GMPF did not uphold Mrs D’s appeal at Stage Two IDRP in June 2017 because it considered that the Council had complied with the relevant LGPS regulations. GMPF, however, also said in its decision letter that:
  - it was surprised that the Council did not ask Dr Gidlow to provide further information on receipt of his letter dated 31 August 2016 because it and the IRMP must have regard for the statutory guidance mentioned in Regulation 36(4) of the Local Government Pension Scheme Regulations 2013 (**the 2013 Regulations**) and also the Frequently Asked Questions (**FAQs**);
  - point 20 of the FAQs stated that the employer would need to understand the reasoning of the IRMP when making its decision and it was therefore recommended that the IRMP provided a narrative report to accompany the certificate;
  - where the IRMP was of the opinion that the applicant could work in his/her current role with adjustments or in an alternative role that was likely to be available with that employer, it was appropriate to include advice on this in the narrative report if such advice had not already been given to the employer previously;
  - point 21 of the FAQs stated that under Regulation 36(1) of the 2013 Regulations, the role of the IRMP was to certify whether or not, in his/her opinion, on the balance of probabilities, the criteria for entitlement to an ill health benefit were satisfied in any individual case;
  - there was no evidence to suggest that a report was requested by the Council and Dr Gidlow did not mention in his letter the “balance of probabilities” test or medical treatments which might yet be tried;
  - the Council’s letter dated 6 September 2016 quoted the incorrect LGPS regulations and also showed the wrong Normal Retirement Age (**NRA**) of 65 when it should be 66, i.e. her State Pension Age (**SPA**);
  - Dr Hadland’s report, on the other hand, was comprehensive and prepared in accordance with the statutory guidance and FAQs;
  - the Council’s decision letter dated 8 March 2017 was also poor because it did not (a) refer to the LGPS regulations relied upon, (b) provide an explanation for its decision and (c) supply information about the Pensions Advisory Service (**TPAS**); and

- it would ask the Council to review its letters to supply information to members in line with Regulation 74 of the 2013 Regulations.

13. Mrs D says:

"The Council have defaulted at every step of the way. They defaulted at the first assessment with Dr Gidlow's unprofessional manner, including his reporting of the assessment, which bore out my concerns, that Dr Gidlow was preoccupied and uninterested in my assessment. They tried to put things right by offering a second assessment, but the Council didn't realise or understand that for the second assessment to be credible, it had to have total integrity and clarity. The Council's actions failed on both points, as the Council again defaulted by compromising the second assessment, when giving Dr Hadland prior knowledge of the first assessment and its outcome, which the Council stated they hadn't given prior knowledge, yet Dr Hadland mentioned Dr Gidlow's verdict in his report. The Stage Two Referee also defaulted, by failing to spot the two above obvious failings within his findings. He chose to hide behind the fact that they had followed procedure, even though that procedure was flawed...

The Council should do the "Right Thing" and grant me my pension on the grounds of their "Defaults".

I do believe that I am entitled to my pension on the grounds of my ill health, I have produced regularly up to date medical evidence...that states, I am still unfit for any work and my condition will not improve.

Whilst the Council have stated that they will implement the recommendations... the Council have not made any suggestion or inference that they will grant my pension, as the way of rectifying their errors, even though it has been the Council that has made continual errors of default throughout. The Council don't have to wait for clarification, the Council can grant me my pension on grounds of default now. Then still review my case with clarification as a learning exercise for themselves if they wish. Instead, the Council continue to drag their feet, at my expense, again asking for extra time, causing more upset and stress for me. It really is diabolical that the Council are allowed to operate in this manner, knowing that they have messed up on numerous occasions and yet do not have the decency to rectify the situation as quickly as possible, especially when the Council have accepted they are the ones that are shown to be in error."

### **Adjudicator's Opinion**

14. Mrs D's complaint was considered by one of our Adjudicators who concluded that further action was required by the Council. The Adjudicator's findings are summarised briefly below:-

- The original decision made by the Council in September 2016 to refuse Mrs D's IHER application was taken only after seeking the view of an IRMP, Dr Gidlow, on all the available medical evidence at the time.
- The questions Dr Gidlow was required to address were, firstly, whether Mrs D was permanently incapable of efficiently discharging her Council 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.
- Dr Gidlow's brief letter of 31 August 2016 provided inadequate information for the Council to understand the reasoning behind his medical opinion essentially for the reasons given by GMPF at Stage Two IDRP (see paragraph 12 above).
- Dr Gidlow stated that there was insufficient evidence to conclude that Mrs D was unfit to return to her role but did not explain sufficiently what he meant by this. The FAQs recommended that the IRMP provide a narrative report to accompany the certificate. Dr Gidlow, however, did not provide the Council with either document. The Adjudicator did not therefore consider that Dr Gidlow had properly assessed Mrs D's employment capabilities.
- By failing to obtain a detailed medical report and certificate from Dr Gidlow before making its decision, the Council failed to correctly apply the 2013 Regulations and obtain the appropriate evidence. It accepted Dr Gidlow's opinion without knowing the reason(s) for his opinion. Its decision was therefore not properly informed and flawed. This amounted to maladministration by the Council.
- The Council tried to take the appropriate remedial action at Stage One IDRP by agreeing to reconsider Mrs D's IHER application afresh. Its new decision to refuse Mrs D's IHER application in March 2017 was taken after seeking the view of a different IRMP, Dr Hadland, on all the available medical evidence at the time.
- Dr Hadland weighed the evidence before him and considered that Mrs D's incapacity would not continue until her SPA. He listed the medical evidence which he had considered, and also set out his reasons for his opinion, in his report dated 1 March 2017. Dr Hadland also certified that Mrs D did not satisfy the criteria for medical retirement.
- The Adjudicator was unable to agree with GMPF's conclusion at Stage Two IDRP that Dr Hadland's report was comprehensive and had been prepared in accordance with the statutory guidance and FAQs.
- Dr Hadland said that Mrs D was currently, and for the foreseeable future, unfit for any work. He then mentioned treatment options he considered might improve Mrs D's condition. But that did not go far enough. The expected improvement needed to be sufficient to mean that Mrs D would be capable of efficiently discharging her Council duties before age 65. Dr Hadland did not specifically say that in his report.

He also needed to explain why he believed the suggested treatments would improve Mrs D's condition to that extent.

- The Council accepted Dr Hadland's opinion when it should have asked him to clarify it. The Adjudicator was consequently not satisfied that the Council has given proper consideration to Mrs D's application.
- There was no doubt from the evidence presented that the Council had consistently provided Mrs D with a substandard level of service dealing with her IHER application. Apart from failing to make a properly informed original decision, it also sent Mrs D several letters which contained errors and inadequate information. These errors constituted examples of maladministration which has caused Mrs D significant distress and inconvenience.

15. Mrs D did not accept the recommendations made by the Adjudicator, in his Opinion, and the complaint was passed to me to consider. Mrs D provided her 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 Mrs D for completeness.

### **Ombudsman's decision**

16. When considering how a decision has been made by the Council, I look at whether:

- the correct questions have been asked;
- the applicable scheme rules or regulations have been correctly interpreted;
- all relevant but no irrelevant factors have been taken into account; and
- the decision arrived at is not one that no reasonable body would make.

17. Providing the Council has acted in accordance with the above principles and within the powers given to it by the 2013 Regulations, I cannot overturn its decision merely because I might have made a different one. It is not my role to review the medical evidence and come to a decision of my own. I am primarily concerned with the decision making process.

18. The weight which is attached to any of the medical evidence is for the Council to decide. It is also open to the Council to prefer evidence from its own advisers unless there is a cogent reason why it should, or should not, without seeking clarification. If the decision making process is found to be flawed, as it is the case here the appropriate course of action is for the decision to be remitted for the Council to reconsider.

19. Whilst I fully appreciate Mrs D's point of view on this matter, I cannot direct that the Council should automatically award her IHER benefits from the LGPS in order to put matters right as Mrs D would like.

20. I uphold Mrs D's complaint and make the appropriate directions below.

**Directions**

21. Within 21 days of the date of this Determination the Council shall ask Dr Hadland to clarify his opinion and also pay Mrs D £500 for the significant non-financial injustice which she has suffered.
22. Within 21 days of receiving Dr Hadland's clarification, review its decision not to award IHER benefits to Mrs D; and inform Mrs D of its fresh decision with reasons.

**Anthony Arter**

Pensions Ombudsman  
5 January 2018