

Ombudsman's Determination

Applicant	Miss K
Scheme	Local Government Pension Scheme (the Scheme)
Respondent	Hull City Council (the Council)

Outcome

1. I do not uphold Miss K's complaint and no further action is required by the Council.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Miss K's complaint is that she has been refused ill health early retirement (**IHER**).

Background information, including submissions from the parties

4. In October 2014, following a period of sickness due to stress related illness at work Miss K was referred to the Council's Occupational Health Unit.
5. On 28 October 2014, the Council wrote to Miss K's GP for a medical update including diagnosis and prognosis along with recommendations, treatment plans and consultant opinions regarding her mental health condition.
6. On 4 November 2014, Miss K's GP provided a report which confirmed that work related issues would need to be resolved in order for Miss K to return to work.
7. On 2 May 2015, Miss K ceased employment with the Council on the grounds of dismissal and was awarded deferred benefits.
8. On 19 November 2015, Miss K was referred to Professor Gillbody to establish the presence of psychological disorders in relation to Miss K's workplace difficulties.
9. On 2 December 2015, Professor Gillbody prepared an Independent Psychiatric Report for the tribunal. Professor Gillbody said that he anticipates that Miss K "has a 50-70% chance of making a substantial recovery over the next 12 months if she is offered optimal treatment in the near future". He also said he was of the opinion that Miss K can be expected to re-enter the workplace in between 6-12 months.

10. On 25 January 2016, Miss K emailed the Administering Authority (the East Riding Pension Fund (**the Fund**)) to access her deferred benefits on the grounds of IHER.
11. On 7 April 2016, Miss K was referred to Dr Hynes, an independent registered medical practitioner (**IRMP**). Dr Hynes reviewed the occupational health notes, including Professor Gillbody's report and Miss K's GP report.
12. On 12 April 2016, Dr Hynes said that he did not think it is possible to state on the information available that Miss K is permanently incapacitated from the normal duties of her former job. He said that improvement would be expected in her current condition, that the tribunal case had been concluded and that he agreed with Professor Gillbody's estimate that she is likely to be able to return to the working environment within 6-12 months. He certified that in his opinion Miss K is not permanently incapable of discharging efficiently the duties of her employment because of ill health or infirmity of mind or body.
13. On 12 April 2016, the Council wrote to Miss K confirming that she does not meet the criteria for IHER.
14. On 17 June 2016, Miss K appealed the decision made by the Council. Her appeal was dealt with by the Council under stage 1 of the internal dispute resolution procedure (**IDRP**).
15. On 1 September 2016, the Council issued its stage 1 IDRP response to Miss K. It reviewed the independent psychiatric report dated, 2 December 2015, by Professor Gillbody for the tribunal, Miss K's GP report from March 2016, a report from Dr Hynes on 12 April 2016, and additional information provided by Miss K. The adjudicator referred to the psychiatric report from Professor Gillbody who said that, he anticipates Miss K had a 50-70% chance of making substantial recovery over the next 12 months if she was offered treatment. The adjudicator noted that Dr Hynes had referred to the GP report, in particular that "the GP hopes and expects" that Miss K's condition will improve in the future and then at some point she will return to some form of work. Based on this, the Council did not uphold Miss K's appeal and it maintained that she does not meet requirement for IHER.
16. On 30 January 2017, Miss K appealed under stage 2 of the IDRP.
17. On 16 May 2017, the Fund issued its stage 2 IDRP response to Miss K. The decision maker held that the decision to not award Miss K IHER was reasonable given all the medical evidence, and he was satisfied that the relevant Scheme regulations had been applied correctly.

Adjudicator's Opinion

18. Miss K's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council. The Adjudicator's findings are summarised briefly below: -

- The Ombudsman's role is not to decide whether Miss K is eligible for IHER; that is a matter for the Council to decide after obtaining requisite certification from an IRMP.
 - The Ombudsman's role is to decide whether the Council has abided by the regulations, asked relevant questions, considered all relevant evidence and explained the reason(s) for its decision in a transparent way. The Ombudsman can require the Council to look at Miss K's case again should he find flaws in the decision making process. The medical evidence is reviewed in order to determine whether it is appropriate and supports the decision made. However, it is up to the Council to decide which evidence it wishes to attach any weight. The Council can prefer the advice of its own medical advisers unless there is a cogent reason why it should not.
 - Miss K says her GP's opinion seems to have been ignored. However, it is for the Council to attach weight (if any) to the relevant medical evidence. The Council made its final decision based on Dr Hynes' report, which made reference to her GP's report. As such, the Adjudicator was satisfied that the Council had considered all the relevant information.
 - Miss K says that Dr Hynes did not read the independent psychiatric report. However, the Adjudicator was of the opinion that there was no evidence of this and Dr Hynes took into account relevant evidence and referred to appropriate medical research. The Adjudicator appreciated that Miss K disagreed with Dr Hynes report, but this was not a sufficient reason for her to remit the matter back to the Council.
 - Miss K asserts that the Council delayed in responding to her complaint. A scheme's IDRPs must ensure that decisions are reached, and notified to applicants, within a "reasonable period". The Pensions Regulator's code of practice provides that the relevant decision-maker will be expected to determine disputes within four calendar months of receiving the application. The four-month period applies separately to each determination stage. The Adjudicator was satisfied that the time taken by the Council was reasonable as that it took it less than 3 months to consider Miss K's complaint to issue its IDRPs 1 response, and less than four months for it to issue its IDRPs 2 decision.
19. Miss K did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Miss K 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 Miss K for completeness.

Ombudsman's decision

20. Miss K has said that she was led to believe that she could access her ill health pension as an active member but was instead considered only as a deferred

member. However, to be considered for ill health retirement as an active member, Miss K would need to have been dismissed from her employment on the grounds of ill health or infirmity of mind or body under Regulation 35(1) Local Government Pension Scheme Regulations 2013. As Miss K's employment ceased on the grounds of dismissal the Council were correct in considering her application for ill health retirement as a deferred member.

21. Under Regulation 38 of the Local Government Pension Scheme Regulations 2013, Miss K is only entitled to payment of deferred benefits when an IRMP has certified that she has become permanently incapable of discharging efficiently the duties of the employment she was engaged in at the date she became a deferred member, and that she is unlikely to be capable of undertaking gainful employment before normal pension age, or for at least three years, whichever is earlier. This was confirmed to Miss K on 21 September 2016 whereby the Council's solicitor emailed her confirming her entitlement to early payment of her pension as a deferred member. As the IRMP certified that she does not meet the ill health criteria set out in Regulation 38, I agree with the Council that the legal position is that she is not entitled to the benefit.
22. Miss K questions how a decision can be made that she is fit for work when she has not worked since 28 August 2014, and is signed off sick by the Department for Work and Pensions until February 2018. However, as explained by the Adjudicator in the Opinion, my role is not to review the medical evidence and come to a decision of my own but to consider the decision making process. In this particular case, looking at the whole process from the time Miss K challenged the IHER award, to when the Council issued its IDRP stage 2 response, I find that it has considered all the relevant facts and followed the procedure correctly. As such there are no justifiable grounds for me to find that the Council's decision was perverse or that the process undertaken to reach its decision was flawed.
23. Therefore, I do not uphold Miss K's complaint.

Anthony Arter

Pensions Ombudsman
26 April 2018

Appendix

35 Early payment of retirement pension on ill-health grounds: active members

- (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, 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, 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 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
 - (b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment; but
 - (c) is likely to be able to undertake gainful employment before reaching normal pension age.
- (7) Subject to **regulation 37** (special provision in respect of members receiving Tier 3 benefits), if the member is likely to be capable of undertaking gainful employment within three years of leaving the employment, or before normal pension age if earlier, that member is entitled to Tier 3 benefits for so long as the member is not in gainful employment, up to a maximum of three years from the date the member left the employment.