

## Ombudsman's Determination

Applicant	Ms S
Scheme	Local Government Pension Scheme ( <b>LGPS</b> )
Respondents	Emerson Park Academy ( <b>the School</b> )

## Outcome

1. Ms S's complaint is upheld and to put matters right the School shall consider Ms S's ill health retirement pension (**IHRP**) application again.
2. The School shall also pay Ms S £500 in recognition of the distress and inconvenience caused by not following the procedure properly.
3. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

4. Ms S's complaint against the School is that it refused her Tier 1 benefits.

## Background information, including submissions from the parties

5. Ms S's IHRP is regulated by Regulation 35 and Regulation 36 of the LGPS Regulations, which are set out in the Appendix.
6. Ms S worked as a Cover Supervisor for the School since 2008. She has been on sickness absence since September 2015 due to fibromyalgia and an accident at work. She was subsequently referred to Occupational Health (**OH**) for assessment.
7. On 15 March 2016, Dr Kapoor of OH, issued a medical report that said:

“...in my opinion Ms S suffers from conditions that are not likely to respond to treatment and she is likely to have impairment of her functional ability for the foreseeable future. She is not likely to be fit enough to work as a Cover Supervisor or in any other substantive position. In my opinion, she is likely to fulfil the criteria for ill-health retirement. However, before an informed opinion is given, I would like to have a detailed opinion regarding her medical condition from her GP. Once these details have been received and we hear

from you with regard to the Local Government Pension Scheme, the ill-health retirement process could be initiated.”

8. Ms S was then referred to an independent registered medical practitioner (**IRMP**), Dr Coles, who issued a report in April 2016, that said:

“Further pain management treatment would often, in my experience, help individuals in this situation to return to at least some form of sedentary work and it would appear that further weight loss is likely to be helpful as well. There are therefore some treatment options which over a reasonable period of time could help Ms S return to some form of employment, although I would accept that work in a school environment as a Teacher is probably not likely to be possible on the balance of probability. This leads me to the conclusion that whilst she is probably permanently unfit to return to her current substantive role. I do not think it would be reasonable to conclude that she is permanently unfit for any form of meaningful work at any time in the future between now a [sic] normal retirement age. “

9. On 4 May 2016, the School sent Ms S a letter that said:

“Further to your application for ill-health retirement, I am writing to confirm that the Occupational Health Physician has confirmed that you cannot continue your duties because of your ill-health. The issue of alternative role was identified. It is therefore agreed that the best course of action is for you to be retired on health grounds. To enact this process, I am required to tell you that I have received a report from Occupational Health’s Independent Medical Practitioner, together with a Certificate of Incapacity indicating you meet the criteria for Ill Health Retirement at Tier 3...”

10. Ms S appealed against Dr Cole’s decision by invoking the two-stage internal dispute resolution procedure (**IDRP**). Ms S believed that her complete medical history was not considered by the IRMP.

11. On 27 May 2016, the School sent a letter to Ms S informing her that the additional medical evidence will be considered by Dr Coles, who made the original decision. It also advised Ms S that if the decision remains the same, it will seek another opinion from a new IRMP.

12. On 25 August 2016, a new IRMP, Dr Giridhar, was appointed. He upheld the previous decision and added that:

“Gainful employment could be in a less physically/psychologically demanding area (other than the school environment). In my opinion she should be able to undertake a sedentary/semi-sedentary role within the next 3 years.”

13. On 5 December 2016, Peter Riedel of Hymans Robertson LLP (acting on behalf of the School), sent a response, under stage one of the IDRP, to Ms S that said:

“Consequently, although there is not a completed declaration on file, the letter sent to you by your employer provides written evidence that they had considered and seen the medical opinion before making a decision. While the lack of formal declaration on the medical certificate is absent this does not fundamentally alter this decision and the process taken to arrive at a conclusion.”

14. In August 2017, Ms S brought the complaint to this Office.
15. On 12 October 2017, the School sent this Office a formal response that said:

“...the decision as to whether or not a Scheme Member is eligible for ill-health retirement is not made by the employer but by an Independent Registered Medical Practitioner (IRMP) further to receipt of medical records and assessment of the member....Therefore in response to the complaint, Emerson Park Academy did not make the decision as to whether or not Ms S was eligible for ill health retirement, nor did it determine the Tier. This decision was made by an Independent Registered Medical Practitioner in accordance with the LGPS Regulations above.”

### **Adjudicator’s Opinion**

16. Ms S’s complaint was considered by one of our Adjudicators who concluded that further action was required by the School. The Adjudicator’s findings are summarised briefly below:-
  - Essentially Regulation 36 states that the decision “shall be made by the member's Scheme employer after that authority has obtained a certificate from an IRMP”. In order to properly consider Ms S’s eligibility for ill health pension, the School must ask itself the right questions and consider all relevant factors in reaching its decision (ignoring any irrelevant ones). It is clear that the School had not reached the decision itself to award Ms S Tier 3 benefits. The decision was made by the IRMP and the School just relied on it without properly considering Ms S’s medical evidence and her circumstances. So, the School did not follow the Scheme Regulations correctly.
  - In the Adjudicator’s view, the complaint should be upheld as the School’s decision was perverse as it had not followed the Scheme Regulations. The School should have made its own independent decision and provide the reasons for its decision to Ms S. The Adjudicator believed that the case should be remitted back to the School for another review.
  - The Adjudicator was of the view that this had undoubtedly caused Ms S significant distress and inconvenience, therefore, the School should award her £500 in recognition of this. The Adjudicator considered it to be in line with the Pensions Ombudsman’s approach in similar cases.

17. The School did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The School 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 the School for completeness.
18. The School made an assertion that the Adjudicator's Opinion upheld Ms S's complaint on a different issue to the one that Ms S had raised. It believes that the reason why Ms S' complained is that she believes that the School deliberately downgraded Ms S's pension entitlement to a Tier 3.
19. The School contends that even if it failed to reach a decision under Regulation 36, there is no basis for requiring it to obtain a fresh certificate from a new IRMP, as there was nothing wrong with the original certificate issued by Dr Coles. The School says that it is not required to provide reasoning behind its decision because the Regulations do not require the decision maker to do so.
20. The School says that any redress determined by the Pensions Ombudsman is discretionary and it is entirely unrealistic to think that a fresh decision would result in a different outcome for Ms S. The School also suggested that when exercising his discretion, the Ombudsman should not require time and money to be wasted on such a futile exercise.

### **Ombudsman's decision**

21. The School made an assertion that the Adjudicator's Opinion upholding the complaint was on a different point to the one that Ms S had raised. However, Ms S's application to this Office which was subsequently accepted for investigation is as set out in the Opinion.
22. I do not find that the School's decision making process was satisfactory. The School failed to reach its own decision on what tier of IHRP Ms S was to be awarded. It simply relied on the opinion of the IRMP. Under the Regulations, the employing authority i.e. the School is required to take advice on capability from an IRMP but it, not the IRMP, must determine, which tier should be paid to Ms S. The School must comply with certain principles such as it must ask itself the right questions and consider all relevant factors in reaching its decision, ignoring any irrelevant ones. I therefore consider that the School failed to follow Regulation 36, as it was required to do. The exercise of the discretion on whether to award an ill health pension and if so which tier, is not for the IRMP to decide. The IRMP provides a medical opinion and issues a certificate which is taken into account by the employer, together with any other evidence which may be relevant.
23. The School believes that any remedies determined by the Pensions Ombudsman are discretionary. However, if I find that the employing authority has failed to abide by the Regulations, as I find in this case, I can make directions that are legally binding on all parties. I believe the Adjudicator's recommendation to nominate a new IRMP, who

has had no prior dealings with the matter, is a reasonable course of action which I usually direct in similar cases.

24. Therefore, I uphold Ms S's complaint and Ms S' IHRP application is remitted back to the School to consider afresh.

### **Directions**

25. Within 21 days from the date of this Opinion, the School will nominate a new IRMP, who has had no previous involvement with the matter, from whom a certificate is to be obtained under Regulation 35 and Regulation 36 of the LGPS Regulations.
26. Within 21 days of nominating a new IRMP, the School will consider Ms S's relevant medical evidence and ask the IRMP to consider whether she meets the criteria as stated within the Regulations and provide his or her report.
27. Within 21 days of receiving medical report, the School will then inform Ms S of its decision in writing and explain the reasons for its decision.
28. The School will pay an award of £500 to Ms S in recognition of the significant distress and inconvenience she has suffered as a result of the School failing to consider her IHRP application correctly in accordance with the Regulations.

**Anthony Arter**

Pensions Ombudsman  
5 January 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, 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

(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.

### **36 Role of the IRMP**

(1) A decision as to whether a member is entitled under regulation 35 (early payment of retirement pension on ill-health grounds: active members) to early payment of retirement pension on grounds of ill-health or infirmity of mind or 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; and
- (c) where a member has been working reduced contractual hours and had reduced pay as a consequence of the reduction in contractual hours, whether that member was in part time service wholly or partly as a result of the condition that caused or contributed to the member's ill-health retirement.

(2) An IRMP from whom a certificate 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.

(2A) For the purposes of paragraph (2) an IRMP is not to be treated as having advised, given an opinion on or otherwise been involved in a particular case merely because another practitioner from the same occupational health provider has advised, given an opinion on or otherwise been involved in that case.

(3) If the Scheme employer is not the member's appropriate administering authority, it must first obtain that authority's approval to its choice of IRMP.

(4) The Scheme employer and IRMP must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation and regulations 37 (special provision in respect of members receiving Tier 3 benefits) and 38 (early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members).