

Ombudsman's Determination

Applicant	Mrs T
Scheme	Local Government Pension Scheme (LGPS)
Respondents	Surrey County Council (SCC)

Outcome

1. Mrs T's complaint against Surrey County Council is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) Surrey County Council should pay Mrs T £500 for distress and inconvenience.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs T has complained that her eligibility for ill health retirement benefits has not been properly assessed.

Background information, including submissions from the parties

Background

4. Mrs T was employed full-time (36 hours per week) by SCC until November 2016. She went on long term sickness absence in April 2016.
5. Mrs T was considered for ill health retirement in August 2016. The relevant regulations are the Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended). As at the date Mrs T's employment ceased, regulation 35 provided:
 - “(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.”
6. “Gainful employment” is defined as “paid employment for not less than 30 hours in each week for a period of not less than 12 months”. “Normal pension age” is defined in Schedule 4 to the Pensions Act 1995. Mrs T’s normal pension age is 67.
 7. Regulation 36 required SCC to decide whether Mrs T was entitled to benefits under regulation 35 and, if so, which tier. Before it made its decision, regulation 36 required SCC to obtain a certified opinion from an independent registered medical practitioner (**IRMP**).
 8. Mrs T’s case was referred to SCC’s occupational health adviser, Team Prevent UK. It was reviewed by Dr Ratti, who requested additional evidence from Mrs T’s GP. In particular, he said he required additional evidence relating to Mrs T’s kidney condition. Dr Ratti provided a report on 9 November 2016. Dr Ratti said he had seen a report from Mrs T’s GP, Dr James, including clinic correspondence. He said he had

seen correspondence from a musculoskeletal and sports physician, Dr Tanner. Summaries of the medical evidence relating to Mrs T's case are provided in an appendix. Dr Ratti provided a certificate supporting a Tier 3 award.

9. On 29 January 2017, Mrs T submitted an appeal under the two-stage internal dispute resolution (**IDR**) procedure. In support of her appeal, Mrs T referred to the reports provided by Drs James and Tanner. She submitted it was impossible to conclude from these that she would experience any functional improvement before normal retirement age. Mrs T said Dr Ratti's report implied that she had been coping with the demands of full-time work. She disagreed and referred to a summary of health concerns relating to an occupational health assessment in March 2015. Mrs T also pointed out that she had been notified of a stage two capability hearing which, although postponed, indicated that her managers considered it unlikely that she would be able to provide reliable service again. Mrs T drew particular attention to a report from her consultant nephrologist, Dr Gallagher, dated 29 July 2015 and his reference to significant albuminuria. Mrs T said this indicated that her functioning kidney was at risk of failure, which was a direct result of high blood pressure caused by the demands of her work.
10. SCC has confirmed it received Mrs T's appeal on 3 February 2017. Having not had a response, Mrs T chased up her appeal on 25 March 2017. SCC responded on 29 March 2017. It apologised for the delay but gave no reasons for it. SCC said Mrs T should receive a response within the next six weeks. SCC's nominated adjudicator issued an interim response, on 19 May 2017, stating the expected date for response would be in one month.
11. The IDR adjudicator issued a stage one response on 14 June 2017. His response is summarised below: -
 - The role of the adjudicator was to check that the LGPS regulations had been applied correctly and to review the original decision.
 - Dr Ratti held the relevant qualifications for an IRMP and had not previously been involved in Mrs T's case. He was, therefore, a suitable appointment.
 - SCC was required to have regard to guidance issued by the Secretary of State. This guidance required it to weigh up all of the available evidence, including the IRMP's opinion, and come to a decision. It should explain its decision clearly to the applicant.
 - He did not consider that SCC had fully complied with these requirements; inasmuch as there was no evidence to show it had considered all relevant factors in reaching a decision or that the decision had been clearly documented and explained to Mrs T.
 - SCC should provide Mrs T with a decision as to her eligibility for ill health retirement and set out the reasons for that decision.

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12. SCC asked Dr Ratti for further advice. He provided a response, on 16 August 2017, confirming his opinion that a Tier 3 award was appropriate.
13. SCC wrote to Mrs T, on 29 August 2017, setting out its decision. SCC provided a list of quotes from the medical reports it had considered. It said it was felt that a Tier 3 award was appropriate because Mrs T's medical situation did not amount to a permanent disablement and there was an expectation of improvement which would allow her to obtain gainful employment within three years.
14. Mrs T submitted a further appeal. She said she did not see how it could be inferred from Dr Tanner's and Dr James' reports that her conditions were going to improve in the next two and a half years. She said she had undergone stability work and pain relief for her back in the previous month. Mrs T said it seemed to her that SCC had blindly accepted the IRMP's opinion and there had been no proper consideration of her appeal. She also said that at no time had she accepted a Tier 3 award.
15. SCC issued a stage two IDR decision on 23 November 2017. Its decision is summarised below: -
 - Dr James' letter had been available to Dr Ratti. Dr James had commented that the main reason Mrs T had been signed off work in the previous two years related to stress at work and the effect on her blood pressure. Dr Ratti had referred to this in his November 2016 report.
 - Dr Tanner had acknowledged that Mrs T's musculoskeletal problems were unlikely to improve in the short to medium term but did not appear to regard these as preventing her from working. He had said acute episodes could be managed medically and, once settled, did not require ongoing medical management; rather, they required management by Mrs T, her employer, and the occupational health and other support services. Dr Tanner thought, from the description given to him, that Mrs T could sustain her current job activities. Dr Ratti had referenced Dr Tanner's opinion in his report.
 - The LGPS regulations and guidance indicated that SCC could place significant weight on the IRMP's opinion. In Mrs T's case, the IRMP had been asked to review his opinion and had confirmed he had read the correspondence from her doctors. There was nothing in this correspondence which was inconsistent with Dr Ratti's opinion.
 - The letter sent to Mrs T on 29 August 2017 demonstrated it had weighed up all of the evidence.
 - The level of benefits awarded did not require agreement to be reached between the employer and member.
 - The Tier 3 award was confirmed.

Mrs T's position

16. Mrs T's submission is summarised below: -

- It was impossible to infer from the medical reports supplied that she would ever again be capable of full-time work.
- She encountered unreasonable delays in dealing with her appeal under the IDR procedure.
- The Tier 3 award causes her significant financial hardship and the continuing uncertainty is profoundly stressful. Stress is potentially very dangerous to her health because high blood pressure is inimical to kidney function.
- She questions the independence of the IDR adjudicator and disagrees that he had no previous knowledge of her case.

SCC's position

17. SCC's submission is summarised below: -

- It understands Mrs T believes she should be awarded Tier 1 benefits.
- It is of the view that it has fully complied with the requirements of the relevant regulations and has taken a reasonable decision.
- It was entirely appropriate for it to appoint its Head of Human Resources and Organisational Development as the stage one IDR adjudicator. He had no previous knowledge of the case.
- It accepts it was at fault in the clarity of its initial handling of Mrs T's case and the speed at which it remedied the situation. It should have been clearer in its initial decision-making and it was slow in progressing stage one of the IDR procedure. Mrs T was kept informed of progress. It apologises to Mrs T for any distress or inconvenience resulting from the prolonged period of uncertainty.
- It does not accept that Mrs T has suffered any financial loss as a result of its decisions or actions. She has been in receipt of the applicable level of ill health retirement benefits.

Adjudicator's Opinion

18. Mrs T's complaint was considered by one of our Adjudicators who concluded that further action was required by Surrey County Council. The Adjudicator's findings are summarised briefly below: -

- It was not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to Mrs T's eligibility for payment of benefits under regulation 35. The Ombudsman was primarily concerned with the

decision-making process. The issues considered included: whether the relevant rules had been correctly applied; whether appropriate evidence had been obtained and considered; and whether the decision was supported by the available relevant evidence. Medical (and other) evidence was reviewed in order to determine whether it supported the decision made. However, the weight which was attached to any of the evidence was for SCC to decide (including giving some of it little or no weight)¹. It was open to SCC to prefer evidence from its own advisers; unless there was a cogent reason why it should not, or should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant rules by the medical adviser. If the decision-making process was found to be flawed, the appropriate course of action was for the decision to be remitted for SCC to reconsider.

- In order for Mrs T to be awarded any ill health retirement benefits under regulation 35, she had to be: -
 - permanently incapable of discharging efficiently the duties of her employment with SCC, and
 - not immediately capable of undertaking any gainful employment.
- Mrs T disagreed with SCC's decision to award Tier 3 benefits. The Tier 3 award did mean that SCC had accepted that Mrs T was permanently incapable of discharging the duties of her former role. It had also accepted that she was not, at the date her employment terminated, immediately capable of undertaking any gainful employment. The disagreement lay in the degree to which Mrs T was likely to be capable of undertaking gainful employment before age 67.
- The Adjudicator noted that Mrs T had argued that it was impossible to infer from the medical evidence that she would ever again be capable of full-time employment. However, regulation 35 did not refer to full-time employment. Gainful employment was defined as any paid employment for not less than 30 hours per week for a period of not less than 12 months. It was against this definition that SCC had to assess Mrs T's eligibility for benefits under regulation 35.
- Dr Ratti had advised that the evidence did not suggest that Mrs T's health issues were permanently disabling. He had defined this as preventing her from obtaining gainful employment of 30 hours per week and lasting until normal retirement age. Whilst Dr Ratti did not stick strictly to the wording of regulation 35, in the Adjudicator's view, this was not evidence of any misunderstanding of the regulation's requirements on his part. He had accepted that it was unlikely

¹*Sampson v Hodgson* [2008] All ER (D) 395 (Apr)

that Mrs T would be able to work for the following 6-12 months and, for this reason, recommended a Tier 3 award. In other words, he considered Mrs T not immediately capable of undertaking any gainful employment.

- SCC had accepted this recommendation. The Adjudicator agreed with the IDR stage one adjudicator that there was little or no evidence that SCC had considered all the available evidence before coming to a decision in the first instance. However, this approach was, at least to some extent, rectified during the IDR procedure when SCC did review other medical evidence available to it. The Adjudicator noted that its references to other medical evidence, in its letter of 29 August 2017, did not include the reports from Mrs T's GP, Dr Tanner or Dr Gallagher. Given that Mrs T had specifically referred to these reports in her appeal submission, it would have been helpful if SCC had explained why it was not attaching much weight to this evidence.
- In the Adjudicator's view, that omission was addressed at stage two of the IDR procedure. SCC then specifically referred to the reports provided by Dr James and Dr Tanner. It also said there was nothing in the correspondence between Mrs T's doctors which was inconsistent with Dr Ratti's opinion.
- Having reviewed the reports, the Adjudicator agreed that Dr Ratti's opinion could not be said to be inconsistent with the evidence from Mrs T's own doctors. Dr Gallagher did have concerns about Mrs T's blood pressure and noted that she was under a lot of stress at work. Dr Tanner said Mrs T remained relatively disabled by her back pain and required adaptations in order to work. He thought her back condition was unlikely to improve in the short to medium term but that it was likely to improve in 5-10 years' time. Dr James said Mrs T's kidney condition was not going to improve and would continue to require tight control of her blood pressure. He said he hoped not to see deterioration in the short to medium term but would expect further deterioration in 20-30 years. This evidence was not wholly inconsistent with a Tier 3 award.
- For a Tier 2 award, Mrs T would have to have been unlikely to be capable of undertaking any gainful employment within three years of leaving the employment but likely to be able to do so before reaching age 67. For a Tier 1 award, she would have to have been unlikely to be capable of undertaking any gainful employment at any time before age 67. The expectation, at the time Mrs T's employment ceased, appears to have been that a reduction in the level of stress she was experiencing would help to control her blood pressure. This expectation was not inconsistent with a Tier 3 award; given that gainful employment could be less stressful part-time (30 hours per week) employment.
- In the Adjudicator's view, there were no grounds for remitting the decision for SCC to reconsider.

- Mrs T had also complained about the way in which her appeal was handled. SCC had acknowledged that it was slow in progressing stage one of the IDR procedure. Regulation 75 required SCC's adjudicator to give written notice of a decision "before the expiry of two months beginning with the date on which the application was received". If such notice is not going to be provided within that timescale, an interim response must be given.
- SCC received Mrs T's appeal on 3 February 2017. The IDR adjudicator, therefore, had until 2 April 2017 to issue written notice of his decision. Mrs T's appeal was acknowledged on 29 March 2017. The Adjudicator accepted that this was, just, within the required two months. However, this acknowledgment was only issued after Mrs T had chased for a response and it gave no reasons for the delay. In the Adjudicator's view, this did amount to maladministration on SCC's part. It would have caused Mrs T unnecessary distress and inconvenience at an already difficult time for her. This part of her complaint could be upheld on that basis.
- The Adjudicator noted Mrs T's concerns about the adjudicator's independence. The LGPS regulations did not specify who should be appointed as adjudicator nor that the individual has to independent of the employer. The Adjudicator could see no reason why SCC should not have appointed its Head of Human Resources. She thought Mrs T may have misunderstood the reference to prior involvement in her case. She took SCC to mean involvement prior to stage one of the IDR procedure.
- In order to put matters right, the Adjudicator suggested that SCC should pay Mrs T £500 for the distress and inconvenience resulting from its failure to deal with her appeal in a timely manner.

19. SCC did not respond to the Adjudicator's Opinion and her complaint was passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only comment briefly and make directions accordingly.

Ombudsman's decision

20. SCC can only pay Mrs T benefits in accordance with the LGPS regulations. Regulation 35 is quite specific as to the criteria which must be met for the different tiers of benefit to be paid. SCC was required to seek a certified opinion from an IRMP and was entitled to rely on that opinion, unless there was good reason not to. A difference of opinion, even between medical practitioners, is not usually sufficient for me to find that a decision should be reviewed. In Mrs T's case, I accept that she was not entirely in agreement with the view expressed by the IRMP. However, the kind of issues which would warrant a review do not arise in her case.
21. I do, however, find that SCC's approach to Mrs T's appeal was not helpful and will have added, unnecessarily, to her distress and inconvenience to a significant degree.

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22. Therefore, I uphold Mrs T's complaint to this extent.

Directions

23. Within 21 days of the date of receipt of this determination, SCC shall pay Mrs T £500 for non-financial injustice arising out of the way in which it dealt with her appeal.

Anthony Arter

Pensions Ombudsman
29 June 2018