

## Ombudsman's Determination

Applicant: Mrs N  
Scheme: Local Government Pension Scheme  
Respondent: London Borough of Bromley (**Bromley**)

### Complaint Summary

Mrs N has complained that Bromley has declined to backdate her ill health retirement benefits to the date her employment ceased.

### Summary of the Ombudsman's Determination and reasons

The complaint is upheld against Bromley because it has failed to comply with the terms of the agreement it entered into with Mrs N in relation to an appeal against non-payment of a pension under Regulation 35.

## Detailed Determination

### Material facts

1. Mrs N was employed by Bromley until 15 May 2015. Her employment was terminated on the grounds of capability. Mrs N submitted a claim to the Employment Tribunal (ET) on the grounds of unfair dismissal and disability discrimination. Mrs N's claim was settled under the terms of a COT3 Agreement dated 29 August 2016 (the **Agreement**). The Agreement stated that:

“The Respondent will extend the Claimant’s period for appealing against the decision not to award her ill-health retirement until the 5<sup>th</sup> September 2016. The Respondent offers no guarantees to the Claimant regarding the outcome of her appeal but agrees the statement in Annexe 1 should be submitted by the Claimant in respect of her appeal as the agreed position of both parties on the appeal.”

2. The agreed statement was that:

“[Mrs N] was first employed by LBB on 10<sup>th</sup> January 1997 until she resigned with effect from the 31<sup>st</sup> October 2003. She then returned ... on 13<sup>th</sup> January 2004 and continued in employment until 15<sup>th</sup> May 2015 ...

[Mrs N] has a chronic problem with lower back pain that has been treated at ... By email dated 19<sup>th</sup> February 2015 LBB's Occupational Health Unit advised that Dr Mason could not give an opinion on ill health retirement as [Mrs N] had not progressed through the full range of treatment options. A further appointment was made for Occupational Health on 18<sup>th</sup> May 2015 but employment was terminated on the grounds of capability (due to ill-health and poor attendance) on the 15<sup>th</sup> May 2015.

LBB have agreed to extend the time limit for [Mrs N] to appeal against the de facto decision not to consider [Mrs N] for ill-health retirement at the point of dismissal. LBB have agreed to extend the appeal period until the 5<sup>th</sup> September 2016. LBB cannot offer any guarantees regarding the outcome of the appeal.

Subsequently evidence was available by way of a letter dated the 30<sup>th</sup> June 2015 to the GP for [Mrs N] from Mr Yaw Antwi Yeboah on behalf of the neurosurgery department indicating that surgery was not an option and it was a matter of pain management.”

3. The relevant regulations are The Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended) (the **2013 Regulations**). Extracts from the 2013 Regulations are provided in Appendix 1.
4. As required by the 2013 Regulations, Bromley referred Mrs N's case to an independent registered medical practitioner (**IRMP**), Dr Parekh. In its email, dated 11 January 2017, to its occupational health provider, Bromley said it had completed the

details on the form for a current employee. It said Dr Parekh should complete this form if he felt that Mrs N was eligible for ill health retirement at the point when she left Bromley on 15 May 2015. Bromley went on to say that, if Dr Parekh considered that Mrs N became eligible for ill health retirement at a later date, he should complete the other form and state the date on which she became eligible.

5. Dr Parekh provided a report, on 12 January 2017, expressing the opinion that Mrs N was unlikely to be able to return to her former role or undertake any gainful employment for the foreseeable future. He signed the form for a “Deferred Beneficiary” and said he had taken the date of a GP’s report as receipt of the medical evidence indicating that Mrs N remained unfit for work and should qualify for an ill health retirement pension. The report was emailed to Bromley, on 12 January 2017, by the occupational health provider. In the email, the occupational health provider’s administrator said:

“Please note that, as stated in the report, Dr Parekh considers the 11<sup>th</sup> of November 2016 to be the date of confirmation for the Ill Health Retirement.”

6. A summary of Dr Parekh’s report is provided in Appendix 2.
7. Bromley wrote to Mrs N, on 16 February 2017, confirming that it had considered her appeal under the Internal Dispute Resolution Procedure (**IDRP**). It said her appeal related to its decision regarding her eligibility for ill health retirement when her employment ended on 15 May 2015. Bromley informed Mrs N that it had decided, on the basis of advice from the IRMP, that her deferred benefits should be paid with effect from 11 November 2016. It said it agreed with the IRMP’s opinion that Mrs N was permanently incapable of discharging efficiently the duties of her former employment from that date. It also agreed that Mrs N was permanently incapable of engaging in any regular employment from that date.
8. Bromley also emailed its decision to Mrs N’s solicitor. He responded, on 20 February 2017, saying that, since Mrs N’s appeal was against a deemed refusal of ill health retirement in May 2015, her pension award should be from the date of termination of her employment. Bromley responded the same day by referring to its decision letter and saying this set out Mrs N’s further right of appeal under the IDRP. Mr N’s solicitor responded:

“Clearly we can go that route but the start date is the only issue and as that seems to be an obvious oversight I assumed you could deal with that without any further appeals.”

9. On 27 February 2017, Bromley responded:

“For the avoidance of doubt I can confirm that a decision to award the ill health retirement benefits for [Mrs N] from 11 November 2016 was not an oversight. [Bromley’s decision-maker] made his decision based on the recommendation from the independent Occupational Health Physician whose view was that

[Mrs N] became eligible for the aforementioned pension benefits from 11 November 2016.”

10. On 7 March 2017, Mrs N’s solicitor requested sight of Dr Parekh’s report. Bromley sent this to him on 14 March 2017. On 24 March 2017, Mrs N’s solicitor emailed Bromley again. He queried why the decision that Mrs N was entitled to early retirement had not been relayed to the Teachers’ Pension Scheme (**TPS**). The solicitor said, if the occupational health provider had undertaken a review in 2015, it would have seen the evidence from Mr Antwi-Yeboah. He said, if further medical evidence had been needed, it would have been available in 2015. The solicitor suggested that a decision would have been reached by the end of November 2015 and Mrs N would have been in receipt of a pension from then. In its response, Bromley said, as a deferred member of TPS, Mrs N needed to apply directly to that scheme for early payment of her deferred benefits.
11. Prior to joining the LGPS, Mrs B was a member of the TPS. In 2017, she applied for ill health retirement in respect of her benefits in the TPS. Her application was accepted, in June 2017, and her TPS benefits were paid with effect from 11 May 2016.

### **Summary of Mrs N’s position**

12. Mrs N submits:-

- The Agreement provided for Bromley to give her the opportunity to appeal the decision not to award ill health retirement. Although the document only refers to the award of ill health retirement, her appeal was clearly against the decision to dismiss her on the grounds of capability due to ill health.
- Her solicitor was advised by Bromley that, if she called a halt to the ET proceedings, it would consider ill health retirement as an alternative final decision. She would not have suspended the ET case otherwise because she had been advised that she had a strong case.
- The IDRPs were looking at whether ill health retirement should have been offered at the point of dismissal on 15 May 2015. Bromley did alter its decision and agreed to offer her retirement on the grounds of ill health. She is at a loss to understand why the decision was to offer ill health retirement from 11 November 2016.
- On receipt of Bromley’s decision, her solicitor raised the matters she was unhappy with. Bromley knew that she wished to appeal its February 2017 decision.

### **Summary of Bromley’s position**

13. Bromley submits:-

- It does not agree that the ET proceedings were suspended on the basis that it would re-visit its original decision. Mrs N’s ET claim was withdrawn in its entirety. As part of the Agreement, it agreed to pay Mrs N a financial settlement (without

admission of liability) and to extend the period for appealing the decision not to award her ill health retirement.

- In line with Regulation 35 (*sic*), an IRMP was appointed to consider whether Mrs N satisfied the criteria for entitlement to early release of her pension benefits on the grounds of ill health and the date on which the benefits might become payable from.
- The IRMP advised that Mrs N met the criteria for the early release of her benefits with effect from 11 November 2016. It does not accept that it ignored the fact that Mrs N's date of dismissal was May 2015. The report from the IRMP advised that Mrs N met the criteria for ill health retirement, but not backdated to the date she was dismissed. It agreed with the IRMP's opinion and notified Mrs N that her deferred benefits would be payable from 11 November 2016.
- It does not agree that its original decision to dismiss Mrs N on the grounds of capability has been overturned. She was awarded deferred ill health retirement benefits from 11 November 2016. This does not impact on the reasons for dismissal in May 2015.
- Dr Parekh was asked to consider whether Mrs N met the criteria for ill health retirement under Regulation 35 or Regulation 38. Forms for both options were sent to him and he was asked to complete the appropriate one. It is satisfied that, if it had asked Dr Parekh to complete both forms, he would have declared that Mrs N did not meet the Regulation 35 criteria at the point of dismissal.
- Its decision-makers are not medical professionals and have to carefully consider the professional occupational health advice which they receive. The decision-maker was satisfied that Dr Parekh's conclusion, in his report of 12 January 2017, had been reached on the basis of all the medical evidence which had been provided by both parties. This included medical evidence submitted both before and after Mrs N's dismissal.
- Dr Parekh referred to an email from Dr Cooper, a report from Mr Sharr and a report by Mr Antwi-Yeboah. Its decision-maker concluded that Dr Parekh had found no medical evidence to reach a decision to backdate ill health retirement to when Mrs N left its employment in May 2015, under Regulation 35. He noted that Dr Parekh had made his decision with due regard to medical reports which were provided just before and just after Mrs N left its employment.
- In an email dated 5 May 2015, Dr Cooper, an occupational health physician, said: "Thank you for your email about [Mrs N]. From the information I can see in the notes [Mrs N] has still not been through the full treatment options and therefore Dr

Mason's opinion<sup>1</sup> would still be valid in that she would not be eligible for ill-health retirement yet."

- In reaching its decision, it had regard for advice from the LGPS Employers' Guidance. This advises that, where an employee meets the criteria for payment of their benefits under Regulation 38, the pension is payable from the date on which the former employer agrees to the request.
- Mrs N did not appeal under Stage Two of the IDRPs within the six months deadline. This is despite the fact that it reminded her solicitor of the right of appeal in February 2017. It is clear, from the exchange of emails in February 2017, that Mrs N's solicitor was aware of the need to appeal within a timeframe if she wished to challenge its decision.

## Conclusions

14. Bromley has queried whether I have the jurisdiction to consider Mrs N's complaint in light of the fact that she did not appeal its decision within the six months provided for under the LGPS Regulations. I am satisfied that I do have jurisdiction to consider Mrs N's complaint and, accordingly, I have proceeded with an investigation. I have set out my reasoning for this in a separate letter.

### The merits of Mrs N's complaint

15. Having determined that I have jurisdiction to consider Mrs N's complaint, I now consider the merits of the complaint.
16. Under the Agreement, Bromley agreed "to extend the time limit for [Mrs N] to appeal against the de facto decision not to consider [Mrs N] for ill-health retirement at the point of dismissal". It agreed to extend the appeal period to 5 September 2016.
17. The reference to "the de facto decision not to consider [Mrs N] for ill-health retirement at the point of dismissal" can really only mean a decision not to pay her a pension under Regulation 35. No other decision had been made at that time and, therefore, there was no other decision which Mrs N might have wished to appeal. Mrs N had not asked to receive payment of a retirement pension under Regulation 38, so Bromley could not have made any decision relating to entitlement under Regulation 38.
18. Mrs N had already satisfied the conditions set out in paragraph (1) of Regulation 35; that is, she had the requisite years of service and her employment had been terminated on the grounds of ill health. The decision which Mrs N wished to appeal was the de facto decision that she did not satisfy the conditions set out in paragraphs (3) and (4); the **First Condition** and the **Second Condition**. The First Condition was that Mrs N was permanently incapable of discharging efficiently the duties of the

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<sup>1</sup> The opinion referred to was sent to Bromley via an email dated 19 February 2015 which said: "Dr Mason has asked me to respond on his behalf. The answer is no at the moment as she has not progressed through full range of treatment options."

employment she had been engaged in. The Second Condition was that she was not immediately capable of undertaking any gainful employment.

19. In order to make a decision as to whether Mrs N satisfied the First and Second Conditions, Bromley was required to obtain a certificate from an IRMP. Under Regulation 36, the IRMP should have been asked:
  - whether, in May 2015, Mrs N satisfied the conditions in Regulation 35(3) and (4); and
  - if so, how long she was unlikely to be capable of undertaking gainful employment.
20. It is not clear from Dr Parekh's report that he had understood what he was being asked to consider. Bromley has said that he was sent forms which applied to both Regulation 35 and Regulation 38. In its email, which was not addressed to Dr Parekh, it asked that he should complete one form if he felt that Mrs N was eligible for ill health retirement at the point when she left Bromley on 15 May 2015; and the other form if he considered that she became eligible for ill health retirement at a later date. Dr Parekh was asked to specify the date on which Mrs N became eligible for payment of a pension.
21. Dr Parekh advised Bromley that, based on the available evidence, Mrs N was unlikely to be able to return either to her usual role or to any gainful employment "at this stage" or in the foreseeable future. He then said that he had taken the date of a report from Mrs N's GP dated 11 November 2016 as:

"... receipt of the medical evidence indicating that, despite the prolonged treatment that has been implemented, she remains unfit to return to work in the foreseeable future, and hence should qualify for Ill Health Retirement Pension."
22. Dr Parekh did not, at any point in his report, address the question of whether Mrs N had satisfied the First and Second Conditions at the date her employment terminated. Bromley has said it based its decision upon the assumption that, if he had considered Mrs N satisfied the First and Second Conditions in May 2015, he would have completed the appropriate form. I do not find that this amounts to a proper consideration of Mrs N's eligibility for a pension under Regulation 35.
23. There is nothing in Dr Parekh's report to show that he gave any consideration to Mrs N's position in May 2015. If his view was that she did not satisfy the First and Second Conditions on 15 May 2015, he should have been asked to give his reasons for this. For example, he should have been asked to explain what had changed between 15 May 2015 and 11 November 2016. In any event, it was not appropriate for Bromley to proceed on an assumption that this was Dr Parekh's view when it could not be sure that he was even aware that he was required to consider the position with regard to Regulation 35. Bromley is relying on it having provided two forms to the occupational health company, rather than any direct communication with Dr Parekh.

24. Bromley has also referred me to an email from a Dr Cooper, which itself referred to an opinion from a Dr Mason. I do not find that this supports Bromley's position. Dr Mason's comment that Mrs N had not progressed through the full range of treatment options indicates a misunderstanding of what is required under Regulation 35. Regulation 35 does not require a claimant to have progressed through all treatment options in order to qualify for a pension. Rather, a view must be taken as to the likelihood that the claimant is permanently incapable of discharging efficiently the duties of the employment s/he was engaged in. This requires a view to be taken as to the likely efficacy of any treatment options not yet completed.
25. Under the Agreement, Bromley agreed to extend the time limit for Mrs N to appeal its de facto decision that she did not satisfy the First and Second Conditions. I acknowledge that it gave no guarantees as to the outcome of her appeal. However, it was implicit in Bromley's agreement to consider Mrs N's appeal that it would do so in a proper manner. I do not find that Bromley did undertake a proper consideration of Mrs N's appeal.
26. Bromley did not, therefore, comply with the terms of the Agreement. I find that its failure to do so amounts to maladministration on its part. Mrs N sustained injustice as a consequence of Bromley's maladministration inasmuch as her eligibility for a pension under Regulation 35 has yet to be properly decided. It is not clear whether Mrs N is in receipt of the correct pension or that it has been paid from the correct date. I uphold Mrs N's complaint against Bromley.

### **Directions**

27. Within 28 days of the date of the Determination, Bromley shall take the necessary steps to reconsider whether, at the date her employment was terminated, Mrs N was entitled to a pension under Regulation 35. In order to do so, Bromley shall obtain a certified opinion from an IRMP, who has not previously been involved in the case, as to whether Mrs N satisfied the First and Second Conditions as at 15 May 2015. It shall provide Mrs N with a decision within 14 days of receipt of the IRMP's opinion.
28. The Agreement referred to a letter, dated 30 June 2015, from Mr Yaw Antwi-Yeboah. The intention appears to have been to allow Mrs N to submit a copy of this letter as part of her appeal; notwithstanding the fact that it post-dated the termination of her employment. Bromley shall ask the IRMP to have regard to this letter as part of the reconsideration of Mrs N's case.
29. That being said, Mrs N had to satisfy the First and Second Conditions at the time her employment was terminated in order to receive a pension under Regulation 35. Any evidence which Bromley and the IRMP consider now must relate to Mrs N's condition as it stood in May 2015. In particular, regard should be had to the reasonable expectations as to prognosis as at May 2015. Bromley is not required to reconsider Mrs N's case with the benefit of hindsight.
30. Bromley shall write to Mrs N with its decision as to her entitlement to a pension under Regulation 35 as at 15 May 2015. It shall set out its reasons for the decision it



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reaches and reference the evidence and/or advice it has relied on in coming to its decision.

31. If the decision is that Mrs N should have been paid a pension under Regulation 35 in May 2015, she is to be paid arrears, together with interest at the rate provided for under the LGPS Regulations.
32. Also, within 28 days of the date of the Determination, Bromley shall pay Mrs N £500 for the significant non-financial injustice arising out of its failure to comply with the Agreement.

**Anthony Arter**  
Pensions Ombudsman

10 November 2020

## Appendix 1

### The Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended)

33. As at 15 May 2015, 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.”

34. Regulation 36 provided:

- “(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).”

35. Regulation 38 provided:

- “(1) A deferred member who, because of ill-health or infirmity of mind or body -

- (a) becomes permanently incapable of discharging efficiently the duties of the employment that member was engaged in at the date the member became a deferred member, and
- (b) is unlikely to be capable of undertaking gainful employment before normal pension age, or for at least three years, whichever is the sooner,

may ask to receive payment of a retirement pension whatever the member's age.

- (2) A request under paragraph (1) must be made in writing to the deferred member's former Scheme employer or appropriate administering authority where the member's former Scheme employer has ceased to be a Scheme employer.
- (3) Before determining whether or not to agree to a request under paragraph (1), the deferred member's former Scheme employer, or administering authority, as the case may be, must obtain a certificate from an IRMP as to whether the member is suffering from a condition that renders the member -
  - (a) permanently incapable of discharging efficiently the duties of the employment the member was engaged in because of ill-health or infirmity of mind or body; and, if so,
  - (b) whether as a result of that condition the member is unlikely to be capable of undertaking gainful employment before reaching normal pension age, or for at least three years, whichever is the sooner.
- (4) ...
- (8) An IRMP appointed under paragraph (6) may be the same IRMP who provided the first certificate under regulation 36(1) (role of the IRMP)."

36. Regulation 32(10) provided:

"Where a member is entitled to early payment of pension due to ill-health under regulation 38 ... the first period for which retirement pension is payable begins on the date of the determination that the member is permanently incapable under that regulation."

## Appendix 2

### Medical evidence

#### Dr Parekh, 12 January 2017

37. Dr Parekh said he had reviewed the following reports:

- an occupational health report by Dr Bell dated 3 July 2014;
- an MRI scan dated 15 October 2014;
- a report from Mrs N's pain consultant dated 17 October 2014;
- a further report from Dr Bell dated 9 December 2014;
- a report by a colleague, Dr Mason, dated 18 February 2015;
- a report by an occupational health specialist nurse practitioner, dated 15 April 2015;
- an email from Dr Cooper dated 22 April 2015;
- a report from a consultant neurosurgeon, Mr Sharr, dated 19 March 2015;
- a report by Mr Antwi-Yeboah dated 1 July 2015 (*sic*);
- a report from a pain management consultant, Dr Peat, dated 29 November 2016;  
and
- a report from Mrs N's GP, Dr Entwistle, dated 11 November 2016.

38. Dr Parekh said Dr Peat had explained that a further neurological opinion had been requested, but he had also confirmed that Mrs N's symptoms had remained ongoing despite treatment to date. He said Dr Entwistle had confirmed the current level of Mrs N's symptoms despite a long course of treatment. Dr Parekh concluded:

“Based on available evidence, and despite plans from the pain clinic under whose review [Mrs N] remains and further plans for a neurosurgical review, [Mrs N] is unlikely to be able to return at this stage, either to her usual role ... or in any gainful employment, or in the foreseeable future. I have taken the date of the GP's report dated 11<sup>th</sup> November 2016 as receipt of the medical evidence indicating that, despite the prolonged treatment that has been implemented, she remains unfit to return to work in the foreseeable future, and hence should qualify for Ill Health Retirement Pension.”