

Ombudsman's Determination

Applicant	Mrs T
Scheme	Barclays Bank UK Retirement Fund (the Fund)
Respondent	Barclays Bank PLC (Barclays)

Outcome

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

Complaint summary

3. Mrs T's complaint is that she has been refused ill health early retirement (**IHER**).
4. Mrs T is concerned that Barclays has not considered her circumstances in full and only assessed her likelihood of recovery by reference to the general population.
5. Mrs T also feels Barclays has not reflected upon all the medical evidence when coming to its conclusion. Barclays' original decision was made on the basis that Mrs T had not exhausted all reasonable treatment, so it was not satisfied that Mrs T was incapable of carrying out any employment in the future. Mrs T says her consultant neurosurgeon, Mr Cowie, and a pain management specialist, Dr al-Quaragooli, have both said pain management treatment would not benefit her. Mrs T feels Barclays should have consulted Mr Cowie and/or Dr al-Quaragooli before making a judgment.

Background information, including submissions from the parties

1. In February 2010, Mrs T commenced long term sick leave for back and neck pain. From August 2010 to August 2012 she received ill health income protection payments.
2. In May 2012, Barclays' occupational health adviser, AXA PPP Healthcare Services (**AXA**), obtained an independent medical assessment from Dr Caplan. Dr Caplan said Mrs T's functional capacity was poor and there were no adjustments that would allow her to return to work.

3. In June 2012, Mrs T was assessed by Mr Cowie, who said he felt it unlikely Mrs T, in her current clinical situation, would be able to return to work even in a part time capacity.
4. The following month Dr Mason, one of AXA's consultant occupational physicians, assessed Mrs T and said that she was significantly functionally impaired. Dr Mason said Mrs T had not had the benefit of specialist pain management, so felt it, "premature to speculate whether the current level of disability will remain permanent."
5. On 15 August 2012, Barclays' Ill Health Retirement Decisions Committee (**the Committee**) met and agreed with Dr Mason's opinion.
6. In November 2012, Mrs T's employment was terminated on grounds of capability due to ill health. Barclays informed Mrs T that the Committee had assessed her circumstances and determined her not eligible for IHER.
7. Mrs T appealed, saying:-
 - Barclays had not explained why it felt Mrs T did not qualify for IHER; and
 - at the very beginning of her illness she had asked her original consultant about pain management and had been told that she would receive no benefit from such intervention, because her condition was too severe.
8. In January 2013, Dr Gray, another AXA consultant occupational physician, reviewed Mrs T's appeal and all available medical evidence before concluding, "...it would be reasonable for [Mrs T] to have an assessment and advice from a medical consultant in pain management on her suitability for evidence based treatment for her chronic pain." Dr Gray thought this would still be the case despite Mrs T's insistence that Mr Cowie had told her such treatment would not have been of use. Dr Gray decided "...available medical evidence does not support permanent incapacity for work, on the balance of probabilities."
9. In June 2013, Dr Gray reaffirmed her earlier view. She made it clear she could not support permanent incapacity for work, "...whilst there has been no specialist medical pain management advice sought or attempted."
10. Barclays requested a new report from AXA. Dr Lley noted the appeal letter from the Union Unite, which said further medical intervention is unlikely to prove of benefit. Dr Lley responded, concluding "...the benefit (of treatment) cannot be excluded, the assessment not having occurred, and so the required conditions cannot be (currently) met."
11. On 14 August 2013, Barclays responded to Mrs T's appeal. It confirmed the decision made by the Committee. Barclays determined that it could not say Mrs T's condition could be viewed as permanent until she had exhausted all treatment options.
12. Mrs T was dissatisfied with Barclays' response so brought the complaint to The Pensions Ombudsman. On 4 August 2016, this Office provided an Opinion on the

case deciding that Barclays had not given proper consideration to Mrs T's eligibility for IHER. This Office felt that although the medical professionals said pain management could have been useful, they had not given an outlook to the efficacy of the treatment. This Office suggested that Barclays should request an additional report from another AXA medical advisor. The Opinion also said that if the medical advisor felt Mrs T was not permanently incapacitated, the medical advisor should provide evidence-based reasons for why sufficient recovery is to be expected. Because of the distress and inconvenience caused, an award of £500 was also recommended.

13. Barclays agreed to the recommendations.
14. On 23 August 2016, Dr Tremlett, an AXA occupational health physician, wrote a report on Mrs T's health. Dr Tremlett said she did not have enough information to say that Mrs T would continue to be incapable of continuing her current occupation as a result of medical incapability. Dr Tremlett reflected on Mrs T's position in 2012 and noted that she had refused surgery and no additional treatments had been offered to her. Dr Tremlett said the natural history of Mrs T's condition is for it to resolve over time even without surgical treatment. Reflecting on some medical papers, Dr Tremlett commented, "...the symptoms tend to be stable for long periods but there can be exacerbations of pain at times." Dr Tremlett concluded it was more likely than not that Mrs T would experience a degree of recovery from symptoms that would permit a return to a desk based role over the 15 years remaining until her normal retirement age (**NRA**). In her summary Dr Tremlett said the previous reports suggested Mrs T had already seen an improvement from when she saw Mr Cowie in 2012.
15. On 8 September 2016, the Committee met again and deliberated the case. The Committee discussed the significance of the medical evidence and research papers put forward by Dr Tremlett. The Committee decided it was reasonable to rely on the view of Dr Tremlett as an occupational health specialist. Dr Gray was at the meeting and explained that the meaning of 'degenerative' in the context of Mrs T's condition does not necessarily correlate with increasing spinal pain and worsening symptoms.
16. On 13 September 2016, Barclays wrote to Mrs T to explain that, "the Committee have determined that you are more likely than not to experience a degree of recovery sufficient to allow you to return to employment before your NRA." The Committee concluded that Mrs T did not meet the performance criteria and was not eligible for IHER.
17. On 27 June 2017, The Pensions Advisory Service (**TPAS**) requested Barclays review their decision. TPAS outlined three reasons for dispute: -
 - "The medical advisor has assessed the likelihood of recovery by reference to the generality of the population." Mrs T feels the Committee should have explored whether she was more likely than not to have the same experience of the condition as the general population.

- The Committee did not require the medical advisor to ask Mr Cowie for his opinion on whether a pain management treatment would benefit Mrs T. Nor has it asked for an up-to-date opinion on the appropriateness of pain management for Mrs T.
 - Mrs T feels the Committee should also have contacted her pain management specialist, Dr al-Quaragooli, who has told her a pain management treatment would not benefit her.
18. On 7 September 2017, Barclays replied and said that it complied with the Opinion in full and it would not be reviewing its decision.
19. Our Office received Mrs T's second complaint on 26 October 2017 and requested Barclays' formal response.
20. Barclays argues that it has fully complied with the previous Adjudicator's recommendations as well as the requirements of the Fund rules. Barclays says Mrs T's disagreement with its opinion is not a sufficient enough reason to challenge it. Barclays argue the test provided in *Edge v Pensions Ombudsman (1999) 4 All ER 546* applies to this case. It is for these reasons Barclays does not believe there are grounds on which the decision can be challenged.
21. The relevant Fund rules are provided in Appendix 1.
22. Extracts of the relevant medical evidence are provided in Appendix 2.

Adjudicator's Opinion

23. Mrs T's complaint was considered by one of our Adjudicators who concluded that no further action was required by Barclays. The Adjudicator's findings are summarised briefly below:-
- The Adjudicator outlined the Ombudsman's role in this matter, explaining that the Ombudsman's concern is with the decision making process used by Barclays. The Adjudicator was satisfied Barclays had complied with the Fund rules and considered all relevant evidence.
 - The Fund rules provide two levels of IHER – the HMRC Test (the lower level) and Incapacity (the higher level). Eligibility for the former requires the Member to be, on the balance of probability, permanently (that is to NRA) incapable of their occupation. Eligibility for the latter requires the Member to be permanently incapable of any work.
 - Dr Tremlett deemed it likely Mrs T's condition would resolve over time, even without surgical treatment. Dr Tremlett concluded, "...it was more likely than not that Mrs T would experience a degree of recovery from the symptoms that would permit a return to a desk based role over the 15 years remaining until her NRA." The Adjudicator believed Barclays had instructed Dr Tremlett to contemplate the

right issues, ensuring Mrs T's IHER application was assessed in line with the Fund rules.

- Mrs T complained that Barclays continued to base its decision on the outlook of the general population, not on her specific circumstances. The Adjudicator noted that it was necessary for medical advisors to consider patterns of recovery in order to provide an accurate prognosis. Dr Tremlett based her medical opinion on medical studies that showed a likelihood of improvement over a long term basis. The Committee discussed the studies referred to in Dr Tremlett's report and concluded that it was more likely than not that Mrs T would be able to return to employment prior to her NRA. The Adjudicator decided it was acceptable for Barclays to attach weight to the medical studies when reaching its decision.
- The Adjudicator also believed Barclays had properly considered the meaning of "degenerative". The Committee questioned its meaning with Dr Gray, who clarified that, "degenerative does not necessarily correlate with increasing spinal pain and worsening symptoms". The Committee scrutinised Dr Tremlett's report and considered Mrs T's specific circumstances. The Adjudicator felt Barclays' decision making process ensured it gave proper consideration to Mrs T's eligibility for IHER.
- Mrs T said that Barclays should have consulted with her pain management specialist, who had told her that pain management would not have provided any benefit. When issuing her report, Dr Tremlett noted that surgery had been turned down leaving no additional treatments. Dr Tremlett thought, even without any further treatment, Mrs T was likely to recover prior to her NRA. So, the Adjudicator did not agree it was necessary for Dr Tremlett to explore Mrs T's potential reaction to pain management treatment.

24. Mrs T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs T provided her further comments which do not change the outcome.
25. Mrs T has told me that her condition has not improved since her employment was terminated due to ill health. Mrs T said that her lack of progress lends itself to a prognosis that she is highly unlikely to be able to return to work before her NRA. Mrs T has also complained that the medical evidence that Barclays has relied on was not written by anybody who has examined her. Mrs T contends that anybody who has examined her feels that improvement is unlikely, and she feels that her General Practitioner (**GP**) should be consulted.
26. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs T for completeness.

Ombudsman's decision

27. My role in this matter is not to decide whether Mrs T is entitled to IHER – that is for Barclays to decide in consultation with its medical advisor. Also, it is not for me to agree or disagree with any medical opinion.
28. My role is to consider whether the decision was reached in a proper manner. There are some well-established principles which a decision maker is expected to follow in exercising its discretion. Briefly, the decision maker must consider and weigh all the relevant factors and no irrelevant ones. But the weight to attach to any piece of evidence is for the decision maker to decide. A decision maker could, if it wished, attach no weight at all to a piece of evidence. The only requirement is that the evidence is considered. Further, the decision maker must not reach a decision which no reasonable decision maker, properly directing itself, could arrive at in the circumstances.
29. If I am not satisfied that the decision has been taken properly I can ask the decision maker to look at the matter again. However, I will not usually replace the decision maker's decision with a decision of my own, nor can I tell them what their subsequent decision should be.
30. Mrs T complains that there has not been an improvement in her condition, and she contends that this lack of improvement shows she will never be able to return to work. Whilst I have sympathy for the situation Mrs T finds herself in, I can only assess Barclays' decision on the evidence available in 2012, when Mrs T applied for IHER.
31. I acknowledge that Mrs T has not worked since her employment was terminated. However, the fact that expectation of recovery is not realised is not evidence that the decision is incorrect. I must assess whether Barclays' assessment could be considered perverse. The medical research outlined by Dr Tremlett said it was likely that patients would experience a recovery within ten years. Dr Tremlett also commented that, in 2012, Mrs T had only experienced symptoms for a "relatively short period given the timeframes considered in the research literature." Given Dr Tremlett's prognosis and the medical research provided to support her view, I cannot say that the decision to reject the IHER application was perverse.
32. Mrs T has complained that Barclays has accepted the prognosis of a doctor who has not personally assessed Mrs T. Mrs T goes on to say that specialists, who have examined her, feel improvement is very unlikely. Barclays instructed Dr Tremlett, further to an Opinion from this office, to write a medical report in August 2016. Given that Dr Tremlett had to assess Mrs T's condition in 2012, I do not find that a face to face assessment was necessary. Dr Tremlett's report shows she has engaged with the medical assessments of medical professionals who had examined Mrs T prior to her IHER application. Whilst I appreciate Mrs T is unhappy that Dr Tremlett went on to make her recommendation without meeting Mrs T in person, there is no requirement within the Fund rules for a face to face assessment. I cannot find that Barclays has acted improperly by not insisting on one.

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33. I find that Barclays considered all relevant medical evidence and abided by the Fund rules. I do not find its decision perverse, so I have no reason to remit this case back to the Barclays for re-consideration.
34. Therefore, I do not uphold Mrs T's complaint.

Anthony Arter

Pensions Ombudsman
25 July 2018

Appendix 1

Incapacity Test

35. The Fund's Rules define 'Incapacity' (and 'Incapacitated') in relation to:

"...an AW Member, the situation where the Bank considers him or her permanently and totally unable to carry out any employment,"

36. Rule F7.8 sets out the benefits payable on retirement and provides that,

"Entitlement to a benefit under the Rule is conditional on the Member having ceased to carry on his or her occupation and the Trustees and the Bank...receiving evidence from a registered medical practitioner that the Member is, and will continue to be, unable to work in order to satisfy the criteria for Incapacity."

HMRC Test

37. The "HMRC Test" is defined as:

"...the Member is and will continue to be medically incapable (either physically or mentally) as a result of injury, sickness, disease, or disability of continuing his or her current occupation and as a result of the ill-health ceases to carry on the occupation."

38. Entitlement under Rule F7.10 is conditional on:

"(a) the AW Member having ceased to carry on his or her occupation

(b) the Trustees and the Bank (and the Scheme Administrator if neither the Trustees nor the Bank are the Scheme Administrator) receiving evidence from a registered medical practitioner that the Member satisfies the HMRC Test;"

Appendix 2

Dr Caplan, 31 May 2012

Dr Caplan summarised Mrs T's circumstances: -

"...the current functional capacity is very poor. I do not see any mechanism for her going back to work. I did suggest that she might want to see a neurosurgeon again but she felt that she could not put herself through an operation with the thought that this might actually make her worse, because of her family."

Dr Caplan concluded by saying, "I do not feel there are any adjustments or restrictions that could help her return to work and I feel that she is not able to continue in her present post."

Mr Cowie, consultant neurosurgeon, 27 June 2012

Mr Cowie has commented: -

"The clinical impression today is of a mechanical back pain disorder due to both cervical, thoracic and lumbar sacral degenerative disc and facet joint changes. The pattern of her symptoms is typical of this type of pathology.

...I think that she has genuine disability as a result of these pathologies and note their failure to respond satisfactorily to conventional treatment. Personally I feel doubtful about the indication for surgery as an operation is unlikely to have any material effect on the background degenerative changes in the cervical and lumbar spine even if it addresses the nerve irritation in the cervical region.

I feel that it is unlikely on the basis of her current clinical situation that she will be able to return to work even in a part time capacity and fear that if she did there would be an exacerbation of symptoms and morbidity as a consequence."

Dr Mason, an AXA consultant occupational health physician, 11 July 2012

Dr Mason considered the reports of Dr Mason and Mr Cowie. Dr Mason considered both the HMRC and Incapacity tests and deemed Mrs T incapable of carrying out her current occupation. However, Dr Mason did not regard Mrs T's condition as permanent.

Dr Mason said, "From the information available it did not appear that [Mrs T] has received treatment for her psychological ill health symptoms, and does not appear to have had the benefit of specialist pain management interventions. Whilst current incapacity for work is not in question, where there is scope for further effective treatment it would be premature to speculate that the current level of disability may remain permanent."

Dr Gray, an AXA consultant occupational physician, 28 January 2013

Dr Gray reviewed Mrs T's appeal letter and the previous medical evidence.

Dr Gray says that whilst Mr Cowie and Dr Caplan agree on Mrs T's current disability, they have not considered any potential benefits of pain management treatment.

Dr Gray concludes, "...current disability as a result of her back pain is not disputed. However, the available medical evidence does not support permanent incapacity for work, on the balance of probabilities."

Dr Gray, an AXA consultant occupational physician, 13 June 2013

Dr Gray maintained the position of her earlier assessment. Her opinion remains the same despite Mrs T's testimony that she has been told that pain management would be unsuccessful: -

"...it would be reasonable for [Mrs T] to have an assessment and advice from a medical consultant in pain management on her suitability for evidence based treatment for her chronic pain, despite the view she states she was given by the treating and Independent Neurosurgeon on this matter."

Dr Lley, an AXA consultant occupational physician, 7 August 2013

Dr Lley's opinion was unchanged from those of Drs Mason and Gray. For both tests he concluded: -

"[Mrs T] has a diagnosed musculoskeletal medical condition leading to current impairment of day to day activities including mobility. These functional restrictions would be so restrictive that she is currently unfit for any employment even with adjustments or employment restrictions in place.

Further treatment is available and is reasonable to undertake including a multi-disciplinary pain management programme. This has been shown in this type of condition to be effective in reducing impairment and improving functional status. Future employment with appropriate restrictions or adjustment cannot be ruled out on a permanent basis.

I note the comments in the appeal letter from... Unite the Union relating to [Mrs T's] belief that further medical intervention is unlikely to prove of benefit.

Sadly, it is the potential of some such benefit occurring which must be measured in offering advice against the prescribed pension scheme rules. In this case the potential for benefit cannot be excluded, the assessment not having occurred, and so the required conditions cannot be (currently) met."

Dr al-Quaragooli, Pain Management Specialist, anecdotal evidence supplied on 7 April 2014

Mrs T has told us Dr al-Quaragooli concluded she will not be able to work and her illness/condition will only deteriorate. On the back of this Mrs T has said, "I now feel that I have proved that a pain management course/specialist will not make me better, which is something that I have known all along."

Dr Tremlett, an AXA occupational health physician, 23 August 2016

Dr Tremlett reviewed the previous medical evidence before determining that Mrs T failed to satisfy either the HMRC or Incapacity tests.

Dr Tremlett agreed with Mr Cowie's opinion that Mrs T would not be able to return to work. However, Dr Tremlett stopped short of agreeing with the overall outlook. Dr Tremlett said that at the time Mrs T's health was first assessed she would have experienced neck symptoms for about two years and four months. Dr Tremlett said Mrs T had only been experiencing symptoms for a relatively short period of time given the timeframes considered in the research literature.

Dr Tremlett contemplated the previous medical evidence and said, "considering the situation in 2012, it was more likely than not that Mrs T would experience a degree of recovery from the symptoms that would permit a return to a desk based role over the 15 years remaining until her NRA."