PO-20991

Ombudsman's Determination

Applicant	Mr H
Scheme	Local Government Pension Scheme (**LGPS**)
Respondent	South Tyneside Council (**the Council**)

Complaint Summary

Mr H complains that the Council incorrectly decided to award him Tier 2 ill health early retirement (**IHER**) benefits in the LGPS because he believes that he is entitled to Tier 1 benefits.

Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld against the Council because I do not consider that the Council has interpreted or applied the eligibility criteria for Tiers 1 and 2 benefits set out in Regulation 35(5) and 35(6) incorrectly or in a discriminatory manner.

Detailed Determination

Material facts

1. Mr H worked for DB Regio as a train driver. He has suffered from severe chronic stress, depression and anxiety for many years caused by "difficulties he had with his special needs child and the traumatic death of his father" for which he has sought medical treatment.

2. In September 2016, he applied for IHER. DB Regio accepted the medical opinion of an Independent Registered Medical Practitioner (**IRMP)** who concluded that:

    - Mr H was suffering from a condition that, on the balance of probabilities, rendered him incapable of permanently discharging efficiently the duties of his employment with DB Regio because of "ill health or infirmity of mind and body"; and
    - given Mr H's age, he was likely, however, to be able to undertake gainful employment again within the next three years

    The IRMP recommended that Mr H should be reassessed in three years' time and provided DB Regio with the relevant medical certificate.

3. DB Regio informed Mr H that his employment would terminate on 4 November 2016 and he had been awarded Tier 3 IHER benefits in the LGPS from this date.

4. Mr H was dissatisfied with this decision and appealed it under the LGPS Internal Dispute Resolution Procedure (**IDRP**). His appeal was not upheld at Stage One IDRP in November 2016. However, at Stage Two IDRP in March 2017 the Council found that DB Regio's decision making had been flawed and it should therefore reconsider Mr H's IHER claim by applying the 2013 Regulations correctly, the relevant paragraphs of which are shown in the Appendix below.

5. Before DB Regio could reconsider its decision, it had ceased to be a LGPS employer and the Council therefore took over the responsibility for doing this.

6. In its letter dated 15 August 2017 to Mr H, the Council said that:

    - In view of "the severity and the ongoing nature of the issues which have caused Mr H's illness", there was insufficient evidence to suggest that he would be able to undertake gainful employment within three years of leaving his employment and Tier 3 benefits was consequently inappropriate;
    - There was, however, also inadequate evidence to show that Mr H would not be able to carry out gainful employment before reaching his Normal Retirement Age (**NRA**) of 67 in the LGPS on 7 June 2036; and
    - Mr H himself did not disagree with the opinion of the IDRP, Dr C, that there was a significant chance that he will, at some point in the next 19 years, once again be fit for gainful employment

7. The Council also said that:

> "…the opinion of Dr C is not the only factor that needs to be considered when assessing the applicability of Tier 2 benefits to Mr H's particular circumstances.
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> …he has provided a great deal of evidence about the nature, extent and severity of his son's autism and of the care and support he needs…It appears clear that the degree to which he and his wife are required to provide care for his son is…greater than which they would both provide if it were not for his disability…
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> Dr C acknowledged the effect that his caring responsibilities have had on Mr H's health, as well as the impact of the discovery of the abuse and neglect of his son (at his former school) had upon him. I too have considered the potential effect that both legal proceedings (against the school) and his caring responsibilities may have upon his ability to undertake gainful employment.
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> "Gainful employment" is defined in the Regulations as 30 or more hours work per week for a period of not less than 12 months. Guidance published by the Department for Communities and Local Government (**DCLG**) in September 2014, pointed to Regulation 35 restricting entitlement considerations to medical factors, taking into account the full medical effects of the condition which gave rise to the retirement on the grounds of permanent ill health (Paragraph 26 of the Guidance).
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> …Paragraph 27 of the above Guidance states:
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> > "Non-medical factors, such as the general availability of gainful employment in a particular area or the attitude to certain conditions, would not be material factors and should not be part of the IRMP's consideration, while the effect of a medical condition would have on their practical ability to undertake gainful employment would."
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> In light of that, Dr C's conclusion that there was a significant chance of Mr H becoming fit to undertake gainful employment before his NRA would appear to represent a very sound basis for determining his entitlement to Tier 2 benefits.
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> Turning in particular to the two non-medical matters which Mr H mentioned…it appears to me that the legal proceedings on behalf of his son have been taken into account by Dr C, and whilst I accept that most if not all forms of litigation can act as stressors, I believe that it is more likely than not that such proceedings will be concluded well before his NRA.
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> With regard to his caring responsibilities, I note the limitations which they place on his time, both at the start and end of each day during the School term, but also during the School holidays. Such factors are non-medical ones, but I

accept that at least at the present time, they present practical difficulties for him in view of his son's age.

In view of the clarity of the Regulations, supported by the statutory guidance, on the issue of which factors should be taken into account when assessing the extent of Mr H's entitlement, and which factors should not, I consider that the most appropriate conclusion to draw is that he is more likely than not to be capable of undertaking gainful employment within the next 19 years.

The above would indicate that Tier 2 would be appropriate…

To be entitled to receive Tier 1 benefits, a member must be found to be unlikely to be capable as a result of ill health or infirmity of mind or body, of undertaking gainful employment before normal pension age (**NPA**).

The factors which Mr H raised as being barriers to him ever being able to undertake gainful employment do not appear to relate to his own medical capability, but rather to other demands upon his time which he sees as restricting his opportunities from securing any work which may be available. As such I do not consider that the matters he raised, including the factors above, support his contention that the payment of Tier 1 benefits would be appropriate in his case.

…I am also aware that he has made references to the requirements of employers to make reasonable adjustments in certain circumstances, and to the concept of discrimination by association.

It certainly appears to be the case that Mr H's restricted ability for work was recognised by his former employer, and the shift pattern which he worked accommodated the limitations on his time. However, as I understand it he considers that adjustments should be made to the Regulations which govern the way in which he is assessed for pension benefits and that those adjustments should be to include in the assessment the non-medical factors referred above.

I have studied the Regulations carefully, and the guidance which relate to their application. I have come to the view that the duty on the employer to consider matters arising out of the Equality Act, in particular the issue of reasonable adjustments, is engaged at the stage at which the decision about whether or not to grant an employee ill health retirement is made.

In the above circumstances, an employer is under a duty to consider all reasonable adjustments which could be made to an employee's workplace or employment, before going on to consider ill health retirement. I am not aware of any similar requirement for an employer to consider reasonable adjustments to the pensions regulations so far as they apply to the determination of what tier of benefits an employee should receive.

> …Scheme employers are required to have policies which govern the exercise of discretion when considering the early release of pension benefits, or effecting the payment of an unreduced pension…Such discretion can be exercised in circumstances where compassionate grounds are found to exist. Regulation 30(8) provides this flexibility…
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> Having introduced the above-mentioned degree of potential flexibility into the process…., it is of some relevance that those drafting and regularly revising the Regulations did not introduce an equivalent degree of flexibility or discretion into the mechanism used to determine the tier of benefits payable upon ill health retirement.
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> In light of the above, I am unable to conclude that by failing to award him Tier 1 benefits, Mr H is suffering less favourable treatment by virtue of his association with his son. I would ask him to note that I fully appreciate that his caring responsibilities presently impact upon his availability for work. I would suggest that those are unlikely to remain unchanged in the forthcoming 19 years and I consider that even if his availability for work could be a determinative factor in assessing which tier of benefits he should receive, it would not be impossible for him to secure gainful employment.
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> In coming to the above conclusion, I bear in mind the arrangements adopted by Mr H's previous employer and the fact that other employers would also be required to take steps to accommodate his particular circumstances.
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> In light of the above, having considered the issues Mr H raised regarding possible discriminatory treatment, I am not persuaded that those matters should alter the determination that he should receive Tier 2 benefits… I in no way seek to minimise the extent to which his son's needs have impacted upon his health or the extent to which his caring responsibilities continue to impact upon his availability for work. However, I hope that I have set out above an explanation of why notwithstanding their significance, the non-medical factors are insufficient to alter the above determination.
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> I can therefore confirm that the decision of the Council is that Tier 2 IHER benefits are payable and that these benefits should be backdated to date of the original decision, 1 November 2016."

Summary of Mr H's position

8. The Council has failed to properly consider the Equality Act 2010 **(the Act)** "which supersedes pension rules legally" in its decision to award him Tier 2 benefits in the LGPS. The "gainful employment" criterion should be disregarded because it contravenes the Act.

9. His son's severe autism is permanent and there is no evidence that his condition will improve. He must care for his son and consequently he is unable to meet the "gainful employment" criterion.

10. He will be over 60 when his son eventually leaves full time education and believes that he is severely disadvantaged in meeting the criterion of "gainful employment".

11. As a carer for his son, the likelihood of him being able to meet "gainful employment" is negligible so reasonable adjustments should be made to the pension rules.

12. The Council has also not applied other relevant legal legislation in its decision-making such as the rights of carers for a disabled child or the "European human rights" of a disabled person to receive care from a family member as recently ruled in judgment of *Hurley and Ors v Secretary of State for Work and Pensions* [2015] EWHC 3382 (Admin).

13. He agrees that in the future he may be fit enough to meet the "capable of undertaking gainful employment" criterion but he would not be "able" or "guarantee /promise" to meet gainful employment whilst he is the carer for his disabled son. Taking his carer away would be directly discriminatory against his son and may also be discriminatory against him as the carer.

14. He says that:

> "…the Council are presuming that my son will not require my care beyond him reaching 19 years old, which is highly unlikely.
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> Dr C did not discuss my son's care needs as it was not within his remit.
>
> It is highly likely that my son will remain in his education setting until he is 25 years old under his EHCP…
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> Even in the unlikely eventuality that my son will not require my care if he leaves school at age 19, I will be 60 years old and would find it almost impossible to find gainful employment at that age.
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> I therefore believe that I am being treated less favourably because I have a disabled son with a lifelong condition who will need care all his life, yet I am being told I may be fit to work in the future, therefore I must work and not care for my disabled son."

Conclusions

15. The Council must comply with the 2013 Regulations when awarding IHER benefits in the LGPS, and is required to have proper regard to relevant laws and guidance when exercising this function. To be eligible for Tier 1 benefits, Regulation 35(5) of the 2013 Regulations requires that the "member is unlikely to be capable of undertaking gainful employment before NPA". By Regulation 35(6) a member is entitled to Tier 2 benefits

"if that member is not entitled to Tier 1 benefits and is unlikely to be capable of undertaking gainful employment within three years of leaving employment, but is likely to be capable of undertaking gainful employment before reaching NPA." Gainful employment is defined under Schedule 1 of the 2013 Regulations as "paid employment for not less than 30 hours in each week for a period of not less than 12 months."

16. Mr H has submitted that the gainful employment criterion in Regulation 35 should be disregarded because it contravenes the Act. I should clarify that in circumstances where the Court has not ruled that Regulation 35 or the gainful employment criterion *per se* contravenes or is incompatible with the Act and should therefore be set aside, it is not within my power to make such a ruling. It is also not my role to comment on matters of wider Government policy or to amend the 2013 Regulations.

17. My role in Mr H's complaint is essentially to consider whether:

- In interpreting the terms "capable of undertaking gainful employment", the Council asked itself the correct questions, interpreted the applicable Regulations correctly in accordance with applicable laws and guidance, took into account all relevant factors, disregarded irrelevant factors and reached a decision that was not perverse; or

- The Council applied the criteria to the applicant incorrectly and in a discriminatory manner.

Within the context of these considerations, I will consider whether the Council interpreted and applied the criteria in a manner that contravened or was incompatible with the Act.

18. It is my view that the Council has not interpreted or applied the "capable of undertaking gainful employment" criterion and the eligibility criteria for Tiers 1 and 2 benefits set out in Regulation 35(5) and (6) of the 2013, in a manner that discriminates against Mr H. I also do not consider that the Council interpreted or applied the criteria in a manner that contravenes or is incompatible with the Act.

Discrimination by association – the legal position

19. Mr H, though presently suffering from ill health does not himself have a disability but argues that the Council has discriminated against him on the basis of his son's disability. Mr H considers that the gainful employment criterion contravenes the Act and he has asked that the criterion is disapplied, so that the Council accommodates his caring responsibilities for his disabled son and grants him Tier 1 benefits.

20. The Act prohibits direct discrimination (section 13) and indirect discrimination (section 19) on the grounds of disability as well as discrimination arising from disability (section 15). Disability is defined in section 6 of the Act as a physical or mental impairment which has a substantial and long term adverse effect on the individual's

ability to carry out normal day to day activities. Where there is a discriminatory provision in a pension scheme which is not exempt or justified, under the Act a non-discrimination rule will be implied into the scheme overriding the provision and requiring trustees to refrain from doing an act which is unlawful.

21. In accordance with section 61 of the Act which introduced the "non-discrimination rule", the trustees or managers and employer in relation to a pension scheme must refrain from discriminating against a disabled person in carrying out their functions for the scheme including treatment of members of the scheme. Furthermore, the trustees now have power to modify the scheme to comply with the non-discrimination rule (section 62 of the Act). The effect of the non-discrimination rule will be that until the discriminatory provision is eliminated, the less favoured group will be levelled up to the benefits of the more favoured group.

22. Mr H's complaint that the Council has discriminated against him due to his association with his disabled son, is effectively a complaint about indirect discrimination by association pursuant to section 19. I have considered in detail, the caselaw relevant to discrimination by association, most notably the cases of *Hainsworth v Ministry of Defence* [2014] IRLR 728, and the decisions of the Court of Justice of the European Union ("CJEU") in *Coleman v Attridge Law* C-303/06 [2008] IRLR 722 and *Chez Razporedelenie Bulgaria* [2015] EUCJEU C-83/14.

23. I have considered whether (a) the Council's interpretation and application of the gainful employment criterion is inconsistent with the current law on discrimination by association, and (b) whether, as an alternative, there is a legal right for Mr H (who is not disabled) to have reasonable adjustments made to the gainful employment criterion to accommodate his caring responsibilities for his disabled son.

24. The CJEU in *Coleman* decided that the prohibition in Article 2 of the Employment Directive (2000/78/EC) against direct discrimination was not limited only to disabled people. The Court held that where an employer treats a non-disabled employee less favourably due to the disability of the employee's disabled child, such treatment would amount to direct discrimination contrary to Article 2. *Coleman* concerned direct discrimination by association, not indirect discrimination by association as the case is here, so I do not consider that *Coleman* assists Mr H's complaint.

25. *Chez Razporedelenie Bulgaria,* on the other hand, was a case where the CJEU found indirect discrimination by association. The CJEU in *Chez Razporedelenie Bulgaria* held that if a company's practice in relation to the erection of meters put people of the Roma ethnicity at a particular disadvantage without justification, such practice would amount to indirect discrimination by association contrary to Article 2 of the Race Directive (2000/43/EC).

26. *Chez Razporedelenie Bulgaria* concerned indirect discrimination by association on the grounds of race, not indirect discrimination by association on the grounds of disability as the case is here and it is arguable that *Chez Razporedelenie Bulgaria*

can be distinguished from Mr H's case on this basis. The decision in *Chez Razporedelenie Bulgaria* has not been tested further and its scope is currently unclear. I note, however, that the Supreme Court in *Hainsworth v Ministry of Defence* stated at paragraph 8 of its judgment that:

> "……in Chez RB the Grand Chamber, by reference to Coleman, developed the notion of associative discrimination, albeit in the context of the Race Directive…..That, then, would be indirect associative discrimination."

27. Whilst the Supreme Court in *Hainsworth* UKSC 2014/0164 acknowledged the CJEU's ruling on indirect associative discrimination within the context of the Race Directive, the Supreme Court did not go on to rule that indirect associative discrimination applies more generally to protected characteristics other than race.

28. Therefore, in my view, the decision in *Chez Razporedelenie Bulgaria* has not effected any material change to UK disability Laws such that it can now be said that there is, in the UK, a legal right to be protected from indirect discrimination by association on the grounds of disability. Neither the UK Courts nor Parliament have made this extension to UK Law and it is not within my jurisdiction to extend the Law. Even if it can be argued that there is a legal right to protection from indirect discrimination by association in the UK and Mr H succeeds in establishing that the gainful employment criterion contravenes that right, Mr H would also need to show that the criterion could not be objectively justified. I have not received submissions on this specific point from the parties to this complaint.

29. In any event, I am conscious that the Law on discrimination by association is developing, and I should clarify that I am required to determine complaints in light of the laws in force at the relevant time. As UK law (including the Act and relevant caselaw) currently stands, there is no clearly recognised legal basis for indirect discrimination by association on the grounds of disability. I therefore do not consider that the Council has interpreted or applied the criterion in a manner that is inconsistent with the Act.

30. Mr H has sought to rely on the decision in *Hurley v Secretary of State for Works and Pensions*, however, the case of *Hurley* concerns a separate matter. *Hurley* is concerned with indirect disability discrimination arising from the specific issue of the UK Government's inclusion of Carers' allowance in the benefit cap. *Hurley* is not concerned with indirect discrimination by association on the basis of disability in the context of the provision of benefits or payments to a non-disabled person and I do not consider it is therefore applicable to Mr H's case.

31. I have also considered whether, as an alternative, Mr H may have a viable claim for the reasonable adjustment of the gainful employment criterion. The Council has a duty under section 39(5) of the Act to make reasonable adjustments where by virtue of section 20(3) of the Act, a "provision, criterion or practice" puts a disabled person at a disadvantage in comparison with persons who are not disabled.

32. The Ministry of Defence (MOD) in *Hainsworth* had argued at Court of Appeal *(*[2014] IRLR 728), that section 20 of the Act only applied to the person with the disability, not to his/her family members. The Claimant had asked the Court to interpret section 20 so as to comply with Article 5 of the Employment Directive which provides that:

> "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in or advance in employment, or to undergo training unless such measures would impose a disproportionate burden on the employer."

33. The Court of Appeal decided that discrimination by association on the grounds of disability did not fall within the wording of the Act and the Claimant in that case could only pursue the claim under Article 5. The Court then considered the wording of Article 5 and the Recitals to the Employment Directive and decided that discrimination by association did not extend to Article 5. The Court's decision is usefully set out at paragraphs 19 and 20 of the judgement as follows:

> "19. …it seems to me that the obvious and entire focus of Article 5 is upon provisions to be made by an employer for his disabled employees, prospective employees and trainees. That is, I think, powerfully supported in particular by Recital 20 "measures to adapt the workplace to the disability"….
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> 20. … once it is postulated that the disabled beneficiary of Article 5 may be a person other than the employee, the Article gives no clue as to who that other person might be. On the face of the Article, it would be an entirely open question who such a person might be. The Article would be, in my judgment, hopelessly uncertain."

34. The Supreme Court in *Hainsworth* endorsed the Court of Appeal's position and concluded that the cases of *Coleman* and *Chez Razporedelenie Bulgaria* were limited to Articles 1 and 2 and those cases did not bring discrimination by association within the remit of Article 5.

35. Applying the Court of Appeal and Supreme Court decisions in *Hainsworth* to the facts of this case, it is clear to me that a claim by Mr H for the reasonable adjustment of the gainful employment criteria would not succeed in law. This is simply because UK law (including the Act and relevant case law) does not currently recognise that discrimination by association applies to a claim for reasonable adjustments on the grounds of disability. There is no legal obligation on the Council to make reasonable adjustments to accommodate Mr H's caring responsibilities for his disabled son and I find no maladministration on the part of the Council in this regard.

Regulation 35

36. Schedule 1 to the 2013 Regulations defines gainful employment as "paid employment for not less than 30 hours in each week for a period of not less than 12 months". The 2013 Regulations do not, however, define the term 'capable of undertaking'. Paragraph 26 of the LGPS statutory ill health retirement guidance published by DCLG in September 2014 states in relation to capable of undertaking that**:**

> "…….it is important to highlight the fact that regulation 35(4), (5), (6) and (7) restrict entitlement considerations to medical factors, taking into account the full medical effects of the condition which gave rise to the retirement on the grounds of permanent ill health."

37. Having considered paragraph 26 within the context of the guidance as a whole, it is clear to me that a member's capability of undertaking gainful employment is assessed by reference to his/her own medical condition, rather than that of a medical condition of a third party which creates caring responsibilities for the member. I therefore agree with the Council that Mr H's caring responsibilities are a non-medical factor which the guidance excludes from entitlement considerations. I do not consequently consider that by disregarding a non-medical factor in accordance with the relevant guidance the Council have acted in a discriminatory manner.

38. Regulation 35 and the guidance published by DCLG appear to be consistent with the Courts' decisions in *Hainsworth* in its requirement that it is the member's own medical condition that is relevant to the assessment of a member's capability to undertake gainful employment, not the disability of an associated third party. Regulation 35 and the DCLG guidance would also appear to be compatible with the Act, given that, as stated above, there is currently no clearly recognised legal basis in UK Law for indirect associative disability discrimination or for a claim for reasonable adjustments by virtue of associative disability discrimination. The Council has therefore, in my view, interpreted and applied the 2013 Regulations correctly in accordance with the relevant laws and guidance, and I cannot see any basis for upholding this element of his complaint.

39. Mr H has set out his interpretation of the criteria "capable of undertaking", based on the dictionary definition of the terms "capable" and "undertaking". I do not consider that his interpretation advances his case. In accordance with the current UK case law and the LGPS guidance, it is Mr H's own medical condition that is relevant to the assessment of his capability to undertake gainful employment, not the disability of an associated third party.

40. Looking generally at the Council's decision-making process in this case, I cannot see any evidence of discrimination, that the Council reached a perverse decision or that the process itself was flawed in anyway. I note that the Council considered Mr H's own medical condition and recognised the impact that his son's health had on his

own. These are medical factors specific to Mr H which the Council was required to take into consideration by the 2013 Regulations and guidance.

41. By taking into account the medical evidence of Dr C in his report, I consider that the Council gave full and proper consideration to Mr H's medical condition and the impact of his caring responsibilities and other family matters had on his health before concluding that Tier 2 benefits were appropriate. The Council also considered that the underlying issues impacting on his health were unlikely to last until his NPA such that he would be unable to undertake gainful employment at some point prior to his NPA which I consider is a reasonable view to take.

42. In these circumstances, I do not think that the allegations of discrimination are made out in this case.

43. It is therefore my opinion that this complaint should not be upheld.

Karen Johnson

Deputy Pensions Ombudsman
5 February 2019

APPENDIX

Regulations 35 of the Local Government Pension Scheme Regulations 2013

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.