

Ombudsman's Determination

Applicant	Mrs L
Scheme	Local Government Pension Scheme (LGPS)
Respondent	Buckinghamshire County Council (BCC)

Outcome

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

Complaint summary

3. Mrs L is currently receiving an ill health early retirement (**IHER**) pension from LGPS. However, she is unhappy because BCC will not award her the tier with the highest IHER benefits.

Background information, including submissions from the parties

4. On 8 September 2014, Mrs L commenced long-term sick leave.
5. On 29 April 2015, Mrs L was awarded tier 3 IHER, following an assessment by an Independent Qualified Medical Practitioner (**IQMP**), Dr Martin.
6. Tier 3 is the lowest IHER tier available. It is awarded when an LGPS member is unable to work due to ill health, but there is a reasonable prospect they will be able to undertake gainful employment within three years of leaving employment due to ill health.
7. Tier 2 is the second highest IHER tier available, and it is awarded when there is no reasonable prospect of an LGPS member being able to undertake gainful employment within three years of leaving employment due to ill health.
8. Tier 1 is the highest IHER tier available and provides the highest benefits. It is awarded when there is no reasonable prospect of an LGPS member being able to undertake gainful employment before normal retirement age (see Appendix A).

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9. Dr Martin's medical opinion was that there were several treatment options for Mrs L still to try at the time, which were likely to enable her to return to work within the next three years. BCC therefore granted Mrs L a tier 3 IHER.
10. Mrs L says she accepted tier 3 IHER in April 2015, as she was informed at the time her IHER would be reviewed after 18 months, and that she could be awarded tier 1 as a result of this.
11. In April 2017, Mrs L's IHER 18-month review was completed. In particular, a report had been obtained from a new IQMP, Dr Brown.
12. Dr Brown's report stated that it was unlikely Mrs L would be able to undertake gainful employment within three years of the date she left employment. As a result, BCC awarded Mrs L tier 2 IHER.
13. Mrs L complained that she ought to have been awarded tier 1 IHER. In response to this, BCC highlighted that a tier 3 IHER could only be changed to a tier 2 IHER following the 18-month review. In particular, it explained that the Local Government Pension Scheme Regulations 2013, which govern Mrs L's LGPS benefits, do not allow a tier 3 IHER to be changed to a tier 1 IHER following the 18-month review (see Appendix B). As such, it had no authority to grant tier 1 IHER benefits at this stage.
14. Mrs L then complained that, had she known she could not be awarded tier 1 IHER following the 18-month review, she would have appealed the original decision in April 2015.
15. In an attempt to resolve the matter, BCC agreed to appoint another new IQMP to review Mrs L's original IHER application.
16. On 24 October 2017, Dr Folkes considered Mrs L's IHER application as it had been in April 2015. As part of this, Dr Folkes reviewed a number of medical reports and documents regarding Mrs L's health (see Appendix D).
17. Dr Folkes' conclusions were that a tier 3 IHER was appropriate based on the information and medical evidence available in April 2015. As such, BCC has maintained its decision that it was reasonable to award Mrs L tier 3 IHER in April 2015, and tier 2 IHER following the 18-month review.
18. Mrs L remained unhappy, and referred the matter to our Office.

Adjudicator's Opinion

19. Mrs L's complaint was considered by one of our Adjudicators who concluded that no further action was required by BCC. The Adjudicator's findings are summarised briefly below:-
 - The Adjudicator did not fully investigate whether Mrs L was led to believe, in April 2015, that the 18-month review of her IHER could result in an upgrade to tier 1.

This is because BCC had already done what she would have recommended, if she found Mrs L had been misled. In particular, BCC has already obtained a second opinion from a new IQMP regarding Mrs L's medical condition as of April 2015.

- The Adjudicator confirmed that her role is not to decide what IHER tier Mrs L should be awarded. She explained she is not a medical professional and she cannot establish what tier is appropriate for Mrs L. Instead, her role is to assess whether BCC's decision-making process amounts to maladministration. She did this by reviewing whether BCC had: asked the wrong questions or obtained irrelevant information, misdirected itself in law (i.e. incorrectly interpreted the relevant LGPS regulations), or reached a decision which is perverse (i.e. a decision which no reasonable decision maker would reach based on the same information).
- The Adjudicator was satisfied that BCC had only ever made a decision regarding Mrs L's IHER after having obtained a medical opinion from an IQMP. This was in accordance with the relevant LGPS regulations (see Appendix C), and was evidence that BCC had followed the correct processes and obtained the correct information.
- The Adjudicator was satisfied that the medical evidence BCC had been provided with indicated that Mrs L met the criteria for a tier 3 IHER in April 2015, and a tier 2 IHER following the 18-month review. This was based on the relevant LGPS regulations and how they corresponded with the evidence available to BCC.
- The Adjudicator did not believe BCC's decision-making process at any stage amounted to maladministration. She considered that BCC had not asked the wrong questions or obtained irrelevant information, and she did not consider its decisions were perverse

20. Mrs L did not accept the Adjudicator's Opinion. She emphasised that she is still unable to work, despite her willingness to. She believes the medical evidence available in 2015 ought to have been sufficient for BCC to have offered a higher tier IHER.

21. The complaint has been passed to me to consider, but Mrs L's further comments do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs L for completeness.

Ombudsman's decision

22. Firstly, I agree that whether Mrs L was misled in 2015 does not require further investigation. If she had been misled, I would have instructed that a fresh report, by a new IQMP, be completed in relation to her health as of April 2015. This would have placed Mrs L back into the position she would have been in, had she successfully raised an appeal in April 2015. However, this has already happened.

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23. For clarity, a successful appeal in April 2015 would not have necessarily resulted in a different tier IHER. Instead, it would have resulted in a new IQMP being appointed, and Mrs L's health being reconsidered afresh. Dr Folkes' report has done precisely this, as it is based on Mrs L's condition as of April 2015 and the medical evidence available then.
24. Furthermore, Dr Folkes' report evidences that her medical opinion is based on a significant amount of medical evidence, including an up to date report from Mrs L's GP. As such, I consider it was reasonable for BCC to accept Dr Folkes' report and not amend the IHER tier Mrs L was awarded in April 2015.
25. Under the regulations, as previously described, BCC is unable to award Mrs L a tier 1 IHER following the 18-month review. It has therefore acted reasonably in only amending Mrs L's IHER to a tier 2 award from 2017 onwards.
26. I understand my Determination will be of great disappointment to Mrs L. I acknowledge that she says she would work if she could, and it is unfortunate that she will need to rethink her future plans. However, I believe BCC has acted in accordance with the relevant regulations and I do not find any administrative error.
27. I do not uphold Mrs L's complaint.

Anthony Arter

Deputy Pensions Ombudsman
29 June 2018

Appendix A

Extract of the Local Government Pension Scheme regulations 2013

S35:-

“(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.”

Appendix B

Extract of the Local Government Pension Scheme regulations 2013

S37:-

“(5) A Scheme employer must review payment of Tier 3 benefits after they have been in payment for 18 months.

(6) A Scheme employer carrying out a review under paragraph (5) must make a decision under paragraph (7) about the member’s entitlement after obtaining a further certificate from an IRMP as to whether, and if so when, the member will be likely to be capable of undertaking gainful employment.

(7) The decisions available to a Scheme employer reviewing payment of Tier 3 benefits to a member under paragraph (5) are as follows—

(a) to continue payment of Tier 3 benefits for any period up to the maximum permitted by regulation 35(7) (early payment of retirement pension on ill-health grounds: active members);

(b) to award Tier 2 benefits to the member from the date of the review decision if the authority is satisfied that the member—

(i) is permanently incapable of discharging efficiently the duties of the employment the member was engaged in, and either

(ii) is unlikely to be capable of undertaking gainful employment before normal pension age, or

(iii) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment, but is likely to be able to undertake gainful employment before reaching normal pension age; or

(c) to cease payment of benefits to the member.”

Appendix C

Extract of the Local Government Pension Scheme regulations 2013

S36:-

(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 hours and had reduced pay as a consequence of the reduction in working hours, whether that member was in part time service wholly or partly as a consequence of ill-health or infirmity of mind or body.

(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.

(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).

Appendix D

List of medical documents reviewed by Dr Folkes, as confirmed in her report dated 24 October 2015:-

- The referral paperwork.
- A report from Dr Olujobi* dated 1 May 2015 and an outpatient referral request dated 24 June 2008.
- Reports from specialist and orthopaedic surgeon Mr Rees, dated 4 April 2009.
- A clinic letter from Mr Wallace, orthopaedic surgeon, dated 30 May 2012.
- Clinic letters from Mr Jackson, consultant orthopaedic surgeon, dated 29 August 2012 and 26 November 2012.
- Clinic letters from Mr Little, consultant orthopaedic surgeon, dated 30 November 2012 and 1 April 2014.
- A physiotherapy report from Milton Keynes dated 11 August 2008.
- An ultrasound report of Mrs L's right shoulder dated 2 February 2015.
- MRI reports of Mrs L's right shoulder dated 10 December 2012, and of the spine, dated 10 December 2012 and 17 June 2014.
- Occupational health reports from E Addison and Dr Sarangi dated 20 February 2015 and 17 April 2013 respectively.
- An Occupational health report from Ms O'Dwyer dated 21 November 2014.

*Dr Olujobi is Mrs L's general practitioner