PO-21354

The Pensions Ombudsman

Ombudsman's Determination

Applicant	Mrs T
Scheme	Local Government Pension Scheme (**LGPS**)
Respondent	The Spring Partnership Trust (**the Trust**) on behalf of Leesons Primary School (**the School**).

Outcome

1. Mrs T's complaint is upheld and to put matters right the Trust shall reconsider Mrs T's application for an ill health retirement pension (**IHRP**). The Trust shall also pay Mrs T £1000 for the serious distress and inconvenience caused.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs T's complaint against the Trust is that she believes she should have been awarded Tier 1 and not Tier 2 benefits.

Background information, including submissions from the parties

4. The Trust is a multi-academy trust currently comprising of six academies, including the School. The School transferred into the Trust with effect from 1 November 2016.

5. Mrs T's IHRP is regulated by Regulations 35 and 36 of the LGPS Regulations 2013 (**the Regulations**). Relevant sections of which are set out in the Appendix.

6. Mrs T has worked at the School since 18 April 2006. She has had a history of back pain and had undergone surgery 20 years ago. Since 2014, Mrs T's back pain has increased significantly due to vertebrae problems.

7. In 2015, Mrs T was referred to the School's occupational health (**OH**) adviser who confirmed that she could not walk or sit for long periods of time or be involved with manual handling or bending to work with small children. The OH adviser recommended that Mrs T returned to work with adjustments. Following her OH assessment, Mrs T was put on an absence management procedure by the Head Teacher, in September 2015, and referred to the Pain Clinic.

8. On 24 September 2015, a Pain Clinic consultant, Dr Sinovich issued a report that concluded:

> "I have scheduled her for bilateral branch blocks from L3-S1- if this does prove of great pain relief, I will then schedule her for a denervation of these levels…"

9. In February 2016, Mrs T went on sickness absence due to lower back pain and was subsequently referred to an OH adviser. In March 2016, OH adviser, Dr Cooper concluded that Mrs T might not be able to return to work for the foreseeable future, but the School could provide additional support that would help her return to work.

10. On 12 April 2016, the OH held a telephone assessment with Mrs T. However, her specialists' and treatment appointments had been delayed at that stage. The OH adviser noted that there had been no improvement with Mrs T's back pain. It scheduled another review in May 2016, at which it concluded there had been no improvement with her back and suggested the consideration of an ill health pension for Mrs T.

11. In May 2016, the School arranged a home visit to meet Mrs T. It was at this meeting that an IHRP was discussed and, a dismissal hearing was scheduled for October 2016.

12. Mrs T was referred to the Scheme's independent registered medical practitioner (**IRMP**), Dr Mason. In her submission, among other reports, Mrs T provided a report from her Consultant in Pain medicine, Dr Pang. He issued a report dated 27 September 2016, that said:

> "Despite a number of treatments including physiotherapy, TENS and acupuncture, her pain was ongoing…Overall, the diagnosis is chronic low back pain from failed back surgery syndrome. She has significant functional limitation, in that the pain restricts her in many daily activities and her work, and she is due to be considered for a trial of spinal cord stimulation to see if it can improve her pain... A spinal cord stimulator may help reduce the intensity of pain such that the programme and its benefits can be maximised; however, there is no guarantee of its success. As far as prognosis, I do not expect the pain intensity levels to change, as the pain has become chronic…The strategies taught by our pain management centre are aimed at helping her cope and manage better rather than reduce the pain intensity…None of our treatments will address the underlying pathology, however, and, our aim is to find ways that she can manage her symptoms rather than cure them."

13. On 10 October 2016, having reviewed numerous medical reports, including that of Dr Pang, Dr Mason issued his report that said:

> "The evidence indicates that [Mrs T's] musculoskeletal symptoms have gradually increased in frequency and severity over the last six years…[Mrs T's] symptoms have progressed to the stage where she has been unable to attend work consistently, as a result of her low back symptoms and bilateral

sciatic symptoms…the latest report…indicates that [Mrs T] is on the waiting list to receive a trial of a spinal cord nerve stimulator. The current level of symptoms create significant functional limitations and restrict her day to day activities, in addition to her workplace activities…The current evidence, in my opinion, indicates that there is unlikely to be any significant change in [Mrs T's] pain intensity levels in the foreseeable future, as these have now become chronic and are associated with sensitisation and self-perpetuation. The strategies…will be to attempt to assist [Mrs T] cope with her ongoing symptoms and manage these better, rather than reduce any pain intensity…In my opinion, therefore, I consider that permanence has been established, in terms of [Mrs T's] ongoing symptoms…There is, however, the potential in my opinion for [Mrs T] to manage her symptoms more successfully in due course. Therefore, in my opinion, the evidence would support a Tier 2 recommendation and I have completed the relevant pension scheme form reflecting this decision."

14. On 14 October 2016, the School held a dismissal meeting with Mrs T. It informed her that following her assessment by Dr Mason, she was awarded Tier 2 ill health pension benefits. Unhappy with the decision, Mrs T said she would be making an appeal against it as she felt she deserved Tier 1. The School also informed Mrs T that she would be dismissed on the grounds of ill health with effect from 31 December 2016.

15. On 20 October 2016, the School sent Mrs T a letter with the minutes from the 14 October 2016 meeting that said:

"Mrs E [Union representative] also informed the Hearing that you would be appealing against the decision of the [IRMP]…Mrs E said that you understood that the appeal process against the suggested Tier 2 is outside of the school's remit…You would present your written appeal to the [Trust]…The [Trust] would be responsible for referring the appeal details on to the [IRMP] for a response."

16. In November 2016, Mrs T appealed by invoking the Scheme's two-stage internal dispute resolution procedure (**IDRP**). In her submission, Mrs T made the following comments: -

- None of the treatments being considered would address the underlying cause of the pain.
- She disputes the fact she would ever be able to undertake gainful employment of 30 hours a week as she is only able to stand without pain for 20 minutes.
- Her condition has become worse over years and she relied on her daughter's help to do some most basic daily activities.
- It has not been considered by the IRMP that Graf ligament procedure has subsequently accelerated the disc degeneration.

17. On 13 December 2016, the Trust sent Mrs T a response under stage one of the IDRP that did not uphold her complaint and concluded:

> "I am now writing to you to inform you that having reviewed all the evidence provided to the Committee at the Staff Dismissal hearing on the 14th October and having carefully considered your appeal and taken into account your representations, I have decided: that the decision made at the original hearing to confirm a Tier 2 Ill Health Retirement has been awarded in accordance with the [LGPS] Regulations 2013, Regulations [sic] 36 which was supported by the Occupational Health Physician was appropriate and so we do not uphold your appeal. This decision has been taken because all the evidence provided at the hearing supported an eventual return to work before your normal retirement age."

18. Mrs T further appealed under stage two of the IDRP, and her appeal was considered by the Administering Authority's Pensions Manager.

19. On 30 December 2016, Mrs T's employment was terminated.

20. On 28 August 2017, the Pensions Manager sent Mrs T a response under stage two of the IDRP that upheld her appeal. He concluded that there was evidence that the decision to award Tier 2 had been made prior to the Staff Dismissal Committee meeting on 16 October 2016; although he noted that this may be a presentational issue. He also said that the decision was made by the IRMP and not by the School, so not made in accordance with the Regulations and suggested that not all relevant evidence had been considered by the Respondent. He therefore recommended that the School reconsidered Mrs T's application.

21. Following the stage two IDRP decision, an Appeal Committee Hearing took place in December 2017. At the meeting, Mrs T reiterated that her condition would never allow her to return to work before pension age and supplied a further report from her GP. The Committee informed Mrs T that it would write to her within the next 7 days to confirm the next steps.

22. In March 2018, Mrs T brought her complaint to the Ombudsman.

23. It was not until 20 June 2018, that the Committee sent Mrs T a response. It explained that it had considered all Mrs T's medical evidence including most recent evidence post-dating the original application date but did not uphold her appeal. The Committee accepted that the 20 October 2016 decision referred to the decision of the IRMP rather than the School's one but now it had fully considered Mrs T's appeal. The key points made by the Committee are as follow: -

    - There is scope for Mrs T to better manage her pain over time, as set out in Dr Pang's report dated 27 September 2016.

- The aim of the management programme is to allow Mrs T to return to enjoying daily activities and does not exclude equipping her with the coping mechanisms to eventually return to undertaking gainful employment before retirement age.

- It is accepted that Dr Mason's advice is that whilst the intensity of Mrs T's pain is likely to remain stable, potential future treatment will assist her in coping and managing pain better.

- It has considered Graf ligament procedure on Mrs T's disc degeneration.

- It does not dispute the impact of Mrs T's ill health on her mental wellbeing however the aim of the pain management programme is to address both physical and psychological impacts of her symptoms.

24. On 22 June 2018, Mrs T appealed against the Committee's decision, thinking she was back at stage one, and she was appealing under stage two. She provided further comments to the Trust. In her appeal, Mrs T said that the Committee should not accept IRMP's opinion blindly, according to the Pensions Ombudsman's approach. Dr Mason's rationale for his decision was unreasonable and not in accordance with the Regulations. The spinal cord stimulator has no guarantee of success especially that her condition is of a chronic nature and has deteriorated. Mrs T was also unhappy with the unreasonable time that the Trust took to deal with her appeal process.

25. On 10 September 2018, the School sent Mrs T a letter confirming that it had already gone through both stages of the IDRP and now she would have to refer her complaint to the Ombudsman. This is because the Committee's decision was considered under stage two. It also accepted that the time taken to reach the final decision, had not helped.

26. In October 2018, the Trust sent us a formal response. It maintained its previous stance. However, it acknowledged unnecessary delays due to the process of transferring the School to a new Trust in December 2016, which may have negatively impacted Mrs T. However, it did not accept that this has resulted in maladministration on its part as it was outside its control and due to various factors.

Adjudicator's Opinion

27. Mrs T's complaint was considered by one of our Adjudicators who concluded that further action was required by the Trust. The Adjudicator's findings are summarised below: -

- The Trust's decision was heavily influenced by the opinion given by the IRMP. It is, therefore, appropriate to consider this in some detail. Under Regulation 35 of the Regulations, the questions the IRMP was required to address were, firstly whether Mrs T was permanently incapable of efficiently discharging her school duties, if so,

secondly whether her capacity for any gainful employment was impaired, and if so, thirdly to what extent it was likely to remain so.

- The conclusions made by the stage two adjudicator in August 2017 were sound. In the Adjudicator's opinion, the Trust did not follow its procedure and regulatory requirements when considering Mrs T's IHRP application. The Adjudicator said this because, in her view the Trust did not ask all the correct questions before making its decision and the decision was made by the IRMP instead of the Trust.

- However, the Adjudicator would expect Dr Mason to provide a medical reasoning for his conclusion on the appropriate Tier such as studies supporting long term prognosis and the likelihood of Mrs T recovering to a sufficient extent to facilitate a return to gainful employment. The Trust should have considered, on balance, the extent to which Mrs T would get better in order to return to work before pension age.

- On the basis of the medical evidence that was actually before it at that time, it could not be said that it was reasonable for the Trust to have decided that Mrs T's condition was not such as to preclude her from being capable of undertaking gainful employment before normal pension age.

- The Adjudicator also noted that the Trust had admitted that there were unnecessary delays in dealing with Mrs T's appeal but did not accept the responsibility for it due to external factors such as the process of transferring the School to the Trust. The Adjudicator appreciated that the School was in the process of transferring to the new Trust. However, it took the Trust nearly two years to deal with the appeal and this must have undeniably caused Mrs T serious distress and inconvenience. The Adjudicator would expect the Trust to have taken some steps to deal with Mrs T's appeal in a more timely manner. In light of the above, she believed that Mrs T deserved an award of £1000, in recognition of the serious distress and inconvenience caused by the Trust's actions. Therefore, it was the Adjudicator's opinion that this complaint should be upheld.

28. The Trust did not accept that it should reconsider Mrs T's application but, it agreed to pay Mrs T's £1000 for the serious distress and inconvenience suffered with regard to the delay in dealing with her application. Therefore, the complaint was passed to me to consider. The Trust provided its further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by the Trust for completeness.

29. The Trust said that as it is not medically qualified, it is required to take advice and guidance from its IRMP. In Mrs T's case, it thought it was reasonable that Dr Mason recommended Tier 2 benefits. It was entitled to prefer the evidence of the IRMP to that of Mrs T's GP. It had made its decision, based on the IRMP's recommendation, to award Mrs T Tier 2 benefits.

Ombudsman's decision

30. It is not my role to review the medical evidence and come to a decision of my own as to Mrs T's eligibility for payment of benefits under the Regulations. I am primarily concerned with the decision making process. Medical (and other) evidence is reviewed in order to determine whether it supported the decision made. The issues considered include: whether the relevant regulations have been correctly applied; whether appropriate evidence has been obtained and considered; whether the correct questions have been asked; and whether the decision is supported by the available relevant evidence.

31. The weight which is attached to any of the evidence is for the Trust to decide (including giving some of it little or no weight). It is open to the Trust to prefer evidence from its own advisers; unless there is a cogent reason why it should not without seeking clarification, fFor example, an error or omission of fact or a misunderstanding of the relevant regulations by the medical adviser. If the decision making process is found to be flawed, the appropriate course of action is for the decision to be remitted for the Trust to reconsider.

32. I agree that it is open for the Trust to place greater weight on advice which it receives from its own medical advisers than it places upon that from a GP. However, it must ensure that any medical advice upon which it places weight has addressed the right questions under the Regulations.

33. I appreciate that the Trust is not a medical professional itself and can only review the medical advice from a lay person's perspective. The same applies for me and my staff. The questions the Trustee might be expected to ask of its medical advisers are only those which a reasonably informed lay person might ask. In order to arrive at a reasonable decision about appropriate tier, the Trust is required to satisfy itself whether or not, on the balance of probabilities the complainant was likely to be able to return to work before normal pensionable age and must be able to provide reasons for that conclusion. Dr Mason's report did not expressly address the requirements of the Regulations and contained no reasoning setting out why he considered Tier 2 conditions were satisfied rather than Tier 1. His opinion that there was 'potential for [Mrs T] to manage her symptoms more successfully in due course' does not provide a view about likely prognosis and does not provide the Trust with the evidence which they need to make the necessary decision about which elements of the Regulations apply to Mrs T's case.

34. With that in mind, I consider there were elements of Dr Mason's advice where the Trust needed to seek clarification before it could make a reasonable decision about which tier was appropriate.

35. I find that the Trust should have asked Dr Mason further questions, specifically with regard to the long term prognosis and the likelihood of Mrs T recovering to a sufficient extent to facilitate a return to gainful employment. The Trust should have then

considered, on balance, the extent to which Mrs T was likely to be able to improve her pain management such that she could return to work before pension age.

36. I find that the Trust has reached a flawed decision in that it has not asked all the relevant questions before reaching a conclusion about appropriate Tier.

37. Therefore, I uphold Mrs T's complaint.

Directions

38. Within 21 days of the date of this Determination the Trust shall:

- ask an IRMP who has not previously advised on Mrs T's IHRP application to seek information from her treating physicians on all her symptoms and conditions and all planned treatments, including any prospects for recovery, before deciding whether she would be able to achieve gainful employment before the normal retirement age and prepare the relevant certificate accordingly;
- then make a fresh decision about whether to award Tier 1 IHRP pension from the LGPS to Mrs T; and
- inform Mrs T of its decision with reasons.
- The Trust shall also pay Mrs T £1000, for the serious distress and inconvenience caused.

Karen Johnston

Deputy Pensions Ombudsman
30 May 2019

Appendix

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…"

36 Role of the IRMP

"(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…"