

Ombudsman's Determination

Applicant	Mrs E
Scheme	Local Government Pension Scheme (LGPS)
Respondent	Derbyshire County Council (the Council)

Outcome

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

Complaint summary

3. Mrs E's complaint concerns the Council's decision to award her an ill-health retirement pension (**IHRP**) at Tier 3, rather than Tier 2 or Tier 1 in April 2017, when she left her employment.

Background information, including submissions from the parties

4. Mrs E's IHRP is regulated by Regulations 35, 36 and 37 of the LGPS Regulations 2013. Relevant sections of which are set out in the Appendix to this Opinion.
5. Mrs E worked for the Council as a Teaching Assistant until her employment was terminated on the grounds of ill health on 25 April 2017.
6. Mrs E was assessed by Occupational Health (**OH**) in July 2016. In her report, dated 7 July 2016, the OH adviser concluded that:

"[Mrs E] was diagnosed with rheumatoid arthritis in 2013. She explained that this is currently being treated with weekly injections and regular medication. She told me that she was last seen by her specialist in January 2016 and it is likely that she will be reviewed again after an interval of twelve months but will continue to have regular appointments with the specialist nurse team...[Mrs E] explained that she had surgery for a blockage in her bowel in 2005 and has continued to experience difficulties as a result of this."
7. Mrs E was subsequently seen twice by an OH adviser for assessment, in October and December 2016. On 12 December 2016, an OH adviser concluded that Mrs E

should be referred for an ill health application. In her submission, Mrs E provided a report from her Consultant Rheumatologist, Dr Mathew, dated 25 November 2016, that said:

“She has been under regular review in the Rheumatology clinic since, and her inflammatory arthritis has remained settled. She was switched from oral to subcutaneous Methotrexate in April 2014 due to nausea. She was last seen in the Rheumatology clinic in February 2016 and her arthritis was inactive on 15mgs of subcutaneous Methotrexate and 200mgs of Hydroxychloroquine. The natural course of Rheumatoid arthritis can be characterised by periods of remissions and flare ups. Effective treatment options are now available to control the inflammatory component of the disease. Her arthritis currently appears settled on disease modifying treatment.”

8. In January 2017, Mrs E was referred to an independent registered medical practitioner (**IRMP**), Dr Sharp, for an assessment. In her report dated 19 January 2017, Dr Sharp said:

“[Mrs E] reports a high level of functional impairment despite her specialist indicating that her arthritic condition is currently stable on her current management plan. Her GP indicates that pain, fatigue and difficulty in using her hands continue to impact on her daily activities...Optimisation of her painkilling medication with the involvement of the pain clinic and [Mrs E] engaging in a robust rehabilitation plan is likely to result in improvement in the level of her functional impairment... there is likelihood of her being able to return to employment over the long timescale to her natural retirement age...her role is physically demanding as a teaching assistant within a classroom and on the balance of probabilities she may have difficulty returning to this role...”

9. Dr Sharp, together with her report, filled in a medical certificate that certified that “because of that ill health or infirmity of mind or body, the employee **IS NOT** immediately capable of undertaking...any gainful employment” however “**IS LIKELY** to be capable of undertaking...any gainful employment...within the next three years (or before his/her normal pension age...if earlier). (Tier 3).” (Original emphasis).

10. On 30 January 2017, the Council sent Mrs E a decision letter that said:

“I write to confirm we have received from the independent doctor formal notification of your incapacity indicating that you meet one of the criteria for ill-health retirement...I am therefore giving you notice to terminate your employment with the County Council on the grounds of ill health from Tuesday 31st January 2017. In accordance with our contract of employment the period of notice to which you are entitled is twelve weeks making your final date of employment Tuesday 25th April 2017...Payment of Tier 3 benefits means that your pension benefits are payable for a maximum of 3 years. Payment of your pension will commence on the expiry of your notice period.”

11. Unhappy with the Council's decision, Mrs E appealed by invoking the Scheme's two-stage internal dispute resolution procedure (**IDRP**).
12. On 18 April 2017, the Council's decision maker sent Mrs E a response under stage one of the IDRP that did not uphold her appeal and added that:

"I can appreciate why at the present time you cannot envisage your health improving sufficiently to enable you to undertake some form of employment in 3 years' time or sooner. However, having read all of the medical reports on your occupational health file very carefully I do not consider that there is anything which is ambiguous, or which contradicts Dr Sharp's opinion that you meet the criteria for Tier 3 ill-health pension benefits."
13. Unhappy with the Council's decision, Mrs E further appealed under stage two of the IDRP.
14. On 21 June 2017, the Council's Pensions and Investments Committee sent Mrs E a response under stage two of the IDRP that said:

"Having considered your application and the regulations relating to ill-health retirement, the Committee upheld the ... decision made at Stage 1...As you have been awarded Tier 3...the payment of your pension benefits has been arranged to commence from the termination of your employment. After a period of 18 months in payment, your employer will arrange to review the payment of your Tier 3 pension and must obtain a further certificate...the scheme regulations also allow you to ask the County Council to review your case once you are in receipt of Tier 3 ill-health benefits..."
15. In July 2017, Mrs E contacted the Council via email to request another health assessment due to the fact that her health condition had deteriorated.
16. In August 2017, the Council emailed Mrs E to inform her that she could submit further medical evidence/reports to show that her condition had deteriorated since the initial decision was made. It said she must include a covering letter stating that she is in receipt of Tier 3 benefits, and further medical evidence including a report from her Consultant Rheumatologist dated 6 October 2017, that confirmed her condition had deteriorated and that her dose of medication had been increased. Following her submission, Mrs E's case was referred to Dr Sharp for re-consideration.
17. On 20 October 2017, Dr Sharp issued a report that said:

"I understand that she has had a further flare-up of her arthritis as indicated in a letter from her general practitioner which I understand has been requested by Mrs E dated 21 July 2017. Her GP at that stage, indicated that the statement that she was in remission in June 2016 was no longer valid and an attached outpatient letter dated 19 June 2017 indicated that she was currently experiencing a flare-up of her joints secondary to her arthritis...but on review in August 2017, on the higher dose of medication, her joints appear to have

once again settled. He notes that although she has recently had a flare of her symptoms, clinical evidence of joint inflammation was relatively mild...The additional information both from her general practitioner in July 2017 and her specialist in October 2017 has not indicated that the situation has changed and as the natural course of her arthritis remains periods of remissions and flare-ups which does appear to have been the case over the last few months. My opinion remains that she is likely to be capable of alternative gainful employment."

18. In March 2018, Mrs E brought her complaint to this Office.

Adjudicator's Opinion

19. Mrs E's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council. The Adjudicator's findings are summarised below:-

- Dr Sharp certified that Mrs E was unlikely to be immediately capable of undertaking any gainful employment, however she was likely to be capable of undertaking gainful employment within the next three years, as required by Regulations 35 and 36. Dr Sharp also said that Mrs E's condition could be characterised by periods of remissions and flare ups and was manageable with the right doses of medication.
- Mrs E disagreed with Dr Sharp's assessment and provided her GP's opinion to support it. However, a difference in medical opinion between an IRMP and GP is not sufficient for the Ombudsman to say that the Council's preference for Dr Sharp's opinion was flawed.
- Under Regulation 37, a member, once in receipt of Tier 3 benefits, may ask the Council to review its decision. I note that Mrs E made that request and that the Council allowed her to submit further evidence for the review. So, the Council made its final decision based on Dr Sharp's supplementary report dated 20 October 2017, which made reference to the latest GP's report. As such, the Adjudicator was of the view that the Council had considered all the relevant evidence and abided by the Scheme's Regulations. Therefore, the Adjudicator did not uphold Mrs E's complaint.

20. Mrs E did not accept the Adjudicator's Opinion and in response said:

- Her current health condition has deteriorated. She doesn't understand why Dr Sharp deems her fit to work when she is in constant pain, has brain fog and is depressed. Mrs E provided a report from her Consultant Rheumatologist dated 28 November 2018.
- Dr Sharp has acknowledged all the health conditions in her reports but ignored her GP's report.

21. The complaint was passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs E for completeness.

Ombudsman's decision

22. It is my view that Dr Sharp's report took into account relevant medical evidence and considered all Mrs E's medical conditions. Dr Sharp covered all the necessary requirements and provided the Council with a comprehensive opinion in order for it to reach a decision. I have not seen any evidence to show that it did not review any aspect of Mrs E's concerns or medical conditions. I appreciate that Mrs E disagrees with the Council's decision not to grant her Tier 2 or Tier 1 IHRP. However, Mrs E's disagreement is not a sufficient reason for me to remit the matter back to the Council for her IHRP application to be reconsidered.
23. Mrs E has provided a report from her Consultant Rheumatologist dated November 2018. However, I do not consider that this evidence should alter the view that the Council had taken because that opinion was provided, as it acknowledges, only in retrospect. At the time the Council made its decision on Mrs E's IHRP application, its view was properly supported by different evidence.
24. I find that, based on the evidence that had been presented to the Council, it had considered the relevant factors in arriving at its decision not to grant Mrs E Tier 2 or Tier 1 IHRP. There are no justifiable grounds for me to find that the Council's decision was perverse or that the process it undertook in reaching its decision was flawed.
25. Therefore, I do not uphold Mrs E's complaint.

Anthony Arter

Pensions Ombudsman
16 January 2019

Appendix

LGPS Regulations 2013 (SI 2013/2356)

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.

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.

(2A) For the purposes of paragraph (2) an IRMP is not to be treated as having advised, given an opinion on or otherwise been involved in a particular case merely because another practitioner from the same occupational health provider has advised, given an opinion on or otherwise been involved in that case.

(3) If the Scheme employer is not the member's appropriate administering authority, it must first obtain that authority's approval to its choice of IRMP.

(4) The Scheme employer and IRMP must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation and regulations 37 (special provision in respect of members receiving Tier 3 benefits) and **38** (early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members).

37 Special provision in respect of members receiving Tier 3 benefits

(10) A Scheme employer may, following a request for a review from a member in receipt of Tier 3 benefits or within 3 years after payment of Tier 3 benefits to a member are discontinued, make a determination to award Tier 2 benefits to that member from the date of the determination, if the employer is satisfied after obtaining a further certificate from an IRMP, that the member is permanently incapable of discharging efficiently the duties of the employment the member was engaged in, and either—

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

(b) 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.