PO-22508

Ombudsman's Determination

Applicant	Mrs G
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondent	City of Bradford Metropolitan District Council (**the Council**)

Outcome

1. I do not uphold Mrs G's complaint and no further action is required by the Council.

Complaint summary

2. Mrs G's complaint concerns the Council's decision not to award her an ill health retirement pension (**IHRP**) from active status.

Background information, including submissions from the parties

3. Regulations 35 and 36 of the Local Government Pension Scheme 2013 (SI 2013/2356) (as amended) (**the Regulations**), apply to ill health retirement from active status. Relevant sections of the Regulations are set out in Appendix 1.

4. Mrs G worked for 38 years as a Support Assistant for the Council.

5. Around May 2014, Mrs G started suffering from bilateral shoulder pain and attended physiotherapy. In June 2014, the Council referred Mrs G to Occupational Health (**OH**) for an assessment.

6. In his reports, dated June and August 2014, the OH doctor, Dr Suleman, said:

> "Mrs G is likely to be suffering with fibromyalgia but she is likely to get confirmation of this next week…She is currently not fit for work and I cannot envisage her being in a position to return to work within a reasonable time period."

7. Mrs G continued being on sickness absence and on 31 March 2015, the Council wrote to her confirming the outcome of a long-term sickness welfare meeting. It said that Mrs G had now been absent since June 2014, her current sick note was due to expire on 1 May 2015 and the next OH referral was going to be arranged soon.

8. On 19 May 2015, Mrs G's GP, Dr Passant, wrote to OH listing her current conditions. He said that her main problem was multiple joint pain which had started in December 2013. He also said Mrs G was currently being assessed by the local musculoskeletal team and referred to the local Pain Rehabilitation Clinic.

9. In her report dated 2 June 2015, the OH doctor, Dr Brain, recommended that the Council provide suitable work adjustments such as a work-station risk assessment, specialist ergonomic assessment and flexibility of working hours. Dr Brain said that it was premature to consider that Mrs G's condition "may be permanently incapacitating her from the substantive role."

10. Between July and September 2015, the Council tried to arrange Mrs G's work assessment for when she was going to return to work. In September 2015, Mrs G chased the Council for an update regarding her work assessment appointment. The Council informed Mrs G that it was arranged for 9 October 2015.

11. On 4 September 2015, the Council had emailed OH asking for an up-to-date report on Mrs G's condition. Following the work assessment, OH emailed the Council saying it still supported the recommended work adjustments for Mrs G, however it was for the Council to decide. It also informed the Council that Mrs G had cancelled her physiotherapy assessment.

12. On 26 November 2015, in the Council's referral note to OH, it said that Mrs G's sickness absence was continuing despite Dr Brain's opinion that she was fit to return to work in June 2015. It said that anxiety appeared to be:

> "…the main obstacle and the stress factors identified outstanding. To deal with these Mrs G has been offered a different role in the service…in addition a phased return to help deal with the anxiety has been discussed…".

13. In January 2016, Mrs G was referred to Dr Brain for an assessment. In her report dated 6 January 2016, Dr Brain recommended medical redeployment. Relevant extracts from the report are set out in Appendix 2.

14. On 15 January 2016, Mrs G emailed the Council saying that she had been advised not to put herself on the redeployment register:

> "…as [she] did not realise that [she] would subsequently lose [her] job if [she] was not successful in finding a post, [she] would just be dismissed which seems very unfair in the circumstances."

15. On 5 February 2016, the Council emailed OH saying that Mrs G had not consented to the release of Dr Brain's report dated 6 January 2016. Between February and April 2016, there was correspondence between Mrs G, the Council and OH regarding Dr Brain's report. Mrs G asked Dr Brain to add the reason why she was unable to return to her post. In Mrs G's opinion, this was because "the reasonable adjustments that [she has] requested to help [her] return have all been declined by management."

16. Following Mrs G's request, Dr Brain subsequently added that paragraph as an addendum. Mrs G did not return to work or take a medical redeployment; and on 6 May 2016, the Council terminated her employment on the grounds of capability.

17. On 30 August 2016, Mrs G raised an appeal against the Council's dismissal decision, under the Scheme's two-stage Internal Dispute Resolution Procedure (**IDRP**). She said the reason for the dismissal should have been ill health and not capability. Mrs G also wrote to Dr Brain saying she had never provided her with a reason why she was not eligible for an IHRP.

18. On 1 September 2016, Dr Brain wrote to Mrs G providing further comments. Relevant extracts from the letter are set out in Appendix 2.

19. Between September 2016 and July 2017, the stage one decision-maker made enquiries with the Council regarding Mrs G's dismissal and the ill health retirement. The Council informed the stage one decision-maker that:

> "…Mrs G had refused the offer of a move to another department and declined mediation, both of which may have facilitated a return to work and Mrs G had openly stated that she wanted to work for a particular manager, therefore confirming that she accepted that she was fit for work. Her perceived breakdown in her relationship with her line manager was the actual reason for her absence, not any medical condition and therefore Mrs G could not have met the criteria for ill health retirement."

20. In July 2017, the stage one decision-maker sent Mrs G a decision that upheld her appeal and said:

> "…Mrs G was referred to the Council's Employee Health & Wellbeing department where a medical assessment was carried out by Dr Brain…who is a registered medical practitioner. The evidence shows that Dr Brain had previously been the consulting physician involved in Mrs G's case. [The Council] has been unable to provide a duly completed medical certificate…therefore I am referring Mrs G's case back to the council instructing them to arrange for a medical assessment to be carried out… by an independent registered medical practitioner [**IRMP**] who has not previously been involved in her case…"

21. On 16 August 2017, OH wrote to Mrs G's GP for up-to-date medical evidence. In her submissions, Mrs G provided medical reports from her GP, Dr Passant, Physiotherapist, Ms Marsden, and Consultant Gynaecological Oncologist, Dr Hudson.

22. On 18 December 2017, the IRMP, Dr Chauhan, issued his report. He considered the medical evidence dated up to 6 May 2016, the date when Mrs G's employment was terminated. He was of the opinion that Mrs G was not eligible for an IHRP as at 6 May 2016, because with work adjustments suggested by Dr Brain, she "would be expected to improve gainful work ability." Relevant sections of the report are set out in Appendix 2.

23. On 19 February 2018, the Council sent Mrs G a revised decision letter, following the IRMP's opinion. It said that the IRMP had issued the required certificate and applied the criteria under the Scheme regulations correctly. The Council had considered the IRMP's opinion and it had decided to uphold its original decision not to award Mrs G an IHRP.

24. In March 2018, Mrs G appealed the Council's decision. Her main points were:-

- The Council's decision to terminate employment without any updated medical evidence and no certificate was wrong.
- Dr Chauhan's opinion was wrong. He should have requested updated medical evidence.
- At the time when Dr Brain issued her report, Mrs G was in a "terrible mental state".
- Perception and the relationship breakdown with the Council was used against her in the decision-making process.
- She did not believe the correct questions had been asked by the Council about her health.

25. On 17 April 2018, the stage one decision-maker sent Mrs G a holding letter acknowledging her appeal.

26. In August 2018, the stage one decision-maker made enquiries with the Council regarding Dr Chauhan's report. The Council said that there was a typographical error in his report dated 18 December 2017. Reference to a management referral on 26 November 2016 should have read 26 November 2015.

27. On 10 October 2018, the stage one decision-maker sent Mrs G his decision that he did not uphold her appeal. He said:

> "I have carefully considered the evidence, along with your comments as part of appeal and I have determined that [the Council] referred your case back to Employee Health & Wellbeing, as instructed. A medical assessment was carried out, by an [IRMP], based on the information available as at the date of your leaving, along with a further medical report from your GP, dated 2nd November 2017. The appropriate medical certificate (RTM) was completed, as required…I am satisfied that [the Council] did act in accordance with the appropriate procedures, therefore, I must turn down your appeal."

28. Mrs G appealed the IDRP stage one decision in October 2018. In her submissions, Mrs G said that she had a permanent medical condition that "more likely than not renders [her] incapable of discharging efficiently the duties of the relevant employment." She also said that Dr Chauhan had not fully considered her doctors' reports and had not provided any reasoning for his opinion. As a result, she believed the Council's decision was flawed as it was based on a flawed report.

29. On 22 February 2019, the stage two decision-maker sent Mrs G her decision, not upholding her final appeal. The decision-maker said:-

- Before the Council could award Mrs G an IHRP, it must first be satisfied that as a result of her ill health, she was permanently incapable of discharging efficiently the duties of her former employment.
- The Council would then need to determine that as a result of ill health "or infirmity of mind or body", Mrs G was not immediately capable of undertaking any gainful employment.
- After taking account of the available evidence and reading the report from Dr Chauhan, she was satisfied, that the Council had followed the correct process and regulatory requirements.
- In order to satisfy the criteria under the Regulations, Mrs G had to exhaust all the treatment options made available to her to no avail.
- Since her employment ended, she had been diagnosed with further medical conditions. In order to consider all her medical conditions, she might wish to apply for an IHRP as a deferred member of the Scheme.

Adjudicator's Opinion

30. Mrs G'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:-

- Members' entitlement to benefits when taking early retirement due to ill-health are determined by the scheme rules or regulations. The scheme rules or regulations determine the circumstances in which members are eligible for ill-health benefits, the conditions they must satisfy and the way in which decisions about ill-health benefits must be taken.
- In Mrs G's case the relevant regulations were Regulation 35 and 36 (see Appendix 1). Regulation 36 states that: "A decision as to whether a member is entitled under Regulation 35…to early payment of a retirement pension…shall be made by the Scheme employer…" In this case, the Council, as Mrs G's employer, was the decision-maker.
- The Council, after obtaining a certificate from an IRMP, needed to consider Mrs G's IHRP application in line with the Scheme's Regulations and properly explain why her application could, or could not be approved. It must ask the right questions and consider only relevant information before reaching a reasonable decision.

- Regulation 35(3) and (4) of The Local Government Pension Scheme Regulations 2013 state that:

  "(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."

- If Mrs G met the two conditions, the Council could then consider which tier of benefits she should receive. The tier of benefits awarded depended on the likelihood of Mrs G being capable of undertaking gainful employment at some time before her normal pension age.

- The Adjudicator noted that the stage one decision-maker upheld Mrs G's first appeal. He concluded that her assessment for an IHRP was not conducted in accordance with the Regulations. This was because the OH doctor, Dr Brain, did not issue a medical certificate and had previously been involved with Mrs G's case. The decision was remitted back to the Council for reconsideration. So, the key documents in Mrs G's application were Dr Chauhan's report and the Council's decision based on his report.

- Dr Chauhan was required to consider the medical evidence up to the date Mrs G's employment ended, which was 6 May 2016. This was because she applied for an IHRP as an active member of the Scheme. So, all the medical evidence post-dating her employment could not be considered by Dr Chauhan. Dr Chauhan's opinion was that, with the work adjustments previously suggested by OH, Mrs G would be expected to have improved gainful work ability. He concluded that Mrs G would not have met the criteria for an IHRP because, in May 2016, with appropriate workplace adjustments, she was not unfit to return to her post. In the Adjudicator's view, Dr Chauhan's opinion was reasonable as it was in line with OH's recommendations at the time when Mrs G's employment was being terminated.

- Mrs G disagreed with the IRMP's assessment and said that he had not considered all the medical evidence. The Adjudicator considered Dr Chauhan's report carefully and was satisfied that the IRMP had considered all the relevant medical evidence which was available at the time Mrs G's employment was terminated.

- The Council made its final decision based on the IRMP's report. While the Council could be expected to actively review Dr Chauhan's report, it was only expected to do so from a lay perspective. It was not expected to challenge a medical opinion and the Adjudicator could not see any reason for it to have queried the content of Dr Chauhan's report.

- The Adjudicator noted that Mrs G's medical evidence post-dating the original application, suggested that her health condition had not improved, and her

fibromyalgia symptoms had persisted. While the Council could not consider this evidence in its decision-making process, it correctly advised Mrs G that she could apply for an ill health pension from deferred status. Mrs G could then submit all medical evidence that was available after she left employment.

- In the Adjudicator's view, the Council considered all the relevant evidence and abided by the Regulations. It considered the relevant factors in arriving at its decision not to grant Mrs G an IHRP from active status. There were no grounds for the Adjudicator to say that the Council's decision was flawed or that the process it undertook in reaching its decision was incorrect.

- It remained open for Mrs G to apply for ill health retirement from deferred status. Consequently, it was the Adjudicator's opinion that this complaint should not be upheld.

31. Mrs G did not accept the Adjudicator's Opinion and in response made the following points:-

- She was not offered any mediation or redeployment other than the same job in the same office, on the same floor.

- Following Dr Brain's recommendation for redeployment, she could not carry out her duties as normal due to struggling with sitting for short periods of time.

- She was not happy with the work adjustments offered, which were a chair and footstool that she previously had, but which did not help.

- She refused the physiotherapy appointment as her manager arranged for her to "sit in the middle of the office" to have her assessment. She was also "so fragile with [her] emotions on top of the physical pain, she could not face being questioned by colleagues."

- Her union representative advised her to cancel her physiotherapy appointment and ask for it to be rearranged.

- She referred to the actions of her manager at the time, concerning work shifts and said other colleagues whose situation was similar, were treated better than her. She thinks her manager did not believe her health condition was "real".

- She referred to Dr Brain's report and reiterated that Dr Brain did not have up to date medical evidence in her assessment. She said that HR and management did not know the right process for an IHRP.

- Dr Brain did not get a form completed by HR or her manager which would have helped in the process to discuss ill health. Therefore, the Council did not know the right process.

32. As Mrs G did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. Mrs G provided her further comments which I note but they do not change the outcome, I agree with the Adjudicator's Opinion.

Ombudsman's decision

33. In order to receive an ill health pension under Regulation 35, Mrs G must satisfy the conditions set out in that Regulation. In particular, Mrs G must be: permanently incapable of discharging efficiently the duties of her employment with the Council; and not immediately capable of undertaking gainful employment.

34. The decision as to whether Mrs G satisfied the conditions of Regulation 35 was for the Council to make, having first sought an opinion from an IRMP. It is not my role to review the medical evidence and come to a decision myself as to whether Mrs G is eligible for an ill health pension under Regulation 35. My concern is with the decision-making process undertaken by the Council. If I find that decision-making process to be flawed, I can direct the Council to reconsider its decision.

35. Mrs G referred to Dr Brain's report, however her report must be put aside. Following the IDRP stage one decision, the decision-maker sent Mrs G's application back to the Council for reconsideration. This is because the decision-maker found flaws in the decision-making process. In accordance with the Regulations, the Council obtained another opinion from a new IRMP, Dr Chauhan. Dr Chauhan advised that, in his opinion, with the work adjustments previously suggested by OH, Mrs G would be expected to have improved gainful work ability. He concluded that Mrs G would not have met the criteria for an IHRP in May 2016, because with appropriate workplace adjustments at that time, she would not have been unfit to return to her post.

36. The desirability of obtaining further medical reports is largely down to the IRMP's own professional judgment and is not required by the Regulations themselves. I find that Dr Chauhan had sufficient, appropriate evidence that was available at the time Mrs G's employment was being terminated, on which to base his advice.

37. The Council is not bound by the opinion it receives from an IRMP, but it is entitled to rely on the opinion in reaching a decision; unless there is a good reason why it should not do so. Examples of reasons why the Council might not accept the IRMP's opinion include errors or omissions of fact, or a misunderstanding of the Regulations. I have found no reason why the Council should not have relied on Dr Chauhan's report, when considering Mrs G's IHRP application.

38. Mrs G has commented on the way in which certain matters were handled by her employer regarding redeployment, mediation, work adjustments. These issues are employment matters and fall outside of my remit. I have not considered them in any detail and will not comment on them further.

39. I do not find the Council's decision-making process to be flawed, and I do not uphold Mrs G's complaint.

Anthony Arter

Pensions Ombudsman
12 January 2021

Appendix 1

The Local Government Pension Scheme 2013 (SI 2013/2356) (as amended)

40. Regulations 35, 'Early payment of retirement pension on ill-health grounds: active members', provides:

> "(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."

41. Regulation 36, ‘Role of the IRMP’, provides:

> “(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).”

Appendix 2

Medical evidence

42. In her report dated 6 January 2016, Dr Brain said:

> "The previous advice and recommendations from the report of 2nd June 2015 are still relevant to the situation. I had sensitive but open discussions with Mrs G, and she acknowledges that realistically she is not likely to return to work in her previous substantive role. Given this, and her difficulty in being able to even consider mediation due to her current symptoms. I think it would be reasonable to support a medical redeployment, as detailed in the final paragraph of my previous report."

43. In her letter to Mrs G dated 1 September 2016, Dr Brain said:

> "My understanding following both meetings with you had been that you were keen to consider return to work, in some capacity, assuming that reasonable adjustments were to be considered. I documented at the close of the consultation that we had discussed medical redeployment, and that you were of the timescales and limitations of this (sic). My rationale for this was that I was of the opinion that you may be fit for work in some capacity, and that organisational issues were providing significant barrier to you returning to work
>
> I think it is important to clarify, that ill health retirement is a decision that is made by the employer and pension trustees. It is not for an [OH] department to determine this, but make recommendations as required. My understanding from our initial consultation of 2 June 2015, and our subsequent meeting on 6 January 2016 was that preference was to return to work in some capacity, but not necessarily within that department."

44. In his report dated 18 December 2017, IRMP, Dr Chauhan said:

> "I was asked to review [Mrs G's] case notes up until the date of termination of her employment (3 May 2016), and provide my opinion whether she may have been a candidate for ill health retirement at the time. For the purpose of this assessment, I have intentionally disregarded any clinical information received after the above date and I will attempt to provide my opinion based on the contemporaneous evidence.
>
> I have taken into consideration the previous occupational health records, but more specifically, the management referral dated 26 November 2016, and occupational health reports from Dr G Brain dated 2 June 2015 and 6 January 2016.
>
> In summary, [Mrs G] had described perceived work related issues and breakdown in the relationship with her employer as the main barrier to

returning to work. She could not foresee a return to work in the same work environment, and consequently, redeployment to another position was suggested as a potential option.

[Mrs G] had also complained of body ache and multiple joint pain, which was understood to cause some functional restriction, but it was suggested by her at the time that she was managing most of her normal household chores by self pacing herself.

OPINION AND RECOMMENDATION

Based on the review of her case notes and previous occupational health records, I am of the opinion that [Mrs G] would not have met the criteria for early release of her pension benefits on the grounds of ill health on or prior to the date of her dismissal. I am also of the opinion that with the work place adjustments as suggested by Dr Brain, which in most cases (including hers), would be expected to improve gainful work ability.

I have completed an ill health certificate to reflect my opinion."