PO-24573

Ombudsman's Determination

Applicant	Mrs Y
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondent	Shropshire Fire & Rescue Service (**SFRS**)

Outcome

1. Mrs Y's complaint is upheld and to put matters right SFRS shall reconsider Mrs Y's application for an ill health retirement pension (**IHRP**).

Complaint summary

2. Mrs Y's complaint concerns SFRS' decision not to award her an IHRP from active status.

Background information, including submissions from the parties

3. The relevant IHRP Regulation concerning Mrs Y's ill health application is Regulation 20 of the LGPS Regulations 2007. Relevant sections of which are set out in the Appendix.

4. Mrs Y worked for SFRS for 23 years, and her final position was a Watch Manager in Fire Control. She had been on sickness absence from November 2011 due to a bowel condition and was seen by occupational health (**OH**) for assessments.

5. On 14 August 2012, following a meeting to discuss Mrs Y's sickness absence, SFRS wrote to her and said:

> "We looked at the most recent report from Dr Ferriday [OH] following your visit on 26 July 2012. I expressed my concern regarding your 'unwillingness to engage with possible workplace adjustment that could facilitate a phased return to work'…You also expressed concern and…assured us this was a misinterpretation of your conversation and that you are very willing to engage with us in looking at a means of returning to work…We discussed your current medical condition and I recognise that we need further information from your GP which you expected to further inform Dr Ferriday to allow her to make a definitive decision regarding your ability to return to your duties."

6. In November 2012, Mrs Y was assessed by an OH doctor, Dr Ferriday who concluded in her report that:

> "Mrs Y remains unwilling to return to work because of the unpredictability of her bowel condition…There are possible adjustments that could be considered e.g. having Mrs Y's workstation close to toilets, taking medication such as codeine or loperamide of (sic) such an event, although her GP has indicated that she has suffered side effects from medication tried to date, and possibly resorting to incontinence aids. Unfortunately, Mrs Y remains unwilling to try such modifications. My opinion in this case remains unchanged, it is unlikely that Mrs Y would comply with the requirements of an early ill health retirement."

7. In November 2012, SFRS sent Mrs Y a letter following another sickness absence review. It explained that a number of options had been discussed with Mrs Y such as work adjustments, alternative posts within Fire Control with a designated adjoining toilet facility for her sole use and redeployment to another role. However, Mrs Y said that "rather than to cause upheaval it would be better for her to retire."

8. In December 2012, SFRS sent Mrs Y a termination of employment letter that said:

> "We also considered a further report from [OH] following your appointment on 15 November. This report referred to further investigations into your prognosis and work capability into the future, which would involve requesting a report from your gastroenterologist. You stated that this could take some time and that the outcome was likely to remain inconclusive. With this being perceived to be the case, you confirmed your preference would be for us to consider your position based solely on the information available to us at this time…I concluded that, having considered all options available, you will be unable to fulfil your contract with the Service for the foreseeable future. It is with much regret that your contract will therefore be terminated on the grounds of capability."

9. Mrs Y's last day of employment was 11 December 2012.

10. On 20 July 2014, having turned age 60, Mrs Y started receiving her pension benefits on the standard basis.

11. In February 2015, Mrs Y contacted SFRS asking it to re-consider the reason for the termination of her employment and her entitlement to an IHRP due to her ongoing poor health. SFRS subsequently agreed and referred Mrs Y for an assessment with an Independent Registered Medical Practitioner (**IRMP**), Dr Knightingale.

12. On 16 April 2015, Dr Knightingale issued his report that said:

> "My professional medical opinion is that Mrs Y is permanently unfit for her previous role, namely that of Watch Manager, and the date of permanence [was] 23 March 2015. The rationale for awarding permanence is due to the

> fact that she would not have ease of access to a lavatory as frequently and /or for whatever duration required in that role…I have therefore requested the deferred [IHRP] certificate to complete it accordingly to that effect. I am aware that Mrs Y was dismissed on capability grounds in December 2012. She is not eligible for [an IHRP] backdated to that date due to the fact at the time investigations were ongoing as well as further treatment being required, thus permanence had not been established. Furthermore, with hindsight, given the further investigations and treatment, it could not retrospectively be said that permanence was there in December 2012."

13. In May 2015, SFRS sent Mrs Y a letter explaining that at the time of her employment being terminated, there were still further tests to be done. Therefore, its decision was that Mrs Y was not eligible for early release of her pension and, she had accepted that decision. Following receipt of that decision, Mrs Y could have made an application for an IHRP from deferred status. However, it was never intended for potential future applications to be backdated to the date the member's employment was terminated.

14. SFRS explained that when Mrs Y made her request for retrospective assessment, it was not aware that she was already in receipt of her deferred benefits, so, SFRS started the process for her. Had it known that Mrs Y was already in receipt of her deferred benefits, it would not have referred her for an assessment with an IRMP as the option to apply for deferred ill health pension benefits was no longer available to her.

15. In October 2015, Mrs Y's solicitors (**the Solicitor**), contacted SFRS on her behalf and asked it to pay Mrs Y an IHRP from December 2012. The Solicitor argued that SFRS:-

    - Put undue weight on OH's advice not to refer Mrs Y to an IRMP for assessment.
    - Failed to obtain an IRMP's certificate before deciding to dismiss her on the grounds of capability.
    - Delayed making a decision which resulted in Mrs Y's sick pay being reduced by half.

16. On 1 December 2015, SFRS responded to the Solicitor, saying that the appeal would be dealt with under the LGPS' internal dispute resolution procedure (**IDRP**).

17. On 5 January 2016, SFRS sent Mrs Y a response under stage one of the IDRP not upholding her complaint. It made the following points:-

    - The OH doctor's opinion was that Mrs Y was not eligible for an IHRP as she was awaiting further tests and she could work with adjustments.
    - A number of options were discussed with Mrs Y such as phased return on modified duties, redeployment to another post within the Fire Control unit and

redeployment to posts outside SFRS. However, none of those were accepted by her.

- The fact that Mrs Y had already been in receipt of pension benefits from age 60 meant that she was no longer eligible to apply for deferred ill health pension benefits.
- Mrs Y did not appeal being dismissed on the grounds of capability at the time.
- Mrs Y should have appealed the decision not to award her an IHRP in December 2012, within six months of that decision. However, SFRS had agreed to review that decision despite it being out of time.

18. Unhappy with the stage one IDRP response, the Solicitor further appealed, on Mrs Y's behalf, under stage two of the IDRP. In April 2016, SFRS sent Mrs Y the stage two IDRP decision, upholding her complaint. It concluded:

> "The 2007 Regulations are clear that before making a determination under regulation 20 an employer must obtain a certificate from an [IRMP]…[SFRS] have a report from an authorised IRMP but do not have the certificate that the regulations require. Also the report of 16 April 2015, states the IRMP has been asked to undertake a deferred Ill Health deliberation not an active member opinion. So, though it is clear SFRS made an informed decision that they felt you did not satisfy the conditions laid out in Regulation 20, on the basis that they felt they had enough medical advice on this case, their decision is flawed as they did not obtain a certificate from an IRMP…I refer your case back to your Employer's HR department for them to make a decision in line with the…regulations after obtaining a certificate from an [IRMP]…"

19. SFRS referred Mrs Y's case to a new IRMP, Dr Richards, who in his report, dated 3 July 2016, said:

> "In my opinion, Ms Y who is almost aged 62 appears to have been suffering from many years (sic) a bile salt malabsorption (BAM) and she had to seek out the diagnosis herself…I do consider that based on the available evidence Ms Y would have been totally incapacitated, as far as employment was concerned in her previous role with the Local Authority. I would therefore support her request for ill health retirement under the Local Authority Pension Scheme from 11 December 2012. I do also consider that despite appropriate medical treatment she would not have been able to obtain suitable gainful employment…and that she would in all probability have qualified for ill health retirement under Tier 1 of the LGPS (Amended) Regulations 2008. Ultimately it is up to the employer to decide on ill health retirement and the appropriate Tier, based on the advice above…"

20. In an email dated July 2016, SFRS wrote to the Solicitor saying:

> "…since 2012 the Service has switched its Occupational Health advisers from its previous adviser Working Well to Shropshire County Council. It has transpired that not all OH files, in particular those for former employees at the time of the change, were transferred to the Council. We therefore need Mrs Y to sign the attached release form to allow the Council's OH Team to obtain Mrs Y's records from Working Well to provide to the IRMP."

21. In August 2016, SFRS referred Mrs Y's case to another IRMP, Dr Yusuf, who concluded in his report, dated 25 September 2016, that Mrs Y was "NOT permanently incapable of discharging the duties of her role because of ill health." He said that Mrs Y could have recovered from her bowel condition with reasonable adjustments such as close access to a toilet. Dr Yusuf further added:

> "I cannot say how long such a recover (sic) might have taken…I believe that these conditions were treatable and a return to her normal role of watch commander, with reasonable adjustments, was a realistic possibility within a reasonable period of time."

22. On 6 October 2016, SFRS sent Mrs Y a decision letter (**the October decision**) that referred only to Dr Yusuf's report. Based on this report, it made a decision not to award Mrs Y an IHRP. It said that the IRMP's findings were consistent with the OH reports prior to the termination of her employment. However, it recognised that "the process had involved some complex issues…and had taken some time to resolve" and for that, it offered Mrs Y £500 compensation.

23. In response to the October decision, the Solicitor raised his concerns with SFRS. He said that Dr Yusuf's report was based on limited information and that he understated the severity of Mrs Y's condition. The Solicitor also expressed dissatisfaction with the fact that SFRS purely relied on Dr Yusuf's opinion without making its own decision. It asked SFRS for Mrs Y's case file under a subject access request.

24. SFRS declined to deal with Mrs Y's appeal against the October decision on the grounds that she was out of time to appeal.

Adjudicator's Opinion

25. Mrs Y's complaint was considered by one of our Adjudicators who concluded that further action was required by SFRS. The Adjudicator's findings are summarised below:-

    - Members' entitlements 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 which they must satisfy, and the way in which decisions about ill-health benefits must be taken.

- In Mrs Y's case, the relevant regulation is Regulation 20 of the 2007 Regulations (see the Appendix).

- To be eligible for benefits under Regulation 20, Mrs Y must pass a two-part test. Namely, on the balance of probabilities, Mrs Y must be:

  - permanently incapable of discharging efficiently the duties of her employment with SFRS; and

  - have a reduced likelihood of being capable of undertaking any gainful employment before her normal retirement age.

- The decision as to whether Mrs Y was entitled to receive payment of her benefits on the grounds of ill health was for SFRS to make after obtaining the certified opinion of an IRMP. Having obtained an opinion from an IRMP, SFRS needed to consider it along with any other relevant evidence, such as medical reports from other doctors. If Mrs Y met the two conditions, SFRS could then decide which tier of benefits she should receive. The tier of benefits awarded was dependant on the likelihood that Mrs Y would be capable of undertaking gainful employment at some time before her normal pension age.

- The weight attached to any of the evidence was for SFRS to decide and it was open to SFRS to give more weight to the advice that it received from the IRMP. However, SFRS should not accept the IRMP's opinion blindly. It is generally the case that the person making the decision at this stage is not medically qualified. Nevertheless, SFRS was expected to actively review the IRMP's opinion. For example, it should have satisfied itself that the IRMP had applied the correct eligibility test, considered the relevant medical evidence and explained his/her opinion.

- The Adjudicator noted that Mrs Y's complaint was upheld at stage two of the IDRP. The decision maker rightly said that SFRS had dismissed Mrs Y on the grounds of capability due to ill health without proper consideration being given to awarding her an IHRP. In effect, SFRS had made a decision under Regulation 20 without having first obtained a certified opinion from an IRMP. It had relied on advice from its own OH adviser that Mrs Y was not eligible for ill health retirement. SFRS should have obtained an appropriate certificate from an IRMP before deciding that Mrs Y was not eligible for an IHRP.

- SFRS subsequently referred Mrs Y to an IRMP, Dr Richards. In his July 2016 report, Dr Richards concluded that she "would have been totally incapacitated as far as employment was concerned in her previous role with the Local Authority". He recommended Tier 1 benefits that should have been backdated to last day of employment which was 11 December 2012.

- SFRS then referred Mrs Y to another IRMP, Dr Yusuf. In his report dated September 2016, Dr Yusuf expressed the opinion that Mrs Y was "NOT permanently incapable of discharging the duties of her role because of ill health."

This is because she might have recovered from her bowel condition "within a reasonable period of time."

- In the October decision, SFRS referred to Dr Yusuf's report without considering Dr Richards' report. The evidence suggests that SFRS did not consider Mrs Y's application correctly. It should have provided its reasoning for the decision and explained why it preferred a more optimistic opinion to the less favourable one. In the Adjudicator's view, SFRS had failed to make a properly reasoned decision. Instead, SFRS merely rubberstamped the recommendations of Dr Yusuf without considering the recommendation from Dr Richards. It should have sought further clarification from Dr Yusuf on the likelihood of Mrs Y improving sufficiently, with the available treatments, to the extent that she would be able to undertake gainful employment, at some point between December 2012 and her 65th birthday. SFRS should have then considered both reports carefully and issued a decision providing reasons for reaching that decision.

- It was the Adjudicator's view that Mrs Y's case should be remitted back to SFRS for reconsideration. In saying this, the Adjudicator was not expressing a view as to whether Mrs Y was entitled to an IHRP, as this was a decision for SFRS to make.

- The Adjudicator noted that SFRS offered Mrs Y £500 for a lengthy and complex process. In the Adjudicator's view, that award was sufficient and in line with my guidelines.

26. Mrs Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. SFRS accepted the Adjudicator's Opinion but provided further comments. Mrs Y provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the points made by Mrs Y and SFRS for completeness.

27. In response to the Adjudicator's Opinion, the Solicitor made a number of comments. In summary they were:-

- Mrs Y agrees that the complaint should be upheld but does not accept the Adjudicator's recommendations.

- Mrs Y believes that the Pensions Ombudsman's role is to make a decision on whether Mrs Y was entitled to an ill health pension or not.

- Although the Pensions Ombudsman does not normally make awards of costs, the Solicitor believes given the circumstances of the case, the Pensions Ombudsman should direct SFRS to reimburse Mrs Y for the cost she incurred to get legal help.

- The Solicitor provided his view on what points SFRS should have addressed when making a decision regarding Mrs Y's application.

- The award of £500 offered by SFRS is not sufficient, given the circumstances of Mrs Y's case.

28. SFRS provided further comments explaining why it did not consider Dr Richard's report. It said:

> "It transpired on receipt of Dr Richards' opinion that Dr Richards had not been sent the full records for Mrs Y that were needed to undertake the opinion, in particular some documents which were still held by Working Well had not been obtained by [SFRS] when the instructions were sent to Dr Richards. Dr Richards did not question why all the documentation was not available which also caused concern. The missing information could have been sent to Dr Richards and a revised opinion obtained. However, of greater concern was the fact that Shropshire Council had, in error, accidentally included a copy of a subsequent report of a consultant gastroenterologist dated 23 March 2015 in the pack of information sent to Dr Richards. This report was referred to in Dr Richards' covering letter and had been taken into account when preparing his opinion. The 2015 report clearly did not exist as at 11 December 2012, the effective retrospective date of the opinion, and therefore should not have been considered by Dr Richards."

Ombudsman's decision

29. It is not my role to review the medical evidence and come to a decision of my own as to Mrs Y'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.

30. The weight which is attached to any of the evidence is for SFRS to decide (including giving some of it little or no weight). It is open to SFRS to prefer evidence from its own advisers; unless there is a cogent reason why it should not without seeking clarification. For 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 SFRS to reconsider. However, it must ensure that any medical advice upon which it places weight has addressed the right questions under the Regulations.

31. I appreciate that SFRS 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 SFRS 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 an IHRP, SFRS 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.

32. I note SFRS' comments regarding its decision to only consider Dr Yusuf's report and not Dr Richards', and I accept this. As Dr Richards had not been provided with all Mrs Y's medical evidence, it was reasonable for SFRS not to have considered his opinion when making a decision regarding Mrs Y's IHRP. However, I find that Dr Yusuf's report did not provide his reasons for why he believed Mrs Y, having only 4 years left until her retirement age of 65, was likely to return to her previous role or obtain further gainful employment before age 65. Therefore, I find that SFRS did not ask Dr Yusuf appropriate questions before accepting his opinion.

33. Mrs Y believes that SFRS' previous offer of £500 is not sufficient given the circumstances of her case. This award is in line with my guidelines when significant distress and inconvenience is caused. I do not consider a higher award is warranted in this case.

34. Regarding the Solicitor's costs incurred by Mrs Y, I do not usually make such awards and may only consider such awards in extreme circumstances. Mrs Y could have sought the free advice of the Pensions Advisory Service (now Money and Pensions Service). I do not take the view that Mrs Y should be reimbursed for her legal costs.

35. With regard to the distress which Mrs Y has undoubtedly suffered. I agree with the Adjudicator that the level of distress is significant. SFRS has offered an award of £500, which is the amount I would have awarded for significant distress; I make no additional award for distress and inconvenience.

36. I uphold Mrs Y's complaint.

Directions

37. Within 21 days of the date of this Determination, SFRS shall seek clarification from Dr Yusuf as to why he thought a return to Mrs Y's previous role was likely, or that she was capable of obtaining gainful employment, on the balance of probabilities, between December 2012 and her normal pension age. In particular, it should ask Dr Yusuf to clarify what he meant by Mrs Y's condition being treatable. He shall also be asked to clarify what timescale he had in mind when he said a return to work was a possibility within "a reasonable period of time".

38. SFRS shall then consider all the medical evidence and inform Mrs Y of its decision in writing and explain the reasoning behind it.

39. In the event that a decision is made to grant Mrs Y an IHRP, SFRS shall forthwith pay Mrs Y a sum equal to the outstanding instalments of her pension, plus interest. The interest payment shall be calculated as provided for in Regulation 81 of the 2013 LGPS Regulations.

40. Within 14 days of the date of this Determination, SFRS shall pay Mrs Y the £500 it has offered for the significant distress and inconvenience which Mrs Y has suffered.

Anthony Arter

Pensions Ombudsman
9 December 2019

Appendix

The Local Government Pension Scheme (Benefits, Membership and Contributions)

Regulations 2007 (SI 2007/1166) (as amended)

Regulation 20 Early leavers applicable at the date Mrs Y left employment in December 2012 states:

"20. - (1) If an employing authority determine, …

(a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and

(b) that he has a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age, they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph

(2) [Tier 1], (3) [Tier2] or (4) [Tier3], as the case may be.

(2) If the authority determine that there is no reasonable prospect of his being capable of undertaking any gainful employment before his normal retirement age, his benefits are increased …

(3) If the authority determine that, although he is not capable of undertaking gainful employment within three years of leaving his employment, it is likely that he will be capable of undertaking any gainful employment before his normal retirement age, his benefits are increased …

(4) If the authority determine that it is likely that he will be capable of undertaking gainful employment within three years of leaving his employment, or before reaching normal retirement age if earlier, his benefits—

(a)are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and

(b)unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(5) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine ("IRMP") as to whether in his opinion the member is suffering from a condition that renders him permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether as a result

of that condition he has a reduced likelihood of being capable of undertaking any gainful employment before reaching his normal retirement age." …

(7) … once benefits under paragraph (4) have been in payment to a person for 18 months, the authority shall make inquiries as to his current employment.

(b) If he is not in gainful employment, the authority shall obtain a further certificate from an independent registered medical practitioner as to the matters set out in paragraph (5)…"

...

(11) (a) An authority which has made a determination under paragraph (4) in respect of a member may make a subsequent determination under paragraph (3) in respect of him.

…

(b) Any increase in benefits payable as a result of any such subsequent determination is payable from the date of that determination."

…

(14) In this regulation –

"gainful employment" means paid employment for not less than 30 hours in each week for a period of not less than 12 months;

"permanently incapable" means that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday;"