

## Ombudsman's Determination

Applicant	Mr N's
Scheme	Local Government Pension Scheme ( <b>the Scheme</b> )
Respondents	Bristol, Gloucestershire, Somerset & Wiltshire Community Rehabilitation Company ( <b>BGSW CRC</b> )

### Outcome

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

### Complaint summary

3. Mr N is challenging the reason given by BGSW CRC for leaving his employment and the consequence of the refusal for ill health pension benefits (**IHPB**) as an active member following that decision.

### Background information, including submissions from the parties

4. In November 2016, Mr N accepted voluntary severance following his union advice from BGSW CRC. On 24 November 2016 BGSW CRC sent a letter confirming Mr N's termination of employment. It showed Mr N's date of termination as 31 March 2017 at which he would receive a voluntary severance payment of £48,815.04.
5. During Mr N's notice period between November 2016 and 31 March 2017, Mr N had a period of sickness and in February 2017 he applied for early payment of his pension benefits on ill health grounds from active member status.
6. On 16 March 2017 BGSW CRC sent Mr N an email where it confirmed to Mr N that it had not dismissed him on the grounds of ill health and as an employer it was not bound to release his benefits early on ill health grounds.
7. In May 2017, Mr N was referred to Dr Pugh-Williams, an independent registered medical practitioner (**IRMP**). She was of the opinion that Mr N did not meet the criteria for early payment of his pension benefits on ill health grounds from active member status. She completed the Medical Practitioner's Certificate for Active Members. Dr Pugh-Williams said that in her opinion there was insufficient medical evidence

available for her to conclude that Mr N was permanently incapable of his current role until normal retirement age. Following this BGSW CRC sent a leaver form to Greater Manchester Pension Fund (**the Fund**) and Mr N became a deferred member of the Fund.

8. In August 2017, Mr N provided his consent for Dr Pugh-Williams to have sight of psychiatrist reports from 2008 and 2017 in order that she may reconsider her original opinion.
9. On 14 August 2017, Mr N's case was referred back to Dr Pugh-Williams. Dr Pugh-Williams in her subsequent report supported Mr N's application for IHPB. Dr Pugh-Williams confirmed in her report that she had considered Mr N's Occupational Health (**OH**) file; additional information provided by Mr N dated 18 March 2017; Mr N's job description; GP report dated 21 March 2017; Dr Parker's functional capacity assessment dated 28 April 2017 and Dr Bruce-Jones Psychiatrist report dated 26 July 2017. Dr Pugh-Williams was of the opinion that, based on the evidence available, Mr N's ill health or infirmity of mind or body did render him, on the balance of probabilities, permanently incapable of discharging efficiently the duties of his current employment. She was of the view that he had no reasonable prospect of undertaking any gainful employment before the normal retirement age of 65. Dr Pugh-Williams certified that in her opinion Tier 1 IHPB should be awarded.
10. No decision was made by BGSW CRC regarding Mr N's eligibility for IHPB.
11. On 20 October 2017, Mr N raised a complaint under the Scheme's internal dispute resolution procedure (**IDRP**). Mr N complained that BGSW CRC had failed to make a decision regarding his IHPB application following Dr Pugh-Williams report.
12. On 19 December 2017, BGSW CRC issued its stage 1 IDRP response to Mr N. It confirmed that due to the conflicting medical evidence that it had been provided with, a further medical assessment was needed to assist it with reaching its final decision. BGSW CRC held that it needed the agreement of Mr N to a further medical assessment by Dr Vivian. BGSW CRC further said that in November 2016, when the voluntary severance offer was made to staff, Mr N was not absent from work due to ill health. However, he was absent from work after that and a report was prepared by OH indicating that Mr N would be able to return to work in 6 to 12 weeks. As such Mr N's employment was not terminated on the grounds of ill health. Due to the delays in reaching a decision BGSW CRC made an offer of an ex gratia payment of £500 to Mr N in recognition of any distress and inconvenience it may have caused him.
13. On 22 December 2017, it was agreed between BGSW CRC and Mr N that Dr Pugh-Williams would clarify the reasons for the difference between the two certificates and the Stage 2 appeal was suspended pending the receipt of this information.
14. On 31 January 2018, Dr Pugh-Williams issued her response and confirmed the difference in her opinion between the certificates issued in May 2017 and August 2017 was due to the psychiatrist report provided in August 2017. She said that had

the psychiatrist's reports been available to her when she first assessed Mr N in May 2017, her opinion would have been the same as it was in August 2017.

15. BGSW CRC declined to make a decision and confirmed that it still had questions that had not been fully answered and wished to have sight of the psychiatrist report.
16. On 12 March 2018, Mr N appealed under stage 2 of the IDRP. He complained that: BGSW CRC has failed to instruct the Fund to pay him Tier 1 IHPB in accordance with the IRMP opinion; it did not issue a decision in respect of his application for ill health early retirement (IHER); and it did not provide reasonable grounds for its refusal to pay him Tier 1 IHPB since the IRMP certificate was issued on 14 August 2017.
17. On 4 May 2018, the Fund's Appointed Referee (Tameside Metropolitan Borough) issued its stage 2 IDRP response to Mr N. The decision maker upheld Mr N's case on the grounds that BGSW CRC had failed to provide any reasonable explanation for the delay in making its first instance decision. Under the Scheme regulations, this should have been provided as soon as was reasonably practicable. He further said that he was unsure as to why BGSW CRC felt it necessary to have Mr N's case looked at by Dr Vivian who was not an IRMP under the Scheme rules. As per the ill health guidance, employers should remit any further questions they have back to the IRMP who provided the original opinion.
18. The Appointed Referee directed BGSW CRC to make a decision as to Mr N's entitlement to early payment of IHPB, as at the date of his original application in 2017, based on the information it held. The Referee said, should it need to have further questions answered, then it should refer these questions back to the original IRMP, Dr Pugh-Williams. BGSW CRC should then provide its decision to Mr N within 28 days of receipt of any information requested from Dr Pugh-Williams. He further said, as compensation for the delay it caused Mr N, BGSW CRC should pay Mr N a further £250. The decision maker said BGSW CRC had sent leaver paperwork to the Fund in 2017 and Mr N was now a deferred member of the Fund. As Mr N's application had been made under Regulation 35, should BGSW CRC decide to grant early payment of pension benefits on ill health grounds from the date of Mr N's original application, it would need to provide the Fund with the correct paperwork to reverse the effects of that already submitted to it.
19. On 31 May 2018, Mr N's case was referred to Dr Thornton to answer BGSW CRC's questions. Dr Pugh-Williams had said she was not in a position to answer the questions due to her already issuing a report relating to Mr N's application as an active member. Dr Pugh-Williams pointed out there may have been errors in the process as Mr N took voluntary severance and left employment and it seems he should have been assessed on the basis of a deferred member. Dr Thornton in his report confirmed that he considered all the evidence on file, including two IRMP reports, OH consultations, and reports from Mr N's GP and consultant psychiatrist. Dr Thornton was of the opinion that, on the balance of probability, Mr N would not have been capable of working in an alternative role. He certified that Mr N would be eligible for IHER as a deferred member.

20. On 23 July 2018, BGSW CRC confirmed that the Board had decided that based on the medical evidence, Mr N would be awarded IHER as a deferred member.

### **Adjudicator's Opinion**

21. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by BGSW CRC. The Adjudicator's findings are summarised briefly below: -
- To be eligible for IHPB from active status Mr N must have left his employment because of incapacity/ill health. Mr N argued that there was an agreement in place with BGSW CRC which said Mr N would be treated as an active member, however from the evidence provided Mr N left his employment and received a severance payment . It was the Adjudicator's opinion that Mr N was correctly assessed for IHER against the deferred member ill health criteria and BGSW CRC had correctly applied the Scheme regulations. The Ombudsman does not have the power to direct the employer on how it may terminate its employee's employment, it is up to the employer to say on what grounds it is terminating an employee's employment. If BGSW CRC does agree that Mr N can be assessed as an active member for the purposes of IHPB then it may be that Mr N would have to pay back the severance payment. Mr N is unable to have both IHPB and a severance payment.
  - BGSW CRC has accepted that it made an error when initially assessing Mr N as an active member and through the Scheme's stage 1 and 2 IDRP and it was only after stage 2 when receiving legal advice and checking the Regulations it became aware Mr N should be treated as a deferred member.
22. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his 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 Mr N for completeness.

### **Ombudsman's decision**

23. In order for a member to be eligible for IHPB from active status, he must have ceased employment due to ill health. Since Mr N accepted voluntary severance, rather than being dismissed on grounds of ill health, he is not entitled to IHPB as an active member under Regulation 35 of the Scheme rules.
24. Mr N has said there was an agreement in place, between him and BGSW CRC, that he would remain employed until completion of the IHPB process, so that he would be assessed for IHPB as an active member. However, I have been provided with no evidence of such an agreement and the contemporaneous documentary records support the position taken by BGSW CRC that the reason for Mr N leaving employment was voluntary severance.

25. Mr N considers that the problem stems from the means and circumstances by which his employment was terminated. He considers that he ought to have been considered for ill health retirement from active service. I have considered the impact of the difference between Dr Pugh-Williams' first and second certificates. I can see that with the benefit of hindsight he would wish that the termination discussions had ended differently. However, I have to consider the facts as they would have appeared to the parties at the time that the relevant decisions were taken. At the time of the voluntary severance being agreed neither party would have been aware that the medical evidence would turn out to be supportive. That did not become apparent until after the voluntary severance had been agreed. I have considered the letter of termination of employment dated 24 November 2016 and email of 16 March 2017. These plainly explain to Mr N that he is not dismissed on the grounds of ill health and as such he may qualify for deferred benefits. There is no evidence that BGSW CRC were asked to reconsider this position or to delay the termination decision until Dr Pugh-Williams had considered further medical evidence. Rather Mr N accepted the voluntary severance payment, an action which I find to be inconsistent with an argument that his employment should instead have been terminated on ill health grounds. Given these circumstances, once the voluntary severance was agreed, I do not consider that BGSW CRC were any longer under an obligation to consider IHPB from active service on Mr N's behalf. On the balance of probabilities, the evidence supports BGSW CRC's submission that it made an error when continuing to make its assessment on that basis.
26. As explained by the Adjudicator, it is not my role to direct employers how to terminate employees' employment and employment matters are not within this Office's jurisdiction. As it stands, Mr N's employment was terminated on the grounds of voluntary severance, for which he received payment, and not on the grounds of ill health. Therefore, he did not meet the eligibility conditions set out in the Scheme Regulations.
27. BGSW CRC has conceded that it made an administrative error in the way that it processed the application and it only realised that once the second IDR decision had been made. There is no dispute that when it was confirmed to Mr N that he would be treated as a deferred member for the purposes of his IHPB application, he would have experienced significant distress and inconvenience. However, I find that the £750 award offered by BGSW CRC at stage 2 appeal was sufficient in the circumstances. Accordingly, I do not find that BGSW CRC needs to increase its award.
28. Therefore, I do not uphold Mr N's complaint.

**Karen Johnston**

Deputy Pensions Ombudsman  
23 July 2019