

**PENSION SCHEMES ACT 1993, PART X**  
**DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN**

<b>Applicant</b>	Mrs Ruth Hudspith
<b>Scheme</b>	Local Government Pension Scheme ( <b>LGPS</b> )
<b>Respondent(s)</b>	Sunderland City Council

**Subject**

Mrs Hudspith complains that Sunderland City Council, the employing authority refused to award an ill-health pension at first and following further applications, they refused to award tier 1 or tier 2 benefits.

**The Deputy Pensions Ombudsman's determination and short reasons**

The complaint should be upheld against Sunderland City Council because they have not reached a decision as to whether Mrs Hudspith met the criteria for ill-health retirement through-out the whole process. They relied on the opinion of the independent medical practitioners.

## DETAILED DETERMINATION

### Material Facts

1. Mrs Hudspith was employed as a Strategy and Schools Improvement Officer for Sunderland City Council (**the Council**).
2. In December 2006 Mrs Hudspith had a skiing accident in which she suffered a serious shoulder injury. She had numerous operations to repair the shoulder damage, but these surgical procedures did not improve her symptoms.
3. Mrs Hudspith was continuously absent from work due to ill-health from 19 January 2009. The Council terminated her employment on 10 March 2010 due to inability to perform duties due to ill-health.
4. Mrs Hudspith applied for ill-health early retirement prior to being dismissed and after. I will now concentrate on those applications.

### Ill-health application 2009

5. Mrs Hudspith undertook a fitness to work assessment in June 2009, after being off work due to ill-health for six months. Dr Pritchard, Occupational Health Physician for the Council conducted the assessment. He considered Mrs Hudspith's ability to return to work. He sent his conclusions to the Council's HR department, in which he said:
 

“...I feel it is very unlikely that Mrs Hudspith will be able to return to work in the short or medium term. I understand she has been informed by her surgeon that she may never be able to return to work. Clearly the lady will shortly go on half pay and I feel that a meeting would be advisable between Mrs Hudspith, Personnel and her line management to discuss a way forward...The meeting with Mrs Hudspith should discuss whether the Council are able to offer any adjustments to enable her to return to work. Clearly if this is not possible ...then we may need to think about ill health retirement...”
6. A further meeting was arranged with Dr Pritchard, after Mrs Hudspith submitted medical statements from her treating physicians and her G.P. Dr Gibbons, Consultant Orthopaedic Surgeon was of the opinion that her medical condition made it difficult for her to return to work as she was unable to drive her car, which was needed for her role. Further, Ms Loughhead, Senior Physiotherapist said that while Mrs Hudspith had regained some movement, it was not enough for her to return to work. Her G.P. was of a similar opinion but said that her medication made it dangerous for her to drive (as it made her drowsy).

7. Dr Pritchard reviewed the information, and on 9 October 2009 informed the HR Department that, "...I now feel it is time to conclude this case and I feel that the best route would be for an ill health retirement application for Mrs Hudspith." Dr Pritchard asked HR to start the process and he would pass the papers to an independent medical practitioner for an assessment.
8. On 2 November 2009, Dr Wong the independent medical practitioner said:
 

"...On reviewing the Occupational health consultations, there is discussion regarding Access to Work and adjustments however there is no evidence to support that any of these were approached or trialled. There is possibility that further adjustments in the workplace would assist [Mrs] Hudspith returned to work in some capacity. The evidence suggests that the main concerns are in relation to driving and using the PC and also concerns regarding the distance she lives from work. There is no robust evidence that adjustments have been made to try to address these within the workplace."
9. Dr Wong reached his opinion that Mrs Hudspith's application did not warrant ill health early retirement.
10. The Council's HR Department wrote to Dr Wong on 21 December 2009. They said that they had completed the reasonable adjustment exercise with Mrs Hudspith, her line manager and her Union representative. HR concluded that:
 

"The physical problems Mrs Hudspith has, however, are further compounded by her dependency on medication to cope with the pain and this is a problem for which adjustments cannot be made due to the side effects of the medication which cause significant drowsiness and lack of concentration...Mrs Hudspith also has been advised that she will be required to take these tablets for the rest of her life as there is no further re-construction or surgery planned for her and therefore her future employment possibilities are severely compromised. I look forward to receiving your reconsidered decision in relation to ill health retirement in light of the new evidence..."
11. Dr Wong replied on 11 January 2010. He said that Mrs Hudspith's GP confirmed that she was undergoing physiotherapy and continuing to see an orthopaedic surgeon. Further, the GP said that he may refer her to pain clinic so that she can manage her pain. As a result of this, Dr Wong's opinion was, "As she is on continued treatment we cannot say that she is permanently incapable of discharging efficiently the duties of her employment or other available comparable employment unless all treatment options have been exhausted." Dr Wong considered the reasonable adjustments made by the Council. It was his opinion that, "...the focus of your adjustments and redeployment cannot be

reasonably made. However, as the Mrs Hudspith is still on regular follow-up from her specialist and may have potential new treatments, hence we cannot say that she will permanently have the side-effects as a result of her medication or that she will be permanently unfit to work till the age of 65<sup>th</sup> birthday [sic].”

12. Dr Wong’s opinion was that Mrs Hudspith did not meet the criteria for ill health retirement. He completed the appropriate certificate.
13. The Council wrote to Mrs Hudspith on 8 February 2010, in which they explained why her application for ill-health was declined. The Council said:

“I refer to correspondence received from the Occupational Health Unit in relation to the additional information supplied to the independent doctor following their initial decision to reject your application for ill health retirement on the grounds of permanent incapacity.

I can confirm that the independent doctor has re-considered your application including the additional information provided. The independent doctor has stated that in their view at this stage the assessment does not comply with the terms of the Local Government Pension Scheme, and unfortunately cannot consider you permanently unfit at this time.

The decision to reject your request for the early release of your pension benefits at this stage is based upon medical opinion...”

14. Mrs Hudspith sought the assistance of the Pensions Advisory Service (**TPAS**).
15. Mrs Hudspith sent a further report from Dr Gibbon (Consultant Orthopaedics) to TPAS dated February 2010. Dr Gibbons responded to Dr Wong’s comments that there was potential new treatments available, said: “ ... I am happy to state that my professional opinion as a consult [sic] shoulder surgeon is that there will be no significant further gains in the future and the level of debility seen will persist in the longer term...”
16. Mrs Hudspith on 3 March 2010 wrote to TPAS, saying that two occupation physicians supported her application, whereas Dr Wong did not. She said, “Dr Wong turned down the application for ill health retirement again but this time on medical grounds, apparently in contradiction of his initial assessment.”
17. On 12 March 2010 Mrs Hudspith received her termination of employment letter from the Council. The reason for the termination of employment was her continuing ill-health. It noted that Mrs Hudspith would be appealing the decision reached.

18. On 19 March 2010, Mrs Hudspith invoked the Internal Dispute Resolution (**IDR**) procedure, in which she addressed her appeal to Mr Briscoe, the specified person to deal with the first stage of the IDR procedure. Her basis of appeal was that she disagreed with Dr Wong's "decision" to not award her ill health retirement.
19. On 31 May 2010, Mr Briscoe sent Mrs Hudspith his stage one IDR decision. He did not uphold the complaint because he said that the correct regulations were followed and the Council's decision was based on independent medical practitioner's opinion. He said: "Following receipt of Dr Wong's opinion the Council confirmed their decision that you did not meet the criteria for the payment of your pension benefits, on ill-health grounds. This decision was based on the opinion of the independent medical practitioner that you were not permanently incapable of discharging efficiently the duties of your former post because of ill-health." Mr Briscoe told Mrs Hudspith that she must lodge the stage 2 appeal within six months of his stage one decision.
20. Mrs Hudspith lodged her appeal on 22 September 2010. Mr Hudspith said that Mr Briscoe did not consider the medical evidence submitted from her consultant in February 2010. Mrs Hudspith obtained another report from Dr Gibbon dated 28 September 2010. In which, Dr Gibbon said, " I am happy to state my professional medical opinion...that there is no direct further medical intervention or surgical intervention that I would consider making that I think has a realistic expectation of improving Mrs Hudspith's shoulder function... If it is accepted that she is currently unable to carry out her work duties I do not think there will be an improvement sufficient to allow her to resume those duties prior to her expected retirement age of 65." Mrs Hudspith forwarded this report to the Council.
21. On 25 November 2010, stage two of the IDR procedure was issued by South Tyneside Council. They did not uphold the complaint saying that the decision reached by the Council was in line with the regulations, but they did suggest Mrs Hudspith make a fresh application because of the recent reports from Dr Gibbon. South Tyneside Council said:

"It was for Dr Wong to assess you and decide whether or not in his opinion, you were permanently incapable of discharging efficiently the duties of your employment because of ill-health or infirmity of body or

mind. Having received this opinion the Council was to determine whether or not to allow the early release of your pension benefits.

...

...Dr Wong was not prepared to provide the necessary certificate stating that you fulfilled the criteria for early payment of your pension benefits, which the Council would need to provide the TWPF [administering authority] with in order to release your pension benefits.

...

However, I can see from your medical records you have since been ...for an appointment with Mr Gibbon...since the date of the medical certificate prepared by Dr Wong. ...

You may therefore wish to consider making a fresh application to the Council asking that they take into account this new medical evidence regarding the persistent debility of your shoulder.”

## Ill-health application 2011

22. Mrs Hudspith re-applied for ill-health retirement on 3 December 2010 to release her preserved pension benefits. Mrs Hudspith contacted the Council, as she had not heard from them for a while, said they were reviewing her file and would make a referral to see another independent practitioner.
23. On 3 February 2011, the Council informed Mrs Hudspith that her medical records were being sent to another independent medical practitioner at Gateshead Occupational Health Department.
24. On 15 February 2011, Dr Goldsmith from Gateshead Council Occupational Health Unit agreed that Mrs Hudspith's ill-health was permanent and said:
 

“I understand that Mrs Hudspith has applied for early payment of her preserved pension benefit but in this case the report from the specialist was dated 11 February 2010 that pre-dates the termination of her contract on the 10<sup>th</sup> March 2010. It is my view that permanence of her medical condition could have been known on the 10<sup>th</sup> March 2010 but could not have been known on the 11<sup>th</sup> January 2010. I therefore enclose a certificate for early payment of her preserved pension benefits but this should date from the 10<sup>th</sup> March 2010, the date of termination of her contract.”
25. The Council informed Mrs Hudspith that they would award her Tier 3 of ill-health early retirement pension. Mrs Hudspith complained and the Council wrote back on 5 April 2011. The Council said, “She [Dr Goldsmith] also informed me that she was remaining with her decision that you would be entitled to Tier 3 on your pension”.

26. On 14 July 2011, Mrs Hudspith sent Mr Briscoe her first stage appeal under IDR procedure. Mrs Hudspith appealed the decision to award tier 3 whereas she held the belief she should receive tier 1.
27. On 14 September 2011, Mr Briscoe reviewed the matter and issued the stage 1 decision. It was his decision to remit the decision to award tier 3 back to the Council, as it was not clear how Dr Goldsmith reached her conclusions that Mrs Hudspith will recover within three years. He said:
 

“With regard to their decision that your ill-health pension should be paid at tier three, it is less clear to me how they arrived at their decision. Whilst I appreciate that Dr Goldsmith had indicated on the revised “ill-health certificate” that you would be capable of obtaining gainful employment within the next three years, she had not provided the Council with any evidence or reasoning to support her opinion...”
28. The Council asked the occupational health unit of Durham Council to review whether tier 3 was a reasonable award. On 16 November 2011, Dr Wynn from Durham Council sent his opinion to the Council. Dr Wynn said:
 

“I have reviewed all the medical evidence submitted to me and feel that on the balance of probability, Mrs Hudspith is permanently incapable of discharging efficiently the duties of Strategy Manager because of ill health or infirmity of mind and body...

I am further required to provide an opinion on the likelihood of Mrs Hudspith being able to obtain gainful employment before age 65... In my opinion, it is not possible to establish that Mrs Hudspith would be unfit for gainful employment within 3 years of a termination of her employment in March 2010.”
29. Dr Wynn’s opinion was that Mrs Hudspith medical condition does not prevent her from obtaining lesser strenuous roles in the future, therefore he could not establish permanency.
30. After the report was submitted to the Council, Mrs Hudspith did not hear from the Council for a few months. TPAS and Mrs Hudspith chased the Council for their decision, which was not forthcoming.
31. Dr Wynn wrote to the Council on 14 March 2012, who clarified that his role was to issue an opinion but the final decision rests with the employer. It was Dr Wynn’s opinion that Mrs Hudspith qualified for tier 3 not tier 2 and he enclosed a certificate stating such.

32. On 3 April 2012, the Council informed Mrs Hudspith via TPAS of their decision. They wrote, "Please see attached a letter from Dr Wynn [14 March 2012] from Durham County Council which confirms that in his opinion Mrs Hudspith should continue to be awarded Tier 3..."
33. TPAS asked the Council why, as Dr Wynn had said, the decision remains with the Council, that no decision has been reached. In response by email, on 11 April 2012, the HR department of the Council said, "I have contacted Occupational Health as I am unsure as to what the process is after an independent doctor has reviewed a case..."
34. After speaking with Occupational Health, the HR Department said by email on 11 April, to TPAS that, "...Dr Abbas has stated that Occupational Health have looked at all the medical information relating to Mrs Hudspith including the medical report from the independent doctor, Dr Wynn, dated 16<sup>th</sup> November 2011, and he has confirmed that Sunderland's decision is for Mrs Hudspith to remain on Tier 3." The Council confirmed the above in writing on 12 April 2012.
35. Mrs Hudspith appealed the decision and asked for the matter to be considered under stage 2 IDR. On 3 July 2012, South Tyneside Council informed Mrs Hudspith that as her appeal was six months after the stage 1 decision by Mr Briscoe, they did not consider the matter "within time". They cited regulation 60 of the Administration regulations for reasons in refusing to consider the matter under stage 2.

#### IDR procedure 2012 and 18 month review

36. TPAS advised Mrs Hudspith to submit a fresh application for IDR procedure on 31 July 2012.
37. On 12 October 2012, West Yorkshire Pension Fund considered the stage 1 of the IDR procedure. West Yorkshire Pension Fund said:

"Having studied all the available evidence I have formed the view that on the balance of probabilities, at the time your employment was terminated, you satisfied the criteria for ill health retirement. However, I am not satisfied that Sunderland City Council, after obtaining another medical opinion from Dr Wynn, have shown any evidence of making a proper decision on the correct level of ill health benefit. I would have expected Sunderland City Council to ask Dr Wynn to elaborate on what type of gainful employment he would expect you to carry out. Dr Wynn in his report does not mention if he took into consideration the report from your Physiotherapist dated 4 June 2009 [no further scope for

improvement]. This I consider to be vital piece of evidence which I would have expected Dr Wynn to have considered when forming his opinion. Furthermore I am concerned the only communication you received was Dr Wynn's report and that you did not receive any communication from your Employer. Regulation 57 of the Administration Regulations lays down how an employer should give notice of their decision to the member.

As the decision to award ill health benefits is made by the employer, I must turn down your appeal. However, I am referring your case back to Sunderland City Council to obtain another medical opinion from an Independent Registered Medical Practitioner who has had no prior involvement in your case, taking the above points into consideration. Should the outcome still be a Tier 3, I have also asked them to carry out the 18 month review as required by the Regulations for Tier 3 ill health benefit. This review can be carried out by the same Independent Registered Medical Practitioner after obtaining medical reports on the state of your health at the point of the 18 months review. Should the reports indicate that there is no prospect of you obtaining gainful employment within 3 years of your employment being terminated, Sunderland City Council can make the decision to uplift your benefits to Tier 2. In any event, once they have carried out the review, they must notify you of their decision..."

38. Dr Obishai from the Council's occupational health completed his report into the matter on 29 November 2012. He said:

"In my opinion, having considered all the available evidence, Mrs Hudspith is not likely to be capable of undertaking gainful employment within three years of leaving her previous employment, however she does not have a reduced likelihood of being capable of undertaking gainful employment before the normal retirement age of 65 years. I have therefore completed the appropriate certificate as at 10 September 2010. I wish to state that the ultimate decision regarding the award of benefit lies with the employer."

39. The Council wrote to Mrs Hudspith on 10 January 2013. In which, they said, "Dr Obishai has stated, that in his opinion, he agrees with Dr Goldsmith's decision to award you a Tier 3 ill health benefit from 10<sup>th</sup> March 2010. His opinion remained the same after conducting an 18 month review. I have looked into your case with my line manager and agree with Dr Obishai's decision."
40. The Council (while did not make it clear) did uplift Mrs Hudspith from after the 18 months review to tier 2. Mrs Hudspith appealed the decision and asked for IDR stage two to be considered by South Tyneside Council. South Tyneside Council issued their decision on 12 June 2013.

41. In their decision they said:

- “It appears that the Council did satisfy the requirements of the Regulations at the time of the original decision. However, the lack of evidence relating to the subsequent decisions makes it unsafe to proceed on the assumption that proper consideration has been given by the Council to your subsequent applications.”
- “I do not believe that the appropriate regulations were considered by the Council in respect your application. I do believe that the Council has asked the correct questions but they do not appear to have directed themselves correctly to reach reasonable and consistent decisions that stand up to external scrutiny.”
- “I do not believe the Council has communicated their decision to you in accordance with the correct regulations.”
- “I am also concerned to see references to “Dr Obishai’s decision” and the “doctor’s decision”. Responsibility for deciding the grounds on which the employment of a scheme member has been terminated and level of their tier rests solely with the Council. I appreciate that the Council cannot make a determination unless they have obtained a certificate from an independent registered medical practitioner qualified in occupational health medicine, but the decision is ultimately that of the Council but they do not seem to have understood this.”
- “The Council makes no reference or provide any explanation as to the continued delays throughout the process in any of the correspondence I have seen.”
- “In the circumstances I do not see any merit in referring the matter back to the Council. The Council have now made a decision to uplift your pension from Tier 3 to Tier 2 as from 10 September 2010, albeit I cannot be satisfied that this has been communicated to you in accordance with the Regulations...”

#### **Summary of Mrs Hudspith’s position**

42. Mrs Hudspith says that the whole process was poorly handled by the Council and would like tier 1 or tier 2 to be awarded from the date she left employment.
43. She does not agree that tier 3 should have been awarded to her, as in her opinion her condition warranted a higher tier.
44. She has concerns about the independence of the independent medical practitioners previously appointed by the Council. Her concerns are that they do not want to award her tier 1 because of financial reasons, further that they have shown little understanding of the nature of her condition and the treatments she has had.

45. She would like the independent medical practitioner to have all the medical reports and documentation before they reach an opinion.
46. She would like me to take into consideration the distress and inconvenience she has suffered as a result of the Council's handling of the whole process. She adds that she has suffered financial hardship (she has not supplied any evidence to show this) and any award made by me, should reflect this.

### **Summary of the Council's position**

47. The Council say that they appointed Dr Obishai to review the matter. Further they are satisfied that the independent medical practitioner gave opinions which the Council agreed with. The Council are satisfied that the tier 3 award was correct. Further the Council have uplifted Mrs Hudspith pension to tier 2 in line with the regulations after the 18 month review.

### **Conclusions**

48. It should not come as a surprise for the Council that my conclusions are that the Council's actions are maladministration, because the Council has failed to reach a decision on any of Mrs Hudspith's applications and have allowed the matter to drag on for as long as they have. I will go through each application and explain how the Council's actions amounted to maladministration

### **III-health application 2009**

49. Under regulation 20(1)(a) of the Benefits Regulations, it is for the "employing authority to determine". The employing authority is the Council in this instance. They have to reach a decision. It does not state that the independent medical practitioner reaches the decision on behalf of the Council. There is no scope for the Council to delegate this responsibility to anyone else.
50. Dr Wong expressed his opinion that Mrs Hudspith had not had reasonable adjustments made for her by the Council. Further, he was of the opinion that there were on-going medical treatment options available, which had not been explored. Therefore, his opinion was that Mrs Hudspith was not permanently incapacitated.
51. The Council on receipt of Dr Wong's opinion issued their "decision" on 8 February 2010. I say decision even though; there is no evidence of how the Council reached their decision. Regulation 57(2) of the Administration

Regulations states, “A notification of a decision that the person is not entitled to a benefit must contain the grounds for the decision”. I have not seen any reasoned conclusion from the Council. The Council simply relied on the information presented by Dr Wong.

52. This is maladministration by the Council. The Council have failed to follow well established legal principles of; asking the right questions, relying on the rules and not reaching a perverse decision. It was for the Council to reach a decision which they did not do.
53. It was for the Council to ask Dr Wong in his opinion on the balance of probabilities whether or not Mrs Hudspith was permanently incapacitated. Further it was for the Council to ask Dr Wong regardless of the medical treatment options, to express an opinion on the likelihood of their success. The Council did none of this.
54. The matter was considered by Mr Briscoe, as the specified person, during stage one of the IDR procedure. His decision was that the Council followed the correct procedures. I am surprised he was able to conclude this, bearing in mind the Council did not reach a decision.
55. Under stage two of the IDR procedure, South Tyneside Council concurred with Mr Briscoe but because Mrs Hudspith has supplied new medical evidence suggested that she make a fresh application. It should have been clear to the administering authority that the Council did not reach a decision and as such the refusal to award ill-health was not made correctly.

#### Ill-health application 2011

56. Mrs Hudspith was made to submit a new application, even though no proper decision was reached regarding the first application. Nonetheless, during the second application, Dr Goldsmith reached an opinion that Mrs Hudspith was incapacitated and her ill-health pre-dates her termination from employment.
57. However, Dr Goldsmith was reviewing the recent medical evidence from Dr Gibbon yet reviewing the whole file, he expressed an opinion which was contrary to Dr Wong's. The Council did not question this and did not consider whether Dr Wong's opinion was flawed.

58. Dr Goldsmith opinion was that tier 3 should be awarded as there was scope for Mrs Hudspith to be able to get gainful employment within three years. I think the Council should have asked Dr Goldsmith, which role did she expect Mrs Hudspith to take up with her medical condition? This was a reasonable question to ask to test whether tier 3 was actually a fair opinion. As the Council did not ask this question and simply again relied on Dr Goldsmith's opinion, the decision-making process was flawed.
59. Mr Briscoe who considered the stage one IDR procedure, picked up on the same point. There was no reasoning (medical) why tier 3 was suitable for Mrs Hudspith and neither did the Council question this.
60. The Council asked Dr Wynn for his opinion. He expressed the same opinion as Dr Goldsmith and in my view did not explain the roles he had in mind, which Mrs Hudspith could do within three years and whether he was certain that her condition would improve within three years. The Council were told by Dr Wynn, that this was his opinion and it was for the Council to reach their decision.
61. The Council delayed corresponding with Mrs Hudspith and when they did , they simply reiterated the comments from Dr Wynn. The Council did not again explain their own reasons for why tier 3 was suitable. This was maladministration.
62. I am surprised why South Tyneside Council decided not to consider stage 2 of the IDR procedure. It was clear that the Council had delayed corresponding with Mrs Hudspith and until she heard from them, it was not reasonable for her to have lodged the stage two appeal. As South Tyneside Council have not been named respondents of the complaint, I do feel it should be noted that they were wrong in not considering the stage 2 IDR procedure when there was good reason for why Mrs Hudspith did not lodge an appeal within six months. Regulation 58(7)(b) grants scope to extend the six month period if there is good reason to do so. I think Mrs Hudspith had good reason in this instance.

#### 18 month review

63. Mrs Hudspith re-started the IDR procedure. West Yorkshire Pension Fund were right to say that there was no evidence that a decision had been reached by the

Council. They asked the Council to reconsider the whole matter and also conduct an 18 month review.

64. Dr Obishai was asked to review the matter and he reached an opinion that tier 3 was suitable from when Mrs Hudspith left employment. He did however say during the 18 month review that tier 2 should be awarded as there is now no scope for Mrs Hudspith to return to work after three years.
65. Again the Council in their letter to Mrs Hudspith said, “ Dr Obishai’s decision”. Again it was for the Council reach a decision not reiterate what Dr Obishai said. Indeed the Council did not ask the right questions why Dr Obishai concluded that tier 3 was suitable opinion bearing in mind her condition and what role he expected Mrs Hudspith to undertake.
66. I am surprised that South Tyneside Council after the considering the stage 2 of IDR procedure and highlighting all the failings did not step in and reach a decision, as no such decision has ever been reached by the Council.
67. It was maladministration by the Council to rely on Dr Obishai’s opinion rather than reach their own decision.

#### Injustice

68. As the Council have reached no such decision in any of Mrs Hudspith’s applications and reviews, the injustice she has suffered is that she does not know whether her entitlement has been established properly. What would have happened if the Council had considered Mrs Hudspith’s application correctly? It would have sought further medical advice setting out what treatments she was to receive and what impact they would have had on her condition. It would then have made a decision as to whether, on the balance of probabilities, she had a permanent incapacity.
69. I will not ask the Council to consider if tier 3 was suitable or not, as this has been reviewed many times even though I have reservations about the Council’s “decision”.
70. I will direct the Council to reach a decision as to whether Mrs Hudspith met the criteria for ill health retirement before her employment ended and, if so, whether tier 2 or tier 1 would have been appropriate. The decision needs to be made by the Council. The Council needs to ask the right questions. They need to

ask an independent medical practitioner, who has had no prior involvement in the matter to express their opinion. The opinion the Council should seek is whether Mrs Hudspith on the balance of probabilities was permanently incapacitated. It is not enough to say the Council could not decide whether she was permanently incapable unless all treatment options had been exhausted. If they say there was on-going treatment, then the independent medical practitioner needs to specify what those treatments were and express an opinion on the likelihood of success of those treatments based on the balance of probabilities. The Council should not reach a decision until they have asked all the right questions.

71. While Mrs Hudspith expresses doubts about the independence of the independent medical practitioner, I do not share her doubts. Under Administration regulation 56(1)(a), the independent medical practitioner must fulfil the following criteria , “he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested”. So it follows that any independent medical practitioner appointed by the Council, must be someone who has not previously been involved with the case in any capacity. I trust this assures Mrs Hudspith that the independent medical practitioner will indeed be independent.
72. Once the Council have obtained a medical opinion and asked the right questions, they need to decide whether tier 1 or 2 should have been awarded to Mrs Hudspith from when she left employment. Their decision should comply with regulation 57(2) of the Administration Regulations.
73. The fact that the Council have not reached a decision in the whole process and delayed reaching their “decision” after Dr Wynn had expressed his opinion, means the whole process has caused Mrs Hudspith distress and inconvenience. The Council have handled the whole matter poorly which no doubt exasperated the distress Mrs Hudspith suffered.
74. Mrs Hudspith has said that she would like all the medical evidence considered by the independent medical practitioner before the Council reach their decision. I will direct the Council to contact Mrs Hudspith first so that she can send any medical evidence, which she considers was not previously seen or submitted to the Council to pass on to the independent medical practitioner.

75. Typically I award modest amounts, but this particular case, it warrants distress and inconvenience which reflects the total failure by the Council. Mrs Hudspith says that she has suffered hardship while waiting for the Council to consider her applications. As there is a possibility that if the Council decide that she should be awarded tier 1 or tier 2, then Mrs Hudspith would be returned to the position she would have been in had there not been any maladministration. So with this in mind, I think my award for distress and inconvenience is sufficient to redress the stress she suffered. I will direct the Council to pay Mrs Hudspith in compensation £1,000 for distress and inconvenience.
76. I uphold the complaint against the Council.

### **Directions**

77. Within 21 days of this Determination, the Council will give Mrs Hudspith an opportunity to submit further medical records or documentation, which she would like the independent medical practitioner to consider.
78. The Council within 21 days of receiving Mrs Hudspith's further submission will ask an independent medical practitioner to review the medical records and submissions and reach an opinion based on the balance of probabilities whether Mrs Hudspith warranted tier 1 or tier 2 before she left employment. As part of that process, the Council shall ask the independent medical practitioner to specify what treatments would have been available; whether it would have been reasonable to expect Mrs Hudspith to undergo those treatments; and consider the following questions:
- Was her condition likely, on the balance of probabilities, to be permanent in the absence of treatment?
  - If so, was the treatment likely, on the balance of probabilities, to change that?
79. The Council before reaching their decision will scrutinise the opinion supplied and ask the right questions, where necessary. The Council will reach a decision in line with regulation 57(2) of the Administration Regulations and decide whether Mrs Hudspith qualified for tier 2 or tier 1 ill-health retirement.

80. If the conclusion is that the Council would have decided that her condition was likely to be permanent, even after treatment, Mrs Hudspith should be paid enhanced benefits at the appropriate tier on the basis that she should have been retired on the grounds of ill health in March 2010. Simple interest is to be paid on any benefits from the due date of each payment to the date of actual payment. The interest is to be calculated at the base rate for the time being applicable to the reference banks.
81. Within 21 days the Council will pay Mrs Hudspith £1,000 as compensation for the distress and inconvenience she has suffered.

**Jane Irvine**  
Deputy Pensions Ombudsman

1 August 2014



## Appendix

### Relevant Regulations

#### The Local Government Pension Scheme (Benefits, Membership and Contributions) 2007

##### Regulation 20

(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5-

(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 obtaining 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), (3) or (4), as the case may be.

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

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date the whole of the period between that date and the date on which he would have retired at normal retirement age.

(3) If the authority determine that, although he cannot obtain gainful employment within three years of leaving his employment, it is likely that he will be able to obtain any gainful employment before his normal retirement age, his benefits are increased-

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date 25% of the period between that date and the date on which he would have retired at normal retirement age.

(4) If the authority determine that it is likely that he will be able to obtain any gainful employment within three years of leaving his employment, 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 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 obtaining any gainful employment before reaching his normal retirement age.

...

(7)

(a) Once benefits 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).

(b) The authority shall in any event discontinue the payment of benefits under paragraph (4) after they have been in payment to a person for three years.

(c) The authority shall forthwith notify the appropriate administering authority of any action they have taken under this paragraph.

...

(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; and

"qualified in occupational health medicine" means-

(a) holding a diploma in occupational medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA State; and for the purposes of this definition, "competent authority" has the meaning given by the General and Specialist Medical Practice (Education, Training and Qualification) Order 2003 ; or

(b) being an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State.

## **The Local Government Pension Scheme (Administration) Regulations 2008**

56 First instance determinations: ill-health

(1) An independent registered medical practitioner from whom a certificate is obtained under regulation 20(5) of the Benefits Regulations in respect of a determination under paragraph (2), (3) or (4) of that regulation (early leavers: ill-health) must be in a position to declare that-

(a) he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested; and

(b) he is not acting, and has not at any time acted, as the representative of the member, the employing authority or any other party in relation to the same case, and he must include a statement to that effect in his certificate.

(2) If the employing authority is not the member's appropriate administering authority, it must first obtain that authority's approval to its choice of registered medical practitioner for the purposes of regulation 20 and 31 of the Benefits Regulations.

(3) The employing authority and the independent registered medical practitioner must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation or, in the case of the employing authority, when making a determination under regulation 20 of the Benefits Regulations.

#### 57 Notification of first instance decisions

(1) Every person whose rights or liabilities are affected by a decision under regulation 55 must be notified of it in writing by the body which made it as soon as is reasonably practicable.

(2) A notification of a decision that the person is not entitled to a benefit must contain the grounds for the decision.

...

(4) Every notification must contain a conspicuous statement giving the address from which further information about the decision may be obtained.

(5) Every notification must also-

(a) refer to the rights available under regulations 58 and 60;

(b) specify the time limits within which the rights under those regulations may be exercised; and

(c) specify the job title and the address of the person to whom applications under regulation 58 may be made.

#### 58 Applications to resolve disagreements

(1) This regulation applies where there is a disagreement about a matter in relation to the Scheme between a member (or an alternative applicant) and an employing authority or the administering authority.

...

(7) An application must be made before the end of-

(a) the period of six months beginning with the relevant date; or

(b) such longer period as the person giving the decision on the disagreement considers reasonable.

(8) The relevant date is-

(a) in the case of a disagreement relating to a decision under regulation 55, the date notification of the decision is given under regulation 57; and

(b) in any other case, the date of the act or omission which is the cause of the disagreement or, if there is more than one, the last of them.

...