

## Ombudsman's Determination

Applicant	Mrs R
Scheme	West Yorkshire Pension Fund ( <b>the Fund</b> )
Respondent	University of Bradford ( <b>UoB</b> )

### Outcome

1. I do not uphold Mrs R's complaint and no further action is required by UoB.

### Complaint Summary

2. Mrs R complains that UoB refused her application for Ill Health Retirement (**IHR**).

### Background information, including submissions from the parties

3. Mrs R was on sickness leave between May 2015 and January 2016.
4. On 19 April 2016, Mrs R was referred to Occupational Health (**OH**) to be considered for IHR. Mrs R resumed sickness leave after returning to work in February 2016.
5. On 16 May 2016, Mrs R applied to be considered for IHR.
6. On 15 July 2016, an Independent Registered Medical Practitioner (**IRMP**), Dr Sharp, assessed Mrs R in person and collated medical evidence from her specialists. Dr Sharp provided a detailed, narrative report of Mrs R's state of health that is summarised below:-
  - a. Mrs R had "long term low back pain requiring specialist input, surgery, pain clinic input and medication since 1993".
  - b. Mrs R reported a high level of disability.
  - c. A return to work for Mrs R could not be excluded if 'external work factors' that were impacting on her mental and physical health could be addressed.
  - d. It would be very difficult to predict Mrs R's prognosis for the 22 years remaining before her Normal Pension Age (**NPA**). Mrs R had managed her lower back pain whilst working for a long time and there was a likelihood of Mrs R improving over the long term.

- e. Full consideration could not be made of Mrs R's IHR application without receiving a further report of her mental health from her psychiatrist.
- 7. Dr Sharp subsequently provided a further IRMP report on 26 August 2016 and noted Mrs R's psychological health had deteriorated. Dr Sharp said that addressing issues at work would likely improve Mrs R's mental and physical health, meaning a return to work couldn't be excluded. Dr Sharp also said that Mrs R could not be considered permanently incapable of discharging the duties of her role
- 8. On 2 September 2016, UoB wrote to Mrs R stating that it refused her IHR application.
- 9. On 13 September 2016, Mrs R raised a complaint under the Fund's internal dispute resolution procedure (**IDRP**). Mrs R's complaint is summarised below:-
  - a. Mrs R disagreed with Dr Sharp's IRMP report on the basis that she considered all remaining treatment options to have been exhausted. Likelihood of improvement in her condition was slim.
  - b. She was permanently incapacitated and did not consider that her age was a relevant consideration for IHR.
  - c. The "chronic" pain Mrs R experienced fluctuated in severity. However, she had "extreme pain for 20 years". None of her orthopaedic consultants or pain specialists considered that her pain would recede.
- 10. On 15 November 2016, Mrs R was dismissed on grounds of capability by UoB.
- 11. On 30 January 2017, UoB provided its Stage 1 IDRP response to Mrs R's complaint. UoB said it was responsible for the decision to grant Mrs R's IHR application after obtaining a report from an IRMP and quoted the criteria Mrs R needed to satisfy in order to be eligible for IHR:

**Regulation 35 Early Payment of retirement pension on ill-health grounds: active members**

(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.

- 12. UoB said that Dr Sharp's report was one of several it had considered in assessing Mrs R's IHR application against the criteria stipulated in the Regulations. UoB also said that it had considered the medical evidence. In spite of Mrs R's history of sickness absence, mental health conditions and pain, UoB decided that Mrs R was not permanently incapable of performing the duties of her role. UoB acknowledged that workplace issues Mrs R experienced affected her mental and physical health. However, UoB considered that they were "unlikely to be an issue in future employment" in line with the reasoning in Dr Sharp's IRMP report.

13. On 25 May 2017, Mrs R requested that her complaint be considered at Stage 2 of the IDRPs. Mrs R's complaint is summarised below:-
  - a. UoB based its decision to decline her application on a letter from one of her specialists, Dr Gorelov, that was 6 years old. Her prognosis changed significantly and UoB discounted other pertinent parts of Dr Gorelov's analysis.
  - b. Treatments performed after Dr Gorelov's 2011 report were unsuccessful and, in spite of referral to pain management specialists, management of her back pain was now limited to her taking powerful, opioid painkillers.
  - c. Her mental health had worsened and she was still under the care of mental health specialists. Other causes of her depression and anxiety remained.
  - d. Other specialists determined that her back pain was incurable and permanently incapacitating.
14. On 26 August 2017, the City of Bradford Metropolitan District Council (**CBMDC**) provided its Stage 2 IDRPs response, in its capacity as Administering Authority of the WYPF. CBMDC said it was not satisfied that UoB had "followed the correct process and regulatory requirements" in reaching its decision on Mrs R's IHR application. It said that the delay between Dr Sharp's IRMP report and Mrs R's employment being terminated in November 2016 was too long. CBMDC also said that further evidence and another IRMP report would be required to cover August 2016 – November 2016. Consequently, it remitted Mrs R's application to UoB. CBMDC told UoB to gather further medical evidence, request another IRMP report and consider Mrs R's application afresh.
15. On 24 November 2017, Dr Hall-Smith, another IRMP, provided a further report on Mrs R, which is summarised below:-
  - a. Dr Hall-Smith was in receipt of further evidence from Mrs R's doctors and psychiatrist.
  - b. It was not disputed that Mrs R had chronic, ongoing medical problems.
  - c. Dr Hall-Smith had seen no evidence that there was a deterioration in Mrs R's state of health between August 2016 and November 2016. All the available evidence would likely not have led Dr Sharp to reach a different conclusion, if her IRMP report had been made in November 2016.
16. On 4 January 2018, UoB wrote to Mrs R stating that it would not grant her IHR application.
17. On 28 May 2018, Mrs R raised a further complaint under the Fund's IDRPs. In UoB's view, there was no material change in the facts or its position since Mrs R's original IDRPs complaint. After consulting with this Office and WYPF, UoB forwarded Mrs R's appeal directly to the Pensions Ombudsman in order not to delay matters further.

## Adjudicator's Opinion

18. Mrs R's complaint was considered by one of our Adjudicator's who concluded that no further action was required by UoB. The Adjudicator's findings are summarised below:-

- a. The Ombudsman's role is not to decide whether Mrs R is eligible for IHR; that is a matter for UoB to decide after obtaining evidence and a report from a suitably qualified IRMP. It is also not for the Ombudsman to agree or disagree with any medical opinion.
- b. The Ombudsman's role is to decide whether UoB has abided by the Fund's Regulations, asked relevant questions, considered all relevant evidence and explained the reason(s) for its decision in a transparent way. If there are flaws in the decision-making process, the Ombudsman can require UoB to look at Mrs R's case again. However, the weight which is attached to any of the evidence is for UoB to decide, including giving some of it little or no weight. It is open to it to prefer the advice of its own medical advisers unless there is a cogent reason why it should not. Or, should not without seeking clarification. This might include errors or omissions of fact on the part of the IRMP, or a misunderstanding of the relevant Regulations. The Adjudicator reviewed Mrs R's case on this basis.
- c. UoB is entitled to ascribe little weight to recommendations in support of Mrs R being granted IHR from her specialists. Particularly if those recommendations are not made with reference to the criteria laid out in the Regulations. IHR decisions can only be made on the balance of probabilities. UoB appropriately considered the question of whether Mrs R would likely be permanently incapable of performing her duties until NPA.
- d. In its Stage 2 IDRP response, CBMDC remitted Mrs R's IHR application back to UoB to re-consider because of the length of time between Dr Sharp's IRMP report and Mrs R's dismissal in November 2016. The Regulations do not stipulate that an IRMP's report must be provided to UoB within a certain date of a member being dismissed.
- e. WYPF stated that it was good practice for Mrs R to be assessed as close to her dismissal as practicable. Consequently, Mrs R's IHR application was remitted to UoB and she was afforded the opportunity to submit further evidence. UoB then sought a further IRMP opinion from Dr Hall-Smith. The Adjudicator said that both Dr Sharp's and Dr Hall-Smith's reports assessed Mrs R's functional capacity and her likelihood of returning to gainful employment.
- f. It is for UoB to apportion weight (if any) to the relevant medical evidence as it sees fit. However, it should be able to justify why it prefers one opinion over another. The evidence supplied supported the finding that UoB reviewed Mrs R's application appropriately.

- g. The Adjudicator understood why Mrs R felt that UoB relied upon a report from Dr Gorelov that did not accurately reflect her current prognosis. However, UoB considered the duties Mrs R performed in making its decision.
  - h. UoB thoroughly assessed all the available evidence against the Fund Regulations for granting IHR and did not reach a flawed decision.
19. Mrs R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs R 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 key points made by Mrs R for completeness.

### **Ombudsman's Decision**

20. Mrs R disagrees with UoB's decision not to grant her IHR. However, Mrs R's disagreement on its own is not sufficient grounds for me to remit the matter back to UoB for her application to be re-considered.
21. In her comments, Mrs R says that UoB based its decision partly on Dr Sharp's incorrect assertion that further treatment options are available to treat her condition. Mrs R considers that the overwhelming opinion of all of her specialists is that no further, untried treatment options exist. Mrs R also says that UoB did not take adequate account of the medical evidence submitted by her General Practitioner (GP).
22. UoB is entitled to prefer the views of one specialist over another if it has considered all of the relevant factors and not considered any irrelevant factors. I can see no evidence that UoB has not considered Mrs R's application for IHR in accordance with the Regulations and all the medical evidence available.
23. As explained by the Adjudicator in his Opinion, my role is not to review the medical evidence and come to a decision of my own but to consider UoB's decision-making process. I agree with the Adjudicator that it was good practice for CBMDC to remit Mrs R's application back to UoB to consider again after her dismissal.
24. In view of there being less than three months between Dr Sharp's IRMP report and Mrs R being dismissed it is not surprising that there was a paucity of further medical evidence for Dr Hall-Smith to refer to. Consequently, I agree with the Adjudicator's view that UoB reviewed Mrs R's IHR application appropriately based on the facts.
25. I do not uphold Mrs R's complaint.

**Anthony Arter**

Pensions Ombudsman  
9 September 2019