

Ombudsman's Determination

Applicant	Miss S
Scheme	Teachers' Pensions Scheme (the Scheme)
Respondents	Teachers' Pensions (TP) Department for Education (DfE)

Outcome

1. I do not uphold Miss S' complaint and no further action is required by TP or DfE.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Miss S' complaint is that she has been incorrectly refused an ill-health retirement pension (**IHRP**).

Background information, including submissions from the parties

4. TP is the administrator of the Scheme. DfE is the Scheme Manager. The responsibility for decision-making in ill health cases is divided between the two. At the initial application stage, and at the first stage of the Internal Dispute Resolution Procedure (**IDRP**), it is the responsibility of TP to make a decision taking into account a recommendation from the Scheme's medical adviser, OH Assist. If a further appeal is made at stage two of the IDRP, it is the responsibility of DfE to make a decision, again after receiving a recommendation from OH Assist.
5. The relevant regulations in Miss S' case are the Teachers' Pensions Regulations 2010 (SI2010/990) (as amended) (**the Regulations**), which came into force on 1 September 2010. Relevant sections of the Regulations are set out in Appendix 1.
6. On 31 August 2010, Miss S handed in her notice at Lady Zia Wernher School in order to care for her mother.
7. On 7 March 2017, Miss S applied for IHRP.
8. On 22 March 2017, Miss S was referred to OH Assist. OH Assist took into consideration: form 18, completed by Miss S' GP, Dr Gupta, dated 23 February 2017;

a letter from Miss S' Consultant Neurologist, Dr Watts dated 31 January 2011; a letter from her Consultant Anaesthetist, Dr Hickson dated 3 January 2017; some letters from Miss S dated 24 November 2016 and 16 March 2017; and, a letter from her Consultant Gynaecologist, Mr Owens, dated 22 November 2016. OH Assist was of the opinion that it was unlikely that Miss S would be capable of returning to teaching within a busy demanding school environment. However, she had demonstrated that she was capable of home tutoring on a part-time basis, albeit in a much-reduced capacity. OH Assist therefore concluded that it was not possible to say that Miss S was permanently incapacitated from teaching by reason of ill health.

9. As such, OH Assist said that Miss S does not meet the criteria for being permanently incapacitated for teaching as defined by the Regulations. And in addition to being incapacitated from teaching, Miss S' ability to carry out any work was not impaired by more than 90%. So, Miss S did not meet the criteria for total incapacity.
10. On 13 April 2017, TP sent Miss S a letter advising that her application had been rejected on the basis that her "health is such that it should not prevent you from continuing in the profession until your normal pension age."
11. On 17 August 2017, Miss S complained under the Scheme's IDRP.
12. On 23 November 2017, TP wrote to Miss S, apologising for the delay in replying to her and confirming that her case has been referred to OH Assist.
13. On 30 November 2017, TP wrote to Miss S regarding her appeal for IHRP and explained that OH Assist required further information before her application could be considered. OH Assist requested an up to date report from Miss S' GP or specialist regarding her medical conditions, particularly her recent uterine cancer treatment, along with other health problems and prognosis to age 60.
14. On 23 January 2018, Miss S' GP, Dr Sarwar, responded to TP stating that Miss S was currently under the Gynaecology Team's surveillance, as her uterus had shown abnormality but was not yet considered cancer. He further said Miss S' "long [on] going neurological issues post surgery and the schwannoma mean that she does have problems in busy environments, such as supermarkets. The Amitriptyline we know does help this, but I would agree she would find teaching very difficult to continue in a normal classroom setting."
15. On 31 January 2018, TP referred Miss S' case to another doctor at OH Assist, Dr Wladyslawska, who took into consideration: a letter from Miss S' GP, dated 23 January 2018; a letter from her Consultant Neurologist, Dr Watts, dated 31 January 2011; a letter from her Consultant Anaesthetist, Dr Hickson, dated 3 January 2017; a letter from Katja O'Neill, dated 13 December 2017; and, some letters from the Miss S dated 17 August 2017, 5 January 2018 (together with an undated letter). Dr Wladyslawska noted that Miss S' condition had improved between 2010 and 2012 and had remained stable ever since, and that she was able to undertake essential everyday tasks. Miss S had indicated the beneficial effect of Amitriptyline and stated

that she did one on one, teaching for family and friends' children, for one to two hours a week at home. Dr Wladyslawska understood that, because of her health problems, Miss S was unfit for work in a busy school environment. She also accepted that the unpredictable nature and tendency to sudden deterioration of her symptoms, meant Miss S was unable to sustain a teaching role, even in a reduced capacity. However, Dr Wladyslawska said it was expected that Miss S should be able to undertake significantly less demanding work, in terms of cognitive function and with restricted sensory stimuli, preferably of part time nature and adequately adjusted in view of her symptoms employment, before her normal retirement age of 60.

16. Dr Wladyslawska said that Miss S did meet the criteria for being permanently incapacitated as defined by the Regulations. She said that, in her opinion, Miss S' ability to carry out any work was not impaired by more than 90%, therefore, Miss S did not meet the criteria for total incapacity.
17. On 6 February 2018, TP sent Miss S a letter, rejecting her appeal under stage one of the IDRP. It said that, following advice from Dr Wladyslawska, it had been determined that the original decision was correct.
18. On 9 February 2018, Miss S appealed.
19. On 16 April 2018, after receiving no response, Miss S chased DfE.
20. On 11 July 2018, DfE wrote to Miss S, confirming there was no trace of her appeal; it requested that she resubmit the documents.
21. On 17 July 2018, Miss S submitted further evidence to support her appeal.
22. On 15 August 2018, Miss S' case was referred to another doctor at OH Assist, Dr Glen, who took into consideration all previous existing evidence, including letters from Miss S dated 9 February, 16 April and 17 July 2018. Dr Glen noted that although Miss S suffered from a short term post-operative decline in her cognitive function as a complication of the anaesthetic, and experienced ongoing problems of imbalance, migraine and trigeminal neuralgia, these symptoms improved with use of Amitriptyline. Dr Glen accepted that Miss S was unlikely to be able to function at the high level required of a Teacher, due to her difficulties coping with busy and demanding work. However, there was no evidence to support any further decline in health that should interfere with her undertaking a less demanding role part time, suitability adjusted to accommodate her residual cognitive difficulties, prior to her normal retirement age of 60 years.
23. On 20 August 2018, DfE responded under stage two of the Scheme's IDRP. It rejected her complaint, following advice from Dr Glen. It added that:

“All appeals against the non-award of benefits are considered on the basis of whether they show that the original decision arrived at following the application should not have been reached. [DfE's] medical adviser has considered most carefully all the information which has been made available in support of your

second stage appeal and has reviewed all information provided as part of the original application and subsequent first stage appeal. The medical adviser however, has been unable to recommend that you have become permanently incapacitated for any work as described above.”

Adjudicator’s Opinion

24. Miss S’ complaint was considered by one of our Adjudicators, who concluded that no further action was required by TP or DfE. The Adjudicator’s findings are summarised below:-

- The Ombudsman’s role was to decide whether TP and DfE had abided by the Regulations, asked relevant questions, considered all relevant evidence and explained the reason(s) for its decision. If there were flaws in the decision-making process, the Ombudsman could require TP or DfE to look at Miss S’ case again. However, the weight attached to any of the evidence was for TP or DfE to decide, including giving some of it little or no weight. It was also open to TP or DfE to prefer the advice of its own medical advisers unless there was a cogent reason not to do so.
- The Adjudicator was of the opinion that, in considering the initial application, and the first and second stage appeals, both TP and DfE had asked themselves the right questions and taken all the relevant, and no irrelevant, matters into account. In addition, they had obtained advice from the Scheme’s medical advisers and considered the test as set out in the Regulations. Therefore, she was satisfied that they had applied the Regulations properly.
- Miss S contends that she should be entitled to an in-service IHRP as her condition was diagnosed whilst she was in employment.
- Under the Regulations, in order to be eligible for an IHRP Miss S must have left her employment because of incapacity/ill health. However, based on the evidence provided, Miss S had resigned from her teaching post on 31 August 2010, but did not apply for IHRP until March 2017. The Adjudicator noted that Miss S had said that her operation was scheduled for 2 September 2010. However, she had also confirmed that she left employment to look after her mother. The Adjudicator was of the opinion that Miss S was correctly assessed against the out of service ill health criteria and both TP and DfE had correctly followed the Regulations.
- The Adjudicator appreciated that Miss S had said she was not well during that time, however, the date someone becomes eligible for ill health retirement is from the date the medical advisor confirms a person is incapacitated, not the date of diagnosis.
- Under the Regulations, an applicant must satisfy either conditions, 1, 2 and 3 or condition 4, in order to be awarded an IHRP. Conditions 1, 2 and 3 comprise the in-service ill health early retirement requirements and state that: the applicant must be incapacitated for teaching and likely to remain so up to their normal pension age, that they were in service immediately before becoming incapacitated, and that they were in

service within the 'in-service' application period. Condition 4 is the out of service criteria and this requires that the applicant be incapacitated for all forms of work.

- Miss S did not leave her employment for reasons that would satisfy conditions 1, 2 and 3 and, so, only condition 4 applied to her case. The medical advisors at stages 1 and 2 of the appeal process had advised that, whilst she was incapacitated for teaching work, she was not incapacitated for all forms of work. Miss S further confirmed that she was teaching privately at home.
 - Miss S said that she received misinformation from both TP and DfE, in that TP advised her to apply for an IHRP in the first place and one advisor informed her that she had already been awarded her pension. However, this was not a sufficient reason for the Adjudicator to remit the matter back to TP for her application to be reconsidered.
25. Miss S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Miss S provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and will therefore only respond to the key points made by Miss S for completeness.

Ombudsman's decision

26. Miss S has complained about the amount of time TP and DfE took in processing her IHRP application and that it provided her with misinformation. A scheme's IDRPs must ensure that decisions are reached, and notified to applicants, within a "reasonable period". The Pensions Regulator's code of practice provides that the relevant decision-maker is expected to determine disputes within four calendar months of receiving the application. The four-month period applies separately to each determination stage. Whilst I appreciate that TP's and DfE's stage 1 and 2 IDRPs responses took more than four months, I can see that between the time Miss S appealed to the time TP and DfE issued the responses, there was communication between TP, DfE and Miss S. As such, I am satisfied that the time taken by TP and DfE was reasonable when considering Miss S' complaint.
27. Miss S has said TPAS advised her to apply for an IHRP, which cost her £200 in medical reports, postage, phone calls and anxiety. Whilst I appreciate TPAS may have suggested to Miss S to apply for an IHRP, it was ultimately her decision to apply and, in any case, TPAS is a separate organisation from this Office, therefore, we cannot take responsibility for any costs incurred as a result of any information or guidance TPAS gave Miss S.
28. The Adjudicator could have explained that I can make an award in respect of "non-financial injustice", that is distress and inconvenience suffered by an Applicant. But I will only do so where: (a) the distress and inconvenience was caused directly by maladministration by the respondent; and (b) the distress and inconvenience was significant. In this particular case, I do not find that either TP or DfE made an administrative error.

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29. I do not uphold Miss S' complaint.

Anthony Arter

Pensions Ombudsman
5 April 2019