

Ombudsman's Determination

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| Applicant | Mr R |
| Scheme | Central Networks Group of the Electricity Supply Pension Scheme |
| Respondent | The Trustee of the Central Networks Group of the Electricity Supply Pension Scheme (the Trustee) |

Outcome

1. Mr R's complaint is upheld and to put matters right the Trustee shall review its decision not to backdate his pension to 2015.

Complaint summary

2. Mr R has complained that the Trustee has paid his frozen benefits with effect from April 2017, rather than September 2015.

Background information, including submissions from the parties

Background

3. The relevant rules are now contained within a consolidated Trust Deed and Rules dated January 2017. Rule 17(1A) provides:

"Benefits ... shall be paid to a Member entitled to Frozen Benefits, and he shall be treated as having retired:

(a) ...

(b) ... on a date earlier than the date of his attaining Normal Pension Age on the grounds of his Ill-Health ..."

4. "Ill-Health" is defined as:

"bodily or mental incapacity or physical infirmity which, in the opinion of a Medical Adviser of the Scheme, will prevent, otherwise than temporarily, the person concerned from carrying out any duties which the Employer employing

him may reasonably assign to him having regard to the duties carried out by him immediately before so becoming incapacitated or infirm”

5. “Medical Adviser of the Scheme” means a “duly registered medical practitioner appointed or approved by any of the Principal Employers for the purposes of the Scheme”.
6. The Scheme is administered by Western Power Distribution (South West) plc (**WPD**).
7. Mr R’s employment ceased in April 2003 and he became a deferred member of the Scheme. He applied for the early payment of his frozen (deferred) benefits on the grounds of ill health in September 2015. Mr R’s case was referred to an occupational health physician, Dr Williams. In a report dated 27 November 2015, Dr Williams said he had received a report from Mr R’s GP detailing his underlying medical condition. He advised that the permanence of Mr R’s ill health could not be established at that stage. Dr Williams said there was an expectation that, with appropriate treatment, there was a likelihood that Mr R would recover sufficiently “to return to meaningful employment”.
8. Mr R appealed via the Scheme’s two-stage internal dispute resolution (**IDR**) procedure. Stage one applications are considered by the Scheme’s Disputes Officer. Stage two applications are considered by the Trustee board.
9. A stage two decision was issued on 4 April 2017. This upheld the initial decision not to pay an ill health retirement pension. Mr R was informed that the Trustee was not able to consider medical evidence from a practitioner who had not been appointed by the Employer.
10. Mr R reapplied for the early payment of his frozen benefits on 26 April 2017. In support of his application, Mr R provided details of his claim for Employment Support Allowance in 2016, appointments with a pain management team between June 2016 and February 2017, and fitness for work forms completed by his GP between September 2015 and December 2016.
11. Mr R’s case was referred back to Dr Williams. On 1 September 2017, Dr Williams wrote to WPD stating:

“Based on the medical evidence available, I am of the opinion that [Mr R] is suffering significant ill health, which is likely to prevent him from undertaking any meaningful employment for the foreseeable future. I am of the opinion that he is now eligible for early release of his frozen benefits.”
12. WPD wrote to Mr R, on 14 September 2017, informing him that his pension would now be paid. It provided him with a statement of the benefits payable. Mr R queried the effective date of payment and WPD wrote to him again on 3 October 2017. It said his pension would be paid with effect from 26 April 2017; that is, the date of his request.

13. Mr R appealed under the IDR procedure. A stage one decision was issued on 24 November 2017. WPD said:-

- A member was eligible for ill health early retirement if, in the opinion of a medical practitioner appointed by the Employer, he could show that his condition prevented him from carrying out his workplace duties and was not temporary.
- It was required to consider each case under the procedure set out in the rules of the Scheme. This meant that only evidence from a medical practitioner appointed by the Employer will be accepted.
- Dr Williams had provided a report, dated 27 November 2015, in which he had said that the permanency of Mr R's condition could not be established and, therefore, he was not eligible for ill health retirement at that time.
- After Mr R's second application, Dr Williams had provided a second report, dated 1 September 2017, stating that, in his opinion, Mr R satisfied the ill health early retirement requirement under the Scheme rules.
- Mr R's pension could not be backdated to September 2015 because the medical practitioner appointed by the Employer did not establish that he met the requirements for ill health early retirement until his second application in April 2017.

14. Mr R submitted a further appeal. A stage two decision was issued on 11 April 2018. The Trustee said:-

- It must consider each member's case in accordance with the procedure required by the Scheme rules.
- The Scheme rules provide that a member is eligible for ill health early retirement only if, based on the opinion of a medical practitioner appointed by the Employer, he can show that his condition prevented him from carrying out his workplace duties and was not temporary.
- This meant that the Trustee cannot consider evidence from a medical practitioner who is not appointed by the Employer.
- The medical practitioner appointed by the Employer did not establish that Mr R met the requirements for ill health early retirement under the Scheme rules until April 2017.

Mr D's position

15. Mr D submits:-

- He has not been able to work for the last nine years because of ill health.
- He applied for early retirement from September 2015.

- He has never worked for WPD.
- He provided medical certificates which were accepted by the Department for Work and Pensions (**DWP**) as proof of his incapacity from September 2015.
- He has not been examined by the company doctor.
- Dr Williams believed he would recover but his health deteriorated.
- The Trustee has discriminated against him by not accepting legitimate medical evidence and not allowing Dr Williams to examine him.
- He is a member of the Scheme and, as such, the scheme administrator and Dr Williams had a duty of care towards him, which they failed in providing. This resulted in distress and financial hardship which should be taken into account.

The Trustee's position

16. The Trustee submits:-

- It is sympathetic to Mr R and notes the significance of his condition.
- The Scheme rules require it to obtain the opinion of a medical adviser "of the Scheme" before an ill health pension may be paid. This means obtaining the opinion of a registered medical practitioner appointed or approved by the Principal Employer.
- Such an opinion was only provided in relation to Mr R's second request for an ill health pension. It is for this reason that his pension was backdated to 26 April 2017.
- It recognises it has a role in ensuring that the SMA has properly formed an opinion about the member's health. This may include satisfying itself that the Scheme's medical adviser has taken account of information or opinions from alternative sources where relevant. Once it has satisfied itself that the Scheme's medical adviser has reached an opinion in a proper manner, it is not entitled to substitute its own opinion or that of another medical professional.

Adjudicator's Opinion

17. Mr R's complaint was considered by one of our Adjudicators who concluded that further action was required by the Trustee. 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 Mr R's case, the relevant rule was Rule 17(1A) which provides for the payment of frozen benefits before normal pension age (**NPA**) where the member is suffering from "Ill-Health". Ill-Health was defined as:

"bodily or mental incapacity or physical infirmity which, in the opinion of a Medical Adviser of the Scheme, will prevent, otherwise than temporarily, the person concerned from carrying out any duties which the Employer employing him may reasonably assign to him having regard to the duties carried out by him immediately before so becoming incapacitated or infirm"
- In other words, Mr R could only be paid his benefits if he was permanently unable to carry out any duties which his former employer might reasonably have assigned to him. In the Adjudicator's view, this definition envisaged a wider range of duties than simply those which Mr R had actually been undertaking before his employment ceased. However, in deciding whether the range of duties considered for the purposes of Rule 17(1A) was reasonable, due regard must be had for Mr R's actual former duties.
- Rule 17(1A) required the opinion "of a Medical Adviser of the Scheme". This was defined as a "registered medical practitioner appointed or approved by any of the Principal Employers". The Trustee had said that it could not consider any evidence from a medical practitioner who had not been appointed by an employer. In the Adjudicator's view, this was applying too narrow an interpretation to Rule 17(1A). The rule did require the Scheme's Medical Adviser (**SMA**) to form an opinion as to whether or not the member is suffering from Ill-Health. However, she was of the view that this did not preclude the Trustee from considering any other medical evidence.
- The Trustee had an overall responsibility for ensuring that members received the benefits they were entitled to. Mr R could not be paid his frozen benefits before his NPA if the SMA was not of the opinion that he was suffering from Ill-Health. However, the Trustee had a responsibility to ensure that the SMA reached his/her opinion in a proper manner. It should not accept the SMA's opinion blindly; particularly if other relevant evidence had been submitted.
- The Trustee could only be expected to review the medical evidence from a lay perspective. It was not expected to challenge a medical opinion. It could, however, be expected to ensure that there had been no error or omission of fact by the SMA and that s/he had not misinterpreted the relevant rule. If there was a difference of opinion between the SMA and other medical advisers, for example, the member's treating physicians, the Trustee should expect the SMA to explain why.
- Mr R's frozen benefits had been put into payment with effect from 26 April 2017. This was the date of his second application. Mr R argued that the benefits should be paid with effect from September 2015; the date of his first

application. The Trustee had declined to backdate Mr R's benefits to September 2015 on the grounds that the SMA was not of the opinion that he was suffering from Ill-Health (as defined) at that time.

- In November 2015, Dr Williams had advised that the permanence of Mr R's ill health could not be established at that stage. He had said there was an expectation that, with appropriate treatment and input, Mr R was likely to recover sufficiently "to return to meaningful employment".
- Dr Williams' report was brief. He referred to appropriate treatment and input but did not explain what this might be. He referred to Mr R returning to "meaningful employment" but it was not clear whether he was aware of or had considered Mr R's former duties. Rule 17(1A) did not require Mr R to be permanently incapable of "meaningful employment". It required him to be permanently incapable of "carrying out any duties which the Employer employing him may reasonably assign to him having regard to the duties carried out by him".
- In the Adjudicator's view, the report provided by Dr Williams in November 2015 lacked sufficient detail for the Trustee to be able to satisfy itself that his opinion had been reached in a proper manner. It also lacked sufficient detail for Mr R to fully understand why his benefits were not being paid at that time and either accept this or prepare an informed appeal.
- The Adjudicator noted that Mr R had appealed the decision at the time under the Scheme's IDR procedure but did not apply to the Ombudsman when his appeal was unsuccessful. She considered whether this now precluded the Ombudsman from considering the effect of Dr Williams' 2015 report. In her view, the fact that the Trustee was relying on Dr Williams' 2015 report in deciding not to backdate Mr R's benefits to September 2015 brought it within the scope of this investigation. If the decision not to pay Mr R's benefits in 2015 met the requirements of Rule 17(1A), his claim for further backdating could not succeed. It was, therefore, appropriate to consider whether or not that was the case.
- It was the Adjudicator's opinion that the lack of detail in Dr Williams' 2015 report meant it was not safe to conclude that his opinion had been reached in accordance with Rule 17(1A). In order to satisfy itself that due process had been followed, the Trustee required more detail from Dr Williams. It did not request this and its failure to do so amounted to maladministration. Mr R had sustained injustice as a consequence because the appropriate commencement date for the payment of his benefits had yet to be established. His complaint could be upheld on that basis.
- The Adjudicator clarified that, in coming to this conclusion, she was not expressing an opinion as to the appropriate date for the payment of Mr R's frozen benefits. It might well be that, having obtained further information from

Dr Williams, the Trustee would be able to satisfy itself that the 2015 decision had been reached correctly. If that was the case, Mr R's benefits would be payable from the date of his second application; 26 April 2017.

- The Adjudicator suggested that, in order to put matters right, the Trustee should ask Dr Williams to provide more information about his reasons for concluding that Mr R was not suffering from Ill-Health in 2015. In particular, it should ask Dr Williams to explain what treatment and input he had in mind and whether he had had appropriate information about Mr R's former duties. It would also be helpful if the Trustee was to ask Dr Williams to explain what had changed between 2015 and 2017. On receipt of the further information from Dr Williams, the Trustee should consider whether the 2015 decision was reached in accordance with Rule 17(1A). If it was satisfied that it was, it should write to Mr R explaining this. If not, it should ask Dr Williams to review Mr R's case as at September 2015.

18. The Trustee was willing to undertake the steps suggested by the Adjudicator, but Mr R did not fully agree with her Opinion and the complaint was passed to me to consider. Mr R 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 R for completeness.

Ombudsman's decision

19. Mr R's benefits could only be paid before his normal pension age on the grounds of ill health if and when the requirements of Rule 17(1A) were met. This meant that the SMA had to be of the opinion that he met the definition of Ill-Health, as set out in the Scheme Rules. If this was not the case, the Trustee could not pay the benefits.
20. In 2015, Dr Williams expressed the view that the permanence of Mr R's ill health could not be established at that stage. He said there was an expectation that, with appropriate treatment, it was likely that Mr R would recover sufficiently to return to meaningful employment. On the basis of this opinion, the Trustee declined to pay Mr R's benefits.
21. Whilst the Trustee cannot substitute its own opinion for that of the SMA or pay the benefits on the basis of an opinion from another medical practitioner, it does have an overarching responsibility for the administration of the Scheme. Its role in Mr R's case was to ensure that the SMA reached an opinion in a proper manner; that is, in accordance with the Scheme Rules and having taken account of all relevant matters. The Trustee cannot fulfil this role if it does not have sufficient information as to why the SMA has reached the conclusions s/he has.
22. Dr Williams' 2015 report did not provide the Trustee with sufficient information for it to be able to understand his reasoning. I accept that the Trustee can only review cases from a lay perspective. I am in the same position. However, it should have asked Dr Williams to explain what treatment he had in mind and what he meant by "meaningful

employment". This would have enabled the Trustee to satisfy itself that there was no error or omission of fact or misunderstanding of the Scheme Rules on Dr Williams' part. For example, it would have been able to check that Dr Williams was not referring to treatment Mr R had already received and that he understood what duties Mr R had been undertaking. These are simple factual checks within the ambit of a layperson.

23. The Trustee's decision not to backdate Mr R's pension to September 2015 is based on Dr Williams' opinion at that time. It should, therefore, satisfy itself that this opinion was reached in a proper manner. As it stands, the Trustee requires more information in order to do so. I note that the Trustee has expressed a willingness to obtain clarification from Dr Williams and review its decision. I find that this an appropriate response in the circumstances.
24. Mr R clearly feels that he did not receive the service he was entitled to expect when he applied for the early payment of his benefits. It is not yet clear whether or not Mr R's benefits should have been paid from 2015. As a result, it is not possible to say that Mr R has suffered any financial injustice as a consequence of the flaws in the Trustee's approach. If it turns out to be the case that backdating his pension to 2015 is appropriate, any financial injustice can be addressed by payment of arrears, with interest. For the sake of clarity, I have made directions to this effect.
25. With regard to Mr R's distress, I find that an apology from the Trustee is sufficient in the circumstances. The maladministration relates to a misunderstanding of the scope of the Trustee's role, rather than multiple errors, and the Trustee is willing to take the necessary steps to provide redress.
26. Therefore, I uphold Mr R's complaint.

Directions

27. Within 28 days of the date of this Determination, the Trustee shall obtain clarification from Dr Williams concerning his 2015 opinion. It shall review Mr R's case and provide him with a decision on backdating his pension setting out its reasons for reaching that decision.
28. If the Trustee concludes that it would be appropriate for it to backdate Mr R's benefits, it shall pay him arrears of pension, together with simple interest at the base rate quoted by the Bank of England for the period in question.

Anthony Arter

Pensions Ombudsman
20 November 2019