

## Ombudsman's Determination

Applicant	Mr S
Scheme	Local Government Pension Scheme ( <b>the Scheme</b> )
Respondents	North West Fire Control ( <b>NWFC</b> ), Cheshire West and Chester Council ( <b>CWCC</b> )

### Outcome

1. I do not uphold Mr S' complaint and no further action is required by NWFC or CWCC.

### Complaint Summary

2. Mr S complains that NWFC, his former employer, and CWCC, the Administering Authority, should have considered his application for ill health retirement (**IHR**), as if he were still employed by NWFC. Mr S says that had he not resigned and remained an employee, then NWFC may have terminated his employment on the grounds of capability and he would have been entitled to an IHR pension.

### Background information, including submissions from the parties

3. The Scheme is governed by the Local Government Pension Scheme 2013 Regulations and the relevant IHR Regulations are provided in the Appendix.
4. On 18 May 1998, Mr S was employed as a Fire Fighter with Cheshire Fire & Rescue Service (**CFRS**).
5. On 7 January 2013, Mr S joined the Scheme through a part-time, secondary employment as a Fire Control-room Operator (**FCO**). Mr S was still employed as an On-call Fire Fighter/Crew Manager with CFRS.
6. In May 2014, CFRS combined its control services with other services to form NWFC. Mr S continued working as an FCO for NWFC.
7. On 30 September 2014, Mr S sustained an injury at work. Mr S ruptured the patella ligament of his left knee and was absent from work at NWFC between 1 October 2014 and 3 February 2015.

8. Mr S continued working in both roles until 30 September 2016, when he was granted IHR by CFRS from his firefighting role. Mr S had further complications following surgery that resulted in him developing Post Thrombotic Syndrome (**PTS**).
9. On 10 November 2016, after being referred by NWFC, Mr S was assessed by Dr Mcllroy, an Occupational Health (**OH**) practitioner. Dr Mcllroy said that Mr S struggled to work night shifts due to increased journey times and limited recovery time between shifts. Dr Mcllroy also said that Mr S was “fit for his normal role” but that the “appropriate support is to consider restricting him from the nightshift”.
10. On 13 February 2017, after further exchanges of correspondence, NWFC requested that Dr Mcllroy provide a further OH report on Mr S and its referral letter is summarised below:-
  - a. Mr S had not said that he could not work night shifts. There appeared to be little difference between Mr S’ journey time on day and night shifts.
  - b. NWFC had explored its capacity to support restricting Mr S’ night duties but it was not possible to eliminate them entirely. NWFC was a small organisation that had operational requirements it was required to meet.
  - c. Mr S’ ability to fulfil the terms of his employment contract was “in serious jeopardy”.
  - d. NWFC requested further guidance on how it could make reasonable adjustments to accommodate Mr S’ condition.
  - e. NWFC also asked Dr Mcllroy to consider whether Mr S would be suitable for IHR as it was concerned that “the inability to accommodate the current restriction will result in the termination of [Mr S’] employment”.
11. On 24 February 2017, Dr Mcllroy provided a further OH report on Mr S. Dr Mcllroy said that, in his view, it was premature to consider IHR until “all avenues of adjustments and redeployment have been completed”. Dr Mcllroy also said that the existing restriction on Mr S’ working patterns would have to continue and NWFC would have to consider the length of Mr S’ shifts and journeys.
12. On 10 April 2017, Mr S resumed sickness absence from work and said this was due to stress at work, caused by his on-going health issues.
13. On 14 June 2017, after further exchanges of correspondence with Dr Mcllroy, Mr S attended a meeting with NWFC and initially agreed to return to work on an amended shift pattern that NWFC said addressed Mr S’ limitations.
14. On 1 July 2017, Mr S tendered his resignation to NWFC. His last working day was 31 July 2017.
15. On 6 September 2017, Mr S wrote to NWFC requesting that it consider him for IHR under Regulation 35 as if he were still employed.

16. On 3 October 2017, NWFC wrote to Mr S stating that the Scheme Regulations did not allow deferred members to be granted IHR in the way he was requesting. NWFC stated the criteria for IHR and said that Mr S would need to submit an application and provide supporting evidence of his medical condition to be considered under Regulation 38.
17. On 10 October 2017, Mr S started constructive dismissal proceedings through the Advisory Conciliation Arbitration Service (**ACAS**) that resulted in an Agreement (**the Agreement**) between the parties. The Agreement stated that:-

“Without admission of liability the Respondent shall pay to the Claimant the sum of £5,000 in full and final settlement of all claims which the Claimant could bring to the Employment Tribunal against the Respondent arising out of the Claimant contract of employment with the Respondent or the termination thereof. This agreement does not affect any rights the Claimant may have in relation to personal injury claims or accrued pension rights”.
18. On 14 October 2017, Mr S applied to NWFC for IHR from deferred status.
19. On 17 October 2017, NWFC acknowledged receipt of Mr S’ IHR application and notification of the ACAS proceedings.
20. On 10 November 2017, ACAS sent Mr S and NWFC forms to sign and return to ratify the Agreement.
21. On 30 January 2018, Mr S met with Dr Walker, an independent registered medical practitioner (**IRMP**), for an assessment. Dr Walker’s subsequent report said that Mr S was permanently incapable of discharging the duties of his employment and would be unlikely to be capable of undertaking gainful employment before Normal Retirement Age (**NRA**). Dr Walker noted that Mr S had had a repair operation and was subsequently diagnosed with “significant ilio femoral Deep Vein Thrombosis in the left leg, PTS and persistent swelling”. Dr Walker also said that Mr S had impaired mobility and was only fit for light, sedentary, part-time work.
22. On 6 March 2018, NWFC wrote to Mr S saying that it approved his application for IHR from deferred status as at that date.
23. On 26 March 2018, Mr S raised a complaint via the Scheme’s Internal Dispute Resolution Procedure (**IDRP**). Mr S said that NWFC should have considered him for a Regulation 35 IHR pension, rather than the Regulation 38 pension he was awarded. Mr S also said that his health had not changed markedly since he resigned and, had he not been forced to resign, he would likely have been awarded a Tier 1, Regulation 35 pension.
24. NWFC’s Stage 1 IDRP response was provided on 16 May 2018. The Stage 1 response is summarised below:-
  - a. The Regulations did not allow applications for Regulation 35 IHR pensions for deferred members.

- b. If Mr S' employment had been terminated on the grounds of capability he would not have been awarded IHR.
  - c. NWFC had acted in accordance with the Regulations and did not uphold Mr S' complaint.
25. On 8 June 2018, Mr S asked for his complaint to be considered under Stage 2 of the IDRP. Mr S maintained his previous arguments and said that he was constructively dismissed. Consequently, Mr S argued that his application for IHR should have been considered under Regulation 35.
26. On 1 October 2018, CWCC as the Administering Authority, provided its Stage 2 IDRP response and did not uphold Mr S' complaint. CWCC's response is summarised below:-
- a. Mr S was not an active Scheme member when he applied for IHR.
  - b. The Agreement did not confer any rights to Mr S being granted IHR and the Regulations made no provision for employment disputes.
  - c. Mr S resigned while discussions about adjusting his shift patterns were on-going with NWFC and it had acted reasonably up to the point Mr S resigned.
  - d. Mr S applied for IHR under Regulation 35 five weeks after leaving employment and an application could not be retrospectively made.

### **Adjudicator's Opinion**

27. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by NWFC or CWCC. The Adjudicator's findings are summarised below:-
- a. Mr S complains that his application for IHR should have been considered as though he were still employed by NWFC.
  - b. CWCC should take no further action because the responsibility for considering Mr S' IHR application lies solely with NWFC under the Scheme Regulations.
  - c. The Adjudicator appreciated why Mr S believed that NWFC should have considered his application under Regulation 35. Mr S' employment with NWFC ended on 31 July 2017 and he applied for IHR on 6 September 2017. Mr S was a deferred Scheme member when he applied for IHR. As a deferred member Mr S could only apply for IHR under Regulation 38. There is no provision in the Regulations for Mr S' IHR application to be retrospectively considered under Regulation 35. In the Adjudicator's view, NWFC has acted in accordance with the Scheme Regulations.
  - d. Mr S chose to resign from NWFC. Discussions about Mr S' return to work were still ongoing in July 2017, and it was not now possible to speculate about what

decision NWFC would have taken, had Mr S not resigned. The Adjudicator had seen no evidence to suggest that Mr S would have been awarded a Regulation 35 IHR pension. Mr S' employment may have been terminated on the grounds of capability by NWFC without granting him IHR.

e. NWFC consistently informed Mr S throughout the process that it was considering his IHR application under Regulation 38. In the Adjudicator's view, an Ombudsman would not make an award for distress and inconvenience based on the circumstances.

28. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S 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 S for completeness.

### **Ombudsman's Decision**

29. I agree with the Adjudicator's view that CWCC should take no further action. Under the Scheme Regulations the responsibility for considering Mr S' IHR application is made by NWFC.

30. Mr S says that NWFC deliberately delayed dealing with his case. He points out that over 22 weeks elapsed between Dr McIlroy's February 2017 report and his resignation. Mr S considers that as NWFC had exhausted its internal review process and, as further adjustments to his working pattern were impossible, it should have instructed an IRMP in February 2017. Having reviewed the papers, I am satisfied that NWFC did not delay Mr S' case unnecessarily. Negotiations and meetings about Mr S returning to work continued until June 2017 and Mr S had initially agreed to an amended shift pattern before resigning. Consequently, it was not inevitable that Mr S would be dismissed by NWFC and it would need to instruct an IRMP. Mr S resigned instead of accepting the adjustments NWFC proposed.

31. In his comments, Mr S maintains that he was constructively dismissed by NWFC and that the Agreement is evidence of this. However, that is an employment matter and does not fall within my jurisdiction to consider. Mr S resigned from NWFC. Once Mr S had resigned, his application for IHR retirement could only be considered as a deferred member under Regulation 38. The Regulations do not permit retrospective IHR applications arising from employment disputes. Consequently, I agree with the Adjudicator's view that NWFC reviewed Mr S' IHR application appropriately based on the facts.

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32. I do not uphold Mr S' complaint.

**Anthony Arter**

Pensions Ombudsman  
23 September 2019

## Appendix

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

(1) An active member who has qualifying service for a period of two years and whose employment is terminated by a Scheme employer on the grounds of ill-health or infirmity of mind or body before that member reaches normal pension age, is entitled to, and must take, early payment of a retirement pension if that member satisfies the conditions in paragraphs (3) and (4) of this regulation.

(2) The amount of the retirement pension that a member who satisfies the conditions mentioned in paragraph (1) receives, is determined by which of the benefit tiers specified in paragraphs (5) to (7) that member qualifies for, calculated in accordance with regulation 39 (calculation of ill-health pension amounts).

(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.

(5) A member is entitled to Tier 1 benefits if that member is unlikely to be capable of undertaking gainful employment before normal pension age.

(6) A member is entitled to Tier 2 benefits if that member—

(a) is not entitled to Tier 1 benefits; and

(b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment; but

(c) is likely to be able to undertake gainful employment before reaching normal pension age.

(7) Subject to regulation 37 (special provision in respect of members receiving Tier 3 benefits), if the member is likely to be capable of undertaking gainful employment within three years of leaving the employment, or before normal pension age if earlier, that member is entitled to Tier 3 benefits for so long as the member is not in gainful employment, up to a maximum of three years from the date the member left the employment.

### **Regulation 38 Early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members**

(1) A deferred member who, because of ill-health or infirmity of mind or body—

(a) becomes permanently incapable of discharging efficiently the duties of the employment that member was engaged in at the date the member became a deferred member, and

(b) is unlikely to be capable of undertaking gainful employment before normal pension age, or for at least three years, whichever is the sooner,

may ask to receive payment of a retirement pension whatever the member's age.

(2) A request under paragraph (1) must be made in writing to the deferred member's former Scheme employer or appropriate administering authority where the member's former Scheme employer has ceased to be a Scheme employer.

(3) Before determining whether or not to agree to a request under paragraph (1), the deferred member's former Scheme employer, or administering authority, as the case may be, must obtain a certificate from an IRMP as to whether the member is suffering from a condition that renders the member—

(a) permanently incapable of discharging efficiently the duties of the employment the member was engaged in because of ill-health or infirmity of mind or body; and, if so,

(b) whether as a result of that condition the member is unlikely to be capable of undertaking gainful employment before reaching normal pension age, or for at least three years, whichever is the sooner.

(4) A deferred pensioner member who, because of ill-health or infirmity of mind or body, is unlikely to be capable of undertaking gainful employment before normal pension age, may ask to receive payment of a retirement pension at any time before the member's normal pension age.

(5) A request under paragraph (4) must be made to the deferred pensioner member's former Scheme employer, or appropriate administering authority where the member's former Scheme employer has ceased to be a Scheme employer.

(6) Before determining whether to agree to a request under paragraph (4), the deferred pensioner member's former Scheme employer, or administering authority, as the case may be, must obtain a certificate from an IRMP as to whether the member, as a result of ill-health or infirmity of mind or body, is unlikely to be capable of undertaking gainful employment before normal pension age.

(7) If the Scheme employer is not the deferred or deferred pensioner member's appropriate administering authority, it must obtain that authority's consent to the appointment of an IRMP under this regulation.

(8) An IRMP appointed under paragraph (6) may be the same IRMP who provided the first certificate under **regulation 36(1)** (role of the IRMP).