PO-26603

Ombudsman's Determination

Applicant	Mrs N
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondent	Northern Ireland Local Government Officer's Superannuation Committee (**NILGOSC**)

Outcome

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

Complaint summary

2. Mrs N's complaint against NILGOSC concerns its decision to award her Tier 2 ill health retirement pension (**IHRP**) benefits. She believes she should have been awarded Tier 1.

Background information, including submissions from the parties

3. The pertinent Regulation in Mrs N's case is Regulation 36 of the Local Government Pension Scheme (Northern Ireland) 2014 (**the 2014 Regulations**) (SR 2014/188). Relevant sections of which are set out in Appendix 1.

4. NILGOSC is the administering body for the Scheme. Mrs N worked as a library assistant for Libraries NI (**the Employer**).

5. Mrs N had a long history of fatigue and joint pain dating back to 1997. In 2010, she was diagnosed with Fibromyalgia and seasonal affective disorder (SAD). Mrs N had been on sickness absence from work since February 2015.

6. In April 2015, the Employer referred Mrs N to an occupational health (**OH**) advisor for assessment. In his report, dated 30 April 2015, Dr Connolly recommended a reduction in hours on a temporary basis for three months with a maximum of five hours per day. Dr Connolly also recommended work adjustments, if possible. He also said that Mrs N should be seen by an OH advisor in three months' time.

7. On 2 July 2015, Mrs N saw an OH physician, Dr Jenkinson. In a report, Dr Jenkinson concluded:

> "Based on my assessment Mrs N is unfit for work at present, and likely to remain so indefinitely. It could be worthwhile reviewing her condition in six to eight weeks' time, but a recovery before then is unlikely…I think even with adjustments to her work such as reduced hours and modified work, it is unlikely that she could cope with work at present…I would be more certain of this opinion if she makes no progress over the next three months."

8. On 15 July 2015, the Employer wrote to Mrs N saying that following Dr Jenkinson's report it had arranged another appointment for her with Dr Jenkinson on 20 August 2015. It said once it received the new report, "consideration will be given to your continuing employment…".

9. On 20 August 2015, Dr Jenkinson concluded that, even with adjustments, Mrs N would remain unfit for work and this was likely to remain the case for the foreseeable future.

10. On 1 September 2015, the Employer wrote to Mrs N saying it was considering terminating her employment on the grounds of ill health and would refer her to an independent registered medical practitioner (**IRMP**).

11. On 23 September 2015, the Employer wrote to Mrs N to confirm that her employment was to be terminated on the grounds of ill health, with her last day of service being 3 October 2015.

12. On 14 October 2015, NILGOSC sent Mrs N a letter informing her that it had arranged for her to have a face to face assessment with an IRMP. Mrs N provided medical evidence from her doctors to the IRMP (see Appendix 2).

13. On 27 October 2015, the IRMP, Dr Maguire certified a Tier 2 award. In his report Dr Maguire said:

> "Following assessment today it is my opinion Mrs N is permanently incapable of discharging efficiently the duties of her previous scheme employment because of ill health. However…symptoms are variable over periods of time. Patient education, graded exercise, medication and CBT are treatments for Fibromyalgia and SAD and are likely to improve symptoms significantly. In my opinion, it is reasonable to expect a patient to avail of these treatments. In view of the above I feel this lady is likely to become capable of undertaking any gainful employment before reaching normal pension age: hence Tier 2 applicable in this case."

14. On 3 December 2015, NILGOSC sent Mrs N a 'decision letter' advising her that based on the available evidence and Dr Maguire's report, its decision was to award her Tier 2 benefits.

15. Dissatisfied with NILGOSC's decision, Mrs N appealed in March 2016 by invoking the Scheme's two-stage internal dispute resolution procedure (**IDRP**).

16. In her submissions at stage one of the IDRP, Mrs N provided a report from her GP, Dr Hearnshaw, dated 4 February 2016 (see Appendix 2). Mrs N said her condition had deteriorated over years, instead of getting better, and that it was of a chronic nature. She said her neurological symptoms had worsened, and her pain had been severe. Mrs N also said there were no further treatments or therapies that could help her.

17. NILGOSC asked Dr Maguire for his further opinion on Mrs N's case. In an April 2016 report, Dr Maguire said Mrs N had not yet undergone all available treatments. He said although Mrs N was currently unwell, "most patients improve and are able to lead full active lives. In my opinion, it is reasonable to expect a patient to avail of these treatments." Dr Maguire also said that as there were 16 years until Mrs N normal retirement age, his opinion was that she was likely to become capable of undertaking gainful employment before she retired.

18. On 8 June 2016, NILGOSC turned down Mrs N's appeal. It said based on all available evidence Mrs N was permanently incapable of discharging efficiently the duties of her employment but likely to become capable of undertaking any gainful employment before reaching her pension age of 67.

19. Unhappy with the IDRP stage one decision, Mrs N appealed through stage two of the IDRP. As part of her submissions she provided reports from:

- Dr Kuriacose, her GP, dated 12 August 2004.
- Dr McCrea, an independent OH doctor, dated 10 December 2004.
- Consultant Neurologist, Dr Al-Memar, dated 22 January 2012.
- Consultant Rheumatologist, Dr Riddel dated 8 May 2013.
- Dr Hearnshaw dated 13 October 2016, (see Appendix 2).

20. NILGOSC referred Mrs N's application to IRMPs Drs Turner and Black, who issued a joint report in December 2016. They said:

> "To date [Mrs N] has had interventions but would not appear to have been referred for, or received, all the treatments as advised under the NICE guidelines including CBT, graded exercise therapy and condition management programmes. She maintains a level of cognitive functioning which includes the ability to safely drive and control a vehicle and to participate in regular swimming. While we accept that Mrs N is unwell at present and permanently incapable of her previous role as a library assistant it would be reasonable for her to be expected to pursue all available treatments and she will likely to become [sic] capable of undertaking any gainful employment before reaching normal retirement age."

21. On 6 February 2017, NILGOSC turned down Mrs N's final appeal. It said Mrs N had not undertaken other forms of treatment such as CBT, graded exercise therapy and

condition management programmes, as advised under the NICE guidelines. It said it was reasonable for her to pursue those available treatments, which were likely to improve her symptoms sufficiently to enable her to return to gainful employment before age 67.

22. In April 2017, Mrs N's solicitor wrote to Dr Hearnshaw requesting that he provide further information regarding available treatments and the long-term benefits to Mrs N's condition.

23. On 15 May 2017, Dr Hearnshaw replied that Mrs N had not completed all available treatments, but he had referred her for these now. Dr Hearnshaw said he was unsure "whether any of the above will have a long term benefit to her condition."

24. It was not until June 2018 that Mrs N was referred to a Pain Management Programme (**PMP**) by her GP. Mrs N did not engage with it and was duly discharged.

25. In response to Mrs N's complaint, NILGOSC maintained its previous stance and explained that it had considered Mrs N's application in accordance with the 2014 Regulations. It agreed that Mrs N "passed the first but not the second limb of the test" for a Tier 1 award.

26. It said Mrs N was permanently incapable of discharging efficiently the duties of her employment but did not have a reduced likelihood of being capable of undertaking gainful employment before her normal pension age of 67. Whilst her GP was of a different view, it was allowed to give more weight to the IRMP's reports as they were assessing Mrs N's application in line with the 2014 Regulations.

27. Mrs N's solicitor disagreed and raised further concerns:

- they cannot understand why Dr Maguire's view differed from Dr Jenkinson's who concluded that Mrs N was "unfit for her usual work… and likely to meet the criteria for ill health retirement.";
- they believe the two-part test under the 2014 Regulations is extremely unfair;
- Mrs N's health condition has deteriorated since 2015[1]; and
- Mrs N had exhausted all available treatments to date and her condition had not improved.

28. In January 2020, Mrs N's solicitor submitted two letters. The first dated 15 January 2020, from Greenvale Leisure Centre confirming that Mrs N is an annual member.

[1] It referred to the recent report from Consultant Rheumatologist, Dr Meenagh, dated 13 August 2018 that said: "I would therefore deem it to be totally impractical to expect her to return to employment again now or in the future, given the severity of her fibromyalgia…"

The second letter from PMP confirming that Mrs N completed 8 out of 10 group sessions on 18 April 2019.

Adjudicator's Opinion

29. Mrs N's complaint was considered by one of our Adjudicators who concluded that no further action was required by NILGOSC. 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 Mrs N's case, the relevant regulation is Regulation 36 of the 2014 Regulations (see Appendix 1).

- To be eligible for benefits under Regulation 36, Mrs N must pass a two-part test. Namely, on the balance of probabilities, Mrs N must be:

  - permanently incapable of discharging efficiently the duties of her employment with the Employer; and

  - have a reduced likelihood of being capable of undertaking any gainful employment before her normal retirement age, 67.

- The decision as to whether Mrs N is entitled to receive payment of her benefits on the grounds of ill-health is for NILGOSC to make after obtaining the certified opinion of an IRMP. Having obtained an opinion from the IRMP, NILGOSC must then consider this along with any other relevant evidence, such as medical reports from other doctors. If Mrs N met the test, NILGOSC could then consider which tier of benefits she should receive. The tier of benefits awarded depends upon the likelihood that Mrs N will be capable of undertaking gainful employment at some time before her normal pension age.

- The weight that is attached to any of the evidence is for NILGOSC to decide and it is open to NILGOSC to give more weight to the advice that it receives from the IRMP. However, NILGOSC should not accept the IRMP's opinion blindly. It is generally the case that the person making the decision at this stage is not medically qualified. Nevertheless, NILGOSC can be expected to actively review the IRMP's opinion. For example, it should satisfy itself that the IRMP has applied the correct eligibility test, considered the relevant medical evidence and explained his/her opinion.

- Dr Maguire certified in October 2015, that Mrs N was "permanently incapable of discharging efficiently the duties of her previous scheme employment" but was "likely to become capable of undertaking any gainful employment before reaching

normal pension age: hence Tier 2 applicable in this case." This is because Mrs N had not undertaken all available treatments, such as CBT and PMP, recommended under NHS NICE guidelines.

- During the IDRP appeals process, NILGOSC referred Mrs N's case for another opinion from two new IRMPs, Drs Turner and Black. They concluded that having 16 years to retirement, with the recommended treatments available on the NHS, Mrs N was likely to improve sufficiently in order to undertake gainful employment before age 67. Mrs N disagreed with this opinion and referred to the opinion of her GP.

- However, it is for NILGOSC to attach weight (including little or none) to the relevant medical evidence. NILGOSC made its final decision based on the IRMPs' report, which referred to Mrs N's GP's report and her Consultant Rheumatologist's report.

- Mrs N's solicitor said they could not understand why Dr Maguire's view differed from Dr Jenkinson's. However, essentially, this is a difference of medical opinion. A difference in medical opinion is not sufficient for the Ombudsman to say that NILGOSC's preference for the opinions of Drs Maguire, Turner and Black means that its decision was flawed.

- Mrs N's solicitor also said they believed the two-part test under the 2014 Regulations is extremely unfair. Nevertheless, that is the applicable test for ill health retirement.

- The solicitor said Mrs N's condition had deteriorated and she had exhausted all treatments. However, that did not invalidate the opinions of the IRMPs which was based on the medical evidence available at the time.

- In the Adjudicator's view, NILGOSC had considered all the relevant evidence and abided by the 2014 Regulations. It had considered the relevant factors in arriving at its decision to grant Mrs N Tier 2 benefits. There were no grounds for the Adjudicator to say that NILGOSC's decision was flawed or that the process it undertook in reaching its decision was incorrect. It was therefore the Adjudicator's opinion that this complaint should not be upheld.

30. Mrs N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs N 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 main points made by Mrs N.

31. In response to the Adjudicator's Opinion, Mrs N's solicitor made a number of comments. In summary they were:-

- The decision making process and regulations must be thoroughly checked again.

- Mrs N's partner was not allowed in the meeting with the IRMP.

- NILGOSC should review Mrs N's evidence again.
- Reference was made to another similar case where NILGOSC agreed to pay Tier 1 benefits.
- Mrs N cannot understand why Dr Maguire's opinion is different to Dr Jenkinson's. If Dr Jenkinson was on the panel, the outcome would most likely have been different.
- Mrs N would like a detailed analysis of why Dr Maguire believes she can work 30 hours per week.

Ombudsman's decision

32. Mrs N has said that her health has deteriorated since 2015, and she has been unable to work since February 2014. In his report dated October 2016, Mrs N's GP, Dr Hearnshaw, was of the opinion that it was "highly unlikely that she would be able to return to work". I accept that Dr Hearnshaw's opinion differs to the opinions of the IRMPs who considered Mrs N's ill health applications. However, as explained by the Adjudicator, my role is not to review medical evidence and come to a decision of my own concerning whether or not Mrs N would be unable to return to work between now and age 67. My role is to consider the decision making process, at the time the decision was made.

33. I sympathise that Mrs N has said there has been no improvement in her condition despite having completed available treatments. However, NILGOSC in reviewing its decision cannot take into account events which have occurred after her IHRP application was considered. I have reviewed the whole process, from the time Mrs N made an application to when NILGOSC issued its IDRP stage two response. I find that throughout, NILGOSC considered all relevant facts and applied the correct test as prescribed by the 2014 Regulations, when it made the decision to grant Mrs N Tier 2 benefits instead of Tier 1 benefits. There are no justifiable grounds for me to find that NILGOSC's decision making was flawed.

34. I do not uphold Mrs N's complaint.

Anthony Arter

Pensions Ombudsman
13 March 2020

Appendix 1

Relevant extracts of The Local Government Pension Scheme Regulations (Northern Ireland) 2014 (SR 2014/188)

> "Regulation 36
>
> Early payment of retirement pension on ill-health grounds: active members
>
> (1) Where an active member who has qualifying service for a period of two years or more ceases local government employment on the grounds that—
>
> (a) the member's ill-health or infirmity of mind or body renders the member permanently incapable of discharging efficiently the duties of the employment the member was engaged in; and
>
> (b) the member, as a result of ill-health or infirmity of mind or body, has a reduced likelihood of being capable of undertaking any gainful employment before reaching normal pension age,
>
> the Committee may, at the request of the employing authority, determine that the member's retirement pension comes into payment before the member's normal pension age in accordance with this regulation.
>
> (2) If a member satisfies the conditions in paragraphs (1)(a) and (1)(b) then the member shall take early payment of a retirement pension.
>
> (3) The amount of the retirement pension that a member who satisfies the conditions mentioned in paragraphs (1)(a) and (1)(b) receives is determined by which of the benefit tiers specified in paragraphs (4) and (5) that member qualifies for, calculated in accordance with regulation 39 (calculation of ill-health pension amounts).
>
> (4) A member is entitled to Tier 1 benefits if that member is unlikely to be capable of undertaking any gainful employment before normal pension age.
>
> (5) A member is entitled to Tier 2 benefits if that member—
>
> (a) is not entitled to Tier 1 benefits; and
>
> (b) is likely to become capable of undertaking any gainful employment before reaching normal pension age.
>
> (6) Before determining whether a member who has ceased to hold a local government employment is entitled to a benefit under this regulation, the Committee shall obtain a certificate, in accordance with regulation 38 (role of the IRMP), from an IRMP qualified in occupational health medicine who is appointed by the Committee..."

Appendix 2

In his report dated 12 August 2004, Dr Kuriacose said:

> "My opinion is that she would be better suited to a job inside a building. I do not think travel in a bus agrees with her."

In his report dated 10 December 2004, Dr McCrea said:

> "Consequently at this point in time the outlook is slightly unpredictable…I would not plan a routine review at this stage but would of course like to review her in due course to reassess progress or developments."

In his report dated 25 November 2012, Consultant Neurologist, Dr Al-Memar, said:

> "…CT scan of the chest revealed a benign sub-pleural nodularity, which is unchanged from previous imaging. I booked her a regular follow up in few weeks."

In his report dated 8 May 2013, Dr Riddel said:

> "…on ultrasound this is simple soft tissue swelling and is not associated with any tendinitis or joint effusion. Unfortunately, I think this is a cosmetic issue more than anything else but I have no suggestions as to the management that will make a considerable difference to this. I have simply suggested that [Mrs N] try and undertake some general lifestyle adjustments with regular exercise and relaxation in an attempt to improve her sleep pattern and to manage symptoms."

In his report dated February 2016, Dr Hearnshaw said:

> "Despite treatment she has been unable to work more than 30 hours a week for the last 2 years and has been off work completely since February 2014. With her ongoing problems, in particular joint pains and fatigue on a daily basis, I cannot foresee any significant improvement in her symptoms."

In his report dated October 2016, Dr Hearnshaw said:

> "Her symptoms relate to daily joint and muscle pains and extreme fatigue resulting in her having to have regular rest periods during the day. She is unable to carry out any repeated tasks as this aggravates her joint and muscle pains and causes worsening of her fatigue. She has become very reliant on her husband to help her with daily tasks. Her concentration is greatly affected and limits her ability to focus on tasks for long periods. Given the chronicity of her symptoms and her poor response to medical treatment and self-management it is highly unlikely that she would be able to return to work."