

Ombudsman's Determination

Applicant	Mr Y, on behalf of Mrs Y's estate
Scheme	Teachers' Pension Scheme (TPS)
Respondent(s)	Teachers' Pensions (TP)

Complaint Summary

Mr Y disagrees with the decision to backdate ill health retirement benefits paid in respect of his late wife only to January 2007. He also disagrees with the decision not to award enhanced benefits.

Summary of the Ombudsman's Determination and reasons

The complaint is upheld against TP because it has not considered whether it would be appropriate to exercise its discretion to extend the time limit for an application for ill health retirement benefits.

Detailed determination

Material facts

1. Mrs Y was employed as a teacher until 18 December 2006. Her employment was terminated on the grounds of incapability. She was paid in lieu of notice until 30 April 2007.
2. Rochdale Metropolitan Borough Council (**Rochdale**) wrote to Mrs Y, on 21 December 2006, following a Medical Capability Hearing. Rochdale confirmed that Mrs Y's contract of employment was being terminated with effect from the date of the hearing on the grounds of medical incapacity. The letter stated:

"I also confirm the decision that the school is unable to grant ill-health retirement at this time, and that this decision is made on the grounds that, in the light of the available medical advice, that [*sic*] you are not considered to be permanently incapable of discharging efficiently the duties of your normal occupation or any comparable employment by reason of ill health or infirmity of mind or body."
3. The letter went on to say that the TPS regulations were administered by TP and, if Mrs Y disagreed with a decision made by TP about how the regulations applied to her, she should write to TP's Customer Services Manager. If Mrs Y was dissatisfied with TP's reply, then she should write to the Department for Education and Skills. The letter said an appeal should be made within six months of receiving a reply to her first letter of complaint or dispute. The letter also went on to say that Mrs Y was entitled to appeal against "this decision" and, if she wished to do so, she should notify the school governors within five working days.
4. The available medical evidence at the time consisted of a report from a consultant occupational physician, Dr Hussain, and a report from a psychiatrist, Dr Ginjupalli, which had been commissioned by Mrs Y's union. Summaries of these reports and other medical evidence relating to Mrs Y's case are provided in the attached appendix B.
5. At the time Mrs Y's employment ceased, the relevant regulations were the Teachers' Pensions Regulations 1997 (SI1997/3001) (as amended). Extracts from the relevant regulations are provided in the attached appendix A.
6. Mrs Y unsuccessfully appealed against her dismissal. In her appeal letter, dated 14 January 2007, Mrs Y said her medication had been increased and she felt like her old self again. She said she was ready to return to the classroom; albeit with less responsibility and on a part time basis.
7. Mrs Y saw Dr Ginjupalli on 11 June 2007. In a letter to Mrs Y, Dr Ginjupalli noted there had been no major improvement in her symptoms and she was not responding to medication as he had expected. He expressed the view that, given her current

mental state and symptoms, she would not be able to carry on with employment as a teacher in the future.

8. Mrs Y signed an application for ill health retirement on 25 June 2007. Dr Ginjupalli completed Part B of the application form on 31 July 2007. This was received by TP on 4 September 2007. Because the application was received by TP more than six months after the end of Mrs Y's employment, it was treated as an "out of service" application. TP's medical adviser (**Atos**) expressed the view that Mrs Y did not meet the eligibility criteria. TP accepted this advice and declined her application on the grounds that its medical adviser had concluded that her health was such that it should not prevent her from serving as a teacher.
9. Mrs Y appealed on 17 September 2007. Atos advised that the original rejection remained appropriate. Mrs Y's appeal was declined on 24 September 2007. TP informed Mrs Y that she had the right to make a second appeal within six months.
10. Mrs Y was seen by a medical adviser for the DWP, Dr Sheikh, on 3 October 2007 in connection with an application for Incapacity Benefit. He completed a "Medical Report Form" setting out the results of his examination. Dr Sheikh said Mrs Y had a moderate mental health condition affecting her ability to cope with a number of the activities of daily living. In the section headed "Prognosis", Dr Sheikh said Mrs Y's condition "should improve significantly within 12 months". In the section headed "Reasons for the Opinion Given", he said "may improve". Mrs Y was awarded Incapacity Benefit.
11. Mrs Y's eligibility for Incapacity Benefit was reviewed in 2009. The Approved Disability Analyst concluded Mrs Y's functional incapacity could be expected to improve significantly in 18 months. She noted Mrs Y had ongoing depression and was on medication. She noted Mrs Y was to have a CT scan because of concerns about possible early onset dementia. She went on to say Mrs Y's level of disability "may improve with sufficient time and appropriate treatment". Mrs Y's award was confirmed.
12. With effect from 1 September 2010, the Teachers' Pensions Regulations 1997 were revoked by the Teachers' Pensions Regulations 2010 (SI2010/990). Paragraph 2, Part 2, Schedule 13 provided,

"Anything done or having effect as if done under or for the purposes of a provision of the revoked instruments has effect, if it could have been done under or for the purposes of the corresponding provision of these Regulations, as if done under or for the purposes of that corresponding provision."
13. TP received a fresh application for ill health retirement on 26 January 2011. Atos recommended it be declined on the grounds that not all treatment options had been tried. TP wrote to Mrs Y, on 28 January 2011, notifying her that her application had been unsuccessful because Atos had advised that her health should not prevent her

from continuing in the profession or any other gainful employment until her normal pension age.

14. TP received an application for the early payment of actuarially reduced benefits on 3 February 2011. These benefits were paid from 16 March 2011.
15. On 10 December 2012, TP received an appeal from Mr Y, on behalf of his wife, relating to the payment of ill health retirement benefits. Mr Y submitted a report, dated 28 November 2012, from a consultant psychiatrist, Dr Leuvennink. TP's medical adviser reviewed the appeal and report and recommended that the appeal be accepted. TP notified Mr Y that his appeal had been accepted and that ill health retirement benefits would replace his wife's actuarially reduced benefits with effect from 28 May 2012.
16. Mr Y submitted a request for retrospective enhanced benefits payable from the date his wife's employment ceased.
17. An internal memorandum from the Department for Education (**DfE**), dated 19 April 2013, to TP stated the Department would not exercise its discretion for Mrs Y's case to be treated as an "in-service" application. It did not say why.
18. The DfE responded to Mr Y, on 17 May 2013, under stage two of the Scheme's internal dispute resolution procedure. Its response is summarised as follows:-
 - Its remit was to consider whether the processes applied by TP to reach its decisions were appropriate and that it had applied the TPS regulations correctly.
 - Mrs Y left pensionable employment on 17 [sic] December 2006 and that the final period of 89 days had been designated as sick leave on full pay by her employer. There was no subsequent period of sick leave on half pay which was unusual.
 - Sick leave on half pay was automatically pensionable employment but a period for which pay in lieu of notice was paid was not.
 - The termination of a contract of employment was a matter between an employer and employee over which it had no jurisdiction. These details were accepted as correct.
 - Mrs Y signed an application for ill health retirement on 25 June 2007 and this was received by TP on 4 September 2007. It was treated as an out of service application because it had been received more than six months after Mrs Y had left employment.
 - Mr Y's 2012 appeal had been accepted on the basis of Dr Leuvennink's report of 28 November 2012. Mrs Y had been awarded ill health benefits with effect from 28 May 2012.

- The TPS regulations prescribed that ill health retirement benefits are payable from the latest of the date the person satisfies the eligibility criteria, the day after they leave employment or the date six months prior to the medical report used to determine that they have satisfied the eligibility criteria. The date cannot be earlier than the date of any medical report upon which a previous application or appeal was unsuccessful.
 - Since TP's medical advisers now accepted that Mrs Y's current illness was fundamentally the same as that which she was suffering from in 2006, and this illness meant she was permanently incapacitated, there were grounds to consider Dr Leuvennink's report as confirmation of Dr Thomas' earlier report of 10 January 2011. Mrs Y's ill health retirement benefits should, therefore, be payable from six months before this report; that is, 10 July 2010.
19. Following Mr Y's application to the Ombudsman, TP referred the case back to its medical advisers. The medical adviser said the first report which indicated poor response to treatment on Mrs Y's part was that provided by Dr Ginjupalli on 31 July 2007. She recommended that Mrs Y's ill health retirement benefits be paid from six months before this report; that is, 31 January 2007. TP accepted this advice.

Mr Y's position

20. The key points in Mr Y's submission are summarised briefly below:-
- His wife was incorrectly diagnosed as suffering from anxiety and depression and told she was medication resistant.
 - Her application for ill health retirement was rejected because it was outside the time limits or because the medical reports suggested she might improve.
 - His wife was finally diagnosed with vascular dementia. He applied for retrospective payment of ill health retirement benefits on the grounds that this was, in all probability, the condition she had been suffering from at the outset.
 - TP has agreed to backdate the award but not to the date his wife's employment ceased. He is of the opinion that the earlier medical reports should be set aside.
 - TP has now accepted that Dr Ginjupalli's 2007 report was flawed. It should also accept that his earlier report was equally flawed.
 - TP said they missed the 2007 deadline to apply for ill health retirement but he considers this to have been an appeal against the refusal of ill health retirement contained in Rochdale's letter of dismissal.
 - In addition, his wife was not in a fit state to conduct her affairs and had to wait for an appointment with a psychiatrist. She was offered no support at this time. Nor was she given a period of sick leave.

TP's position

21. TP's submission is summarised below:-

- It administers the TPS on behalf of the DfE.
- At all stages, its decisions are based on advice provided by independent occupational health experts appointed separately by the DfE. Applications received by it are referred to these experts to assess against the criteria laid down by the DfE, following the TPS regulations.
- When Mrs Y was in pensionable employment, the regulations which applied were the 1997 regulations. When her second application was considered, the 2010 regulations applied.
- Under regulation E4(4) of the 1997 regulations and schedule 7(3) of the 2010 regulations, a member or former member of the TPS may apply for ill health retirement benefits at any time prior to normal pension age.
- In order to obtain ill health retirement benefits, the member must satisfy three conditions or, failing that, they must satisfy a fourth condition. The conditions are:-
 1. The person must be incapacitated and likely to be permanently so.
 2. Immediately before becoming incapacitated, they must have been in pensionable employment or paying contributions to cover an absence or on certain types of agreed leave.
 3. A written application must be made within six months of leaving pensionable employment or ending the agreed leave.
 4. Their ability to carry out any work is impaired by more than 90% and likely to remain so.
- Regulation 65 of the 2010 regulations deals with the payment of enhanced benefits and applies where the member satisfies the first three conditions and a further two conditions.
- The entitlement day for payment of ill health benefits is the latest of: (a) the day on which the person satisfies condition 1 or condition 4, as applicable; (b) the day after pensionable employment ceases; or (c) the day six months before the date of the medical report on which the eligibility decision is based.
- Mrs Y's application should have been completed by 17 June 2007 in order to be considered as an in-service application. It was not made until 25 June 2007. It has no discretion over this time limit.

- Mrs Y's application was considered under condition 4. At the time, its medical advisers were unable to advise that she was incapacitated for the purposes of condition 4 and likely to remain so.
 - It received a new application on 26 January 2011. This was again considered against condition 4 and again its medical advisers were unable to advise that she met the criteria.
 - Mr Y appealed and provided a copy of Dr Leuvennink's report. Its medical advisers advised, on the basis of this report, that Mrs Y met the condition 4 test. She was awarded ill health retirement benefits but not enhanced benefits because she did not satisfy the regulation 65 criteria.
 - On appeal, the DfE concluded that enhanced benefits could not be paid because it had no discretion to consider Mrs Y's application as an in-service application.
 - The DfE did agree that Dr Leuvennink's report of 28 November 2012 should be treated as confirming an earlier report, dated 10 January 2011, and Mrs Y's benefits were backdated to 10 July 2010.
 - Having been notified of Mr Y's application to the Ombudsman, it referred the case back to its medical advisers. It asked if it could be reasonable to regard Dr Leuvennink's report as confirmation that the earlier medical reports confirm that Mrs Y was permanently incapable of any work and it was the same illness which caused her to apply in June 2007. Its medical adviser has expressed the view that the first report to indicate poor response to treatment, which is consistent with the current medical opinion, as that from Dr Ginjupalli on 31 July 2007.
 - It has accepted this advice and will pay Mrs Y's benefits from 31 January 2007. These will not be enhanced because the conditions in regulation 65 have not been met.
22. In correspondence with Mr Y, TP has also said it was not appropriate for Rochdale to say the school was unable to award ill health retirement. It said this was a decision for the Secretary of State and, at that time, no decision had been made.
23. With regard to the discretion contained within both the 1997 and 2010 regulations, TP said it could be exercised by it or the DfE depending upon the circumstances. It said it did not apply to the calculation of a payable date and neither it nor the DfE could consider using the discretion to alter a payable date.

Conclusions

24. I will start by acknowledging that this is not a straightforward case; involving, as it does, a retrospective award of benefits under two sets of regulations. I would also like to acknowledge the very difficult circumstances out of which this case arises and the clear distress Mr Y has experienced over the past several years.
25. It may help if I begin by explaining I am primarily concerned with the decision making process; rather than giving consideration to making a fresh decision of my own, as to Mrs Y's eligibility for benefits. The line between those two actions can be finely drawn on occasion. The approach I take is to review the medical (and other) evidence in order to determine whether it supported the decisions made by TP. The issues I consider include: whether the relevant regulations have been correctly applied; whether appropriate evidence has been obtained and considered; and, as I have said, whether the decisions are supported by the available relevant evidence.
26. When Mrs Y's employment ceased, the 1997 regulations applied. I note Mr Y has some concerns about the way in which his wife's employment was terminated; in particular, the fact that she does not appear to have been granted the usual amount of sick leave. This is an employment matter and does not, I am afraid, fall within my jurisdiction. I cannot consider this further.
27. At the time her employment ceased, Mrs Y would have been eligible for ill health retirement benefits if she met the definition of "Incapacitated"; that is, she was unfit, by reason of illness or injury and despite appropriate medical treatment, to serve as a teacher and was likely permanently to be so. However, to receive enhanced benefits, the regulations required her to apply within six months of her employment ending.
28. In fact, Mrs Y applied just eight days outside the six month period. She also applied after the date on which certain amendments to the 1997 regulations had taken effect. TP says it, therefore, treated Mrs Y's application as, what it refers to as, an "out of service" application. The consequence of this was that Atos applied the stricter eligibility test of 90% impairment for any work. In doing so, Atos and TP appear to have proceeded on the assumption that sub-paragraph (c)(i) in regulation E4 (as amended) did not apply to Mrs Y. Neither, however, appear to have assessed whether or not that was the case. Sub-paragraph (c)(i) required an assessment of when the member's incapacity commenced. It was not affected by the six month time limit; this only applied to eligibility for enhanced benefits.
29. The question Atos should have asked was whether Mrs Y was permanently incapacitated for teaching and, if so, when that incapacity arose. If her incapacity arose after she ceased to be in pensionable employment, then it could have proceeded to consider sub-paragraph (c)(iii). I find, therefore, that Atos failed to apply the right eligibility test when assessing Mrs Y's application in 2007. It was maladministration on the part of TP to accept Atos' advice on that basis.

30. In addition, TP does not appear to have considered whether it would have been appropriate to exercise the discretion available to it (acting on behalf of the Secretary of State), under regulation H7, to extend the time limits. TP has said it had no discretion over the time limit for Mrs Y to submit her application. However, in my view, the discretion provided for in regulation H7 was sufficiently wide-ranging and could easily have encompassed Mrs Y's circumstances. This is not to say that TP should have exercised the discretion to treat Mrs Y's application as received within six months of the end of her employment. But, it should, at least, have considered doing so.
31. The question then arises as to whether Mrs Y suffered any injustice as a result of the maladministration of her 2007 application. In order to assess this, I need to consider how likely it was that her application would have been accepted had it been assessed against her capacity to teach.
32. As I have said, in order to receive ill health retirement benefits, at the time, it would have been necessary to consider whether Mrs Y was permanently unfit to serve as a teacher. Having reviewed the medical evidence available at the time, I do not find that it would have supported such a conclusion. The evidence indicated that, at that time, Mrs Y was expected to respond to treatment as she had done before. She quite clearly was not fit to serve as a teacher at that point but she was not thought likely to satisfy the requirement for this to continue to be the case. I do not find that the maladministration of Mrs Y's 2007 application led to any injustice to her at that time.
33. The above assessment takes account only of the medical evidence which was available at the time. For the purposes of determining whether the 2007 decision, in and of itself, led to injustice, I can only take into account the evidence which was available at that time. A decision can only be judged on the basis of the evidence which was, or could have been, available to the decision maker at the time it was made.
34. With regard to the subsequent decisions relating to the backdating of Mrs Y's ill health retirement benefits; these decisions, quite properly, take account of medical evidence which has become available since the 2007 decision.
35. TP has backdated Mrs Y's benefits to 31 January 2007 on the grounds that the report which identified her lack of response to treatment was that provided by Dr Ginjupalli on 31 July 2007. It has applied paragraph 6(1)(c) of the 2010 regulations. This provides that the entitlement date is the latest of: (a) the day on which a person first satisfies condition 1 or 4, as appropriate; (b) the day after the day on which the person ceases to be in pensionable employment, or certain types of leave; or (c) the day which occurs six months before the date of the medical report following consideration of which the Secretary of State determines that the person satisfies condition 1 or 4, as appropriate.

36. If, as TP says, the reason for choosing Dr Ginjupalli's report was that it was the first to indicate Mrs Y was not responding to treatment, this would apply equally to his letter to Mrs Y of 11 June 2007. I can see no logic in accepting Dr Ginjupalli's July report as evidence of Mrs Y's incapacity and not his June letter; since both reference the fact that Mrs Y was not responding to treatment, which is the key issue. On that basis, TP could backdate Mrs Y's benefits to the day after the cessation of her employment, 19 December 2006.
37. Mr Y is firmly of the view that his wife should have received enhanced benefits. TP has explained that her benefits, although now backdated, have not been enhanced because she did not meet the requirements of regulation 65. Regulation 65 requires the member to meet the three conditions set out in paragraph 3, Schedule 7 and then a further two conditions contained within the regulation itself. Briefly, as they might apply to Mrs Y, these are:
1. she was incapacitated and likely to be so permanently;
 2. immediately before satisfying condition 1, she was in pensionable employment; and
 3. her application was made within six months of the end of her pensionable employment.
38. The additional conditions contained within regulation 65 itself, as they might apply to Mrs Y, are:
- A. her ability to carry out any work was impaired by more than 90% and was likely to be so permanently; and
 - B. immediately before satisfying condition A, she was in pensionable employment.
39. Of these, the one which Mrs Y ostensibly fails on is condition 3. However, regulation 133 of the 2010 regulations provides that TP, acting on behalf of the Secretary of State, has the same wide-ranging discretion to "extend, or treat as extended, the time within which anything is required or authorised to be done under these Regulations". As before, I consider this to be sufficient in scope to allow TP to consider whether it would be appropriate, in the circumstances, to extend the six months required by paragraph 3. It appears the DfE thought it had such a discretion when considering Mrs Y's case in the light of Dr Leuvennink's report. It opted, at that time, not to exercise the discretion in Mrs Y's favour. This option bears revisiting in the light of the subsequent advice from Dr Wladyslawska.
40. Since this is a discretion, the appropriate course of action is for me to remit the case to TP for review. I make directions for it to do so.

Directions

41. Within 28 days of the date of my Determination, TP will review Mrs Y's case and consider whether it would have been appropriate for it to extend the six months' time limit. If it concludes that it would have been appropriate to treat Mrs Y's case as if her application had been received within six months of the end of her pensionable employment, it is to review her eligibility for enhanced benefits accordingly. If TP is of the view that it cannot exercise this discretion, it must refer Mrs Y's case back to the DfE for it to do so.

Anthony Arter

Pensions Ombudsman
24 January 2018

Appendix A

The Teachers' Pensions Regulations 1997 (SI1997/3001) (as amended)

42. As at the date Mrs Y's employment terminated, regulation E4 "Entitlement to payment of retirement benefits" set out a series of "Cases" in which a member became entitled to the payment of benefits, including,

"(4) In Case C the person -

- (a) has not attained the age of 60,
- (b) has ceased after 31st March 1972 and before attaining the age of 60 to be in pensionable employment,
- (c) is incapacitated and became so before attaining the age of 60,

..."

43. "Incapacitated" was defined as

"A person is incapacitated -

- (a) in the case of a teacher, an organiser or a supervisor, while he is unfit by reason of illness or injury and despite appropriate medical treatment to serve as such and is likely permanently to be so ..."

44. Regulation E8 "Enhancement of retirement benefits in case of incapacity" provided,

"(1) This regulation applies to a person who has become entitled to payment of retirement benefits by virtue of regulation E4(3) or (4) by reason of his having become incapacitated before ceasing to be in pensionable employment , but only if -

- (a) ...
- (b) the application for payment required by regulation E33 is made within 6 months after the end of his pensionable employment ..."

45. The 1997 regulations were amended with effect from 1 January 2007. In paragraphs (a) and (b) of regulation E4, "the normal pension age" replaced "the age of 60" and paragraph (c) was replaced as follows,

"(c) is incapacitated, became so before attaining the normal pension age, and

immediately before he became incapacitated -

- (aa) was in pensionable employment, or
- (bb) was taking a period of unpaid sick leave, maternity, paternity or adoptive leave (taken with the consent of the person's employer)

or a career break which, in each case, followed on immediately after a period of pensionable employment, or

- (cc) was paying additional contributions under old regulation C9 or regulation C10, or

made an application for payment under regulation E33(2) such that it was received by the Secretary of State before 6th January 2007, or

(where neither paragraph (i) nor (ii) applies) his ability to carry out any work is impaired by more than 90% and is likely permanently to be so.”

46. The definition of “Incapacitated” remained unchanged.

47. As at the date of Mrs Y’s 2007 application, regulations E8 and E8A provided,

“E8 Enhancement of retirement benefits in case of incapacity where application is received before 6th January 2007

- (1) This regulation applies to a person who has become entitled to payment of retirement benefits by virtue of regulation E4(3) or (4) by reason of his having become incapacitated before ceasing to be in pensionable employment and whose application for payment under regulation E33(2) is received by the Secretary of State before 6th January 2007 , but only if -
 - (a) ...
 - (b) the application for payment required by regulation E33 is made within 6 months after the end of his pensionable employment ...”

“E8A Total incapacity benefit where application received on or after 6th January 2007

- (1) This regulation applies to a person who has become entitled to payment of retirement benefits by reason of his having become incapacitated and where, immediately before he became incapacitated -
 - (a) he was in pensionable employment, or
 - (b) he was taking a period of unpaid sick leave, maternity, paternity or adoptive leave (taken with the consent of the person's employer) or a career break which, in each case, followed on immediately after a period of pensionable employment, or
 - (c) he was paying additional contributions under old regulation C9 or regulation C10,

and whose application for payment under regulation E33(2) is received by the Secretary of State on or after 6th January 2007 and who satisfies the condition in paragraph (2)(a) and either the condition in paragraph (2)(b) or ...

- (2) The conditions are -
 - (a) that (in addition to being incapacitated) the person's ability to carry out any work is impaired by more than 90% and is likely permanently to be so, and
 - (b) where the person falls within paragraph (1)(a) ..., that the application for payment required by regulation E33(2) is made within 6 months after the end of the pensionable employment ..., or
 - (c) ...
- (3) The person becomes entitled (subject to regulation E32(2) (limitation of effective reckonable service to 45 years)) to payment of a total incapacity pension and (where applicable) a total incapacity lump sum calculated in accordance with regulation E5 or (where applicable) E6 but with the amount of effective reckonable service calculated in accordance with paragraph (4) ..."

48. Regulation E33 Payment of benefits provided,

- "(1) Benefits under this Part are payable by the Secretary of State.
- (2) No benefit is to be paid unless a written application for payment has been made and paragraph (3), if applicable, has been complied with.
- (2A) Where the application for payment is made on the basis that the person is entitled to retirement benefits under regulation E4(3) or (4) (incapacity), the application shall -
 - (a) where the person falls within regulation E4(4)(c)(i)(aa) or (bb), be signed by, or on behalf of, the person's employer, and
 - (b) shall be accompanied by all medical evidence necessary to determine whether the person falls within regulation E4(3) or (4) and, where applicable, that the person's ability to carry out any work is impaired by more than 90% and is likely permanently to be so.
- (3) If the Secretary of State notifies him in writing that he so requires, the applicant is to provide any relevant information (including medical evidence such as is mentioned in paragraph (2A)) specified by the

Secretary of State that is in his possession or that he can reasonably be expected to obtain ...”

49. At the time of Mrs Y’s application for ill health retirement, regulation H7 provided,

“The Secretary of State may in any particular case extend, or treat as having been extended, the time within which anything is required or authorised to be done under these Regulations.”

The Teachers’ Pensions Regulations 2010 (SI2010/990) (as amended)

50. At the time of Mrs Y’s application in 2011, regulation 65 “Total incapacity benefits” provided,

- “(1) This regulation applies where -
- (a) an ill-health pension becomes payable to a person (P) because P satisfies Conditions 1, 2 and 3 set out in paragraph 3 of Schedule 7 (Case C: ill-health retirement), and
 - (b) P satisfies Conditions A and B.
- (2) P satisfies Condition A if P's ability to carry out any work is impaired by more than 90% and is likely to be impaired by more than 90% permanently.
- (3) P satisfies Condition B if immediately before satisfying Condition A -
- (a) P was in pensionable employment,
 - (b) P was paying contributions under regulation C9 of TPR 1997 or regulation 19 (election to pay contributions by a person serving in a reserve force), or
 - (c) P was taking a period of non-pensionable sick leave, a period of non-pensionable family leave or a career break which, in every case, followed on immediately after a period of pensionable employment.
- (4) A total incapacity pension is payable to P from the entitlement day.
- (5) Except as otherwise provided in these Regulations, the total incapacity pension is payable for life.
- (6) Where P is a pre-2007 entrant, a total incapacity lump sum is payable to P on the entitlement day.
- (7) The annual rate of the pension and the amount of the lump sum are to be calculated in accordance with regulation 66 (annual rate of total incapacity pension and amount of total incapacity lump sum).

- (8) The entitlement day is the date on which the ill-health pension mentioned in paragraph (1) becomes payable to P.”

51. Paragraph 3, Schedule 7 provided,

- “(1) ... a person (P) falls within this paragraph if -
- (a) P was in pensionable employment at any time after 31st March 1972,
 - (b) P ceases to be in pensionable employment, excluded employment, on non-pensionable sick leave, on non-pensionable family leave or on a career break,
 - (c) P satisfies either Conditions 1, 2 and 3 or Condition 4, and
 - (d) P makes an application under regulation 107 for retirement benefits on the basis that Case C, and no other Case (apart from Case A), applies to P's reckonable service.
- (2) Condition 1 is that P is incapacitated and is likely to be incapacitated permanently.
- (3) Condition 2 is that immediately before satisfying Condition 1 -
- (a) P was in pensionable employment,
 - (b) P was paying contributions under regulation C9 of TPR 1997, or
 - (c) P was, with the consent of P's employer, on non-pensionable sick leave, on non-pensionable family leave or on a career break which, in every case, followed on immediately after a period of pensionable employment.
- (4) Condition 3 is that P's application under regulation 107 -
- (a) is made within 6 months after the end of pensionable employment, within 6 months after the end of the period in respect of which the contributions mentioned in sub-paragraph (3)(b) are paid or before the date on which, under the arrangements made with P's employer, the non-pensionable sick leave, non-pensionable family leave or career break ends, and
 - (b) except where P satisfies Condition 2 because P falls within sub-paragraph (3)(b), is signed by P's employer.
- (5) Condition 4 is that P's ability to carry out any work is impaired by more than 90% and is likely to be impaired by more than 90% permanently.”

52. Paragraph 6, Schedule 7 provided,

- “(1) The entitlement day for Case C is the latest of the following -
- (a) the day on which a person (P) first satisfies Condition 1 (where P satisfies Conditions 1, 2 and 3) or Condition 4 (where P does not satisfy Conditions 1, 2 and 3);
 - (b) the day after the day on which P ceases to be in pensionable employment, excluded employment, on non-pensionable sick leave, on non-pensionable family leave or on a career break;
 - (c) the day which occurs 6 months before the date of the medical report following consideration of which the Secretary of State determines that P satisfies Condition 1 (where P satisfies Conditions 1, 2 and 3) or Condition 4 (where P does not satisfy Conditions 1, 2 and 3).
- (2) But the entitlement day must not be before the date of any previous medical report following consideration of which the Secretary of State did not make the determination mentioned in sub-paragraph (1)(c).”

53. Regulation 133 provided,

“The Secretary of State may in any particular case extend, or treat as extended, the time within which anything is required or authorised to be done under these Regulations.”

54. Paragraph 2, Part 2, Schedule 13 provides,

- “(1) Anything done or having effect as if done under or for the purposes of a provision of the revoked instruments has effect, if it could have been done under or for the purposes of the corresponding provision of these Regulations, as if done under or for the purposes of that corresponding provision,”

Appendix B

Medical evidence

Dr Hussain (consultant occupational physician), 11 October 2006

55. Dr Hussain said Mrs Y had developed a recurrence of symptoms and was currently unfit to work. He noted she had a long history of psychological symptoms and said she had been trying extremely hard over the last few years to maintain her employment. Dr Hussain said Mrs Y had seen her GP and had been referred to a psychiatrist. He said it was difficult to see that Mrs Y would be able to return to work and he was unable to give a return to work date. Dr Hussain suggested that a case for ill health retirement could be made but Mrs Y would have to see a psychiatrist and obtain a report from them.

Dr Ginjupalli (psychiatrist), 5 December 2006

56. Mrs Y had been referred to Dr Ginjupalli by her GP. He saw her on 20 November 2006.
57. Dr Ginjupalli noted Mrs Y had had an episode of depression around 16-17 years earlier and another about eight years earlier. He noted she had been tested for Alzheimer's disease at this time because of episodes of forgetfulness and family history. He noted that no abnormality had been found at this time.
58. Dr Ginjupalli said, on formal mental state examination, Mrs Y came across as quite depressed. He said he had advised her GP to increase her antidepressant medication. Dr Ginjupalli said Mrs Y's test results showed no deficits in her cognition and he had assured her she need not worry about developing Alzheimer's disease at this time. He diagnosed a moderate depressive episode. Dr Ginjupalli concluded,

"The normal course of a depressive episode is around six months. It may also last for up to one year.

In my opinion I feel [Mrs Y] may well respond to the antidepressant medication as she has responded to this in the past.

Evidence also suggests that the individuals having depressive episodes can suffer from recurrent depressive illness in the future."

Dr Gibson (GP), 18 January 2007

59. In a letter in support of Mrs Y's appeal against her dismissal, Dr Gibson said she was improving clinically and was hoping to be fit to return to work after Easter 2007 on a part time or supply basis.

Dr Ginjupalli, 11 June 2007

60. In a letter to Mrs Y, Dr Ginjupalli said, although he had anticipated her symptoms would improve, there had been no major improvement for a long period.
61. Dr Ginjupalli expressed the view that, given her current mental state and her symptoms, Mrs Y would not be able to carry on with employment in the future as a teacher. He noted Mrs Y's symptoms of anxiety were aggravated by work. He concluded,

“As I have discussed in the report regarding relapse of your illness, unfortunately your relapse seems to be a more severe one and is not responding to the medication as I would have expected.”

Dr Ginjupalli, 31 July 2007

62. Dr Ginjupalli said Mrs Y had been diagnosed with a moderate depressive episode. He explained her current medication had been increased to the maximum dose with no major improvement. He said the next option would be to try a different medication. Dr Ginjupalli expressed the view that Mrs Y would not be able to fulfil the duties of a teacher.

Dr Martin (Atos), 7 September 2007

63. Dr Martin said the evidence did not support a conclusion that Mrs Y would remain unfit for all work until her normal retirement date. He said the medical evidence consisted of the reports from Drs Hussain and Ginjupalli. Dr Martin concluded,

“Treatment for depression would not normally be considered to have failed until several medications at adequate dosage for adequate duration (perhaps in combination) and appropriate psychological therapies have been tried and failed.

With full reasonable available therapeutic intervention this applicant is expected to recover sufficiently to undertake some form of work in the nine years to age sixty.”

Atos, 21 September 2007

64. The medical adviser said the evidence did not support a conclusion that Mrs Y would remain unfit for all work until her normal retirement age. He noted that there was no supporting evidence for the appeal and it related to an out of service application under the two-tier scheme. He said, to succeed, there must be evidence to indicate probably permanent incapacity for any work, not just for teaching. He went on to say further treatment was likely to bring about recovery in due course and Mrs Y “should be fit to resume some employment, if not in the role of a teacher”.

Dr Thomas (psychiatrist), 10 January 2011

65. Dr Thomas completed Part B of Mrs Y's application for retirement benefits form on 10 January 2011. He said she had been diagnosed with mixed anxiety and depression.
66. Dr Thomas said he had first reviewed Mrs Y in 2009, when she was suffering from low mood, anxiety, panic attacks and poor memory. He said Mrs Y had described two previous episodes of anxiety and low mood, and had described the current episode as starting in 2007. He noted Mrs Y's mood was lifting but her anxiety and poor concentration remained pervasive. Dr Thomas outlined the results of a mental state examination. He noted Mrs Y's score had dropped by one point but thought this was due to anxiety and said she had corrected herself. He said a CT scan of Mrs Y's head had been normal. Dr Thomas went on to say,

"The patient's current level of anxiety requires significant reassurance, which would be currently incompatible with working in a stressful teaching environment. Her current poor concentration would also impair her teaching ability."

"I feel that a further increment in ... would help with the anxiety, and that CBT would be useful for anxiety management. However, given the considerable negative ruminations about her previously perceived treatment at work, I think it would take a considerable psychological shift in the patient before the prospect of teaching does [illegible] significant anxiety."

Dr Fisher (Atos), 28 January 2011

67. Dr Fisher said Mrs Y's application was out of service and the criteria to be considered were those for Total Incapacity, requiring incapacity for any work. He expressed the view that the evidence did not support a conclusion that Mrs Y satisfied the criteria.
68. Dr Fisher said Mrs Y had a history of persistent mixed anxiety and depressive disorder pre-dating her leaving teaching in 2006. He noted that she had not worked since, in any capacity, and remained on Incapacity Benefit. He noted Mrs Y was reported to have tried three different antidepressants without benefit and had been referred for CBT but had been unable to engage with this. Dr Fisher noted a further increase in Mrs Y's medication and a course of CBT had been recommended. He said these had not so far taken place and, therefore, treatment was considered incomplete.

Dr Leuvennink (consultant psychiatrist), 28 November 2012

69. Dr Leuvennink said he had been responsible for Mrs Y's care since April 2011. He outlined the treatment Mrs Y had received since 2005. He noted Mrs Y had not seen any benefit from the various medications she had been prescribed.
70. Dr Leuvennink explained that Mrs Y had had significant concerns about her memory and had been assessed on a number of occasions. He explained that a recent CT

scan had shown mild evidence of ischaemic changes and this had been confirmed by an MRI scan. He said this might explain Mrs Y's increased levels of confusion and also the treatment resistant nature of her depressive illness. Dr Leuvennink said Mrs Y had been seen by a dementia specialist who had confirmed a diagnosis of severe depression with probably underlying structural brain damage. He said the diagnosis had been confirmed as unipolar depressive disorder, current episode treatment resistant major depressive episode, severe in degree with chronicity. He said the prognosis was poor.

71. Dr Leuvennink concluded,

"It is clear that [Mrs Y] continues to suffer from the same episode of illness which she had at the time of her retiral from work and this had become entrenched and associated with increased difficulty in daily functioning. In my opinion she would not be fit to return to any form of work at the present time nor is it at all likely that she would be able to return to work in the future."

Dr Wladyslawska (Atos), 3 January 2013

72. Dr Wladyslawska said the relevant regulations were the 2010 regulations and Mrs Y had to satisfy the criteria for Total Incapacity; namely, an inability to carry out any gainful employment up to normal retirement age.

73. Dr Wladyslawska referred to Dr Leuvennink's report. She provided a short summary and went on to say,

"It is noted that her previous Psychiatrist Opinion indicated possible improvement with further increase of medications and Cognitive Behavioural Therapy. However this has not been achieved despite exploring these treatments and multiple additional therapeutic interventions. Considering severity of her mental health condition and associated incapacitating effects that are likely to continue in the future [Mrs Y's] ability to carry out any work is likely to be permanently impaired by more than 90%.

The date of the report that leads to this conclusion is 28/11/2012."