

Ombudsman's Determination

Applicant	Mr W
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	Northumbria Police (NP), Tyne & Wear Pension Fund (TWPF)

Outcome

1. I do not uphold Mr W's complaint and no further action is required by NP or TWPF.

Complaint Summary

2. Mr W's complaint is that NP, his former employer, and TWPF did not award him Tier 1 Ill Health Retirement (**IHR**).

Background information, including submissions from the parties

3. In August 2014, Mr W fractured his right elbow, a bone in his right wrist, dislocated his right thumb and tore a supporting ligament whilst on holiday. Mr W was subsequently off work on sick leave.
4. In January 2015, Mr W discovered he might be made redundant by NP as part of a business re-structure that would permanently remove his current role. Mr W resumed working in February 2015. However, he says that he struggled with his duties and returned to sick leave shortly afterwards.
5. On 21 April 2015, Mr W emailed NP requesting that he be considered for IHR due to his "permanent incapacity and pain".
6. On 7 July 2015, Mr W had a scheduled operation on his right elbow. The same day Mr W's Orthopaedic Surgeon wrote to NP regarding his elbow surgery and said the outcome would leave him with "permanent disability" and that "medical retirement would be an acceptable solution".
7. On 11 July 2015, NP made Mr W redundant. NP says it took the decision to proceed with redundancy over investigating IHR further after consulting with its Force Medical Adviser (**FMA**). NP also said Mr W's application for IHR was at an initial stage and his future prognosis was uncertain in July 2015.

8. On 30 September 2015, Mr W requested that NP consider him for deferred IHR under the Local Government Pension Scheme Regulations 2013. The relevant Regulations are summarised in the Appendix.
9. On 11 November 2015, NP requested that Dr McGuinness, an Independent Registered Medical Practitioner (**IRMP**), provide a report on Mr W. In addition to the usual Scheme criteria for IHR, NP directed Dr McGuinness to consider if:-

“(4) at the time Mr W exited from the organisation on the 11th July 2015 is there sufficient evidence which would have enabled a determination of permanent incapacity at that point in time”.
10. On 25 November 2015, Mr W attended an appointment with Dr McGuinness. The same day, Dr McGuinness provided an IRMP report on Mr W. Dr McGuinness’ report is summarised below:-
 - a. Mr W had “significant” impaired movement, pain and weakness in his right arm. Surgery and opiate painkillers made some improvement. However, Mr W could not fully bend or straighten the elbow and had severe pain.
 - b. Mr W was forgetful and had impaired concentration. The opiate painkillers Mr W took contributed to his symptoms. His persisting symptoms impaired his ability to undertake normal day-to-day activities.
 - c. Mr W was permanently incapable of performing the duties of his role at the date NP made him redundant.
 - d. Only 5 months had elapsed since Mr W’s most recent operation and Dr McGuinness felt that further improvement in Mr W’s arm mobility was likely. Dr McGuinness also said that further psychological intervention would likely improve Mr W’s residual symptoms to the extent he “should be capable of undertaking some gainful employment within three years”.
 - e. Dr McGuinness recommended that Mr W be awarded Tier 3 IHR.
11. On 8 April 2016, after seeking legal advice, NP wrote to Mr W stating that he was ineligible for deferred IHR under the Scheme Regulations. However, in view of Dr McGuinness’ IRMP report, NP offered Mr W the following options:-
 - a. Back-dated Tier 3 IHR with effect from 11 July 2015. Mr W’s health would be reviewed in 2017 in line with the Regulations. However, Mr W would need to repay his compulsory redundancy payment to NP.
 - b. Decline Tier 3 IHR. Mr W could keep his redundancy payment and claim early, reduced retirement at age 55.
12. On 14 June 2016, after further exchanges of correspondence, Mr W wrote to NP accepting IHR.

13. On 15 February 2017, Dr McGuinness conducted an 18-month review of Mr W's IHR and provided a further IRMP report. Dr McGuinness' report is summarised below:-
 - a. There was minimal improvement in Mr W's right arm mobility since Dr McGuinness' previous report. However, Mr W's movement was still severely restricted. Mr W's right arm strength was limited, and he had significant pain.
 - b. Mr W had found further counselling about his psychological symptoms beneficial.
 - c. In view of the limited progress since Mr W's last elbow surgery and persisting symptoms, Dr McGuinness said that it was likely that Mr W would remain permanently incapable of undertaking his former duties. Dr McGuinness recommended that Mr W be awarded Tier 2 IHR.
14. On 9 March 2017, after reviewing Dr McGuinness' report, NP wrote to Mr W stating that it was awarding him Tier 2 IHR.
15. On 20 March 2017 Mr W wrote to NP stating that he disagreed with its decision to award him a Tier 2 IHR award. Mr W queried why he could not be awarded Tier 1.
16. On 29 March 2017, NP wrote to Mr W stating there was no provision in the Regulations for a Tier 3 award to be revised to a Tier 1 award.
17. On 14 August 2017, Mr W complained to TWPF under the Scheme's internal dispute resolution procedure (**IDRP**). Mr W said that NP should have awarded him a Tier 1 IHR pension when his employment was terminated.
18. On 9 October 2017, TWPF provided its response. It said that Mr W's appeal was outside the six-month time limit stated in the Regulations. Consequently, it did not uphold Mr W's complaint. This position was maintained by the Stage 2 decision maker, South Tyneside Council (**STC**), in February 2018.

Adjudicator's Findings

19. Mr W's complaint was considered by one of our Adjudicators who concluded that no further action was required by NP or TWPF. The Adjudicator's findings are summarised below:-
 - a. TWPF should take no further action as, under the Regulations, Mr W's IHR application was solely considered by NP.
 - b. The Ombudsman's role is to decide whether NP has abided by the Scheme's Regulations, asked relevant questions, considered all relevant evidence and explained the reason(s) for its decision in a transparent way. If there were flaws in the decision-making process, the Ombudsman can require NP to look at Mr W's case again. However, the weight which is attached to any of the evidence is for NP to decide, including giving some of it little or no weight. It is open to it to prefer the advice of its own medical advisers unless

there is a cogent reason why it should not. Or, should not without seeking clarification. This might include errors or omissions of fact on the part of the IRMP, or a misunderstanding of the relevant Regulations. The Adjudicator reviewed Mr W's case on this basis.

- c. Mr W's circumstances were uncommon in that he was being assessed for redundancy at the time he requested IHR. As Mr W's request for IHR was at an early stage and an opinion had not been sought from an IRMP, it was reasonable for NP to progress Mr W's redundancy in July 2015. NP adhered to its internal policy and sought a view from its FMA. Mr W subsequently applied for deferred IHR less than three months later.
 - d. It was a relevant consideration for NP to ask Dr McGuinness to consider Mr W's permanent incapacity at the time he was made redundant as part of his IRMP report. NP decided that Mr W did not meet the criteria for IHR as a deferred member. Consequently, NP's decision to offer Mr W back-dated, Tier 3 IHR was more generous than simply his entitlement under the Regulations.
 - e. Mr W disagreed with NP's decision to grant him Tier 3 IHR. However, NP is entitled to ascribe little weight to recommendations made by his specialists in support of Mr W being granted IHR. Particularly if those recommendations are not made with reference to the criteria laid out in the Regulations. IHR decisions can only be made on the balance of probabilities. NP appropriately considered the question of whether Mr W would likely be permanently incapable of performing his duties until Normal Pension Age (**NPA**).
 - f. The Adjudicator appreciated why Mr W believes that his prognosis was clear before he was made redundant and NP should have ascribed greater weight to his Orthopaedic Surgeon's letter of 7 July 2015. However, Mr W's Surgeon's recommendation that Mr W would be suitable for IHR was made with no reference to the criteria stipulated in the Regulations. Both of Dr McGuinness' reports assessed Mr W's functional capacity and his likelihood of returning to gainful employment.
 - g. It is for NP to apportion weight (if any) to the relevant medical evidence as it sees fit. However, it should be able to justify why it prefers one opinion over another. The evidence supplied supported the finding that NP reviewed Mr W's application appropriately. NP gave due consideration to the duties Mr W performed in making its decision. NP also thoroughly assessed all the available evidence against the Scheme Regulations for granting IHR and did not reach a flawed decision.
20. Mr W did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr W 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 W for completeness.

Ombudsman's Decision

21. I appreciate that Mr W disagrees with NP's decision to grant him Tier 3 IHR. However, Mr W's disagreement is not sufficient grounds for me to remit the matter back to NP to be re-considered. My role is not to review the medical evidence and come to a decision of my own but to consider NP's decision-making process. Only 2 months separated Mr W's redundancy and his application for IHR. I agree that it was relevant for NP to direct Dr McGuinness to consider Mr W's condition at the time he was made redundant in his IRMP report. There is nothing in the Regulations that required NP to take this course. I do, however, agree that it was good practice for NP to do so.
22. Mr W says that he had no choice but to accept the option of Tier 3 IHR because of his financial situation. I empathise with Mr W's position. However, Mr W's financial circumstances do not affect his entitlement under the Scheme Regulations. NP offered Mr W a choice between retaining his redundancy payment and accepting IHR. I agree with the Adjudicator's view that offering Mr W this choice was generous on the part of NP and appropriate considering his circumstances.
23. In his comments, Mr W says that his original diagnosis was more severe than stated by Dr McGuinness and that his prognosis was clear, as evidenced by the view of his Orthopaedic Surgeon. Mr W acknowledges that the Surgeon's recommendation for granting him IHR was made without reference to the Scheme Regulations. However, Mr W says that NP was aware of the limited extent of his future recovery at the time he was made redundant and NP should have accepted the view of his Orthopaedic Surgeon as a specialist.
24. As the Adjudicator noted, NP is entitled to give little weight to recommendations in support of Mr W being granted IHR from his specialists if those recommendations are made without reference to the Regulations. I can see no evidence that NP did not consider Mr W's application for IHR in accordance with the Regulations and the medical evidence available. Consequently, I agree with the Adjudicator's view that NP reviewed Mr W's application for IHR appropriately.
25. I do not uphold Mr W's complaint.

Anthony Arter

Pensions Ombudsman
10 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 37 Special provision in respect of members receiving Tier 3 benefits

- (1) A member in receipt of Tier 3 benefits who attains normal pension age continues to be entitled to receive retirement pension and ceases to be regarded as being in receipt of Tier

3 benefits from that date, and nothing in the remainder of this regulation applies to such a person.

(2) A member who receives Tier 3 benefits shall inform the former Scheme employer upon starting any employment while those benefits are in payment and shall answer any reasonable inquiries made by the authority about employment status including as to pay and hours worked.

(3) Payment of Tier 3 benefits shall cease if a member starts an employment which the Scheme employer determines to be gainful employment, or fails to answer inquiries made by the employer under paragraph (2), and the employer may recover any payment made in respect of any period before discontinuance during which the member was in an employment it has determined to be gainful employment.

(4) A Scheme employer may determine that an employee has started gainful employment for the purposes of paragraph (3) if it forms the reasonable view that the employment is likely to endure for at least 12 months and it is immaterial whether the employment does in fact endure for 12 months.

(5) A Scheme employer must review payment of Tier 3 benefits after they have been in payment for 18 months.

(6) A Scheme employer carrying out a review under paragraph (5) must make a decision under paragraph (7) about the member's entitlement after obtaining a further certificate from an IRMP as to whether, and if so when, the member will be likely to be capable of undertaking gainful employment.

(7) The decisions available to a Scheme employer reviewing payment of Tier 3 benefits to a member under paragraph (5) are as follows—

(a) to continue payment of Tier 3 benefits for any period up to the maximum permitted by regulation 35(7) (early payment of retirement pension on ill-health grounds: active members);

(b) to award Tier 2 benefits to the member from the date of the review decision if the authority is satisfied that the member—

(i) is permanently incapable of discharging efficiently the duties of the employment the member was engaged in, and either

(ii) is unlikely to be capable of undertaking gainful employment before normal pension age, or

(iii) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment, but is likely to be able to undertake gainful employment before reaching normal pension age; or

(c) to cease payment of benefits to the member.

(8) A member whose Tier 3 benefits are discontinued under paragraph (3) or (7)(c) is a deferred pensioner member from the date benefits are discontinued and shall not be entitled to any Tier 3 benefits in the future.

(9) A Scheme employer which determines that it is appropriate to discontinue payment of Tier 3 benefits for any reason shall notify the appropriate administering authority of the determination.

(10) A Scheme employer may, following a request for a review from a member in receipt of Tier 3 benefits or within 3 years after payment of Tier 3 benefits to a member are discontinued, make a determination to award Tier 2 benefits to that member from the date of the determination, if the employer is satisfied after obtaining a further certificate from an IRMP, that the member is permanently incapable of discharging efficiently the duties of the employment the member was engaged in, and either—

(a) is unlikely to be capable of undertaking gainful employment before normal pension age; or

(b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment, but is likely to be able to undertake gainful employment before reaching normal pension age.

(11) The IRMP who provides a further certificate under paragraphs (6) or (10) may be the same IRMP who provided the first certificate under regulation 36(1) (role of the IRMP).

(12) Where the member's former employer has ceased to be a Scheme employer, the references in paragraphs (5) to (7), (9) and (10) are to be read as references to the member's appropriate administering authority.