

Ombudsman's Determination

Applicant: Mrs D

Scheme: Local Government Pension Scheme (**LGPS**)

Respondent: Dorset Council (**Dorset**)

Outcome

1. Mrs D's complaint against Dorset is partly upheld. To put matters right Dorset shall pay Mrs D £1,000 for the serious non-financial injustice which she has experienced.

Complaint summary

2. Mrs D disagrees with Dorset's decision that she does not qualify for an ill health retirement pension.

Background information, including submissions from the parties

Background

3. Mrs D was employed by Dorset until 10 February 2017. She tendered her resignation by letter dated 14 November 2016. In her letter, Mrs D asked what the contractual notice period was. She said she had enjoyed her work but needed to move on.
4. Also on 14 November 2016, Mrs D sent an email to Dorset. She said she had been in communication with her employer in 2015 regarding ill health retirement. Mrs D said she wished for ill health retirement to be reconsidered. She referred to a letter from Dorset, dated 15 October 2015¹, in which she had been told that it was not possible to appeal because she remained an employee and could return to work with adjustments. Mrs D said she did not think Dorset was able to make the adjustments she needed. She explained why she thought part-time working was not helping her. In particular, Mrs D mentioned she was unable to travel long distances because of

¹ Dorset had written to Mrs D, on 15 October 2015, referring to an appeal against dismissal on the grounds of medical incapability. It referred to discussions with Mrs D concerning the termination of her employment by mutual consent, rather than progressing to a formal attendance management hearing. Dorset confirmed that a hearing had been arranged. It said, since Mrs D remained an employee, there was nothing for her to appeal because she had not been dismissed. Dorset referred to an appeal against an ill health retirement decision. It said, since Mrs D remained an employee and was saying she could return to work with adjustments, it was not possible to consider an appeal at that time.

her epilepsy. She said she felt her health had been improving but had taken a retrograde step. Mrs D said she did not want to risk becoming unwell again. She described her previous ill health as frightening and life-changing. Mrs D acknowledged that she had made a good recovery, but said it was clear she had not returned to her former good health and resilience.

5. The relevant regulations are The Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended) (the **2013 Regulations**). Regulation 35 provides for ill health retirement from active status. It provides for three tiers of benefits depending upon the member's level of incapacity for future employment. Briefly:-
 - Tier 1 The member is unlikely to be capable of undertaking gainful employment before normal pension age.
 - Tier 2 The member is unlikely to be capable of undertaking any gainful employment within three years of leaving employment but is likely to be capable of such employment before normal pension age.
 - Tier 3 The member is likely to be capable of undertaking gainful employment within three years of leaving employment (or before normal pension age if earlier).
6. Extracts from the relevant regulations are provided in Appendix 1.
7. On 10 February 2017, Dorset's pensions team wrote to Mrs D setting out her pension options. On 28 February 2017, Mrs D elected to receive an actuarially reduced pension. On 5 April 2017, Mrs D wrote to Dorset requesting she be considered for an enhanced ill health retirement pension.
8. Dorset responded on 2 May 2017. It said it understood that Mrs D wished to appeal the amount of pension she was receiving. It said it could only review her case to see whether the LGPS regulations had been followed. Dorset said, under the LGPS regulations, it was for a scheme employer to decide whether an individual's employment should be terminated due to ill health. It referred to the requirement to obtain a certificate from an independent registered medical practitioner (**IRMP**) before making a decision. Dorset acknowledged that Mrs D had applied for ill health retirement in 2014/15. It noted that she had been unsuccessful and had returned to work full-time after a long period of absence. Dorset said, prior to her resignation, Mrs D had reduced her working hours and ill health retirement was not being investigated at the time of her resignation.
9. In October 2017, Mrs D submitted an appeal under the Scheme's two-stage Internal Dispute Resolution Procedure (**IDRP**). Dorset obtained a report from an IRMP, Dr Jewell. A summary of and extracts from Dr Jewell's report, together with other medical evidence relating to Mrs D's case, are provided in Appendix 2. Dr Jewell advised that Mrs D had been permanently incapacitated in relation to her role with Dorset at the time her contract of employment terminated in February 2017. However, she said there was no medical reason why Mrs D would not have been immediately

capable of gainful employment in an alternative less demanding, less responsible role at that time.

10. Dorset issued a Stage One IDRPs decision on 4 July 2018. The decision-maker acknowledged that Mrs D disagreed with Dr Jewell's conclusion that her long-term medical conditions were stable. He referred to the definition of "gainful employment" in the 2013 Regulations and quoted from statutory guidance issued by the Ministry of Housing, Communities and Local Government. The decision-maker said:

"This being so ... I'm afraid that Dr Jewell's assessment ties my hands. The criteria set out in the Local Government Pension Scheme ... are very, very clear and specific. The fact that the gainful employment test is subject to a stated minimum of 30 hours per week, I think, is particularly significant here: Dr Jewell is convinced your current state of health should enable you to take on a job over a significant proportion of a typical working week, whereas towards the end of your time working for DCC you were only working 18.5 hours each week. So her assessment is not a marginal one, but a decisively clear one. Obviously this notional 'gainful employment' would have to involve a type of job that is much less stressful than social work, and therefore less well-paid. With great respect, I think the passage above that states "*The assessment being made is whether the member is likely or unlikely to be capable of undertaking gainful employment and not whether the member would actually want to*" is also significant here.

When we spoke by telephone, you were equally convinced that you are not well enough to undertake gainful employment, but you then went on to say that what you are trained to do is social work, and you are definitely not well enough to return to social work. Once again, with respect, this misses the crucial point here: you, your ex-employer and the OH physician all agree that you are not and will not again become well enough to return to social work. But that is not the test you must satisfy ... The honest medical assessment is that you are, however, fit enough to do other gainful employment, doubtless of a less demanding kind ..."

11. The decision-maker concluded that, given the clarity of Dr Jewell's conclusions, he was unable to uphold Mrs D's appeal.
12. Mrs D submitted a Stage Two appeal on 1 September 2018. The main points from Mrs D's submission are summarised below:-
- In November 2016, she had become unable to work due to ongoing anxiety and poor health. Her GP had provided a "fit note" for the period 30 November 2016 to 20 January 2017. This had resulted in her resigning in February 2017.
 - She had submitted an IDRPs appeal in October 2017 but had not received an outcome until July 2018.

- She was currently unable to work and her GP had provided a further fit note for six months from 1 August 2018. This stated that she was not fit for any work due to pulmonary sarcoidosis and anxiety.
 - Her application for Employment Support Allowance (**ESA**) had been accepted.
 - Her respiratory consultant had informed her that, due to the continued deterioration of her lungs, she had to undergo steroid treatment as a matter of urgency. Her condition had never been stable.
 - She had suffered a stroke in December 2013 and had subsequently had a number of seizures, including one which led to her being placed in an induced coma.
 - She suffered from other medical conditions, including anaemia and vitamin D deficiency, for which she was on medication.
 - Dr Jewell's assessment had failed to consider the breadth and depth of her complex health situation. Dr Jewell had not spoken to the key health professionals involved in her care and her findings were based upon limited information.
13. Mrs D said she had provided evidence to show that she was not capable of working for 30 hours per week in any capacity and had a reduced likelihood of being capable of undertaking any gainful employment before her normal pension age. She asked Dorset to detail why she did not meet the criteria set out in Regulation 35².
14. Dorset issued a Stage Two IDRPs decision on 2 January 2019. It apologised for Mrs D's appeal not having been decided earlier. The decision-maker said he had read Mrs D's September 2018 letter, the Stage One decision and the report from Dr Jewell. He said he had also seen Mrs D's pension file. The Stage Two decision is summarised below:-
- Following her resignation and the expiry of her notice period, Mrs D had ceased to be an active member of the LGPS.
 - When she elected to receive an actuarially reduced pension, Mrs D became a pensioner member.
 - Under Regulation 35, an active member whose employment was terminated by a scheme employer on the grounds of ill health was entitled to early payment of a pension in certain circumstances. Mrs D's employment was not terminated; it ended as a result of her resignation. As a result, she did not meet an essential requirement for payment of a pension under Regulation 35.
 - Under Regulation 38, a deferred member who became permanently incapable of discharging the duties of their former employment and who was unlikely to be capable of undertaking gainful employment before normal pension age, or for at

² Mrs D actually cited Regulation 20 from the previous set of LGPS Regulations.

least three years, could ask to receive a pension. As Mrs D was not a deferred member, she did not come within Regulation 38.

- For the above reasons, questions as to whether Mrs D was permanently incapable of working in her previous employment, or was likely to be capable of undertaking gainful employment, did not arise.
- Even if the decision-maker disagreed with Dr Jewell's assessment or the Stage One IDRPs decision, he could not award a pension because Mrs D was not an active or deferred member; she was already in receipt of a pension.
- The Stage One decision may have given the impression that the Stage One decision-maker had relied exclusively upon Dr Jewell's advice. He was aware that the Pensions Ombudsman had found such an approach to be wrong. He had, therefore, approached Dr Jewell's report afresh. He had not treated it as dictating what the decision should be.
- Dr Jewell had provided details of the evidence available to her and this included information from Mrs D's specialist in respiratory medicine, her epilepsy nurse and her GP. It was not necessary for Dr Jewell to speak to Mrs D's health professionals. Her findings were not based upon too limited an evidence base.
- The assessment of whether a member was immediately capable of undertaking gainful employment had to be made at the time when their employment ceased. This was February 2017 in Mrs D's case. Dr Jewell's advice was that there was no medical reason why Mrs D would not have been immediately capable of undertaking gainful employment in a less demanding and less responsible role.
- Gainful employment meant paid employment for not less than 30 hours per week for a period of not less than 12 months. It did not have to be in local government or commensurate with Mrs D's former role in terms of pay and conditions.
- The decision-maker found Dr Jewell's analysis of the work-related stress arising specifically from Mrs D's former role convincing. He accepted Dr Jewell's advice that there was no medical evidence to show Mrs D was physically incapacitated from her local government role. He also accepted Dr Jewell's conclusions that it was the psychological demands of the role and Mrs D's perceived lack of managerial support which had led her to resign. Against that background, Mrs D could reasonably have been expected to go on to find alternative less stressful employment.

Mrs D's position

15. Mrs D submits:-

- She was not given the option to return to work on anything other than full-time (37 hours) or half-time (18.5 hours). She found the workload and travelling anxiety provoking. Not wishing to become unwell again, she decided to resign on 14

November 2016. She is of the view that, if she had been able to stay in one of her previous roles, she would have managed better.

- At the time of her resignation, she had been signed off as unfit to work by her GP.
- She does not agree that she was a pensioner member or a deferred member at the time she applied for ill health retirement. She applied for ill health retirement in 2014/15 and again on 14 November 2016. Her employer responded to her resignation, on 17 November 2016, but did not mention ill health retirement.
- She disagrees that 14 November 2016 or 10 February 2017 are the relevant dates. Her pension entitlement should be tested by reference to 5 April 2017.
- Dorset did not refer to Dr MacCarthy's advice (see Appendix 2). In his report of 24 June 2015, Dr MacCarthy said she was unlikely to be able to resume her normal role because it was likely to be unduly stressful and result in an aggravation of her underlying medical conditions. He did suggest alternative work, such as an administrative role, but her employer did not offer guidance or support on this. She is of the view that undertaking such a role would be stressful because she had previously had a similar role and found it unchallenging.
- Dorset did not refer to Dr Milne's report of 1 October 2014 (see Appendix 2). Dr Milne said she was unfit for work. He suggested she might be fit for work with adjustments but the outlook was uncertain.
- Dorset has cherry picked the OH Assist assessments and focussed entirely on Dr Jewell's assessment. It has ignored the views of her GP who supported her application for retirement on medical grounds.
- Contrary to Dorset's submission, Dr Jewell accepted she was permanently incapacitated for her local government role at the time her employment terminated in February 2017.
- She disagrees that her medical conditions are stable. She is on medication to try and halt her progressively worsening lung condition. Her lung condition is worsening; not stable.
- She has provided sufficient evidence to show that she is not capable of working 30 hours per week and that she has a reduced likelihood of undertaking gainful employment before her normal pension age.

She has suffered financially since 27 March 2017 when her reduced pension benefits were put into payment.

Dorset's position

16. Dorset submits:-

- As a pensioner member of the LGPS in receipt of benefits before she made a request for an ill health pension, Mrs D was not entitled to an enhanced pension.
- If the relevant date for assessing Mrs D's entitlement to a pension was 14 November 2016, when she resigned, or 10 February 2017, when her notice expired, it would agree that she was, on those dates, still an active member.
- However, Mrs D's employment ceased through voluntary resignation; not through dismissal on ill health grounds. It does not see how 14 November 2016 or 10 February 2017 could serve as the relevant date on which her pension entitlement should be assessed.
- It has considered the question of medical incapacity and accepts Dr Jewell's advice that there was no medical evidence to show that Mrs D was medically incapacitated from undertaking her local government role. Dr Jewell gave this advice having taken the views of Mrs D's GP into account.
- Mrs D refers to there having been consideration of ill health retirement in 2015. It is clear from the case documents that there was no termination of employment on the grounds of ill health at this time.

Adjudicator's Opinion

17. Mrs D's complaint was considered by one of our Adjudicators who concluded that there had been maladministration on the part of Dorset. The Adjudicator's findings are summarised below:-

- Members' entitlements to benefits when taking early retirement due to ill health were determined by the scheme rules or regulations. The scheme rules or regulations determined the circumstances in which members were eligible for ill health benefits, the conditions which they had to satisfy, and the way in which decisions about ill health benefits had to be taken.
- In Mrs D's case, the relevant regulation was Regulation 35 of the 2013 Regulations. Under Regulation 35, in order to qualify for a pension, Mrs D's employment had to have been terminated by her employer on the grounds of ill health or infirmity of mind or body. It was a matter of fact that Mrs D's employment terminated because of her voluntary resignation.
- As a rule, once a valid notice to terminate a contract of employment had been given, it could not be withdrawn or altered unilaterally by either party. There were no grounds on which the Ombudsman could direct Dorset to set aside Mrs D's resignation. While her resignation stood, she could not meet the eligibility requirements set out in Regulation 35.
- There was nothing preventing Dorset from agreeing with Mrs D that, instead of accepting her resignation, it would consider her for ill health retirement. The

Adjudicator noted that Mrs D had raised the question of ill health retirement with Dorset at the same time as she had submitted her notice. Dorset did not appear to have responded to Mrs D's request that her eligibility for ill health retirement be reconsidered; it had simply proceeded on the basis that she had resigned. Although Dorset was under no legal obligation to do anything other than accept Mrs D's notice, the Adjudicator noted that the Employment Appeal Tribunal (**EAT**) had found that a reasonable employer ought to give consideration to whether the employee might be entitled to take advantage of any ill health retirement provisions³. The EAT's decision had been given in the context of a dismissal by the employer but, in the Adjudicator's view, it indicated that it would have been just as reasonable to expect Dorset to respond to Mrs D's request; instead of simply proceeding on the basis that she had resigned.

- It was the Adjudicator's opinion that Dorset's failure to respond to Mrs D's request, that it consider her for ill health retirement, could amount to maladministration on its part. However, in order to uphold a complaint, the Ombudsman had to be satisfied, not only that there had been maladministration, but also that the individual had sustained injustice as a consequence.
- In 2018, Dorset had obtained an opinion from an IRMP. Dr Jewell had said she had been asked to review Mrs D's case and consider whether she would have been able to access her pension on the grounds of ill health when she left her employment in February 2017. Mrs D had suggested that 10 February 2017 was not the relevant date for the purposes of assessing her eligibility for ill health retirement under Regulation 35. On this point, the Adjudicator agreed with Dorset; the member had to satisfy the eligibility criteria set out in Regulation 35 as at the date her/his employment ceased.
- In order to "access" her pension under Regulation 35, Mrs D had to satisfy two conditions:-
 - She had to be, as a result of ill health or infirmity of mind or body, permanently incapable of discharging efficiently the duties of the employment she had been engaged in; and
 - She had to be, as a result of ill health or infirmity of mind or body, not immediately capable of undertaking any gainful employment.
- Dr Jewell had advised that, in her opinion, there was no medical evidence to suggest that Mrs D was physically incapacitated from undertaking her former role with Dorset. However, she had noted that Mrs D had been struggling psychologically with the demands of the job, and her perceived lack of managerial support and excessive workload. Dr Jewell had advised that she thought it unlikely that Mrs D would be able to return to her role with Dorset due to the risk of exacerbating of her anxiety. She had advised that Mrs D should be considered

³ *First West Yorkshire v Haigh* [2008] 16 PBLR

permanently incapacitated for her role with Dorset at the time her contract of employment terminated in February 2017. In other words, Mrs D satisfied the first of the two conditions.

- However, Dr Jewell went on to advise that there was no medical reason why Mrs D would not have been immediately capable of gainful employment in an alternative less demanding, less responsible role at this time. In other words, Mrs D did not satisfy the second condition to qualify for a pension under Regulation 35 in February 2017.
- The Adjudicator acknowledged that Mrs D did not agree with Dr Jewell's opinion. So far as their medical opinions are concerned, the IRMPs did not come within the Ombudsman's jurisdiction. They were answerable to their own professional bodies and the General Medical Council. The question for the Ombudsman was whether there was any reason why Dorset should not have relied on Dr Jewell's opinion in making a decision as to Mrs D's eligibility under Regulation 35. The reason would have to be obvious to a lay person. Dorset would not be expected to challenge a medical opinion as a matter of course. The kind of things the Adjudicator had in mind were errors or omissions of fact by the IRMP or a misunderstanding of the relevant regulations. The Adjudicator said she had not identified any such reason in Dr Jewell's report.
- Mrs D had referred to the reports provided by Dr Milne, in 2014, and Dr MacCarthy, in 2015. Dr Milne had said Mrs D was unfit for work and her outlook was uncertain. However, he was commenting in the context of Mrs D returning to her role with Dorset. He did not appear to have been asked to comment on whether she satisfied the Regulation 35 conditions. Dr MacCarthy had said Mrs D was unlikely to be able to resume her normal social work role but would be fit for alternative work, such as an administrative role. He did suggest that, if Mrs D could not be accommodated with suitable alternative work, it might be appropriate to consider ill health retirement. However, Dr MacCarthy had suggested Dorset seek an opinion from an IRMP if that was the case. He was not making a recommendation himself; nor was he in a position to do so because he did not meet the statutory requirements to act as an IRMP in Mrs D's case. In the Adjudicator's view, Dr Jewell's report was not incompatible with the evidence from Dr Milne and/or Dr MacCarthy.
- The Adjudicator noted that, in 2017, Mrs D's GP had been supportive of her application for ill health retirement. However, it was not clear whether the GP was aware of the conditions Mrs D needed to satisfy in order to qualify for ill health retirement.
- On the basis that, had she been asked in November 2016, Dr Jewell would have come to the same conclusions, it was more likely than not that Dorset would have decided that Mrs D did not satisfy the conditions set out in Regulation 35 at that time. Dorset's failure to respond to Mrs D's request to be reconsidered for ill health retirement in 2016 had been redressed by it obtaining a report from Dr

Jewell which considered the situation as at the relevant date; 10 February 2017. Mrs D was in the position she would have been in had her request been considered at the earlier date. To that extent, she had not sustained injustice as a consequence of the failure to consider her request in 2016.

- However, it was the Adjudicator's opinion that Dorset's failure to respond to Mrs D in 2016 would have resulted in non-financial injustice in the form of distress and inconvenience. It was aware that Mrs D was experiencing significant stress at this time and it could have done more to alleviate this. The Adjudicator noted also that it had taken eight months to respond to Mrs D's Stage One IDRPs appeal and a further four months to respond to her Stage Two appeal. Even allowing for the fact that Dorset would have been waiting for Dr Jewell's report in that time, this was much longer than would be considered acceptable in the circumstances. In her view, it was appropriate for Mrs D to receive a payment for non-financial injustice in line with the Ombudsman's current guidance.
- The Adjudicator suggested that, in order to put matters right, Dorset should pay Mrs D £1,000 for the serious non-financial injustice she had sustained as a consequence of the way in which it had dealt with her case.

18. The parties did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs D and Dorset provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will respond to the main points made by the parties.

Mrs D's further comments

19. In addition to her earlier submissions, Mrs D has commented:-

- There has been insufficient acknowledgement of the extent of the injustice she has sustained.
- It has clearly been established that she is permanently incapable of discharging efficiently the duties of her employment as a social worker. Dorset maintains that she is capable of undertaking gainful employment, but it has never explored this. The obvious alternative roles would have been a social work assistant or administrative officer, which would have involved writing up harrowing reports about children being harmed. As she was not fit for social work, she is not sure what role she could have done. No role would be free from a high level of intrinsic stress.
- She was convinced, at the time of her resignation, that her employer would not be helpful in her request for assistance in terminating her employment on the grounds of ill health, because it had shown nothing but disregard for her health.
- Dorset relentlessly pursued her, from October 2014, to agree to dismissal on the grounds of medical incapability. It had no intention of offering her alternative work.

- She sought work through her local job centre, but the jobs on offer were less appropriate than her role as a social worker; they involved lifting, walking distances or carrying heavy loads. She cannot undertake such roles because her sarcoidosis means she becomes breathless on exertion. As a result of her epilepsy, she has also discounted work which requires working shifts because of the disruption to her sleep.
- Dr Jewell did not meet her. If she had, she would have had a more comprehensive understanding of her case. Dr Jewell's view contradicts those of Dr Milne and Dr MacCarthy. She cherry picked the available information and omitted much of the medical evidence.
- Dorset did not offer her any alternative employment. She would not have been keen to relinquish her role as a social worker for less demanding work, but may have given it a go if offered reasonable financial terms.
- She relates the basis of her ill health to a particular case which involved a murder. Due to restructuring, she was left in role which required working with clients with a similar profile. This expedited her resignation.
- Dr Jewell based her decision on a letter from Dr Stringfellow, whom she had only seen once. Her consultant since 2011 was Dr McConnell and he was not consulted. Nor was her GP consulted. Dr Jewell mentioned deterioration in her lung function and that she was stable. Any decline in her lung function is irreversible.
- Dr Jewell focussed on the fact that she was struggling psychologically with her role. This is incorrect. Her sarcoidosis had, since before 2011, a significant impact on her exercise tolerance and energy. Without the steroid treatment she began in 2018, the decline in her lung function would continue.

Dorset's further comments

20. In addition to its earlier submission, Dorset says:-

- Mrs D terminated her employment by resigning. Resignation is a unilateral act; it is not dependent upon acceptance by the employer in order for it to take effect. It does not accept that the EAT's decision in *Haigh* can be extended to the circumstances of Mrs D's case.
- The time taken to conclude the IDRPs in Mrs D's case was the result of the complexity, volume of material, periods of ill health extending back to 2011 and the need for reassessment. IDRPs can take a long time without there having been an administrative fault. The Stage Two appeal also coincided with preparations for the abolition of the County Council and eight other councils in Dorset. The time taken compares favourably with the time taken by the Pensions Ombudsman to investigate Mrs D's complaint. It considers an award of £500 for significant, not serious, non-financial injustice would be more appropriate.

Ombudsman's decision

21. It is a matter of fact that Mrs D's employment terminated because she resigned; not because she was dismissed by Dorset. On that ground alone, she would not have satisfied the conditions set out in Regulation 35 in February 2017. Regulation 35 applies to an "active member ... whose employment is terminated by a Scheme employer on the grounds of ill-health".
22. However, on the same day as she gave notice of her intention to terminate her contract of employment, Mrs D asked about ill health retirement. My Adjudicator acknowledged that once a valid notice to terminate a contract of employment has been given, it usually cannot be withdrawn or altered unilaterally by either party. The parties to an employment contract are not, however, precluded from coming to an agreement not to give effect to the notice. Mrs D's letter of resignation certainly did not prevent Dorset from responding to her enquiry about ill health retirement.
23. My Adjudicator referred to *Haigh*; not because she thought it might have direct application in Mrs D's case, but because it gives an indication of what might be expected of a "reasonable employer". An employer's reasonable treatment of its employees is not confined to the manner in which it dismisses them. In Mrs D's case, Dorset was well aware that she was a vulnerable person with a serious health condition. On the very day on which she tendered her resignation, she enquired about ill health retirement. The very least which might be expected of a reasonable employer is that it would respond to such an enquiry. Dorset failed to do so. That failure amounts to maladministration on its part.
24. Mrs D's eligibility for a pension under Regulation 35 was considered subsequently by Dr Jewell. She concluded that, as at 10 February 2017, Mrs D was permanently incapable of discharging efficiently the duties of her employment as a social worker. However, Dr Jewell was of the opinion that Mrs D would have been capable of alternative gainful employment.
25. I note Mrs D's comments that the roles of social work assistant or administrative officer in the social work office would have been intrinsically stressful. She also points out that Dorset did not offer her any alternative role. In this, Mrs D has misunderstood the requirements of Regulation 35. The alternative gainful employment need not be in social work or with Dorset; it is any gainful employment of at least 30 hours per week for a period of not less than 12 months. Mrs D has explained that she is unable to undertake employment which involves shift work, lifting or carrying heavy loads, or walking distances. This will inevitably limit her choice of employment, but does not mean that she is permanently incapable of gainful employment as required by Regulation 35. The availability of suitable gainful employment is not a relevant factor in considering Mrs D's eligibility under Regulation 35.
26. Mrs D has commented on the way in which certain matters were handled by her employer. There is one incident, in particular, which she feels may have precipitated her eventual resignation. These issues are employment matters and, therefore, fall

outside my remit. I have not considered them in any detail and will not comment on them any further.

27. Mrs D disagrees with the conclusions drawn by Dr Jewell. In particular, she feels that Dr Jewell might have come to a different view if she had seen her. Mrs D also points out that Dr Jewell did not consult with her GP or her respiratory consultant. My Adjudicator explained that, so far as her medical opinion is concerned, Dr Jewell does not come within my jurisdiction. The question for me is whether there was anything in Dr Jewell's report which Dorset could be expected to seek to clarify before it relied on the report to make a decision. This might be an error or omission of fact, or a misunderstanding of the regulatory requirements. The decision to offer an opinion on the basis of a paper review or the desirability of obtaining further medical reports is largely down to the doctor's own professional judgment; neither are required by the 2013 Regulations themselves.
28. I find that Dr Jewell had sufficient, appropriate evidence on which to base her advice. Mrs D has queried the reference to Dr Stringfellow's letter, but this related to a review which was contemporaneous with the cessation of her employment. I do not find its use to be inappropriate. It is clear that Dr Jewell understood what she was being asked to advise on. She said she had been asked to consider whether Mrs D would have been able to access her pension on the grounds of ill health when she left her employment in February 2017. I find this to be a reasonable summary of what was required from Dr Jewell. There was no reason why Dorset should not rely on Dr Jewell's advice.
29. On the basis that Dr Jewell would likely have given the same advice if she had been asked for it in February 2017, it is more likely than not that Dorset would have come to the same decision then as it did later. In other words, Mrs D is in the same position as she would have been if Dorset had considered her under Regulation 35 in February 2017, insofar as her pension is concerned. She has not sustained a financial loss as a consequence of Dorset's failure to respond to her in 2016.
30. Resolving the question of Mrs D's eligibility for a pension under Regulation 35 is not the only issue here. I have also considered the matter of non-financial injustice; commonly referred to as distress and inconvenience.
31. I take Dorset's point that there can be many reasons why the IDRPs can take a long time and that it may not be down to an administrative fault. It has mentioned the complexity of Mrs D's case, the volume of material and a need for reassessment. I am not unsympathetic to the fact that ill health retirement cases can be complex and involve a weight of evidence to be considered. Although, it has to be said that some of the complexity in Mrs D's case might have been avoided if Dorset had responded to her enquiry in 2016. Dorset has also explained that the Stage Two of IDRPs coincided with a period of local government reorganisation. It has pointed out that it completed Stage Two in less time than my Office has taken to investigate Mrs D's complaint.

32. I am not unaware that it often takes much longer for my Office to complete an investigation than anyone, including myself, would like. However, Dorset appears to have misunderstood the purpose of an award for non-financial injustice. These awards are not intended to be punitive. They are intended to offer redress for injustice sustained as a result of maladministration. In Mrs D's case, this is redress for the fact that Dorset failed to respond to her enquiry about ill health retirement in 2016; as a consequence of which she was required to pursue matters via the long drawn-out IDRP and eventually to me. This will have resulted in considerable distress and inconvenience for Mrs D; much of which might have been avoided had Dorset not ignored her enquiry.
33. I uphold Mrs D's complaint to this extent.

Directions

34. Within 14 days of the date of my Determination, Dorset shall pay Mrs D £1,000 for serious non-financial injustice which she has experienced.

Anthony Arter
Pensions Ombudsman

10 August 2020

Appendix 1

The Local Government Pension Scheme Regulations 2013

35. At the date Mrs D's employment ceased, Regulation 35 provided:

- “(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.”

36. Regulation 36 provided:

- (1) A decision as to whether a member is entitled under regulation 35 (early payment of retirement pension on ill-health grounds: active members) to early payment of retirement pension on grounds of ill-health or infirmity of mind or body, and if so which tier of benefits the member qualifies for, shall be made by the member's Scheme employer after that authority has obtained a certificate from an IRMP as to -
 - (a) whether the member satisfies the conditions in regulation 35(3) and (4); and if so,
 - (b) how long the member is unlikely to be capable of undertaking gainful employment; and
 - (c) where a member has been working reduced contractual hours and had reduced pay as a consequence of the reduction in contractual hours, whether that member was in part time service wholly or partly as a result of the condition that caused or contributed to the member's ill-health retirement.
- (2) An IRMP from whom a certificate is obtained under paragraph (1) must not have previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested.
- (2A) For the purposes of paragraph (2) an IRMP is not to be treated as having advised, given an opinion on or otherwise been involved in a particular case merely because another practitioner from the same occupational health provider has advised, given an opinion on or otherwise been involved in that case.
- (3) If the Scheme employer is not the member's appropriate administering authority, it must first obtain that authority's approval to its choice of IRMP.
- (4) The Scheme employer and IRMP must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation and regulations 37 (special provision in respect of members receiving Tier 3 benefits) and 38 (early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members)."

37. "Gainful employment" was defined as: "paid employment for not less than 30 hours in each week for a period of not less than 12 months". "Permanently incapable" was defined as: "the member will, more likely than not, be incapable until at the earliest, the member's normal pension age".

Appendix 2

Medical evidence

39. Dr Milne, occupational health physician, 1 October 2014

Dr Milne said he had written his report to provide advice in response to a business referral received on 16 September 2014. He noted Mrs D's diagnoses of pulmonary sarcoidosis and epilepsy. He said Mrs D felt anxious, unable to multi-task and had to concentrate hard. He noted that, apart from ant-epileptic medication, no further treatment was planned for Mrs D.

Dr Milne said:

"She is unfit for work. She currently feels frightened to do her job. She is worried she would be unable to keep pace with work demands and the rigours of thinking required. She feels she may not be able to do that job again. However, she may be fit with work adjustment eg a gradual return to work over several weeks, on reduced hours initially; supervision / a buddy / mentor to help her reintegrate back to work; relatively simple work to begin with; transport to/from work or for home visits ...

Her outlook is uncertain. It is not known whether she will be able to achieve a successful return to work. However, work adjustment ought to be considered to try and help her. If she does not manage to return to her job, then suitable alternative work (if available) may need to be considered for her – perhaps indefinitely, although it is still early days yet with her treatment."

40. Dr MacCarthy, occupational health physician, 24 June 2015

Dr MacCarthy said he had written his report to provide advice in response to a business referral received on 17 April 2015. He said:

"Current capacity for work.

She is unlikely to be able to resume her normal social work role as this is likely to be unduly stressful and result in aggravation of underlying medical conditions. (As the stress arises from the intrinsic nature of the work, adjustments to control workload etc. would be unlikely to allow a return). She would be fit for alternative work such as an administrative role for example, which she did not perceive as unduly stressful.

Outlook

Her health is currently stable. Advice on her fitness outlined above will remain applicable indefinitely."

In response to the question: "Is Ill Health Retirement (IHR) appropriate?", Dr MacCarthy said:

“... if she cannot be accommodated with suitable alternative work, in my opinion there would be grounds to consider one of the tiers of ill-health retirement under the local government pension scheme that she tells me she is in. In that case I would recommend you seek an opinion from your IHR advice-provider on whether she satisfies the criteria.”

41. Dr O’Neill, GP, 16 October 2017

Dr O’Neill said Mrs D had had a number of medical problems over the last few years and she listed them. She said Mrs D attended regular outpatient reviews but had a tendency to underplay the impact this had on her daily life. Dr O’Neill said Mrs D had tried to return to work but had found herself physically and mentally limited. She said she would support Mrs D’s application for retirement on medical grounds.

42. Dr Jewell, IRMP, 20 June 2018

Dr Jewell said she had been asked to review Mrs D’s case and consider whether she would have been able to access her pension on the grounds of ill health when she left her employment in February 2017. She listed the medical evidence as follows:-

- Documentation from Mrs D’s previous application and appeal
- A letter from Dr Stringfellow, specialist registrar in respiratory medicine, dated 8 June 2017
- Letters from an epilepsy nurse specialist dated 11 November 2016 and 10 November 2017
- A letter from Mrs D’s GP dated 25 April 2018
- A partial hospital letter dated 25 March 2014

In response to the question: “Is the member suffering from a condition that, more likely than not, renders them permanently incapable, of discharging efficiently the duties of their employment, because of ill health or infirmity of mind or body?”, Dr Jewell said: “Yes”.

In response to the question: “Is the member immediately capable of undertaking any gainful employment?”, Dr Jewell said: “Yes”.

Dr Jewell then set out her reasons for her responses. She said:-

- Mrs D had been diagnosed with a chronic lung disease in 2011. She had since had a stroke and developed epilepsy.
- She had returned to work on reduced hours but had found her job untenable and resigned.

- She had been reviewed by the epilepsy nurse specialist in November 2016, at which time she was back at work and driving. She remained seizure free on her current medication.
- She had been reviewed by Dr Stringfellow, in June 2017, and had been described as getting along very well. There had been some deterioration in her lung function but clinically she was stable. Mrs D had said that her breathing had not changed since around 2010. She was able to walk good distances on the flat but struggled with inclines. A review in 12 months was advised.
- The GP had advised that Mrs D had a history of anxiety dating back to 2004 and had had cognitive behavioural therapy (**CBT**). Her anxiety was mainly triggered by stressful situations. She was not on regular medication and managed her anxiety by taking measures to reduce the triggers.
- Work-related stress was documented in the occupational health correspondence. The GP had said that Mrs D had reported that the main reason she needed to leave work was that she was having difficulty dealing with violent clients. Dr MacCarthy had been of the opinion that Mrs D was unlikely to be able to resume her role because of intrinsic stressors.

Dr Jewell concluded:

“When [Mrs D’s] contract of employment ceased in February 2017 there was no medical evidence to support that she was physically incapacitated from her local government role. Her epilepsy was controlled, and her pulmonary sarcoidosis was not having any significant impact on her exercise tolerance. It appears that she was struggling to cope with the demands of the job psychologically and the perceived lack of managerial support and excessive work load.

Such were the depth of perceptions held by [Mrs D] in relation to her local government employment when she resigned from her post, it is accepted as unlikely that she would again be able to return to the above role or to work with her current employer due to the risk of exacerbation of her anxiety. Permanent incapacity for the local government role is accepted at the time her contract was terminated in February 2017. However, there was no medical reason why she would not have been immediately capable of gainful employment in an alternative less demanding, less responsible role at this time.”