

Ombudsman's Decision

Applicant	Mrs Petrina Greene
Scheme	Local Government Pension Scheme (the Scheme)
Respondent(s)	Rotherham Metropolitan Borough Council (the Council) South Yorkshire Pension Authority (SYPA)

Complaint summary

In essence, Mrs Greene's complaint is that she has been refused ill health retirement from the date her employment with the Council ended.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld because the Council failed to obtain the information they needed to reach a properly informed decision.

The complaint is not upheld against SYPA.

DETAILED DETERMINATION

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 – the 2007 Regulations.

1. See 'Appendix' to the Determination.

Material Facts

2. Mrs Greene was employed by the Council as a Non-Teaching Assistant in an Infant School.
3. SYPA are the Administering Authority for the Fund and responsible for authorising independent registered medical practitioners (**IRMP**) (that employers to the Fund must seek an opinion from before making a decision on an application for ill health retirement) and for acting as the adjudicator for internal dispute resolution (**IDR**) procedure stage 2 appeals.
4. After Mrs Greene had been off work for 12 months due to ill health (fibromyalgia and clavicle and lumbar spondylosis), she was notified at a meeting with the Council (on 22 July 2008) that her employment was to be terminated on grounds of capability.
5. The Council's termination of employment letter (of the same day), among other things, notified Mrs Greene:
 - if in the future her health improved that her doctor was of the opinion that she could return to employment SYPA would be happy to consider an application for any suitable vacancy;
 - alternatively she could submit an application for her pension.
6. Prior to the Council's decision, in May 2008 an Occupational Health (**OH**) doctor had notified the Council that it was premature to consider Mrs Greene for ill health retirement, but recommended a review in 3 to 4 months' time. The Council say Mrs Greene was not referred again to OH before they made their decision "as there was still no immediate prospect of Mrs Greene's return to work".

7. Mrs Greene's employment formally ended on 31 August 2008. In November 2008 she asked for an estimate of her benefits if she had retired on grounds of ill health on 31 August 2008. SYPA quoted a Tier 2 pension (not capable of undertaking gainful employment within three years of leaving employment, but likely to be capable of undertaking any gainful employment before normal retirement age). Mrs Greene took no further action – in a letter to TPAS dated 28 August 2012 Mrs Greene said: “The estimate I requested in 2008 was simply to see what my pension would be if I were to claim it, something I was reluctant to do as it felt like I was giving in to my illness”.
8. In November 2010 Mrs Greene contacted the Council saying she wished to claim her preserved pension.
9. The Council confirmed to Mrs Greene the process for considering payment of her preserved pension on health grounds and she attended an appointment with an OH doctor who supported her application.
10. However, the IRMP's (Dr Williams) subsequent opinion did not and OH wrote to the Council that the decision was to reject the application - the certification completed by Dr Williams stated it was the medical advisor's determination.
11. The Council informed Mrs Greene that her claim had not been successful.
12. Mrs Greene appealed the decision. The Council (the referee at IDR stage 1) declined the appeal on the grounds that the IRMP had rejected her application and ultimately they had to be guided by the IRMP's opinion "we have no real alternative but to accept this medical opinion". However, the Council notified Mrs Greene that they had passed the information she had submitted with her appeal to SYPA and had informed them of her wish to appeal.
13. As an IDR stage 2 decision, SYPA upheld the appeal remitting Mrs Greene's case back to the Council for reconsideration :

"Having reviewed the decision that was made I am satisfied that the regulations and procedures have been complied with and that based upon the available evidence the decision was not perverse in any way.

However, the additional evidence you have supplied and the comments you have made in response to Dr Williams' report in support of your appeal do

pose a number of questions: however, as a non-medical professional I feel that I am unable to answer them. Therefore, there is an element of doubt in my mind over the validity of the original decision. In light of the new evidence I suspect that had I been responding to your stage 1 appeal I might have sought a further independent medical opinion."

14. In October 2011, a second IRMP gave their opinion that Mrs Greene was permanently incapable of efficiently discharging the duties of her former employment and that it was likely that she would remain unfit for other gainful employment for the next three years (thereby satisfying the criteria under regulation 31 of the Scheme's 2007 Regulations). The Council (the referee at IDR stage 1) to accepted the IRMP's opinion and Mrs Greene's pension was backdated to November 2010 (the date of her application).
15. Following advice from the Pensions Advisory Service (**TPAS**) Mrs Greene then complained that she was entitled to an ill health pension from the date her employment ceased in August 2008.
16. Correspondence followed between TPAS and the Council during 2012, as a result of which the stage 1 referee agreed in December 2012 that it would be helpful to seek another IRMP's opinion on Mrs Greene's eligibility for an ill health pension from the termination date of her employment.
17. In February 2013 the new IRMP (Dr Davies) gave her opinion, that Mrs Greene would not have fulfilled the criteria for ill health retirement at 31 August 2008. In her full report among other things Dr Davies said:

"In order to provide the opinion I have referred to all documents provided dated prior to 31 August 2008. This would have formed the evidence on which an opinion for Ill Health Retirement would have been based had Mrs Green[e] been referred prior to termination of her contract. I have also considered documents dated from 1st September 2008 to 30th November 2008, which covers the three month period post termination of contract.

...

Ms Greene would have been 44 years and 11 months old at the time her employment was terminated, 20 years and 1 month before she reached the age of 65. As the IRMP I have to take into consideration with regards to the prognosis of a condition(s) and consider interventions which are available to address any symptoms or conditions. Consideration is also given with regards to the accessibility of treatment as the opinion is looking at

probability. If the evidence identifies that there are outstanding symptoms; conditions etc, which are being treated or have not yet been addressed, the IRMP then needs to consider what the impact on functioning and ability to undertake the duties of their employment would be if these were addressed. Consideration also needs to be given to the practicalities of this.

Ms Greene[s] symptoms of 'chronic widespread pain' have been stated as being due to Fibromyalgia and cervical and lumbar spondylosis by her Consultants, SR in rheumatology and her GP. The [Specialist Registrar's] report of 24 July 2008 states 'that she [Mrs Greene] is convinced there is something else causing her symptoms'. In addition it is recognised that long standing pain can have physical, mental and psychological impacts on a person. The result of her investigations and the report from Dr Fawthrop [Consultant Rheumatologist] confirms that no other pathology had been identified to account for the ongoing symptoms.

The evidence supports that a multidisciplinary approach to treatment is associated with the best outcome. At the time that Mrs Greene's employment was terminated there were outstanding referrals and treatments, in particular cognitive behaviour therapy. This treatment was accessible to her and she was on the waiting list. It would not have been possible to state the likely outcome of this at the time of termination of her contract."

18. However, Dr Davies' full report was not sent to the Council. The Council received a shortened report which said:

"In my opinion, on 31st August 2008, Ms Greene would not have fulfilled the local government pension scheme regulations of being permanently unfit and would therefore not have fulfilled the criteria for ill health retirement as defined by the regulations.

The evidence supports that a multidisciplinary approach to treatment is associated with the best outcome. At the time that Mrs Greene's employment was terminated there were outstanding referrals and treatments, in particular cognitive behaviour therapy. This treatment was accessible to her and she was on the waiting list. It would not have been possible to state the likely outcome of this at the time of termination of her contract."

19. The Council (the IDR stage 1 referee) wrote to Mrs Greene that in the light of Dr Davies' opinion her complaint could not be upheld.
20. Mrs Greene exchanged further correspondence with the Council about the medical evidence and submitted a stage 2 complaint to SYPA:
- It appeared that the referee at IDR stage 1 had just passed on the decision of the IRMP.

- The advice provided by Dr Davies was incomplete as no opinion was given on whether any further treatment would on the balance of probabilities enable her to return to employment before her normal retirement age.

21. SYPA's stage 2 decision was that the referee at IDR stage 1 had dealt with the matter correctly, but remitted the case back to the Council to ask Dr Davies for her view, on the balance of probabilities, whether she would have considered that the treatment not yet completed by Mrs Greene in 2008 would or would not have been successful and then come to a conclusion after proper consideration of her reply.
22. Dr Davies wrote to the Council on 30 July 2013 confirming her opinion that Mrs Greene would not have met the criteria for IHER on 31 August 2008:

"As stated in my previous report the outcome of outstanding treatments cannot be stated. Both Mrs Greene'[s] Consultant Rheumatologist...and her GP,...were unable to provide a prognosis as of 31 August 2008.

Mrs Greene had over 20 years until she would reach the age of 65 years. The aim of the treatment is to improve symptoms and enable her to return to functioning including work.

The evidence base available at the time includes research from the effect of exercise for fibromyalgia and a multidisciplinary approach. This found that 'on-going exercise is associated with maintenance of improvement in fibromyalgia; Cognitive Behavioural Therapy targeted to specific outcomes is beneficial and 'combining education and exercise can improve a sense of control over symptoms and reduce the impact of fibromyalgia'. A cochrane review published in 2008 concluded that there was 'gold' level evidence 'that supervised aerobic exercise training has beneficial effects on physical capacity and' symptoms of fibromyalgia.

In my opinion, on the balance of probabilities, it would have been expected that the outstanding treatments would have been successful and Mrs Greene would not have fulfilled the LGPS criteria for Ill Health Retirement as of 31st August 2008."

23. The Council (the IDR stage 1 referee) provided Mrs Greene with a copy of Dr Davies' further opinion and notified her:

"Based on all the evidence presented it is my decision that that (sic) I would not be in a position to agree to your ill health retirement as at 2008 and so your appeal is not upheld."

24. TPAS then questioned whether Dr Davies' opinion was valid as she had not mentioned Mrs Greene's spondylosis; and also asked whether Dr Davies had seen Mrs Greene's job description.
25. The Council (the IDR stage 1 referee) replied: "In checking the specific Cervical/lumbar spondylosis issue I have been informed that this was also taken into account by Dr Davies". He also confirmed that Dr Davies had been provided with "the Task Analysis form which details the physical and mental requirements of the specified job."
26. The Council subsequently informed our service that SYPA had advised them that Dr Davies' opinion of 30 July 2013 had taken into account Mrs Greene's cervical/lumbar spondylosis as evidenced in her February 2013 report from which the July 2013 assessment was prepared.

Summary of Mrs Greene's position

27. Mrs Greene says:
 - the Council informed her that they were not obligated to follow the advice of an occupational health doctor;
 - at her termination meeting she was not informed that she could apply for ill health retirement;
 - the only reference to pensions she received was in the Council's termination letter;
 - when she asked SYPA for a quote of what her ill health pension was that is what they provided;
 - they did not say she was not entitled to the pension;
 - after successfully appealing the Council's decision she was awarded a preserved pension, but it was not until TPAS' involvement that she was offered a further appeal to consider whether she met the criteria for ill health retirement at the date her employment ended;
 - while SYPA pointed out faults with the Council's consideration of her claim they were not prepared to help her further;

- the IRMPs chosen by SYPA (Dr Williams and Dr Davies) have a known bias against recommending ill health retirement;
- the Council failed in their duty of care and removed any opportunity for her to receive an ill health retirement pension from 2008;

Summary of the Council's position

28. On behalf of the Council the IDR stage 1 referee says:

- at the time her employment was terminated Mrs Greene was not referred again to Occupational Health as there was no still no immediate prospect of her return to work and the appropriate course of action in these circumstances was to terminate her employment;
- where an employee is dismissed in such circumstances and they are a member of the pension scheme they are informed of their right to seek the release of their pension benefits after a dismissal has taken place and their benefits are deemed preserved;
- given the experience of the Human Resources Officer the opportunity for Mrs Greene to apply for the early release of her pension on grounds of ill health would have been covered during the meeting with her at which the decision to terminate her employment was made;
- as further evidence of Mrs Greene's awareness of the potential to apply retrospectively for ill health retirement she requested in November 2008 and received a quotation for Tier 2 benefits;
- ultimately he took the necessary steps to seek an IRMP's opinion as to whether Mrs Greene satisfied the criteria for ill health retirement at 31 August 2008;
- proper consideration was given to Mrs Greene's complaint - given that he had agreed to a further appeal for Mrs Greene, had sought further independent advice, obtained and considered additional information from Mrs Greene and demonstrated a willingness to pose further question to the IRMP;

- If at any stage he had received supporting information and independent medical opinion that demonstrated Mrs Green met the criteria for ill health retirement at 31 August 2008 he would have acted accordingly and agreed the release of her benefits on that basis.

Summary of SYPA's position

29. SYPA say:

- they are surprised that Mrs Greene's complaint has been extended to include them;
- as an Administering Authority they have no decision making responsibilities in relation to the award of ill health retirement benefits;
- they fulfil their responsibilities for authorising IRMPs and acting as an adjudicator at IDR stage 2;
- Mrs Greene's assertion that SYPA were not prepared to help her further is right if by her statement she is implying that they were not prepared to overturn the Council's decision and award her ill health retirement;
- as an adjudicator they are committed to ensuring that the Scheme's regulations have been correctly applied, the member has been treated fairly and decisions made employers are not perverse;
- in respect of Mrs Greene they detected that Dr Davies had not specifically commented on whether the available treatment in 2008, more likely than not, would have been successful for Mrs Greene and remitted the case back to the Council to find out;
- Mrs Greene's comment that the IRMPs are biased against ill health retirement is outrageous – they are eminent in their field, apply the regulations as intended, provide objective opinion not decisions and are consistent across the three hundred plus employers that make up the Fund;
- their ill health procedure is considered best practice compared to other LGPS funds;

- they did not go back to Dr Davies in relation to the question of spondylosis as she clearly referred to it in her February 2013 report.

Conclusions

30. Immediately before Mrs Greene's employment was terminated the Council did not consider whether she satisfied the criteria for ill health retirement by obtaining an IRMP's report and certification, despite OH recommending in May 2008 a review in 3 to 4 months. This denied Mrs Greene the opportunity to have a properly considered decision on her eligibility at that point.
31. The termination letter whilst informing Mrs Greene that she could apply for a pension did not say that this would be considered from preserved rather than enhanced active status. Mrs Greene was therefore then denied the opportunity to appeal for retirement benefits under Regulation 20.
32. Mrs Greene says the quotation she requested in 2008 was simply to see what her ill health pension would be if she claimed it. It is not clear why SYPA issued a Tier 2 estimate, when the Council had not considered her for ill health retirement.
33. Turning to Mrs Greene's application for the early release of her preserved pension, the certification that Dr Williams' signed incorrectly said that it was the medical advisor's determination and the Council's subsequent letter to Mrs Greene notified her that her application for the early release of her preserved pension had been unsuccessful. In effect the Council simply passed on the IRMP's opinion rather than made a decision.
34. Mrs Greene has commented that Dr Williams and Dr Davies are biased against ill health retirement. I find nothing to support her contention. Whilst neither were of the opinion that she satisfied the criteria for ill health retirement (Dr Williams in respect of the early release of Mrs Greene's preserved pension and Dr Davies in respect of an entitlement to an ill health pension at the date her employment ended) that was not due to bias, but rather their respective objective opinion.
35. The Council's decision of 28 February 2013 was based on Dr Davies' short report. But from this the Council could not have known the basis / the consideration Dr Davies had given to arrive at her opinion.

36. The Council did not have sight of Dr Davies' full report until after they had again turned down Mrs Greene's application after receiving Dr Davies' 30 July 2013 report.
37. Dr Davies' July 2013 report does not mention Mrs Greene's spondylosis. The Council did not ask SYPA if Dr Davies had considered it until TPAS queried the matter (after the Council had again turned down Mrs Greene's application) and SYPA did not ask Dr Davies, but inferred that she had as she had referred to referred it in her original report.
38. Commenting on Mrs Greene's fibromyalgia while Dr Davies says (in her July 2013 report), on the balance of probabilities, it would be expected that the outstanding treatments would be successful she needed to go another step and explain why she was of that opinion.
39. If she had gone onto to say there was no reason to suppose that Mrs Greene's response to the outstanding treatments would be any different to the findings of the research then that probably would have been sufficient, but she did not.
40. I am therefore not satisfied that the Council had sufficient information to turn down Mrs Greene's claim.
41. By not providing Mrs Greene with Dr Davies' original full report the Council denied Mrs Greene the opportunity to make a full appeal.
42. I therefore remit the matter back to the Council to consider wholly afresh whether Mrs Greene satisfied the criteria for ill health retirement at the date her employment ended.
43. Inevitably this whole matter has caused Mrs Greene distress and inconvenience. I direct below that the Council pay Mrs Greene £350 for this.

Directions

44. Within 14 days of the date of this determination the Council shall request a medical report and certification from another IRMP not previously involved as to whether Mrs Greene satisfied the criteria for Tier 1 or Tier 2 ill health retirement at 31 August 2008.

45. Within 28 days of receiving the IRMP's report and certification the Council shall decide whether Mrs Greene is entitled to Tier 1 or Tier 2 benefits from 31 August 2008.
46. If the Council decide to award Mrs Greene Tier 1 or Tier 2 benefits simple interest at the rate for the time being declared by the reference banks should be added to the increased backdated instalments of pension from the due date to the date of each payment to the date of actual payment.
47. Within 14 days of the date of this determination the Council shall pay Mrs Greene £350 for the distress and inconvenience she has suffered.

Jane Irvine

Deputy Pensions Ombudsman

9 March 2015

Appendix

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007.

As relevant Regulation 20 says:

“(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5-

(a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and

(b) that he has a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age,

they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2) [Tier 1], (3) [Tier 2] or (4) [Tier 3], as the case may be.

(2) If the authority determine that there is no reasonable prospect of his being capable of undertaking any gainful employment before his normal retirement age, his benefits are increased-

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date the whole of the period between that date and the date on which he would have retired at normal retirement age.

(3) If the authority determine that, although he is not capable of undertaking gainful employment within three years of leaving his employment, it is likely that he will be capable of undertaking any gainful employment before his normal retirement age, his benefits are increased-

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date 25% of the period between that date and the date on which he would have retired at normal retirement age.

(4) If the authority determine that it is likely that he will be capable of undertaking gainful employment within three years of leaving his employment, or normal retirement age if earlier, his benefits-

(a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and

(b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(5) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine ("IRMP") as to whether in his opinion the member is suffering from a condition that renders him permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition he has a reduced likelihood of being capable of undertaking any gainful employment before reaching his normal retirement age.

...

(7) (a) Subject to sub-paragraph (c), once benefits under paragraph (4) have been in payment to a person for 18 months, the authority shall make inquiries as to his current employment.

(b) If he is not in gainful employment, the authority shall obtain a further certificate from an independent registered medical practitioner as to the matters set out in paragraph (5).

...

...

(11)

(a) An authority which has made a determination under paragraph (4) in respect of a member may make a subsequent determination under paragraph (3) in respect of him.

(aa) A subsequent determination under paragraph (3) must be made within three years of the date that payment of benefits is discontinued under paragraph (8), or before the member reaches the age of 65 if earlier.

(b) Any increase in benefits payable as a result of any such subsequent determination is payable from the date of that determination.

...

(14) In this regulation-

"gainful employment" means paid employment for not less than 30 hours in each week for a period of not less than 12 months;

"permanently incapable" means that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday; and

"an independent registered medical practitioner ("IRMP") qualified in occupational health medicine" means a practitioner who is registered with the General Medical Council and-

(a) holds a diploma in occupational health medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA state; and for the purposes of this definition, "competent authority" has the meaning given by section 55(1) of the Medical Act 1983; or

(b) is an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA state."