

## **Determination by the Deputy Pensions Ombudsman**

<b>Applicant</b>	Ms Anna Sims Williams
<b>Scheme</b>	Local Government Pension Scheme
<b>Respondent(s)</b>	City of Westminster, Housing & Care 21

### **Complaint summary**

Ms Sims Williams' complaint is that Housing & Care 21 (her late husband's employer) and City of Westminster (who operate the Scheme) failed to consider Mr Sims request for ill health retirement in a timely manner.

### **Summary of the Ombudsman's determination and reasons**

The complaint should not be upheld against Housing & Care 21 because Mr Sims changed his mind after applying for ill health retirement and subsequently died shortly after his application was reactivated.

The complaint should not be upheld against City of Westminster as the decision to award ill health retirement did not rest with the Council.

## **DETAILED DETERMINATION**

### **Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (as amended)**

1. 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 ...

...

(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.

## **Material Facts**

2. The London Pensions Fund Authority (**LPFA**) is contracted by the Council to administer the benefits of the Scheme.
3. Ms Sims Williams is represented by Mr F (a family friend and independent financial adviser with Merlin Financial Consultants).

4. Mr Sims was an employee of Housing & Care 21. While on certified sick leave he reactivated an earlier application for ill health retirement. He died in service while his request was being considered - see 'Appendix' for the sequence of events.
5. Ms Sims Williams received a death grant of £129,000 plus a widow's pension of £8,614.
6. Mr F complained to Housing 21 that Ms Sims Williams and her children had been significantly disadvantaged by their failure to process Mr Sims' application for ill health retirement before his death – Mr F says if Mr Sims' request had been processed before his death he would have opted for an increased lump sum of £94,093 and a residual pension of £14,113 and Ms Sims Williams would have received (following her husband's death) a lump sum of the balance of the ten years guaranteed pension plus a widow's pension.
7. Responding on behalf of Housing & Care 21, Devonshires Solicitors rejected the complaint:
  - Housing & Care 21 were not at fault in dealing with the matter and had not delayed the process;
  - without the required IRMP certificate it was not possible for Housing & Care 21/City of Westminster to make a decision as to whether Mr Sims qualified for ill health retirement;
  - while it is likely that Mr Sims would have satisfied the criteria he cannot be posthumously retired on grounds of ill health; and therefore he is classed as having died in service;
  - it takes on average 3-4 months for an ill health application to be completed. As the other client that Housing & Care 21 referred to Santia (at the same time as Mr Sims) was yet to be decided even if Mr Sims had not decided to initially halt the process it is unlikely that his application would have been processed before he died.
  - The Pensions Ombudsman's determinations on Tew (N00118) and McNidder (S00277) are similar to the position that Ms Sims Williams finds herself in. While both cases were dealt with under the old 1997

Regulations, which the 2007 Regulations replaced, the determinations are case law to be followed as the regulatory provision is the same.

- The 2007 Regulations are clear that:
  - a determination of ill health retirement cannot be made without an IRMP's medical certificate;
  - the reason for leaving pensionable employment determines the type and level of pension benefits a member receives and it would be ultra vires to award ill health pension benefits without an appropriate ill health certificate
- As the case law is clear neither Housing & Care 21 nor LPFA can change the fact that Ms Sims Williams will now only receive pension benefits for Mr Sims based on his death in service.

8. The response was treated as a stage 1 internal dispute resolution (**IDR**) decision. Mr F invoked IDR stage 2 complaining to City of Westminster, amongst other things, that:

- the person designated by Housing & Care 21 to deal with Mr Sims was inexperienced in such matters, by their own admission;
- from when Mr Sims commenced sick pay there was no explanation of the sick pay arrangements, no offers of professional support and no explanation of the decisions he should consider about pension and death benefits;
- Mr Sims had to ask when his sick pay would be reduced to half pay – a key factor in making decisions over ill health retirement as it would make a significant difference to household income;
- there is no doubt that Mr Sims would have qualified for ill health retirement under the terms of Regulation 20 of the 2007 Regulations;
- in January 2012 Housing & Care 21 knew that Mr Sims had qualified for a terminal illness payment from his life insurance policy with Legal & General;

- Housing & Care 21 commenced processing Mr Sims' request to take ill health retirement on 3 February 2012;
- by this time Mr Sims was under heavy medication and finding it difficult to make financial decisions but despite his obvious confusion over whether or not to retire he was not offered professional assistance;
- Housing & Care 21 failed to follow the advice given by Santia on 14 February that an appointment should proceed regardless of Mr Sims saying he did not want to pursue it;
- the process was reactivated with Santia on 22 March, but it was not until 4 April that Housing & Care 21 chased the matter and 11 April before Santia requested the completion of forms;
- Housing & Care 21 had ample time to obtain IRMP certification if they had acted properly (and in particular if they had followed the advice given by Santia in 14 February);
- the cases of Tew and McNidder are irrelevant - the first because Mr Sims submitted his application for ill health retirement before he died and the second because Housing & Care 21 were fully aware of Mr Sims' state of health.

9. The Pensions Officer for City of Westminster rejected the appeal:

- In September 2011 Mr Sims asked LPFA what his retirement benefits would be;
- LPFA issued a normal retirement quotation to Mr Sims which he sent to Merlin Financial Consultants Ltd;
- the quotation was not issued to Housing & Care 21;
- only ill health retirement estimates are sent to employers as benefits vary according to the tier of ill health and the decision to award ill health rests with the employer;

- from the available evidence it is not reasonable to assume that Housing & Care 21 were aware that Mr Sims was a potential ill health retirement prior to 18 January 2012;
- payments made by other providers including Life Insurance were irrelevant to the considerations of this case;
- it appears there was confusion between Housing & Care 21 and Mr Sims on exactly what he wanted to do (that is whether he wanted ill health retirement or death in service) between 3 February and 21 March 2012;
- on 3 and 26 February he had conversations with Housing & Care 21 where he appears to have indicated that he wanted to die in service, but between both dates he appears to have notified Santia that he wanted to retire;
- it was not until 21 March that Mr Sims for the final time stated to Housing & Care 21 that he wanted to take ill health retirement;
- while Housing & Care 21 appear to have misunderstood Santia's requirements and Santia delayed responding to Housing & Care 21's reactivation request and subsequent chaser of 11 April 2012 it was very unlikely that Mr Sims could have been ill health retired before he died on 16 April;
- this was because even if Housing & Care 21 had been aware on 21 March that Mr Sims needed to complete consent forms obtaining evidence from his doctors could take several weeks and even if certification had been provided Mr Sims may not have been able to participate in signing the relevant retirement forms before his death;
- Housing & Care 21's handling of the case did cause delays and they should have sought further advice from Westminster City Council or the pension administrators during the process;
- However, Housing & Care 21 were trying to do their best for Mr Sims, they had referenced his case as urgent and they had tried to comply with

Mr Sims' wishes and ill health retirement is not always the best solution either financially or mentally;

- there was no evidence that Housing & Care 21 were aware of the financial implications to Mr Sims as the result of his decision not to proceed with ill health retirement prior to March 2012;
- had Mr Sims maintained his January 2012 ill health retirement request Housing & Care 21 should have had time to process it, but there was insufficient time to retire Mr Sims after he made his final request in March 2012.

10. Mr F next approached the Pensions Advisory Service (**TPAS**). TPAS asked the Pensions Officer at City of Westminster a series of questions:

- Did they agree that the decision to retire Mr Sims on grounds of ill health rested with Housing & Care 21, rather than with Mr Sims?
- If so, did they agree that the IRMP certificate could have been obtained and the overall process completed at some point between 18 January and 15 April 2012 regardless of Mr Sims' change of mind?
- Did they agree that the consent forms could have been with Housing & Care 21 by 1 February 2012?
- If so, did they agree that it was reasonable to suggest, in any event, that the process could have been completed before 15 April 2012?

11. The Pensions Officer replied:

- while she agreed that the decision to ill health retire a Scheme member rested with the employer over the 13 years she had worked for City of Westminster she had not come across a case where a terminally or seriously ill member had been retired against their wishes – although it was possible in the interests of the business;
- consequently she would not have expected Housing & Care 21 to have sought to retire Mr Sims if they had good reason to believe he did not want it;

- while Housing & Care 21 could have handled Mr Sims' case more proactively and he may have benefited from a face to face meeting or a letter setting out all of his options when he first indicated he wanted to die in service at no point did Mr Sims or his financial adviser ask which option would more financially benefit his dependants and that this would be the basis for his decision of whether to die in service or request ill health retirement;
- however, financial considerations are not the only factor people take into account when considering their options in such circumstances;
- even if Housing & Care 21 had asked Mr Sims to complete a consent form and he had returned it before he said he wanted to die in service, his case would then have been suspended and not reactivated until he said in March that he wanted to retire;
- it was unlikely that an OH doctor would continue to seek medical information if they believed the person did not want it or had verbally withdrawn prior written consent.

**Ms Sims Williams position as represented by Mr F:**

12. Mr F says:

- it is a fact that Mr Sims would have qualified for ill health retirement and had successfully made (with the very speedy assistance of his treating Consultant) a terminal illness claim with Legal & General in January 2012 (which Housing & Care 21 were aware of at that time);
- Mr Sims did not have a professional adviser in the months preceding his death and was reliant on the support of Housing & Care 21 in making his ill health retirement decision;
- Housing & Care 21 failed to provide written guidance or support to Mr Sims who was on heavy medication and confused;



- Housing & Care 21 clearly did not understand the retirement process or the potential financial implications of the decisions faced by Mr Sims;
- Housing & Care 21 ignored Santia's advice of 14 February 2012 that a meeting should take place in light of Mr Sims obvious confusion;
- Mr Sims' indecision and delay was predominantly caused from this lack of support and the general confusion of when his sick pay would be reduced, which Housing & Care 21 failed to confirm until March 2012;
- had Housing & Care 21 laid out Mr Sims' sick pay arrangements in writing at the time he stopped work and had they advised his options regarding ill health retirement he would have made a claim in good time;
- the decision of the Pensions Officer (for City of Westminster) at IDR stage 2 did not take sufficient account of the negligence of the Employer.

### **City of Westminster's position**

13. City of Westminster say:

- Housing & Care 21 were aware of the serious nature of Mr Sims' condition in January 2012 and that ill health retirement was an option;
- when an individual is terminally ill the employer should let the individual contribute to the decision and wherever possible follow what the individual wants;
- Housing & Care 21 followed Mr Sims' personnel wishes regarding medical retirement or death in service;
- if Mr Sims' 18 January request for ill health retirement had progressed unhindered he should have been medically retired before his death and consequently any delay in processing his case could be attributed to Housing & Care 21's lack of understanding of their own Occupational Health processes. However, Mr Sims changed his mind more than once (on 3 February he notified Housing & Care 21 that he wanted to die in service, on 14 February he notified Santia that he wanted to retire and on

23 February he again told Housing & Care 21 that he wanted to die in service).

- When Mr Sims notified Housing & Care 21 that he wanted to die in service they could not have instructed their Occupational Health adviser to proceed with the ill health application.
- Ill health retirements can take several months to complete and there was insufficient time from 21 March to process Mr Sims reactivated application before he died.
- There is no indication in any of the emails that Mr Sims was stating that he wanted help with setting out his retirement options.
- It is not clear why Mr Sims changed his mind for the final time on 21 March given that he appears not to have been taking financial advice.
- While Mr Sims may have benefitted if Housing & Care 21 had obtained estimates in late January / early February of both his options it cannot be concluded that he would have wanted to, or would have been able to (given the rate at which his health deteriorated) engage in a discussion of the figures for ill health retirement or death in service.

### **Housing & Care 21's position**

14. Housing & Care 21 say:

- they disagree with City of Westminster's view that if Mr Sims' ill health retirement had progressed unhindered from 18 January then he could have been medically retired prior to his death. Their experience was that it can take longer. Another employee's application was referred to their occupational health advisers with Mr Sims', but an ill health certificate was not provided for that employee until 22 August 2012 and the individual was medically retired shortly after.
- In any event Mr Sims' application was not processed unhindered because he changed his mind on more than one occasion, which meant there was

insufficient time to process his reactivated application after he finally decided (in March 2012) he wanted to take ill health retirement, as medical evidence and necessary consent forms had not been completed.

- They acted in accordance with the Scheme's regulations and do not consider Mr F's drawing of comparison with Mr Sims' application under a different scheme helps in considering the merits of the complaint, which is based on unique facts.
- In the absence of medical evidence it is difficult to comment on Mr F's assertion that Mr Sims was confused due to his medication. The documents relaying Mr Sims' wish to explore death in service on 3 and 23 February 2012 are clear and do not suggest any confusion on his part.
- Mr F has misunderstood what was being referred to in Santia's recommendation of 14 February 2012 for a 1 to 1 meeting with Mr Sims. There was a telephone consultation with Mr Sims after he had said he wanted to remain employed with Housing & Care 21 to establish whether there was any support Housing & Care 21 could give him during his absence, which is Housing & Care 21's normal approach with employees absent from work due to ill health.
- At no time were they advised that Mr Sims was confused due to his medication and there is no medical evidence to support this.
- They acted at all times in good faith and in accordance with the wishes of Mr Sims.
- They are not authorised to give financial advice.
- They were not able to progress Mr Sims' application without his agreement. He needed to complete and sign a medical consent form and agree to a third party report from his consultant and to attend an examination if required and the processing of sensitive data required his consent. When he said he wanted to die in service he effectively withdrew his agreement to the processing of his application.
- They asked Santia to reactivate Mr Sims' application on 22 March 2012 and sent a chaser on 4 April. On 11 April Santia advised that Mr Sims needed to sign the consent sections of form IHR1. This further reinforces

the fact that the application could not have been progressed without his consent and that it was unlikely to be progressed as quickly as Mr F suggests.

## **Conclusions**

15. This is a very unfortunate matter. Mr Sims appears to have carefully considered matters and I do not doubt that his intention at all times was to take the best option for his immediate family (his surviving wife and children).
16. Mr F says Housing & Care 21 were aware that Mr Sims had successfully made a terminal illness claim with Legal & General, that the requirements for which were no less onerous than those for ill health retirement under the Scheme, and that the medical disclosure from the Consultant could have been made available by Legal & General.
17. Putting to one side whether Housing & Care 21 were aware, the fact that Mr Sims qualified for a terminal illness payment with Legal & General is not material, as the plan had no connection with the Scheme and Housing & Care 21 could not make a decision on his application until IRMP certification had been obtained (as required under the Scheme's Regulations).
18. It is not disputed that Mr Sims would have been awarded Tier 1 if his claim for ill health retirement had been processed before he died. From his handwritten note to Mr F of 14 October 2011, Mr Sims was clearly aware of what the Tier 1 benefits were likely to be after receiving the pension estimate from LPFA. He was particularly interested in taking an increased lump sum.
19. It is also not disputed that Mr Sims changed his mind about his ill health application in February 2012. Mr F says Mr Sims was confused at that time because of the medication he was on, but he did separately notify Housing & Care 21 (on 3 February), Santia (on 10 February) and again Housing & Care 21 (on 23 February – Housing & Care 21's internal email of 26 February refers to a conversation with Mr Sims the previous Thursday) that he wished to pursue death in service. Once Mr Sims changed his mind it was not unreasonable for the ill health referral with Santia to stop.

20. It was not for Housing & Care 21 to advise Mr Sims on his best interests and it is unfortunate that Mr Sims did not seek Mr F's advice at that time on his options.
21. In his subsequent email to Mr F of 16 March 2012 Mr Sims was of the opinion, albeit mistaken, that dying in service would provide his wife with a larger lump sum than if he died following ill health retirement.
22. The retirement form submitted to Santia in January 2012 was incomplete. But even if it had been fully completed (including Mr Sims' consent for Santia to approach his treating doctors), by the time Mr Sims finally decided that he wanted to take ill health retirement (on 21 March, after receiving the advice to do so from Mr F the day before) it is unlikely that the matter could have been processed before his death.
23. I do not think that Housing & Care 21 delayed matters following Mr Sims final notification (in March 2012) that he wanted to proceed with ill health retirement.
24. I consider that City of Westminster gave proper consideration to Mr F's appeal at IDR stage 2 and that the decision not to uphold it was not perverse.
25. I therefore do not uphold Ms Sims Williams' complaint.

**Jane Irvine**

Deputy Pensions Ombudsman

26 January 2015