

Ombudsman's Determination

Applicant	Mr Terence Craven
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	Liverpool City Council (the Council) Merseyside Pension Fund (MPF)

Complaint Summary

Mr Craven's complaint is that he has not been awarded an ill health pension from the date his employment ended on 31 January 2005.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld as both the Council and MPF reached their respective decisions in a proper manner after due consideration of the medical opinion provided.

Detailed Determination

The Local Government Pension Scheme Regulations 1997 (as amended).

I. As relevant:

Regulation 27 'Ill-health' says:

"(1) Where a member leaves a local government employment by reason of being permanently incapable of discharging efficiently the duties of that employment or any other comparable employment with his employing authority because of ill-health or infirmity of mind or body, he is entitled to an ill-health pension and grant.

(2) The pension and grant are payable immediately.

...

(5) In paragraph (1)-

"comparable employment" means employment in which, when compared with the member's employment-

(a) the contractual provisions as to capacity either are the same or differ only to an extent that is reasonable given the nature of the member's ill-health or infirmity of mind or body; and

(b) the contractual provisions as to place, remuneration, hours of work, holiday entitlement, sickness or injury entitlement and other material terms do not differ substantially from those of the member's employment; and

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

Regulation 97 'First instance decisions' says:

"...

(9) Before making a decision as to whether a member may be entitled under regulation 27... on the ground of ill-health or infirmity of mind or body, the Scheme employer must obtain a certificate from an independent registered medical practitioner who is qualified in occupational health medicine as to whether in his opinion the member is permanently incapable of discharging efficiently the duties of the relevant local government employment because of ill-health or infirmity of mind or body.

(9A) The independent registered medical practitioner must be in a position to certify, and must include in his certification a statement, that-

- (a) he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested; and
 - (b) he is not acting, and has not at any time acted, as the representative of the member, the Scheme employer or any other party in relation to the same case.
- (a) "permanently incapable" has the meaning given by regulation 27(5), and
 - (b) "qualified in occupational health medicine" means holding a diploma in occupational medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA State (which has the meaning given by the European Specialist Medical Qualifications Order 1995) or being an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State."

Regulation 101 'Notice of decisions under regulation 100' says:

"(1) A decision on the matters raised by an application under regulation 100 must be issued by the person deciding the disagreement –

...

- (3) A notice under paragraph (1) must include-
- (a) a statement of the decision;
 - (b) a reference to any legislation or provisions of the Scheme relied upon;
 - (c) in a case where the disagreement relates to the exercise of a discretion, a reference to the provisions of the Scheme conferring the discretion;
 - (d) a reference to the rights of the applicant to refer the disagreement for reconsideration by the appropriate administering authority under regulation 102, specifying the time within which they may do so; and
 - (e) a statement that OPAS (the Pensions Advisory Service) is available to assist members and beneficiaries of the Scheme in connection with any difficulty with the Scheme which remains unresolved and the address at which OPAS may be contacted."

Regulation 103 'Notice of decisions under regulation 102' says:

"(1) The appropriate administering authority must issue their decision on the matters raised by an application under regulation 102 to the parties to the disagreement...

...

- (3) A notice under paragraph (1) must include-
- (a) a statement of the decision;
 - (b) in a case where there has been a decision made under section 100, an explanation as to whether and, if so, to what extent that decision is confirmed or replaced;
 - (c) a reference to any legislation or provisions of the Scheme relied upon;
 - (d) in a case where the disagreement relates to the exercise of a discretion, a reference to the provisions of the Scheme conferring the discretion;
 - (e) a statement that OPAS (the Pensions Advisory Service) is available to assist members and beneficiaries of the Scheme in connection with any difficulty with the Scheme which remains unresolved and of the address at which it may be contacted; and
 - (f) a statement that the Pensions Ombudsman may investigate and determine any complaint or dispute of fact or law in relation to the Scheme made or referred in accordance with the Pension Schemes Act 1993 and of the address at which he may be contacted."

Material Facts

1. Mr Craven has complained previously about the same matter. In January 2008 the Ombudsman determined (number S00103) the information provided to the Council's medical advisers (specifically independent registered medical practitioners, **IRMPs**, Dr Wilson and Dr Green) about Mr Craven's duties was inadequate and directed the Council to issue a fresh decision after "having obtained a copy of Mr Craven's job description and referred to its medical advisers".
2. The Council's Specified Person duly referred back to Dr Wilson (who in June 2005, at IDR stage 1, gave his opinion that Mr Craven did not satisfy the criteria for ill health retirement from the date his employment ended). Dr Wilson was provided with two Job Descriptions - the first submitted by Mr Craven (as a copy of his actual job description) for a Welfare Rights Manager, the second provided by the Council for a Manager Benefits Maximisation Service (the current equivalent post, as the Council did not have a copy of Mr Craven's original job description) - and asked to reconsider his original opinion.
3. Dr Wilson's opinion remained unchanged. In addition to the medical evidence that he had previously seen he considered the Consultant Psychiatrist Dr Johnson's medical report of 25 February 2007. In his report Dr Wilson, among other things, said:

“The Psychiatrist notes that he had access to copies of the entire NHS GP record for Mr Craven. The Psychiatrist documents that Mr Craven accepts that he has made “substantial progress” in the last two years, would like to return to employment as an employment advocate, wishes to do a postgraduate degree, but does not wish to enter employment which has “anything to do with the Council”.

...

The objective medical evidence from the medical reports provided, including the new Psychiatric report and the consultations, suggested that Mr Craven was suffering from mild to moderate anxiety and depression for which the primary trigger was a dispute regarding his working environment. The facts that his medical condition had persisted for two years, had not resolved after a course of one antidepressant medication and once course of cognitive behavioural therapy suggested that his medical condition was likely to be prolonged.

However, the fact that 11 years remained until normal retirement age, that a second pharmacological treatment had not been tried, and that Mr Craven has not been assessed or treated by a specialist Psychiatrist made it difficult to conclude that there would be no remission in Mr Craven’s medical condition before normal retirement age.

The substantial progress between 2005 and 2007 documented in the Psychiatric report suggests that remission with adequate treatment is likely. The new job description provided by Mr Craven does not alter the medical facts of the case in any respect. Nor does the new job description suggest that there was any feature of the post which was intrinsically hazardous or would be likely to cause or worsen anxiety or depression. There are no features of Mr Craven’s medical condition which would suggest that he will retain his aversion to working with Liverpool City Council permanently, or that such aversion is rational.

...

Based on the totality of the medical evidence, and also considering the new job description and the Psychiatric report provided, on the balance of probabilities, I am unable to confirm that Mr Craven was permanently incapable of discharging efficiently the duties of his employment by reason of ill health, because permanence of his impairment had not been demonstrated on 27/06/05.”

4. The Council’s Specified Person duly upheld his original July 2005 decision not to grant Mr Craven ill health retirement under regulation 27.

5. At IDR stage 2 Mr Craven submitted an August 2008 report from Dr Orton (who prior to the termination of Mr Craven's employment gave his opinion to the Council that he did not meet the criteria for ill health retirement) – Mr Craven had been referred to Dr Orton by an Independent Human Resources Consultant. In his report Dr Orton concluded:

“In my opinion, it is more likely than not, that this man is permanently incapacitated from returning to work with Liverpool City Council between now and the age of sixty five. I believe he is capable of work with other employment.”
6. Mr Craven's appeal was turned down by the Appointed Person for MPF.
7. In 2009 Mr Craven appealed in the Employment Tribunal that the Council and MPF had discriminated against him on grounds of disability in rejecting his claim. Mr Craven withdrew his claim due to poor health in February 2010.
8. After engaging various parties including the Pensions Advisory Service, Mr Craven complained to our service, but later withdrew his complaint at the suggestion of our service as the Specified Person for the Council had agreed to a further review / reconsideration of his claim in light of a new report (that Mr Craven had obtained post submission of his second complaint to our service) from Dr Green (an independent registered medical practitioner - **IRMP**) supporting his case. Dr Green had previously given his opinion to MPF (in June 2006) that Mr Craven did not satisfy the criteria for ill health retirement, but in his March 2010 letter ('To Whom it May Concern') supported Mr Craven's claim on the basis that if he had had Dr Johnson's (Consultant Psychiatrist) 2007 report at the time he initially assessed Mr Craven's appeal he would have concluded that Mr Craven met the criteria for ill health retirement.
9. In June 2010 Mr Craven commissioned a report from Professor Green (MB, ChB, FRCPsych, FHEA):

“I have been instructed by Mr Craven to provide him with a psychiatric report in relation to his pension entitlement and, specifically, to comment on whether he is capable of returning to work with Liverpool City Council until the age of 65.”
10. In the Opinion section of his report, among other things, Professor Green said:

“I do not believe that he is currently capable of full-time, or even part-time work with remuneration. I do not feel that he could function occupationally in any capacity, let alone in the employment of Liverpool City Council, employers from whom he has been alienated for some years. I would agree with Dr Johnson that Mr Craven should be viewed as somebody who is unable to continue working with Liverpool City Council.

In view of his poor physical health, and his mental health record, I do not believe that Mr Craven will be able to function occupationally again before the retirement age of 65.

... His battles with Liverpool City Council for his pension rights appear to be a maintaining factor for mental ill health. Both in terms of future treatment there is a role for long-term antidepressants, the addition of mood stabilising drugs such as Lamotrigine, further psychotherapy, possibly on an interpersonal therapy model.

In terms of prognosis, as indicated above, I do not envisage that Mr Craven will be able to return to occupational functioning before the age of 65. He should be viewed as psychiatrically disabled on a permanent basis and the point of further treatment is to improve his quality of life. I do not envisage that he will be able to return to work."

11. In November 2010 the Specified Person for the Council requested the opinion of Dr Trafford (IRMP). Among other things Dr Trafford said:

"I note that this referral was specifically to ask me to consider whether Mr Craven met the criteria for ill-health retirement under the terms of the local government pension scheme regulation 27 (1997) as in force on 31st January 2005 when his employment ceased...

In considering this question that has been put to me I have considered the following medical evidence:

Occupational Health reports from Dr Lister between the 4th July 2003 and April 2004 and copies of Dr Lister's clinical notes taken at these consultations related to these reports.

1. A report from Dr Orton dated 7th October 2004 and August 2008
2. A report from Dr Wilson dated June 2005
3. A report from Dr Johnson, Consultant Psychiatrist February 2007
4. Reports from Dr Green, Consultant Occupational Physician from June 2006 and March 2010.
5. Letters from Drs Redman and McGuinness from May 2005. Some previous brief reports from the General Practitioner's surgery from 2003
6. A report from Professor Green, Consultant Psychiatrist from June 2010
7. Details of the relevant regulation 27...
8. Reports from Gemma Hague, trainee psychologist from February and March 2005 (supplied by Mr Craven after the consultation).

...I have to consider the information that was or could have been discoverable at the time [at 31 January 2005]. I would class the two psychology reports in that category. The later reports [from] Professor Green and Dr Orton I cannot really consider as valid for a decision in 2005.

The Occupational Physicians who saw him and assessed his position clearly did not feel this was the case. I cannot be certain whether they had sight of the Psychologist reports, and for this reason I specifically asked Mr Craven to find these for me. However, they suggest that with therapy he had made great improvements. The reports highlight that he could have further difficulties related to the ongoing dispute with his employer. However, they do not suggest that Mr Craven at that time was severely ill, or should not have been able to recover and undertake his former role at some time. The General Practitioners from 2003 were stating that Mr Craven could not return to his role or similar, though give no reason or evidence for that opinion. He had not commenced psychological therapy until late 2004, and it seems that was being beneficial. I believe this suggests that if willing to meet with management and with some mediation and compromise to reach some conclusion to his concerns, that Mr Craven might well have been able to continue in the post. However, Mr Craven has continued to focus on his belief that he was ill treated (I cannot comment on the veracity of this view), and also that he should have been granted ill health retirement.

In my opinion, having considered all the considerable information, I do not consider the medical evidence would have supported ill health retirement on the relevant date, [in spite] of the opinion of the GPs. Professor Green's report from 2010 and Mr Craven's presentation to me may suggest that permanent incapacity may now be demonstrated, but I do not think this was the case in 2005."

12. Whilst the Council acting on behalf of the Specified Person requested certification with the report it does not appear to have been completed by Dr Trafford.
13. Dr Orton's report of 28 August 2008 was commissioned by Mr Craven. In it he said:

"In my opinion, it is more likely than not, that this man is permanently incapacitated from returning to work with Liverpool City Council between now and the age of sixty five."
14. In December 2010 the Council's Specified Person turned down Mr Craven's application:

"In summary the situation remains to date that no IRMPs' opinion have ever indicated permanency as required under the relevant LGPS regulations on Ill Health."

15. In March 2011 Mr Craven obtained further comment from Professor Green:

“...I have reviewed the report that I provided for you in 2010.

I believe that there was sufficient evidence of a lengthy past psychiatric history in 2005 and a prolonged absence from work of some years to make [the] conclusion that you were permanently incapable of carrying out duties until the age of 65, more probable than not. Given the history you described and the numerous entries in the GP notes to corroborate this, I think the chances of any rehabilitation into a working environment would be truly minimal.”

16. Mr Craven unsuccessfully appealed to MPF. The Nominated Person, concluded (in September 2011):

“...I cannot find any new evidence other than another opinion by a doctor qualified in occupational health that you did not meet the criteria and therefore can only repeat the findings of the previous nominated person in that you have clearly exhausted the appeals procedure.”

Summary of Mr Craven's position

17. Mr Craven, among other things, says:

- in their reconsideration (following the Ombudsman's 2008 Determination) the Council referred back to Dr Wilson who had previously been involved in his case which is contrary to the Scheme's Regulations;
- the job description considered by Dr Wilson was a draft one he was negotiating with the Council when his employment ended (it was a basic job description and did not contain vital information “e.g. Eviction warrants needed authorisation from me to be actioned”);
- the Council did not refer back to Dr Green and consequently failed to abide by the direction in Determination S00103 to refer back “to its medical advisers”;
- Dr Wilson did not explain why he rejected his application after considering his job description;
- neither Dr Wilson nor Dr Trafford had sight of his GP medical records, their opinions were based on sparse medical evidence after briefly seeing him and both failed to conduct any mental health tests on him;
- the Council's failure to seek an expert opinion from a psychiatrist or psychologist was unreasonable and maladministration;
- his mental health issues are complex and would not be understood in any depth by a physician;

- the Council's and MPF's over reliance on IRMP opinion has been at the expense of the relevant and expert evidence that he has submitted;
- the Council and MPF have sifted evidence and been selective in their approach to his claim – they did not pass on his GP's medical records to Dr Wilson and Dr Trafford, they accepted Dr Green's 2006 report but attached no weight to his March 2010 report, they disregarded Dr Orton's 2008 report and submitted Professor Green's 2010 report (whilst arguing that it should not be considered) but not his 2011 addendum to Dr Trafford;
- the medical evidence he has submitted: reports from: 3 GPs (2003-2006), Dr Johnson (2007), Dr Green (March 2010) and Professor Green (June 2010 and March 2011) proves on the balance of probabilities that he is entitled to an ill health pension;
- it was not fair or just for Dr Trafford to dismiss Professor Green's June 2010 report and ignore Dr Green's March 2010 report;
- Dr Trafford does not have a qualification in psychology or psychiatry;
- Professor Green's report and subsequent addendum of March 2011 ought to be accepted as a valid opinion for an ill health pension as he is a qualified OH Consultant as well as a Consultant Psychiatrist;
- Professor Green's opinion was on his psychiatric condition in 2005, not just in 2011;
- the Council and MPF have used his mental disability to deny him what is rightfully his and a fair hearing;
- the Council and MPF have contravened Articles 6 (the right to a fair hearing), 8 (the right to respect for private and family life) and 14 (right to non-discrimination) of the European Court of Human Rights Act 1998.

Summary of the Council's position

18. The Council say:

- they have acted properly and with regard to due process in dealing with Mr Craven's application and subsequent appeals;
- the 2010 review was offered as a gesture of goodwill by the Specified Person. As it sat outside normal processes certification from Dr Trafford was not required.

Summary of MPF's position

19. MPF, among other things, say:

- there is no clear evidence that Mr Craven satisfies the criteria for ill health retirement from the date his employment ended;
- account has been taken of all the relevant medical evidence (including all the specialist reports that Mr Craven has provided);
- at no time did an IRMP support Mr Craven's ill health retirement under the Scheme's Regulations;
- if the IRMP had needed clarification on Mr Craven's condition and prognosis it would have been sought prior to the IRMP giving their opinion;
- the Council did all they could to assist Mr Craven by offering him further opportunities for medical referrals;
- it is not their practice to normally directly commission psychiatric or other specialist reports on a member;
- instead they rely on the IRMP to decide what specialist medical evidence they need (if any) to give their opinion;
- Mr Craven was not disadvantaged by this since he was able to submit his own psychiatric reports;
- Professor Green's March 2011 letter was considered (by the Nominated Person) but not passed to Dr Trafford as it simply summarised his June report (which Dr Trafford had seen and commented on) and it was not felt that any doctor who had read the report "would gain anything from the letter other than the advocacy the Professor feels he must give";
- they have acted within the confines of the Scheme's Regulations.

Conclusions

20. My consideration of this matter is restricted to events after 23 January 2008 as the Determination (S00103) reviewed events prior to then and Mr Craven withdrew his 2010 complaint at the suggestion of our service as the Specified Person for the Council had agreed to reconsider Mr Craven's application taking into account Dr Green's 2010 letter.
21. My role is not to decide if Mr Craven is entitled to ill health retirement. That is a matter for the Council to decide in consultation with their medical advisers. It is also not for me to agree or disagree with any medical opinion.

22. My role is to decide whether the Council (and MPF) have correctly applied the Scheme's Regulations, considered all relevant information and reached a decision which is not perverse. By perverse I mean a decision which no other decision maker, properly advising themselves, would come to in the same circumstances.
23. I am satisfied that the correct Scheme Regulations have been applied.

The Council's 2008 decision

24. The matter had been remitted back to the Council on one point only – Mr Craven's job description. I do not find that the Specified Person acted improperly by asking Dr Wilson (and not Dr Green) to reconsider his original opinion as the Determination's direction did not specify that the referral should be made to more than one IRMP or that the IRMP should not be previously involved.
25. For the same reason I do not find that the Council's action breached regulation 97(9A). But even if it had done, Mr Craven's subsequent appeal was considered by Dr Trafford (another IRMP not previously involved), thereby rectifying the matter.
26. Mr Craven says the job description that Dr Wilson considered was inaccurate as it was a draft and a basic description of his job. But this was the job description that Mr Craven had submitted and had (according to Dr Wilson) stated was his original job description. The Council also provided Dr Wilson with a job description, albeit for the current equivalent post. I therefore think it likely that Dr Wilson had sufficient information to form a reasonable understanding of the role, duties and responsibilities.
27. Clearly Dr Wilson did not consider that the job description impinged on his earlier opinion and I am satisfied that he explained why that was.
28. I do not think that Mr Craven is right in saying that Dr Orton's report was ignored. Rather no weight was attached to it because the opinion he gave did not satisfy the criteria for ill health retirement under regulation 27.
29. Dr Orton said that Mr Craven was permanently incapacitated from now to age 65 from going back to work with the Council, but was capable of other work. To qualify for ill health retirement under regulation 27 Mr Craven has to be permanently incapable of discharging efficiently the duties of his employment or comparable employment from the date his employment ended to age 65.

The Council's 2010 decision

30. Mr Craven makes the point that Dr Trafford is not qualified in psychology or psychiatry. But he qualifies to be an IRMP. Since the question is one of capacity to work rather than diagnosis, Dr Trafford's qualification in Occupational Health is appropriate.

31. Mr Craven says that Dr Trafford (and Dr Wilson) did not have sight of his GP records. But Dr Trafford did refer to Dr Johnson's report (as did Dr Wilson) and Professor Green's 2010 report both of whom had and had made reference to in their respective reports.
32. It was for Dr Trafford to decide whether he required further information before giving his opinion – at the consultation he asked Mr Craven for a copy of Ms Hague's psychology reports, which Mr Craven later provided along with GP letters which Dr Trafford then considered.
33. With regard to Dr Trafford's opinion, he clearly understood that he was being asked to look at the situation as it was in 2005 and to give his opinion as if he had been asked then. He refers to Ms Hague's psychology reports. These appear to have said that, with therapy, Mr Craven had improved. Dr Trafford says that they refer to further difficulties with his employer but notes that they had not suggested he was severely ill or that he would not have recovered to the extent that he could return to his former role.
34. These are contemporary reports and, therefore, give a good indication of what was thought about Mr Craven's likelihood of recovery at the time.
35. Mr Craven says that Dr Trafford dismissed Professor Green's June 2010 report. I do not think that is quite right. He clearly considered it, but was of the opinion (as he was with Dr Orton's 2008 report) that Professor Green's opinion was not specific to Mr Craven's condition in 2005, rather it gave a current opinion.
36. I concur with that view as Professor Green says in his report that he has been asked to comment on whether Mr Craven is capable of returning to work with the Council until the age of 65 and he concludes: "I do not envisage that Mr Craven will be able to return to occupational functioning before the age of 65".
37. Mr Craven says that Dr Trafford ignored Dr Green's 2010 report. Again I do not think that is right. Dr Trafford included Dr Green's report in the list of medical evidence he had considered. Whilst he does not again refer to it in his report that does not mean that he did not give it consideration. There is a difference between ignoring evidence and considering evidence but attaching little or no weight to it.
38. I am satisfied that Dr Trafford gave sufficient reason for his opinion and the evidence he had relied on.
39. Certification does not appear to have been obtained from Dr Trafford, albeit it was requested by the Council at the time Dr Trafford was asked for his opinion.
40. IRMP certification is required in respect of first instance decisions by the employing authority (the Council), but not in respect of decisions in the Scheme's appeal process by the Specified Person (for the employing authority) or the Nominated Person for the (administering authority - MPF)

41. It is not clear where in the first instance decision/appeal process this particular decision falls. If it were considered another first instance decision, then a certificate should have been obtained. If, on the other hand, it was still part of an ongoing appeal process, then a certificate was not required. Regardless of this, the law recognises that procedural irregularity does not necessarily invalidate a decision. Equally, my role is to consider whether there has been maladministration leading to injustice – it is insufficient simply to find maladministration if it has not caused injustice. In this case, the lack of a certificate did not, in and of itself, cause injustice to Mr Craven because the Council would have reached the same decision even if they had obtained a certificate because that certificate would simply have reiterated Dr Trafford's opinion as set out in his report.
42. Professor Green's 2011 letter was not seen by Dr Trafford. As it was simply a further expression of Professor Green's opinion, I do not find that it was maladministration by MPF in not seeking further comment from Dr Trafford. The Nominated Person had to make the decision. Whilst there would have been no harm in asking Dr Trafford for further comment, I cannot see that not doing so undermines the Nominated Person's decision. All that would have been gained from further referral is possibly further explanation from Dr Trafford as to why he thought Professor Green's report was not directly relevant – not dating from 2005.
43. At some point the Nominated Person would still have had to weigh up the evidence and come to a decision, which is what they did.
44. A difference of medical opinion is not sufficient for me to say that the subsequent decisions by the Council and MPF were perverse.
45. Mr Craven says the Council and MPF have contravened Articles 6, 8 and 14 of the European Court of Human Rights Act 1998. I do not find that to be the case.
46. Mr Craven's disability has been respected because he could potentially have had an entitlement under the Scheme's Regulations, there is a procedure in place for it, and the Council and MPF have considered his ill-health application carefully. The matter has been reviewed and reconsidered and he has been able to provide and have considered various further reports. The decision taken by the Council and MPF has been purely in respect of whether Mr Craven satisfied the criteria for ill health retirement at the date his employment ended.
47. For these reasons I do not uphold Mr Craven's complaint.

Jane Irvine

Deputy Pensions Ombudsman
23 March 2015