

## Ombudsman's Determination

<b>Applicant</b>	Mr William Gilliland
<b>Scheme</b>	Northern Ireland Local Government Officers' Superannuation Scheme ( <b>the Scheme</b> )
<b>Respondent(s)</b>	Northern Ireland Local Government Officers' Superannuation Committee ( <b>NILGOSC</b> )

### Subject

Mr Gilliland has complained that NILGOSC refused to award him an ill health retirement pension.

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

The complaint should be upheld against NILGOSC because they made their decision following their review of Mr Gilliland's application for an ill health retirement pension based on an incomplete and insufficient report by Dr Turner and subsequent reports by Dr Maguire and Dr Anderson.

## DETAILED DETERMINATION

### Material Facts

1. NILGOSC are the administering body for the Scheme.
2. Mr Gilliland is currently 34 years old and his normal retirement age under the Scheme is 65.
3. Mr Gilliland was diagnosed with fibromyalgia in 2011.
4. Dr McCarthy wrote to Mr Gilliland on 19 October 2011 enclosing a copy of a report from Dr O'Hanlon of 19 October 2011. Dr O'Hanlon said in his report,  
  
“ We've had some success using pregabalin to treat the nerve pain of fibromyalgia...the thing that worries me is the use of Fentanyl, some studies would suggest that there are no...receptors in the central nervous system of the patients with fibromyalgia. So when given these drugs they can cause significant problems with sleep and hormonal imbalances...”
5. Dr McCarthy, wrote to Translink, Mr Gilliland's employer on 3 July 2012 saying,  
  
“ Thank you for referring Mr Gilliland to occupational health for a medical assessment ...Mr Gilliland does have a chronic underlying health complaint which at this stage ...is likely to be permanent in nature...I would therefore advise consideration of ill health retirement ...”
6. NILGOSC considered Mr Gilliland's suitability for an ill health pension in 2012 and appointed Dr Todd an occupational health physician to do an assessment.
7. Dr Todd wrote to NILGOSC on 15 August 2012. He indicated that in his opinion on the balance of probabilities, Mr Gilliland was not permanently incapable of discharging efficiently the duties of his employment with his employer because of ill health. Also that he did not have a reduced likelihood of being capable of undertaking gainful employment whether in local government or elsewhere. He said,  
  
“The ...applicant was examined today as arranged. He has a 4 year history of various symptoms which have been investigated by his GP and other specialists...He has been tried on a number of treatments since then but has

not yet been reviewed by his specialist...I do not consider him, at this time, being as permanently unfit for his work.”

8. Mr Gilliland’s case was considered by NILGOSC at stage 1 of their review process. Dr Turner, a specialist in occupational medicine wrote to NILGOSC on 30 November 2012 regarding the stage 1 review. She indicated that on the balance of probabilities, Mr Gilliland was permanently incapable of discharging efficiently the duties of his employment with his employer because of ill health. She also indicated that he did not have a reduced likelihood of being capable of undertaking gainful employment whether in local government or elsewhere. She reported that,  
“...Mr Gilliland last worked in June 2012 when he went off work with symptoms indicated as fibromyalgia ...As is often the case with this type of illness it can take a number of years to recover once the symptoms have become chronic in nature as in Mr Gilliland’s case but there remains the possibility with the appropriate and ongoing treatment that he could eventually make sufficient recovery to permit a return to gainful employment. Given the nature of his duties with his employer and in particular the safety critical nature of his work on balance I feel he may not be able to return to this type of work in the future however this should not preclude him in the longer term from obtaining gainful employment elsewhere”.
  
9. Mr Gilliland’s case was considered by NILGOSC at stage 2 of their review process. Dr Maguire an occupational health physician and Dr Anderson MB BCH, wrote to NILGOSC on 14 February 2013 following their stage two review of his case. They reported that,  
“ From assessment today his symptoms have continued to increase to the extent that he complains of pain all over ... We feel on the balance of probabilities this member is permanently incapable of discharging efficiently the duties of his employment with his employer because of ill health or infirmity of body or mind. However, he does not have a reduced likelihood of being capable of undertaking gainful employment whether in local government or elsewhere before age 65.”

10. NILGOSC wrote to Mr Gilliland on 11 April 2013 confirming the result of his stage 2 appeal. They said that the Committee considered the evidence of a number of medical practitioners. This included Dr Turner and her report of 30 November 2012. They mentioned,

“After examining all the evidence available, the Committee is unable to support your application. I regret to inform you that your request for ill-health retirement has been declined on the grounds that you do not have a reduced likelihood of being capable of undertaking gainful employment before age 65.”

### **Scheme Provisions**

11. **Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations (Northern Ireland) 2009**

“Early leavers: ill-health

20.—(1) Where a member, who has total membership of at least one year, leaves a local government employment on the grounds that—

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

(b) he has a reduced likelihood of obtaining gainful employment (whether in local government or otherwise) before his normal retirement age, the Committee may, at the request of the employing authority, determine that his retirement pension comes into payment before his normal retirement age.

(4) Where the Committee, at the request of the employing authority, is considering whether a person who has ceased to hold a local government employment is entitled to benefit under this regulation, it shall refer for decision to an independent registered medical practitioner qualified in occupational health medicine, appointed by the Committee, as to whether in his opinion, expressed as a certificate, 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...”

### **Summary of Mr Gilliland's position**

12. Translink terminated his employment in December 2012 on the ground of ill health based on advice given to them by NILGOSC.

13. There is no cure for fibromyalgia and he has exhausted all treatment options available to sufferers.
14. Other NILGOSC members with similar medical conditions have been deemed medically unfit to carry out any gainful employment.
15. Dr McCarthy in her report of July 2012 says that his condition was permanent and that he should be considered for an ill health pension.
16. Dr O'Hanlon said that his symptoms were not improving even though all treatment options were exhausted.
17. Dr Todd's report contains inaccuracies because he says that his illness would not affect his working life and that he was too young to be considered for early retirement. However, as his employment was terminated because of ill health this therefore shows that he does have an illness that affected his employment.
18. The independent registered medical practitioners have incorrectly used probability when coming to their conclusions.
19. He questions the medical qualifications of NILGOSC.
20. He has not received a proper explanation from NILGOSC as to why they refused his application for an ill health pension. They have not explained why he has a reduced likelihood of being capable of undertaking gainful employment.

### **Summary of NILGOSC's position**

21. NILGOSC did not provide any advice to Translink as to whether Mr Gilliland's employment should be terminated on the grounds of ill-health. This was for Translink to decide.
22. Mr Gilliland was considered by NILGOSC to have met the first eligibility criterion under the Scheme rules, in that he was deemed to be permanently incapable of carrying out his current duties. However, based on the medical evidence that was available they considered that he did not meet the second eligibility criterion, as he was not deemed to have a reduced likelihood of being capable of obtaining gainful employment before age 65.

23. While Mr Gilliland did not agree with Dr Todd's conclusions, it does not follow that Dr Todd's opinion was inaccurate.
24. Dr Turner's report of 30 November 2012 and the reports of Dr Maguire and Dr Anderson were produced in line with the Scheme rules. The Scheme rules do not require them to obtain additional medical evidence or to specify untried treatments.

## **Conclusions**

25. There is no evidence that shows that NILGOSC gave Translink inappropriate advice about Mr Gilliland's ill health that led Translink to terminating his employment.
26. Mr Gilliland contends that Dr McCarthy said in her report of July 2012 that his condition was permanent and that he should be considered for an ill health pension. He also submits that Dr O'Hanlon said that his symptoms were not improving even though all treatment options were exhausted. However, for NILGOSC to favour the opinions of some experts against others who reported that his illness did not preclude him in the longer term from obtaining gainful employment, is not in itself, evidence of any perversity in the decision. It simply represents the weighing of one set of evidence against another.
27. Mr Gilliland asserts that Dr Todd's report of 15 August 2012 contained inaccuracies because he says that his illness would not affect his working life. However, in my view there is nothing contained in Dr Todd's report that suggests that it should be treated as invalid. Further, just because Mr Gilliland's employment was terminated by Translink on the grounds of ill health, it does not automatically follow that he was entitled to an ill health pension under the Scheme rules. There would have been different factors involved in Translink's decision to terminate his employment.
28. Mr Gilliland questions the medical qualifications of NILGOSC. However, although NILGOSC themselves may not have been medically qualified, under the regulations they were entitled to make their decisions regarding applications for ill health pensions by obtaining medical advice from appropriate medical practitioners. I do not consider that there is evidence that the medical practitioners used by NILGOSC in assessing his case were not suitable.

29. Mr Gilliland claims that he has not received a proper explanation from NILGOSC as to why they refused his application for an ill health pension. He says that they have not explained why he has a reduced likelihood of being capable of undertaking gainful employment. However, I note that they gave their decision with reasons in their letter to him of 11 April 2013.
30. NILGOSC say that based on the medical evidence that was available to them that they did not consider that Mr Gilliland met the second eligibility criterion under the Scheme rules , as he was not deemed to have a reduced likelihood of being capable of obtaining gainful employment before age 65. They say that Dr Turner, Dr Maguire and Dr Anderson had all concluded this as part of their assessment.
31. There are certain well-established principles which NILGOSC are expected to follow in the decision making process and it is against these that the decision making process must be assessed. Briefly, they:
- must take into account all relevant matters and no irrelevant ones;
  - must direct themselves correctly in law;
  - must ask themselves the correct questions;
  - must not arrive at a perverse decision.
32. One of the fundamental issues in deciding whether or not NILGOSC had properly considered Mr Gilliland's claim for an ill health pension is the matter of untried treatments.
33. There are no specific references to the consideration of untried treatments in relation to ill health within the Scheme rules. However, treatment (tried and untried) is an important factor in determining whether or not it is likely that anyone requesting an ill health pension will (or will not) be deemed to have a reduced likelihood of being capable of obtaining gainful employment before age 65.
34. Dr Turner says in her report of 30 November 2012 that there remains the possibility that with appropriate and ongoing treatment that Mr Gilliland could eventually make sufficient recovery to return to gainful employment. However, she has not properly explained the basis she has made this statement. Of course, it would be perfectly

legitimate for Dr Turner to reach this view, if there were evidence to support that view. But she gives no explanation or any evidence.

35. Dr Turner needed to be specific about what the medication or therapy was; whether it was reasonable to expect Mr Gilliland to undergo the treatment; what effect it would have on his condition; and be able to conclude that the specific treatment meant he would recover sufficiently to return to gainful employment.
36. Dr Turner and evidently Dr Maguire and Dr Anderson have therefore not considered all relevant matters in their review of Mr Gilliland's claim under the Scheme rules. It is therefore my view that NILGOSC could not reasonably rely on Dr Turner's report and the subsequent reports from Dr Maguire and Dr Anderson. It may be that, with further investigation he turns out not to be entitled to an ill health pension but they have not completed that process as yet.
37. NILGOSC has to be satisfied that Mr Gilliland was not deemed to have a reduced likelihood of being capable of obtaining gainful employment before age 65. For the reasons I have stated above, I do not think Dr Turner had sufficient medical evidence on which to make a proper decision and should therefore have sought additional information.
38. I think that it was maladministration on the part of NILGOSC to have made their decision based on an incomplete and insufficient report by Dr Turner. I therefore think that a fresh review of Mr Gilliland's application should be undertaken by Dr Turner.
39. The failure to reach a decision in the proper manner would have caused Mr Gilliland additional stress and I find that it is appropriate that this should be recognised. I have made directions for the payment of a modest sum in recompense.
40. Mr Gilliland has provided this office with fresh evidence in connection with his claim for an ill health pension. However, NILGOSC have not seen this new evidence and I will only consider evidence that was available at the time the decision on his suitability for an ill health pension was made. Mr Gilliland may want to submit any fresh evidence to NILCOSC for them to consider as part of their review.



## **Directions**

41. I direct that within 28 days of this determination NILGOSC shall ask Dr Turner to obtain additional medical evidence to enable her to properly to explain whether or not in her view that with appropriate and ongoing treatment that Mr Gilliland could eventually make sufficient recovery to return to gainful employment and set out the basis of her decision. Dr Turner should establish and specify:
  - what treatments are considered appropriate and the likely effects of those treatments on Mr Gilliland's medical condition, what other medication or therapy are available; whether it was reasonable to have expected Mr Gilliland to undergo the treatment; what effect it would have had on his condition; and whether the specific treatment meant he would be deemed to have a reduced likelihood of being capable of obtaining gainful employment before age 65.
42. On receipt of this further opinion from Dr Turner, NILGOSC shall review Mr Gilliland's ill health application and consider whether or not his medical condition was such that he met the criteria for an ill health pension under the Scheme rules.
43. In addition, I direct that within 14 days of this determination NILGOSC shall pay Mr Gilliland £250 for the distress and inconvenience caused to him by their maladministration as identified above.

**Jane Irvine**  
Deputy Pensions Ombudsman

26 January 2015