

Ombudsman's Determination

Applicant	Mrs Jillian Wren
Scheme	Local Government Pension Scheme (the Scheme)
Respondent(s)	Tameside Metropolitan Borough (the Council)

Complaint Summary

Mrs Wren's complaint is that she has been refused ill health retirement from the date her employment ended.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against the Council because they failed to make a proper decision and their administration of the process fell short in several respects.

Material Facts

1. Relevant extracts from the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (**the 2007 Regulations**) and the Local Government Pension Scheme (Administration) Regulations 2008 (**the 2008 Regulations**) are set out in the Appendix.
2. Mrs Wren is a member of the Greater Merseyside Pension Fund (**the Fund**) which is part of the Scheme.
3. The Council has two capacities: the first as an employing authority, the second as administering authority for the Fund.
4. Mrs Wren was a Home Care (Support) Worker for the Council. In October 2010 she suffered a heart attack.
5. Whilst she was on extended sick leave the Council's Occupational Health team (**OH**) advised the Council:

"As her role requires a high level of physical ability in my opinion she is unfit to return to this type of role and consideration should be given to redeployment to a non physical or stressful role [if] available or to possible ill health retirement."
6. Mrs Wren subsequently requested ill health retirement and OH asked for a report from her treating Consultant Cardiologist, Dr Puri. In his 29 September 2011 report Dr Puri said:

"[Mrs Wren] was an inpatient following a N-STEMI...

She's had several admissions with angina symptoms since that time...

The current plan of action is to see if there [are] any arrhythmia's causing her symptoms.

Currently she is quite symptomatic and any heavy work causes her to have symptoms. I therefore think currently she is unfit to return to work.

There is no doubt at the moment that any kind of lifting or heavy work would reproduce her symptoms. In your letter, you ask "is ill health work related"? This is impossible to say 100%. It has already been the best part of 12 months since [Mrs Wren] originally presented and she has ongoing symptoms despite many changes in her treatment to date. My own opinion is that it is unlikely that [Mrs Wren] will become symptom-free in the near future and therefore retirement on ill health grounds should be considered."
7. On 21 December 2011 the Council notified Mrs Wren by telephone that her request for ill health retirement had been refused – the Council's decision appears to have been on the grounds of verbal feedback received from Dr Fox (an independent

registered medical practitioner - **IRMP**). No report or certificate was obtained from Dr Fox.

8. Mrs Wren enquired about the appeal process. The Council referred back to Dr Fox for a report and certification.
9. On 10 January 2012 Mrs Wren was scheduled to see Dr Puri. The day before the Council informed Mrs Wren that:
 - it would be extremely helpful if Dr Puri could send a report to Dr Fox providing clarification and any further relevant information with regards to her medical opinion of whether she [Mrs Wren] was fit for any type of work and an estimation of any timescales that she felt able to comment on – providing clarity on what she had meant (in her previous report) by the “near future”, together with any further information she felt may be relevant;
 - an appointment would be arranged for Mrs Wren to see Dr Fox.
10. In his subsequent report to Dr Fox (typed on 2 February 2012) Dr Puri, among other things, said:

“With regards to her prognosis, this is still rather complex but given her current functional status and recent history, I think there is no likelihood of her being able to do her original work in the next 12-18 months.

In terms of redeployment to a more sedentary job, although the physical aspect is of the most concern with her symptoms, she also has significant symptoms with stress related situations ...and this should be taken into consideration in any further evaluations”.
11. Dr Fox certified that Mrs Wren did not satisfy the criteria for ill health retirement. In his report he said:

“Regarding prognosis, the specialist indicates that there is no likelihood of her being able to return to her original work in the next 12-18 months but redeployment to a more sedentary job may be more feasible but stress – related symptoms of chest pain would need to be taken into consideration. I think also there could be some improvements in this with some stress management so that she experiences less stress or experiences fewer situations to be stressful.

The specialist is clearly indicating is [sic] that she is currently incapacitated from her normal work but not necessarily in the long term. She has 10 years to her normal retirement age and the specialist is clearly not indicating that she is permanently incapacitated for that duration on the current evidence.”
12. A copy of Dr Fox’s report and certificate were sent to Mrs Wren on 2 March 2012.

13. Three days later the Council wrote to Mrs Wren informing her that it had been determined (based on Dr Fox's opinion) that she did not currently satisfy the criteria for ill health retirement under Regulation 97(9) (of the Local Government Scheme Regulations 1997).
14. On 27 April 2012 Mrs Wren saw Dr Puri for a review of her condition. In a letter (typed on 10 May 2012) to Mrs Wren's GP (which was copied to Mrs Wren and Dr Fox), Dr Puri said:

"As you are aware from the cardiac point of view, we are doing our best with her treatment, but I think the major problem here has been the psychological impact of her original presentation and ongoing symptoms. Because of the nature of this, I don't think she will ever be fit to return to her original post.

I would be happy for you to manage her psychological symptoms as appropriate and leave this to your discretion."

15. The Council terminated Mrs Wren's employment (with effect from 18 May 2012) on grounds of capability due to ill health.
16. Mrs Wren invoked the Scheme's two-stage internal dispute resolution (**IDR**) procedures.
17. Initially the Council confused the appeal process and in September 2012 wrote to Mrs Wren incorrectly referring to her request to access deferred pension benefits.
18. After an exchange of several letters between the Council and Mrs Wren the matter was belatedly corrected and the opinion of another IRMP was sought. After obtaining a current report from Mrs Wren's GP and considering Dr Puri's last report Dr Atkinson gave his opinion that Mrs Wren was not permanently incapable of discharging efficiently the duties of her former employment. In his August 2012 report, among other things, he said:

"...we have now received a report from her General Practitioner. This confirms the cardiac information we already had but also states that she was feeling hopeless and upset with her symptoms when seen in December 2011...Having had a telephone screening assessment conducted on 5th April 2012, she has been added to Step 3 Treatment Wait List for CBT...

CBT is the most well researched and most beneficial treatment for anxiety and would be a logical treatment of choice for this sort of problem. In addition to this, her General Practitioner has commenced her on a small dose of an anti depressant which will also relieve anxiety and he is mindful to increase this gradually upwards in dosage.

While he states that on the basis of probability, given her recurrent episodes of chest pain, he suspects she is not capable of continuing her occupation as a Home Care Worker, he also states that Cognitive Behavioural Therapy could

help in reducing these symptoms and it would be too early to comment as to whether she could return to work.

Obviously if she can return to work or there is a distinct possibility of this, then she would not be eligible for medical retirement at the moment and I think we need to wait and see what the effects of both the CBT and the anti depressant are before coming to any firm conclusions.”

19. The Council did not obtain Dr Atkinson’s certification until November 2012 and later that month turned down Mrs Wren’s stage 1 appeal. The Council did not enclose a copy of Dr Atkinson’s opinion with their decision letter.
20. In December 2012 Mr Wren complained about the Council’s handling of his wife’s request for ill health retirement.
21. In February 2013 the Appointed Referee for the Council as administering authority (at IDR stage 2) concluded that while the Council had made two proper decisions (in March and November 2012) their administration of Mrs Wren’s case fell short of the required standard because:
 - the Council took a long time to reach their initial and IDR stage 1 decisions, there were unnecessary delays and Mrs Wren was not kept informed;
 - in December 2011 the Council appear to have decided Mrs Wren’s application without requisite IRMP certification and incorrectly communicated their decision verbally, rather than in writing;
 - the Council’s formal initial decision of 5 March 2012 referred to out of date regulations and gave incorrect information about the Scheme’s IDR procedures, which resulted in a great deal of confusion and added to delays;
 - Mrs Wren’s stage 1 application was inexplicably treated as an application for the early payment of deferred benefits on grounds of ill health;
 - the Council failed to comply with regulation 59(1) of the LGPS Administration Regulations 2008 by not providing the IDR stage one decision within two months of the stage one application.
22. The Appointed Referee recommended that the Council pay Mrs Wren £200 for distress and inconvenience caused, which the Council duly did.
23. Mrs Wren’s solicitors requested a report from Dr Puri. In his report (dated 4 July 2013) Dr Puri said:

“My opinion is that with all the medications that we have used, this is probably as good as we can get her. I don’t feel she would be able to do work that is heavy but she would be able to do work that was more sedentary in nature. This is based on my having reviewed her notes.

...

She is currently awaiting an ultrasound scan of her gallbladder to ensure there aren't any other elements contributing to her current symptomatology.

To recap, in terms purely from the cardiac point of view, given how symptomatic she is with exertional symptoms when doing heavy work, I don't think she would be able to do the role that she had.

Given the frequency of her symptoms and admissions to hospital I think there is definitely a reduced likelihood of her being capable of undertaking any gainful employment before retirement age."

24. Mrs Wren appealed the Council's IDR stage 1 decision:

- the opinion of her Cardiac Consultant and GP was that she would never be fit to return to her original post;
- both had examined her and conveyed their opinions to the IRMP who she had not met or been examined by;
- her angina attacks were caused by both physical and emotional stress which reduced her capacity of obtaining gainful employment.

25. The Appointed Referee turned down Mrs Wren's appeal, among other things, he said:

- There was no requirement for either IRMP to meet or examine her;
- Dr Fox and Dr Atkinson had expressed the opinion that she was not permanently incapable of discharging efficiently the duties of her employment;
- Dr Puri in his July 2013 report had expressed the opinion that Mrs Wren "would be able to do work that was more sedentary in nature";
- there was no evidence to suggest that Mrs Wren was unlikely to be medically capable of undertaking any gainful employment immediately on leaving her local government employment.

Summary of Mrs Wren's position

26. Returning to her old job or retraining for and undertaking a sedentary job would cause such stress "that I would suffer at best more frequent angina attacks or at worst another heart attack";
27. Her belief that she is incapable of undertaking any further work is reinforced by the fact that she has been in receipt of Employment and Support Allowance (from the Department for Work and Pensions) since 2011;

28. She is not aware that her cardiologist, GP or the DWP medical advisors are of the opinion that she was reasonably capable of gainful employment when her employment with the Council was terminated.

Summary of the Council's position

29. The Appointed Referee for the Administering Authority found that their decisions were properly made but their administration fell short in several respects.
30. They duly paid Mrs Wren the £200 distress and inconvenience payment that the Appointed Referee had recommended.

Conclusions

The decision

31. Under regulation 20 (of the 2007 Regulations) the employing authority (in this case the Council) are required to obtain IRMP certification before deciding whether or not to grant ill health retirement (at Tier 1, 2 or 3 benefits).
32. The Council's verbal notification to Mrs Wren in December 2011 without first obtaining IRMP certification that she did not satisfy the criteria for ill health retirement did not amount to a proper decision (albeit it appears from the Appointed Referee's review of 14 February 2013 to have been requested, but the IRMP was unwilling to provide because the medical evidence was uncertain).
33. It also appears (again from the Appointed Referees February 2013 review) that the Council referred the matter back to the same IRMP (Dr Fox) after Mrs Wren enquired about appealing the Council's verbal notification. If that is correct then Dr Fox did not satisfy the declaration in Regulation 56 (of the 2008 Regulations) that he had not "previously advised, or given an opinion on, or otherwise been involved in the particular case". Consequently, the Council should have asked another IRMP (who had not been previously involved) for a report and certification as to whether Mrs Wren satisfied the criteria for ill health retirement.
34. There are two parts to the test for ill health retirement, which is to be decided on the balance of probabilities. First the person must be deemed permanently incapable (that is to age 65) of efficiently discharging the duties of their employment. Second the person must have a reduced likelihood to be able to undertake gainful employment.
35. If both parts of the test are passed then Tier benefits are payable subject to whether it is considered likely that the person will never be capable of gainful employment again (Tier 1), or will be capable before age 65 (Tier 2) or will be capable within the next three years (Tier 3).
36. Dr Puri in his February 2012 report said that there was no likelihood of Mrs Wren being able to do her original work in the next 12 to 18 months.

37. Dr Fox interpreted this as meaning that Dr Puri was of the opinion that Mrs Wren was not necessarily incapacitated in the longer term. But it is not clear that Dr Puri was specifically asked for a long term prognosis or that he was aware of the Scheme's criteria for ill health retirement when he was asked for his opinion.
38. Dr Puri did not rule out redeployment. Dr Fox cited this as another reason why Mrs Wren was not permanently incapacitated. But Regulation 20 (1) (a) (the first part of the test for ill health retirement) refers to "duties of his current employment". The redeployment question is therefore more relevant to the second part of the test once permanent incapacity is accepted.
39. The Council's subsequent decision letter to Mrs Wren referred to Regulation 97(9) of the 1997 Regulations. Not only was this the wrong regulation from the 1997 Regulations, the 1997 Regulations did not apply to Mrs Wren at all. It is therefore not clear that the Council had the correct regulations in mind when they made their decision.
40. Dr Atkinson (the second IRMP) considered the psychological side of Mrs Wren's condition, but did not address the above issues. He seems to have started from the point that Mrs Wren's physical symptoms were not causing her to be permanently incapable of discharging the duties of her employment (as a Home Care Worker).
41. Dr Puri's report (typed on 10 May 2012) says that from the cardiac point of view they are doing the best with Mrs Wren's treatment but the psychological impact of her ongoing symptoms is the major problem and why she thinks that Mrs Wren will never be fit to return to her work. From this Dr Atkinson appears to have taken the view that if Mrs Wren's psychological symptoms are addressed she will be fit to do her former duties. But before making that assumption it would have been prudent to ask Dr Puri if that is what she had actually meant.
42. Dr Atkinson then says "we need to wait and see what the effects of both the CBT and anti depressant are before coming to any firm conclusions". That did not go far enough. The Council should have asked Dr Atkinson to give his view on the likely outcome of this treatment.
43. After Dr Atkinson issued his report it took nearly three months before the required certification was obtained from him.
44. The Council's subsequent decision (at IDR stage 1) failed to give the reasons for Dr Atkinson's opinion and Dr Atkinson's report was not enclosed with the letter sent to Mrs Wren. This meant that Mrs Wren was denied the opportunity to understand the reasons why the appeal had been unsuccessful.
45. At IDR stage 2, the Appointed Referee (the second time around) said it was implicit within regulation 20 and the guidance from CLG that a member who is reasonably likely to be capable of undertaking any gainful employment immediately on leaving

his local government employment is not entitled to the payment of ill health retirement benefits.

46. I do not think that has quite captured the meaning of the regulation. To pass the second part of the test the person just has to have a reduced likelihood of being capable of gainful employment (assuming a person starts at 100% any percentage less than that would constitute a reduced likelihood). The question then remains is the person more likely than not (that is more than 50 per cent likelihood) capable of undertaking gainful employment in the future and when (that is within three years or before age 65 or never).
47. The Appointed Referee decided that she could not justify referring Mrs Wren for a further medical opinion (presumably another IRMP). Partly this was on the grounds that Dr Puri's July 2013 report did not suggest that Mrs Wren was medically incapable of undertaking any gainful employment from the date her employment ended.
48. However, whilst Dr Puri says in his report that Mrs Wren would be capable of sedentary employment, later in the same report he concluded that Mrs Wren would never be capable of returning to her former role and that there was definitely a reduced likelihood that she would be capable of gainful employment before her retirement age.
49. I therefore remit back to the Council to consider wholly afresh whether Mrs Wren satisfied the criteria for ill health retirement from the date her employment ended.

The process

50. The Council's decision of 5 March 2012 referred to out of date regulations and gave incorrect information about the Scheme's IDR procedures.
51. The Council then incorrectly treated Mrs Wren's IDR stage 1 appeal as an application for the early payment of deferred benefits on grounds of ill health, which caused further confusion and delays.
52. The Council failed to comply with regulation 59(1) of the 2008 Regulations by not providing the IDR stage one decision within two months of the stage one application and communicated directly with Mrs Wren rather than with Mr Wren who Mrs Wren had appointed as her representative.
53. This whole matter has inevitably caused Mrs Wren distress and inconvenience. In all the circumstances I consider £300 (in addition to the £200 already paid) to be sufficient for that.

Directions

54. 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 Wren satisfied the criteria for pension benefits from the date her employment ended;
 - pay Mrs Wren £300 for distress and inconvenience caused.
55. Within 28 days of receiving the IRMP's certification and report the Council shall decide whether Mrs Wren is entitled to pension benefits from the date her employment ended.
56. If the Council decide to award Mrs Wren pension benefits then simple interest at the rate for the time being declared by the reference banks should be added to the backdated instalments of pension (and any lump sum) from the due date of each payment to the date of actual payment.

Tony King

Pensions Ombudsman
31 March 2015

Appendix

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

As relevant regulation 20 ('Early leavers ill-health') 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)...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.

...

(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."

The Local Government Pension Scheme (Administration) Regulations 2008 – the 2008 Regulations

As relevant regulation 56 ('First instance determinations: ill-health') says:

"(1) Subject to paragraph (1A), an independent registered medical practitioner ("IRMP") from whom a certificate is obtained under regulation 20(5) of the Benefits Regulations in respect of a determination under paragraph (2), (3) or (4) of that regulation (early leavers: ill-health) must be in a position to declare 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 employing authority or any other party in relation to the same case, and he must include a statement to that effect in his certificate."