

Ombudsman's Determination

Applicant	Mrs Karen Wainwright
Scheme	Local Government Pension Scheme (the Scheme)
Respondent(s)	Shropshire Council (the Council)

Complaint Summary

Mrs Wainwright's complaint is that she has been refused the early release of her deferred pension on grounds of ill health.

Summary of the Ombudsman's determination and reasons

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

Detailed Determination

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

1. Regulation 20 deals with ill-health retirements from active service. As relevant is 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."

2. Regulation 20 (14) says:

"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."

3. Regulation 31 permits a member who has left to apply for their pension early. (The benefits will normally be less than for ill-health retirement from active service.) It says:

"(1) Subject to paragraph (2), if a member who has left his employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body he may ask to receive payment of his retirement benefits, whatever his age.

(2) Before determining whether to agree to a request under paragraph (1), an employing authority must obtain a certificate from an IRMP as to whether in

the IRMP's opinion the member is suffering from a condition that renders the member 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 the member has a reduced likelihood of being capable of undertaking any gainful employment before reaching normal retirement age, or for at least three years, whichever is the sooner.

(3) In this regulation, "gainful employment", "IRMP" and "permanently incapable" have the meaning as given to those expressions by regulation 20(14)."

The Local Government Pension Scheme (Administration) Regulations 2008

4. Regulation 50(4) says:

"The first period for which any retirement pension under regulation 31 (early payment of pension: ill-health) of the Benefits Regulations is payable begins on the date when the member became permanently incapable as determined under regulation 31 of those Regulations."

5. 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."

Material Facts

- 6. Mrs Wainwright was employed by the Council and a member of the Scheme. In May 2011 she applied for ill health retirement, a few days after she had received a redundancy notice.
- 7. At the time she was a DP and Project Finance Officer - she was transferred to this role four years previously from her then post as a Finance Officer.

8. The Council referred Mrs Wainwright to their occupational health department (**Occupational Health**) who obtained a current report from Mrs Wainwright's GP.
9. In the report her GP, among other things, said:
 - Mrs Wainwright had suffered with depression for approximately 11 years;
 - since 2006 she had been receiving Disability Living Allowance;
 - the problems with her depression had become quite severe again at the end of the last year, but she had continued to work through this difficult time using annual leave when necessary;
 - the depression itself was fairly well under control;
 - Mrs Wainwright felt that her short-term memory had been impaired since having electroconvulsive therapy (**ECT**);
 - psychological therapies with CBT and other counselling services and consideration to her medications had unfortunately been of little help in regard to this particular factor;
 - the whole situation had only added to her depression.
10. On 5 July 2011 the Council emailed Mrs Wainwright saying that it was "not feasible" for the Council to support her application "as we have not had any issues with your attendance or performance over the last couple of years".
11. Mrs Wainwright replied saying:
 - the reason there had not been any issues with her attendance was because, with the full agreement and knowledge of her manager, she had taken annual leave or flexi leave when necessary rather than sick leave;
 - her health problems (poor memory and an inability to concentrate) had been highlighted to her when she had recently applied for an internal vacancy;
 - because of her condition(s) she would not be able to seek employment after her redundancy;
 - her GP's report (requested by Occupational Health) confirmed that she was unable to work because of her medical condition;
 - there had been a number of instances in the past couple of years when her ill health had caused her to become frustrated and lose her temper at work. This had been noted in her last appraisal.
12. The Council changed their stance and requested Occupational Health to progress the consideration of Mrs Wainwright's ill health retirement request.

13. In an email to Mrs Wainwright of 13 July 2011 the Council said:

“Just to clarify, this decision will not affect the date on which your employment with Shropshire Council will be terminated, assuming that we are unable to identify a suitable alternative role for you. The application will be considered by the same process as for employees, as it is acceptable under the policy for a member of the Pension scheme to request consideration for ill-health retirement after their employment with the Council has come to an end.”

14. Mrs Wainwright's employment ended on redundancy grounds on 7 August 2011.
15. Occupational Health arranged for Mrs Wainwright to see Dr Leeming-Latham (an independent registered medical practitioner - **IRMP**) in October 2011.
16. Before the appointment Occupational Health had informed Mrs Wainwright that her file “will have to go to Dr Baron as Dr Latham will not be independent anymore” - Dr Leeming-Latham had seen Mrs Wainwright four years previously following a deterioration in her performance as a Finance Officer. However it was apparently decided that Mrs Wainwright should still see Dr Leeming-Latham and pass his notes to Dr Baron.
17. After seeing Mrs Wainwright, Dr Leeming-Latham (not Dr Baron) certified that she did not satisfy the criteria for the early release of her deferred pension on grounds of ill health. He began by noting that he understood that she had applied for early payment of preserved pension benefits. He went on to say:

“Although much troubled by her depression for these recent years, Mrs Wainwright has managed to keep her job as a Finance Officer until she reached the point where, unfortunately, she was made redundant on 7th August 2011. She has required frequent substantial adjustments to her treatment regime for her mental health condition and it seems that the treatment may not yet be optimal for her. There have been recent changes to her medication.

Mrs Wainwright's case is that she is more depressed than ever and that her memory difficulties have become more severe progressive over the last few years. She feels that she would not be able to do her job as a Finance Officer effectively because of her depression and memory problems.

There is no specific evidence that Mrs Wainwright's work performance has been considered unsatisfactory in recent times and the impression that I get from management and HR reports is that, were it not for the redundancy programme, Mrs Wainwright would continue to be retained in her appointment as a Finance Officer.

This means that Mrs Wainwright should be considered fit for the duties of her normal occupation as a Finance Officer. Her current absence certified as

being due to “Depressed. Acute reaction to stress” should not for the time being be considered as likely to persist for the next 16 years until she reaches the age of 65 years. Therefore, it is not possible to provide the medical evidence that would support an opinion that the incapacity that she has at present because of depression and memory difficulties is likely to be permanent until the age of 65 years.

Therefore I am unable to do better than to indicate that the incapacity is not regarded as permanent for the time being.”

18. The Council wrote to Mrs Wainwright:

“Further to your recent meeting with Dr Leeming-Latham, I am writing to confirm that on the basis of the information that has been provided your request for ill-health retirement has been declined.”

19. It appears that Mrs Wainwright was by then aware of Dr Leeming-Latham’s opinion as the Council’s letter goes on to refer to a telephone conversation with Mrs Wainwright during which she had said that she wanted to appeal the decision. The Council informed Mrs Wainwright that her case would be referred to another IRMP.

20. Mrs Wainwright, among other things, said in her first stage appeal:

- in the past three years she had had a number of days off due to sickness but covered these by taking annual or flexi leave;
- she should have been referred to another IRMP as Dr Leeming-Latham had previously seen her ;
- ECT in 2004 had impaired her short term memory (Mrs Wainwright submitted several articles on the side effects of ECT with her appeal);
- due to her ill health she had not been able to obtain employment since being made redundant.

21. In December 2011 the appointed person (at IDR stage 1) informed Mrs Wainwright that as her case was not straightforward, as the Council had terminated her employment on redundancy grounds (and not for ill health), rather than make a formal decision he deemed it sensible to refer her case back to the Council to check that the requirements of regulation 20 (of the 2007 Regulations) and regulation 56 (of the 2008 Regulations) had been complied with and “to confirm their decision on which benefit is payable to you under the LGPS Regulations”.

22. The Council referred Mrs Wainwright’s case to Dr Baron. Dr Baron requested a neuropsychologist’s report on Mrs Wainwright’s cognitive function.

23. Dr Rafique (Clinical Psychologist) who completed the assessment, among other things, said in his June 2012 report to Mrs Wainwright’s Consultant Psychiatrist:

“Mrs Wainwright undoubtedly struggles with attention and memory, but the inconsistency within her results does not suggest organic memory impairment which fits the results of her CT scan. It seems likely that ECT may have caused a genuine cognitive deficit initially but depression and anxiety have maintained this in the long-term...

Other factors that may be affecting Mrs Wainwright’s performance include her medication and current stresses...

In terms of intervention, it is difficult to rule out the possibility that if Mrs Wainwright’s anxiety and depression were to be alleviated these would be expected to lead to a subsequent improvement in her memory and attention. Some work may be done to help Mrs Wainwright to respond differently to everyday memory failures too in order to break the cycle. If you think it appropriate you may also wish to review her medication.”

24. It appears that sometime in July 2012 the report was sent to Occupational Health by the GP practice, but was not received. Occupational Health chased for the report in September 2012 and a further copy was provided which Occupational Health passed to Dr Baron.
25. Dr Baron subsequently certified that Mrs Wainwright was not permanently incapable of discharging efficiently the duties of her former employment. He used a certificate headed “Medical Practitioner’s Certificate for Active Members Terminated after 30-09-08”. In his accompanying report, among other things, he said:

“There have been two conditions in question. First a longstanding psychological problem, which continues intermittently and secondly a problem with short term memory loss which [Ms] Wainwright attributed to treatment she received for the first problem some years ago. The main issue I have considered is the long term prognosis of her problems, particularly the memory problem. The Relatively recent assessment by Dr Rafique indicates that there is some degree of short term memory loss but that this is unlikely to be related to the treatment she received previously and more likely to be associated with the condition itself. Therefore, as the condition has potential to improve in the future, the memory loss cannot be judged to be permanent. On the basis of the information available to me I can confirm that in my opinion she does not fulfil the criteria required under the Regulations for permanent incapacity from her local government employment.”

26. In early January 2013 the Council notified Mrs Wainwright that her request for the early release of her deferred pension had been unsuccessful:

“Dr Baron has based his decision on medical documents supplied to him, including specialist reports and detailed psychological assessments undertaken by Dr Rafique. In reaching his decision, Dr Baron considered the

long term prognosis, particularly the concerns regarding memory loss, and the fact that based on the reports received, that the memory loss is unlikely to be related to the treatment received previously and more likely to be associated with the condition itself. Given that the condition has potential to improve in the future, Dr Baron has determined that the loss of memory cannot be judged as permanent, and on that basis he states that you do not fulfil the criteria required under the pension regulations to be considered permanently incapable”

27. In March 2013 Mrs Wainwright appealed (the appeal was considered as a first stage appeal). Among other things she said Dr Rafique's report did not provide a solid diagnosis, any potential cure, or potential to return to work in the next two years. From this Mrs Wainwright concluded that the outcome of the assessment was confirmation of her health issues at the time her employment was terminated, her ongoing health issues and the overall uncertainty as to whether her health would ever improve (or indeed within the next two years) and therefore she satisfied the Scheme's criteria (under regulation 31 of the 2007 Regulations) for the release of her deferred benefits on grounds of ill health.
28. Under regulation 59 of the 2008 Regulations there is a two month time limit to reply to an appeal, unless an interim reply is given. In July 2013 Mrs Wainwright complained to the Council that she had not received a reply to her appeal..
29. The appointed person for the Council apologised and offered to immediately progress Mrs Wainwright's case to IDR stage 2 or assess her stage 1 appeal by week beginning 19 August 2013. Mrs Wainwright confirmed that she would wait for the outcome of his investigation under stage 1 of the procedure.
30. On 19 August 2013 the appointed person turned down Mrs Wainwright's appeal on the grounds that:
 - the Council had followed the correct procedure;
 - the Council's decision was upheld by a medical certificate from Dr Baron;
 - the IRMP had considered the available evidence and was of the opinion that Mrs Wainwright's underlying condition had potential to improve and therefore could not be deemed to be permanent.
31. In her second stage appeal (submitted on 3 September 2013), among other things, Mrs Wainwright said:
 - her GP continued to issue medical certificates which confirmed that her health was not improving;
 - she had now been unemployed for two years despite applying for jobs at a significantly lower level than the post she was made redundant from;

- post interview feedback from prospective employers confirmed that they were shocked at the number of times they had to repeat questions to her;
 - HR had stated following her internal interview (before she was made redundant) that she was not capable of carrying out the role she had applied for despite its grade being at the same level she then held (and had held for a number of years);
 - HR had also stated they were unsure what she was capable of doing;
 - how was Dr Baron therefore able to say that she would be capable of undertaking a job at the level of her former duties?
32. Mrs Wainwright's final appeal was turned down for the same reasons her first stage appeal had been unsuccessful.

Summary of Mrs Wainwright's position

33. Mrs Wainwright says:
- the Council took over three years to deal with her request for ill health retirement, which was not reasonable or acceptable;
 - Dr Leeming-Latham was of the opinion that her incapacity could not be considered as permanent at that time, which strongly suggests that If her condition stayed unchanged or deteriorated she would qualify as permanently incapacitated;
 - her health since Dr Leeming-Lathams October 2011 report had deteriorated ruling out completely any hope of her being able to carry out the duties of any job particularly those similar to her role at the Council;
 - Dr Leeming-Latham had previously assessed her health in 2007 (in relation to her ability to carry out her duties as a Finance Officer and as a result of his report she was transferred to the role of DP Project and Finance Officer) and therefore was not independent as required under the Scheme's Regulations;
 - Dr Baron did not see or examine her, his opinion was based on Dr Rafique's report the findings of which were inconclusive;
 - it took the Council six months (from when Dr Rafique's report was obtained to issuing their decision), which is totally unacceptable;
 - the appointed person at IDR stage 1 failed to issue his decision within two months of her appeal being made - despite being given written permission to access her medical records in April 2013 it took a further four months before the stage 1 decision was issued;

- since her meeting with Dr Latham-Leeming and Dr Rafique's report her mental health has further deteriorated and her memory retentive abilities are very poor.

Summary of the Council's position

34. The Council say:

- Mrs Wainwright's ill health retirement request of 13 May 2011 was considered in accordance with the Council's policy on ill health retirement;
- the Scheme's Regulations do not stipulate timescales for processing an ill health retirement request;
- Mrs Wainwright's case had been considered by two IRMPs, neither of whom were of the opinion that she fulfilled the criteria for ill health retirement;
- the Council's decision was therefore justified and supported by the evidence available at the time;
- they are unable to comment on why it took from March to August 2013 for the appointee at IDR stage 1 to issue his decision to Mrs Wainwright (albeit it may have been due to external factors relevant to his March 2013 request for medical records).

Conclusions

The basis on which the application was considered

35. There seems to have been some confusion as to whether Mrs Wainwright was to be treated as having made an application from active employment, or as a leaver with deferred rights in the Scheme.
36. The 13 July 2011 email says that the application will be dealt with as for an active employee (it "will be considered by the same process as for employees"). Next, Dr Leeming-Latham's letter says he is dealing with an application for early payment of preserved benefits. Then in December 2011 the appointed person for the Council referred to the regulations relating to early retirement from active membership – and Dr Baron used the certificate that related to such an application.
37. The matter of whether Regulation 20 or Regulation 31 applies is important. The primary test, whether Mrs Wainwright was permanently incapable of undertaking her employment is the same. But, the benefits are potentially significantly better under Regulation 20, albeit the test for payment is more stringent under Regulation 20 for two of the three possible tiers of benefits. Also, Mrs Wainwright says Dr Leeming-Latham's certification is invalid as he had previously examined her back in 2007. That would be true if the application was being considered under regulation 20 of the

2007 Regulations, but not regulation 31, as the declaration called for by regulation 56 of the 2008 Regulations is not a requirement in relation to regulation 31.

The decision

38. Whichever regulation was thought to be applicable, the Council needed to make a reasoned and proper decision after obtaining relevant IRMP certification. It is not clear that they made a decision at all. Their letter to Mrs Wainwright, after receiving Dr Leeming-Latham's opinion, merely said "on the basis of the information that has been provided your request for ill-health retirement has been declined". But their subsequent letter to Mrs Wainwright, after obtaining Dr Baron's report and certification, referred to Dr Baron's "decision" and then "Dr Baron has determined", which suggests that the Council failed to make a decision at either time. This amounts to maladministration.
39. Before she was made redundant there is evidence that Mrs Wainwright was already having difficulty discharging her duties efficiently – she was taking annual leave in order not to trigger the absence threshold. She had been turned down by the Council for an internal job and their own HR had doubts about her capacity. So, the question was one of permanency and the likelihood of improvement.
40. Dr Rafique took the view that ECT may have caused Mrs Wainwright memory problems at the time, but it was the depression and anxiety which were maintaining this. He goes on to say that if these could be alleviated it was likely that there would be an improvement in her memory (though not to what extent). He suggested reviewing her medication. However, it is not clear how much he knew about the medication/treatment she had already tried. The evidence from Mrs Wainwright's GP suggests that she had tried other treatment without success.
41. Dr Baron concluded that, because Mrs Wainwright's depression had the potential to improve, her memory problems did too. But it is not clear where he gets this from. He does not say why he thinks her depression will improve (after more than 11 years) or to what extent – if he thought there was some untried treatment, he did not say what it was.
42. As Dr Baron signed certification for an active member it is not clear that he had the correct regulation in mind when he gave his opinion, albeit the first part of the test is the same under Regulation 20 and Regulation 31 (that is whether the applicant is permanently incapable of discharging efficiently the duties of their employment), which Dr Baron deemed Mrs Wainwright failed.
43. I therefore remit back to the Council to consider wholly afresh, first which regulation they intend to review her application under and second whether Mrs Wainwright satisfies the relevant criteria for benefits on grounds of ill health.

The process

44. I have already alluded to the doubt over what regulation was being applied, which at one point led to Mrs Wainwright being told that she was seeing Dr Leeming-Latham when he was purportedly disqualified by reason of having seen her before. In addition to that, there was unnecessary and unexplained delay.
45. Mrs Wainwright's initial application was in May 2011. In January 2013 she got a decision (leaving to one side the first decision that the first IDR decision maker was not confident about).
46. The appointed person at IDR stage1 (the second time around) failed to give an interim reply before the expiry period of two months (between the date the application was received when the decision notice should be given) and it is not clear why the stage 1 decision was so delayed.
47. Inevitably this whole matter has caused Mrs Wainwright distress and inconvenience. I direct below that the Council pay Mrs Wainwright £500 as compensation for this.

Directions

48. Within 7 days of the date of this Determination the Council shall write to Mrs Wainwright explaining what regulation her application, as made in May 2011, is being considered under – that is either Regulation 20 or Regulation 31.
49. Within 14 days of the date of this Determination the Council shall pay Mrs Wainwright £500 for the distress and inconvenience she has been caused.

If the Council's consideration is under Regulation 20:

50. 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 Wainwright satisfies the criteria for pension benefits from the date her employment ended.
51. Within 28 days of receiving the IRMP's certification and report the Council shall decide whether Mrs Wainwright is entitled to pension benefits from the date her employment ended.
52. If the Council decide to award Mrs Wainwright 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.

If the Council's consideration is under Regulation 31:

53. Within 14 days of the date of this Determination the Council shall request a medical report and certification from another IRMP not previously involved (even though that

is not strictly required) as to whether Mrs Wainwright satisfies the criteria for the early release of deferred pension benefits and if so from when.

54. Within 28 days of receiving the IRMP's certification and report the Council shall decide whether Mrs Wainwright is entitled to the early release of her deferred pension benefits and if so from when.
55. If the Council decide to award Mrs Wainwright backdated pension benefits then simple interest at the rate for the time being declared by the reference banks should be added to any 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