

Ombudsman's Determination

Applicant	Mr Peter Sutton
Scheme	Local Government Pension Scheme (the Scheme)
Respondent(s)	Monmouthshire Housing Association Limited (MHA)

Complaint Summary

Mr Sutton has complained that MHA, his former employer, failed to properly consider him for ill health retirement prior to the termination of his employment and incorrectly charged him for medical expenses.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against MHA because:

- the decision as to whether Mr Sutton met the requirements of regulation 20 does not appear to have been taken by MHA; and
- MHA incorrectly invoiced Mr Sutton for fees/costs of the IRMP.

Detailed Determination

'The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007' and 'The Local Government Pension Scheme (Administration) Regulations 2008'

1. See Appendix to the Determination.

Material Facts

2. Torfaen County Borough (TCB - the Administering Authority of the Greater Gwent (Torfaen) Pension Fund) issued guidance (dated May 2012) to assist MHA with the Scheme's ill health procedure. Part 14.8 says:

"The employer may decide that medical fees arising from referrals to the IRMP and in relation to the medical evidence requested from the General Practitioner, Consultant or Specialists in respect of a deferred member will be met by the former employee".

3. Mr Sutton was an Area Maintenance Officer for MHA. His employment was terminated (effective 30 June 2011) on grounds of incapability following a period of long term sickness absence from work (due to work related stress and depression).
4. Prior to the termination of his employment MHA referred Mr Sutton to Dr Crosbie (Occupational Health Advisor - **OHA**). The OHA's opinion was that while Mr Sutton was "unfit for work for the foreseeable future" the prognosis was "ultimately excellent" and consequently he would not be a candidate for ill health retirement.
5. MHA verbally informed Mr Sutton of the OHA's opinion and that they could not approve ill health retirement as he had not satisfied the criteria of the Scheme's Regulations (including for Tier 3 benefits), but if his condition worsened he could submit an application for the early release of his deferred pension.
6. After leaving MHA Mr Sutton queried his entitlement for ill health retirement with TCB. TCB confirmed the Scheme's criteria for the early release of a pension from active member status, advised that the phrase "foreseeable future" (used by the OHA) did not constitute permanent ill health to age 65; and said if he (Mr Sutton) felt that his health had worsened he could apply to MHA for the early release of his deferred pension and confirmed at age 60 (in October 2013), under the 85 years rule, he would qualify for an unreduced pension.
7. In September 2011 Mr Sutton requested the release of his pension and submitted a letter from his GP which said that his mood and spirit had not improved over the last year and, if anything, had recently deteriorated.
8. MHA notified Mr Sutton that an independent medical review would be arranged, but if his "appeal" was unsuccessful he would be required to pay any medical bills incurred during the process. Mr Sutton signed his acknowledgement of this.

9. Dr Bell (an independent registered medical practitioner - **IRMP**) certified that Mr Sutton did not satisfy the criteria for ill health retirement at 30 June 2011. In her 12 December 2011 letter to MHA (copied to Mr Sutton) she said:

“I have now received a GP’s report for this employee. Taking into consideration this, the assessment I made on 31st October and the information in the occupational health file, I do not feel his is a candidate for ill health retirement.”

10. On 19 December MHA, referring to Dr Bell’s letter “which confirmed the independent medical advice that you do not meet the criteria for ill health retirement”, invoiced Mr Sutton for £150 medical fees (£90 for the appointment with Dr Bell and £60 for an updated report that Dr Bell had obtained from Mr Sutton’s GP).

11. In January 2012 Mr Sutton requested a copy of Dr Bell’s medical report. MHA informed him that he would have to contact the Practice where Dr Bell worked for this.

12. On 15 March 2012 Dr Bell wrote to MHA (copying in Mr Sutton) that she had received a request from Mr Sutton’s wife for a copy of the report she made during her examination of Mr Sutton. Dr Bell said:

“I am writing to expand on the decision I made i.e. that he is not a candidate for ill health retirement.

The diagnosis is reactive depression and the long term prognosis for recovery is good, however it is not possible to set a timescale for this and therefore I would conclude that he is not fit for work for the foreseeable future. While his condition is significant it is not necessarily permanent and he has not exhausted all treatment options. I therefore am not able to say that he is likely to be permanently incapable until he reaches the age of 65.”

13. MHA wrote to UNISON on 2 May 2012 after receiving a letter same day from their Occupational Health Adviser:

“We have today received a letter from them to say that Peter ‘has not exhausted all medical treatment’ and therefore Tier 3, Tier 2 or Tier 1 medical ill health retirement does not apply to the gentleman.”

14. In June 2012 (responding to a letter received from Mrs Sutton in May and following a telephone conversation with Mr Sutton) TCB wrote to Mr Sutton that an appeal of the recent decision could only take account of the medical evidence at the time of the original decision. As he had stated during the conversation that his condition had deteriorated (since the original decision) he would need to submit a fresh application with further medical evidence to support this.

15. The next month Mr Sutton’s wife submitted a current report from Mr Sutton’s GP and requested that her husband’s pension claim be reviewed.

16. In his report the GP advised that Mr Sutton's medical condition had deteriorated over the past couple of years, he had three main problems (Osteoarthritis affecting his knees and back, depression relating to his former employment and type 2 diabetes which had developed over the past six months affecting feeling in his feet) and gave his opinion that Mr Sutton was not fit for work "nor ever will be".
17. MHA asked Mr Sutton to provide any current consultant reports on his revised medical conditions and advise how his day to day activities were being affected.
18. Mrs Sutton notified MHA that her husband's depression was ongoing, causing apathy and withdrawal from family life and his other conditions meant that he now required assistance with personal hygiene and his mobility and manual dexterity had been reduced.
19. MHA referred Mr Sutton back to Dr Bell. In a letter to MHA dated 30 July 2012 Dr Bell, among other things, said:

"The employee told me that he continues to be significantly affected by his depression, Since December he has become significantly disabled due to two new conditions, osteoarthritis of the back, legs, hands and feet and diabetic neuropathy which means that he is unable to feel his feet, These conditions have a further significant impact on his mobility and ability to function.

Assessing the employee today I had his occupational health file which contained a brief letter from the employee's GP and a letter from his wife about his current presentation. I have explained to him that I need an up to date report from his GP and Specialist letters which the GP can also provide me with and then once I receive this I will be able to make a decision and will be back in contact with you."

20. The GP, among other things, gave his opinion that it was unreasonable to expect Mr Sutton (with his level of incapacity, which was likely to deteriorate) to continue in work and he "wholeheartedly recommended" his retirement on grounds of ill health.
21. In September 2012 Dr Bell certified that Mr Sutton did not satisfy the criteria for ill health retirement. In her report to MHA (copied to Mr Sutton) she said:

"...It does [the GP's report] confirm that he has now been diagnosed with osteoarthritis in his back which causes pain in his legs and fibromyalgia. It confirms the ongoing depressive symptoms.

He has been offered referral to a specialist regarding this depression but has declined this. He has been given tablets for the fibromyalgia and the osteoarthritis, however he has not seen a specialist. I would therefore conclude that he has not exhausted all medical treatments and investigations and is therefore not a candidate for ill health retirement."

22. The next month MHA invoiced Mr Sutton £155 for medical fees in respect of Dr Bell's assessment and chased for the payment of the first invoice for £150.
23. Mr Sutton asked the Pension Advisory Service (TPAS) for assistance. TPAS advised Mr Sutton to invoke the Scheme's internal dispute resolution (IDR) procedures and said that he might want to suggest that this should be treated as a second stage appeal (and not a new issue at all).
24. Mr Sutton submitted an appeal in November 2012 on the grounds that his case had not been properly considered and submitted a further letter from his GP in support of his ill health retirement:
- “At his last Occupational Health review he was told that he could not pick up his pension owing to the fact that not all avenues in relation to his depression and orthopaedic problems had been explored. Against my better judgement I was persuaded to make referrals to both Orthopaedic Surgeons and the Consultant Psychiatrists concerning his problems. However, on reflection and after feedback from the departments I feel, as they do, that they have no specific further role in managing Mr Sutton's medical problems at the current time as, although they are significant, they are static and not in need of intervention.”
25. MHA after consulting with TCB suggested to Mr Sutton that his appeal be considered as a new application as it included new medical evidence which could not be considered in an appeal against the last decision. Again MHA informed Mr Sutton that whilst they were happy to arrange an appointment with an IRMP he would be required to cover the costs.
26. MHA again referred the matter to Dr Bell.
27. In April 2013 Mr Sutton invoked the Scheme's two stage internal dispute resolution (IDR) procedures complaining that MHA had actively discouraged him from making an application for ill health retirement (prior to the termination of his employment) and had failed to make a formal decision.
28. The next month Dr Bell notified MHA that she was awaiting specialist reports from the hospital treating Mr Sutton.
29. The same month MHA turned down Mr Sutton's IDR stage 1 appeal:
- there had been several meetings with Mr Sutton and his union representative before the termination of his employment;
 - at these he had been informed that MHA had sought advice from the OHA but could not approve ill health retirement as the conditions of the Scheme's Regulations were not met (including for Tier 3 benefits);

- at the last meeting he had been informed that if his condition worsened he could apply for the early release of his pension;
- whilst this information was not put in writing if it had been it would have made no difference to the outcome as the medical information at the time was that the prognosis for a return to work was good;
- his subsequent request for the release of his pension (after leaving service) was considered by an IRMP (after obtaining a current report from his GP) and it was deemed (by MHA) that he did not satisfy the criteria for ill health retirement;
- his latest request for the release of his pension was under consideration (reports from specialists treating him were awaited by the IRMP) and he would be notified of MHA's decision as soon as the requested information was received.

30. After consulting with TPAS Mr Sutton invoked IDR stage 2:

- at the time of his meetings with MHA he was not well enough to decipher verbal information and therefore should have been provided it in writing;
- the stage 1 response implied that MHA had not used the correct procedures and therefore they should be asked to deal with his case correctly;
- it referred only to him being informed of his rights subsequent to leaving service (as a deferred member of the Scheme) and had avoided his point that he had been actively discouraged from applying for ill health retirement whilst in MHA's employment;
- MHA charging for medical examinations was contrary to the Scheme's Regulations;
- following medical examinations by MHA's OHA he had not been given a decision or a report explaining why the specific decision had been made to refuse his application.

31. In July 2013 MHA informed TPAS that their Occupational Health department had received a report from Mr Sutton's consultant. Later that month Dr Bell certified that Mr Sutton satisfied the criteria for the early release of his deferred pension:

"The employee was diagnosed with depression in 2010 caused by stress in the work place and he has been unable to work as a result since 6th September 2010. Several anti-depressants have been tried and he has received support from a community nurse from the community mental health team.

He has not been seen by a consultant from the community mental health team as they felt that his problems were being satisfactorily managed by his GP... In 2012 the employee was diagnosed with osteoarthritis in his knees and low back. He was seen by Mr [D], Consultant Orthopaedic Surgeon ...and referred for physiotherapy. Mr [D's] letter to the employee's GP dated the 13th December 2012 states his view is that in view of the combination of the

employee's weight, peripheral neuropathy and patello-femoral osteoarthritis he would have thought that climbing ladders would have been a significant risk for him. No follow-up was arranged. I was unable to obtain a report from this specialist and therefore wrote to 2 of his colleagues, Mr [N] replied enclosing copies of Mr Davies's letters which I had already received. Mr [W] also replied and his report contained a summary of Mr Davies's letter but unfortunately he was not able to express any further opinions as he had not met the patient himself.

When I assessed the employee on the 30th July 2012 I found that he was still displaying significant symptoms of severe depression, diabetic neuropathy which has caused reduced sensation in his feet. He told me that he cannot feel his feet at all and has significant pain in his back, legs, hands and feet from osteoarthritis. He told me that he requires help with all activities of daily living and was in the process of applying for Disability Living Allowance which I understand he was granted.

Given that no further treatment or specialist referrals are planned for any of his medical conditions and the lack of improvement in his depression alongside the deterioration in his physical symptoms, I would conclude that all investigations and active treatment has been exhausted and that he would therefore be a candidate for ill health retirement."

32. Early the next month Dr Bell advised MHA:

"The recommendation of ill health retirement is not solely based on the statement from the letters received from Mr [D] and Mr [W] but on consideration of all the medical evidence and the assessment that I made of the employee when I saw him on 30th July 2012, his condition had deteriorated at that point to the extent that it would have prevented him from working. However I was unable to state that at the time until I received the evidence from the consultant specialists, the first of which was from Mr [D] dated 13th December 2012."

33. MHA accepted Dr Bell's opinion and awarded Mr Sutton his pension backdated to 30 July 2012.

34. Whilst pleased that his pension had been released, Mr Sutton chased for a response to his IDR stage 2 appeal.

35. The Appointed Person for TCB turned down Mr Sutton's appeal:

- the matter of oral communication and the lack of anything in writing was outside the direct matter of his complaint (that is not being awarded ill health retirement from active status);
- whilst MHA failed to refer him to an IRMP prior to the termination of his employment they did within a few months of that date and made a decision, based on the medical

evidence available at that time, that he did not satisfy the criteria for ill health retirement when his employment ended;

- there was no provision in the Scheme Regulations for a member to apply for ill health early retirement whilst an active employee and member of the Scheme;
- the Regulations state that it is for Employer to determine whether an employment should be terminated and the reason for that termination;
- charging for a medical examination was a matter for the Employer to decide and outside the Scheme's Regulations;
- whilst there were some procedural issues at the time his employment was terminated these were addressed by MHA in September 2011;
- the termination of his employment related solely to work related stress and depression which would not have qualified him for ill health early retirement.

36. Later the Appointed Person clarified his opinion to TPAS. Among other things he said:

- MHA should have referred Mr Sutton to an IRMP prior to his employment ending and should not have relied on the opinion of the OHA in deciding that Mr Sutton did not satisfy the criteria for ill health retirement from active status;
- however, MHA did revisit the matter in September 2011 using the correct procedure and after obtaining IRMP certification decided that Mr Sutton was not entitled to an ill health pension from the date his employment ended based on the medical evidence available up to that time;
- whilst regulation 31 states that a deferred member may ask to receive his/her pension early no similar provision for active members is stated in regulation 20; albeit "in practice the initiation of a request is often the result of sensible and pragmatic engagement between the parties involved on an on-going basis";
- the Scheme's Regulations are silent on whether an employer should or should not impose a charge for the provision of medical information in relation to a deferred member's application for ill health early retirement.

37. TPAS notified TCB while they disagreed that MHA had followed the correct procedure after obtaining IRMP certification that Mr Sutton did not satisfy the criteria for ill health retirement (at the date his employment ended), Mr Sutton had accepted it was unlikely that a new decision would be in his favour and so was content to leave the matter, except for one thing. He wanted to be assured that MHA had reviewed and amended their procedure accordingly for future decisions.

38. In addition TPAS requested that TCB or MHA consider making a suitable payment to Mr Sutton for distress and inconvenience caused and financial loss (due to a lack of income Mr Sutton incurred interest on unpaid debts plus bank charges).

39. MHA replied that they had updated and clarified their 'Attendance Management' policy in consultation with TCB. With regards to Mr Sutton's claimed financial loss, no details had been provided but MHA had decided not to pursue the medical fees that Mr Sutton had been invoiced. TCB rejected paying any compensation on the grounds that they had handled matters in accordance with the Scheme's Regulations.
40. In December 2013 Dr Bell completed a corrected certificate (active status) in respect of her December 2011 opinion.

Conclusions

41. Under regulation 20 the employing authority (in this case MHA) are required to obtain IRMP certification before deciding whether or not to grant ill health retirement (at Tier 1, 2 or 3 benefits).
42. MHA failed to do this prior to the termination of Mr Sutton's employment. The opinion sought from the OHA was to enable MHA to decide whether or not to terminate Mr Sutton's employment. It was not to decide whether Mr Sutton was entitled to ill health retirement.
43. While MHA subsequently obtained the opinion of Dr Bell (IRMP) that Mr Sutton did not satisfy the criteria for ill health retirement at the date his employment ended it is apparent that MHA did not actually make the required decision. Instead Dr Bell's opinion, which was copied to Mr Sutton, was treated as the decision. This is contrary to regulation 20 and amounts to maladministration by MHA.
44. Dr Bell's March 2012 comment that all treatment options had not been exhausted did not go far enough. She needed to give an opinion on their likely outcome. The certification she completed was also incorrectly for a deferred member.
45. The Council's letter to UNISON of 2 May 2012 again did not amount to a proper decision. It merely conveyed what Occupational Health had said.
46. I therefore remit back to MHA to consider wholly afresh whether Mr Sutton satisfied the criteria for ill health retirement at the date his employment ended.
47. MHA referred Mr Sutton's subsequent application for the early release of his deferred benefits to Dr Bell. As Dr Bell had been previously involved this breached regulation 56 of the 2008 Regulations and again it is not apparent that MHA made the decision to award Mr Sutton his pension.
48. Nevertheless, I am not minded to remit this back to MHA to consider wholly afresh as Mr Sutton was awarded his pension (albeit from deferred status) retrospectively from the date that Dr Bell assessed him in July 2012.
49. Turning now to the matter of MHA invoicing Mr Sutton for medical fees incurred. While the Regulations are silent on the matter under both regulation 20 and 31 the employing authority are required to obtain IRMP certification before making their decision.

Consequently, irrespective of the outcome of Mr Sutton's request for the release of his pension (from active or deferred status) he was under no obligation to pay the fees/costs of the IRMP. Therefore MHA should not have invoiced Mr Sutton for the payment of these and the subsequent waiver of both invoices (albeit the second invoice fell away because his deferred pension was released) does not amount to the payment of compensation to Mr Sutton.

50. Mr Sutton says he wants MHA to review their policy to ensure that this was an isolated case. As my role is limited to a consideration of whether Mr Sutton has been caused injustice that is a matter for MHA decide and not one for me to direct - I do note however that MHA say they have updated their procedures in consultation with TCB.
51. Inevitably this whole matter has caused Mr Sutton distress and inconvenience. I consider that MHA should pay Mr Sutton £500 for that.

Directions

52. Within 14 days of the date of this Determination MHA shall request a medical report and certification from another IRMP not previously involved as to whether Mr Sutton satisfied the criteria for Tier 1 pension benefits from 30 June 2011.
53. Within 28 days of receiving the IRMP's certification and report MHA shall decide whether Mr Sutton is entitled to Tier 1 pension benefits from 30 June 2011.
54. If MHA decide that Mr Sutton is entitled to Tier 1 pensions 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 from the due date of each payment to the date of actual payment.
55. Within 14 days of the date of this Determination MHA shall pay Mr Sutton £500 for the distress and inconvenience he has been caused.

Jane Irvine

Deputy Pensions Ombudsman
31 March 2015

Appendix

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

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."

Regulation 31 ('Early payment of pension: ill-health') 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 immediately, whatever his age.
- (2) Before determining whether to agree to a request under paragraph (1), an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine as to whether in his opinion the member is 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 that condition is likely to prevent the member from obtaining gainful employment (whether in local government or otherwise) before reaching his normal retirement age, or for at least three years, whichever is the sooner.
- (3) In this regulation, "gainful employment", "permanently incapable" and "qualified in occupational health medicine" have the same meaning as in regulation 20."

The Local Government Pension Scheme (Administration) Regulations 2008

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.

(1A) Paragraph (1)(a) does not apply where a further certificate is requested for the purposes of regulation 20(7) of the Benefits Regulations."