

PO-5143

Ombudsman's Determination

Applicant	Mrs J Young
Scheme	Local Government Pension Scheme (LGPS)
Respondent(s)	Gateshead Council (Gateshead)

Complaint summary

Mrs Young has complained that her application for ill health retirement was not considered properly by Gateshead.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against Gateshead because they failed to give proper consideration to Mrs Young's eligibility for ill health retirement benefits under Regulation 20 of the LGPS (Benefits, Membership and Contributions) Regulations 2007.

Detailed Determination

Relevant LGPS Regulations

1. The relevant regulations are the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended). At the time Mrs Young's employment with Gateshead was terminated, Regulation 20 provided,

 “(1) If an employing authority determine, ...

 (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), (3) or (4), as the case may be ...”
2. Paragraphs (2) to (4) set out the various enhancements to benefits depending upon the level of incapacity. Paragraph (5) provided that, before making a decision, an authority had to obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine (**IRMP**) as to whether, in his opinion, the member met the criteria set out in paragraph (1). “Gainful employment” is defined as “paid employment for not less than 30 hours in each week for a period of not less than 12 months”.

Material facts

3. Mrs Young was employed by Gateshead from November 2003 until May 2012 as a part-time Customer Services Adviser. She has a previous period of LGPS service from October 1995 to November 2003 for which she has deferred benefits.
4. Mrs Young commenced long term sickness absence in November 2010. During 2011 and 2012, Gateshead and Mrs Young were in discussions concerning her future employment, including the possibility of voluntary redundancy. Gateshead offered her a lump sum equivalent to her redundancy payment and termination of her employment under a compromise agreement. Mrs Young declined to sign a compromise agreement. Gateshead wrote to her, on 10 May 2012, saying that they had no option but to terminate her contract of employment “due to [her] medical condition, which [had] led to [her] inability to perform [her] duties”.
5. Following the termination of her employment, Mrs Young's union asked for her eligibility for ill health retirement to be considered. Gateshead referred her case to their occupational health unit.

6. On 1 June 2012, Dr Wong wrote to Gateshead. He confirmed that he was appropriately qualified as an IRMP and had not previously been involved in the case. He said that he had reviewed Mrs Young's occupational health records, including a consultation with his colleague, Dr Abbas, on 30 May 2012. Dr Wong said that there was evidence from Mrs Young's GP that she was actively having ongoing treatment to improve her health. He concluded that Mrs Young was not suffering from a condition which rendered her permanently incapable of discharging efficiently the duties of her employment. Dr Wong referred to B2 in his letter. This was the tick box on the pro-forma certificate which he had completed. The form asked the IRMP to tick either B1 "is" or B2 "is not" to state whether, in his opinion, the employee was "suffering from a condition that, on the balance of probabilities, renders him/her permanently incapable of discharging efficiently the duties of his/her employment with his/her employer because of ill health or infirmity of mind or body".
7. Mrs Young's GP had written three letters: 9 August, 13 September and 17 October 2011. In the first, he said that Mrs Young was normally fit and well and had had no previous problems with mental health issues until she had consulted him with significant stress in November 2010. This related to Mrs Young's father's health and her caring responsibilities. The GP said that a phased return to work had been tried in January 2011 but, because of issues with work, this had been unsuccessful. He said that a second return to work in May 2011 had also been unsuccessful. The GP said that Mrs Young's mental health had continued to deteriorate and he said she now had agitated depression for which she was prescribed medication. In his second and third letters, the GP said that Mrs Young was not well enough to attend meetings.
8. Gateshead notified Mrs Young's union that her application for ill health retirement had been unsuccessful. Mrs Young queried the decision. Following further correspondence, Gateshead decided to refer her case to another IRMP.
9. Dr Abbas wrote to Mrs Young's GP, on 18 July 2012, requesting a report on her diagnosis, management plan and prognosis. He asked for copies of any relevant hospital reports, investigations or other relevant evidence. Dr Abbas said that the GP was not required to comment on Mrs Young's eligibility for ill health retirement because this would be determined by an IRMP.
10. In his response, Mrs Young's GP said that she was normally fit and well with no significant past medical history but had consulted him on 24 September 2010 with stress related symptoms. He said that a lot of the stress was the result of Mrs Young's caring responsibilities for her father. The GP outlined the history of Mrs Young's condition and said that, by 9 August 2011, he thought she was experiencing an agitated depression. He explained that he had prescribed medication and referred her to the primary mental health worker at his surgery. The GP then outlined the subsequent development of Mrs Young's condition. He said that he had seen her on 19 July 2012 and considered her condition to have deteriorated. The GP said that he was so concerned that he had referred Mrs Young to a crisis team. He concluded,

“I have no doubt for the immediate time [Mrs Young] remains unfit for work, she has an agitated depression, she receives DLA and ESA and her husband ... has had to reduce his hours to care for her and he receives carers allowance. Until she is assessed by secondary psychiatric services I am unable to give an exact estimate of prognosis and improvement but clearly at the present time she is very unwell, and at significant risk of self harm.”

11. On 20 August 2012, Mrs Young’s consultant psychiatrist, Dr Lyons, wrote to Dr Abbas. He said that Mrs Young had been referred to his team in August 2012 and that he was concerned that Mrs Young was extremely depressed. Dr Lyons said that he was aware that Mrs Young had been involved in some very difficult dealings with Gateshead, including have complained to the Local Government Ombudsman. He said that he was optimistic that Mrs Young might make a good recovery but that the ongoing situation with Gateshead was a significant aetiological factor in perpetuating her condition. Dr Lyons said that it was unreasonable to expect that Mrs Young could ever work for Gateshead again because any involvement was always likely to be stressful and predispose Mrs Young to a relapse.
12. Mrs Young’s case was reviewed by Dr Wynn at Durham County Council’s occupational health service. He wrote to Dr Abbas on 17 September 2012. Dr Wynn confirmed that he had reviewed (amongst other things) Mrs Young’s occupational health records, a job description for a customer services adviser, Dr Lyons’ report, Dr Wong’s certificate, letters from Mrs Young’s GPs and a report from a Primary Care Mental Health Worker, Ms Cairns.
13. Dr Wynn referred to the “Local Government Pension Scheme Regulations 1997 (as amended in 2008)”. He said he was required to give an opinion as to whether Mrs Young was permanently incapable of discharging efficiently her previous employment with Gateshead because of ill health. Dr Wynn said that the Regulations defined permanently incapable as likely to last until Mrs Young’s 65th birthday. He said that, if he determined this to be the case, he was further required to consider whether Mrs Young would be capable of undertaking other regular employment within three years of the date of application. He noted that gainful employment was defined by the Regulations. Dr Wynn also said that he had referred to the guidelines for IRMPs provided by the Department for Communities and Local Government (**CLG**).
14. Dr Wynn said that, on the balance of probabilities, he did not feel that Mrs was permanently incapable of discharging efficiently the duties of her previous employment as a customer services adviser. He went on to say:
 - Mrs Young’s diagnosis had changed over the period of her absence but stress related factors had consistently been reported as significant precipitating and maintaining factors.
 - Mrs Young had no significant previous psychiatric history of note.
 - He noted Mrs Young’s detailed and cogent correspondence with Gateshead.

- Mrs Young's recovery was likely to be impaired by her ongoing relationship with Gateshead.
- Further therapeutic options were available and she had only recently been in contact with secondary care services.
- Major depression is common and in most cases did not represent a permanent barrier to paid employment. The therapeutic benefits of work should encourage a return to suitable employment as a treatment goal.
- Mrs Young's good pre-morbid functioning, lack of co-morbidities and reactivity to events may make such an outcome more achievable.

15. Dr Wynn concluded,

"Ongoing significant obstacles to Mrs Young's return to her previous role include a breakdown of Mrs Young's sense of trust and respect in her employer. It is likely that this will remain a barrier to a return to employment with the Council in any capacity in the foreseeable future. However the generic demands of her job are not presented as a specific barrier to work and it is not possible to establish, from a clinical perspective, that these psychological barriers will persist until the age of 65 years, a period of 7 years for Mrs Young.

In my opinion it is not possible to establish that Mrs Young is likely to prove permanently unfit for a wide range of alternative employments. The issues in relation to Mrs Young's fitness for her current roles, raised by Dr Lyons, appear not to relate to the specific demands of her job duties but instead the general support received by Mrs Young prior to and during her current absence. Given the specific triggers to Mrs Young's symptoms associated with her current worksite I do not consider it likely that Mrs Young will remain unfit for the generic role of Customer Services Advisor."

16. Dr Wynn noted that Mrs Young had successfully applied for Disability Living Allowance (**DLA**) but said that the eligibility criteria were significantly different.

17. In a second letter also dated 17 September 2012, Dr Wynn said,

"Mrs Young has a health condition likely to fall within the provisions of the Equality Act 2010 and has recently come under the care of an appropriate specialist. Mrs Young is currently unfit for her substantive post. In my opinion, on the basis of the typical course of her condition and additional therapeutic options, it is not established that on balance she is likely to remain unfit for her specific substantive post until normal retirement age."

18. Mrs Young was informed that her appeal had been unsuccessful and she appealed further under the internal dispute resolution (**IDR**) procedure.

19. Mrs Young's consultant psychiatrist, Dr Rees, wrote an open letter on 30 January 2013. Dr Rees described the symptoms Mrs Young experienced when she thought about Gateshead or went near a Council building. She said that there had been no

improvement despite ongoing therapy and expressed that view that, because of the strength of Mrs Young's beliefs and her resistance to treatment, she would never be able to take a job with Gateshead in the future.

20. The first stage of the IDR procedure was undertaken by West Yorkshire Pension Fund (**WYPF**). Mrs Young submitted a copy of Dr Rees' report to them on 31 January 2013. WYPF issued a decision on 18 February 2013. They said that they were satisfied that Dr Wynn was qualified to provide an opinion for Gateshead and that he had completed a certificate in accordance with the LGPS Regulations. WYPF went on to say that they were not, however, satisfied that Gateshead had dealt with Mrs Young's applicant correctly because there was no evidence that they had made a decision themselves. They referred the matter back to Gateshead.
21. Gateshead wrote to Mrs Young, on 5 March 2013, saying that they had considered the information provided by the IRMPs and their occupational health advisers and were unable to support her request for ill health retirement.
22. Mrs Young submitted an appeal under stage two of the IDR procedure. She also approached the Pensions Advisory Service (**TPAS**) for assistance.
23. The second stage of the IDR procedure was undertaken by South Tyneside Council (**STC**). STC said that Gateshead had not properly considered Mrs Young's eligibility for retirement under Regulation 20 at the time they terminated her employment. Amongst other things, STC noted that the only medical evidence considered at the time was a report from Dr Abbas, dated 31 July 2011, which was related to re-deployment and 10 months old. They said that Gateshead should have sought an opinion from an IRMP. STC said that the evidence suggested that Gateshead had taken irrelevant matters into account; namely, whether Mrs Young was willing to sign a compromise agreement. They said that the stage one IDR decision had been flawed because it had looked at medical evidence which did not relate to the time when Mrs Young's employment ceased. STC also said that they did not consider that Gateshead had notified Mrs Young of their decisions in accordance with the LGPS Regulations. They upheld Mrs Young's appeal and referred the matter back to Gateshead.
24. Gateshead appointed their Director of Human Resources and Organisational Development (**Director of HR**) to reconsider Mrs Young's case. He issued a decision under stage one of the IDR procedure on 23 August 2013. The Director of HR said that an employer should consider whether ill health retirement was appropriate where there had been prolonged sickness absence and noted that this had not happened in Mrs Young's case. He referred to advice from Dr Abbas, in 2011, that there was no specific medical reason why Mrs Young could not return to work as a customer services adviser but that, due to a breakdown in relations with management, she felt that she could not return to the same service. The Director of HR said that an up to date report from their occupational advisers should have been sought prior to terminating Mrs Young's employment.

25. The Director of HR said that he was satisfied that Dr Wynn was independent and had no previous knowledge of Mrs Young's case. He said that he had not considered Dr Wong's report other than to satisfy himself that there was nothing in it which was in conflict with Dr Wynn's opinion. The Director of HR referred to notes from a meeting in May 2012, the letter terminating Mrs Young's employment, the request from her union, correspondence from 2012 relating to Mrs Young's Employment Support Allowance and Disability Living Allowance, Dr Wynn's report and certificate, Mrs Young's job profile and the medical evidence provided for Dr Wynn. He concluded:

- On the balance of probabilities, Mrs Young did not fulfil the criteria set out in Regulation 20.
- He had attached considerable weight to Dr Wynn's opinion. In particular, Dr Wynn's comment that,

“... in my opinion, on the basis of the typical course of her condition and additional therapeutic options, it is not established that on balance she is likely to remain unfit for her specific substantive post until normal retirement age.”
- Dr Wynn had acknowledged that Mrs Young was suffering from stress and depression at the time her employment ceased. Dr Wynn had noted that Mrs Young's diagnosis had changed over the period of her sickness absence. Dr Wynn had said that Mrs Young's recovery was likely to be impaired by her ongoing relationship with Gateshead, that depression was comment but did not represent a permanent barrier to paid employment, and that it was likely that her condition fell under the provisions of the Equality Act 2010.
- Dr Wynn had noted that one of the significant obstacles to Mrs Young returning to work was the breakdown of her relationship with Gateshead. However, he had also said that the generic demands of Mrs Young's job did not present a barrier to her return and that it had not been established that the psychological barriers would persist until age 65.
- Dr Lyons had said that he was optimistic that Mrs Young would make a good recovery and that the ongoing situation with Gateshead was a significant aetiological factor in perpetuating her illness.
- He accepted that Mrs Young's condition had been inextricably linked with and exacerbated by her issues with Gateshead. However, he had to decide whether her condition rendered her permanently incapable of discharging efficiently the duties of her former employment. He had considered the demands of her former role and it was his opinion that, notwithstanding the cause of Mrs Young's condition, there was compelling evidence that, with appropriate treatment, she could not undertake the demands of her former post at some point before normal retirement age. Nor did he consider that Mrs Young was permanently incapable of undertaking any gainful employment within the next 10 years.

- He had noted that, at a meeting in May 2012, Mrs Young had said that she might consider returning to work if it was not in her former department. He noted that redeployment had been considered previously but had not been progressed. He did not attach much weight to Mrs Young's comments but noted that they did not conflict with the medical opinion.
 - With regard to Mrs Young's DLA, he was aware that this was due for review in March 2013. Whilst the award was consistent with her current condition, the criteria for the award was quite different to those for ill health retirement.
26. Mrs Young submitted a further appeal. This was considered by WYPF. They did not uphold Mrs Young's appeal. Amongst other things, WYPF said that Gateshead had been correct in not considering Dr Rees' report because they had to consider whether Mrs Young should have been awarded ill health retirement at the time her employment ceased. They also said that Gateshead were correct to consider Dr Wynn's report because otherwise they would have had to base their decision on out of date reports. WYPF said that it was up to Gateshead (as employer) to determine what information was relevant when making their decision.
27. Mrs Young submitted a further appeal. This was considered by STC and they issued a decision on 10 February 2014. STC upheld Mrs Young's appeal. Amongst other things, they found:
- Under Regulation 20, Gateshead had to consider a number of questions before ill health retirement could be awarded. These included length of scheme membership and the IRMP's opinion. If these indicated that ill health retirement could be awarded, Gateshead must then consider the level of benefit.
 - Gateshead failed to consider Mrs Young's case properly when her employment was terminated. They had said that they were looking at it afresh following the previous appeal process.
 - Gateshead's Director of HR had simply accepted Dr Wynn's report. As he was making a fresh decision, a new medical report should have been requested. The Director of HR had not sought clarification on some of Dr Wynn's comments. For example, his reference to depression being common and not representing a permanent barrier to paid employment. Dr Wynn should have looked specifically at Mrs Young's situation.
 - Dr Wynn had said that it was not possible to establish that Mrs Young was likely to be permanently unfit for a wide range of alternative employments. This suggested that Dr Wynn had not applied the correct test in determining Mrs Young's level of incapacity. He should have been looking at Mrs Young's ability to carry out the duties of her employment as a customer services adviser. The breakdown of her relationship with Gateshead was relevant to this and Dr Wynn said it was likely to remain a barrier to her returning to work.

- Gateshead could not consider Dr Rees' report but knowledge of its existence might have prompted them to seek clarification from Dr Wynn.
- There had been no exploration of the treatment options available to Mrs Young.
- It was not for Gateshead to decide what was relevant. They should take into account all relevant evidence and there was evidence to suggest that they had considered irrelevant matters as well as not taking all relevant matters into account.

28. STC referred the matter back to Gateshead. Following receipt of STC's decision, Gateshead wrote to Mrs Young saying that they did not think that further reconsideration of her case would be appropriate or of benefit to either party. They suggested that she refer the matter to the Pensions Ombudsman Service. Gateshead said:

- The Director of HR was not making a fresh decision; he was reviewing the previous decision.
- Any new medical opinion could not be relevant to the facts as they were on the date Mrs Young's employment terminated or the date of the decision. A new medical report would only have been obtained on receipt of a new application on the grounds that Mrs Young's condition had deteriorated.
- Dr Wynn's report was detailed and thorough. They were satisfied that he had considered the facts of Mrs Young's case and was not generalised or non-specific. STC had taken his comment on depression out of context. They referred to Dr Wynn's subsequent comments concerning Mrs Young's pre-morbid functioning, lack of co-morbidities and reactivity of mood.
- Dr Wynn was required to apply a two-stage test. He had expressed the view that Mrs Young was not likely to remain unfit for her substantive post until normal retirement. He did not think that she satisfied the first limb of the test and therefore did not need to consider the second.
- Dr Wynn had referred to the 1997 Regulations but this appeared to be a simple error. He had referred to "similar or other employments" but this was not material and, in any event, the certificate he completed was quite clear.
- They had not had sight of Dr Rees' report but, in any case, it had been written after the date of termination of Mrs Young's employment.
- STC had suggested that there should have been some exploration of treatment options available to Mrs Young. The Director of HR was not qualified to undertake such an exploration and Dr Wynn had referred to further therapeutic options being available to her.
- They did not agree that any irrelevant matters had been taken into account.

Summary of Mrs Young's position

29. When she said she would like to try to return to work, at the sickness absence meeting, she did not mean with Gateshead.
30. Some of the documents provided by Gateshead have incorrect dates on them which suggests that they are not originals. The notes of the sickness absence review meeting are not an accurate record of what was said at the meeting. They do not match with what was said in the letter terminating her employment.
31. Gateshead complained that she provided the Ombudsman with documents dating back to 2010 but these relate to her other complaint/grievance which is a factor in her ill health.
32. Gateshead changed their reason for not referring her for assessment for ill health retirement during the course of the appeal process. They originally said that it was because Dr Abbas thought that she was fit to return to work (based on a report which was 10 months old). They now say it was because she had previously rejected this option.
33. Gateshead did not provide Dr Wynn with correct or up to date information.
34. The job profile referred to is not hers. It relates to a different department.
35. Dr Abbas did not obtain a report from her GP before referring her case to Dr Wong. He did not record her medication correctly and she believes he did not include the letter confirming her DLA award in the file passed to Dr Wong.
36. Dr Wong used the wrong form. The form was headed "Medical Retirement and EPPA Justification". This should only be used for applications for the early payment of deferred benefit. She has not applied for the early payment of her deferred benefits.
37. Dr Wynn referred to the 1997 Regulations and to her capacity for undertaking regular employment within three years of the date of application. This is the test for payment of deferred benefits. He incorrectly quoted the date of her deferred benefits as her date of birth and misquoted the date of one of the GP letters. Dr Wynn said that he had completed a certificate in his letter dated 17 September 2012, but the certificate was dated 9 October 2012. This suggests that he completed the wrong certificate.
38. Ill health retirement certificates can be downloaded and are not numbered. It is not possible to be sure that the certificate has not been altered.
39. The irrelevant matters referred to by STC relate to information included in the referral form concerning the grievance procedure, her dispute with Gateshead and her refusal to sign a compromise agreement.
40. Gateshead are dismissive of Dr Rees' report and make light of her illness. They have incorrectly stated that her own attitude to her illness is not generally part of the IRMP's

consideration. The Regulations recognise that, in some cases, the member's attitude can constitute a medical condition in itself.

41. Mrs Young provided a comprehensive bundle of documents in support of her case. Some of these documents relate to grievance and other proceedings and are not directly relevant to her case before me. They have been noted but are not referred to below.

Summary of Gateshead Council's position

42. In the final sickness absence review meeting, Mrs Young indicated that she might consider a return to work somewhere other than customer services or financial services. It appears to have been this, together with a previous rejection of ill health retirement on Mrs Young's part, which led to their refusal to refer her for assessment. They accept that they should have given consideration to ill health retirement given the length of Mrs Young's absence.
43. They subsequently referred Mrs Young to Dr Wong. Mrs Young did not consider Dr Wong to be sufficiently independent and this is why her case was referred to Dr Wynn.
44. They wrote to Mrs Young in October 2012 confirming Dr Wynn's decision. They accept that this was incorrect and that it was for them to make the decision. They had not appreciated this until it was pointed out by WYPF at stage one of the IDR procedure.
45. Their Director of HR wrote to Mrs Young in February 2013 confirming the decision to refuse ill health retirement. He told Mrs Young that she could appeal this decision at stage two of the IDR procedure. It should really have been referred back to stage one.
46. They accepted the criticism by STC (in the first stage two decision) that they failed to obtain a medical opinion prior to terminating Mrs Young's employment. They tried to put this right but it was not possible to "conjure up" a medical report obtained and written before that decision. They did obtain two IRMP reports which they considered sufficiently contemporaneous with the date of termination of Mrs Young's employment.
47. They also accepted a suggestion from TPAS that someone other than the original decision maker (who was Mrs Young's senior manager) should review the decision. They appointed their Director of HR. He has no line management responsibility for the original decision maker or any of his staff.
48. The Director of HR was not making a fresh decision.
49. Dr Wynn provided a thoughtful and thorough report based on matters relating specifically to Mrs Young. It is not unreasonable for a doctor to supplement his opinion with a view informed by their empirical knowledge of the matter under consideration.

50. They did not see Dr Rees' report. They accept that they should not follow the advice from an IRMP "slavishly" but they would require compelling reasons to act to the contrary. The Director of HR was satisfied that Dr Wynn had addressed the question correctly and there was nothing which required clarification. It is not surprising that Dr Wynn did not explore whether therapeutic options were assisting in Mrs Young's recovery because she had only recently been referred to secondary care.
51. They believe Dr Wynn's medical opinion is sound and that he provided a sufficiently detailed and reasoned opinion upon which they could make a decision. They do not consider that the errors relating to Mrs Young's age prejudiced his medical assessment. They believe that Dr Wynn did have Regulation 20 in mind when assessing Mrs Young's case, but he may have conflated the tests under the 1997 and 2007 Regulations. They accept that the result is a "less than clear" conclusion relating to the first limb of the eligibility test and a question as to whether the second limb should have been considered. They have considered whether Dr Wynn's report is salvable. If so, they proposed to reconsider Mrs Young's case on the basis that the first limb of the test had been met. They consider this to be contrary to the certificate, however, and that instructing another IRMP is the only option.
52. Dr Rees' report is really more a letter of support rather than a medical report. It largely repeats what Mrs Young has told her. It is unlikely that this letter, written within three months of Dr Wynn's report, would have been sufficient to tip the balance of probabilities in Mrs Young's favour. Further, an individual's own attitude to their condition is not generally part of the IRMP's consideration.
53. They have some concern as to whether the fact that an employee can attend their workplace or not for psychosocial reasons should be a significant consideration in the assessment. They point out that, at any one time, there may be one or two employees on sick leave who say they are unable to attend meetings and for whom alternative arrangements must be made. They say the expectation would be that this would be capable of being addressed over the short to medium term. They would expect the IRMP to carefully scrutinise any such statements whether they came from the employee or his/her medical advisers. They refer to guidance issued by the DCLG and the Faculty of Occupational Medicine (**FOM**).
54. It has been said that they took irrelevant matters into account when making a decision in Mrs Young's case. It is difficult to respond when the allegations are unspecified. The signing of a compromise agreement pre-dates the application for ill health retirement and played no part in either Dr Wynn's consideration or that by the original decision maker or the Director of HR.
55. They accept that they have not "covered themselves in glory" in the way they dealt with Mrs Young's case. Failure to apply the correct procedure led to two sets of appeal which they accept would have been unnecessary if they had acted correctly. They apologise for the inconvenience and stress that this may have caused Mrs Young. They believe that they have now done everything they can to correct the procedural flaws and have properly considered Mrs Young's application.

56. If Mrs Young wishes to reapply for ill health retirement on the basis that her condition has deteriorated, they will give it full and proper consideration.
57. If they are required to reconsider Mrs Young's case, it is important that there is clarity as to the instructions for the IRMP and the information which is to be provided. They argue that the IRMP should only be provided with documentation which was available to Dr Wynn. They would accept that any documentation which might constitute information which the IRMP might have sought by way of clarification could also be included. They do not accept that this includes Dr Rees' report. They also require clarification as to whether the IRMP should see information relating to the previous decisions.

Conclusions

58. To be eligible for benefits under Regulation 20, Mrs Young must pass a two-stage test. Namely:
- is she permanently incapable of discharging efficiently the duties of her employment with Gateshead; and
 - has she a reduced likelihood of being capable of undertaking any gainful employment before her normal retirement age.

"Permanently incapable" and "gainful employment" are both defined in the Regulations.

59. Gateshead accept that the decision as to whether Mrs Young meets the eligibility criteria to receive benefits under Regulation 20 is for them to make. Before doing so, they are required to obtain an opinion from an IRMP. Having obtained an opinion from an IRMP, Gateshead must then consider this along with any other relevant evidence, such as medical reports from other doctors. The weight that they attach to any of the evidence is for them to decide and it is open to them to give more weight to the advice that they receive from the IRMP. However, they should not accept the IRMP's advice blindly. It is generally the case that the person making the decision at this stage is not medically qualified. Nevertheless, they can be expected to actively review the IRMP's opinion. For example, they should satisfy themselves that the IRMP has applied the correct eligibility test, has taken all relevant evidence into account and has not made any factual errors. If there is a divergence of opinion between the IRMP and other doctors, the decision maker can expect the IRMP to provide an explanation.
60. Mrs Young's case was first reviewed by Dr Wong. Gateshead accept that they did not actively review Dr Wong's opinion. Had they done so, they might have asked him to provide more detail. However, because of concerns raised by Mrs Young, Gateshead referred her case on to Dr Wynn. I need not, therefore, give any greater consideration to Dr Wong's report. I note Mrs Young's concerns about the form used by Dr Wong but, in the circumstances, I consider it would be more helpful to move on to consider Dr Wynn's report.

61. Mrs Young has pointed out that there are a number of errors in Dr Wynn's report. It is unfortunate that errors crept into Dr Wynn's report because it undermined Mrs Young's confidence in the whole process. However, it is not necessarily the case that the errors were such that Gateshead should have asked Dr Wynn to reconsider his report; though there may be other reasons for them to have done so. For example, whilst Dr Wynn misquoted Mrs Young's date of birth, he quoted her correct age. It is of more concern that Dr Wynn referred to the incorrect regulations. Mrs Young is of the view that this is because Dr Wynn referred to an incorrect version of the ill health retirement form. The important question is whether this error meant that Dr Wynn applied the incorrect eligibility test.
62. Dr Wynn said he was required to give an opinion as to whether Mrs Young was "permanently incapable of discharging efficiently her previous employment with Gateshead". I do not find that this is very far removed from the first limb of the test set out in Regulation 20. Dr Wynn went on to say that, if he found Mrs Young to be permanently incapable of discharging efficiently her previous employment, he had then to consider whether she would be capable of "undertaking other regular employment" within three years. He also noted that "gainful employment" was defined in the Regulations. Mrs Young has pointed out that this is the test for the early payment of deferred benefits.
63. The regulation providing for the early payment of deferred benefits requires the IRMP to give an opinion as to whether the member is permanently incapable of discharging efficiently the duties of the relevant employment and also whether 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. Regulation 20, on the other hand, would require Dr Wynn to give an opinion as to whether Mrs Young had a reduced likelihood of being capable of undertaking any gainful employment before her normal retirement age. Regulation 20 would require an assessment of Mrs Young's capacity for undertaking gainful employment in the three years after her employment ceases – in order to determine which level of benefits she should receive. But this would only be required if she passed the initial eligibility test.
64. The evidence indicates that Dr Wynn did not have Regulation 20 in mind when he was assessing Mrs Young's case. However, given that the first part of the test is the same for both active and deferred members, it has not, in and of itself, had a material effect on the outcome of her case. In other words, Dr Wynn is likely to have come to the same conclusion if he had been thinking of Regulation 20.
65. Dr Wynn noted that Mrs Young's recovery was likely to be impaired by her ongoing relationship with Gateshead. He described it as a significant obstacle to her return to her previous role and thought that it would remain a barrier to her return to employment with Gateshead "in the foreseeable future". This is not far removed from the opinion expressed by Dr Lyons. However, Dr Wynn went on to say that "the generic demands" of Mrs Young's role did not present a barrier to her return. He said

that it was not possible to establish that “these psychosocial barriers” would persist until age 65. It is not clear which barriers he was referring to and, as a result, why he considered it not possible to establish whether they would persist. Dr Wynn said it was not possible to establish that Mrs Young would be permanently unfit for “a wide range of alternative employments”. He said that he did not consider it likely that Mrs Young would remain unfit for the generic role of customer services advisor and she could return to “similar or other” employment before normal retirement age.

66. Regulation 20 calls for an assessment of Mrs Young’s ability to discharge the duties of her employment with Gateshead; not the generic role of customer service advisor. In very many cases, there would be nothing to distinguish the two. However, in Mrs Young’s case the question of whether she would be able to return to work for Gateshead was pertinent. I find that attending Gateshead’s premises was a factor in Mrs Young’s ability to discharge the duties of her employment with them. As such, if she was more likely than not going to continue to find her relationship with Gateshead a barrier to returning to work, then she would be unable to discharge the duties of her employment with them. This is not the same thing as Mrs Young’s attitude to her condition or to returning to work. It is not clear from Dr Wynn’s report whether or to what extent he considered this aspect of her case. In fact, his report suggests that he based his opinion on Mrs Young’s ability to undertake a generic role rather her specific employment with Gateshead. This is particularly in view of his comment that her relationship with Gateshead would remain a barrier to her return to employment with them “in the foreseeable future”. Whilst “foreseeable future” may not be the same as “permanently”, Dr Wynn’s comment suggests that he thought the barrier to Mrs Young returning to work for Gateshead might be less than short term.
67. This is something Gateshead should have clarified with Dr Wynn. I note that their view, as expressed in their final letter to Mrs Young, is that Dr Wynn considered the facts of Mrs Young’s case and his report was not generalised or non-specific. However, this relates to his comment that major depression is common and does not represent a permanent barrier to paid employment. Gateshead have not addressed the question of Mrs Young’s ability or otherwise to attend her place of work. I do not find, therefore, that they have properly addressed the question of whether or not she meets the first criterion set out in Regulation 20.
68. Gateshead say that they would expect the IRMP to carefully scrutinise any statements regarding inability to attend the workplace, whether made by an employee or his/her medical advisers. Any information which is provided in connection with an application for ill health should be carefully considered by both Gateshead and the IRMP. There is no reason why evidence relating to the effect on an applicant’s mental health of attending their former place of work should be singled out for special care.
69. The DCLG/FOM guidance states that the IRMP should consider the effect that the individual’s medical condition would be expected to have on their practical ability to undertake gainful employment. It states that this should include any effect that the condition has on the individual’s attitude towards undertaking gainful employment, which

might be a limiting factor in their search for employment. The IRMP is advised to assume that the individual has average motivation “except in so far as his/her motivation may have been reduced as a clinical feature of the illness”. The question of what effect attending her former place of work might have on Mrs Young’s mental health goes further than questions of attitude and motivation. The DCLG/FOM guidance goes on to discuss the question of exacerbation of an individual’s condition. The example given is of an employee with allergic occupational asthma who might need to avoid exposure to the sensitising agent. However, the guidance does not need to be confined to purely physical triggers for exacerbation; it is conceivable that attendance at a particular venue/organisation might be sufficient to trigger or exacerbate a mental health condition. Whether this is the case for Mrs Young is something which is properly the subject of specialist advice.

70. Gateshead say that, at any one time, there may be one or more of their employees on sick leave who say they are unable to attend meetings. They say the expectation is that this would be addressed over the short to medium term. This is the crux of the matter. As with any other aspect of Mrs Young’s health, the question is whether any barrier to her attending her former place of work is likely to be permanent. As before, Gateshead will likely wish to seek medical advice to assist in coming to that decision.
71. The eligibility test in Regulation 20, as I have said, has two stages. In addition to being permanently incapable of discharging efficiently the duties of her employment with Gateshead, Mrs Young would also have to have a reduced likelihood of being capable of undertaking any gainful employment before her normal retirement age. This is any paid employment (not just with Gateshead) for not less than 30 hours in each week for a period of not less than 12 months. The test is whether there has been a reduction in Mrs Young’s ability to undertake gainful employment; not whether she is able to undertake such employment at all. Because he did not think that Mrs Young met the first limb of the eligibility test, Dr Wynn was not prompted to consider the second.
72. I find that Gateshead have not properly considered Mrs Young’s eligibility for receipt of benefits under Regulation 20. This amounts to maladministration on their part and Mrs Young has suffered injustice as a consequence. I uphold her complaint against Gateshead.
73. The decision, however, remains one for Gateshead to make and neither I nor the courts may come to an alternative decision as to Mrs Young’s eligibility. The proper course of action is for me to remit the decision for Gateshead to reconsider. My doing so should not be taken as any indication that I have taken a view on whether Mrs Young should receive benefits under Regulation 20. It is possible that, on proper consideration of the matter, Gateshead may come to the view that she does not meet the eligibility test as described above. This might be the correct decision if it is supported by appropriate evidence. Gateshead will need to obtain such evidence before they can make the decision.

74. In order to properly consider Mrs Young's case, Gateshead will need to obtain an opinion from another IRMP who has not previously been involved. I note their comment that they cannot conjure up medical evidence from prior to the termination of Mrs Young's employment. However, it remains the case that her incapacity must be assessed as at that date. Gateshead will need to ask the IRMP to give an opinion (on the balance of probabilities) as if he/she had been asked to do so in May 2012. This is not an easy task for the IRMP but it is an unfortunate consequence of the failure to consider Mrs Young's case properly at the time. Similarly, if Mrs Young wishes to submit medical evidence for Gateshead to consider or the IRMP requires additional medical evidence, the doctors will have to be asked to say what their opinion might have been had they been asked in May 2012.
75. Gateshead have raised questions concerning the documentation which should be made available to the IRMP. In particular, they feel that evidence which was not available to Dr Wynn should not be made available to the new IRMP. They are particularly concerned about Dr Rees' report. Any evidence provided for the new IRMP must *relate to* Mrs Young's state of health as at May 2012. For example, if it was said that her health had deteriorated since, this would not be relevant. However, some allowance must be made for the fact that Gateshead failed to properly consider Mrs Young's eligibility at the relevant time. Thus, opportunities to seek further information may have been missed by both parties. Any aspect of Dr Rees' opinion which can be said to relate solely to the state of Mrs Young's health after May 2012 will not be relevant. However, I do not find that this is reason to remove it from the documents to be given to the IRMP. One of the consequence of Gateshead's maladministration is that the parties find themselves in the artificial situation of trying to make a decision in the past. They must accept that this inevitably means that recreating the decision making environment as at May 2012 will not be entirely possible. The same can be said of the previous decisions and this determination. The safest path is to provide the new IRMP with all available evidence but to make it clear that the decision relates to May 2012.
76. I am conscious that I have not addressed Mrs Young's concerns about the veracity of various documents relating to her case. I am taking the view that, since her case is to be reviewed and Gateshead are being required to seek new evidence, that a more detailed investigation of these aspects of her case is not necessary; it would not add anything to the outcome of her case before me. I will, however, direct Gateshead to ensure that Mrs Young has full copies of all correspondence between them and the IRMP. I have no reason to find that Gateshead will not approach the reconsideration of Mrs Young's eligibility in a proper manner.
77. Gateshead say that they have not "covered themselves in glory" and they have apologised for any distress and inconvenience Mrs Young has suffered. I find that, in the circumstances, something rather more than an apology is called for.

Directions

78. Within seven days of the date of my final determination, Gateshead will refer Mrs Young's case to an IRMP who has not previously been involved. A copy of the referral is to be provided for Mrs Young at the same time. Gateshead are to provide the IRMP with a copy of my final determination. They are to ask the IRMP to provide an opinion within a further 21 days and to send a copy to Mrs Young at the same time as it is sent to them. On receipt of the IRMP's opinion and any evidence Mrs Young wishes to submit, Gateshead will make a decision as to whether Mrs Young was eligible to receive benefits under Regulation 20 in May 2012. That decision is to be made within 21 days of receipt of the IRMP's opinion. Gateshead must provide Mrs Young with their decision in writing and include their reasons for reaching the decision they have.
79. Within 21 days of the date of my final determination, Gateshead are to pay Mrs Young £500 in recognition of the distress and inconvenience the failure to consider her case properly will have caused.

Jane Irvine
Deputy Pensions Ombudsman

5 May 2015