

PO-5197

Ombudsman's Determination

Applicant	Mrs S Jones
Scheme	Local Government Pension Scheme (LGPS)
Respondent(s)	South Yorkshire Police (Employer) (SYP) South Yorkshire Pensions Authority (SYPA)

Complaint summary

Mrs Jones has complained that her eligibility for ill health retirement has not been considered in a proper manner.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against SYP because they failed to consider Mrs Jones' eligibility for a pension under Regulation 20 in a proper manner.

Detailed Determination

LGPS Regulations

1. As at the date Mrs Jones' employment terminated, Regulation 20 of the Local Government Pension Scheme (Benefits, Membership & Contributions) Regulations 2007 (SI2007/1166) (as amended) provided,

“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 obtaining 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. The regulation then provided for the member's pension to be enhanced depending upon the level of his/her incapacity for 'gainful employment'. The term 'gainful employment' was specifically defined in the Regulations.
3. As at the date Mrs Jones requested her pension to be paid on the grounds of ill health, Regulation 31 of the above Regulations provided that a member could ask to receive payment of his/her retirement benefits immediately if he/she became permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body. Regulation 31 provided,

“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.”

Material facts

4. Mrs Jones was employed by SYP as a Finance Assistant. Her employment was terminated under a compromise agreement dated 26 October 2009. This stated that Mrs Jones' contract of employment with SYP was terminated “by agreement”. At the time, Mrs Jones was not attending work, having commenced long term sickness absence in June 2008.

5. On 8 January 2010, Mrs Jones asked for her pension to be paid on the grounds of ill health. Having not had a response from SYP, Mrs Jones followed up her letter on 20 February 2010. Following further correspondence and telephone contact with SYP, Mrs Jones wrote to the Chief Constable on 20 May 2010. SYP responded by suggesting a meeting with Mrs Jones.
6. Following the meeting, SYP wrote to Mrs Jones, on 15 June 2010, saying they could not consider her for ill health retirement and referred her to the compromise agreement. In particular, SYP referred to the statement that the payment Mrs Jones had received was in “full and final settlement of all claims or rights of action of any kind whatsoever” which she might have “in relation to her employment, its termination or any related or connected matter”. SYP said this would cover early access to Mrs Jones’ pension on medical grounds. They said she could have early access to her deferred benefits early. Following further correspondence from Mrs Jones, SYP confirmed that the legal advice they had received was that pension rights were not exempted from the compromise agreement.
7. Mrs Jones was considered for the early payment of her deferred benefits in early 2011. As required by the LGPS regulations, an opinion was sought from an independent registered medical practitioner (**IRMP**).
8. SYPA have explained they have only approved a maximum of three IRMPs for the use of the employers they cover. None of their IRMPs are based locally. In addition, they have what they refer to as a ‘panel doctor’. This is a locally based doctor, approved by SYPA, who meets with the member, gathers evidence from specialists and GPs and provides a report for the IRMP. In Mrs Jones’ case, this was a Dr McKenzie.
9. On 13 January 2011, Dr McKenzie wrote to Mrs Jones saying he had received a report from her specialist, Professor Mathias. He said, because Professor Mathias was planning further treatment, no decision could be made about her condition until a response to the treatment had been determined. Dr McKenzie said he had asked Professor Mathias to write to him once he had noted her response to all treatment. Professor Mathias had written to Dr McKenzie, on 22 November 2010, confirming that Mrs Jones’ condition was pure autonomic failure, with postural hypotension. He said,

“Overall the prognosis is good, in terms of longevity, unlike some of the other autonomic failure syndromes. However to be able to answer your specific question, whether a return to work before the age of 65, we will need to ascertain the response to a medication. Therefore to answer this I would ideally like to review her, and if needed arrange for the relevant tests to determine her response.”
10. On 4 April 2011, Mrs Jones wrote to Dr McKenzie saying she had been told that Professor Mathias had not been contacted since writing in November 2010. She said her GP had said he could not provide any additional information because she had not been registered with him very long. Mrs Jones said, on her last visit to hospital, her

consultant neurologist, Dr Ingle, had said her latest results had shown a deterioration in her condition and agreed that a return to work was no longer an option. She asked Dr McKenzie to contact Professor Mathias.

11. In response to a letter from Mrs Jones, Dr Ingle wrote to her, on 12 April 2011,

"I remember clearly the discussion we had when we met up at the end of last year and it seems to me entirely reasonable to say that you will be unable to resume your previous work. Your diagnosis of primary (or pure) autonomic failure seems secure and *although in comparison to other causes of autonomic failure ... there is a relatively good long term prognosis in this condition, this is not to say that it does not result in life (or work) limiting symptoms, including fatigue.*"

12. SYPA sent Mrs Jones a copy of the IRMP's report dated 26 May 2011. The IRMP, Dr Williams, said he had seen the following reports:

- Dr Allahabadia, consultant endocrinologist, 7 and 22 August 2007
- Dr McDermott, consultant neurologist, 29 August, 18 September and 12 December 2007 and 28 March 2008
- Mr Ackroyd, consultant surgeon, 20 December 2007
- Dr Knox, GP, 22 January 2008 and 10 August 2009
- Dr Murray, consultant in pain management, 29 April 2008
- Professor Mathias, 30 January, 20 May and 4 September 2009 and 22 November 2010
- Dr Ingle, 13 October 2009
- Ms Best, clinical nurse specialist, 16 July 2010

13. Dr Williams gave a brief review of the above reports. He went on to say,

"The facts of this case show that Mrs Jones has described numerous symptoms over the past seven years which have resulted in substantial sickness absence, however after extensive investigations only one clear diagnosis has been made. That is a very significant diagnosis, pure autonomic failure, resulting in problems standing, eating and exercising. Her specialist has, however, made it very clear that a good prognosis can be expected with appropriate management. When observed in the clinical setting she was seen to be managing well, and symptoms were only significantly affecting her three or four times a week. The problems she described during the occupational health assessment do not match the view taken by Professor Mathias unless they only apply to the short periods of symptoms experienced early every morning and later in the day three or four times a week. There is a marked difference in approach taken by Professor Mathias in his advice to the GP compared to [Ms Best] in her letter supporting a blue badge application. This suggests a degree of exaggeration from [Ms Best] acting as the patient advocate in an attempt to ensure a blue badge would be provided. The specialist opinion from Professor Mathias is very clear, that a good outcome

would be expected and that Mrs Jones would be expected to be able to work effectively with relatively minor adjustments at work. There is nothing in the clinical reports and notes available to me that would alter that opinion.

Mrs Jones does have other symptoms but no clear diagnosis has been made, they have been present for many years during which she was able to work, and there is no reason why they should prevent her from working effectively and gainfully between now and the age of 65.

On the basis of the specialist reports provided there is good evidence to suggest Mrs Jones should be capable of gainful employment, including that of her former role with minor adjustments, so she would not in my opinion be eligible for early release of pension benefits.”

14. Dr Williams signed a certificate to that effect.
15. Mrs Jones notified SYPA that she did not want Dr Williams’ report sent to SYP. She said she wanted to send it to her consultants for comment. In particular, Mrs Jones commented that there was no mention of Professor Mathias having written to Dr McKenzie twice in December 2010. Mrs Jones also objected to Dr Williams’ comments about Ms Best.
16. On 8 June 2011, Dr Williams wrote to SYP’s Head of HR Management stating,

“There is no medical evidence to suggest that [Mrs Jones] should be permanently unfit for work and I therefore recommend that she does not meet the criteria for early release of preserved pension benefits.”

Dr Williams also provided a list of the medical evidence he had considered (see paragraph 12).

17. SYPA wrote to Mrs Jones on the same day acknowledging her comments on Dr Williams’ report. They said she had sight of the report to check for any inaccuracies. SYPA said the IRMP could only take into account submitted evidence and could only make a recommendation on the basis of that evidence. They went on to explain that the IRMP was making a recommendation only and it was SYP who would determine Mrs Jones’ entitlement to benefits. SYPA said Mrs Jones’ main concern appeared to be the absence of recent reports and she had not challenged the accuracy of Dr Williams’ report. SYPA noted that Mrs Jones did not want the report sent to SYP and said they would proceed by simply informing SYP of Dr Williams’ recommendation, without forwarding his reasons or additional details. They also informed Mrs Jones that she would have the right to appeal SYP’s decision.
18. SYP wrote to Mrs Jones, on 15 June 2011,

“I have now received your assessment for your ill health retirement from Dr Williams, please find copy enclosed. Dr Williams states that you do not meet the criteria for early release of preserved pension benefits, I therefore regret to inform you that you do not meet the criteria for ill health retirement.”

19. SYP informed Mrs Jones that she had the right to a stage 2 appeal. They explained the appeal would be undertaken by SYPA. However, SYP went on to say SYPA's role was to satisfy themselves that the process had been followed and not necessarily to review the outcome of the decision. SYP subsequently notified Mrs Jones that she had the right to a stage 1 appeal. They also confirmed that they would extend the six-month deadline for the appeal.
20. In response, Mrs Jones said (amongst other things) her original intention was to obtain her pension on ill health grounds and this appeared to have been lost sight of. She said SYP's letter had been headed 'early release of preserved pension' and this was incorrect. Mrs Jones referred to having attempted a return to work and having been assessed by an independent police tribunal which found her to be disabled. She said she had also been receiving Disability Living Allowance (**DLA**). Mrs Jones did not agree that the compromise agreement prevented her from being considered for ill health retirement.
21. SYPA sent Mrs Jones another undated report prepared by Dr Williams. In this, he said,

"Mrs Jones has two medical concerns: the first is Pure autonomic failure, a rare condition that causes a variety of troublesome symptoms that her treating hospital specialist indicates should be controlled with medication and other conservative measures and with reasonable modification in the workplace should allow an individual to remain at work. The second is unexplained abdominal and chest pain of uncertain cause. Both conditions cannot, based on available information, be considered permanent and therefore release of preserved benefits cannot be supported."
22. SYPA said, if they did not hear from Mrs Jones within 10 working days, a copy of Dr Williams' report would be sent to SYP.
23. On 1 May 2012, a Dr Oliver wrote to SYP,

"Following appeal, I have assessed the member for suitability for release of benefits on health grounds and made a recommendation.

Upon having sight of the report before it is issued to the employer the member did not give permission for the full report to be sent.

Consequently I can only confirm that my recommendation is **not** to release benefits on health grounds at this time."
24. SYP sent Mrs Jones their stage 1 appeal decision on 10 May 2012. They listed the evidence they had taken into account. SYP referred to the 8 June 2011 letter from Dr Williams and the 1 May 2012 letter from Dr Oliver. SYP said their decision was that Mrs Jones did not meet the criteria for the early release of her deferred benefits.

25. Mrs Jones asked SYP (amongst other things) why they had not been prepared to wait for a report from Professor Mathias. In response, SYP reiterated their view that Mrs Jones could not apply for ill health retirement and said it was her responsibility to submit any additional evidence she felt was necessary.

26. On 14 November 2012, Dr Ingle wrote to Mrs Jones' solicitors. He apologised for any confusion which might have arisen from his previous correspondence. Dr Ingle said,

"Primary Autonomic Failure is only a benign or good prognosis condition in the context of other progressive forms of autonomic failure ... In these other conditions there is an illness that can be rapidly fatal over a few years, This is unlikely to occur in cases of Primary Autonomic Failure but that is not to say however that the condition cannot be significantly limiting.

We have shown blood pressures falling to ... Mrs Jones is likely to be symptomatic at such times. Treatment is available to ameliorate symptoms but this is not the same as cure. The condition remains a progressive one."

Dr Ingle suggested that Professor Mathias should write a response.

27. Mrs Jones submitted a stage 2 appeal application to SYPA. They issued a decision on 7 February 2013. SYPA upheld Mrs Jones' appeal on the grounds that:

- SYP had not considered her request for ill health retirement and had instead considered the early payment of her deferred benefits.
- Under the LGPS Regulations, it was the reason for leaving which determined what benefits became payable. Mrs Jones' employment had been terminated on the grounds of voluntary resignation/dismissal and, as a result, there was no requirement for SYP to consider ill health retirement. However, she had a right to challenge decisions made by SYP relating to her pension and this had not been addressed.

28. SYPA directed SYP to consider Mrs Jones' eligibility for ill health retirement. SYP wrote to Mrs Jones acknowledging this decision and saying that they would refer her case to an IRMP. They said the IRMP would be asked to consider the following questions:

- Prior to signing the compromise agreement, was Mrs Jones capable of undertaking her role due to her medical condition?
- If she was not capable of doing so, would she have met the criteria for ill health retirement?

SYP went on to say that Mrs Jones' eligibility for the early release of her deferred benefits had been considered on two occasions and on both occasions the IRMP had recommended that she did not meet the criteria. SYP said they wished to point out that the criteria for the early release of deferred benefits were less stringent than those for ill health retirement.

29. The IRMP, Dr Davies, provided a report on 3 April 2013. Having listed the evidence she had been provided with, Dr Davies confirmed that she had been asked the two questions referred to by SYP. She then referred to the LGPS Regulations and said her first task was to consider Mrs Jones' role and how her condition and symptoms impacted on her ability to undertake this role (Finance Assistant). Dr Davies included a brief summary of the tasks undertaken by a finance assistant. She then gave a history of Mrs Jones' health since 2004.
30. In particular, Dr Davies referred to a note in Mrs Jones' occupational health records from 29 January 2008, which said, she was then able to stand and make coffee. She noted that the occupational health records had stated, on 20 February 2008, that Mrs Jones had limited mobility because of fatigue and blood pressure but that she could return to work if it had just been a problem with blood pressure. Dr Davies also referred to a medico-legal report from Professor Mathias dated 4 September 2009. In relation to this report, Dr Davies said,

"The medico legal report ... clearly summarises the diagnosis of Pure Autonomic Failure with postural hypotension, management of the condition and investigation and prognosis and his expertise in the field. His summary states that 'the condition is unlikely to be cured, but has a good prognosis'. He further lists a number of things that can be done to overcome a number of the disabilities with low BP and that it 'does not impair higher brain function and life expectancy is usually not diminished'. The content of this detailed expert report is supportive of her being able to function within the workplace with the appropriate accommodations. In my opinion therefore the evidence does not support that she would have been unable to do her job due to her condition of Pure autonomic failure. This is not saying that the condition is not chronic or permanent but that it does not make her 'permanently incapable' of doing her job."

31. The report Dr Davies was referring to had been provided by Professor Mathias in connection with a claim of discrimination brought by Mrs Jones relating to her application for the post of Finance Officer in May 2008. Mrs Jones had been told that her application for this full time post would not be supported because of her sickness absence record. Professor Mathias said his report would begin with a description of Mrs Jones' condition and he would then focus on whether there were issues regarding appropriate management at work, the potential for improving Mrs Jones' disabilities and how her condition would affect her work and performance. Professor Mathias went on to say,

"Mrs Jones is likely to have the condition pure autonomic failure, where the neurological lesions are mainly in the periphery and affect only autonomic nervous system pathways. The disorder does not involve structures within the brain and these patients therefore have none of the other non-autonomic neurological features associated with other disorders associated with autonomic failure. There is no evidence in these patients of cognitive

dysfunction and in their ability to perform tasks, especially when the blood pressure is maintained. It is only when the BP is low that transient changes occur, which should be readily rectified by raising their blood pressure. In suitable situations therefore, while sitting and with appropriate control of external factors (such as air conditioning in hot weather) such patients should perform similarly to people without orthostatic hypotension. With the qualifications and experience that I understand Mrs Jones had, there appears to be no reason why her medical condition should have excluded her from being short listed and thus deprived of the opportunity to be interviewed for the post she sought ...

... Mrs Jones is likely to have the condition of pure autonomic failure ... This would explain a number of her symptoms. This condition is unlikely to be cured, but has a good prognosis. There are a number of disabilities with a low BP, which can be overcome by changes in lifestyle, by modification of work practices, by non-pharmacological measures, and by the appropriate use of drugs. The disorder does not impair higher brain function and life expectancy usually is not diminished. In Mrs Jones' case it appears that this condition had not been initially recognised and when this was confirmed there were no measures instituted to help her at work. There appear to be other factors, including stress, which are likely to have exacerbated her physical disabilities. Her condition should not have prevented her being considered for the job for which she had applied and for which she appeared to have the requisite qualifications and experience."

32. In her report, Dr Davies said, in her opinion, the evidence did indicate that Mrs Jones was unfit for work at the time her employment was terminated. She said she then had to consider whether Mrs Jones would have met the criteria for ill health retirement under the LGPS Regulations. She then referred to the letter from Professor Mathias dated 22 November 2010 (see paragraph 9). Dr Davies said Professor Mathias was, at that time, unable to provide a prognosis or say that Mrs Jones would be unable to work because he needed to ascertain her response to a medication. She said, even though Mrs Jones' condition fulfilled the criterion of permanence, it would not have been possible to state that she was permanently unfit for work until age 65. Dr Davies noted,

"Professor Mathias states that it is 'unlikely to be cured but has a good prognosis'. This has to be taken in context and Mrs Jones would continue to have symptoms, would need to continue with medication and adopt the strategies she had been given to minimise the impact of a fall in her blood pressure and accommodations would need to be considered in the workplace."

33. Dr Davies then went on to consider Mrs Jones' longstanding abdominal pain. She noted that, at the time Mrs Jones' employment was terminated, this had been undiagnosed but was thought to be related to her autonomic failure. Dr Davies said,

considering Mrs Jones had been experiencing symptoms since 2004, had been thoroughly investigated and engaged in treatments, such as cognitive behavioural therapy, it was unlikely that she was going to become symptom free. Dr Davies said it was necessary to consider whether this symptom, without a confirmed diagnosis, would fulfil the LGPS criteria. She expressed the view that there was not sufficient evidence to find that Mrs Jones was permanently unfit for her role. Dr Davies went on to say she had then considered the impact of stress on Mrs Jones. She concluded,

“Taking into account all of the evidence provided in my opinion Ms Jones would not have fulfilled the [LGPS] Regulations of ‘permanently incapable of discharging efficiently the duties of their employment because of ill health or infirmity of mind or body’ in October 2009.”

34. SYP sent a copy of Dr Davies’ report to Mrs Jones, on 22 April 2013, and said their decision was that she did not meet the criteria for the release of benefits on the grounds of permanent ill health at the point her employment ended. Mrs Jones said she wished to appeal this decision. She also explained that she had shown Professor Mathias a copy of Dr Davies’ report and SYP’s letter. Mrs Jones said she was shortly to be admitted to hospital for more tests. SYPA acknowledged Mrs Jones’ letter. They subsequently issued an appeal decision stating that they were satisfied that SYP had now done everything they could to investigate Mrs Jones’ dispute. SYPA said the medical evidence did not support a finding that Mrs Jones was permanently incapable of performing the duties of her former job. They dismissed the appeal.

35. Mrs Jones subsequently wrote to SYPA enclosing a further letter from Dr Ingles. This letter had been written to Mrs Jones’ solicitors after the date of SYPA’s appeal decision. In it, Dr Ingles referred back to Professor Mathias’ September 2009 report, which he said remained the best summary of Mrs Jones’ case. He described pure autonomic failure as a “progressive, incurable, neurological condition” and went on to say,

“It is an unpleasant, clearly life-limiting, condition that has a good prognosis only in relation to other progressive forms of autonomic failure (which can be fatal within a few years of illness). This is not the case in Primary Autonomic Failure, which is not typically a life shortening illness, but the quality of life is unquestionably affected.”

36. Dr Ingle went on to say the illness had an insidious onset and it was difficult, therefore, to say whether Mrs Jones was fit for work in 2008. He said, had she returned to work and found herself unable to carry out her duties, he would have concluded that she was unfit. Dr Ingle then said, in more recent clinic visits, there had been evidence of significant clinical deterioration; particularly in relation to Mrs Jones’ ability to maintain her blood pressure against gravitational stress. He said they would be looking at new treatment in the coming months.

37. SYPA responded by saying this additional evidence did not cause them to change their decision. Mrs Jones sought assistance from the Pensions Advisory Service (**TPAS**). She provided them with a further letter from Dr Ingle in which he suggested that Professor Mathias' reference to a "relatively good prognosis" had been misunderstood. Dr Ingle made the point that this was only relative to other forms of progressive autonomic failure which were rapidly fatal. He said Mrs Jones' condition was a serious one for which, in his experience, an ill health pension would normally be paid. TPAS asked SYPA to review Mrs Jones' case. SYPA responded by saying they had reviewed Professor Mathias' report and did not agree that his comments had been taken out of context. They said they did not think it would be helpful to revisit Mrs Jones' case.

Summary of Mrs Jones' position

38. Mrs Jones has made the following points:

- It took six months for SYP to respond to her original request for ill health retirement. She had to resort to writing to the Chief Constable.
- Incorrect information has been provided on a number of occasions.
- SYP's legal department said she could not apply for ill health retirement because of the compromise agreement. There is no mention of her pension rights in the agreement.
- SYP have disregarded information provided by her specialists and accused Ms Best of exaggerating.
- It took 18 months for her to obtain a report from Professor Mathias in connection with her discrimination case because he was frequently abroad. As a result, his report has been misinterpreted.
- Dr Ingle took over her treatment and provided his report to clarify and confirm her condition and how it affects her daily life.
- She has not been able to work since leaving SYP and has been in receipt of DLA and Personal Independence Payment (**PIP**).

Summary of South Yorkshire Police's position

39. SYP submit:

- It took six months to reach a decision following Mrs Jones' request for ill health retirement. However, communication did take place during the intervening period.
- They do not know the outcome of Dr McKenzie's contact with Mrs Jones' doctors because the information would have been forwarded directly to the IRMP.

- Mrs Jones may have misunderstood their response to her request. When she signed the compromise agreement, Mrs Jones terminated her employment with them. When she applied for her pension, she was no longer an employee and could not apply for ill health retirement; she could apply for the early release of her deferred benefits. This has been addressed under the appeals process.
- SYPA determined that they had done everything they could do to investigate Mrs Jones' dispute. They also determined that the medical evidence did not support a finding that Mrs Jones was permanently incapable of performing the duties of her former job.
- The decision to allow access to a pension is for the employer to make. In order to make an informed decision, the employer seeks the advice of an IRMP. In Mrs Jones' case, three occupational health specialists have provided an opinion on the question of permanent incapacity; all of them reached the conclusion that Mrs Jones did not meet the criteria.
- As to whether information from Mrs Jones' specialists was disregarded and Ms Best accused of exaggerating, they did not have direct involvement in these matters and cannot comment.

Summary of South Yorkshire Pension Fund's position

40. SYPA have made the following points:

- They have no decision making capacity in this case.
- In accordance with the LGPS Regulations, they authorise the IRMPs who are used by employers.
- They authorise three IRMPs; two of whom deal with day to day cases and appeals and the third to deal with cases which may already have been seen by the other two. The IRMPs' assessments are purely evidence based and dependent upon the quality of the evidence supplied by the employer's occupational health department. Reports provided by the IRMPs are now sent to applicants to check for inaccuracies or omissions before being sent to the employer; although this was not the case when Mrs Jones' case began.
- Mrs Jones could have applied for release of her deferred benefits based on later medical evidence if she felt that her condition had worsened since her date of leaving; she has not done so. Mrs Jones is now aged 65 and her benefits are due to be paid because she has reached normal retirement age. They have contacted Mrs Jones but she has so far declined to claim her benefits. The benefits are currently receiving actuarial increases because of non-payment but Mrs Jones could be receiving them, notwithstanding her appeal.

Conclusions

41. Mrs Jones' employment with SYP was terminated under a compromise agreement. At the time, she was on long term sickness absence. SYP initially appeared to take the view that it was the compromise agreement which prevented them from considering Mrs Jones for ill health retirement under Regulation 20. They now say that this was a misunderstanding and what they meant was Mrs Jones was no longer an employee when she applied for ill health retirement. If a misunderstanding arose, it is easy to see why since SYP referred Mrs Jones to the compromise agreement and said that early access to her pension on ill health grounds was covered by payment of a sum in "full and final settlement of all claims or rights of action".
42. SYPA determined, at stage two of Mrs Jones' appeal, that SYP should have considered her under Regulation 20. They made the point that what determined which benefits were payable was the reason for leaving. SYPA determined that Mrs Jones' employment had been terminated on the grounds of voluntary resignation or dismissal and, as a result, there was no requirement for SYP to consider ill health retirement. They then determined that Mrs Jones had a right to challenge this decision and, as a result, SYP should consider if she met the criteria for payment of benefits under Regulation 20.
43. It is questionable whether SYP and Mrs Jones were able to compromise any entitlement she might have to a pension under Regulation 20 in view of Section 91 of the Pensions Act 1995. This prevents any entitlement to benefit which Mrs Jones had under the LGPS being assigned, commuted or surrendered. There is a degree of uncertainty as to what rights are protected by Section 91 and what can be compromised under an agreement (see *International Management Group (UK) Ltd v German and another* [2010] EWCA Civ 1349). Mrs Jones' right to benefits under Regulation 20 was/is contingent on her meeting the criteria set out in the regulation. She would only have a right to the pension if she met the criteria in Regulation 20(1).
44. However, the fact that Mrs Jones was on long term sick leave suggests that SYP should have considered whether her employment should have been terminated under Regulation 20. Although it is for an employer to determine the grounds on which to terminate employment, it would not be appropriate to seek to circumvent Regulation 20 simply by terminating employment under a compromise agreement.
45. It was maladministration for SYP not to consider whether Mrs Jones' employment should have been terminated under Regulation 20 in October 2009. It remains to consider whether any injustice arising out of this maladministration was addressed by the appeal process.
46. SYP referred Mrs Jones' case to an IRMP, Dr Davies, and asked her two specific questions:
 - Prior to signing the compromise agreement, was Mrs Jones capable of undertaking her role due to her medical condition?

- If she was not capable of doing so, would she have met the criteria for ill health retirement?
47. Dr Davies provided a comprehensive report in which she expressed the view that, at the time Mrs Jones' employment was terminated, she would have been unfit to work. She then went on to consider the second question. Dr Davies referred to Professor Mathias' letter of 22 November 2010 (see paragraph 9). She said Professor Mathias had been unable to provide a prognosis or say that Mrs Jones would be unable to work because he needed to ascertain her response to a medication. Dr Davies said Mrs Jones' condition fulfilled the criterion of permanence, but it would not have been possible to state that she was permanently unfit for work until age 65.
48. What Professor Mathias had said was he wanted to review Mrs Jones and possibly arrange for some tests in order to ascertain her response to medication before answering the question. This is not quite the same as saying that he could not provide a prognosis or say that Mrs Jones would be unable to work. In fact, Professor Mathias seems to have been quite willing to provide a prognosis – once he had reviewed Mrs Jones.
49. Mrs Jones' case perhaps illustrates the dangers which can lie in relying solely on the IRMP's report or certificate. Had SYP seen the evidence upon which Dr Davies had based her report, they would have been in a position to seek clarification; either from her or from Professor Mathias himself. There will, no doubt, be cases which are so straightforward and uncontroversial that the IRMP's report alone will suffice. However, where the evidence is contested, it would be prudent for the decision maker to review all relevant evidence.
50. Dr Davies also referred to Professor Mathias' September 2009 report and, in particular, to his comment that Mrs Jones' condition was "unlikely to be cured but has a good prognosis". She considered this to mean Mrs Jones would continue to have symptoms, would continue to need medication and would have to adopt strategies to minimise the impact which a fall in her blood pressure would have. Dr Davies does not appear to have noted Professor Mathias' caveat to his comment regarding prognosis in November 2010; namely, that it was good "in terms of longevity". Dr Davies also noted Professor Mathias' comments that the condition did not impair higher brain function. She considered Professor Mathias' report supported a finding that Mrs Jones would not have been unable to do her job as a result of her condition.
51. Professor Mathias' report was written in September 2009 but it related to Mrs Jones' condition in 2008; when she applied for the post of Finance Officer. Mrs Jones' condition is described as progressive and the evidence indicates there has been a deterioration in her condition; at least since termination of her employment. In view of this, it would have been prudent for SYP to seek more up to date evidence from Professor Mathias or to ask Dr Davies to do so. Perhaps if Dr Davies had not misinterpreted Professor Mathias' letter of 22 November 2010, she may well have followed this up. SYP did not see his letter and were, therefore, unaware that there was additional evidence which was relevant to their decision.

52. SYP have said it is Mrs Jones' responsibility to submit any additional evidence she felt was necessary. However, the LGPS Regulations make it clear that SYP are the decision makers and, as such, they have a responsibility to ensure their decision is informed by appropriate evidence. What weight they give to any of the evidence is for them to determine, but they do at least need to see it. It would be open to SYP to prefer the advice they receive from an IRMP but, at a minimum, they should satisfy themselves that there have been no errors or omissions of fact by the IRMP before relying on the advice. They should also be able to explain to Mrs Jones why they prefer the IRMP's advice.
53. It is not acceptable for SYP to answer Mrs Jones' concerns that evidence from her specialists has not been taken into account by simply saying that they were not directly involved in the matter. The point is they should have been.
54. The evidence does not indicate that SYP have considered whether Mrs Jones was eligible for a pension under Regulation 20 in a proper manner. She has suffered injustice inasmuch as it has not been established whether she should have been receiving a pension since October 2009. Her complaint is upheld against SYP on this basis.
55. SYPA have made the point that they do not have a decision making role, which is true. They do have a role in the appeal process. SYPA came to the conclusion that SYP should have considered whether Mrs Jones should be receiving a pension under Regulation 20. There was no maladministration on their part.
56. Mrs Jones has made the point that it took six months for SYP to respond to her request for ill health retirement. SYP acknowledge that it took six months for them to reach a decision, but say there was communication with Mrs Jones in that time. Mrs Jones asked to be considered for ill health retirement in January 2010; a decision as to her eligibility under Regulation 20 was not made until April 2013. Whilst it is true that SYP communicated with Mrs Jones in that time, it is still the case that it took them over three years to make a decision which should have been made at the time Mrs Jones' employment was terminated. That unnecessarily prolonged period to reach a decision will have been extremely stressful for Mrs Jones and she faces a further period of uncertainty whilst her case is reviewed. It is right that this is recognised by payment of a modest amount of compensation.

Directions

57. Within 14 days, SYP will ask Professor Mathias to provide a further report giving his opinion on Mrs Jones' state of health as at October 2009. Upon receipt of Professor Mathias' report, SYP will refer Mrs Jones' case to an IRMP who has not previously been involved for an opinion under Regulation 20. They will make a fresh decision as to her eligibility for a pension under Regulation 20 upon receipt of the IRMP's report.
58. If, on review, SYP determine that Mrs Jones' employment should have been terminated under Regulation 20, they are to request SYPA to pay her pension from

PO-5197

27 October 2009; arrears of pension should include interest as payable under the LGPS Regulations.

59. In addition, within the same 14 days, SYP shall pay Mrs Jones £500 in recognition of the fact that she has suffered distress and inconvenience as a result of the unnecessarily prolonged decision making process.

Anthony Arter

Pensions Ombudsman
29 July 2015