

Ombudsman's Determination

Applicant	Mrs Danielle Staples
Scheme	Principal Civil Service Pension Scheme
Respondent(s)	Ministry of Justice, MyCSP

Complaint Summary

Mrs Staples has complained that she has been refused ill health early retirement under the Scheme.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against MoJ, because there were flaws in the process in considering whether or not Mrs Staples met the criteria for ill health retirement.

The complaint should be upheld against MyCSP, because they failed to identify flaws in the process on reviewing the matter.

Detailed Determination

Provisions of the rules of the Scheme

The rules of the Scheme (the **Rules**) provide that an active member is entitled to an immediate pension before reaching pension age if:

- in the opinion of the medical adviser the member has suffered a permanent breakdown in health due to incapacity; and
- the member has at least two years qualifying service; and
- the Minister has agreed to the member becoming entitled to an immediate pension.

Permanent under the Rules means a breakdown in health until the member reaches pension age.

In addition, permanent breakdown in health means that the member is (a) incapable of gainful employment, in which case an upper tier benefit will be paid; or (b) incapable of doing his own or a comparable job, in which case a lower tier benefit will be paid.

Material facts

1. Mrs Staples was employed by the MoJ and had been a member of the Scheme since April 2005.
2. In 2010, as a result of prolonged sickness absence and a report from Atos, the MoJ's occupational health adviser, the MoJ decided to submit Mrs Staples' case to Capita Wellbeing and Health, the Scheme Medical Adviser (**SMA**), for consideration. At the time she was 52 years old.
3. Atos, in their report of 14 June 2010, say:

"Current capacity for employment

In my opinion she is not fit for any work.

Outlook

The outlook is for the medical conditions to continue. They are likely to follow a chronic pattern with the symptoms flaring up and settling down from time to time. In my opinion her impairment is likely to be permanent and she is not likely to be fit for work for the foreseeable future.

Responses to specific questions

...

Can you confirm whether the medical treatment Danielle is receiving and the likely medical treatment she will receive in the future, is going to have any impact on her performance in the workplace on her return to work?

The treatment is likely to relieve some of her symptoms but is not going to achieve a cure and the side effects of the treatment are likely to continue to impair her performance.

Are there any therapeutic or lifestyle changes that you would recommend for Danielle to continue in this role?

In my opinion this is not going to achieve a return to work.”

4. The SMA issued a report on 26 November 2010, which concluded:

“It is difficult to conclude that an illness will not resolve or improve until all the evidence-based treatments currently widely available for the specific illness have been completed. The reason for this difficulty is the realistic expectation in most circumstances that remaining treatment options will improve symptoms and functional capabilities to enable a return to work.

When applications are considered before all evidence-based treatments have been taken place account is taken of:

- the likely effect of possible treatments on the incapacitating effects of the applicant’s medical condition;
- the likely outcome to treatment;
- the prospect of the treatment taking place before the normal pension age and whether that treatment will result in improved functional capability and return to work.

...

Having considered the application and evidence there is, in my opinion, reasonable medical evidence that Mrs Staples is prevented from discharging her duties and the key issue in relation to the application is whether or not Mrs Staples’ incapacitating health problems are likely to be permanent. On this occasion it is my opinion that the scheme definitions as outline above are, on the balance of probabilities, unlikely to be met.

The medical information available confirms that Mrs Staples has had significant health issues over a number of years. Her current situation is chronic generalised pain syndrome. The most recent assessment by a

consultant confirms that pain management strategies could be of value to controlling her symptom profile. Her current medication and options for treating her condition have not been exhausted. I recognise that her symptoms impact her day to day living. However, based on the possibility of further treatment options which are likely to improve her current symptoms profile I feel that the criteria for retirement on the grounds of ill health are not met in this case.

I enclose an ill health retirement refusal certificate.

...

5. As a result of the SMA's report and the ill health retirement refusal certificate, Mrs Staples was not granted ill health retirement.
6. In February 2011, Mrs Staples appealed the decision not to grant her ill health retirement. The basis of her appeal was that she did not feel that all the relevant evidence had been considered. She said that there was no indication that the SMA had considered Atos' report, which indicated that her condition was likely to be permanent. She added that over the years she had been made aware of various treatments available for her condition, but due to complications in her case her options were limited.
7. The SMA considered Mrs Staples appeal in May 2011, and concluded that the new medical evidence did not change the decision not to grant her ill health retirement. The SMA said that it was evident that treatment options had not been fully explored and "more aggressive pain management with psychological input and with possible psychiatric input" may be helpful. In the opinion of the SMA, taking into account her relatively young age and the potential for more treatment options, it was premature to judge her as being permanently incapable of work. The most recent clinical assessment confirmed that with better psychological management of her mental health, her perception of her underlying pain and "musculoskeletal conditions", including her respiratory condition may well improve significantly.
8. Atos in their report of 13 June 2011, felt that there were small gains in terms of pain control with medication and the impact of treatment was unlikely to change her functional capacity. As there was a difference in opinion, the SMA felt it appropriate to refer Mrs Staples' case to the Medical Appeals Board (the **Board**).
9. On 5 August 2011, the SMA wrote to the MoJ saying that the Board had considered Mrs Staples' case and concluded that while they had a great deal of sympathy for her, and agreed with other clinicians that her problems did restrict her daily living activities and prevented her from working at that time, they could not conclude that her condition was permanent because there were other treatments available for her to try. The SMA added that in the Board's opinion there were remaining treatment options and that, on the balance of probability, these treatments would enable her to

return to work. Therefore, the Board rejected her appeal against the refusal to support ill health retirement.

10. Mrs Staples was dismissed by the MoJ on 11 August 2011, for unsatisfactory attendance.
11. On 16 September 2011, the SMA wrote to Mrs Staples in response to an email she sent them on 16 August 2011. The SMA said:

“With regard to the issue of remaining treatment options, I will quote from the relevant paragraphs of the Appeal Board’s report,

“We think she would benefit from a psychiatric assessment. This would serve to make an expert diagnosis of her mental illness, as well as advising on the most appropriate form of therapy. Although she has had CBT in the past, given her history, it may be that cognitive analytical therapy would be helpful”.

In Paragraphs 9.11 and 9.12 of their report the Board state “until she has had further functional assessment and a review of her pain management strategy, including the psychological aspects, we conclude that it would be premature to conclude that Mrs Staples’ incapacity is permanent.

We believe that this approach could have a considerable influence on Mrs Staples’ perception of the effects of her chronic generalised pain syndrome and her ability to work.”

12. On 27 September 2011, the MoJ wrote to Mrs Staples telling her that the Board had rejected her appeal against the refusal to grant her ill health retirement. They said that the Board felt that:
 - the key issues in her case were whether her current level of disability was likely to be permanent;
 - if treatment was successful, she would, with suitable adjustments, be able to undertake her former role; and
 - it would be incorrect at the current time to conclude that her incapacity was likely to be permanent meaning the criteria for ill health retirement would not be satisfied.
13. Mrs Staples made a complaint about the refusal to grant her ill health retirement which was dealt with under the Scheme internal dispute resolution procedures (**IDRP**). Her complaint was not upheld under stage one IDRP, which was dealt with by MyCSP. MyCSP said:
 - She was provided with a copy of the Medical Appeals Guide (the **Guide**) by the MoJ.

- The SMA provides an opinion on whether an individual satisfies the criteria for ill health retirement under the Rules. There is nothing in the Guide which indicates that the SMA must stipulate, where in their opinion further treatment might be beneficial in a particular case and what that further treatment might be.
- It was impossible to say what effects any further treatment will have in individual cases, as these could vary from case to case. This is why a condition cannot be considered permanent until all appropriate treatments have been explored.

14. Mrs Staples' complaint was also dealt with by the Pension Scheme Executive (the **PSE**) under stage two IDRP but was not upheld.

Summary of Mrs Staples's position

15. She had to leave her job as a courtroom usher due to ill health.
16. The medical assessors reporting to the SMA believed that, on the balance of probability, the further treatments recommended would enable her to return to work. However, the problems and reasons given at the time for not being able to carry out her normal duties have not changed. She continues to receive treatment, which is life long, and has since suffered further complications with her health.
17. She had previously asked for confirmation of the options of the treatment it was thought she would benefit from in order to return to work, however, no reference was made to what those treatment options maybe.
18. She is able to show that she had previously attended two weeks of back rehabilitation, which covered psychiatric assessment and cognitive analytical therapy. She has also had further back rehabilitation to help with her joints, back, fibromyalgia and rheumatoid osteoporosis, but this has had little effect. She continues to take strong painkillers in order to function daily which is limited still.
19. She was hospitalised last year for total spinal loss and was unable to walk. She has had surgery and will be undergoing a colonoscopy.

Summary of MoJ's position

20. Mrs Staples' complaint was considered by the PSE under stage two IDRP and they are satisfied that the MoJ and the SMA dealt with her application for ill health retirement in accordance with the correct procedures.

MyCSP's position

21. Their position is the same as set out in their stage one and the PSE's stage two IDRP decisions.

Conclusions

22. Mrs Staples' employment did not cease on the grounds of ill health retirement – she was dismissed for unsatisfactory attendance. I accept that the reason for her poor attendance was because of her state of health. However, that alone does not mean that the termination of her employment should be treated as retirement on ill health grounds. It would have been ill health retirement only if her ill health prevented her from being gainfully employed, or if she was unable to do her own or a comparable job and this was likely to be permanent (ie continue until her pension age, which is age 60).
23. The SMA needs to issue a medical certificate stating that the member has suffered a permanent breakdown in health due to incapacity. The medical certificate enables the MoJ to consider Mrs Staples for ill health retirement. The step after that would be for the MoJ to consider whether they agreed to ill health retirement. In my opinion, it is almost certain that they would have bearing in mind that she was dismissed because of absences caused by her ill health.
24. It is not for me to determine whether the correct conclusion has been drawn from the medical evidence in Mrs Staples' case, or to substitute my own opinion for that of those properly appointed to reach a decision. The matter I need to consider is whether the decision has been reached in a proper manner, as provided by law.
25. The reason given by the SMA in November 2010, for rejecting Mrs Staples for an ill health pension was because there were further possible treatment options available to her which were likely to improve her condition. The SMA next rejected Mrs Staples' appeal in May 2011, on the grounds that there were more treatment options that had not been explored. The matter was then referred to the Board and the decision was that the remaining treatment options would, on the balance of probability, enable her to return to work.
26. The question to be answered here was whether, on the balance of probabilities, Mrs Staples' ill health was likely to be permanent. If her health might improve, as a result of treatment, so that she could potentially resume doing her job, then the view might well have been taken that her ill health was not likely to be permanent. However, proper regard should be had for whether, for whatever reason, access to such treatment within the time available is possible and for the speed with which any improvement may be expected. Given that Mrs Staples was within eight years of her pension age when she was first considered, the treatment in question would need to be accessed and her health would need to improve within that timescale. I can see no evidence that these considerations played a part in the decision making process either at the time she was first considered for ill health retirement by the SMA or on appeal when the SMA and the Board considered the matter. Therefore, in my view, the decisions of the SMA and the Board were flawed.

27. It is not uncommon that when various medical opinions have been obtained for there to be differences in opinion. For the decision maker to favour one medical opinion over another is not in my judgment evidence of any perversity in the decision, provided that there is a reasonable explanation as to why weight is given to one set of evidence over another. There was in this case a difference in opinion between Atos and the SMA as to whether further treatment options would improve her condition. I have seen no explanation from the SMA and/or the Board as to why more weight is given to the opinion of the SMA over Atos. As Atos are the MoJ's occupational health adviser there would, in my view, need to be a reasonably good explanation as to why their opinion was being rejected. The view that seems to be taken was that if untested treatments remained available, the condition could not be said to be "permanent". Once again, the decision was flawed.
28. I have identified flaws in the process in deciding whether Mrs Staples met the criteria for an ill health pension under the Scheme. I take the view that it would be safer for the SMA and the Board to have considered: (a) the time available to access the treatment in question and the speed for improvement in her health given her age; and (b) the reason for the difference between the opinions of the SMA and Atos.
29. Even though the SMA issues a medical certificate confirming that Mrs Staples meets the criteria for ill health retirement, the responsibility for ensuring that the SMA's review, and also the Board's review, is carried out properly and in accordance with the Rules lies with the MoJ. In this, I am guided by the case (*R (on the application of Crudace) v Northumbria Police Authority* [2012] EWHC 112 (Admin)) where Behrens J found that the SMP (the Selected Medical Practitioner) and PMAB (the Police Medical Appeal Board) were acting as delegates of the police authority; notwithstanding the fact that they were independent and their decisions were binding on the authority.
30. I therefore uphold the complaint against the MoJ and remit the decision to them for further consideration.
31. With regard to MyCSP, their role was to review that the process had been carried out correctly. Their failure to identify the flaws in the process is maladministration, and therefore I uphold the complaint against them.
32. I recognise that Mrs Staples has suffered non-financial injustice in the form of distress and inconvenience, and therefore, I am awarding her compensation for the flaws in the decision making process in considering her for ill health retirement.

Directions

33. I direct that within 28 days of the date of this determination, the MoJ will take further advice on Mrs Staples' eligibility for an ill health pension at the time she was dismissed, ie August 2011, and upon receipt of that advice, they shall reconsider their decision. In particular, the MoJ will obtain advice on: (a) the availability of the treatment in question and the speed for improvement in her health given her age; and

(b) the reasons for the difference between the opinions of the SMA and Atos and why more weight should be given to one over the other.

34. Within 14 days of reconsidering their decision, the MoJ will write to Mrs Staples informing her of their decision and giving reasons for it.
35. If the MoJ was to decide that she should be granted ill health retirement backdated to the time she was dismissed, the pension should be put into payment as soon as practicable. The back instalments of the pension, from the date of her dismissal to the date payment commences, shall be paid as a lump sum plus interest. Interest is simple interest, calculated in accordance with the rate declared from time to time by the reference banks, is to be paid on each instalment from the due date of each payment to the actual date of payment.
36. In addition the MoJ and MyCSP shall pay Mrs Staples £300 and £200, respectively, for the distress and inconvenience caused to her.

Anthony Arter

Pensions Ombudsman
21 July 2015