

Ombudsman's Determination

Applicant	Mrs E
Scheme	Local Government Pension Scheme (LGPS)
Respondents	Rhondda Cynon Taf (RCT)

Outcome

1. I do not uphold Mrs E's complaint and no further action is required by Rhondda Cynon Taf.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs E has complained about RCT's decision to award her Tier 3 ill health retirement benefits. Mrs E believes she meets the criteria for Tier 1 benefits under the LGPS regulations (see Appendix 2).
4. Mrs E has also complained that RCT have ignored her appeal against their decision. In response to their point that she did not comply with their internal dispute resolution (**IDR**) procedure, Mrs E says she wrote to the person who had been corresponding with her. She says she has been asking that her case be reviewed, under the IDR procedure, by an independent registered medical practitioner and not RCT's Legal Director.
5. Mrs E says she has not been given a second chance to provide additional medical information to RCT; unlike other members of the LGPS. She feels she has been discriminated against. She would like the opportunity to submit Dr Ghosh's report because it pre-dates the decision to uprate her benefits to tier 2. She points out that she had Dr Ghosh's report some eight months prior to RCT's 18 month review of her benefits but they would not agree to her submitting it.

Background information, including submissions from the parties

6. Mrs E's employment with RCT ceased in July 2011. She was awarded Tier 3 benefits under regulation 20(4). Following the 18 month review provided for in the regulations, Mrs E's benefits were uplifted to Tier 2.

7. Following the Ombudsman's previous determination, RCT referred Mrs E's case to an independent registered medical practitioner (**IRMP**), Dr Hancock, who provided a report on 21 September 2014 (see Appendix 1). A copy of this report was sent to Mrs E. She raised a number of queries with Dr Hancock. Amongst other things, Mrs E asked how Dr Hancock could say she would never recover or return to employment but then agree with the decision to award Tier 3 benefits in 2011. She referred to the definition of gainful employment (see Appendix 2) and pointed out that she had already been absent through illness for approximately 20 months at the time. Mrs E also asked Dr Hancock to confirm whether he had been provided with occupational health notes which would show she had been absent from work due to stress and anxiety impacting on her physical health conditions. In his response, Dr Hancock said he had sufficient information to make a reasonable conclusion. He said the specific question to be answered, the medical information reviewed and the reasons for his decision were clearly stated in his report.
8. RCT wrote to Mrs E on 28 October 2014. On the basis of Dr Hancock's opinion and that no new medical evidence had been submitted which suggested a different award should have been made in 2011, RCT concluded that the correct decision had been made.
9. Mrs E notified RCT that she wished to appeal this decision. She said she wished to submit a stage two appeal in order to submit further medical evidence. Mrs E addressed her appeal letter to RCT's Head of Employment Services, who had written to her with RCT's decision. She followed this up on 28 November 2014. On 8 December 2014, RCT's Pensions Administration Manager responded to Mrs E's correspondence. She said Mrs E had previously been afforded the opportunity to submit a stage two appeal in October 2013, and her case had progressed to the Ombudsman. She said RCT had complied with the Ombudsman's directions and that the appeal process had been concluded.

Adjudicator's Opinion

10. Mrs E's complaint was considered by one of our Adjudicators who concluded that no further action was required by Rhondda Cynon Taf. The Adjudicator's findings are summarised briefly below:
 - RCT (and the IRMP) were required to review the 2011 decision. They were required to do so on the basis of the evidence which would have been or could have been available at that time. They could not apply hindsight.
 - Dr Hancock was aware that this is what he was being asked to do. He concluded that, whilst it subsequently proved not to be the case, Mrs E could reasonably have been expected to recover sufficiently to undertake gainful employment within three years of her employment ceasing in 2011. There was no reason why RCT should not have relied on Dr Hancock's advice when confirming the decision to award tier 3 benefits in 2011.

- Dr Ghosh's report had been written in 2012 and it was not clear whether his opinion related to the situation in 2012 or 2011. In any event, a difference of opinion (even between doctors) was not sufficient to find that RCT should not have relied on Dr Hancock's advice.
 - RCT had been incorrect in saying the appeal process had been concluded. Because they had made another decision, Mrs E should have been allowed to appeal this through the IDR procedure. However, it seemed likely that the case would have progressed as far as an application to the Ombudsman and, on that basis, Mrs E had not suffered any injustice.
11. Mrs E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs E provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mrs E for completeness.
 12. Mrs E is most concerned that she was not afforded the opportunity of appealing RCT's decision under the two stages of the IDR procedure. In particular, she wanted the opportunity to submit further medical evidence in the form of Dr Ghosh's report. Mrs E is of the view that, had Dr Ghosh's report been taken into account, RCT would/should have come to the decision to award her tier 2 benefits from an earlier date than they did.
 13. The decision under review was that which was made in 2011 (to award tier 3 benefits). Mrs E was allowed to submit Dr Ghosh's report; it is listed by Dr Hancock in the evidence he reviewed. However, he made the point that the report dated from 2012, which was after the period under review. Mrs E is of the view that, had she been given access to the IDR procedure, she would have been able to submit Dr Ghosh's report to RCT and this would have resulted in a different decision. I do not find that to be the case. It seems more likely than not that RCT would have confirmed their decision (in reliance on Dr Hancock's advice) and Mrs E would have pursued her appeal as far as the Pensions Ombudsman Service. As such, Mrs E is in the position she would have been in regardless of RCT's view on the IDR procedure.
 14. Mrs E has pointed out that she obtained Dr Ghosh's report some eight months before RCT undertook the 18 month review under regulation 20(7)(a). Again, her belief is that had she been allowed to submit this report under the IDR procedure in 2012, RCT would have uprated her benefits to tier 2 from an earlier date. However, this is again based upon an assumption that RCT would have accepted Dr Ghosh's advice instead of that from the previous IRMPs in relation to their decision in 2011. Because the report post-dates their 2011 decision, this is not likely to have been the case. The fact that the report pre-dates the 18 month review is not relevant because RCT are not required to review tier 3 benefits at an earlier date.

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Ombudsman's decision

15. Therefore, I do not uphold Mrs E's complaint.

Anthony Arter

Pensions Ombudsman
22 July 2016

Appendix 1

Medical evidence

16. Dr Hancock provided his report on 21 September 2014. He noted that he was being asked to review Mrs E's case following a determination by the Pensions Ombudsman. Dr Hancock said his remit was to give an opinion, as at the date Mrs E's employment terminated, as to whether she was:
 - permanently (until age 65) incapable of carrying out her duties; and
 - likely to obtain gainful employment within three years following cessation of employment.
17. Dr Hancock said his report was based on a review of the available medical records, ill health retirement certificates, sickness absence records and his clinical assessment following a consultation with Mrs E. He confirmed that the opinion he gave related to the decision which "would have been concluded from [his] assessment of the available medical facts in July 2011". He confirmed that it had not been influenced by the subsequent course of Mrs E's health problems. Dr Hancock listed the medical reports he had reviewed. These included:
 - Dr Ghosh, consultant psychiatrist, dated 15 May 2012,
 - Dr Thomas, occupational health practitioner, dated 16 January 2013,
 - Dr Jones, occupational health practitioner, dated 10 January 2012,
 - Dr Samuels, GP, dated 16 June 2011 and 5 January 2012,
 - Dr Mansouri, specialist occupational physician, dated 6 July 2011, and
 - Ms Hathaway, occupational health adviser, dated between 29 May 2008 and 18 September 2011.
18. Dr Hancock outlined Mrs E's work situation. He said she had confirmed that she had not been employed or undertaken any voluntary work since her retirement in July 2011. He noted that she had, therefore, last been in work four years ago. Dr Hancock then summarised Mrs E's medical history.
19. Dr Hancock said Mrs E was "evidently unfit for work with ongoing anxiety and depression". He recorded that she had been distressed during the consultation. Dr Hancock said,

"Stress-related setbacks are often encountered amongst vocational carers; from my perspective [Mrs E's] presentation is one that is commonly encountered in occupational health. The information provided by [Mrs E] essentially correlates with documentary evidence; recall of times and dates is not expected to be precise.

Like many vocational carers [Mrs E] indicates high commitment and high standards in her previous work. Such values are commendable but increase susceptibility to perceive stress if there are shortcomings in service care ...

... Typically [Mrs E] refers to feeling “burn out” during her final months at work.

[Mrs E] has a long-standing history of recurrent setbacks with anxiety and low mood, as evidenced by the GP record. It is only in the four years prior to retirement in July 2011 that setbacks progressively impacted on attendance at work ...

Although stress has been predominantly attributed to work factors by [Mrs E] it is my opinion that treatment for breast cancer in 2009 would have been a psychological ordeal and would have been a contributory factor in reducing stress resilience. I would therefore reasonably conclude psychological vulnerability on return to work in February 2010 as supported by the prolonged phased return to work, further assessment with the general practitioner for stress-related problems in April 2010 and the regular use of annual leave to offload coping difficulties at work.”

20. Dr Hancock expressed the view that, in July 2011, Mrs E was permanently (until age 65) incapable of carrying out her employed duties. He then said it was his view that she was likely to obtain (*sic*) gainful employment within the three years following the cessation of her employment. Dr Hancock said he would concur with the Tier 3 award.
21. Dr Hancock then gave his reasons for reaching this conclusion as follows:
 - Mrs E’s anxiety and depression were predominantly attributable to work factors. It would be reasonable to expect recovery away from work, enabling her to engage with alternative gainful employment.
 - Mrs E had recovered from previous work related setbacks. Whilst her psychological health setback in 2011 was more entrenched, there would still be a reasonable medical expectation of recovery enabling her to engage with gainful employment elsewhere.
 - Therapeutic intervention had been limited to antidepressant medication and referral to counselling via her employment. Her GP’s report indicated some initial improvement. There was scope for further psychotherapeutic intervention through increased medication, cognitive behavioural therapy (CBT) and specialist referral which would enable Mrs E to recover and engage in gainful employment within three years.
 - Specialist assessment had not taken place until 2012. The specialist’s report had been commissioned in support of Mrs E’s application for ill health retirement, rather than for further therapeutic intervention to assist recovery. The specialist’s recommendations were “inadmissible” to his considerations

which related to information up to July 2011. The only external medical report assisting the recommendation for ill health retirement in July 2011 was the GP's report dated 16 June 2011; this had been considered.

- Dr J had reviewed the Tier 3 recommendation independently in January 2012 and had endorsed it.

22. Dr Hancock noted that he had been asked to provide a further ill health retirement certificate. He questioned this and said a certificate could only be issued with an amendment to indicate that it related to the decision in July 2011. He said this was to avoid confusion because Mrs E's award had been reviewed and upgraded to Tier 2 in January 2013.
23. Mrs E has also provided a copy of Dr Ghosh's report dated 15 May 2012. In his conclusions, Dr Ghosh expressed the view that Mrs E was exhibiting signs of a moderate degree of mixed anxiety and depression. He said she was markedly disabled by her condition and found it difficult to cope with daily activities. Dr Ghosh said Mrs E was unlikely to work ever again in her present state. He outlined the treatment Mrs E had received. He noted that the prescribed medication had provided minimal improvement in her condition and she had not found general counselling to be of benefit. Dr Ghosh expressed the view that Mrs E's mixed anxiety and depressive condition should respond to CBT but thought it unlikely that she would ever fully recover. He thought she met the criteria for Tier 1 benefits and that she had no reasonable prospect of obtaining (*sic*) gainful employment before age 65.

Appendix 2

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended)

24. At the time Mrs E's employment ceased, regulation 20 provided,

- “(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5 -
- (a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and
 - (b) that he has a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age,
- they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2), (3) or (4), as the case may be.
- (2) If the authority determine that there is no reasonable prospect of his being capable of undertaking any gainful employment before his normal retirement age [**Tier 1**], his benefits are increased -
- (a) as if the date on which he leaves his employment were his normal retirement age; and
 - (b) by adding to his total membership at that date the whole of the period between that date and the date on which he would have retired at normal retirement age.
- (3) If the authority determine that, although he is not capable of undertaking gainful employment within three years of leaving his employment, it is likely that he will be capable of undertaking any gainful employment before his normal retirement age [**Tier 2**], his benefits are increased -
- (a) as if the date on which he leaves his employment were his normal retirement age; and
 - (b) by adding to his total membership at that date 25% of the period between that date and the date on which he would have retired at normal retirement age.
- (4) If the authority determine that it is likely that he will be capable of undertaking gainful employment within three years of leaving his employment, or before reaching normal retirement age if earlier [**Tier 3**], his benefits -

- (a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and
 - (b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.
- (5) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine ("IRMP") as to whether in his opinion the member is suffering from a condition that renders him permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition he has a reduced likelihood of being capable of undertaking any gainful employment before reaching his normal retirement age.

...

- (7)
 - (a) Subject to sub-paragraph (c), once benefits under paragraph (4) have been in payment to a person for 18 months, the authority shall make inquiries as to his current employment.
 - (b) If he is not in gainful employment, the authority shall obtain a further certificate from an independent registered medical practitioner as to the matters set out in paragraph (5).

...

- (8)
 - (a) The authority shall discontinue the payment of benefits under paragraph (4) if they consider -
 - (i) that the person is in gainful employment; or
 - (ii) in reliance on the certificate obtained under paragraph (7)(b), that he is capable of undertaking such employmentand may recover any payment made in respect of any period before discontinuance during which they consider him to have been in gainful employment.
 - (b) Subject to sub-paragraph (bb), the authority shall in any event discontinue the payment of benefits under paragraph (4) after they have been in payment to a person for three years.

- (bb) Paragraph (b) does not apply where a person reaches the age of 65.

...

(11)

- (a) An authority which has made a determination under paragraph (4) in respect of a member may make a subsequent determination under paragraph (3) in respect of him.
- (aa) A subsequent determination under paragraph (3) must be made within three years of the date that payment of benefits is discontinued under paragraph (8) , or before the member reaches the age of 65 if earlier.
- (b) Any increase in benefits payable as a result of any such subsequent determination is payable from the date of that determination.

...

(14) In this regulation -

"gainful employment" means paid employment for not less than 30 hours in each week for a period of not less than 12 months;

"permanently incapable" means that the member will, more likely than not, be incapable until, at the earliest, his 65th birthday; and

"an independent registered medical practitioner ("IRMP") qualified in occupational health medicine" means a practitioner who is registered with the General Medical Council and -

- (a) holds a diploma in occupational health medicine (D Occ Med) or an equivalent qualification issued by a competent authority in an EEA state; and for the purposes of this definition, "competent authority" has the meaning given by section 55(1) of the Medical Act 1983; or
- (b) is an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA state ..."