

## Ombudsman's Determination

Applicant	Mr N
Scheme	Local Government Pension Scheme
Respondents	Renfrewshire Council ( <b>the Council</b> )

## Ombudsman's Determination and reasons

1. I do not uphold Mr N's complaint and no further action is required by the Council.
2. My reasons for reaching this view are explained in more detail below.

## Complaint summary

3. Mr N's complaint is that he has been refused ill health retirement from the date his employment ended with the Council.

## Background information, including submissions from the parties

4. Regulation 20 of 'The Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008' (SSI2008/230), covers ill health retirement. Benefits are payable if the member is deemed (on the balance of probability) to be permanently (that is to age 65) incapable of efficiently discharging the duties of his/her current employment. The employing authority is required to make the decision after obtaining the certified opinion of an independent registered medical practitioner (**IRMP**).
5. Mr N was working as a Day Centre Officer (**DCO**). This was a temporary post and he had the right to revert to his substantive post of Caretaker.
6. In September 2011, he was dismissed on grounds of capability due to ill health. He was then 62 years old. He was not considered for ill health retirement.
7. Mr N took early retirement and unsuccessfully complained through the Scheme's two stage internal dispute resolution (**IDR**) procedures for ill health retirement.

8. At IDR stage 2, SPPA (the administering authority) obtained the opinion of Professor M (IRMP):

“...The major health problem, which I believe affects his functional capacity, is his depressive illness with anxiety features. In my view this has been under treated in that he has had tablets for two years with no other intervention. During that time he would appear to have deteriorated and I consider this to be a major underlying problem...

It is my view that his depression could and should be more vigorously treated with a full range of interventions which are available and his mental state will accordingly improve. A significant feature of his functional ability is that of his right knee pain, however objective clinical examination revealed a relatively good range of movement, good musculature of the right thigh compared to the left thigh. While I consider he probably does have osteoarthritis in the right knee and right ankle I consider these to be relatively mild at this stage. The main issue with these joints is the pain he experiences. However, his under treated depression will have contributed to the pain being a much more serious problem with a correspondingly greater impact on his functional ability ...

Turning now to the job outline, I have reservations of him ever becoming fit to undertake the duties of a Day Centre Officer given his description of what he was actually doing...On consideration of the Social Work Caretaker role I do consider that there is potential for [Mr N] to be rehabilitated to a sufficient fitness level to be able to return to this type of duty.

9. Professor M concluded:

“In conclusion, I consider that for [Mr N] there is a reasonable prospect of him gaining employment before normal retirement age and consider that with appropriate rehabilitation he would be capable of undertaking the duties required in the Caretaker role. I confirm that the condition did exist on 04/09/2011 and would have made him incapable of carrying out efficiently the duties in question. I do however consider that he could be improved sufficiently before reaching normal retirement age for him to be considered capable of carrying out those duties efficiently (Caretaker role) and that therefore there is a reasonable prospect of him gaining employment before normal retirement age. “

10. The SPPA accepted Professor M's opinion and turned down Mr N's stage 2 appeal.
11. Mr N complained to the Pensions Ombudsman Service that the Council had incorrectly refused him ill health retirement.
12. In March 2014, the DPO Determined that the Council had accepted and investigated Mr N's appeal for ill health retirement against a decision which it had not taken when Mr N's employment was terminated. The Ombudsman directed the Council to make that decision after obtaining the certified opinion of an IRMP (as required under Regulation 20).

13. The Council obtained the certified opinion of Dr S (IRMP, not previously involved) that Mr N did not satisfy Regulation 20 on the date his employment ended. Dr S said:
  - He could not confirm that either of Mr N's conditions (ongoing knee pain and mental health symptoms) would prevent him from returning to his role permanently.
  - There were other treatment options which could have been pursued for both of his conditions.
  - In respect of Mr N's knee his GP had referred him to physiotherapy, but there was no note as to whether he had been seen or the results of the assessment. The GP had expected that Mr N would be referred to orthopaedics and that surgery might be considered. It therefore was likely that Mr N's knee condition would improve.
  - In respect of his mental health symptoms there was no evidence that Mr N had attended any mental health professionals, for example for cognitive behavioural therapy (**CBT**), anxiety management, or other relevant mental health 'talking' treatments.
  - His GP had only recently increased Mr N's medication and it therefore would have been too early to assess the effectiveness or otherwise.
  - There was no evidence of referral for psychological or psychiatric treatment, which were other treatment options that could be pursued if Mr N's condition became more severe or intractable.
14. The Council sent Mr N a copy of Dr S's report, but there is no evidence of a decision by the Council.
15. Mr N invoked the IDR procedures. Initially, Mr N appealed on the grounds that his health had deteriorated since leaving the Council. He subsequently said the deterioration had started from July 2011.
16. His stage 1 submission included a letter dated 28 November 2012, from his GP to the Pensions Advisory Service (**TPAS**) in which she disagreed with Professor M's opinion. She said she felt that Mr N's depression was not being under treated, he had made some improvement but not sufficient to return to work. Psychotherapy would not help and referral to other Specialists to discuss mental health treatments was not required. His mental and physical illnesses were independent of each other and he would not overcome these before age 65. He was presently trying to lose weight but this was having no impact on his symptoms. She did not feel that he would regain function in his knee before age 65.
17. Dr C (IRMP, not previously involved) gave her certified opinion that Mr N did not satisfy the criteria for ill health retirement on the date his employment ended, "because I have no evidence to confirm that he was likely to be unfit to undertake the duties of his own post in future, at that time." Dr C said the reasons for her opinion were:

- Further therapy options were outstanding for Mr N's mental health symptoms, such as CBT.
  - Appropriate diet and regular physical activities should bring further improvement.
  - The provided GP reports mentioned only two classes of medication tried. Further benefit could be achieved not only by increasing the dosage but by trying another class of medication.
  - Treatment for a progressive degenerative joint disease should evolve with disease progression. Apart from medication and physiotherapy, a specialist opinion would determine the most appropriate management. This might include referral to a pain management specialist and/or an orthopaedic surgeon. There was no evidence that such referrals had occurred.
18. The Council turned down Mr N's appeal on the grounds that they had acted properly in terms of the Regulations in denying Mr N benefits on ill health grounds. Mr N IDR stage 2.
19. SPPA requested Dr W (IRMP, not previously involved) to review the medical evidence available in September 2011. Dr W concluded:
- “[Mr N] indicates that he has not been able to take on any type of work since being made unemployed by [the] Council...He reports that his health started to deteriorate from the beginning of 2011 and has got worse as time went on. He still attends doctors regularly including Breast Cancer Centre and continues with medications.
- It is stated by the GP... in a letter dated 05/08/11, that Mr N has been suffering from severe right knee pain and depression with severe anxiety. There is also history of previous surgical treatment and radiotherapy for breast cancer, in 2006, but there has been no evidence of recurrence.
- He underwent investigations and was advised that his right knee problem is probably related to wear and tear. He was prescribed anti-inflammatory with mild painkilling medication
- The evidence available indicates that it was appropriate to expect, in September 2011, that his physical and psychological condition would improve with ongoing appropriate treatment. There were outstanding appropriate therapeutic interventions, with a scope for improvement in his health and functional status to restore the capacity for his work.
- His medical condition, at the time of termination of his contract, was not considered to result in permanent incapacity of discharging efficiently the duties of the local government employment.”
20. SPPA accepted Dr W's opinion and determined that Mr N was not permanently incapacitated at the time he left employment with the Council.

## **Adjudicator's Opinion**

21. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council. The Adjudicator's findings are summarised briefly below:

- The opinions of Dr S, Dr C and Dr W were consistent. Each understood the timeframe for recovery and based on the medical evidence commenting on Mr N's health in September 2011 all expected, on the balance of probability, that with appropriate treatment Mr N's mental health and knee condition would improve sufficiently to enable him to return to his work before age 65. Their respective opinions were consistent with Professor M's earlier opinion.
- Mr N said his health had not improved and he had not worked since leaving the Council. But it was important to avoid hindsight. The key to Mr N's case was what could reasonably have been expected in 2011 not what was now known in 2016.
- Clearly Mr N's GP disagreed with Professor M's opinion. But a difference of medical opinion was not sufficient for the Ombudsman to uphold Mr N's complaint.
- While again there was no evidence of a reasoned decision by the Council after obtaining Dr S's certified opinion (or at IDR stage 1 after obtaining Dr C's certified opinion) the procedural irregularity had not caused Mr N an injustice as SPPA clearly made a decision after receiving Dr W's opinion.
- Nevertheless, if the Council had made a decision it is unlikely they would have had any grounds to depart from the advice they had received from Dr S and Dr C.

22. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his further comments which have been taken into account. I agree with the Adjudicator's Opinion, summarised above, and I will, therefore, only respond to the key points made by Mr N for completeness.

## **Ombudsman's decision**

23. My role in this matter is not to decide whether Mr N is entitled to ill health retirement - that is for the Council to decide after obtaining the certified opinion of an independent registered medical practitioner. Also, it is not for me to agree or disagree with any medical opinion.
24. My role is to decide whether the Council have correctly applied the Scheme's Regulations, considered all relevant information (it is for the Council to decide what weight, if any, to attach to that information) and made a decision which is not

perverse. By perverse, I mean a decision which no other decision maker, properly advising themselves, would come to in the same circumstances.

25. Mr N disagrees with Professor M's opinion that there was potential for him to be rehabilitated to a sufficient fitness level to be able to return his Caretaker duties before age 65. He says his depression and anxiety began while carrying out those duties – specifically the requirement to use a computer. But his disagreement with Professor M's opinion is not sufficient for me to uphold his complaint.
26. While there is no evidence of a decision by the Council (following their receipt of Dr S' opinion or Dr C's opinion), I am satisfied that SPPA properly made a decision after obtaining Dr W's opinion and that their decision was not perverse.
27. I agree with the Adjudicator that if the Council had made a decision it is unlikely they would have had any grounds to depart from the advice they had received from Drs S and C.
28. Mr N says his health has not improved and he has not worked since his employment with the Council ended. But of course Mr N is applying the benefit of hindsight.
29. Therefore, I do not uphold Mr N's complaint.

**Anthony Arter**  
Pensions Ombudsman

2 June 2016