PO-9250

Ombudsman's Determination

Applicant	Mrs R
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondents	Glasgow City Council (**the Council**)

Outcome

1. I do not uphold Mrs R's complaint and no further action is required by the Council.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs R's complaint is that she has been refused ill health retirement from the date her employment with the Council ended.

Background information, including submissions from the parties

4. Mrs R was employed by the Council as a Senior Pensions Officer (**SPO**).

5. Following a period of long-term sick leave Mrs R was considered for ill health retirement. The Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008, applied. An extract from regulation 20 is provided in Appendix 1.

6. In February 2012, Dr McLaren, an Occupational Health Physician for BUPA, gave his opinion that Mrs R did not satisfy the criteria for ill health retirement at that time.

7. Following Mrs R's continued sickness absence the Council referred her case back to BUPA. Mrs R saw Dr Warnock (a BUPA Senior Regional Physician). In a report dated 18 April 2012, Dr Warnock, among other things, said Mrs R's absence was attributed to fibromyalgia, she was presently unfit for work and there was no realistic prospect of her returning to work in the near future. Dr Warnock said he would be taking into account a request for further consideration of Mrs R's possible ill health retirement once he had received a report from her GP (Dr Rennick).

8. Dr Warnock asked Dr Rennick for the outcome of any investigations and referrals and for details of any treatment programmes that had been initiated.

9. On 20 June 2012, Dr Warnock wrote to the Council stating that he had received Dr Rennick's report (of 14 June 2012) and that on the basis of the information currently available he was not able to support or recommend Mrs R's ill health retirement. He gave no reason(s) for his opinion.

10. In July 2012, the Council informed Mrs R that her employment was to be terminated on the grounds of incapability due to ill health. The Principal Pensions Officer said:

> "As you are aware, Dr Warnock our Occupational Health Adviser had advised ill health retirement was not an option and having explored and excluded all other options available I made the very difficult decision to terminate your contract on capability grounds."

Mrs R was then age 44.

11. Mrs R appealed the decision that she was not eligible for ill health retirement via the Scheme's two-stage internal dispute resolution (**IDR**) procedure. Among other things she said:

- there was no cure for fibromyalgia;
- she had tried a range of treatment (which she listed) to no great benefit;
- she had been unable to sustain a regular attendance at work since April 2011; and
- there was no reasonable prospect of her obtaining gainful employment before age 65.

12. In August 2012, Mrs R became entitled to Disability Living Allowance (Mobility – higher rate and Care – lowest rate).

13. The Council dismissed Mrs R's appeal on the grounds that they had acted in accordance with the Regulations and the medical adviser (Dr Warnock) considered she did not meet the criteria for a Tier 1 or Tier 2 benefit.

14. Unison invoked IDR stage 2 on behalf of Mrs R. Among other things Unison said:

- Mrs R had been diagnosed with fibromyalgia and was also suffering from significant mental health issues and chronic obstructive airways disease;
- BUPA's decision was seriously flawed. It was not based on the balance of probabilities and lacked consistency. All of their reports indicated that Mrs R was not fit to return to work now or in the foreseeable future, but had concluded that she did not meet the criteria for ill health retirement. Dr Warnock's report of 20 June 2012, failed to provide any genuine medical facts or evidence to justify the decision and lacked any detail;

- BUPA's assertion that further medical treatment could make a difference was deeply flawed. Mrs R had tried a range of therapies and treatment (physiotherapy, graded exercise, psychiatric assistance, counselling, BBT, various anti-depressants, pacing activities, IBS tablets and incontinence tablets) all of no great benefit to her health and wellbeing. She was also in receipt of Disability Living Allowance (**DLA**);

- despite her significant health issues Mrs R had attempted to return to work but had found her condition got worse; and

- Mrs R's health had not improved. Dr Reilly, Consultant Physician & Honorary Senior Lecturer in Medicine at the Glasgow Homoeopathic Hospital, had indicated that her condition had worsened and, on balance, she could not work now or in the foreseeable future; and was of the view that ill health retirement would be appropriate.

15. The Scottish Public Pensions Agency (**SPPA**), the Administering Authority and IDR stage 2 decision maker, requested an independent opinion from Atos Healthcare (**Atos**).

16. SPPA informed Mrs R that Atos would be asked to say whether it was more probable than not that her condition:

    - existed on 5 July 2012;
    - would make her incapable of carrying out the duties of a SPO;
    - would not improve sufficiently before age 65 for her to be considered capable of carrying out those duties efficiently; and that
    - either there was a reasonable prospect or there was no reasonable prospect of her obtaining gainful employment before age 65.

17. Dr Simpson, an Atos occupational health medical adviser, obtained a current report from Dr Rennick, dated 7 February 2013, - Dr Rennick enclosed with his report letters from various Specialists that Mrs R had attended in the previous six months.

18. Dr Simpson gave his opinion that Mrs R was not permanently incapable of carrying out the duties of her former post.

19. SPPA accepted Dr Simpson's report and turned down Mrs R's IDR stage 2 appeal.

20. In March 2013, Mrs R successfully applied for ill health retirement from deferred status. Dr Henderson, Consultant in Occupational Medicine, certified that Mrs R was permanently incapable of discharging efficiently the duties of her former SPO employment and was not capable of gainful employment or engaging in any full-time employment before age 65.

21. A summary of the medical evidence is provided in Appendix 2.

Adjudicator's Opinion

22. Mrs R'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.

    - Mrs R's entitlement to DLA did not automatically qualify her for ill health retirement under regulation 20 as the criteria for the latter was more stringent, requiring Mrs R to be permanently (to age 65) incapable of efficiently discharging her duties with the Council.

    - Dr Warnock failed to specify the medical evidence he had considered or give reasons for his opinion and the Council did not ask. Effectively, the Council blindly accepted the IRMP's opinion.

    - At IDR stage 2, SPPA obtained the opinion of another IRMP, Dr Simpson. Dr Simpson gave his opinion that Mrs S did not meet the criterion for ill health retirement under regulation 20. He noted that Mrs R was engaging with appropriate therapies and had made progress. While he considered further improvement and consolidation of progress may take some time, given Mrs R's age, he said it was premature to accept that she was permanently incapacitated.

    - SPPA's subsequent decision corrected the Council's earlier maladministration.

    - The Council's later decision to award Mrs R ill health retirement from deferred status was based on Dr Henderson's opinion that Mrs R was permanently unfit for all work. His opinion was based on Mrs R's current condition.

    - In essence the matter concerned a difference of opinion (between Dr Simpson and Dr Henderson), but that was not sufficient for the Ombudsman to find that it was maladministration by SPPA to accept Dr Simpson's opinion at IDR stage 2.

23. Mrs R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs R 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 R for completeness.

Ombudsman's decision

24. Mrs R says with great sadness and regret that she was not seen by medical professionals who believe in fibromyalgia.

25. My role in this matter is not to agree or disagree with any medical opinion. My role is to decide whether there were flaws in the Council's decision making process.

26. Clearly the Council's blind acceptance of Dr Warnock's opinion amounted to maladministration. However, I am satisfied that this was corrected by SPPA at IDR stage 2 after obtaining the opinion of Dr Simpson.

27. Mrs R says that working at home was not explored and that one of her colleagues who went off sick was allowed to work from home. As this is an employment matter it is not for me to make further comment.

28. Therefore, I do not uphold Mrs R's complaint.

Anthony Arter

Pensions Ombudsman
31 October 2016

Appendix 1

The Local Government Pension Scheme (Benefits, Membership and Contributions) (Scotland) Regulations 2008

29. As relevant, regulation 20 ('Early leavers: ill-health') says:

"(1)If an employing authority determines, in the case of a member who has at least 2 years' total membership or has a transfer value credited to the member-

(a)to terminate the member's local government employment on the grounds that the member's ill-health or infirmity of mind or body renders the member permanently incapable of discharging efficiently the duties of the member's current employment; and the member's administering authority shall pay the member benefits under this regulation.

(2)If the authority determines that there is no reasonable prospect of the member obtaining gainful employment before the member's normal retirement age, the member's benefits are increased-

(a)as if the date on which the member left local government employment was the member's normal retirement age; and

(b)by adding to the member's total membership at that date the whole of the period between that date and the member's actual normal retirement age.

(3)If the authority determines that there is a reasonable prospect of the member obtaining gainful employment before the member's normal retirement age, the member's benefits are increased-

(a)as if the date on which the member left local government employment was the member's normal retirement age; and

(b)by adding to the member's total membership at that date 25% of the period between that date and the member's actual normal retirement age.

…

(6)Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine as to whether in the independent registered medical practitioner's opinion the member is permanently incapable of discharging efficiently the duties of the relevant local government employment because of ill-health or infirmity of mind or body and, if so, as to the likelihood of the member being able to obtain other gainful employment before reaching the member's normal retirement age.

(7)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, the member's 65th birthday"; and

"qualified in occupational health medicine" means-

(a)holding a diploma in occupational 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)being an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State.”

Appendix 2

Medical Evidence

Dr McLaren (BUPA Occupational Health Physician), 8 February 2012

30. Dr McLaren said the information he had received from the Consultant Rheumatologist corroborated his opinion that Mrs R did not currently meet the criteria for ill health retirement. He said Mrs R's clinical presentation was consistent with fibromyalgia and noted that there were a number of treatment options which had yet to be tried. He said fibromyalgia was a chronic condition which runs a relapsing / remitting course and that the prognosis was variable, but evidence based treatments could be beneficial.

Dr Rennick (Mrs R's GP), 14 June 2012

31. Among other things Dr Rennick said:

- Mrs R's problems with employment had started around 2010 and became most noticeable in April 2011 when she developed a functional neurological problem down the right side of her body.
- In May 2011 she had a 'seizure' at work which was attributed to sleep deprivation and a mood disorder.
- By July 2011 she was suffering a degree of pain over the whole of her body and was referred to a rheumatologist who concluded that her condition was not a rheumatological disorder.
- Following an acute deterioration in her mood she was referred to the Community Mental Health Team and the Crisis Team and had continued to engage with the former.
- He believed she still attended a Community Psychiatric Nurse once a month. A second rheumatologist again found no reason for her physical pain, but concluded that the distribution of tender points suggested that she met the criteria for fibromyalgia.
- Since then she had several times been seen at the Homoeopathic Hospital to try to give her further support and help and pointers which may give her some relief. Nevertheless, there was little doubt that her recovery was likely to be slow and protracted.

Dr Warnock (BUPA Senior Regional Physician), 20 June 2012

32. Dr Warnock said:

> "Further to previous correspondence, I have received a Report from [Mrs R's] GP.

> The doctor gives further details of her medical background, investigation and treatment.
>
> On the basis of the information currently available to me, I am not in a position to support or recommend ill-health retirement, either Tier 1 or Tier 2."

Dr Rennick, 10 September 2012

33. On the same day that the Council issued their IDR stage 1 decision, Dr Rennick wrote to JLT Benefit Solutions Limited. He said that Mrs R's fibromyalgia was of such severity that she had constant pain and weakness in her limbs. He said any recovery in her condition would be long and take several years and he could not say with any justification whether she would or would not be able to obtain gainful employment. It is not clear for what scheme Dr Rennick's comments were addressed.

Dr Reilly (Consultant Physician & Honorary Senior Lecturer in Medicine at Glasgow Homoeopathic Hospital), 4 October 2012

34. Dr Reilly gave his opinion that on the balance of probabilities Mrs R would not be able to return to her post with the Council and at this stage and for the foreseeable future she was not fit for gainful employment. He said that Mrs R had been struggling with a variety of difficulties including a functional neurological disorder, the significant loss of self-care ability (ranging from periods of independence to needing assistance to cut up her food) and mobility (ranging from full mobility to wall or furniture walking). He said there had been an active tackling of the inpatient assessment, some one-to-one consultations and a plan to attend the group based Wellness Enhancement Learning Programme. He said Mrs R was in constant pain and tired, her concentration and memory and ability to sit for any length of time was impaired and she had significant levels of emotional distress.

Dr Rennick, 7 February 2013

35. Dr Rennick confirmed that Mrs R was suffering from chronic fibromyalgia and depression. He said she was attending a Homoeopath and a Community Psychiatric Nurse. While her mood had dipped over the past few months since November it had improved (with intensive input from Psychiatric Services) but clearly remained of concern. Dr Rennick listed the medication she was receiving for her pain and said she had been offered CBT which it was hoped she would engage with and further improve. Dr Rennick said it was unpredictable at this stage how quickly she would recover and to what extent. He said she continued to have a very serious and significant disability.

Dr Simpson (Atos Occupational Health Medical Adviser), 12 February 2013

36. Dr Simpson detailed the criteria for ill health retirement (under Regulation 20(2) and 20(3)) and noted the medical advice he had considered: the Occupational Health

case records containing GP and Specialist reports, Dr Rennick's 7 February 2013 report, a physiotherapy discharge letter of 28 December 2012, Dr Reilly's reports to Dr Rennick of 9 August 2012, 6 September 2012 and 23 January 2013. Unison's IDR stage two submission and submissions from Mrs R, a report from the Principal Pension Officer of 30 June 2012 (that Mrs R was not able to fulfil her duties due to her medical conditions and that working from home or reducing her hours was not an option), Dr Reilly's report to Unison of 4 October 2012, Dr Rennick's reports of 14 June 2012 and 10 September 2012 and a Disability Living Allowance letter.

37. Dr Simpson concluded that Mrs R was not permanently incapable of carrying out the duties of her former post. He said:

> "The GP has provided a report in June'12 summarising [Mrs R's] health problems. He has stated that it was previously considered that [Mrs R] had a functional neurological problem in 2011 and she was also thought to suffer from sleep deprivation and a mood disorder. In August '11 she was investigated by the Rheumatologist and no specific rheumatological condition was then diagnosed. The GP states that a disciplinary issue at work then led to acute deterioration in mood requiring referral to the Community Mental Health Team. The GP then adds that [Mrs R] requested a second Rheumatology opinion and that in December '11 this opinion was that the criteria were considered met for fibromyalgia. The GP noted she had been treated at the Homoeopathic Hospital and has offered the opinion that her recovery is likely to be slow and protracted.
>
> A recent updating report has been obtained from the GP, Dr Rennick. He confirms the diagnoses to be chronic fibromyalgia and depression and that symptoms continue. She has remained under the care of the Homoeopathic Specialist and Community Psychiatric Nurse and there had been some worsening in depression in the last few months but this has again improved since November '12 with more intensive input from the Psychiatric Services. She remains on antidepressant and pain relieving medication and she has been offered cognitive behavioural therapy and there is hope she will engage with this and further improve.
>
> On prognosis the GP states that it is unpredictable to know how quickly she will recover and to what extent. He adds that she continues to have very serious and significant disability. Some reports are provided by the GP.
>
> The Physiotherapist notes [Mrs R] has received a course of treatment which has been of benefit and she has wished to continue with such therapy. It is stated that she has been discharged from the service and that advice has been that she continue with her own home exercises. Advice has also been given regarding pacing and a gradual return to more activities that she enjoys such as swimming and gym activities.
>
> The Consultant Physician, Dr Reilly, has stated September '12 that [Mrs R] had benefited greatly from the inpatient programme followed by the WEL programme as an outpatient. She was managing to pace successfully and she realised her therapy

was a long-term project. At review in December ’12, Dr Reilly noted [Mrs R] had suffered a dip but she felt she had developed the skill to cope with such. Routine review was not arranged.

The Community Psychiatric Nurse has noted in January’13 that [Mrs R] has continued to improve steadily and that she planned to attend Cognitive Behavioural Therapy. She was noted to be better able to deal with day-to-day issues, her mood was bright and reactive, and it was agreed to discharge her from follow up.

While it is acknowledged that there may be a fluctuating course for the physical and psychological symptoms of fibromyalgia and depression, the evidence is that [Mrs R] has engaged well with the appropriate therapies and she has made progress. Active therapy continues. Though further improvement and consolidation of progress may require some time, as pointed out by the GP, the period of time under consideration in relation to the ill health retirement criteria is the next 19 years til age 65. It is therefore advised as premature at this stage to accept permanent incapacity over such a period. Given improvement in her health within this period it is reasonable that she will again be able to cope with the demands of her work and take advantage of the type of supportive measures which have been available.”