

Ombudsman's Determination

Applicant	Mrs R
Scheme	Local Government Pension Scheme (LGPS)
Respondent(s)	Trafford Council (Trafford)

Complaint Summary

Mrs R has complained that her application for the early payment of her deferred benefits on the grounds of ill health has been declined.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against Trafford because they failed to consider Mrs R's application for the early payment of her deferred benefits in a proper manner.

Detailed Determination

Material facts

1. Mrs R's employment with Trafford ceased in August 2011. At the time, the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended) (the **Benefit Regulations**), and the Local Government Pension Scheme (Administration) Regulations 2008 (SI2008/239) (as amended) (the **Administration Regulations**), applied.
2. Regulation 31 of the Benefit Regulations provided,
 - “(1) Subject to paragraph (2), if a member who has left his employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body he may ask to receive payment of his retirement benefits, whatever his age.
 - (2) Before determining whether to agree to a request under paragraph (1), an employing authority must obtain a certificate from an IRMP [independent registered medical practitioner] as to whether in the IRMP's opinion the member is suffering from a condition that renders the member 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 the member has a reduced likelihood of being capable of undertaking any gainful employment before reaching normal retirement age, or for at least three years, whichever is the sooner ...”
3. Mrs R applied for the early payment of her deferred benefits on the grounds of permanent incapacity in June 2014.
4. Trafford obtained an opinion from an IRMP. Dr J, at Health Management Ltd, completed a pro-forma certificate in August 2014. In answer to the question,

“was [Mrs R] ... at the date of application for early payment of deferred benefits ..., and on the balance of probabilities, permanently incapable ..., because of ill health or infirmity of mind or body, of discharging efficiently the duties of his/her former employment ...”,

Dr J said “yes”.
5. In answer to the question,

“does [Mrs R], as a result of her ill health ... have a reduced likelihood of being capable of undertaking ... other gainful employment ... within three years of the date of the application ...”,

Dr J said “yes”. He gave the date at which he considered Mrs R to have become permanently incapacitated as 25 July 2014.

6. On 28 August 2014, Trafford wrote to Mrs R declining her application. They said:
 - Whilst Dr J’s opinion was taken into consideration, the decision under regulation 31 rested solely with the employer.
 - Under regulation 31, Mrs R had to be permanently incapable of carrying out the duties of her former employment or have a reduced likelihood of being capable of undertaking other gainful employment within three years of her application.
 - Gainful employment did not have to be commensurate, in terms of pay and conditions, with Mrs R’s former role.
 - Dr J had said Mrs R fell into the category of “treatment resistant depression”. He had referred to partial recovery and to Mrs R having tried four different antidepressants. It was not clear from his report whether there were any remaining treatment options available and what the likely efficacy of these might be.
 - Mrs R’s ill health had been attributed to work overload and stress. Dr J had seen her job description. However, there was no objective analysis or detailed information about the work stresses and the application process did not take Trafford’s views into consideration.
7. Mrs R appealed against this decision under the internal dispute resolution (**IDR**) procedure. Trafford sought an opinion from another IRMP, Dr B. She reported to Trafford on 5 January 2015. Dr B expressed the view that Mrs R was permanently incapable of undertaking her former role, or any gainful employment before normal retirement age. She said she did not consider it likely that any additional treatment would be effective in improving Mrs R’s symptoms such that she would be fit for her former role or any gainful employment. Trafford also asked Mrs R to confirm whether or not she was still studying for a part-time Masters degree. Mrs R provided a letter from the university in question confirming that, whilst she was a student on their Masters course, she was not enrolled on any of their modules at that time.
8. Trafford issued a stage one IDR decision, on 17 April 2015, declining Mrs R’s appeal. They said:
 - Mrs R had complained that they had reached a decision despite there being unanswered questions (potential treatment). This had been addressed by Dr B’s report.
 - Dr B had concluded that Mrs R was permanently incapable of undertaking her former duties or any gainful employment before normal retirement age.

- Trafford still had an overriding discretion as to whether or not to agree to an application under regulation 31, even where they did not contest the views of the IRMP.
 - Regulation 31 specifically referred to Trafford's discretion to "determine whether to agree" or not to agree to an application. Mrs R had accepted this in her complaint¹.
 - The IRMP's opinion had been obtained in accordance with the LGPS regulations and was not contested by them. However, they still had the overriding discretion not to agree to Mrs R's request for the early payment of her benefits.
 - One significant factor which they were duty bound to consider was the cost of agreeing to her request. The capital cost of agreeing to pay Mrs R's benefits early was in excess of £400,000. Given the current budget constraints and cutbacks they were facing, this was a material factor they had to take into account in exercising their discretion.
 - They also had to consider any loss of confidence in the public service which might result from the exercise of their discretion.
 - They had taken relevant factors into account, not asked the wrong questions, not misdirected themselves in law, and had not made a perverse decision.
9. Trafford have provided details of how the capital cost of paying Mrs R's deferred benefits was calculated. They have confirmed that the £400,000 quoted is a one-off cost. Trafford have explained that, as a participating employer in the Greater Manchester Pension Fund (**GMPF**), they are given a capital cost allowance each financial year to offset the cost of ill health and other early retirement. Once the allowance has been exceeded, the amount of any overspend is payable to the GMPF.
10. Mrs R submitted a further appeal. Stage two of the IDR procedure is undertaken by GMPF. They issued a stage two IDR decision on 19 June 2015. GMPF said (amongst other things):
- The Department for Communities and Local Government (**DCLG**) had issued guidance on ill health retirement under the LGPS regulations. This guidance continued to apply to members with deferred benefits which had not been aggregated with benefits under the 2014 LGPS, who ceased active membership on or after 1 April 2008 and before 1 April 2014, and applied for early payment of their benefits under regulation 31.

¹ Mrs R disagrees with the assertion that she had at any time accepted that Trafford had an overriding discretion.

- Paragraph 18 of the DCLG guidance stated early payment of deferred benefits could only be made when the conditions of regulation 31(4)² and (7) as the case may be have been certified by an IRMP.
- The LGPC (Local Government Association) had produced a document outlining the discretionary decisions available to employers. The discretion under regulation 31(4) was to “decide whether the deferred beneficiary met the permanent ill health and reduced likelihood of gainful employment criteria”.
- The LGPS regulations did not require the employer to have a published written policy on this matter.
- The question for them to consider was whether Trafford were correct in exercising discretion under regulation 31 by taking into account matters which were unrelated to the determination of permanent incapacity.
- There was nothing in the regulations which set out the criteria which should be adopted when an employer decided whether or not to agree to the payment of benefits under regulation 31.
- Regulation 31 contained no express provision dealing with the question of whether an employer was entitled to refuse or agree to a request. However, the employer was not being asked to agree that the member was permanently incapacitated; the employer was asked to agree to the early payment of the benefits. This suggested that the regulations envisaged more than a simple determination of whether permanent incapacity existed.
- There was a two-step process under regulation 31:
 - (i) The existence of permanent incapacity was determined; and
 - (ii) The agreement of the employer was sought.
- In contrast, regulation 20 (ill health retirement from active service) was structured in such a way as to make payment of the benefits a requirement if the employer determined that permanent incapacity existed.
- Regulation 30 contained a general provision for deferred members to take their benefits early. Regulation 30(2) provided that such a choice by a member under the age of 60 was ineffective without the employer’s consent. By introducing the requirement for employer consent, the regulation made it clear that such consent could be withheld for any proper reason.

² The DCLG guidance refers to regulation 31 as amended by SI2012/1989. However, regulation 31(4) in the post-2012 version is essentially the same as 31(2) as at the date Mrs R’s employment ceased.

- If regulation 31 had used the concept of consent rather than agreement it would have been clearer.
 - The comparison between regulations 20 and 31 was significant. They both related to the same matter and were interrelated. They were both new provisions introduced into the LGPS regulations in 2007. Regulation 20 had a very different form under the 1997 regulations (regulations 27 and 28) and regulation 31 did not exist at all. Regulation 30 appeared in very similar terms in the 1997 regulations.
 - Regulation 56(3) of the Administration Regulations contemplated that the employer would be making a decision as to permanent incapacity under regulation 20 but not under regulation 31. This reflects the wording of the two regulations and suggests the difference in wording was considered significant.
 - They had considered whether the regulations served a coherent purpose if regulation 20 gave the member a right to early payment of their pension and regulation 31 merely gave the member the right to request early payment. It appeared that there was a policy distinction between the situations in which the two regulations applied. It was not irrational to give an employer a greater degree of discretion in cases relating to employees who had left service.
11. GMPF said they were satisfied Trafford had followed the DCLG guidance. They acknowledged that the discretion contained in regulation 31 was not free from doubt, but concluded that Trafford were entitled to refuse early payment on grounds unrelated to Mrs R's health.
12. Trafford have said that they received eight applications for the early release of deferred benefits on the grounds of ill health in respect of members who left employment after 1 April 2008 in the previous two tax years. Of these, they say five met the criteria and, of these five, four were approved for payment and one was refused.

Summary of Mrs R's position

13. A brief summary of the key points raised by Mrs R is given below:
- Trafford do not contest the view that she is permanently incapacitated for the purposes of regulation 31, she satisfies the qualifying conditions in the regulation and is entitled to payment of her benefits.
 - There is no express provision in regulation 31 or anywhere else in the LGPS regulations which gives Trafford an overriding discretion to decide whether or not to pay her benefits.
 - She does not accept that the cost to the public purse is a relevant consideration. In any event, no consideration appears to have been given to the level of contributions she has paid into the LGPS since joining in 1986.

She has made significant payments and is entitled to the benefits which flow from membership of the scheme.

- If cost was a relevant consideration, it should apply to all deferred pensioners whatever their age, length of service, salary, nature of illness and estimated benefits. Trafford should be required to formulate and publish a policy on the exercise of their discretion. She is unaware of any such policy. If this consideration only applies to high earners, it is potentially discriminatory.
- She does not accept potential loss of public confidence is a relevant consideration; it is not a qualifying condition under the regulation. She does not accept that any information relating to her application for the payment of her benefits should be released into the public domain. Trafford must follow the Data Protection Act requirements to use her personal data fairly and lawfully.
- She resigned because of her health. At the time, she was told, by Trafford's Director of Human Resources, that ill health retirement was an option she could pursue after her employment ended. This gave rise to a legitimate expectation on her part that she would receive her benefits if she satisfied the qualifying conditions in regulation 31. At no time was she advised that regulations 20 and 31 contained different powers or that Trafford had an overriding discretion under regulation 31. Had she been advised of this, she would not have tendered her resignation, but instead would have waited to see if her condition improved and relied on regulation 20 (with potentially higher benefits).

Summary of Trafford Council's position

14. A brief summary of Trafford's position is given below:

- Based on the conclusions made by Dr B, in her report of 5 January 2015, and the certificate signed by her, they do not contest the view that Mrs R is permanently incapable of undertaking the duties of her former employment or any gainful employment before normal pension age.
- They still have an overriding discretion not to agree to Mrs R's request. Regulation 31(4) allows for the employer to exercise discretion in relation to the decision whether or not to agree to the member's request for early payment of their benefits.
- In reaching the decision not to agree to Mrs R's request, a relevant and significant factor was the cost the public purse of allowing the request. This was estimated to be in excess of £400,000. This was felt to be a material factor given the budgetary constraints and financial challenges they face. They had to be mindful of the wider consequences of agreeing to pay Mrs R's benefits early. All early retirements will have an impact on the overall funding

level of the scheme and their retirement history has a significant bearing on future employer contribution rates. They did not perform an individual risk assessment before reaching their decision because there was a clear and significant likelihood that payment would cause them, over the course of the year, to reach the trigger point for overspend. They felt it would be unreasonable to incur the cost of actuarial advice before making their decision.

- They now accept that there was no proper evaluation of the financial position underpinning their decision.
- It is their view that any reconsideration of Mrs R's application should be made by reference to the decision made on 17 April 2015; the date of their decision to decline the application on the grounds of financial impact and public confidence. They also consider that the proper basis for any assessment should be the actuarial effect on the employer's contribution rate on the total council payroll; not the amount of capital allowance remaining at the time. The increased contribution rate has a real cash effect, with financial consequences for them and the services to the public.
- They also took into account any loss of confidence in the public service which might result from exercising discretion to allow Mrs R's request at a time when significant awards to former employees are subject to intense public scrutiny. They do not routinely publish details of their decisions on early retirement but would have a legal obligation to disclose the information if requested to do so under the Freedom of Information Act.
- They now accept that they did not present any evidence to support the position that to grant the request would lead to a loss of public confidence. They have accepted this simply because the fact of the decision and award would be unlikely to come into the public domain. It remains their view that, if the public were made aware of the award, it would not be well received; given the public cynicism which often attaches to such awards and the fact that it would be seen against the context of austerity and all that this has meant for local authorities.
- Rejecting Mrs R's request on the grounds of cost alone was a decision they were entitled to make and it was reasonable and appropriate in the circumstances.

Conclusions

15. Trafford accept that Mrs R meets the criteria for early payment of her deferred benefits on the grounds of ill health; that is, she is permanently incapable of undertaking her former duties and has a reduced likelihood of being capable of undertaking any gainful employment before reaching normal retirement age.

16. At the relevant time, regulation 31(2) stated, “Before determining whether to agree to a request under paragraph (1)”, an employer had to obtain an opinion from an IRMP as to whether the member met the qualifying conditions set out in paragraph (1) and, if so, whether as a result they had a reduced likelihood of being capable of undertaking any gainful employment before reaching normal retirement age, or for at least three years, whichever was the sooner. The question is whether the words “Before determining whether to agree to a request under paragraph (1)” give the employer the discretion to decline a request even if the member does meet the qualifying conditions.
17. The LGPS regulations are contained within a statutory instrument. The courts have developed a number of rules and presumptions to assist both in the interpretation and construction of statute. The starting point for the courts is to say that Parliament’s intentions are found by giving words their ordinary and natural meaning in context; that is, words should be given their common or ordinary meaning as they apply generally to people. If this approach produces an absurd result or one which is inconsistent with the rest of the statute, the courts will modify the grammatical and ordinary sense of a word, but only so far as is necessary to avoid the absurdity or inconsistency. If these approaches do not help, the courts may consider the rationale behind the statute for assistance in interpreting it, including looking at the law as it was before the statute was enacted.
18. It is clear, giving the words their ordinary and natural meaning, that regulation 31 intended the employer to make a decision as to whether or not to agree to a request for early payment of deferred benefits on the grounds of ill health. It is also clear that, before doing so, the employer is required to seek an opinion from an IRMP as to whether or not the applicant meets the criteria set out in paragraph (1) (and also whether the member has a reduced likelihood of being capable of undertaking any gainful employment before reaching normal retirement age, or for at least three years, whichever is the sooner).
19. The reference to permanent incapacity (as defined) in paragraph (1) and the requirement to seek an IRMP’s opinion to confirm this, leads me to conclude that an employer cannot agree to a request if the member does not meet the qualifying criteria. Any discretion which exists under regulation 31 is not, therefore, absolute.
20. I note GMPF’s argument concerning the use of the word “consent” in regulation 30, but I do not find that it helps. There is very little difference between giving consent to something and agreeing to it. Reference to regulation 30 offers limited assistance in interpreting regulation 31. It does, however, indicate that requests for early payment on the grounds of ill health were intended to be treated differently to other requests for early payment. For one thing, such a request could be made at any age (in line with the overarching tax/pensions legislation).
21. GMPF also compared regulation 31 with regulation 20. In their view, regulation 20 required an employer to determine whether or not the member was permanently

incapacitated; whereas regulation 31 did not. In their view, regulation 31 merely required the employer to decide whether or not to agree to early payment of the benefits. In fact, regulation 20 required the employer to make a decision (to terminate the member's employment) and not just determine whether the member was permanently incapacitated.

22. In coming to this view, GMPF appear to have relied on the wording of regulation 56(3) of the Administration Regulations. They suggested that this envisaged an employer making a decision as to permanent incapacity under regulation 20 but not under regulation 31. It is arguable whether regulation 56(3) can be said to suggest this. It merely provides for an employer to have regard for DCLG guidance when making a determination under regulation 20; whilst the IRMP must have regard to DCLG guidance when providing an opinion under both regulations 20 and 31. The fact that an employer is not specifically required to have regard for the DCLG guidance when coming to a decision under regulation 31 does not help to determine the extent of the employer's discretion.
23. GMPF suggested that regulations 20 and 31 were new provisions introduced with the 2007 regulations. However, similar provisions had existed under the 1997 LGPS regulations. Ill health retirement from active service was provided for, on not dissimilar grounds, under regulations 27 and 28. What was new for the 2007 regulations was the introduction of three tiers of benefit. Early payment of deferred benefits on the grounds of permanent incapacity was provided for under regulation 31(6). The key difference between the 1997 regulations and the 2007 regulations appears to be that a deferred member could elect to receive their benefits early under the 1997 regulations; whereas under the 2007 regulations, they could ask for early payment.
24. Giving the regulation 31(2) words their common or ordinary meaning leads me to conclude that the employer does have a discretion to agree or not agree to the early payment of deferred benefits. It cannot agree if the member does not meet the ill health criteria, but it does not automatically follow that the benefits must be paid if the member does meet the criteria.
25. It remains to consider the decision making process undertaken by Trafford in determining not to agree to the early payment of Mrs R's benefits.
26. Where the decision maker is an employer exercising a discretionary power, they have an implied duty of good faith to their employees; that is, there is an implied duty of trust and confidence between an employer and its employees. In *Bradbury v BBC* [2012] EWHC 1369 (Ch), and *Prudential Staff Pensions v Prudential Assurance* [2011] EWHC 960 (Ch), the relevant principles were stated as follows:
 - The implied duty is not a fiduciary duty, meaning, an employer may take its own interests into account.

- The implied duty is not to be assessed by reference to the concept of reasonableness; for what seems reasonable to an employer may seem unreasonable to an employee and vice versa.
- A decision by an employer might be irrational or perverse, if it overrode members' expectations or interests and thereby offended the obligation of good faith. There is no duty to take correct considerations into account and exclude from consideration matters which are irrelevant. However, the court will look at whether, overall, a decision was irrational or perverse. The manner in which an employer arrived at a decision could be material when deciding whether there has been a breach of the obligation of good faith.
- An employer must not exercise its powers under a pension scheme so as seriously to damage the relationship of confidence between the employer and the employee.

It is clear therefore that the employer is entitled to have regard to their own interests when exercising discretion, which includes their own financial interests.

27. Trafford have declined to pay Mrs R's deferred benefits early on the grounds of cost. They have calculated the capital cost of paying Mrs R's benefits early to be around £400,000. Trafford describe this as a one-off cost. However, it only becomes a direct cost to them if they exceed the annual allowance they are given each financial year to cover the cost of early retirements. If they have not exceeded their annual allowance, the cost of Mrs R's retirement would be absorbed within the ordinary funding of the scheme. Trafford say there was a clear and significant likelihood that agreeing to pay Mrs R's benefits would cause them, *in the course of the year*, to reach the trigger point for overspend. In other words, agreeing to pay Mrs R's benefits would not, in and of itself, cause Trafford to exceed their capital allowance; it increased the risk that subsequent applications for early retirement would cause them to 'overspend'. They have acknowledged that they did not seek any actuarial advice as to the likelihood of this happening.
28. The decision Trafford were called upon to make concerns benefits payable under the LGPS. This is a pension scheme to which the members contribute and, thereby, jointly fund. One of the purposes of the scheme is to provide the members with an income when they are no longer able to work through ill health. The presumption must, therefore, be that the benefits will be paid if the member meets the eligibility criteria unless there is a cogent reason why this should not be. To do otherwise runs a very real risk of overriding members' expectations; that is, the expectation that the scheme to which they have been contributing will provide for them when needed.
29. I do not find that Trafford started from the point of view that Mrs R should be paid her benefits (because she met the ill health criteria) unless there was a good reason why she should not. They have argued cost, but there was no immediate cost to them in agreeing to pay the benefits. The cost they have referred to was a hypothetical cost

contingent on there being other subsequent applications for early retirement in that financial year which would cause them to exceed their capital allowance. This approach risks turning the application for early retirement on the grounds of ill health into a lottery. The member's chances of success do not rest on the merits of their case but on the timing of their application.

30. I note that Trafford now argue that the cost to them should be measured by reference to any increase in the employer's contribution rate to the LGPS. They make the point that any such increase would have an effect on their payroll, and the services they provide for the public. Having already explained the approach they would normally take, there is a danger that Trafford will create the perception that they are simply looking for a reason to say no again by changing their approach. However, there is some merit in the approach they are now suggesting.
31. If Trafford were to go down the route of asking the scheme actuary to calculate whether agreeing to the early payment of Mrs R's benefits would have an effect on the employer's contribution rate, it must be on the basis that this is something he/she would normally take into account. That is, Trafford must obtain confirmation from the scheme actuary that he/she would take any such specific ill health retirements into account in calculating the employer's contribution rate at the next scheme valuation. It is only in such circumstances that any increase in the employer's contribution rate can be specifically ascribed to the decision to pay Mrs R's benefits and, as such, becomes an actual cost to Trafford; as opposed to being a hypothetical cost.
32. Trafford have also argued a potential loss of public confidence. However, they have no evidence to support their claim that to agree to the early payment of Mrs R's benefits would have been damaging to public confidence. It is true that, as a result of her long service and former position, her benefits are substantial. However, it was also true that she meet the criteria for early payment of her benefits on the grounds of ill health; circumstances which the scheme specifically catered for. It is also true, as Mrs R has pointed out, that she too had been contributing towards those benefits for the period of her long service.
33. I do not find that Trafford approached their decision in the way which could be expected of them as Mrs R's former employer. She has suffered injustice inasmuch as her entitlement to receive her benefits has not been properly established. Her complaint is upheld on that basis.
34. It is not for me to make a decision of my own as to whether Mrs R's benefits should be paid. The discretion to agree to the early payment of her benefits remains for Trafford to exercise. The correct course of action is for me to remit the decision for Trafford to reconsider.
35. I also find that Mrs R will have suffered non-financial injustice in the form of distress and inconvenience as a result of the failure to consider her application in the proper

manner. I find that it is appropriate that she receive some modest compensation for this.

Directions

36. Within 21 days of the date of my final decision:

(i) Trafford shall reconsider whether Mrs R's benefits should have been paid early in July 2014. They shall make their decision by reference to the financial circumstances which prevailed in April 2015; that is, the amount of capital allowance which remained to them at that time. If Trafford also wish to approach the scheme actuary for information about any potential effect on the employer's contribution rate going forward, they may do so: and

(ii) Trafford shall pay Mrs R £500 for the significant distress and inconvenience suffered as a result of the failure to consider her application in a proper manner.

Anthony Arter

Pensions Ombudsman

10 June 2016