PO-9477

Ombudsman's Determination

Applicant	Mr R
Scheme	Local Government Injury Benefits Scheme
Respondents	Rochdale Borough Council (**Rochdale**)

Outcome

1. I do not uphold Mr R's complaint and no further action is required by Rochdale.

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

Complaint summary

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3. Mr R asserts Rochdale's decision to cease his permanent injury allowance (**PIA**) was unlawful. He is of the view that they have misinterpreted both the independent registered medical practitioner's 2012 report and the relevant regulations. Mr R argues that references to "his work" and "working again" in regulation 34 (see below) should be taken to mean "working again in his work". Mr R has suggested that Rochdale attempted to gather evidence to support their decision after he had complained to the Ombudsman.

4. Mr R also considers Rochdale wasted time in saying there was no stage two for his appeal against their decision. He argues that he had made a new complaint which should have been dealt with under the two stage internal dispute resolution (**IDR**) procedure.

Background information, including submissions from the parties

Background

5. Mr R's eligibility for a PIA was the subject of a determination by the then Deputy Ombudsman in December 2011. Rochdale were directed to reconsider whether Mr R was eligible for a PIA under regulation 34 of the Local Government (Discretionary Payments) Regulations 1996 (SI1996/1680) (as amended).

6. At the relevant time, regulation 34 provided,

> "(1) If -
>
> (a) as a result of anything he was required to do in carrying out his work a person who is employed in a relevant employment -
>
> (i) sustains an injury; or
>
> (ii) contracts a disease; and
>
> (b) he ceases to be employed in that or any other relevant employment as a result of an incapacity which is likely to be permanent and was caused by the injury or disease,
>
> he shall be entitled to an annual allowance not exceeding 85 per cent of his annual rate of remuneration in respect of the employment when he ceased to be employed.
>
> (2) The allowance is to be paid by the relevant employer and, subject to paragraph (1), is to be of such amount as that employer may from time to time determine.
>
> …
>
> (4) The relevant employer may suspend or discontinue the allowance under this regulation if the person becomes capable of working again."

7. A "relevant employment" is defined as "… employment … with a LGPS employer … or the predecessor of such an employer".

8. Mr R was employed by Rochdale, as a Health and Safety Officer, until November 1995; when he retired on the grounds of ill health.

9. Following the Deputy Ombudsman's determination, Rochdale referred Mr R's case to a consultant occupational health physician, Dr Lian. He saw Mr R in May 2012. In his report for Rochdale, Dr Lian said he thought Mr R would have been permanently unfit to work as a Health and Safety Officer in 1995. He also said,

> "Due to the long time gap of around 17 years, it is not possible for me to determine when he was fit for work again. From the GP records, he was in employment in March 1999. He informs me that his memory for that period is vague but he thinks he restarted employment somewhere between January and March 1999."

10. Rochdale wrote to Mr R, on 18 June 2012, informing him that he met the criteria for payment of an injury benefit. They referred to the provision for them to suspend or discontinue a PIA if Mr R became capable of working again. Rochdale said, as Dr Lian had been unable to determine when Mr R became fit for work and Mr R had said he had restarted employment between January and March 1999, they would discontinue his PIA from 1 January 1999. Mr R was paid arrears with interest. In subsequent correspondence, Rochdale said they would be willing to review their

decision if Mr R provided them with evidence of any employment and/or earnings since January 1999.

11. Mr R appealed the decision to suspend his PIA, on 6 September 2013, under the internal dispute resolution (**IDR**) procedure. Rochdale responded on 18 June 2014. They expressed the view that Mr R's PIA had been granted on the basis that he was incapable of working. They did not agree that the PIA was a "life long" award and said it was subject to their statutory duty to periodically review it. Rochdale said their decision was final and was made under regulation 45 of the 1996 regulations and regulations made subsequently. They referred Mr R to the Pensions Advisory Service (**TPAS**) and the Ombudsman.

12. In response to a subsequent enquiry from Mr R, Rochdale said they did not have a medical report stating Mr R was capable of returning to his former position. They said Dr Lian had been asked to provide a date at which Mr R had become capable of working again.

13. Mr R contacted TPAS and was advised that he should submit a stage two appeal under the IDR procedure. TPAS contacted Rochdale, on Mr R's behalf, to ask to whom a stage two appeal should be submitted. In their response, Rochdale said they were unaware of a second stage appeal in relation to Mr R's PIA. In their response to Mr R's complaint to the Ombudsman, Rochdale said, if his appeal was to be considered under the 1996 regulations, regulation 45 provided for his appeal to go to the Secretary of State. Alternatively, they said, if Mr R's appeal was to be considered under the 2011 regulations (see appendix), they had complied with the statutory requirements.

Mr R's submission

14. The key points are summarised below.

- Providing a date when a person starts work again is not sufficient to satisfy the meaning of "becomes capable of working again". Capability for work can be determined in advance of starting work; it can be determined even if the person never works again. This is because it involves a medical determination which must support the administrative action; that is, the decision to suspend a PIA.

- Even if a person starts work, the question remains as to whether they are capable of working.

- The phrase "becomes capable of working again" means more than just a return to work of any duration; it means a sustained period of full-time work.

- Whilst he accepts that, in the absence of a specific definition, words are to be given their ordinary, everyday meaning, any interpretation must be made in context and not in a manner which is inconsistent with the context.

- The regulations make it absolutely clear which employment and employer is referred to; this is "relevant employment", as defined.

- When read in context, the phrase "becomes capable of working again" can only mean being capable of doing the work the person has previously been deemed to be incapable of doing. It can only be referring to relevant employment.

- The word "becomes" indicates a change in circumstances. This is from a previously determined state of capacity for work which is defined in the regulations. It is not a requirement of the regulations that a person be incapable of any work in order to qualify for a PIA.

- The phrase "becomes capable of working again" does not require additional wording to mean capable of working in a relevant employment. The addition of "in a relevant employment" would be consistent with the rest of the regulations. The addition of "in any employment" would have required modification to earlier parts of the regulations to prevent ambiguity or contradiction. Additional wording was not added because it was not expected that the phrase "becomes capable of working again" would be interpreted to include all work.

- He is of the view that Rochdale have applied an incorrect meaning of the word "capable" in coming to their decision. The everyday meaning of "capable of working again" is not the same as "starting working again". In the context of a PIA, capable of working again can only be a medically based opinion which reverses the earlier medically based opinion.

- A decision to suspend a PIA needs to be supported by a medical opinion confirming capability; regardless of the meaning of "becomes capable of working again". At no point did Dr Lian state or imply that he was capable of working again. Dr Lian could only confirm an approximate date on which he had started working and had no medical notes on which to assess his capacity for employment. It is not sufficient for Dr Lian to provide a rough date on which non-relevant employment commenced. This is not a medical assessment but simply a statement of a non-medical fact by a medically qualified person.

- He cites a 2008 decision by the then Deputy Ombudsman (*R00633*). In that decision, the Deputy Ombudsman determined that where a resumption of the member's duties would lead to a relapse, the member would be permanently prevented from discharging those duties, even if he achieved a measure of relief whilst away from his duties.

- Due to the retrospective nature of his initial award, the decision to suspend it was made at the same time as the PIA was awarded and backdated to 1999. A decision to suspend can only be made and supported by either up-to-date medical opinion or an opinion formed by using sufficient contemporaneous medical evidence; that is, evidence from 1999. Dr Lian could not have made

an assessment for 1999 because he did not have any medical records from this time.

- Rochdale only asked at what point he returned to work. This is not the right question. They should have asked at what point did he become capable of working again. If Dr Lian had been asked this question, he could only have made an assessment of his capacity for work in 2012.

- Regulation 34 has been replaced by regulation 29 in the 2011 regulations. Regulation 29 uses the phrase "secures gainful employment", which is defined as employment for not less than 30 hours per week for a period of not less than 12 months. Regulation 29 should apply in his case.

Rochdale's submission

15. The key points in Rochdale's submission are summarised below.

- Their decision not to make any further payments and/or a reduced payment of zero was based on the express powers and/or discretionary powers reserved for them under the 1996 regulations. They refer to regulations 34(1)(b), 34(2), 34(4) and 38(1). They have an absolute discretion to suspend or discontinue payment of a PIA if the individual secures employment and/or begins working again and/or becomes capable of working again; regardless of whether this is for a "relevant employer" or any other employer. Any other interpretation of the regulations would be perverse, without basis, irrational and unlawful.

- The injury allowance scheme is intended to compensate an individual for loss of salary due to a qualifying injury. It cannot be intended that an individual should be placed in a position where potentially he could be better off financially as a result of receiving a PIA and salary from alternative employment.

- "New employment" is defined, in regulation 15(4), as employment with a LGPS employer. Regulation 34(4) does not refer to "new employment"; instead it introduces, for the first time, the phrase "becomes capable of working again". This phrase must, therefore, have a wider connotation than "new employment" and must include any work/employment.

- The terms "relevant employer" and "relevant employment" have been used deliberately throughout the regulations. However, the powers/discretions contained in regulations 34 and 38 have not been fettered by reference to these terms.

- The fact that Mr R commenced employment again on or about January 1999 is, therefore, rightfully a matter they can and/or must take into account. The fact that he was/is capable of working for another employer indicates that he was/is capable of working for his former LGPS employer and/or another LGPS employer.

- They do not have a written policy in respect of the 1996 regulations. This is, however, irrelevant to Mr R's case. They have adopted the wording of the 1996 regulations wholly and without qualification.

- They have indicated that they are willing to review their decision if Mr R provides details of his ongoing employment status and evidence of earnings. He has not done so to date.

- If Mr R's case is to be decided under the provisions of the 1996 regulations, his appeal should have been to the Secretary of State, under regulation 45. If, however, his case is dealt with under the 2011 regulations, they have fully complied with the appeal provisions.

Adjudicator's Opinion

16. Mr R's complaint was considered by one of our Adjudicators who concluded that no further action was required by Rochdale. The Adjudicator's findings are summarised briefly below:

    - Regulation 34 provided for the PIA to be "of such amount as that employer may from time to time determine"; up to a maximum of 85% of Mr R's former remuneration. It was, therefore, for Rochdale to determine how much PIA to pay Mr R. There is/was a maximum award specified in regulation 34, but no minimum award. In fact, the Courts have determined that it is open to an employer to award a token allowance[1]. In previous Ombudsman's determinations it has been accepted that the wording of regulation 34 is wide enough to include a nil award.

    - The inclusion of the term "from time to time" in regulation 34(2) indicates that the employer could revisit the decision to award a PIA in order to determine the amount. The option to review an award is confirmed by regulation 34(4) which specified that an employer could suspend or discontinue a PIA.

    - The key phrase in regulation 34(4) is "becomes capable of working again". Mr R suggests that this should be taken to mean working in the person's former relevant employment. He is relying on the reference to "his work" in regulation 34(1).

    - The general principle which applies when interpreting pension scheme documentation, including the statutory instruments which govern public sector schemes, is that words should be given their ordinary everyday meanings; unless there is a specific definition given. There is nothing stated in regulation 34 which defines "working again" as working again in "his work". The earlier parts of regulation 34 clearly refer to "relevant employment", which is a defined term; employment with a LGPS employer. Given its ordinary everyday

[1] *City and Council of Swansea v Johnson* [1999] Ch 189

meaning, the phrase “capable of working again” would appear to mean working in any capacity for any employer.

- The decision to discontinue Mr R’s PIA is an exercise of discretion on the part of Rochdale. There are well established principles which Rochdale can be expected to follow in exercising a discretion. If they have done so, neither the courts nor the Ombudsman may interfere with their decision. The evidence indicated that Rochdale had followed the required principles in reaching their decision.

- At the time Mr R initiated his appeal, the 2011 regulations were in force. These provided for regulation 45 of the 1996 regulations to continue to apply for any appeals made within six months of 16 January 2012. Mr R’s appeal fell just outside this period. His appeal, therefore, fell to be considered under the 2011 regulations which do not provided for a second stage.

17. Mr R did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider. Mr R provided his 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 Mr R for completeness.

Ombudsman’s decision

18. Mr R argues that providing a date at which he commenced alternative employment was not sufficient for the purposes of regulation 34(4). He points out that capability for work can be determined independently of the individual actually commencing to work. I do not disagree with the latter statement. An individual can be found capable of working without having taken up employment; it is the capacity for work which is the test, not the employment itself. However, the fact that an individual has commenced work must be a strong indication that he/she is capable of working. I do not agree that capability for work can only ever be determined by reference to a medical opinion. Where Rochdale have evidence that Mr R started working again, they are entitled to take that information into account in deciding whether to suspend or discontinue his PIA.

19. Mr R has also argued that the work referred to in regulation 34(4) should be “relevant employment”. The wording of the regulation does not support this interpretation. In any event, “relevant employment” is not confined to the role Mr R was previously undertaking for Rochdale. On that basis, if he is capable of working for another employer, it would be reasonable to say that he would also be capable of undertaking “relevant employment”. I can see no reason for finding that “relevant employment” should mean a sustained period of full-time work. It simply means employment with a LGPS employer which covers a multitude of employment types.

20. I do not find that the previous Ombudsman decision cited by Mr R helps his case. The argument there was that incapacity for employment could be deemed permanent if a

resumption of employment would lead to relapse; even if the member had recovered to some extent whilst away from work. In Mr R's case, his PIA has been suspended because he returned to work. If he wishes to argue that his return to employment caused a relapse in his condition, he should provide evidence of this for Rochdale to consider. They have indicated that they are willing to review their decision if Mr R provides relevant evidence. He has yet to do so.

21. Mr R has suggested that the 2011 regulations should apply in his case; in other words that his PIA should only be suspended if he is capable of gainful employment (30 hours per week for not less than 12 months per year). Mr R's PIA falls to be paid under the terms of the 1996 regulations (as was previously determined). These terms include the conditions under which the PIA may be suspended or reduced. Regulation 34(4) applies. However, the 2011 regulations do apply in relation to any appeal; except as provided for under regulation 16 which does not apply in Mr R's case.

22. Therefore, I do not uphold Mr R's complaint.

Anthony Arter

Pensions Ombudsman
4 November2016

Appendix

The Local Government (Discretionary Payments) (Injury Benefits) Regulations 2011 (SI2011/2954) (as amended)

23. At the time Rochdale decided to suspend Mr R's PIA, regulation 4 provided,

> "(1) If -
>
> (a) in the course of carrying out his or her work a person who is employed in a relevant employment -
>
> (i) sustains an injury; or
>
> (ii) contracts a disease; and
>
> (b) he or she ceases to be employed in that employment as a result of an incapacity which is likely to be permanent and was caused by the injury or disease,
>
> the person may subject to paragraph (2), be entitled to an annual allowance not exceeding 85 per cent of his or her annual rate of remuneration in respect of the employment when he or she ceased to be employed.
>
> (2) The relevant employer shall from time to time determine whether the person continues to be entitled to an allowance under paragraph (1) …
>
> (5) The relevant employer may suspend or discontinue the allowance under this regulation if the person secures gainful employment.
>
> (6) 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."

24. Regulation 9 provided for a first instance decision as to a person's eligibility for an injury benefit to be made by "the relevant LGPS employer"; defined as the LGPS employer who last employed the person in respect of whose employment the question arises. Regulation 11 provided for applications to reconsider a decision made under regulation 9 to be made to a person specified by the employer. A reconsideration decision given under regulation 11 must inform the recipient of TPAS and the Pensions Ombudsman.

25. Regulation16 provided,

> "(1) Subject to the transitional provisions and savings in paragraph (2), the Local Government (Discretionary Payments) Regulations 1996 ("the 1996 Regulations") are revoked so far as not previously revoked.

(2) Notwithstanding the revocation of Part of 5 (injury allowances etc.) and regulation 45 (decisions and appeals) of the 1996 Regulations -

(a) where the event by virtue of which an allowance or lump sum may be payable occurs before the date upon which these Regulations come into force [16 January 2012] -

(i) the relevant employer (for the purposes of the 1996 Regulations) shall decide in accordance with Part 5 and regulation 45, what allowance or lump sum (if any) is to be granted; and

(ii) regulations 3 to 10 shall not apply;

(b) regulation 45(6) shall continue to apply for the purposes of any appeal to the Secretary of State brought before the end of six months commencing on the date these Regulations come into force; and

(c) regulations 11 to 13 shall not apply for the period specified in sub-paragraph (b).”