

## Ombudsman's Determination

Applicant	Mr T
Scheme	Local Government Pension Scheme ( <b>LGPS</b> )
Respondent	University of Bradford ( <b>the University</b> )

## Outcome

1. Mr T's complaint is upheld and to put matters right, the University should reconsider the decision it made to grant Mr T tier 3 ill health retirement benefits.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr T's complaint is that he was not awarded tier 2 ill health benefits when he retired.

## Background information, including submissions from the parties

4. Mr T worked as a Maintenance and Charge Hand Joiner for the University.
5. On 14 March 2012, following Mr T's appointment with a Consultant Ophthalmologist at St. James's Hospital, he was sent a letter which said the following:-
  - The consultants at the hospital were of the opinion that Mr T had a condition known as chronic central serous retinopathy, which had caused considerable damage in his left eye and some impairment to his right eye.
  - They were hopeful of some improvement, following recent laser surgery which Mr T had undergone.
  - Mr T could potentially be certified as sight impaired if there was no improvement following his laser treatment.
6. On 30 April 2012, Mr T was certified as being "severely sight impaired/blind" by the Ophthalmology Department at St James's Hospital.
7. On 8 May 2012, a specialist practitioner working for the University's occupational health department compiled a report. This said the following:-

- The recent laser surgery had not been as successful in Mr T's right eye as had been hoped, however, Mr T's specialist doctor felt that the condition had stabilised.
  - The vision in Mr T's left eye remained the same and was not expected to improve.
  - There were no plans for Mr T to have any surgical or clinical intervention.
  - Mr T was learning to adjust to his new life as a visually impaired person and remained positive about his ability to undertake some kind of role at the University.
8. On 24 May 2012, Mr T met with the University's occupational health department in one of several ongoing meetings concerning his condition. The main points are summarised below.
- Mr T said that he was completely blind in his left eye and looking through his right eye was like looking through a kaleidoscope with blotches creating broken images.
  - As Mr T had been certified as sight impaired, the risk assessment which had been completed in November 2011 had been updated. All manual duties were considered a high risk and clerical duties were a medium risk.
  - Mr T felt more confident when in familiar places, with unknown surroundings posing more difficulty. Mr T had suffered a few accidents.
  - Mr T no longer read and his wife helped him with emails. He could not identify who was calling his mobile phone by reading the named caller and instead relied on their image.
  - Opportunities for retaining and reskilling would be explored for Mr T.
9. On 12 September 2012, Mr T had another meeting with the University's occupational health department. They confirmed to Mr T that a 12 week retraining and reskilling programme for him was in the process of being drafted.
10. On 15 November 2012, the occupational health department sent Mr T a letter in respect of the retraining and reskilling programme. This said:-
- "It is with regret that I must inform you that we are unable to support and progress this option due to the levels and nature of the work available in each division, the resource implications and the level of support that would be required by you."
11. On 28 November 2012, Mr T attended a meeting with the occupational health retirement. The following points were recorded in the summary notes:-
- Mr T felt that his sight had deteriorated a little.
  - Mr T confirmed that retraining in a role that involved a personal computer could be detrimental to his sight. He should raise this with his consultant.
  - The 12 week retraining had been withdrawn but Mr T's GP did not agree with the decision and felt that resource and support could be used.

- The University was of the opinion that they had explored and exhausted all of the options available to get Mr T back to work.
  - Mr T would continue to access Remploy, an independent organisation which supports businesses in employing people with a disability, for training. He had found a couple of hours of training very tiring.
  - Action for Blind People had shown Mr T some aids that he could use at work, however these could only be put in place when Mr T secured a job.
12. On 12 December 2012, Mr T's Ophthalmologist provided him an up to date summary of his visual function for forwarding to the University. This confirmed that no further treatment was planned.
13. On 19 December 2012, an occupational health physician, Dr King, reviewed the matter and sent a report to the University's occupational health department. He made the following points:-
- Mr T's treatment may prove to be quite effective, but it would stabilise his condition rather than improve it. Mr T's vision was unlikely to improve beyond this.
  - Mr T's vision had deteriorated to a point where he was incapable of doing his current role and it seemed unlikely that any work adaptations would improve matters.
14. The final paragraph of the letter said:-
- "Beyond this, however, we have to judge whether he is capable of gaining gainful employment at some time in the future and I think the discussions with him in terms of retraining and the help and support that can be offered suggest that he may well be.
- I believe we must assume that this currently is a possibility for [Mr T] and based on this I would tick the box suggesting that he is capable of undertaking gainful employment within the next three years.
- I have completed the ill health certificate accordingly."
15. On 10 January 2013, representatives of the University met with Mr T and informed him that tier 3 ill health benefits had been granted. A letter of the same date followed.
16. On 19 February 2013, Mr T accepted the University's offer of retiring on ill health grounds.
17. On 23 June 2013, Mr T appealed the tier 3 decision which was awarded to him, as he felt that he was entitled to tier 2 benefits instead.
18. On 20 January 2014, the University responded to Mr T under stage one of the Internal Dispute Resolution procedure (**IDRP**). It said the information provided suggested that although Mr T could not continue his line of work, there was no reason to suggest that he could not return to gainful employment within three years of his ill

health retirement date. The University also rejected claims that it was unwilling to provide a re-skilling programme.

19. On 19 August 2014, Dr King sent the University a letter following a reassessment of Mr T's condition 18 months after the date of leaving employment. This letter is summarised below.
  - At the time of the report 18 months ago, Mr T was still being assessed for treatment which could have improved his vision to a degree and stopped it getting worse.
  - As it stood, the treatment had not brought about any improvement and Mr T continued to show slow deterioration in his vision.
  - Mr T was now severely visually impaired. He had virtually no vision out of his left eye and his right eye vision was completely occluded.
  - Mr T had been experiencing difficulties getting out and about. He could not read, watch the television or look at a computer screen.
  - It was now more certain that this was a permanent condition and one which would deteriorate further.
  - There are always possibilities for those with low vision to continue in work, but those in such a situation usually had some office type skills and had adapted to a lack of vision over many years. The likelihood of Mr T returning to work was very low.
  - It was therefore unlikely that Mr T would undertake gainful employment again in the future. It would be reasonable for his pension to be uplifted from tier 3 to tier 2.
20. Mr T appealed the IDRPs stage one decision to the City of Bradford Metropolitan District Council (**CBMDC**) under stage two of the IDRPs. However, on 26 September 2014, CBMDC said the appeal was not received in time and therefore, it could not be considered.
21. The complaint was subsequently accepted for investigation by this Office. On 16 February 2016, Mr T made the following comments:-
  - Chronic central serous retinopathy is a rare and almost unique degenerative condition involving fluid seeping from the back of the eye causing distorted vision.
  - When attending a further appointment on 30 April 2012, Dr King stated that further laser eye surgery would be of no benefit and would only take place if absolutely necessary. It was at this point that Dr King issued a certificate of severe sight impairment.
  - As far as Mr T was aware, the documents dated 14 March 2012 and 30 April 2012 were the only ones which the University had requested. The University ought to have requested an updated or technical analysis of Mr T's condition when carrying out its assessment, especially when considering the complicated nature of it.

## Adjudicator's Opinion

22. Mr T's complaint was considered by one of our Adjudicators who concluded that the University should reconsider the decision it made to grant Mr T tier 3 ill health retirement benefits. The Adjudicator's findings are summarised briefly below:-

- West Yorkshire Pension Fund (WYPF), the Administering Authority, had set out its ill health retirement application process in its literature. In summary, this was that the WYPF ill health retirement certificate would be completed and forwarded to the Personnel Officer. The Pensions Officer, Personnel Officer and Occupational Health would then review the case information in conjunction with the IHR certificate, and agree the level of ill health retirement to be awarded.
- This wording suggested that whilst the ill health retirement certificate should be taken into account, it should be considered alongside other information.
- The correct procedure was followed in respect of Dr King's report being reviewed by the appropriate staff. However, the correct procedure was not followed in respect of the University not providing its reasons for granting tier 3 benefits in writing.
- Dr King's report appeared to have been given considerable weight, however the language within this letter was questionable. Dr King had implied that he had relied on Mr T's personal judgment, this being that he would be able to undertake gainful employment. Dr King had strongly indicated that his decision was the result of conversations with Mr T.
- However, Dr King was brought into the process in his capacity as an independent registered medical practitioner (**IRMP**). Accordingly, he was required to provide an assessment of Mr T's ability to undertake gainful employment from his own medical experience and knowledge, rather than rely on Mr T's personal assessment.
- The decision made by the University to award Mr T tier 3 benefits was perverse on the grounds that Dr King did not make an appropriate recommendation of the matter based on his own medical opinion. Hence, it was not appropriate for the University to rely on Dr King's recommendation to award tier 3 benefits.
- The University ought to have questioned Dr King's report and sought further information or a second medical opinion to address the less than robust method in which Dr King formed his conclusions.

23. Mr T accepted the Adjudicator's Opinion. The University did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The University provided its further comments which do not change the outcome. I set out the reasons for my decision below.

## Ombudsman's decision

24. The University says that Mr T was aware of the reasons behind being granted tier 3 benefits. Whilst this may be the case, the first paragraph of Regulation 57 of the LGPS Administration Regulations (2008) said:
- “Every person whose rights or liabilities are affected by a decision under regulation 55 must be notified of it in writing by the body which made it as soon as is reasonably practicable.”
25. Hence, the above requirement was not adhered to. The only record of reasoning is contained in Dr King's report and letter.
26. The University does not deem it unreasonable for the medical practitioner to seek the personal view of the employee. I make no finding about whether or not that happened in this case. Although Dr King makes reference to discussions with Mr T in terms of retraining help and support, Mr T does not recall ever meeting him. Suffice to say I make no criticism of the medical practitioner asking an employee what they think they are capable of or considering evidence about retraining options which are available, provided the medical practitioner then goes on to draw their own professionally informed opinion applying the relevant test. The University say Dr King's role was to assess Mr T in line with LGPS Regulations and provide medical opinion. I agree. They consider that he did exactly that. Here I disagree.
27. I agree that Dr King asked himself the correct questions 1) is this person permanently incapable of returning to his normal job? 2) Is he capable of gaining gainful employment before normal retirement age? However, the letter of 19 December 2012 indicates that in answering the second question he applied a lower standard of proof than is required by the Regulations.
28. The medical practitioner is required to apply an objective test on the balance of probabilities; is it more likely than not that the person in front of them will be capable of undertaking gainful employment within the relevant time frame. That is not a test of whether relevant work is likely to be available in the current market, but it does require an assessment of the personal abilities and disabilities of the particular individual and a consideration of how those affect their ability to do work for which they are or could become skilled. Dr King's conclusion that Mr T 'may well be capable' 'and we must assume that [return to work] currently is a possibility' does not demonstrate that he considered whether T was objectively 'more likely than not' to be capable within the next three years. In concluding that this outcome was a possibility, he appears to have made no objective assessment of how likely it actually was. Upon receiving the report in those terms, the University should have questioned it further and asked for an objective assessment of Mr T's capability over the next three years on the balance of probabilities. The University should then have explained the reasons for its decision to Mr T in writing, including the account which it took of the IRMP's conclusions.

29. The University has questioned whether obtaining a second opinion from another IRMP would lead to a different outcome in any event. I can make no finding either way about that and do not seek to prejudge the outcome of a further decision. I am however satisfied that the original medical opinion was flawed in its approach, that flawed approach flowed through into the decision made by the University and the decision should therefore be remade. I consider it appropriate that another IRMP who has had no prior involvement in the case considers whether Mr T qualified for either Tier 1, 2 or 3 at the time he left employment.
30. For the reasons above the complaint is upheld and I will direct the University to remedy the maladministration.

### **Directions**

31. The University shall obtain a medical report and certification from an IRMP not previously involved in this matter. The IRMP shall review Mr T's medical records and other available evidence which he or she considers relevant to the assessment required by the Regulations as at 19 December 2012.
32. The University shall, within 21 days of receiving the IRMP's opinion, review the matter and make a new decision about the ill health benefits which to Mr T was entitled in December 2012.
33. Within 28 days of the second decision, if Mr T is to be awarded a higher tier, then the University has to ensure that any additional cost associated with the payment of a higher tier should be met by it. It shall liaise with WYPF to ensure that the correct tier is paid from 19 December 2012 and that any additional pension is paid from this date, with interest added at the rate quoted by reference banks, from 19 December 2012 to the date of settlement.

**Karen Johnston**

Deputy Pensions Ombudsman  
11 April 2017