

Ombudsman's Determination

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| Applicant | Mr N |
| Scheme | Teachers' Pension Scheme (the Scheme) |
| Respondents | Teachers' Pensions (TP) New Hall School (the School) |

Outcome

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

Complaint summary

3. Mr N's complaint, brought on behalf of his late wife's estate, is that TP and the School did not advise his late wife that she could apply for an ill health pension rather than an actuarially adjusted early retirement pension.
4. Mr N complaint against TP is also due to their refusal to allow Mrs N to change the benefits that she was receiving from an actuarially adjusted early retirement pension, to an ill health pension.

Background information, including submissions from the parties

5. On 24 February 2014, Mrs N gave the School notice of her resignation for the end of the 2013/2014 school year, 31 August 2014.
6. On 6 March 2014, Mrs N's early retirement application was submitted to TP for retirement on 1 September 2014, at the age of 56.
7. On 12 March 2014, Mrs N saw her GP and was diagnosed with cancer, there were no prior symptoms that could have indicated that she was ill.
8. On 20 March 2014, Mrs N was diagnosed with terminal cancer by a specialist.
9. On 22 March 2014, Mr N provided the School with a sickness certificate on Mrs N's behalf and provided details of Mrs N's diagnosis and prognosis. On 25 April 2014, Mr N provided the School with a second sickness certificate upon expiry of the first.

10. On 1 September 2014, Mrs N's actuarially adjusted early retirement pension commenced. In November 2014, Mr N read in the press about enhanced ill health pensions for those with serious or terminal ill health.
11. In February 2015, Mr N contacted TP asking for Mrs N's pension to be revised to an ill health pension.
12. On 26 February 2015, TP rejected the request because Mrs N's pension was already in payment. Mrs N had applied for an actuarially reduced pension not for a pension on the grounds of ill health. TP advised that the pension could not be amended under the Teachers' Pensions Regulations 2010.
13. On 1 March 2015, Mr H appealed this decision through the Internal Dispute Resolution Procedure (**IDRP**) with the Department for Education.
14. On 26 March 2015, the DfE issued its response. The DfE agreed with TP that the Teachers' Pensions Regulations 2010 had been correctly followed, it referred to paragraph 3 (1d) of Schedule 7, and that Mrs N was not entitled to have her benefits amended as they were already in payment, as confirmed in Regulation 60 (5). TP state that between 20 March 2014 and 1 September 2014, Mrs N had ample time to withdraw her early retirement application and submit an ill health retirement application, which TP say would most likely have been approved. However, Mrs N did not apply for an ill health pension and TP were not made aware of her poor health prior to her retirement on 1 September 2014.
15. On 14 April 2015, Mrs N passed away. On 18 July 2015, Mr N wrote to the School and asked for confirmation of its role in the retirement process.
16. On 18 August 2015, the School responded confirming that its role is solely administrative with regard to setting up employees in the pension and ensuring that contributions are paid. It confirmed that it does not offer advice with regard to any aspect of the Scheme and where asked, direct employees to TP or an independent financial advisor. Mrs N did have contact with the School Assistant Finance Manager, in February and early March 2014, regarding the process of applying for her actuarially adjusted pension. It was explained to Mrs N that TP require at least 4 months to process an application for retirement at the end of the school year. The School said that Mrs N confirmed that she was experiencing difficulties completing the online application form for an actuarially adjusted pension. The School's Assistant Finance Manager told Mrs N that she should contact TP directly about any difficulties she experienced whilst making an application. Finally the School said, Mrs N did not contact the School regarding her retirement options after 12 March 2014, when her circumstances changed.

Adjudicator's Opinion

17. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by Teachers' Pensions. The Adjudicator's findings are summarised briefly below:
- TP was not aware that Mrs N was suffering with ill health until after her pension was put into payment. As TP was not informed of Mrs N's deteriorating health, TP could not provide information to Mrs N regarding her available retirement options, including ill health. TP cannot be held to be at fault for not informing Mrs N about ill health, when TP itself was not aware of her poor health.
 - However, it is reasonable to conclude that information regarding ill health retirement, including serious ill health is readily available online on the members section of the TP website. Mrs N visited the TP website to complete the online application form for her actuarially adjusted pension, therefore, she would have also had access to information about ill health retirement.
 - The School does not have any involvement in advising employees of the benefits they hold in the Scheme. Mrs N did not ask for the School's assistance regarding exploring different pension options, and the School are not required to supply this information of its own accord.
 - In the Regulations, Schedule 7, is clear that only one type of pension or "Case" can be applied for. Ill health retirement falls under Case C and state that if applied for no other Case other than Case A (normal retirement) applies. Actuarially reduced early retirement is Case E, this also states that an application under Case E is made "on the basis that Case E, and no other Case (apart from Case A), applies". Mrs N applied for Case E, therefore Case C cannot apply. Mrs N could have withdrawn her application under Case E before retirement and then applied for ill health retirement under Case C, however, she did not. TP has correctly followed this regulation.
 - The Regulations state that once a pension is in payment it will be paid for life. Regulation 60 (5) states, "Except as otherwise provided in these Regulations, the pension is payable for life." The regulations only provide otherwise where a criminal offence has been committed, and forfeiture of all, or part of the pension is applicable.
 - In summary the complaint was not upheld as no application for ill health retirement was made. TP was not aware of Mrs N's ill health and, the School had no obligation to advise Mrs N on pension matters.
18. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N's solicitors provided their further comments which are summarised below:-

- Cancer is a disability within the provisions of the Equality Act. TP, the School and the Pensions Ombudsman's Office had an obligation to ensure that they did not directly discriminate against Mrs N. No consideration has been given by them as to whether Mrs N has been treated less favourably by requiring her to make an application for ill health retirement before 1 September 2014. Mrs N was unable to make the application for ill health before 1 September 2014 due to her disability. Mrs N was therefore treated less favourably than a non-disabled person as a non-disabled person would have been able to make the application.
 - Based on the House of Lord decision in *Scallly and others v Southern Health and Social Services Board* [1992] the School had a duty when it was informed that Mrs N had been diagnosed with terminal cancer to notify TP, or alternatively, the School had a duty to notify Mrs N that she could apply for an ill health pension and to assist her in making that application.
 - The School were aware of Mrs N's diagnosis on 22 March 2014. Given that the School had an administrative obligation to complete any forms that may have been required, the School had an implied duty to inform TP of Mrs N's diagnosis.
19. Mr N's solicitors' comments 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 N's solicitors for completeness.

Ombudsman's decision

20. The Equality Act states that discrimination can be justified if the person who is discriminating can show it is a proportionate means of achieving a legitimate aim. For example if it is necessary for the business to work, an employer may reject an applicant with a severe back problem where heavy manual lifting is an essential part of the job.
21. Following this, it is industry norm and common practice under all pension schemes, that the member must initiate the ill health pension process by making an application. Under the TP Scheme, the employer is also required to complete parts of the ill-health application form but only after the member has completed and submitted his/her parts of the form to the employer.
22. It is useful to adopt the principle in *Redcar and Cleveland Borough Council v Bainbridge* [2008] ICR 249:
- "It is inherent in the principle of proportionality that where different means of achieving a particular object could be achieved, the one which has the least discriminatory effect should be chosen."
23. It is difficult to imagine how the objective of considering a member for ill health retirement could be achieved in any other way.

24. Further, it is worth noting the Employment Appeal Tribunal's (**EAT**) direct discrimination ruling in the case of, *The Trustees of Swansea University Pension & Assurance Scheme and another v Williams* [2015] ICR 1197, The EAT made the point that ill-health retirement provisions under a scheme are set up to benefit disabled people. Non-disabled people would not qualify for ill-health retirement. The judge said that "treatment which is advantageous cannot be said to be "unfavourable" merely because it is thought it could have been more advantageous."
25. The Scheme rules taken overall, favoured those who were disabled and (in the EAT's judgment) it was perverse of the Employment Tribunal to conclude that the Scheme was discriminatory. Therefore, it would not be right to say on the one hand that the Scheme fulfilled an obligation under the Equality Act (by giving an advantage to disabled members over non-disabled members), but in doing so then falls foul of another.
26. The Teachers' Pension Scheme's ill-health provisions are also set up to benefit disabled people, therefore it could not be reasonably said that although the pension scheme rules as a whole favoured disabled people, they then discriminated against subsets of disabled people who had different capabilities with regard to accessing websites and making applications.
27. Mr N's solicitor relies on the case of *Scallly and others v Southern Health and Social Services Board* [1992]. However, the relevant point to be drawn from this judgment is:

Could she reasonably have been expected to know about the opportunity to apply for an ill health pension, unless it was brought to her attention by the employer?
28. Whilst Mr and Mrs N may have misunderstood the benefits available following the diagnosis of terminal cancer, any misunderstanding was not due to any advice given by the School or TP.
29. As there were no symptoms prior to this diagnosis, the School had no reason to consider the member for an ill health pension until it was informed of her cancer on 22 March 2014. However, by this time the member had already applied for early retirement. The TP Regulations 2010 would not allow a subsequent application for ill health retirement unless the first application was withdrawn. Mrs N had approximately six months to withdraw the application and re-apply but she did not.
30. Information explaining pension benefits payable on ill health were readily accessible on the TP website. It is correct that when a member applies online for an early retirement actuarially reduced pension, then on the same page, there is a link to access details for ill health benefits. Further information on ill health (Forms and Factsheets) is also readily accessible on the member page of the TP website.
31. If Mr N's argument was upheld, it may also imply a duty on the employer to advise the member in relation to her economic well-being. In this case being that the ill health

pension will put the member in a better financial position than an actuarially reduced pension. However, in *Outram v Academy Plastics* [2000] IRLR 499, the court decided that there was no general implied duty on an employer to provide information and/or advice to an employee about a pension scheme in order to prevent economic loss.

32. Similarly, in *Crossley v Faithful and Gould Holdings Ltd* [2004] IRLR 377, the Court of Appeal held that there is no general implied duty on an employer to take reasonable care of an employee's economic well-being. Such a duty would impose an unfair and unreasonable burden on employers. It is one thing to say that, if an employer assumes the responsibility for giving financial advice to his employee, it is under a duty to take reasonable care for the giving of that advice. It is quite a different matter to impose on an employer the duty to give his employee financial advice in relation to benefits accruing from his or her employment, or generally to safeguard the employee's economic well-being.
33. Therefore, I do not uphold Mr N's complaint.

Anthony Arter

Pensions Ombudsman
20 March 2017