

Ombudsman's Determination

Applicant	Mr R
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	Birmingham City Council (BCC) Wolverhampton City Council (WCC)

Outcome

1. Mr R's complaint against BCC and WCC is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) BCC shall pay Mr R £1,000 and WCC shall pay Mr R £500 for distress and inconvenience caused.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr R's complaint against BCC is that he was refused ill health retirement from the date his employment ended and that his subsequent stage 1 appeal, under the Fund's internal dispute resolution (**IDR**) procedure, was mishandled and not decided.
4. Mr R's complaint against WCC is that it perversely refused his appeal for ill health retirement at IDR stage 2 and took 11 months to issue its decision.

Background information, including submissions from the parties

5. Mr R is a deferred member of the Fund. The Fund is administered by WCC, the Administering Authority, and is part of the Local Government Pensions Scheme.
6. Mr R was employed as a Principal Auditor by BCC (the Employing Authority). BCC is a participating employer in the Fund.
7. Mr R became absent from work following a road traffic accident in September 2012. He suffered injuries and subsequently developed post-traumatic distress disorder (**PTSD**).
8. As part of BCC's managing attendance process he was referred to Occupational Health Services (**OHS**) for a prognosis on a likely return to work.

PO-9925 and PO-9600

9. In December 2012 an OHS advisor gave her opinion that it was more likely that Mr R would return to work after Christmas. She recommended a number of measures be implemented on his return to work to aid his rehabilitation.
10. Following Mr R's continued absence he was referred back to OHS. OHS requested a report from his GP, Dr Kiteley, to outline Mr R's current active medical condition(s), results of relevant investigations, the intended plan of management and the prognosis.
11. In a report dated 10 April 2013, Dr Kiteley said:-
 - When seen on 7 September 2012 Mr R had pain in his left shoulder, both calves and both ankles. He was having flashbacks, disturbed sleep and anxiety (especially around driving).
 - Treatment had been arranged by Mr R's insurance company and the Practice had no correspondence on this. Mr R had advised he had received physiotherapy, including ultrasound and manipulation, and he was on painkillers.
 - Concerning his flashbacks and anxiety, Mr R initially had a single prescription for diazepam. Subsequently paroxetine was prescribed, an antidepressant. Mr R had received counselling via his wife's employer, but the Practice had no information on this. Mr R had also been referred for NHS counselling. Currently, Mr R was still suffering anxiety and panic attacks and his antidepressant medication had been increased. Mr R was also suffering pain in his right shoulder and left leg. Mr R had shown him a report from a physiotherapist for his insurance company which said his pain was not improving through a psychological block and that they had arranged an assessment of this.
 - Overall Mr R was in limbo, waiting for NHS counselling, counselling via his insurance company and a psychological assessment.
 - Once Mr R got past the trauma of the accident his overall prognosis was good.
12. Later that month Mr R attended an OHS appointment with Dr Southam (an OHS physician). On 26 April 2013, Dr Southam reported to BCC that Mr R appeared to be still experiencing musculoskeletal symptoms and symptoms of PTSD despite treatment undertaken to date, including medication, a course of counselling and physiotherapy. Dr Southam said Mr R had been referred by his GP for more specific counselling and was also due an assessment by an orthopaedic specialist. Dr Southam said he considered Mr R was still unfit for work and realistically there might be a three to six month period before the outcome of further treatment could be evaluated. If a good response was obtained then a return to work might be possible. Dr Southam gave his opinion that whilst additional treatment was being considered neither redeployment nor ill health retirement were applicable.

PO-9925 and PO-9600

13. A Final Hearing in June 2013, under BCC's managing absence policy, was adjourned for six weeks to allow Mr R a further opportunity to make progress with his recovery via ongoing treatment. The reconvened Final Hearing was adjourned for a further month, on the grounds that further medical evidence was required. BCC duly requested OHS' opinion on whether ill health retirement was now appropriate.
14. In September 2013 Dr Southam gave his opinion that Mr R remained unfit for work in any capacity and that there remained considerable doubt as to whether he could return to his substantive post in the foreseeable future. As to whether redeployment or ill health retirement was suitable, Dr Southam said he required medical reports from the treating specialists.
15. Reports were duly requested from Ms Green (Green Wellbeing Solutions) and Ms Portman (a counsellor at Dr Kiteley's practice). The OHS informed Mr R that he would need to make arrangements with Ms Green and Ms Portman to see their respective reports as neither would be sent to him directly.
16. Ms Green replied to OHS that she was not allowed to do a report as she was contracted to Life Matters/Ceridan UK Ltd and OHS would have to contact them. OHS decided not to do so and awaited Ms Portman's report. Ms Portman subsequently advised that Mr R had attended counselling sessions at the Practice since June 2013 and that it was ongoing. She said she was not able to provide a diagnosis or prognosis and directed OHS to contact Mr R's GP. OHS duly requested a report from Dr Kiteley and Mr R was updated.
17. In a November 2013 report Dr Kiteley advised that:-
 - Mr R was still suffering pain in his shoulder and legs and remained on medication. He was mobile and his pain did not require specialist intervention.
 - Mr R's main problem was the symptoms of PTSD. He still was suffering anxiety, panic attacks, flashbacks and disturbed sleep and remained on Paroxetine.
 - Mr R was currently undertaking NHS counselling.
 - He had no reports from Mr R's counsellors or any investigations.
 - While Mr R's physical prognosis was good it was more difficult to predict how his PTSD would affect his ability to work as he was still in treatment. Progress so far was limited and it might be difficult for Mr R to return to his current complex and responsible role.
18. Dr Southam, in a letter dated 25 November 2013, updated BCC on Mr R's condition and said, based on the medical evidence currently available, he was unable to advise a return to work date. Dr Southam said permanent incapacity for work / ill health retirement could not be supported while Mr R's treatment for his psychological condition was ongoing. Dr Southam said he remained to be persuaded that Mr R had

PO-9925 and PO-9600

undergone maximum therapy for this condition, including assessment under a consultant specialist.

19. The next day BCC asked OHS for Dr Southam's opinion on whether medical redeployment for Mr R should be considered. Dr Southam's said he was unable to advise any timescale for when Mr R would be able to engage in such a process.
20. On 10 December 2013 Mr R's legal representative (Black Country Legal Consultants) wrote to BCC. Mr R's legal representative said:-
 - Mr R would not be able to attend either of the Final Hearing dates offered: 16 or 20 December 2013, due to ill health, which had deteriorated since the last adjournment to the extent that his prescription medication had been increased.
 - Dr Southam had not provided Mr R's GP with a copy of the Scheme's regulations for ill health retirement or asked the GP appropriate questions or comments in relation thereto.
 - Mr R had been accepted for ill health retirement in respect of two separate pension scheme arrangements (pertaining to earlier employments) and it saw no reason why this matter should not be dealt with on a medical retirement basis.
 - It was clear that Mr R was medically unfit to continue working and as such should be granted medical retirement.
21. Mr R's legal representative requested that Mr R's GP be provided with the Scheme's criteria for ill health retirement and asked for a further opinion and that Mr R be reviewed by an independent medical case officer as Dr Southam's views were tainted.
22. On 13 December 2013 Dr Kiteley wrote an open letter that despite medication and a course of CBT, Mr R had not improved and remained unable to return to his responsible position. Dr Kiteley's letter does not appear to have been seen by Dr Southam.
23. The Final Hearing reconvened on 16 December 2013. The next day BCC's Assistant Director, Audit & Risk Management, wrote to Mr R informing him that his employment was terminated with immediate effect as his level of sickness absence could not be sustained.

Commenting on the letter received from Mr R's legal representative, BCC's Assistant Director said she was satisfied that Dr Southam had asked Mr R's GP appropriate questions about his medical condition and that Dr Southam had made all enquiries necessary to enable him to provide his medical opinion. Therefore, she saw no reason to grant the request that the matter be referred back to OHS for further consideration.

PO-9925 and PO-9600

In making her decision to terminate Mr R's employment, she said recent indications were that his medical condition had deteriorated and Dr Southam had advised that ill health retirement could not be considered at that time.

The dismissal letter informed Mr R that he would receive a further letter relating to his pension in the near future which would explain his rights of appeal with regard to the non-payment of his pension on ill health grounds. Details of the appeal process were subsequently provided in February 2014.

24. In May 2014 Mr R notified BCC that he wished to appeal the decision not to award him ill health retirement and requested a copy of its appeal application form.
25. Not receiving one, Mr R submitted a written appeal to BCC on 24 July 2014. Mr R said:
 - Dr Southam's decision appeared to have been substantially based on the existence of possible future treatments, but it was not clear that Dr Southam had considered their efficacy. He had completed a course of Cognitive Behavioural Therapy some 9 months previously, in March 2013, which had proven unsuccessful.
 - BCC had merely transmitted Dr Southam's opinion without making their own decision.
 - His condition clearly satisfied the Scheme criteria for Tier 1 retirement.
26. In November 2014 Mr R complained to WCC that BCC and WCC had not complied with the Fund's pension appeal policy and procedure.
27. WCC acknowledged Mr R's complaint and in a separate letter notified Mr R that it could take a fresh look at his complaint if he had not received a decision or an interim letter from BCC and more than three months had passed since his complaint had been lodged.
28. The next month WCC notified Mr R that it had written to BCC for information regarding his case and that a formal response would be issued as soon as possible after the information from BCC had been received. WCC asked Mr R to submit any further evidence or information he had that he wished WCC to consider in its investigation.
29. On 1 April 2015 WCC wrote to Mr R and copied-in BCC. It said to progress any IDR stage 2 case it required a copy of the IDR stage 1 decision by the Specified Person. WCC said it had contacted BCC on several occasions, in December 2014 and January 2015, and last on 2 February 2015, chasing the IDR stage 1 decision, but to date had not received a response. WCC said it was unable to take the matter further without IDR stage 1 decision and suggested, should Mr R wish to escalate the matter further, he should contact TPAS initially and subsequently the Pensions Ombudsman.

PO-9925 and PO-9600

30. The next day Mr R complained to WCC. He said WCC had for more than 12 months done no more than chase BCC for a decision, which he had previously made WCC aware had not been provided by BCC. He required WCC to intervene and provide a final decision. He said he had provided more than ample information to enable WCC to make an IDR stage 2 decision on his entitlement to an ill health pension.
31. On 17 April 2015, the new Specified Person for BCC wrote to Mr R apologising that to date he had not been provided with an IDR stage 1 decision. As a way forward she suggested that BCC would now start the process and medical reports would be requested and asked Mr R if he was happy with this course of action.
32. Mr R replied on 30 April 2015. He said:-
 - BCC was obligated to provide its IDR stage 1 decision by August 2014. It did not have the obligation or right to now introduce an unapproved hybrid IDR procedure. The approved IDR procedure remained active and had not yet been exhausted.
 - BCC had failed to explain why no decision had been made by the Specified Person.
 - The WCC contact provided had been replaced in September 2014. He therefore questioned whether BCC were aware of the correct process.
 - As an IDR stage 1 decision had not been given to him he was allowed to move to IDR stage 2 with WCC, which he had done.
 - BCC should provide the information that WCC had requested.
 - As he had invoked IDR stage 2 it was not clear why he should agree to deviate from the approved procedure.
 - OHS had failed to contact all of his treating medical specialists and OHS and BCC had not considered his GP's letter of 13 December 2013.
 - BCC had not fully investigated and assessed his claim for ill health retirement.
 - He understood that musculoskeletal and PTSD conditions ranked as the top reasons for retirement from the Fund. He had both conditions.
 - He had completed CBT, which had been unsuccessful. His GP had confirmed the treatment and had recommended early retirement and had said that he had a permanent breakdown in health. BCC had since conceded that he had disabilities.
33. In a letter to Mr R, dated 28 April 2015, the Fund's Strategic Director of Pensions conceded that with hindsight certain details related to his case could have been better handled. He said the Fund did have his pension details, but until recently did not have details of the actual dispute upon which the appeal was based. While he accepted that a basic requirement of the Fund was to provide a pensions decision, in this instance the decision originated from an employment dispute rather than a

PO-9925 and PO-9600

dispute of pension benefits, albeit they were indirectly related. He said as a direct result of pressure by the Fund, he was aware that BCC had written (on 17 April 2015) to Mr R to confirm that they would reconsider the early payment of preserved benefits on the grounds of ill health.

34. In May 2015, BCC notified Mr R that it had provided WCC with copies of the evidence which the Specified Person should have considered at IDR stage 1.
35. The Fund's Strategic Director of Pensions next wrote to Mr R on 27 May 2015. He said the medical evidence available, primarily that provided by Dr Southam, had been reviewed, and in light of that evidence and given the time that had now elapsed, the most appropriate course of action was for WCC to arrange an independent medical assessment to be undertaken by their appointed Medical Advisor under IDR stage 2. He asked Mr R to complete and return "form of authority" and "access to medical records" forms. He said once it was in receipt of Mr R's consent it would look to arrange a medical assessment and on receipt of the outcome a decision would be made under IDR stage 2.
36. In reply, Mr R said that Dr Southam's medical evidence was fundamentally flawed and that was why his GP had corrected the matter in his report of 13 December 2013. As Dr Southam could not have seen his GP's letter, Dr Southam's 25 November 2013 report was irrelevant.
37. Mr R asked WCC to ensure that the IRMP chosen was aware that he was not, as Dr Southam had asserted, "undergoing treatment for his psychological condition". He had completed CBT, which had not been successful. His PTSD had deteriorated, as witnessed by OHS in March 2013 and by his Line Manager during a Home Welfare Visit in July 2013.
38. Mr R gave his consent for BCC to disclose all his medical and pension records to the Fund's Strategic Director of Pensions.
39. On 12 June 2015 WCC asked Dr Archer, an independent registered medical practitioner (**IRMP**) for his opinion on whether Mr R satisfied the criteria for ill health retirement from 17 December 2013.
40. On 23 July 2015 the Fund notified Mr R that it was continuing to investigate his case and confirmed that the investigation would cover both the benefits offered to him in light of the additional medical evidence provided, at IDR stage 2, and its handling of his IDR stage 1 appeal.
41. On 24 July 2015 Mr R submitted to the Fund a sick note from his GP, dated 18 June 2015, which extended until September 2015. He said this meant he had now been medically certified for more than three years as unfit for work due to his medical impairments, including PTSD.
42. The same day Dr Archer wrote to the Fund that Mr R did not meet the criteria for permanent incapacity at the date he was dismissed by BCC.

PO-9925 and PO-9600

In his report Dr Archer noted the reports available to him and BCC at the time of Mr R's dismissal to include: Dr Kiteley's report dated 10 April 2013, reports by Dr Southam and a report from Jane Portman counsellor to Dr Kiteley's practice.

Dr Archer said at the time of his dismissal Mr R had not exhausted all reasonably available NHS treatments and insufficient time had elapsed to assess his likely long-term functional and workability prognosis to age 65.

Dr Archer said the available treatments recommended by NICE were effective in the majority of patients facilitating an eventual resumption of normal day-to-day life.

Dr Archer noted that Mr R was 50 when he was dismissed and had 15 years to his NRA. Dr Archer said there was no disagreement that Mr R suffered from severe mental health problems, including anxiety and PTSD and he felt unable to work. However, a failure to return to work was not synonymous with a permanent (to age 65) incapacity to undertake the duties of his post with BCC.

Dr Archer noted that there were no reports showing that Mr R had fully exhausted any treatment plan carried out in accordance with NICE guideline CG 26, or reports from a specialist psychiatrist or specialist clinical psychologist. Dr Archer said that was not surprising given at that time Mr R was in or awaiting counselling and the fact that a full treatment plan in severe cases might take several years to complete.

Dr Archer said in Mr R's case there was no evidence of pre-existing mental health problems or other relevant co-morbidities which might have indicated an underlying vulnerability or adverse prognosis and based on research and consensus evidence the expectation would have been that Mr R would make an eventual recovery, following treatment, before age 65.

Dr Archer referred to NICE guideline CG26 that two-thirds of adults PTSD symptoms resolved naturally, although this might take several months. While one-third had longer-lasting symptoms and for many these were severe and enduring. Dr Archer also referred to Psychosomatic Medicine: November/December 1997. This stated a five year follow-up of people suffering long term psychological effects, as a result of a motor accident, showed that most early onset cases had remitted in five years and a similar number of delayed onset cases in five years.

Dr Archer concluded that on the date of Mr R's dismissal it was entirely reasonable to conclude that his eventual recovery was likely to take place before NRA and that there was insufficient evidence to show that he was permanently incapable of efficiently undertaking his duties as an auditor.

43. In September 2015 WCC asked Dr Archer to review his report as it referred to Mr R having 25 years to his normal retirement age (NRA), when in fact he had 15 years to

PO-9925 and PO-9600

NRA at the time he was dismissed by BCC. WCC asked if the shorter period to NRA changed his opinion. Dr Archer duly amended his report with the correct number of years to Mr R's NRA. His opinion remained unchanged.

44. The appointed person for WCC accepted Dr Archer's opinion and duly upheld BCC's original decision not to award Mr R ill health retirement.
45. In a separate letter to Mr R, dated 16 September 2015, WCC apologised for the time taken to review his IDR stage 2 appeal and that it was aware that this had added to the delay he had experienced in BCC's review of his appeal at IDR stage 1. WCC said points had been learned from his case and these were being incorporated into the Fund's IDR procedures and new guidance would be issued to all employers.
46. Mr R asked WCC to consider new evidence: his GP's sick note of 17 September 2015 and DWP's decision to support his full time care.

BCC's position

47. BCC say:-

- For permanent incapacity to be demonstrated, all possible treatment options must have been fully and energetically exhausted.
- Mr R had been refused ill health retirement based on the available medical evidence.
- The Specified Person failed to make an IDR stage 1 decision and had not responded to WCC's several requests for a copy of that decision.
- In April 2015 the Fund had escalated Mr R's case to the Chief Executive of BCC and a new Specified Person was appointed. The Specified Person had suggested a way forward to remedy the situation, which Mr R had declined.
- From April 2015 the Specified Person ensured that WCC's Appointed Person was provided with all the documentation relating to the case to make an IDR stage 2 decision.

WCC's position

48. WCC say:-

- It has considered all of the medical evidence provided, consulted the regulations and guidance on the application of ill health regulations, obtained an IRMP's report and then decided to uphold BCC's decision not to award Mr R ill health retirement from 17 December 2013.
- Dr Archer's conclusion was that at the time of dismissal it was entirely reasonable to conclude that Mr R's eventual recovery was likely to take place before his NRA.

PO-9925 and PO-9600

- Under the Scheme's regulations, ill health retirement could only be considered if Mr R was permanently incapable of returning to his former employment with BCC
- It was noted that Mr R had provided additional medical evidence in September 2015. Mr R might submit an application for the early payment of his deferred pension if his health has deteriorated.
- The timeliness of the IDR stage 2 decisions had fallen short of meeting the reasonable periods within which WCC normally expected to operate. However it was necessary to ensure that all relevant information had been gathered and reviewed before a final decision could be made. The complexities of Mr R's case had impacted on their ability to operate within normal timescales. These included: Tribunal proceedings in relation to Mr R's dismissal from employment, the volume of correspondence and documentation pertaining to his case, the number of different individuals and departments involved in reviewing the correspondence and documentation and the need to obtain an IRMP's opinion.

Mr R's position

49. Mr R says:-

- BCC failed to make a decision. It merely rubber stamped Dr Southam's flawed opinion.
- BCC failed to comply with the Fund's IDR policy and procedures. It did not issue an IDR stage 1 decision.
- Implausibly it had taken WCC seven months (from 3 November 2014 to 12 May 2015) to obtain his pension information from BCC.
- He does not know what medical evidence was used to contradict the medical evidence he had submitted.
- He was not given the opportunity to meet Dr Archer or review the numerous medical reports that were being prepared for WCC.
- The prognosis of his condition should have been assessed by a qualified practitioner in mental health in conjunction with Dr Archer's prognosis.
- He has been medically unfit for more than three years, he is permanently disabled and requires care for at least 35 hours a week; and the medical evidence he has submitted more than exceeds the Tier 1 evidential threshold for ill health retirement.
- WCC failed to comply with the Fund's IDR stage 2 procedure.

50. The applicable Scheme Regulations are provided in the Appendix.

Adjudicator's Opinion

51. Mr R's complaint was considered by one of our Adjudicators who concluded that further action was required by BCC and WCC. The Adjudicator's findings are summarised briefly below:-

- While the support Mr R was receiving from the State for his disability was an indication of his current state of health, the Scheme's eligibility test for ill health retirement at the date of his dismissal was more stringent.
- It was not clear that Dr Southam met the criteria for an IRMP, as defined in regulation 20(14) of the 2007 Regulations, as no certification was provided when he gave his opinion to BCC. But even if Dr Southam was an IRMP at that time, the fact that he had had been previously involved, providing advice on Mr R's continued sickness absence, meant that BCC should have obtained the certified opinion of another IRMP.
- It was also not clear that Dr Southam had had the correct eligibility test in mind when he said, in his November 2013 report, that permanent incapacity for work and hence ill health retirement could not be supported while Mr R was still undergoing treatment. Permanent incapacity for work was a more stringent test than required under regulation 20; and while Mr R's treatment was ongoing Dr Southam had failed to comment on its efficacy.
- BCC appeared to have done no more than blindly accept Dr Southam's opinion. There was no evidence in the dismissal letter that BCC had considered all of the medical evidence and attached weight to it before making its decision. Apart from stating Dr Southam's view, BCC had failed to explain its decision to Mr R so he could either accept it or submit a properly informed appeal.
- For these reasons BCC had not made a properly informed decision.
- BCC conceded that it had failed to comply with the Fund's IDR procedure. Despite several requests from Mr R and WCC the Specified Person did not make a decision.
- Inevitably BCC's maladministration had caused Mr R significant distress and inconvenience. In the circumstances a payment by BCC to Mr R of £800 was merited.
- At IDR stage 2 WCC obtained the opinion of Dr Archer (IRMP). Dr Archer clearly understood the Scheme's definition of permanent incapacity, had noted the duties of Mr R's post, his age and number of years to NRA when he was dismissed, and had correctly made his assessment based on the medical evidence that was available when he was dismissed.
- Dr Archer had noted that Mr R had experienced symptoms of PTSD for about 15 months prior to his dismissal and that there were no reports showing that Mr R had

PO-9925 and PO-9600

fully exhausted any treatment plan carried out in accordance with NICE guidelines, or reports from either a specialist psychiatrist or specialist clinical psychologist. But said that was unsurprising as Mr R was at that time in or awaiting counselling and a full treatment plan may take several years to complete in severe cases.

- On prognosis, Dr Archer said there was no evidence at the time of the dismissal that Mr R had any pre-existing underlying mental health problems or other relevant co-morbidities which might have indicated an underlying vulnerability or adverse prognosis. Dr Archer said there was a normal expectation of Mr R's eventual recovery leading up to the dismissal and referenced NICE guide CG 26 and other research on PTSD in support of this expectation.
- It was not clear whether Dr Archer had considered Dr Kiteley's November 2013 report and open letter of December 2013, as neither was mentioned in his report. But nothing turned on that as their content was unlikely to have changed Dr Archer's view. While Mr R had completed a course of CBT counselling, at that time he had not seen a specialist psychiatrist or specialist clinical psychologist.
- Mr R argued that Dr Archer had not seen him. But it was for Dr Archer to decide if he required a consultation with Mr R.
- Mr R's suggestion that his claim should have been assessed by a qualified practitioner in mental health, in conjunction with Dr Archer's prognosis, was not required under regulation 20 of the 2007 Regulations. The opinion of an IRMP was and Dr Archer had fulfilled that requirement.
- Mr R's submission of medical evidence pertaining to his condition after he was dismissed and evidence that he was receiving State assistance for full time care was not material to his complaint, as it was not medical evidence pertaining to his condition in December 2013. However, it would have relevance if Mr R decided to submit an application to BCC for the early release of his deferred pension benefits.
- For these reasons WCC had made a properly informed decision, which had corrected BCC's earlier failure to do so.
- WCC conceded that the timeliness of its IDR stage 2 decision had fallen short of meeting the reasonable periods within which it normally expected to operate.
- After acknowledging Mr R's appeal it had made several requests to BCC for a copy of the Specified Person's IDR stage 1 decision. It was not clear why that had been done as Mr R had made it clear that a decision had not been made. WCC had then informed Mr R that it could not take the matter further without BCC's decision before later changing its mind.
- Inevitably this delayed the provision of WCC's IDR stage 2 decision, which would have caused Mr R significant distress and inconvenience. In the circumstances a payment by WCC to Mr R of £500 was merited.

PO-9925 and PO-9600

52. 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

53. In providing his response to the Adjudicator's Opinion Mr R has referred to Determination PO-6196. Mr R says it and his case outline similar and material failings in the conduct of the LGPS administration, service and corporate governance. Nevertheless, my consideration of Mr R's complaint is based on the particular merits of his case.
54. Mr R says if he had been made aware by either Council of the regulations that were being followed or that specialist psychiatric evidence was required then he would have been able to furnish evidence much earlier and his pension case may have been concluded a very long time ago.
55. Mr R has submitted a report from a Chartered Psychologist dated 24 October 2016 and the most recent sick note from his GP dated March 2017. But neither document is material to his complaint, as it is not medical evidence pertaining to his condition in December 2013. As the Adjudicator said in his Opinion medical evidence pertaining to Mr R's condition after his dismissal will have relevance if Mr R decides to submit an application to BCC for the early release of his deferred benefits.
56. Mr R says WCC did not provide him with a copy of Dr Archer's reports and that this is in breach of the Access to Medical Reports Act 1988.
57. In fact there was one finalised report, Dr Archer corrected the term to Mr R's normal retirement age noted in his original report to WCC, but otherwise his opinion was unchanged in his finalised report.
58. Prior to requesting Dr Archer's report, on 27 May 2015, WCC wrote to Mr R informing him that it was its intention to arrange for another IRMP assessment to be undertaken and enclosed an "Access to Medical Reports" form for his completion and return together with a summary of the 1988 Act. The form asked Mr R to confirm whether he wished or did not wish to see the IRMP's report before it was sent to WCC. Mr R does not appear to have returned the form as his letter in reply did not refer to it.
59. While it would have been good practice if WCC had subsequently enclosed a copy of Dr Archer's report with its letter to Mr R informing him of its decision, equally Mr R could have requested a copy of the IRMP's report following his receipt of WCC's decision.
60. WCC has conceded that the timeliness of its IDR stage 2 decision fell short of meeting the reasonable periods in which it normally expected to operate. Taking into

PO-9925 and PO-9600

account all the circumstances, I agree with the Adjudicator that this merits a distress and inconvenience payment to Mr R of £500.

61. Mr R says the Adjudicator's suggested payment to him by BCC of £800 is unduly lenient. Mr R says it has taken over four and a half years for him to reach this point and that he now faces a further period of uncertainty.
62. Mr R says both Councils are continuing to make things harder for him in this complaint by closing down his numerous pension communications. Amongst other things to evidence this Mr R has cited WCC's letter of 3 March 2016, in which the Council said it would await the outcome of this office's review of his complaint before corresponding further on the matter with him. But I do not consider that was an unreasonable stance for WCC to take.
63. Given the material failings by BCC in complying with its IDR procedure causing Mr R considerable distress and inconvenience, I have decided that the payment for the significant maladministration should be increased to £1,000.
64. Mr R says he is very concerned that BCC and WCC will argue that he is out of time to submit a complaint about his medical retirement eligibility in 2012. However, I am satisfied that BCC's failure to make a properly informed decision, on whether Mr R satisfied the criteria for ill health retirement at the date he was dismissed, was corrected by WCC at IDR stage 2.
65. Mr R says BCC should be directed to make a fresh decision taking into account the current medical evidence from his GP and a specialist psychiatrist. That is not for me to direct. It is for Mr R to submit an application to BCC for the early release of his deferred pension on grounds of ill health.
66. Therefore, I partially uphold Mr R's complaint.

Directions

67. To put matters right, within 14 days of the date of this Determination BCC shall pay Mr R £1,000 and WCC shall pay Mr R £500 for the significant distress and inconvenience caused.

Anthony Arter

Pensions Ombudsman
22 March 2017

Appendix

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007

68. As relevant regulation 20 says:

“(1) If an employing authority determine..., in the case of a member...

(a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and

(b) that he has a reduced likelihood of obtaining any gainful employment before his normal retirement age, they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2) [Tier 1], (3) [Tier 2] or (4)[Tier 3], as the case may be.

(2) If the authority determine that there is no reasonable prospect of his being capable of undertaking any gainful employment before his normal retirement age, his benefits are increased -

(a) as if the date on which he leaves his employment were his normal retirement; and

(b) by adding to his total membership at that date the whole of the period between that date and the date on which he would have retired at normal retirement age.

(3) If the authority determine that, although he is not capable of undertaking gainful employment within three years of leaving his employment, it is likely that he will be capable of undertaking any gainful employment before his normal retirement age, his benefits are increased -

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date 25% of the period between that date and the date on which he would have retired at normal retirement age.

(4) If the authority determine that it is likely that he will be capable of undertaking gainful employment within three years of leaving his employment, or before reaching normal retirement age if earlier, his benefits -

(a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and

PO-9925 and PO-9600

(b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(5) 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 his opinion the member is suffering from a condition that renders him 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 he has a reduced likelihood of obtaining any gainful employment before reaching his normal retirement age.

...

(14) 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, his 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."

Local Government Pension Scheme (Administration) Regulations 2008

69. As relevant regulation 56, 'First instance determinations: ill-health', says:

"(1) ...an independent registered medical practitioner ("IRMP") from whom a certificate is obtained under regulation 20(5) of the Benefits Regulations in respect of a determination under paragraph (2), (3) or (4) of that regulation (early leavers: ill-health) must be in a position to declare that -

(a) he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested; and

(b) he is not acting, and has not at any time acted, as the representative of the member, the employing authority or any other party in relation to the same case, and he must include a statement to that effect in his certificate."

PO-9925 and PO-9600

Local Government Pension Scheme Regulations 2013

70. As relevant regulation 74, 'Applications for adjudication of disagreements', says:

“(1) Each Scheme employer and administering authority must appoint a person ("the adjudicator") to consider applications from any person whose rights or liabilities under the Scheme are affected by-

a decision under regulation 72 (first instance decisions);

...

and to make a decision on such applications.

...

(6) The adjudicator must determine-

(a) the procedure to be followed when exercising functions under this regulation;

and

(b) the manner in which those functions are to be exercised.”

71. As relevant regulation 75, 'Decisions of the adjudicator', says:

“(1) The adjudicator must give written notice of a decision under regulation 74 (applications for adjudication of disagreements) to-

the applicant;...

before the expiry of two months beginning with the date on which the application was received.

(2) But if no such notice is given before the expiry of that period, an interim reply must immediately be sent to the persons mentioned in paragraph (1)(a) to (c) setting out-

(a) the reasons for the delay; and

(b) an expected date for giving the decision ("the expected decision date")...”

72. As relevant regulation 77, 'Decisions of the administering authority on reconsideration' says:

“(1) An administering authority must give written notice of its decision after reconsideration under regulation 76 (reference of adjudications to administering authority) to-

the applicant;

...

PO-9925 and PO-9600

before the expiry of the period of two months beginning with the date the application is received.

(2) But if no such notice is given before the expiry of that period, an interim reply must be sent as soon as is reasonably practicable to the persons mentioned in paragraph (1)(a) and (b) setting out-

(a) the reasons for the delay; and

(b) an expected date for giving the decision ("the expected decision date")..."