

Ombudsman's Determination

Applicant	Mrs P
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	Hampshire County Council (the Council)

Outcome

1. I do not uphold Mrs P's complaint and no further action is required by the Council.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs P's complaint against the Council is that it refused to consider her ill-health retirement pension (**IHRP**) from active service.

Background information, including submissions from the parties

4. Mrs P's complaint is focussed on the fact that the Council should have referred her for assessment by an independent medical practitioner, (**IRMP**), before she left her employment.
5. The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2013, (the Regulations), are set out in the Appendix.
6. Mrs P was first referred to Occupational Health (**OH**), in December 2013 and saw an OH Adviser on a regular basis. Mrs P's health problems were attributed to Fibromyalgia and lower back issues. The OH Adviser's report, dated 9 June 2014, said that:

"Mrs P remains unfit for work for her current role only but is hopeful of a return to work in an alternative role if the recommendations made below are put in place prior to her current medical certificate expiring".
7. This opinion was subsequently updated by an OH Adviser on 9 July 2014 following receipt of Mrs P's doctor's report saying that she was fit for work with adjustments. The report said that:

“I am confident that with adjustments in place and the right level of support which should ideally continue after her return that Mrs P should make a successful return to work...The Occupational Health advice is to assist management. It should form part of the decision making process taking into account other managerial factors, for example availability of alternative duties/roles, staffing levels...”

8. On 15 July 2014, Mrs P had a meeting with the HR manager to discuss alternative employment.
9. On 23 July 2014, the Council sent a letter to Mrs P clarifying what was discussed in the meeting of 15 July 2014. The letter explained:

“At this meeting it was acknowledged by all parties that your medical condition precluded you from undertaking a fundamental aspect of your role i.e. restraint of children...It was explained to you that as you are unable to restrain, you are not medically fit for your role as BSW [Behaviour Support Worker]...management considers it not reasonable to ‘passport’ the restraining functions of a BSW to another...support worker...I am of the opinion that no reasonable adjustments can be made to restraint and you cannot continue in this role... you stated that you would accept the offer of redeployment which was made to you...I must advise you that, should you decide to reject this offer and not engage in the redeployment process, consideration will need to be given to managing your medical capability for your role of BSW through a final review meeting under Managing Absence-Long term sickness absence of the Managing Sickness Policy. Such a review could lead to your dismissal for medical capability”.

10. Mrs P subsequently accepted the alternative employment from 21 July 2014 to 7 November 2014. She then left her employment on 9 November 2014 and secured a job with Wiltshire County Council.
11. In February 2015, Mrs P applied for a deferred IHRP.
12. On 28 July 2015, Dr Thornton wrote a medical report that concluded Mrs P satisfies the criteria for deferred benefits. She was subsequently awarded a deferred IHRP by the Council.
13. On 21 August 2015, Mrs P made a complaint to the Council in relation to not being referred for IHRP from active service.
14. On 14 September 2015 she received a response under stage one of the internal dispute resolution procedure, (**IDRP**) that did not uphold her complaint. The letter said that:

“...there was no indication from Occupational Health that ill health retirement was a relevant consideration and on this basis there was no requirement for Christine Palmer to proceed with a further referral to Occupational Health. It is

noted that Regulations 35 and 36 do not apply. You subsequently applied for access to your deferred pension after leaving employment with Hampshire County Council.”

15. Mrs P appealed the decision and invoked stage two of the IDRP.
16. On 10 May 2016, the Council sent Mrs P a response under stage two of the IDRP that upheld the previous decision.
17. In August 2016, Mrs P brought the complaint to this Office. In November 2016, this Office received a formal response from the Council that said:

“The assertion made by Mrs P that she was at that time incapable of any gainful employment is not supported, even by her own evidence. The fact that Mrs P may have subsequently achieved certification of eligibility does not alter the position as at June 2014 when the County Council declined to refer Mrs P for further assessment, specifically addressing her eligibility for ill-health retirement, when the available evidence at that time made it clear that she is not eligible”.

Adjudicator’s Opinion

18. Mrs P’s complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council. The Adjudicator’s findings are summarised briefly below:-
 - Mrs P was a medical redeployee and not further referred to the IRMP. The OH Adviser’s report said that Mrs P was fit work with adjustments. However, due to the nature of her job, the Council’s conclusion was that it was not possible to make reasonable adjustments. The Council then offered Mrs P another position, which she subsequently accepted. So, Mrs P was not considered for IHRP whilst being a redeployee. Regulation 35 essentially allows the consideration of ill-health retirement when an active Scheme member’s employment has been terminated on grounds of ill health.
 - The Adjudicator noted that Mrs P applied for a deferred ill-health pension in February 2015, and was awarded deferred benefits. However, as Mrs P applied for IHRP benefits from deferred status and not active status, there are completely different processes followed by the Council in considering applications for deferred members.
 - During the meeting dated 15 July 2014, the Adjudicator noted that the Council did inform Mrs P that should she decide to reject the offer of redeployment, she would be managed under the sickness policy and that such a review could lead to her dismissal for medical capability. It would be only then that the Council could make a decision to refer Mrs P to IRMP for IHRP consideration based on all the medical evidence available at the time. As the OH Adviser said that Mrs P was fit for work

with adjustments. Mrs P was not entitled to be in employment and claim ill-health retirement.

- The Adjudicator did not believe that the Council has acted with maladministration in connection with Mrs P's complaint. The Adjudicator agreed that the Council correctly interpreted the Scheme Regulations and that Mrs P was not eligible to receive an IHRP from active status.

19. It was therefore the Adjudicator's opinion that this complaint should not be upheld.
20. Mrs P did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs P provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs P for completeness.
21. Mrs P denies the fact that she was a medical redeployee. She says that she had an option to be either dismissed or become a medical redeployee whereby an employee loses all their contractual rights.
22. Mrs P says that HR was supposed to refer her to an IRMP but gave an unqualified medical opinion instead. She also accuses the Council of cherry picking who it feels is eligible for IHRP consideration.

Ombudsman's decision

23. My role in this matter is not to decide whether Mrs P is entitled to IHRP- that is for the Council to decide in consultation with its IRMP. Also, it is not for me to agree or disagree with any medical opinion.
24. My role is to decide whether the Council has correctly applied the Scheme's Regulations, considered all the relevant evidence and make a decision which is not perverse. By perverse, I mean a decision which no other decision maker, properly advising themselves, would come to in the same circumstances.
25. I am satisfied that the Council has abided by the Scheme Regulations and considered all of the relevant evidence before arriving at its decision.
26. Mrs P says she was not a medical redeployee. However, I have not been provided with any evidence that supports this claim. The Council referred Mrs P for OH assessment. The report issued by OH Adviser clearly states that Mrs P was fit for work with adjustments. It also recommends that an alternative type of work be considered by the Council. However, as stated by the Adjudicator, due to the nature of Mrs P's post it was not possible to make reasonable adjustments. So, the Council then offered Mrs P another position following the OH's recommendation. Essentially, Regulation 35 states that in order for an active member to be considered for IHRP, his employment must have been terminated on grounds of ill health. So, I do not find that Mrs P was eligible to apply.

27. Turning to Mrs P's second point concerning the Council 'cherry picking' eligible members, I have not seen any evidence of this. Mrs P was informed of the process in her meeting with HR in July 2014. The Council explained that if she does not engage in the redeployment process it will continue with the meetings under the Sickness Policy. It is not until the member is deemed unfit for work that they can be referred to an IRMP to be considered for ill health retirement. I find that the Council followed the process correctly when presenting these options to Mrs P.
28. Had Mrs P stayed in her alternative position, and continued to be unwell, the Council may have referred her for another OH assessment at a later stage, which could have led her to be eligible for IHRP. However, it was Mrs P's decision to leave employment with the Council and become a deferred member.
29. Therefore, I do not uphold Mrs P's complaint.

Anthony Arter

Pensions Ombudsman
19 October 2017

Appendix

Regulation 35 states:

35 Early payment of retirement pension on ill-health grounds: active members

(1) An active member who has qualifying service for a period of two years and whose employment is terminated by a Scheme employer on the grounds of ill-health or infirmity of mind or body before that member reaches normal pension age, is entitled to, and must take, early payment of a retirement pension if that member satisfies the conditions in paragraphs (3) and (4) of this regulation.

(2) The amount of the retirement pension that a member who satisfies the conditions mentioned in paragraph (1) receives, is determined by which of the benefit tiers specified in paragraphs (5) to (7) that member qualifies for, calculated in accordance with regulation 39 (calculation of ill-health pension amounts).

(3) The first condition is that the member is, as a result of ill-health or infirmity of mind or body, permanently incapable of discharging efficiently the duties of the employment the member was engaged in.

(4) The second condition is that the member, as a result of ill-health or infirmity of mind or body, is not immediately capable of undertaking any gainful employment.

(5) A member is entitled to Tier 1 benefits if that member is unlikely to be capable of undertaking gainful employment before normal pension age.

(6) A member is entitled to Tier 2 benefits if that member-

(a) is not entitled to Tier 1 benefits; and

(b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment; but

(c) is likely to be able to undertake gainful employment before reaching normal pension age.

(7) Subject to regulation 37 (special provision in respect of members receiving Tier 3 benefits), if the member is likely to be capable of undertaking gainful employment within three years of leaving the employment, or before normal pension age if earlier, that member is entitled to Tier 3 benefits for so long as the member is not in gainful employment, up to a maximum of three years from the date the member left the employment.

36 Role of the IRMP

(1) A decision as to whether a member is entitled under regulation 35 (early payment of retirement pension on ill-health grounds: active members) to early payment of retirement pension on grounds of ill-health or infirmity of mind or body, and if so which tier of benefits the member qualifies for, shall be made by the member's Scheme employer after that authority has obtained a certificate from an IRMP as to-

- (a) whether the member satisfies the conditions in regulation 35(3) and (4); and if so,
 - (b) how long the member is unlikely to be capable of undertaking gainful employment; and
 - (c) where a member has been working reduced hours and had reduced pay as a consequence of the reduction in working hours, whether that member was in part time service wholly or partly as a consequence of ill-health or infirmity of mind or body.
- (2) An IRMP from whom a certificate is obtained under paragraph (1) must not have previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested.
- (3) If the Scheme employer is not the member's appropriate administering authority, it must first obtain that authority's approval to its choice of IRMP.
- (4) The Scheme employer and IRMP must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation and regulations 37 (special provision in respect of members receiving Tier 3 benefits) and 38 (early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members).

38 Early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members

- (1) A deferred member who, because of ill-health or infirmity of mind or body-
- (a) becomes permanently incapable of discharging efficiently the duties of the employment that member was engaged in at the date the member became a deferred member, and
 - (b) is unlikely to be capable of undertaking gainful employment before normal pension age, or for at least three years, whichever is the sooner, may ask to receive payment of a retirement pension whatever the member's age.
- (2) A request under paragraph (1) must be made in writing to the deferred member's former Scheme employer or appropriate administering authority where the member's former Scheme employer has ceased to be a Scheme employer.
- (3) Before determining whether or not to agree to a request under paragraph (1), the deferred member's former Scheme employer, or administering authority, as the case may be, must obtain a certificate from an IRMP as to whether the member is suffering from a condition that renders the member-
- (a) permanently incapable of discharging efficiently the duties of the employment the member was engaged in because of ill-health or infirmity of mind or body; and, if so,
 - (b) whether as a result of that condition the member is unlikely to be capable of undertaking gainful employment before reaching normal pension age, or for at least three years, whichever is the sooner.
- (4) A deferred pensioner member who, because of ill-health or infirmity of mind or body, is unlikely to be capable of undertaking gainful employment before normal pension age, may

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ask to receive payment of a retirement pension at any time before the member's normal pension age.

(5) A request under paragraph (4) must be made to the deferred pensioner member's former Scheme employer, or appropriate administering authority where the member's former Scheme employer has ceased to be a Scheme employer.

(6) Before determining whether to agree to a request under paragraph (4), the deferred pensioner member's former Scheme employer, or administering authority, as the case may be, must obtain a certificate from an IRMP as to whether the member, as a result of ill-health or infirmity of mind or body, is unlikely to be capable of undertaking gainful employment before normal pension age.

(7) If the Scheme employer is not the deferred or deferred pensioner member's appropriate administering authority, it must obtain that authority's consent to the appointment of an IRMP under this regulation.

(8) An IRMP appointed under paragraph (6) may be the same IRMP who provided the first certificate under regulation 36(1) (role of the IRMP).