

## Ombudsman's Determination

Applicant	Mrs S
Scheme	Local Government Pension Scheme ( <b>LGPS</b> )
Respondent	Hampshire County Council ( <b>the Council</b> )

## Outcome

1. Mrs S' complaint is upheld, and to put matters right the Council shall reconsider her ill health early retirement (**IHER**) application. The Council shall also pay Mrs S £500 for the significant distress and inconvenience she has experienced.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs S' complaint is about the tier of IHER pension she has been awarded.

## Background information, including submissions from the parties

### Background

4. Mrs S was previously employed as a School Lunchtime Supervisory Assistant. She was contracted to work for 1 hour and 20 minutes each week day.
5. Unfortunately, since around age 17, Mrs S has experienced chronic pain in her lower back.
6. In 2010, Mrs S was involved in a road traffic accident. Since the accident her pain has been persistent and has progressively worsened.
7. Mrs S' pain resulted in an extended period of sickness absence from May 2013.
8. On 30 April 2015, Mrs S' employer decided to terminate her employment on the grounds of incapability due to ill health. Mrs S was aged 41 years and 9 months.
9. During the period of her employment, Mrs S was a member of the Hampshire Pension Fund (**the Fund**) which is administered by the Council. The Fund is part of the LGPS which has a normal retirement age of 65.

10. The LGPS is subject to the Local Government Pension Scheme Regulations 2013 (**the Regulations**). Relevant extracts from the Regulations, which have been referred to in this Determination, are set out in the Appendix.
11. Regulation 35 sets out the three different tiers of IHER benefits available from the LGPS. The tier of pension payable is dependent on the member's ability to carry out gainful employment before their normal retirement age. Gainful employment is defined as, "means paid employment for not less than 30 hours in each week for a period of not less than 12 months."
12. On the termination of her employment, Mrs S applied for IHER. Her claim was accepted and she was awarded Tier 2 benefits.

### **Mrs S' position**

13. Mrs S is unhappy that she has not been awarded the more generous Tier 1 benefits. In support of this she has said:-
  - She was assessed for a Personal Independence Payment (**PIP**) and was awarded the maximum mobility payment.
  - A leading spinal consultant assessed her. If the Council had taken this specialist medical opinion into consideration it would have awarded her Tier 1 benefits.
  - The Council has failed to mention that she was seriously assaulted in 2012, which exacerbated her condition.

### **The Council's position**

14. The medical certificate, provided by Dr Ezan, the independent registered medical practitioner (**IRMP**), is unequivocal in certifying that Mrs S' entitlement to IHER is for Tier 2 benefits. Further, "the regulations do not require the employer to challenge a certificate which is ostensibly correct."
15. The fact that Mrs S is entitled to a PIP is entirely irrelevant to her eligibility for Tier 1 retirement benefits.
16. The consultant spinal surgeon who authored the report Mrs S has referred to is, "not appropriately qualified for the purpose of the regulations, in that he does not hold an appropriate qualification in occupational health medicine."

### **Adjudicator's Opinion**

17. Mrs S' complaint was considered by one of our Adjudicators who concluded that further action was required by the Council. The Adjudicator's findings are summarised briefly below:-
  - Regulation 72(4) specifies that it is the Council that has to make the decision as to what level of ill health benefits to award (if any). The Regulations provide that in

making this decision, the Council must obtain the opinion of an IRMP (Regulation 36(1)). However, the Council, as decision maker, should not accept the opinion offered by the IRMP blindly. As a minimum, it is expected to satisfy itself that there has been no error, omission of fact, or misunderstanding of the relevant Regulations by the IRMP.

- The Council has provided a copy of the IRMP certificate which certified that, in Dr Ezan's opinion, Mrs S was permanently incapable of discharging the duties of her employment with the Council and that she had a reduced likelihood of undertaking other gainful employment before reaching her normal retirement age. Dr Ezan considered that although it was unlikely Mrs S would be capable of undertaking gainful employment within the next three years, he did consider it likely that she would be capable of gainful employment at some time thereafter, and before her normal retirement age.
- The IRMP certificate alone provides no rationale or reasoning for Dr Ezan forming the opinion he did. The Council has not been able to produce a more detailed report from the IRMP which would usually supplement the IRMP certificate.
- The Council has taken the position that the IRMP certificate is unequivocal and has said, "the regulations do not require the employer to challenge a certificate which is ostensibly correct." However it is difficult to see how the Council has determined that the certificate is correct when no other reasoning has been provided by Dr Ezan to support this. The Council has blindly accepted Dr Ezan's opinion without understanding the reasons for this.
- The absence of a detailed IRMP report means it is impossible to identify what medical evidence Dr Ezan has based his decision on. Consequently, it is not possible to determine whether or not all of the relevant medical evidence has been taken into consideration by Dr Ezan. The Council has not sought clarification from Dr Ezan on this point, thus it has failed to direct itself properly when making its decision regarding Mrs S' entitlement to IHER benefits.
- The Council's responses to Mrs S' complaint, which was dealt with under the two stage internal dispute resolution procedure (**IDRP**), merely reiterate what Dr Ezan's opinion was. The IDRP decisions do not provide any explanation or reasoning as to why the Council is of the opinion that Mrs S will be capable of gainful employment before her normal retirement age.
- The Council's stage two IDRP decision states:-

"It is the case that without an appropriate recommendation from an independent registered medical practitioner Hampshire County Council is simply not able to award Tier 1 medical retirement."
- The statement is incorrect. Under the Regulations it is the Council that is the decision maker, and whilst the Regulations require the Council to obtain an IRMP

report, the Council is not bound to follow this. The Council's mis-statement demonstrates a fundamental misunderstanding of the Regulations on the part of the Council.

- The Adjudicator recommended that the Council should reconsider Mrs S' IHER claim and pay compensation for the significant distress and inconvenience it had caused her.

18. The Council did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Council provided its further comments, summarised below:-

- It is not necessary, for the purposes of the Regulations, for the IRMP's certificate to be accompanied by a more detailed report. Further, the authority Mrs S gave to the Occupational Health department entitles them alone to access her medical records. Arguably a more detailed report would be in breach of the data protection principles, insofar as the disclosures made within the report are neither specifically authorised nor necessary.
- There is no requirement under the Regulations for the decision maker to reach an "independent" decision. The only requirement is that any decision is accompanied by the requisite medical certificate. Similarly, there is nothing within the Regulations which requires the Council to interrogate the IRMP certificate. To do so would be professionally impertinent even if the decision maker were medically qualified to challenge the certifying IRMP. It is all the more inappropriate where the decision maker is not so qualified, as is the case here. Placing a requirement to question the findings of the IRMP puts an undue burden on the Council which is not envisaged in the Regulations.
- The Adjudicator's conclusion that the IRMP's opinion ought to have been challenged is based on a flawed logical proposition set out in the Adjudicator's initial correspondence with the Council. Essentially the Adjudicator has said that because Mrs S was unable to undertake 6 hours work in her original role and would never again be able to do so, then she was unlikely ever to be able to undertake the 30 hours work that would be necessary to meet the definition of gainful employment. This suggestion is flawed; being unable to stand for 1½ hours each day does not mean Mrs S could not fulfil a more sedentary role at some point in the future.
- The Adjudicator's Opinion may not recite the views that he had previously expressed but they clearly underpin the conclusion. Similarly the Adjudicator's Opinion fails to acknowledge Mrs S' own consultant's report when he states that she has, "no major arthritis" and that any degenerative changes are, "unremarkable for someone who does not have back pain". Notably the consultant does not say that Mrs S will not work again.
- The Council has followed the recommendation of a qualified IRMP whose professional judgement it is entitled to trust. The Council is not obliged to

interrogate the IRMP unless the medical certificate is patently incorrect. None of the medical evidence the Council has seen suggests that the IRMP's opinion is wrong.

19. The Council's comments do not change the outcome and I agree with the Adjudicator's Opinion. I will therefore only respond to the key points made by the Council for completeness.

### **Ombudsman's decision**

20. My role is not to replace the Council as the decision maker and decide whether Mrs S is eligible for IHER. My role is to decide whether the correct process has been followed resulting in a reasonable decision. If the decision making process was flawed, I can set the decision aside and ask the Council to consider the matter afresh. I will not usually substitute the Council's decision with my own unless the decision is so perverse that no reasonable decision maker could have made it.
21. The Council accepts that the decision as to whether Mrs S meets the eligibility criteria to receive benefits under Regulation 35 is a matter for it to decide. Before doing so, the Council is required to obtain an opinion from an IRMP. Having obtained an opinion from an IRMP, the Council must then consider this along with any other relevant evidence.
22. The Council says it is not required to challenge the IRMP's opinion. Although I accept that it is generally the case that the person making the decision on whether to award IHER is not medically qualified, I disagree with the Council's position. Ultimately it is the Council that is the decision maker, so it should, at the very least, have satisfied itself that the IRMP had applied the correct eligibility test, had taken all relevant evidence into account and had not made any errors or omissions of fact. I do not find that taking such reasonable steps, to ensure it makes a considered decision, places undue burden on the Council.
23. Although the medical certificate details the test which has been applied, it does not clearly show the medical evidence on which the IRMP's opinion is based. The absence of a fuller report from the IRMP means it is impossible for the Council to have satisfied itself that the IRMP had taken all relevant evidence into account and had not made any factual errors.
24. Where a person is considered to be currently incapacitated, but the IRMP has concluded they are likely to be able to work again before normal retirement age, I would expect to see a medical reason. For example, studies supporting the long term prognosis of the condition, or treatments to bring about recovery to a sufficient extent to facilitate a return to gainful employment. In this case no such rationale has been provided by the IRMP.

25. Consequently I am bound to find that the Council has followed the IRMP's advice blindly and has failed to make a decision for itself, as required by the Regulations. This amounts to maladministration and the complaint can be upheld on this basis.
26. The Council has suggested that the Adjudicator has predetermined that the complaint should be upheld based on the flawed proposition set out in his initial correspondence. The reasoning which the Council says is flawed did not feature in the Adjudicator's Opinion, so I disagree with this comment. But, even if this were the case, the complaint can be upheld for different reasons, which I have explained above.
27. Finally, for completeness, I will address Mrs S' argument that she was assessed for a PIP and was awarded the maximum mobility payment. Mrs S' entitlement to a PIP may be an indication of her current state of health, but the eligibility test for LGPS ill health retirement is different compared to that for the PIP so it does not automatically follow that the receipt of PIP confers the right to ill health retirement.
28. Therefore, I uphold Mrs S' complaint.

## **Directions**

29. Within 14 days of the date of this Determination, the Council shall request a medical report and certification, from another IRMP who has not previously been involved, as to whether Mrs S satisfied the criteria as stated under Regulation 35 based on the medical evidence available at the time of the initial application.
30. Within 28 days of receiving the IRMP's certification and report, the Council shall decide and notify Mrs S whether she is entitled to higher tier pension benefits under Regulation 35. On further consideration it may well be found that Mrs S does not meet the criteria for a higher tier, but that decision must be reached by the Council in the correct manner.
31. If the Council does decide that Mrs S is eligible for a higher tier IHER benefit, this benefit shall be paid to Mrs S, backdated to the date her IHER application was originally accepted.
32. Within 14 days of the date of this Determination, the Council shall pay Mrs S £500 for the significant distress and inconvenience that she has experienced as a result of the failure to consider her eligibility for ill health retirement correctly.

**Anthony Arter**

Pensions Ombudsman  
19 October 2017

## **Appendix - The Local Government Pension Scheme Regulations 2013**

### **“Part 1 – Membership, Contributions and Benefits**

#### **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 contractual hours and had reduced pay as a consequence of the reduction in contractual hours, whether that member was in part time service wholly or partly as a result of the condition that caused or contributed to the member's ill-health retirement.
- (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.
- (2A) For the purposes of paragraph (2) an IRMP is not to be treated as having advised, given an opinion on or otherwise been involved in a particular case merely because another practitioner from the same occupational health provider has advised, given an opinion on or otherwise been involved in that case.
- (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).

### 37 Special provision in respect of members receiving Tier 3 benefits

- (1) A member in receipt of Tier 3 benefits who attains normal pension age continues to be entitled to receive retirement pension and ceases to be regarded as being in receipt of Tier 3 benefits from that date, and nothing in the remainder of this regulation applies to such a person.
- (2) A member who receives Tier 3 benefits shall inform the former Scheme employer upon starting any employment while those benefits are in payment and shall answer any reasonable inquiries made by the authority about employment status including as to pay and hours worked.
- (3) Payment of Tier 3 benefits shall cease if a member starts an employment which the Scheme employer determines to be gainful employment, or fails to answer inquiries made by the employer under paragraph (2), and the employer may recover any



payment made in respect of any period before discontinuance during which the member was in an employment it has determined to be gainful employment.

- (4) A Scheme employer may determine that an employee has started gainful employment for the purposes of paragraph (3) if it forms the reasonable view that the employment is likely to endure for at least 12 months and it is immaterial whether the employment does in fact endure for 12 months.
- (5) A Scheme employer must review payment of Tier 3 benefits after they have been in payment for 18 months.
- (6) A Scheme employer carrying out a review under paragraph (5) must make a decision under paragraph (7) about the member's entitlement after obtaining a further certificate from an IRMP as to whether, and if so when, the member will be likely to be capable of undertaking gainful employment.
- (7) The decisions available to a Scheme employer reviewing payment of Tier 3 benefits to a member under paragraph (5) are as follows-
  - (a) to continue payment of Tier 3 benefits for any period up to the maximum permitted by regulation 35(7) (early payment of retirement pension on ill-health grounds: active members);
  - (b) to award Tier 2 benefits to the member from the date of the review decision if the authority is satisfied that the member-
    - (i) is permanently incapable of discharging efficiently the duties of the employment the member was engaged in, and either
    - (ii) is unlikely to be capable of undertaking gainful employment before normal pension age, or
    - (iii) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment, but is likely to be able to undertake gainful employment before reaching normal pension age; or
  - (c) to cease payment of benefits to the member.
- (8) A member whose Tier 3 benefits are discontinued under paragraph (3) or (7)(c) is a deferred pensioner member from the date benefits are discontinued and shall not be entitled to any Tier 3 benefits in the future.
- (9) A Scheme employer which determines that it is appropriate to discontinue payment of Tier 3 benefits for any reason shall notify the appropriate administering authority of the determination.
- (10) A Scheme employer may, following a request for a review from a member in receipt of Tier 3 benefits or within 3 years after payment of Tier 3 benefits to a member are discontinued, make a determination to award Tier 2 benefits to that member from the date of the determination, if the employer is satisfied after obtaining a further

certificate from an IRMP, that the member is permanently incapable of discharging efficiently the duties of the employment the member was engaged in, and either-

(a) is unlikely to be capable of undertaking gainful employment before normal pension age; or

(b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment, but is likely to be able to undertake gainful employment before reaching normal pension age.

(11) The IRMP who provides a further certificate under paragraphs (6) or (10) may be the same IRMP who provided the first certificate under regulation 36(1) (role of the IRMP).

(12) Where the member's former employer has ceased to be a Scheme employer, the references in paragraphs (5) to (7), (9) and (10) are to be read as references to the member's appropriate administering authority.

## **Part 2 – Administration**

### **72 First instance decisions**

(1) Any question concerning the rights or liabilities under the Scheme of any person other than a Scheme employer must be decided in the first instance by the person specified in this regulation.

...

(3) The appropriate administering authority must decide any question concerning-

(a) a person's previous service or employment;

(b) the crediting of additional pension under regulation 16 (additional pension); and

(c) the amount of any benefit, or return of contributions, a person is or may become entitled to out of a pension fund.

(4) A person's Scheme employer must decide any question concerning any other matter relating to the person's rights or liabilities under the Scheme."