

Ombudsman's Determination

Applicant	Ms R
Scheme	Local Government Pension Scheme (the Scheme)
Respondents	City of Wolverhampton Council (the Council), West Midlands Pension Fund

Outcome

1. Ms R's complaint is upheld and to put matters right the Council, should review its original decision not to award Ms R an ill health retirement pension (**IHRP**).
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Ms R's complaint is that she has been refused a Tier 1 IHRP.

Background information, including submissions from the parties

4. The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2013 (**the Regulations**), are set out in the Appendix.
5. Ms R was employed by the Council as a Higher Level Teaching Assistant at New Park School in Wolverhampton.
6. On 7 February 2014, following a period of sickness absence, Ms R was referred to Occupational Health who said that she was fit to carry out her duties with the exception of being able to restrain pupils by herself.
7. On 10 March 2014, Ms R was referred to Dr Gandham, an independent registered medical practitioner (**IRMP**) who certified that, in his opinion, Ms R is suffering from a condition that, on the balance of probabilities, renders her permanently incapable of discharging the duties of her employment with her employer because of ill health. He also said that she does not have a reduced likelihood of being capable of undertaking gainful employment before her normal retirement age (**NRA**).
8. On 27 March 2014, the Council turned down Ms R's application, following Dr Gandham's report.

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9. Ms R appealed the decision made by the Council. It subsequently agreed that Ms R's case would be referred to another IRMP, Dr Richards, for a further medical opinion.
10. On 27 July 2014, Dr Richards considered the occupational health notes, including a report from Ms R's general practitioner (**GP**) and consultant rheumatologist. Dr Richards certified that he does not consider that Ms R would be permanently incapable of discharging efficiently the duties of her current role and he would not support her request for an IHRP.
11. On 22 October 2014, Ms R appealed Dr Richards' decision.
12. On 9 December 2014, the Council referred the matter back to a new IRMP, Dr Bush, for reassessment. Dr Bush certified that, in his opinion, Ms R is suffering from a condition that, more likely than not, renders her permanently incapable of discharging the duties of her employment with her employer because of ill health. He further said that she is likely to be capable of undertaking gainful employment within the next three years or before her NRA. He recommended that a Tier 3 IHRP should be awarded.
13. On 22 May 2015, Ms R ceased her employment with the Council and was awarded Tier 3 IHRP.
14. On 29 May 2015, Ms R appealed the decision made by Council. Her appeal was dealt with by the Council under stage 1 of the internal dispute resolution procedure (**IDRP**). The decision maker accepted Dr Bush's opinion and turned down Ms R's appeal.
15. On 15 December 2015, Ms R appealed under stage 2 of the IDRP. The Council referred Ms R's case back to Dr Cathcart to provide an independent medical opinion.
16. On 23 May 2016, Dr Cathcart said his opinion does not differ from that of Dr Bush in that Ms R did satisfy the criteria for an IHRP from December 2014 and at that time Tier 3 was appropriate. He also said that based on further medical evidence since December 2014, Ms R's condition would have deteriorated and that a higher Tier may be now appropriate.
17. On 20 June 2016, the Council issued its stage 2 IDRP response to Ms R. The decision maker accepted Dr Cathcart's opinion and agreed with the stage 1 IDRP decision. The decision maker recommended, following Dr Cathcart's opinion, that as Ms R's condition would have deteriorated, her former employer should arrange for her Tier 3 review to be brought forward.

Adjudicator's Opinion

18. Ms R'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:-

- It is not the Pensions Ombudsman's role to review the medical evidence and come to a decision of his own as to Ms R's entitlement to an IHRP. That decision is for the Council to make. The Ombudsman is primarily concerned with the decision making process. If this is found to be flawed, the decision can be remitted back for the Council to review. The medical evidence is reviewed in order to determine whether or not it is appropriate and supportive of the decision by the Council. It is on that basis that I have reviewed Ms R's complaint.
 - The Adjudicator was of the view that the Council did not properly consider Ms R's eligibility for an IHRP.
 - In order to properly consider Ms R's eligibility, the Council must ask itself the right questions and consider all relevant factors in reaching its decision ignoring any irrelevant ones. In the first instance it was not clear how the Council had reached the original decision to refuse Ms R a Tier 1 IHRP. The Adjudicator was of the opinion that the decision was made by Dr Bush and the Council merely relied on it without coming to its own independent view and properly communicating this to Ms R in writing. So the Council did not follow the Scheme Regulations correctly.
19. The Council did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Council provided their 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 the Council for completeness.

Ombudsman's decision

20. Following receipt of the Adjudicator's opinion the Council has said that it does not agree that Ms R's application should be considered afresh as it is unsure what a new IRMP's opinion would add to the process and she has received a lengthy report explaining her 18 month review. I can see that on 3 May 2017 Ms R received an uplift to Tier 2 benefits and the process was completed properly. However, I do not consider that the original decision was satisfactory. The Council failed to reach its own decision on what Tier of IHRP Ms R was to be awarded. It simply relied on the opinion of the IRMP. Under the Regulations, the employing authority, i.e. the Council, is required to take advice on capability from an IRMP but it, not the IRMP, must determine, which tier should be paid to Ms R. In the absence of such a decision the Council failed to follow the Regulations, as it was required to do.
21. Therefore, I uphold Ms R's complaint and I find that the case is to be remitted back to the Council to reconsider afresh.

Directions

22. Within 21 days of this determination, The Council shall nominate a new IRMP, who has had no dealing with the matter before, from whom a certificate is to be obtained under Regulation 36 (1) of the Regulations.

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23. The Council shall consider all of Ms R's relevant medical evidence, and ask the IRMP to consider whether she meets the criteria as stated within the Regulations, and provide a report. The Council should then consider all of the relevant evidence and make its decision.
24. The Council shall then inform Ms R of its decision in writing and explain the reasoning behind it.

Anthony Arter

Pensions Ombudsman
13 February 2018

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-

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- (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).