Ombudsman's Determination

Applicant	Mr A
Scheme	TFL Pension Fund
Respondents	TfL Trustee Company Limited (**the Trustee**)

Outcome

1. Mr A's complaint is upheld and to put matters right the Trustee should review the decision not to pay Mr A's ill-health pension benefits.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr A's complaint against the Trustee is that its review of its original decision not to award him ill health pension from active service.

Background information, including submissions from the parties

4. The Pensions Ombudsman, Tony King, issued his Determination on 23 March 2015 and directed the Trustee to reconsider Mr A's application and then decide whether or not he satisfied the criteria under the Rule 19(1).

5. On 13 April 2015, Consultant Occupational Physician, Dr Sheard, who had previously provided his opinion on the matter, expressed his thoughts regarding the Pension Ombudsman's Determination. He noted that:

> "Based on the evidence I had as at 3 March 2012, I would have expected Mr Jeeva's health condition to respond to appropriate treatment from an accredited specialist, (consultant), psychiatrist and clinical psychologist to include high intensity focussed cognitive behavioural therapy of 15 or more sessions over 6-9 months, with the benefit of antidepressant medication at therapeutic dose, mood stabilising drugs, or similar.
>
> Despite my best efforts it is very difficult to identify exactly what treatments he had [between October 2011 and March 2012]. He does not appear to have been under the care of an accredited specialist… He appears to have been on one antidepressant only and there is no evidence that the antidepressant

> medication was altered. He later has a second opinion, which recommended he have high intensity cbt. His CBT sessions were stopped after 7 sessions, as he was not able to engage with the same because he was so unwell.
>
> The period of absence which ended in his employment termination was triggered by a suggestion of changing in working hours but he was at work at the time this change was suggested. Despite a significant reduction in his mental wellbeing, as a result of these suggested changes in work, it is not clear to me, that Mr A's doctors, GP or specialist, considered the need to change his medication or review his other therapies. In my opinion, and in accordance with best practice, I would have anticipated such a review. I would have expected the treatment to have been as described. I would have expected it to have a positive effect over a period of up to 12 months. It is difficult to opine on whether he would have recovered sufficiently to return to his own duties but, on the balance of probabilities, I do not see why he would not have recovered sufficiently to return to the duties he had been carrying out previously in the considerable period until his normal pension age…while the recent CBT [cognitive behavioural therapy] had minor benefits, it had not resulted in significant improvement to Mr A's condition and had ceased after 7 sessions. Mr A was unable to engage with the treatment. In my opinion he required accredited specialist…psychiatric care to include appropriate antidepressant medication or alternative treatments...it was advised he have [sic] high intensity cognitive behavioural therapy when he has the second opinion".

6. On 11 May 2015, the Trustee sent a decision letter to Mr A informing him that it noted every comment made by the Pensions Ombudsman. It also said that:

> "…but the Committee concluded, now withstanding these points, that you did not meet the test under the Scheme Rules at the time of your original application as there was a reasonable expectation that you would be able to return to your own role before your Scheme Pension Age if you undertook available treatment options".

7. On 14 May 2015 Mr A brought the complaint to the Pensions Advisory Service (**TPAS**). TPAS adviser subsequently asked the Trustee to provide a more detailed explanation in regards to its decision.

8. On 18 August 2015, the Trustee sent a response to TPAS with further reasoning that said:

> "…there was a full and considered discussion by the Committee of the evidence and circumstances of Mr A's case as well as direct questioning of the medical and legal advisers at the meeting…the Committee considered Mr A's condition in March 2012 in line with the provisions of Rule 19(1) and what treatments he had undertaken between October 2011 and March 2012 and the likely effect of those treatments. The Committee also considered what

> other reasonable medication or therapy was available and what effect such treatment would on the balance of probability, have had on his condition and his ability to perform his duties".

9. Further to the Trustee's response, Mr A provided more evidence to the Trustee for further consideration. It shows that Mr A was being treated with an increased dosage of antidepressants. His doctors were adjusting his treatment but without any improvement to his condition. It also shows that Mr A attended CBT, which did not improve his condition.

10. On 12 October 2015, TPAS informed Mr A that his complaint will be considered under the internal dispute resolution (**IDRP**).

11. On 25 November 2015, Dr Sheard provided further comments in response to new evidence provided by Mr A. He considered the evidence of Mr A's GP that he was now under Specialist care and on new and powerful medications but noted it was not contemporaneous. He accepted that while Mr A's condition may have been permanent it was 'less clear' whether the ill health and permanent incapacity criteria in Rule 19(1) were met. His opinion remained that it would be appropriate for Mr A to be under the care of a Consultant in psychiatry and receiving specialist clinical psychologist input to ensure that treatment is maintained where required. He concluded that he stood by his advice of 3 March 2012, and was of the opinion Mr A may now meet the criteria for deferred benefit under Rule 19(4) but he would need information from his treating Specialist to determine whether this is, more likely than not, the case and at what time such a threshold may have been reached'.

12. On 23 December 2015, the Trustee sent a response under the IDRP that said:

> "…in view of the medical evidence available regarding your husband's condition and incapacity as at the date of leaving service at March 2012 (which includes the recently provided information) your husband did not meet the test under the Scheme Rules at the time of his original application. This was due to the Committee finding that on the balance of probabilities at the time there was a reasonable prospect that he would be able to return to his own role before his Scheme Pension Age if and when he had completed reasonably available treatment options…the Committee also looked at the evidence of the permanence of your husband's ill health/incapacity as of now, would be willing to consider an application for a claim for an ill-health pension from deferred status".

13. On 7 January 2016, Mr A brought the complaint to this Office.

14. On 12 February 2016, this Office received the Trustee's response that said:

> "Based on its consideration of the total evidence before it, the Trustee was unable to form the opinion that Mr A's condition was such that he would continue to be incapable of carrying on his occupation because of physical or mental impairment. He was under 40 years of age when his employment was

terminated by his ex-employer and, additionally, there was no positive medical opinion that proved to the Trustee's satisfaction that his condition would continue that would have been available to him as at March 2012."

15. In its submission, the Trustee also explained that following the Pensions Ombudsman Determination that referred to the incapacity must be continuing in nature and not for twelve months as previously applied, but until Scheme Pension Age, the Trustee decided to interpret Rule 19(1) in a way that the member's incapacity should be of a continuing nature until age 65.

16. **Mr A's position:**

17. The Trustee overlooked the additional evidence submitted by TPAS when reaching its decision under the IDRP.

18. The Trustee wrongly interpreted Rule 19(1) stating that the incapacity should be continuing in nature until Scheme Pension Age.

19. Future treatment options considered by the Trustee failed to take into account the outcomes of treatments Mr A had undertaken.

20. **The Trustee's position:**

21. It took appropriate legal advice and further medical advice to objectively assess the case afresh on its merits.

22. It considered all the additional evidence submitted by TPAS when reviewing its decision.

23. When considering evidence, the Trustee was aware of the difference between the treatments which Mr A had taken and future treatments that were reasonably available.

24. It accepted the view that future options were available to Mr A such as a managed programme including high intensity CBT with the benefit of antidepressant medication.

Adjudicator's Opinion

25. Mr A's complaint was considered by one of our Adjudicators who concluded that [] further action was required by the Trustee. The Adjudicator's findings are summarised briefly below:-

- The evidence does not support a finding that the Trustee reviewed Mr A's application in an appropriate manner. A decision maker must ask the right questions before reaching its decision.

- Dr Sheard's recommendation was that Mr A's application be refused until he had undertaken specialist psychiatrist care and CBT. It appears that Mr A had been

under the care of a Doctor with a qualification in Psychiatry. His Doctor was adjusting his treatment but without effect and further stated that there is no alternative effective medication for his illness. Mr A also said that he had had low intensity CBT but was too unwell to finish it.

- The Adjudicator understood that Mr A's Doctors may not have been Accredited Specialists (Consultant) in Psychiatry, as stated by Dr Sheard. However, this does not mean that the Trustee or decision maker, did not have to ask the right question. The right question, in this instance would have been, to enquire from its medical adviser whether if Mr A undertook treatment from an Accredited Specialist (Consultant) in Psychiatry , would it have been different to what Mr A's Doctor had undertaken. If it had been, then the decision maker would have been in a position to reach a reasonable decision. However, as things stand, it is unclear whether an Accredited Specialist (Consultant) in Psychiatry would have administered different treatment compared to what Mr A's own Doctor's administered. Therefore in the absence of this information, any decision reached by the Trustee would be considered as perverse especially if it relied on Dr Sheard's assessment.

- Mr A had attended low intensity CBT but was unwell to finish the course. So it was unreasonable for the Trustee to recommend that Mr A has high intensity CBT without stating whether a high intensity CBT would have yielded positive outcome, bearing in mind Mr A was unable to complete a low intensity CBT.

- The Adjudicator appreciates that the Trustee is not a medical professional itself and can only review the medical advice from a lay perspective. The same applies for the Ombudsman and his staff. The questions the Trustee might be expected to ask of its medical advisers are only those which a reasonably informed lay person might ask. With that in mind, the Adjudicator considers there were elements of Dr Sheard's advice which should have been queried as stated above by the Trustee.

26. The Trustee did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Trustee provided its 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 Trustee for completeness.

27. The Trustee maintains its assertion that it considered carefully what alternative treatment was reasonably available. The Trustee does not believe that Mr A had received reasonable treatment under the supervision of a Specialist in Psychiatry.

28. The Trustee says that alternative and further treatment would have been available and administered if Mr A had received treatment from a Specialist (Consultant) in Psychiatry.

Ombudsman's decision

29. It is not for me to substitute my own opinion for that of those properly appointed to reach a decision. The matter I need to consider is whether the decision has been reached in a proper manner, as provided by law.

30. The reason given by the Trustee for rejecting Mr A for an ill health pension was because there were further possible treatment options available to him under the care of appropriate Accredited Specialists (Consultants) in Psychiatry. However I have seen no evidence that this care was in fact available to Mr A in 2012. I note that Dr Sheard considered it should reasonably have been provided, a position accepted by the Trustees in submissions, but as the Trustee noted, that does not mean that these options were in fact reasonably available to him. The opposite appears to have been the case. On the available evidence it cannot be said that Mr A unreasonably refused available treatment which would have helped him recover.

31. Since that Dr Sheard provided his original opinion Mr A has been under the care of such a Specialist and has been discharged by that Specialist back to the care of his GP. He has also had increased intervention. However the advice of that Specialist was not available to Dr Sheard when he produced his recent opinion. I accept that the Trustees examined the basis for Dr Sheard's opinion, but do not consider that they completed the necessary enquiries before coming to a decision. When asked, Dr Sheard said that he would be unable to change his original opinion without input from a Consultant and that to make an assessment even now of whether Mr A satisfied the test of permanence would require expert advice from his treating Specialist. I find that the Trustee's overarching responsibility is to make an informed decision based on the appropriate medical advice. It is not uncommon that the decision maker puts weight on its own medical adviser's opinion and I make no criticism of that approach. In this case the medical adviser made it clear that they needed Specialist input from Mr A's treating clinician to draw a reliable conclusion about prognosis. Due to the complex nature of Mr A's health condition and the reason which Dr Sheard gave for being unable to alter his original conclusion, the Trustee should have sought a second opinion from the Accredited Specialist in Psychiatry, and made it available to Dr Sheard before relying on his evidence to reach its decision. The fact that the Trustee has purely relied on the advice of its Occupational Physician who is not an Accredited Specialist in Psychiatry, has meant that the Trustee has reached a perverse decision.

32. Therefore, I uphold Mr A's complaint against the Trustee and remit the decision to them for further consideration.

Directions

33. I direct that within 21 days of this Determination, the Trustee shall review the decision not to pay Mr A's ill health benefits early under Rule 19(1) by :

- Obtaining information from an Accredited Specialist in Psychiatry on Mr A's condition as at 3 March 2012; the treatments undertaken by Mr A between October 2011 and March 2012; what other treatments were reasonably available to him on the NHS at that time; what effect those other treatments were likely to have had on his condition; whether it was reasonable to require him to undergo them; and whether they would have made it likely that he would recover sufficiently to perform his duties before normal pensionable age.

- Once this information is received, the Trustee will within 14 days, nominate a new Consultant Occupational Physician to consider Mr A's application for ill health again taking into account of all the medical information available including the report from an Accredited Specialist.

- Within 21 days of receiving the report from the Consultant Occupational Physician, the Trustee will reach a decision whether or not to release the pension on grounds of ill health under Rule 19(1).

- If Mr A is due a pension, then such a pension should be paid from the date when he left service and any retrospective pension paid as a lump with interest at the rate quoted by reference banks at the time from date of application to date of payment.

- However, if no such pension is due, then the Trustee needs to provide its reasons to Mr A.

Karen Johnston

Deputy Pensions Ombudsman
17 October 2017