PO-12523

Ombudsman's Determination

Applicant	Mr Y
Scheme	Local Government Pension Scheme (Scotland) (**LGPS**)
Respondent	Dundee City Council (**Dundee**)

Outcome

1. I do not uphold Mr Y's complaint and no further action is required by Dundee.

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

Complaint summary

3. Mr Y's complaint is about Dundee's rejection of an application for an ill health pension.

Background information, including submissions from the parties

4. Mr Y was employed by Dundee as a school technician. One of the benefits of his employment was membership of the LGPS, with a normal retirement age of 65.

5. Unfortunately, on 11 January 2011, Mr Y slipped on ice. He suffered a laceration to his scalp and his General Practitioner (**GP**) certified him as unable to work.

6. Mr Y had not made a recovery by January 2014 and so he submitted an application for ill health retirement, under regulation 20 of the LGPS (Benefits, Membership and Contributions Regulations 2008 (Scotland) (as amended) (**the Regulations**). This regulation provides that, in order to award an ill health pension to a member, Dundee must be satisfied that:

    - the member's ill health renders them permanently incapable of performing efficiently the duties of their former employment;

    - there is a reduced likelihood of the member being able to undertake any gainful employment before they reach normal retirement age.

7. Dundee's Independent Registered Medical Practitioner (**IRMP**), Dr Blatchford, noted that medical specialists who had examined Mr Y had taken the view that he may benefit from psychiatric input. In light of this, Dr Blatchford concluded that the medical

evidence did not establish that Mr Y met the LGPS criteria for ill health retirement. On this basis, Dundee rejected Mr Y's application.

8. Mr Y did not accept this decision and initiated Dundee's internal dispute resolution procedure (**IDRP**). His union representative pointed out that he had been certified as unfit to work for three years. He submitted that as such, there was no medical evidence establishing that his health was likely to improve to a level sufficient to allow him to perform the duties of his former role before he reached the age of 65.

9. The Scottish Public Pensions Agency (**SPPA**) considered Mr Y's complaint and obtained the opinion of Dr Simpson, a second IRMP not previously involved with the case. Dr Simpson's view was that, if Mr Y received further specialist management of the psychological aspects of his condition, it would be reasonable to expect that his health would improve. In Dr Simpson's opinion, this recovery would in all likelihood be sufficient to facilitate Mr Y's return to employment in his former role with Dundee before he reached the age of 65. SPPA rejected Mr Y's complaint on this ground.

10. Mr Y referred the complaint to this service. Essentially, he submits that SPPA gave insufficient weight to the opinions of the medical specialists who treated him.

Adjudicator's Opinion

11. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by Dundee. The Adjudicator's findings are summarised briefly below:

    - The medical professionals who examined Mr Y most recently all reached the opinion that, if he received further psychological treatment, his health could be expected to improve to a degree sufficient to enable him to return to work before the age of 65.

    - Two IRMPs determined that the medical evidence established that Mr Y is likely to benefit from further treatment. On this basis, both IRMPs concluded that the LGPS eligibility criteria for ill health retirement had not been demonstrated.

    - Since the opinions of the IRMPs were consistent with the most recent medical evidence, there was no compelling reason for Dundee to question their conclusions. As such, Dundee had assessed Mr Y's application properly.

12. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr Y for completeness.

Ombudsman's decision

13. Mr Y's position is that medical reports provided by specialists who reviewed him, Dr Spielmann and Dr Davenport, contradict the conclusions of the IRMPs. He submits

that Dundee ascribed insufficient weight to the views of these specialists, and gave excessive credence to the opinions of the IRMPs.

14. Having examined the papers, I note that on 16 July 2013, Mr Spielmann, Consultant Otolaryngologist, wrote to Dundee's Occupational Health Physician, commenting:

> "We shall continue to see [Mr Y] for support but, given the duration of his symptoms and lack of recovery over several years, I am doubtful as to whether he would recover to a meaningful level of function to be able to continue to work."

15. I can also see that on 12 June 2014, Dr Davenport, a Consultant Neurologist, wrote a letter to Thompson's Solicitors, which was acting on behalf of Dundee. He said:

> "Given the time that has gone by, I think the prospects of [Mr Y] returning to work are extremely small …
>
> I suspect the time for effective treatment has long since passed, although I think the concentration on a purely physical solution is misplaced, and personally I think he might benefit more from the involvement of a neuro-psychiatrist with experience of head injury, such as Dr Alan Carson based in Edinburgh, to see whether any non-drug approaches might help."

16. Accordingly, I accept that Dr Spielmann and Dr Davenport considered that Mr Y was unlikely to be capable of returning to work.

17. That said, specialists who reviewed Mr Y more recently - Dr Mumford, Dr Harrison and Dr Carson - all concluded that, with further treatment, Mr Y's health could be expected to improve.

18. More specifically, in a report sent to Dundee's solicitor on 14 October 2014, Dr Mumford, Consultant Neurologist, stated:

> "With regard to prognosis, I think this must be guarded. He has now had symptoms for several years without any improvement and, if anything, a degree of deterioration. However, he has not had any significant input from clinical psychology, nor from psychiatric experts, and I think there is a realistic possibility – perhaps even a probability – that if he was treated appropriately, perhaps with cognitive behavioural therapy and anxiolytic medication or antidepressant medication, that his symptoms might settle to a useful degree."

19. On 21 October 2014, Dr Harrison, Consultant Clinical Neuropsychologist, submitted a report to Thompson's solicitors. He said:

> "I believe that Mr Y's medical symptoms have a significant emotional impact for him and that this affects his behaviour and ways of coping. I believe he would potentially benefit from psychological treatment in this regard. I therefore recommend that Mr Y is referred for treatment with a suitably qualified Clinical Neuropsychologist. This can be accessed either via local

> NHS resources, with possible waiting times, or the private sector with terms and conditions set by the individual clinician …
>
> In psychological terms, should Mr Y engage with treatment offered to him, I anticipate that his self-confidence could improve, as should his ability to put in place strategies to control his symptoms more effectively. Without a substantial improvement in Mr Y's symptoms from a medical and psychological perspective, however, it is in my opinion extremely unlikely that he will be able to return to any form of gainful employment in the future."

20. And on 5 December 2014, Dr Chapman, an Occupational Health Adviser, issued a report to SPPA, in which he concluded:

> "Having carefully reviewed all the evidence, it is my opinion that there is insufficient evidence to support permanent incapacity for his normal duties … There is a suggestion of psychological distress; he has not been reviewed by a Psychiatrist or Psychologist or benefitted from appropriate treatment as described above. It is over 12 years until he reaches his normal retirement age. It is assessed that there is sufficient time for him to be referred for specialist psychological treatment and that such treatment is likely to result in sufficient symptomatic and functional improvement for him to be fit for his former duties within this timescale."

21. As such, Dr Mumford considered that further psychological and psychiatric treatment would be likely to result in an improvement in Mr Y's health. This conclusion was supported by Dr Harrison. Dr Chapman agreed with the conclusions of Dr Mumford and Dr Harrison, and also determined that further specialist psychological treatment would be expected to lead to a recovery, sufficient to enable Mr Y to return to his former role before the age of 65.

22. Dr Simpson, the second IRMP to review Mr Y's application, considered these reports as part of his assessment. He determined:

> "In the initial advice on the application, it was concluded that Mr Y could benefit from a rehabilitative approach and further specialist management of the psychological aspects of his condition. This remains the case, as the GP notes further vestibular rehabilitation has been planned. Given the opinions of the Neurologists and Neuropsychologist, it seems likely that the main benefits will result from psychological input and also with resolution of occupational matters. Given this, it is advised that permanence of incapacity over the period under consideration – the next 12 years – has not been established …
>
> Concluding Decision Advice:
>
> The applicant is likely to benefit from appropriate treatment.

> Such treatment is likely to bring about sufficient improvement, in his health and functional status, to restore the capacity for the local government employment.
>
> On the balance of probabilities, the member is not permanently incapable of discharging efficiently the duties of the local government employment, by reason of ill health or infirmity of mind or body."

23. Therefore, applying the correct LGPS criteria for payment of an ill health pension, Dr Simpson concluded that the medical evidence did not establish that Mr Y's condition rendered him permanently incapable of carrying out the duties of his former role. This determination is consistent with the professional opinions reached by the specialists who reviewed Mr Y most recently, and who should therefore be in the best position to comment on his current condition. In light of this, I consider it was reasonable for Dundee to accept Dr Simpson's advice. Accordingly, I am satisfied that Dundee assessed My Y's application properly.

24. Therefore, I do not uphold Mr Y's complaint.

Karen Johnston

Deputy Pensions Ombudsman

31 January 2017

Appendix 1

Medical evidence

25. On 8 July 2013, Dr Fenwick, Occupational Health Physician, wrote to Mr Y's Human Resources (HR) department. He said:

> "At this time, it would be difficult to offer a definitive timeframe within which he could be in a position to return to work activity, either in his usual contractual duties or any form of alternative employment."

26. On 16 July 2013, Mr Spielmann, Mr Y's Consultant Otolaryngologist, wrote to Dr Fenwick, stating:

> "We shall continue to see [Mr Y] for support but, given the duration of his symptoms and lack of recovery over several years, I am doubtful as to whether he would recover to a meaningful level of function to be able to continue to work."

27. On 28 October 2013, Dr Mumford, Mr Y's Consultant Neurologist, wrote to Dundee's HR department. He determined:

> "In terms of the specific question: 'when will he be able to return to work?' the answer is, 'I cannot say'. In his present state, he would not be able to return to his previous post. It may be that skilled, sub-specialist further assessment may be given that will allow him to return to his previous occupation. I do, however, think that he might be able to work in a sedentary, non-physical capacity in some form, even accepting that his present symptoms are ongoing."

28. On 29 January 2014, Dr Blatchford, an IRMP, wrote to Dundee's HR department. She stated:

> "In my opinion, Mr Y does not meet the medical criteria for early ill health retirement, which require evidence that he is likely to remain unfit for his own role prior to age 65. I hold this opinion because the specific medical pathological basis of his symptoms has never been formally established. No diagnosis has been made, despite the severity and extent of the symptoms and the investigations performed. All of the terms that have been used to describe his condition (such as post-concussion syndrome, vertigo and migraine) have not been based upon a range of objective abnormalities consistent with specific physical damage to the neurological system or balance mechanism within the ear. The expectation of his specialist was initially improvement, and this seems to have stalled. It is on this basis that Dr Spielmann has indicated a poorer prognosis, rather than upon factual medical evidence consistent with a specific disease pathology of known prognosis.
>
> In my opinion, the symptoms are out of context with the extent of the original injury; they are currently not satisfactorily medically explained and the

> outcome cannot be readily predicted … It is evident from the reports provided that a rehabilitative approach is recommended and it is reasonable to expect that [Mr Y] will find he can engage fully with this in due course, prior to the statutory retirement age of 65 set in these regulations.
>
> I also note that in April 2013, it was recognised that anxiety and avoidance behaviours had now become part of his symptom complex and treatment was commenced with anti-depressant therapy. The medical assessment at that time indicated that 'if his symptoms are not settling then psychiatry input may be beneficial'. This does not appear to have been pursued, despite elongation of his symptoms, and this approach may also assist him to improve his long-term function."

29. On 12 June 2014, Dr Davenport, a Consultant Neurologist, wrote a letter to Thompsons Solicitors, which was acting on behalf of Dundee. He stated:

> "Given the length of time that has gone by, I think the prospects of [Mr Y] returning to work are extremely small …
>
> I suspect the time for effective treatment has long since passed, although I think the concentration on a purely physical solution is misplaced, and personally I think he might benefit more from the involvement of a neuro-psychiatrist with experience of head injury, such as Dr Alan Carson based in Edinburgh, to see whether any non-drug approaches might help."

30. On 16 June 2014, Dundee issued its first stage IDRP response. It said:

> "Prior to his dismissal, the employing authority obtained a certificate, in terms of the above regulations, dated 29 January 2014, from Dr Mary Blatchford, Serco Occupational Health. This certificate certified that 'I cannot confirm that the incapability is permanent' …
>
> In the absence of any appropriately qualified medical opinion to the contrary, I find that I am bound by Dr Blatchford's certificate. I note also that all of the medical occupational health reports lodged with the application have been taken into account by her."

31. On 20 August 2014, Dr O'Riordan, Consultant Neurologist, wrote a letter to Mr Y's GP. He submitted:

> "The signs and symptoms in my opinion are very much in keeping with a post traumatic head injury and I am in agreement with Dr Mumford here. In my opinion, these symptoms are very genuine, they are very distressing and at present he would be unable to perform any meaningful work.
>
> In my opinion, at present he is not capable for [sic] any physical work, nor is he capable of any non-physical sedentary capacity work.

> It is now three and a half years since the accident and there has been no meaningful improvement despite extensive vestibular rehabilitation. I am very pessimistic about any meaningful further improvement as it is so long and in my opinion, on the balance of probability, it is more likely than not that he is permanently incapable of any meaningful employment."

32. On 14 October 2014, Dr Mumford, Consultant Neurologist, submitted a medical report to Dundee's solicitor. He said:

> "With regard to prognosis, I think this must be guarded. He has now had symptoms for several years without any improvement and, if anything, with a degree of deterioration. However, he has not had any significant input from clinical psychology, nor from psychiatric experts, and I think there is a realistic possibility – perhaps even a probability – that if he was treated appropriately, perhaps with cognitive behavioural therapy and anxiolytic medication or antidepressant medication, that his symptoms might settle to a useful degree. Again, these comments lead me to stray outside my own area of expertise as a neurologist and would be an area for a psychiatrist to comment on, if appropriate.
>
> I appreciate that he is shortly to embark on a further course of vestibular rehabilitation treatment. In terms of the balance of probability, I suspect that this alone is unlikely to bring much improvement in his symptoms."

33. On 21 October 2014, Dr Harrison, Consultant Clinical Neuropsychologist, issued a report to Thompson's solicitors. He stated:

> "I believe that Mr Y's medical symptoms have a significant emotional impact for him and that this affects his behaviour and ways of coping. I believe that he would potentially benefit from psychological treatment in this regard. I therefore recommend that Mr Y is referred for treatment with a suitably qualified Clinical Neuropsychologist. This can be accessed either via local NHS resources, with possible waiting times, or the private sector with terms and conditions set by the individual clinician …
>
> In psychological terms, should Mr Y engage with treatment offered to him, I anticipate that his self-confidence should improve, as should his ability to put into place strategies to control his symptoms more effectively. Without a substantial improvement in Mr Y's symptoms from a medical and psychological perspective, however, it is in my opinion extremely unlikely that he will be able to return to any form of gainful employment in the future."

34. On 5 December 2014, Dr Chapman, Occupational Health Medical Adviser, supplied a report to SPPA. She concluded:

> "Having carefully reviewed all the evidence, it is my opinion that there is insufficient evidence to support permanent incapacity for his normal duties … There is a suggestion of psychological distress; he has not been reviewed by

a Psychiatrist or Psychologist or benefitted from appropriate treatment as described above. It is over 12 years until he reaches his normal retirement age. It is assessed that there is sufficient time for him to be referred for specialist psychological treatment and that such treatment is likely to result in sufficient symptomatic and functional improvement for him to be fit for his former duties within this timescale."

35. On 14 May 2015, Dr Simpson, SPPA's Medical Adviser, submitted a report to SPPA. He said:

"In the initial advice on the application, it was concluded that Mr Y could benefit from a rehabilitative approach and further specialist management of the psychological aspects of his condition. This remains the case, as the GP notes further vestibular rehabilitation has been planned. Given the opinions of the Neurologists and Neuropsychologist, it seems likely that the main benefits will result from psychological input and also with resolution of occupational matters. Given this, it is advised that permanence of incapacity over the period under consideration – the next 12 years – has not been established …

Concluding Decision Advice:

The applicant is likely to benefit from appropriate treatment.

Such treatment is likely to bring about sufficient improvement, in his health and functional status, to restore the capacity for the local government employment.

On the balance of probabilities, the member is not permanently incapable of discharging efficiently the duties of the local government employment, by reason of ill health or infirmity of mind or body."

Appendix 2

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2008 (Scotland) (as amended)

36. At the time of Mr Y's application to Dundee for ill health retirement, regulation 20 provided:

> "(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5 -
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> (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.
>
> …
>
> (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."

The Local Government Pension Scheme (Administration) Regulations 2008

37. Regulation 52 ('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."