

Ombudsman's Determination

Applicant	Mrs T
Scheme	Local Government Pension Scheme (LGPS)
Respondents	Shropshire Council (the Council)

Outcome

1. Mrs T complaint is upheld but, because the Council has now agreed to reconsider her application for an ill health pension, the directions I have made are only in respect of compensation for the significant non-financial injustice she has suffered, the time frames to which the Council should act and the review of her benefits, should she be awarded Tier 3 benefits.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs T was employed by the Council as a Project Finance Officer. In May 2011 she received a redundancy notice. A few days later Mrs T applied for ill health retirement, citing short term memory problems and depression. Her application was turned down by the Council.

Background information, including submissions from the parties

4. Mrs T previously complained to the Pensions Ombudsman (**case PO-XXX**). In March 2015 the Pensions Ombudsman upheld Mrs T's complaint under case PO-XXX and remitted her application back to the Council to consider wholly afresh. It was directed that the Council should first decide whether the application should be reviewed under regulation 20 or 31 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (as amended); and second, after obtaining the opinion of another independent registered medical practitioner (**IRMP**), decide whether Mrs T met the relevant criteria for benefits on grounds of ill health.
5. The Council decided to reconsider Mrs T's application under regulation 20. Relevant extracts from regulation 20 are set out in Appendix 1.
6. In a referral of Mrs T's application to Occupational Health, the Council said:

“We would like the certificate based upon whether the condition is now permanent and whether taking into hindsight it was permanent at the date of leaving.”

...

“Can a review of the evidence presented last to Dr Leeming-Latham and Dr Baron be considered as well as the new evidence from Karen T and/or GP, Consultant/Specialist to make a decision of permanence at the earlier leave (7th August 2011) date taking into account hindsight?”

“When looking at hindsight application, can the IRMP consider both the current situation and when the situation actually was at the point of the redundancy?”

7. A current report was obtained from Mrs T’s GP, Dr Smith, who highlighted that:

“[Mrs T] continued to report to have great difficulties with carrying out day to day activities within her job because of memory problems, and since her redundancy from Shropshire Council, this has continued to be the case. She has not worked since that time and has been signed off sick. However, in order to maintain some self-esteem, she has continued to make some job applications and even had the occasional interview. These have proved to be difficult due to her memory problems, and she finds that she can’t even answer the questions that are being asked, because she can’t remember what is being said. She has applied for jobs which would not fit her training and experience because of these memory problems, and so some of the difficulty is there is the perception that she is over-qualified for some of the positions she has applied for. This situation is only added to her giving her further poor self-esteem and adding also to her depression.”

8. The Council submitted Mrs T’s medical evidence to Dr Nightingale (an IRMP not previously involved in Mrs T’s case). On 21 August 2015 Dr Nightingale gave her opinion that Mrs T did not satisfy the criteria for ill health retirement. In summary she said:

- if Mrs T came off her depression medication there was potential for her memory issues to improve (although equally they may not), but her depression would likely worsen;
- given the situation Mrs T was permanently unfit for her previous job;
- however, Mrs T had been continuing to apply for jobs since August 2011, which lead her to believe that Mrs T would have been able to undertake gainful employment when she left her role in August 2011; and

- employers needed to consider reasonable adjustments for individuals with disabilities - so memory prompts, or a role that did not require much in the way of memory, could have been undertaken by Mrs T with immediate effect after leaving her position at the Council.
9. In September 2015, Dr Nightingale clarified the type of jobs she had in mind, which included: a receptionist, switchboard operator, gardener, bag packer, shop assistant and pupil escort. The Council duly accepted Dr Nightingale's opinion and refused Mrs T's application.
 10. In December 2015, Dr Smith wrote to the Council querying where the information that Mrs T was capable of gainful employment had come from. Dr Smith said:
 - Mrs T was not capable of any form of work and had been continuously signed off due to mental health and memory problems since leaving the Council;
 - while she wanted to and it had been agreed that she should try and apply for work repeated rejections had had a profound effect on her mental state and it had been suggested that she stop looking for work - she had tried some voluntary work, such as a reception work and customer service but some of this was near impossible due to her memory problems; and
 - Mrs T would never be capable of gainful employment of not less than 30 hours a week because of issues with her memory and lack of concentration.
 11. Later that month, Mrs T wrote to the Council seeking clarification over its decision. After several chasers, in April 2016 she received a response from the Council to her questions. Mrs T then formally appealed the Council's decision via the two-stage internal dispute resolution procedure (**IDRP**).
 12. The Council turned down the first stage appeal In June 2016. It said it had made a clear decision under Regulation 20 and the correct procedures had been followed.
 13. In August 2016, Mrs T submitted her second stage appeal. She said her GP had stated on a number of occasions that she had not been and was unlikely to be capable of gainful employment, but the Council had chosen not to take this into consideration.
 14. The second stage decision maker turned down the appeal, reiterating that the Council had made a clear decision and followed the right procedures.
 15. Relevant extracts from Dr Smith's and Dr Nightingale's medical reports are provided in Appendix 2.

Adjudicator's Opinion

16. Mrs T'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:-
- The Council asked Dr Nightingale for a medical opinion on whether Mrs T's condition was now permanent and whether taking into account hindsight it was permanent at the date she left the Council. Dr Nightingale should only have been asked to give her opinion on permanence at 7 August 2011, and not taking into account hindsight.
 - Dr Nightingale gave her opinion that Mrs T was permanently unfit for her previous job on 7 August 2011, but then associated Mrs T's application for jobs since then to likely mean that when she was dismissed she was medically capable of gainful employment. Applying for a job does not automatically mean that the person is capable of doing that job.
 - The question Dr Nightingale failed to address was whether Mrs T had a reduced likelihood of undertaking gainful employment when her employment ended. If Mrs T did, then irrespective of whether she was capable of undertaking some form of gainful employment at that time, she satisfied the two-part test and consideration should then have been given to whether she was likely to be capable of undertaking gainful employment within three years (Tier 3), after three years but before age 65 (Tier 2) or not before age 65 (Tier 1).
 - The Council did not come to a decision as to Mrs T's eligibility for ill health retirement under regulation 20 in a proper manner. The failure to do so amounts to maladministration by the Council and it should therefore consider Mrs T's 2011 application again.
 - The whole matter has caused Mrs T considerable distress and inconvenience and she now faces a further period of uncertainty while the Council reviews again her case. Consequently, the Council should pay Mrs T £1,000 for the significant non-financial injustice she has suffered.
17. The Council did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Council provided its further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by the Council for completeness.

Ombudsman's decision

18. The Council's response to the Adjudicator's Opinion is set out below.
- It accepts that there may have been some additional considerations that the IRMP should have addressed about Mrs T's eligibility for ill health retirement under regulation 20. Therefore it is prepared to arrange for Mrs T to be seen again by an IRMP and reconsider the IRMP's opinion. However this would be "as soon as that is mutually convenient".
 - It had previously paid Mrs T compensation of £500 in respect of case PO-XXX and therefore do not feel that there is justification in paying her an additional amount.
19. I have carefully considered the Council's response to the Adjudicator's Opinion. I agree with the Adjudicator's findings that there was maladministration by the Council. However, the Council has now agreed to reconsider Mrs T's application for an ill health pension under regulation 20 and this addresses the maladministration identified by the Adjudicator.
20. This leaves the issue of the non-financial injustice that Mrs T has suffered to be decided. I do not agree with the Council that just because Mrs T received £500 in respect of case PO-XXX means that she should receive no further compensation. The £500 awarded in respect of case PO-XXX was compensation for the non-financial injustice Mrs T suffered in respect of that particular case. In my view, taking account of the fact that the matter had previously been remitted back to the Council, the award of £1,000 is an appropriate amount.
21. Therefore, I uphold Mrs T's complaint. However, because the Council has agreed to reconsider Mrs T's application for an ill health pension, the directions I have made below are only in respect of compensation for the significant non-financial injustice she has suffered, the time frame in which the Council should request another certification from a different IRMP, the timeframe in which the Council should make a decision as to whether or not Mrs T is entitled to ill health retirement and the review of her benefits should she be awarded Tier 3 benefits.

Directions

22. Within 14 days of the date of this Determination, the Council shall pay Mrs T £1,000 for the significant non-financial injustice she has suffered.
23. Within 21 days of the date of this Determination the Council shall request a medical report and certification from another IRMP not previously involved as to whether Mrs T satisfies the criteria for pension benefits from the date her employment ended.

24. Within 21 days of receiving the IRMP's certification and report the Council shall decide whether Mrs T is entitled to pension benefits from the date her employment ended.
25. If the Council decide to award Tier 3 benefits it should also complete an 18 months review at 7 April 2013, in accordance with regulation 20(7), to decide if the Tier 3 award should be uplifted to Tier 2 from then onwards.

Anthony Arter

Pensions Ombudsman
21 July 2017

Appendix 1

Local Government Pension Scheme (Benefits, Membership and Contributions) 2007

26. As relevant regulation 20 says:

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

(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 being capable of undertaking 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.

(2) If the authority determine that there is no reasonable prospect of his obtaining being capable of undertaking any gainful employment before his normal retirement age, his benefits are increased-

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date the whole of the period between that date and the date on which he would have retired at normal retirement age.

(3) If the authority determine that, although he cannot obtain gainful employment is not capable of undertaking gainful employment within three years of leaving his employment, it is likely that he will be able to obtain capable of undertaking any gainful employment before his normal retirement age, his benefits are increased-

(a) as if the date on which he leaves his employment were his normal retirement age; and

(b) by adding to his total membership at that date 25% of the period between that date and the date on which he would have retired at normal retirement age.

(4) If the authority determine that it is likely that he will be able to obtain any gainful employment within three years of leaving his employment, his benefits-

(a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and

(b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(4) If the authority determine that it is likely that he will be capable of undertaking gainful employment within three years of leaving his employment, or before reaching normal retirement age if earlier, his benefits-

(a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and

(b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(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 ("IRMP") 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 being capable of undertaking any gainful employment before reaching his normal retirement age.

...

(7) (a) Subject to sub-paragraph (c), once benefits under paragraph (4) have been in payment to a person for 18 months, the authority shall make inquiries as to his current employment.

(b) If he is not in gainful employment, the authority shall obtain a further certificate from an independent registered medical practitioner as to the matters set out in paragraph (5).

...

(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 the General and Specialist Medical Practice (Education, Training and Qualification) Order 2003 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.

"qualified in occupational health medicine" means an independent registered medical practitioner qualified in occupational health medicine ("IRMP")."

Appendix 2

Medical reports

Dr Smith, 30 July 2015

27. Amongst other things Dr Smith said:

“Her main problem and difficulty with not being able to work as a finance officer is due to her memory. This has been presented in a way which has been difficult to quantify with the usual memory tests. Her depression in the past has been severe enough to warrant treatment with ECT. This was back in 2004 and Mrs T feels that her memory problems started from that point. She had been reporting memory problems for quite some time, but it came to ahead in 2011. She was still under the care of Dr Kumar, consultant psychiatrist and in his letter of 5th August 2011, Mrs T states that she still is complaining of memory problems, it is mainly for short-term problems, such as watching a TV programme, when she cannot recall the immediate events. It was thought that maybe some of the difficulties were due to poor concentration and be caused by some of the medication she required in order to control and help her depression. ACT and various blood tests have been taken at that stage, but no abnormalities have been found.

She continued to report to have great difficulties with carrying out day to day activities within her job because of memory problems, and since her redundancy from Shropshire Council, this has continued to be the case. She has not worked since that time and has been signed off sick. However, in order to maintain some self-esteem, she has continued to make some job applications and even had the occasional interview. These have proved to be difficult due to her memory problems, and she finds that she can't even answer the questions that are being asked, because she can't remember what is being said. She has applied for jobs which would not fit her training and experience because of these memory problems, and so some of the difficulty is there is the perception that she is over-qualified for some of the positions she has applied for. This situation is only added to her giving her further poor self-esteem and adding also to her depression. In June 2012, Mrs T had a neuropsychological assessment by a clinical psychologist. I believe you have a copy of the report which was sent to you when Mrs T first made her application for retirement. Its conclusions show that undoubtedly Mrs T struggles with attention and memory, but the inconsistency within her results does not show organic memory impairment which fits with the results of a CT scan. It seems likely that ECT may have caused a general cognitive defective initially but depression and anxiety has maintained this in the long-term. The initial difficulties may have led to a belief in something being wrong, which in itself feeds the worry about memory and increases the salience of everyday memory failure.

The report goes on and if you haven't got that report and require it, then please let us know. There is no treatment for the memory problems itself. There have been various changes in her medication to try and help with this. Her current mental state is fairly stable,

although she has times when she feels low. She continues on regular medication in the form of Priadel, Quetiapine, and Zopiclone. There have not been any signs of improvement in her memory.

Unfortunately over the past couple of years, she has also developed some physical problems, in particular ongoing leg pain. She has been under the care of surgeons in order to release a nerve which was thought to be entrapped and also been to the APCS. She has required increasing amounts of medication to cope with the pain, but has been limited due to the side effects. In fact the increasing amounts of Tramadol she required went on to cause problems with falls, which were causing quite worrying neurological symptoms, for which she underwent scans and a whole spine MRI. The scans did reveal some disc degenerative changes at L5/S1 and a small disc prolapse, which may contribute to the left L5 nerve root, which may be part of her left lateral leg pain. She has been exercising regularly and seen physiotherapy, but unfortunately with only some success in reducing her pain level and she continues on Gabapentin and Naproxen. She has also been to pain management solutions where nothing was found could be helped and I am in the process of referring back to APCS.”

Dr Nightingale, 21 August 2015

28. Amongst other things Dr Nightingale said:

“Within the referral written by HR I note that they state “we would like the certificate based upon whether the condition is now permanent and whether taking in hindsight it was permanent at the date of leaving. As this review is under previous legislations I have forwarded the correct medical certificate that needs completing”.

I have reviewed the evidence that was available in the past, as well as Dr Leeming-Latham and Dr Baron reports, in addition to new evidence – namely GP report and GP records. I note that neither Dr Leeming-Latham nor Dr Baron concluded that permanence had been established at the time of their retrospective deliberations some years ago.

Having obtained a GP report as well as a copy of GP records, I have reviewed the historic evidence as well as the new evidence, in order to duly undertake my deliberations accordingly.

I note that Mrs T declares memory difficulties but that the GP states in their report that this symptom *“has been difficult to quantify with the usual memory tests”*. I note that Ms T has a history of depression and that it was sufficiently severe to warrant treatment with Electroconvulsive Therapy (ECT) in 2004; Ms T alleges her memory problems have started from that point in time. I note that it has been thought perhaps some of her difficulties were due to poor concentration, as well as potentially being caused by some of the medication she requires to control and assist with her depression.

Based upon the evidence before, I am of the opinion that there is the potential that is Ms T came off her depression medication then her memory might improve (although equally it might not), but it would be anticipated that as a consequence her depression would likely

worsen. Given this situation, I could that she is permanently unfit for her job, namely that of Senior Direct Payments & Finance Officer, due to either her reduced memory whilst on antidepressant medication or possible improved memory but worsened depression if off her antidepressant medication. However, I note that Ms T has been continuing to apply for jobs, as well as attending interviews during the intervening period between leaving her role at the Council in August 2011 and the present day; this, coupled with the fact that '*gainful employment*' is a hypothetical assessment, leads me to conclude that at the time of dismissal, namely 7th August 2011, Ms T more likely than not would have been medically capable of other work, namely '*gainful employment*', immediately. Employers needs to consider reasonable adjustments for individuals with disabilities therefore I am of the opinion that memory prompts, or a role not requiring much in the way of memory, could have been undertaken by Ms T with immediate effect at the time of leaving her previous role, namely that of "*Senior Direct Payments & Finance Officer*".

Dr Smith, 8 December 2015

29. After noting the definition of gainful employment Dr Smith said:

"Mrs T has not been capable of any form of work and has been continuously signed off due to her mental health and memory problems since leaving the Council, having been made redundant. It was agreed to try and apply for jobs as she wanted to try and work and has continued to try to find suitable work. Unfortunately her applications were repeatedly unsuccessful. This has had a profound effect on her mental state and it has been suggested that she should stop any form of looking for work. She has, however, tried voluntary work which has been of a much simpler role such as reception work and customer service but some of this has been near impossible due to her memory problems. I would suspect that if she was employed in the way she has acted in these jobs that she would probably be dismissed.

She has also developed some physical symptoms which meant that she wouldn't be able to look at some of the options for gainful employment such as gardener and manufacturing operative type jobs. She would certainly never be able to do the hours which are implicated in gainful employment. The way her memory problems present means there is a lack of concentration as well. Both these elements have affected her job applications and have been detrimental at interviews and still have a profound effect on her daily living. "