

Ombudsman's Determination

Applicant	Mr D
Scheme	Local Government Pension Scheme (LGPS)
Respondent	Kent County Council (the Council)

Outcome

1. Mr D's complaint is upheld and to put matters right the Council shall reconsider Mr D's application for an ill health retirement (**IHRP**).
2. The Council shall pay Mr D £500 in recognition of the significant distress and inconvenience caused by its actions.
3. My reasons for reaching this decision are explained in more detail below.

Complaint summary

4. Mr D's complaint concerns the Council's decision not to award him an IHRP from deferred status.

Background information, including submissions from the parties

5. The pertinent Regulation concerning Mr D's IHRP is Regulation 31 of the LGPS (Benefits, Membership and Contributions) Regulations 2007, which is set out in the Appendix.
6. Mr D worked as a Procurement Manager for the Council and he was a member of the LGPS. He left employment in June 2013.
7. On 27 March 2015, Mr D applied for an IHRP in June 2015. Mr D was referred to an occupational health (**OH**) specialist, who requested a report from his treating specialist. The report dated 14 May 2015 confirmed that Mr D's symptoms of anxiety and depression started over two years ago and had been gradually getting worse. Also, Mr D had recently been referred to the local Mental Health Team.
8. Mr D was subsequently referred to an independent registered medical practitioner (**IRMP**), Dr Gration, for a medical opinion, which he issued on 6 August 2015. The report said that:

“Mr D’s conditions have been continuing to affect him, despite medication/s and other therapies...which he has been having over the past 2 ½ years... His counselling notes indicate that before problems surrounding his leaving KCC, his years of work with the Council, and preceding career, had not been unduly problematic or adversely affected by his health... Anxiety and depression usually improves, although the timing and extent of this is difficult to predict and can be influenced by a number of factors, not all of which are easy to determine or quantify...on the balance of probabilities, at the date of application Mr D was not permanently incapable of discharging efficiently the duties of his former employment because of ill-health...”

9. On 10 August 2015, the Council sent a decision letter to Mr D saying that he did not meet the criteria for deferred pension benefits. Mr D appealed against the decision and provided further comments. Mr D contended that Dr Gration did not take all the relevant facts into account when coming to his conclusion and decision. The Council forwarded these comments to Dr Gration.
10. On 28 January 2016, Dr Gration sent a letter to the Council providing comments which did not change his opinion. He also referred Mr D to appeal under the LGPS’ internal dispute resolution procedure (**IDRP**).
11. Mr D appealed against the Council’s decision in March 2016 and received a response from West Yorkshire Pension Fund’s (**WYPF**) decision maker on 7 June 2016, under stage one of the IDRP, who upheld his complaint. The letter concluded that:

“Having studied all the evidence made available to me I have formed the view that the Council has not obtained sufficient medical evidence in reaching its decision...I would have expected the Council to have investigated the outcome of your referral to the Mental Health Team and explored all the treatment options available to you. Kent County Council also need [sic] establish if any of the treatment, on balance of probabilities, will improve your health to enable you to carry out the duties of your former role, or enable you to engage in gainful employment within three years of the date of your application. That being the case I am referring your case back to Kent County Council to obtain the additional medical information as outlined above and seek another medical opinion from an IRMP. Once the new medical opinion has been received Kent County Council will review its decision and notify you of the outcome accordingly”.

12. On 27 June 2016, the Council emailed OH notifying it of the outcome of the IDRP.

13. It was not until 16 January 2017, due to an unexplained delay by OH, that a new IRMP, Dr Harris, issued a report saying:

“In my opinion, although the prognosis is unclear at present, this type of condition is one which generally responds well to a treatment and Mr D does not appear to have a past history of significant ill health prior to 2012...As a result it is my opinion that Mr D does not currently fulfil the criteria for early release of preserved benefits as on the balance of probabilities he is not permanently incapable of discharging efficiently the duties of their [sic] former employment because of ill health or infirmity of body or mind”.

14. Mr D subsequently contacted the Pensions Advisory Service (**TPAS**) for assistance. In May 2017, TPAS advisor emailed the Council asking it to confirm the medical information that was supplied to Dr Harris. However, the Council informed TPAS in subsequent emails that “we do not have access to the medical information that was provided regarding Mr D...KCC accepted the view by the IRMPs who assessed Mr D’s application...In order to request this information you will need to approach our Occupational Health Department”.
15. On 19 September 2017, the Council confirmed it does not have access to Mr D’s medical evidence as this is directly provided to OH. It also listed other information held on the system regarding Mr D’s application.
16. Following TPAS’ involvement, the Council sent a letter to Mr D, dated 5 October 2017 that said:
- “Although we believe that we have taken appropriate actions in dealing [sic] your request for the early release of your deferred pension benefits on health grounds, we have agreed to the suggested approach in seeking a further medical advice from an Independent Registered Medical Advisor...Could you please complete and sign the enclosed form and return to me as soon as possible so that we can proceed with an IRMP appointment”.
17. Mr D did not act on this request and brought the complaint to this Office instead.

Adjudicator’s Opinion

18. Mr D’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 said that it has properly considered Mr D’s application.
 - However, the Adjudicator was not satisfied that the Council and Dr Harris complied with the LGPS Regulations and that all relevant evidence has been considered. Subsequently, the Council has not made the decision properly.

- Dr Harris certified that Mr D is not permanently incapable of performing his duties of the former post. He concluded that there are treatments available to Mr D and once he has undertaken these treatments, “adjustments to any role may be required”. However, Mr D applied for an IHRP after he left his employment. Essentially, Regulation 31 applies to “a member who has left his or her employment...” So, Dr Harris applied the test incorrectly because his comments regarding work adjustments were not relevant.
 - The Council also confirmed that it does not have access to the medical information that was provided in relation to Mr D and it accepted the view of its IRMPs who assessed Mr D’s application. The responsibility for the decision lays with the Council, as stated in the LGPS Regulations and not the IRMP. So, the Council should not have purely relied on its IRMP’s opinion but considered all Mr D’s medical evidence and asked the right questions itself.
 - In the Adjudicator’s view, due to the complex nature of Mr D’S condition, the Council should have sought further advice from the Mental Health specialist before asking an IRMP whether Mr D should have undergone the available treatments. This is because, as stated by the decision maker, in his response under stage two of the IDRPs, dated 7 June 2016, “in the report from Jayne Curran dated 14 May 2015, it states that your condition is worsening instead of improving and you have been referred to local Mental Health Team.”
 - I would have expected the Council to have investigated the outcome of Mr D’s referral to the Mental Health Team and explored all the treatments available to him. The Council should have also asked the right question. The Council should have established whether any of the treatments, on balance of probabilities, would have improved Mr D’s health to enable him to carry out the duties of his former role, to enable him to engage in gainful employment within three years of the date of his application.
 - The Adjudicator also believed that the whole process has undoubtedly caused Mr D significant distress and inconvenience. It was the Adjudicator’s view the Council should pay Mr D £500 in recognition for the distress and inconvenience suffered by its actions.
19. Mr D and the Council accepted the Adjudicator’s findings however Mr D did not believe that £500 award in recognition of the distress and inconvenience was sufficient and the complaint was passed to me to consider. Mr D provided his 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 Mr D for completeness.
20. Mr D said that taking account of all Adjudicator’s findings and his additional comments he believes that a higher award for distress and inconvenience should be made. Mr D’s key points are the following:
- Dr Gration made multiple errors in his report.

- The Council ignored all the relevant medical evidence and not asked the right questions on two occasions
- The Council took five months to respond to TPAS.
- It has almost been three years since Mr D's application for an IHRP and more than five years since he has been able to work.

Ombudsman's decision

21. I appreciate Mr D has presented his arguments for why the award of £500 is insufficient. The points raised by Mr D satisfy me that he has suffered significant distress and inconvenience, but awards are generally modest and not intended to punish. I consider that an award of £500 is sufficient.
22. Whilst the Council have accepted the Opinion, for completeness I will include within my directions the steps it needs to take when reconsidering the matter and I will direct it to pay Mr D £500.
23. Therefore, I uphold Mr D's complaint.

Directions

24. Within 21 days of the date of this Determination:
 - the Council shall obtain information from a specialist on Mr D's condition as at the date of his application, 27 March 2015, asking specifically what effect available treatments were likely to have had on his condition and whether it was reasonable for him to undergo them.
 - Nominate a new IRMP, who has had no dealing with the matter before, from whom a certificate is obtained under the Regulation 31 of the LGPS Regulations.
 - Consider Mr D's relevant medical evidence and ask the IRMP to consider whether he meets the criteria within the Regulations and provide his report.
25. Within 21 days of the date of obtaining the IRMP's certificate, the Council shall then, inform Mr D of the decision in writing and explain the reasoning behind it.
 - If Mr D is due a pension, then such a pension shall be paid from the date of his original application, and any overdue payments of pension shall be paid as a lump sum with interest running from the original due date of each payment to the date of payment of the lump sum, at the rate quoted by reference banks from time to time.

PO-19182

26. Within 21 days of the date of this Determination, the Council shall pay Mr D £500 in recognition of the distress and inconvenience caused by its actions.

Karen Johnston

Deputy Pensions Ombudsman
22 March 2018

Appendix

Regulation 31 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007.

(1) This regulation applies to-

(a) a member who has left his or her employment before he or she is entitled to the immediate payment of retirement benefits (apart from this regulation), or

(b) a member who has left his or her employment and is a pensioner member with deferred benefits under regulation 20(9).

(2) Subject to paragraphs (3) and (4), if a member to whom paragraph (1)(a) applies becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body, the member may ask to receive payment of their retirement benefits whatever the member's age.

(3) A request under paragraph (2) must be made to the member's former employing authority or appropriate administering authority where the member's former employing authority has ceased to be a Scheme employer.

(4) Before determining whether to agree to a request under paragraph (2), the member's former employing authority or appropriate administering authority as the case may be, must obtain a certificate from an IRMP as to whether in the IRMP's opinion the member is suffering from a condition that renders the member permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition the member has a reduced likelihood of being capable of undertaking any gainful employment before reaching normal retirement age, or for at least three years, whichever is the sooner.

(5) In the case of a member to whom paragraph (1)(b) applies, if the member becomes permanently incapable of undertaking any gainful employment, the member may ask to receive payment of their retirement benefits, whatever the member's age.

(6) A request under paragraph (5) must be made to the member's former employing authority, or appropriate administering authority where the member's former employing authority has ceased to be a Scheme employer.

(7) Before determining whether to agree to a request under paragraph (5), the member's former employing authority, or appropriate administering authority as the case may be, must obtain a certificate from an IRMP as to whether in the IRMP's opinion the member is suffering from a condition that renders the member permanently incapable of undertaking any gainful employment.

PO-19182

(8) In this regulation, "gainful employment", "IRMP" and "permanently incapable" have the same meaning as given to those expressions by regulation 20(14).