PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Mr Paul Gartland
Scheme	Local Government Pension Scheme (**the Scheme**)
Respondent(s)	Durham County Council (**the Council**)

Subject

Mr Gartland is of the opinion that he has been wrongly refused the early release of his deferred pension benefits on grounds of ill health with effect from May 2010.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint should be upheld against the Council because the decision as to whether Mr Gartland met the requirements of Regulation 31 does not appear to have been taken by the Council.

DETAILED DETERMINATION

Scheme Regulations

1. Relevant to this complaint are the Local Government Pension Scheme 1997 Regulations (**the 1997 Regulations**).

2. As relevant, Regulation 31(6) says:

> "If a member who has left a local government employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body-
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> (a)he may elect to receive payment of the retirement benefits immediately, whatever his age,…"

3. As relevant, Regulation 97(9) says:

> "Before making a decision as to whether a member may be entitled…under regulation 31 on the ground of ill-health or infirmity of mind or body, the Scheme employer must obtain a certificate from an independent registered medical practitioner who is qualified in occupational health medicine as to whether in his opinion the member is permanently incapable of discharging efficiently the duties of the relevant local government employment because of ill-health or infirmity of mind or body.
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> …The independent registered medical practitioner must be in a position to certify, and must include in his certification a statement, that-
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> (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
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> (b) he is not acting, and has not at any time acted, as the representative of the member, the Scheme employer or any other party in relation to the same case."

4. Regulation 27(5) defines "permanently incapable" as meaning that: "the member will, more likely than not, be incapable, until, at the earliest, his 65th birthday."

Material Facts

5. Mr Gartland was a Performance and Inclusion Officer (Housing Department) for Derwentside District Council. His employment was terminated in January 2005 following prolonged sickness absence from work attributed to an "Occupational Stress Reaction" and "Chronic Anxiety State". He was not awarded ill health retirement.

6. In May 2010 (then aged 50) he applied for the early release of his deferred pension benefits on the grounds of ill health – at the time Mr Gartland informed the Council (the successor Local Authority to Derwentside District Council) that he had been awarded Disability Living Allowance (mobility and care components) for an indefinite period and had recently qualified for Incapacity Benefit for at least another 3 years.

7. As Mr Gartland's employment ceased in 2005 the early release of his deferred pension was subject to the requirements of the 1997 Regulations (as noted above).

8. The Council referred Mr Gartland's application to the Authority's Senior Occupational Health Physician. Dr Wynn requested a report from the treating Consultant Psychologist (Dr Thejam) regarding:

- the outcome of relevant investigations;
- current diagnosis(es);
- treatments: tried; current and intended;
- his opinion on Mr Gartland's symptomatic and functional prognosis;
- previous psychiatric history.

9. In his August 2010 report Dr Thejam, amongst other things, said:

> "Following psychiatric assessment and reviews, my clinical impression is that [Mr Gartland] has a longstanding history of chronic low moods suggestive of dysthymia with superimposed moderate to severe depressive episodes recently and has chronic phobic anxiety symptoms. In view of his chronic and enduring symptomatology, it is difficult to comment upon any encouraging prognostic outcome with very limited interventions done so far. He appears to be responding slowly to the interventions he has been offered so far. However, he requires further input and reviews to consolidate the improvement and stabilise with a view to prevent any relapses in the future. Currently, he is being titrated on psychotropic medications and is being followed up regularly in the clinic. He is being referred to our secondary specialist Psychology Services for assessment and, if appropriate, for further interventions."

10. Dr Wynn requested an independent medical opinion from Hobson Health. Dr Pandy (Consultant Occupational Physician) certified that Mr Gartland was not permanently incapable of discharging efficiently the duties of his previous employment. In his covering letter he said:

> "With the information available I feel there is insufficient evidence to state permanent incapacity. He therefore does not meet the criteria for ill-health retirement".

11. In his accompanying report Dr Pandy said:

> "Consultant occupational health physician has assessed [Mr Gartland] on 26 July 2010 and [has] recorded that Mr Gartland was employed between 1984 and 2003 in a predominantly office based role and in 2003 [he was] made redundant from employment due to capabilities after sickness absence attributable to stress, anxiety and depression. He has had subsequent employments on a part-time basis with department of work and pensions. There has been no recorded mental health history prior to 2002 and has had mental health input since this time and has been on medications. The consultant occupational health physician records his impression as long-standing mood disturbance and engaged only recently with psychiatrists and that further treatment is likely.
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> The report dated 24 August 2010 by consultant psychiatrist is comprehensive and covers Mr Gartland's mental health symptoms, prognosis and treatment plan. In the past more than 4 year[s] ago Mr Gartland has had thoughts of self harming and the mental health team has assessed him not to have expressed any active plans to end his life saying that his wife and children were major productive factors. In the most recent assessments, there were no psychotic features noted and he has denied any active plans to end his life and the consultant psychiatrist states his intellectual ability was at normal range with appropriate concentration and impact and orientation. Consultant psychiatrist was of the clinical impression that Mr Gartland has long standing history of chronic low moods with super imposed moderate to severe depressive episodes and recently has chronic phobic anxiety symptoms. He states it is difficult to comment upon any encouraging prognostic outcome and continues to explain the reason for this to be limited interventions so far. Consultant psychiatrist feels Mr Gartland requires further input and reviews to consolidate the implement and to stabilize with a way to prevent any further relapses.
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> In summary, Mr Gartland has a history of common mental health problems, characterized by depressive episodes and phobic anxiety symptoms. It appears his episodes have been moderate to severe in severity…With the available information, it appears all treatment options cannot be said to have been explored or exhausted and given that he has more than 10 years to reach his normal retirement age, on the balance of probability I feel it is reasonable to expect an improvement with appropriate treatment and support and therefore I am unable to state permanent incapacity."

12. The Council's Principal Resources Officer subsequently wrote to Mr Gartland informing him that his application had been turned down:

> "Your application was referred to the Authority's Consultant Occupational Health Physician for appropriate consultation with an independent Occupational Health Consultant. I have now been informed

> from the medical evidence presented. Your application cannot be supported at this stage. The Director of Resources has therefore instructed me to inform you that early payment of deferred benefits cannot be paid."

13. Mr Gartland asked the Council for a full explanation of the decision. The Council's Principal Resources Officer replied:

> "The decision not to support your request is wholly based upon the report of the independent medical specialist…
>
> …In his report to me it states that he "feels that there is insufficient evidence to state permanent incapacity, and therefore does not meet the criteria for ill-health retirement". None of your medical information is detailed within the report he has sent to me."

14. In November 2010 Mr Gartland invoked the Scheme's two-stage internal dispute resolution (IDR) procedures. In his stage 1 appeal Mr Gartland detailed his former duties and said:

- Dr Thejam's report to Dr Wynn had incorrectly stated he had been off work for the past year or so. In fact he went off sick in 2003. From April 2007 to March 2008 he worked part-time for the DWP in a minor role, but since then he had not worked because of his condition.
- Dr Thejam's report confirmed that his condition was chronic.
- In 2009, DWP had assessed him as eligible for Disability Living Allowance (indefinitely).
- His wife was his full time carer and had been awarded Carers Allowance by DWP.
- His GP, who had regularly treated him over the past eight years, had not been consulted.
- He had been prescribed the maximum dose of Citalopram continuously over the last eight years and recently had added Mirtazapine (another antidepressant). He had also been prescribed anti-anxiety medication.
- He had received cognitive behavioural therapy, but without a real improvement in his condition.
- The interventions he had received were not geared towards enabling him to be able to perform the functions of his former job or any full time employment, but aimed to enable him to cope (with support).

- The severity and prognosis of his condition had been underestimated and his prospect of being able to work at some point in the future greatly overestimated.

15. The Specified Person (at IDR stage one) requested from the Council a copy of their instructions together with all medical evidence submitted to Dr Pandy, Dr Pandy's opinion, the Council's decision letter to Mr Gartland, Mr Gartland's job description and any other evidence they considered relevant to Mr Gartland's appeal.

16. Having considered all the representations and evidence the Specified Person turned down Mr Gartland's appeal, concluding:

- the Council had made their decision in accordance with the Scheme's regulations after obtaining an opinion from a suitably qualified IRMP:
- the Council and Dr Pandy had asked correct questions;
- whilst Mr Gartland was currently suffering from various medical complaints the criteria for the early release of deferred benefits (under the Scheme's regulations) required that his condition was unlikely to improve before age 65 to allow him to undertake his former duties;
- based on the available medical evidence there was no reason or evidence why he should overrule the Council's decision and refer Mr Gartland back to the Council to review their decision.

17. Mr Gartland consulted with the Pension Advisory Service (**TPAS**). In a letter to TPAS dated 11 July 2011 he made reference to various irregularities in Dr Pandy's report and Dr Wynn's notes and letter to Dr Thejam:

- Dr Pandy's report:
  - incorrectly stated that he had thoughts of self-harm 4 years ago;
  - was unsure of any triggers for his condition. However, he went on sick leave in 2003 with work related stress. It therefore follows that work of the nature he was undertaking would be a trigger. Additionally, Dr Thejam's report commented that he had an inability to cope in crowded places. This also could be regarded as a trigger.

  - Refers to subsequent employments – he had had only one period of part-time employment since his leaving the Council;
  - Used out of context Dr Thejam's comment "with very limited interventions so far". He had received intense treatment (medicinally and personal sessions at the unit where Dr Thejam worked) over a long period and whilst Dr Pandy was not aware at the time he gave his opinion had also received CBT.
- Dr Wynn's letter to Dr Thejam failed to accurately reflect his former duties;
- the section of the IRMP's certification completed by the Council again did not accurately reflect the nature of his former employment;
- Dr Wynn's handwritten notes:
  - incorrectly stated that he had no mental history prior to 2002;
  - stated that he received no in-house care from Social Services. Whilst correct the comment required expanding. His care-coordinator had asked him to complete an assessment for in house care but he had been unwilling to do so because he only wanted his wife to be involved with him in an intense care and support role;
  - failed to provide sufficient detail on his former duties.

18. In October 2011 Mr Gartland invoked IDR stage 2 based on his letter to TPAS. In his covering letter to the Council he added:

> "…the contention I have is that the correct and just question as regards understanding my job duties was not asked; the pertinent list of duties was not provided to the doctors involved; the independent doctor made up information in his report and also [misquoted] my Psychiatrist."

19. The Appointed Person notified Mr Gartland that he felt that further exploration of his medical condition and the prospect of success of any further medical interventions was worthwhile in his case and duly requested an update from Dr Thejam on Mr Gartland's current presentation and involvement with Secondary Care Mental Health Services.

20. In his response Dr Thejam, amongst other things, said:

> "In my opinion, Mr Gartland needs to be on the psychotropic medications for a significant length of time to consolidate and maintain the improvement of his mental state in view of his chronicity or depressive

> features and difficulties in processing his mental functioning. It may be worthwhile getting more information and feedback from the treating Psychologist [Ms Kendrick – Principal Adult Psychotherapist for Tees, Esk and Wear Valley NHS Foundation Trust] for further information to enable you to arrive at an appropriate decision."

21. The Appointed Person asked Ms Kendrick for her opinion on the prospect that the current treatment Mr Gartland was receiving would render him capable of returning to his former duties before his normal retirement age. Ms Kendrick replied:

- Mr Gartland had been engaged with weekly psychodynamic psychotheraphy since January 2011, it was a long-term treatment and she was unable to comment at the moment on its eventual outcome;
- she added:

> "However, from his current presentation and what he has described to me regarding his symptoms, functional abilities and self-perception, together with the chronicity of his mental health problems, it does seem unlikely at the moment that he will be able to do so."

22. The Appointed Person then asked Ms Kendrick:

- to confirm how frequently she (or her colleagues) saw Mr Gartland and if there had been any observed improvement in his condition;
- given the length of treatment to date whether in the short or medium term it was likely that she would be in a better position to give her opinion on the likelihood of Mr Gartland being able to return to his former duties before normal retirement age;
- whether currently she was able to say, on the balance of probabilities, if the treatment interventions were likely to be successful in allowing Mr Gartland to return to his former duties.

23. Ms Kendrick replied that she was seeing Mr Gartland weekly and that his treatment plan was ongoing but was unable to comment further than she had previously.

24. The Appointed Person asked Dr Pandy to review his previous certification decision in light of the comments from Ms Kendrick and Dr Thejam. Dr Pandy replied:

> "…the further information available is that Mr Gartland is continuing with the proposed treatment plan which includes medication and psychotherapy. The Psychiatrist feels the mental state to be stable at the moment and the Psychologist is not able to comment on its eventual outcome. Therefore there does not appear to be any definitive information that either a return to work is not achievable or that it is contraindicated. Also with the available information it would be premature to state permanent incapacity.
>
> In my opinion I would consider the condition treatable or recoverable. On being compliant with the treatment and support offered, on the balance of probability with the identified treatment options I do not see any medical reasons why a return to his previous employment cannot be achieved before reaching his normal retirement age. Therefore I have not identified any condition amounting to permanent incapacity with the further information provided. Therefore I am unable to alter my previous opinion on permanent incapacity."

25. On 6 June 2012 the Appointed Person turned down Mr Gartland's stage 2 appeal on the grounds that:

> "It is clear from Dr Pandy's report that he concludes that on the balance of probability with the identified treatment options that you are currently receiving there are no medical reasons why a return to previous employment cannot be achieved before reaching your normal retirement age. Dr Pandy is therefore not able to alter his previous opinion on permanent incapacity.
>
> I therefore consider that Durham County Council as your previous employer has taken all appropriate steps to review the previous stages and as the medical opinion is that currently there is no permanent incapacity to age of normal retirement, then I am unable to agree that you should access ill-health pension entitlement."

26. Mr Gartland subsequently obtained a report (dated 5 October 2012) from his GP (Dr Astley) supporting his application for ill health retirement:

> "I have read the job description and can confidently say that he is unable to undertake any of the duties or responsibilities of his former job or any job that bares any similarity to it and will not be able to do so before retirement age."

27. TPAS then wrote to the Appointed Person:

- commenting on Dr Pandy's original report:
    - his reference to "office based employee" did not adequately describe Mr Gartland's former duties and responsibilities;
    - incorrectly stated that Mr Gartland had been made redundant in 2003;

  - referred to subsequent employments when Mr Gartland had had only one part-time position for a short period since leaving the Council;
  - incorrectly stated that Mr Gartland had no recorded mental history prior to 2002;
  - stated that he was not sure of any triggers for Mr Gartland's condition - Mr Gartland was of the opinion that as he went on sick leave in 2003 with work related stress work of that nature was a trigger. Also Dr Thejam stated that he had an inability to cope in crowded places which could be another trigger;
  - referred to limited interventions – however Mr Garland has had regular intense interventions: constant heavy medication, CBT on several occasions, Mindfulness therapy, a long period of counselling and therapy at MIND, support from a social worker and from a psychiatrist and psychodynamic psychotherapy.
  - stated that Mr Gartland had been off sick for a year or so when he last worked at the Council eight years ago;
- due to the apparent irregularities in Dr Pandy's report, which was pivotal in the Council's decision to turn down Mr Gartland's 2010 application, requested the Council to reconsider their original decision;
- enclosed Dr Astley's report in support of Mr Gartland's application which was consistent with comments he had previously made back in 2004;
- referring to Dr Pandy's subsequent reconsideration of his original opinion:
  - Mr Gartland was concerned that Dr Pandy had placed an undue negative emphasis on Ms Kendrick's original report ;
  - Dr Pandy's conclusion that Mr Gartland's condition was "treatable or recoverable" was out of line with Ms Kendrick's and Dr Astley's views.

28. The Appointed Person agreed to a further referral to Dr Pandy to review his previous opinion on Mr Gartland's 2010 application. After considering TPAS' letter and Dr Astley's reports of May 2004 and October 2012, Dr Pandy declared that he was unable to state that Mr Gartland was permanently incapacitated and completed a current certificate (dated 19 July 2013):

> "…I understand Mr Gartland's job is a complex and high pressured demanding role involving a lot of interaction with other officers and members and outside agencies and note that problems with his memory, concentration and motivation to be obstacles to the challenges of his previous job. I note the work related stress in 2003.
> …
>
> The essential medical history is a diagnosis of generalised anxiety disorder with secondary depression. The recent letter from his general practitioner does not have any definitive opinion about prognosis. There is no further information available from [the] psychiatrist following on from Dr [Thejam] dated 24.8.10 which stated he required further input to consolidate the improvement and stabilize with a view to prevent further relapses in the future. Generalized anxiety disorder is a common mental health [disorder] and NICE recommends treatment guidelines including for refractory conditions. With effective treatment adequate recovery is the norm. I did not feel the further information provided has any substantial new medical information. I feel unable to state permanency of the incapacity."

29. The Appointed Person duly notified TPAS that he could see no basis to defer from Dr Pandy's view and therefore could not alter the Council's decision.

30. In August 2013, after submitting his complaint to this office, Mr Gartland made a fresh application for the early release of his pension on grounds of ill health. The Council obtained certification from another IRMP not previously involved - the Council recommended that the opinion of Dr Pandy should be omitted from the information submitted to the IRMP to retain impartiality - and on 3 April 2014 wrote to Mr Gartland informing him that his application had been successful and that the early payment of his deferred benefits was payable from 22 August 2013.

Summary of Mr Gartland's position

31. Mr Gartland says:

- The Council have been constantly slow in their responses to his application and his subsequent representations to them.
- Whilst Dr Pandy's original certification was signed in September 2010 it was a further two months before the Council notified him that his application was unsuccessful.
- The Council repeatedly failed to address inconsistences or inaccuracies that he and TPAS had identified - specifically in Dr Pandy's original report and Dr Thejam's August 2010 report to Occupational Health Services.

- In his July 2013 report Dr Pandy comments that with effective treatment "adequate recovery is the norm" for Generalised Anxiety Disorder, but he failed to consider his (Mr Gartland's) personal circumstances. The report made no attempt to address the points raised by TPAS and referred to the NICE guidelines for treatment without considering whether all four stages in the stepped plan had been undertaken in his case, which they had.
- The final certificate signed by Dr Pandy included a false declaration that he had not previously advised or given an opinion on his application.

Summary of the Council's position

32. The Council are of the opinion that they have followed a proper process in accordance with the Scheme's Regulations. Medical opinion has been taken from both those treating Mr Gartland and Dr Pandy (IRMP). The latter has been asked on two occasions to review new information and to review his previous certificate but remains adamant that the symptoms Mr Gartland suffers are treatable and he is not permanently incapable of his former duties.

Conclusions

33. I start by saying that my role in this matter is not to decide whether Mr Gartland is or is not entitled to the early release of his deferred benefits on grounds of ill health - that is a matter for the Council to decide after obtaining requisite certification from an IRMP.

34. My role is to decide whether the Council have abided by the Scheme's Regulations, asked relevant questions, considered all relevant evidence and no irrelevant evidence and reached a decision which is not perverse.

35. In his original report Dr Pandy said "it appears all treatment options cannot be said to have been explored or exhausted" and went on to say "it is reasonable to expect an improvement with appropriate treatment and support". However he did not elucidate what "appropriate" treatment options he had in mind or give an opinion on whether they were likely to improve Mr Gartland's condition sufficiently to mean that he was not permanently incapable of efficiently discharging the duties of his former employment with the Council.

36. Whilst his signing of the certification may imply that Dr Pandy was of the opinion that "with appropriate treatment and support" Mr Gartland's condition would improve sufficiently to mean that he was not permanently incapable, without first clarifying the matter with Dr Pandy the Council did not know that when they notified Mr Gartland his application had been unsuccessful.

37. It is not clear the Council made a reasoned decision. Rather they appear to have treated Dr Pandy's certification as the decision.

38. Whilst the Council are not medical experts and are entitled to accept the certification / opinion of an IRMP they must not do so blindly. The Council do not appear to have seen the medical evidence that was considered by Dr Pandy. Consequently, they did not know whether Dr Pandy had considered all of the relevant evidence and no irrelevant evidence (it is for the Council in consultation with the IRMP to attach weight (if any) to that evidence) or that his report contained no factual inaccuracies.

39. The Council's notifications (original and when Mr Gartland requested a full explanation of why his application had been unsuccessful prior to invoking the Scheme's IDR procedure) did not give the reasons for Dr Pandy's opinion or explain 'their decision' and Mr Gartland was not passed a copy of Dr Pandy's report. That was unfair as Mr Gartland was entitled to know why his application had been refused.

40. The Specified Person (at IDR stage one) failed to recognise these anomalies and although the Appointed Person (at IDR stage 2) identified that further exploration of Mr Gartland's medical condition and the prospect of success of any further medical interventions was worthwhile he failed to obtain certification from another IRMP before reaching his decision that Mr Gartland did not satisfy the criterion for ill health retirement from deferred status.

41. Effectively Dr Pandy was asked to review his 2010 certification in relation to current medical evidence (on Mr Gartland's present condition and the treatments he was receiving), rather than specific medical opinion on whether Mr Gartland was, more likely than not, permanently incapacitated at the time of his 2010 application.

42. It is not clear why Dr Pandy issued a current certificate. Under Regulation 97(9)(a) he was unauthorised to do so.

43. I therefore direct below that the Council should consider Mr Gartland's May 2010 application wholly afresh.

Directions

44. Within 14 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 Mr Gartland satisfied the criteria for the early release of his pension benefits on grounds of ill health as at May 2010.

45. Within 28 days of receiving the IRMP's certification and report the Council shall decide whether Mr Gartland is entitled to the early release of his pension benefits from May 2010.

46. If the Council decides to backdate Mr Gartland's ill health early retirement to May 2010 then simple interest at the rate for the time being declared by the reference banks should be added to the backdated instalments of pension from the due date of each payment to the date of actual payment.

47. Within 14 days of the date of this Determination the Council shall pay Mr Gartland £250 for the distress and inconvenience he has suffered resulting from the Council's maladministration as summarised above.

Jane Irvine
Deputy Pensions Ombudsman

15 August 2014