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

Applicant	Ms J Goulding
Scheme	Local Government Pension Scheme (**LGPS**)
Respondent(s)	Barnsley Metropolitan Borough Council (**Barnsley**) South Yorkshire Pension Authority (**SYPA**)

Subject

Ms Goulding has complained that her eligibility for ill health retirement was not properly considered when her employment was terminated.

The Pensions Ombudsman's determination and short reasons

The complaint should be upheld in part against Barnsley because they failed to consider Ms Goulding's eligibility for ill health retirement in an appropriate manner.

DETAILED DETERMINATION

Material Facts

1. Ms Goulding was employed by Barnsley from September 1984 to December 2008. Her employment was terminated on the grounds of incapability through ill health and she was awarded deferred benefits.

2. Barnsley are Ms Goulding's former employing authority and SYPA are the relevant administering authority for the LGPS.

3. Barnsley arranged a meeting with Ms Goulding in October 2008. In their letter to her, dated 13 October 2008, they referred to a report from their occupational health physician, Dr McKenzie in which he said that he was unable to say when, if ever, she would be fit for work. Barnsley said that, if this was an accurate summary of the situation, they would progress to dismissal. However, they also said that Dr McKenzie was not recommending access to Ms Goulding's pension. Barnsley went on to say that there was "always the possibility of [her] being able to access [her] 'Preserved Benefits' at some time in the future".

4. On 28 November 2008, Barnsley wrote to Ms Goulding notifying her of the outcome of a meeting about her continued employment. Amongst other things, they referred to another report from Dr McKenzie, dated 14 October 2008 and quoted from it. Barnsley said that Ms Goulding's union representative had stated that she agreed with Dr McKenzie's findings and was seeking clarification regarding reasonable adjustments and ill health retirement. With regard to ill health retirement, Barnsley gave Ms Goulding the names of two contacts. They went on to say that the application for benefits was a separate process and the decision to approve was at the discretion of SYPA. Barnsley suggested that Ms Goulding contact SYPA.

5. In January 2009, Ms Goulding wrote to Barnsley saying that she wished to apply for the early payment of her pension on the grounds of ill health. She completed an application form on 24 March 2009. Ms Goulding's case was referred to Dr McKenzie.

6. In February 2010, Ms Goulding's GP referred her to a consultant rheumatologist, Dr Jarrett. He saw Ms Goulding in March 2010 and wrote to her GP noting (amongst other things) that she had been diagnosed initially with lupus, but this had "evolved" into fibromyalgia, which he agreed with. Ms Goulding underwent

further tests and saw Dr Jarratt again in June 2010. He wrote to her GP saying (amongst other things) that the diagnosis was fibromyalgia.

7. Dr Jarratt subsequently wrote to Dr McKenzie confirming a diagnosis of fibromyalgia and saying that there was no evidence of an inflammatory disease. He went on to say that prognosis for fibromyalgia was variable, but that Ms Goulding was already exhibiting several poor prognostic factors such as long term sickness and long duration of symptoms. Dr Jarratt said that most patients were capable of performing some work, but it was difficult to be prescriptive in Ms Goulding's case at this stage. Dr McKenzie wrote to Ms Goulding saying that he had asked Dr Jarratt to write to him once she had completed all treatment and he was able to assess her response. He said that SYPA would want to know that all reasonable treatment had been tried before they could make an assessment. Dr McKenzie said that no decision about Ms Goulding's pension could be made until her treatment had been completed.

8. In response, Ms Goulding wrote to Dr McKenzie pointing out that her application had been submitted over 22 months ago. Ms Goulding said that Dr Jarratt was repeating treatment she had already tried without success. She said that the treatment was intended to maintain her condition on a level; not to provide a cure. Ms Goulding asked how much more treatment she would be expected to try and said that her condition had not improved in the past four years. Dr McKenzie responded,

> "My job as a panel doctor is to obtain evidence to support your application for Ill Health Retirement.
>
> As I have pointed out to you [SYPA] wishes to know that all treatment has been finished before I can make a decision.
>
> I have received a letter from your specialist telling me that you are still having treatment.
>
> Once you have completed the treatment I would be happy to see you again and review the situation. I would also request a further letter from your specialist Dr Jarrett."

9. As the Scheme administrators, SYPA have set up a two-step internal procedure for employers considering ill health retirement for an employee. A case is first passed to a "panel doctor" to obtain relevant medical evidence. It is then passed to an approved independent registered medical practitioner (**IRMP**), as required by the LGPS regulations (see appendix). Ms Goulding's case was passed to Dr

McKenzie and then to an IRMP, Dr Oliver. He reported on 4 January 2011. Dr Oliver confirmed that he had seen the following reports:

- Dr Jarratt 17 and 10 June, 27 April and 18 March 2010
- Senior Occupational Therapist undated
- Senior Physiotherapist 9 September 2010
- Dr Akil, Consultant Rheumatologist, 15 July 2009 (This simply confirmed that Ms Goulding had been seen by his colleague, Dr Kilding, in 2008.)
- Ms Goulding's GP 19 July 2009
- Dr Kilding, Consultant Rheumatologist, 31 March 2009 and 7 October 2008
- Dr Jassim, Consultant Rheumatologist, 13 March 2008

10. Summaries of medical reports dating from 2008 and earlier are provided in an appendix to this document.

11. Dr Oliver said,

> "Ms Goulding has been experiencing symptoms of generalised joint and muscle aches, poor memory and concentration, fatigue and poor sleep since 2007. A formal diagnosis of fibromyalgia seems to have been made in September 2007, although, initially, the diagnosis seems to have been uncertain, and a variety of other medical conditions were being considered at first. Dr Jarrett's recent report however seems to confirm that Ms Goulding's symptoms for the past 3-4 years can be attributed to fibromyalgia. It is evident that Mrs Goulding's symptoms remain ongoing and impact on her day to day activity.
>
> Fibromyalgia is a general condition, of uncertain cause and prognosis. Despite symptoms there is no demonstrable joint or muscle damage and often all blood investigations are normal. Given Ms Goulding's ongoing symptoms and functional impairment there is no doubt that she is unfit for work for the foreseeable future. However Dr Jarrett's most recent available report underlines that the prognosis in fibromyalgia is very variable and could improve with the treatments he has outlined. Therefore based on the available information, I am unable, at this stage, to recommend that Ms Goulding is permanently incapacitated, that is for the next eleven years, until her 65th birthday, from undertaking both her former roles, and therefore eligible to release of her preserved benefits."

12. Barnsley notified Ms Goulding, on 11 April 2011, that her application had been unsuccessful. They quoted from Dr Oliver's report. Barnsley explained that Ms Goulding could appeal if she was dissatisfied with their decision.

13. On 3 May 2011, Ms Goulding's Consultant Rheumatologist, Dr Jarrett, wrote to Dr McKenzie saying that she had been through an evidence based programme, including physiotherapy, occupational therapy and pharmaco therapy, and had not made sufficient progress to allow her to return to work. He expressed the view that this situation was likely to persist until her normal retirement age (65).

14. Dr McKenzie wrote to SYPA saying that he had received Dr Jarratt's letter. He informed them that Ms Goulding had been through an evidence based programme, including physiotherapy, occupational therapy and pharmaco therapy, and that Dr Jarratt was of the view that she had not made sufficient progress to allow her to return to work. Dr McKenzie suggested that Ms Goulding be assessed as Tier 1.

15. Barnsley sought advice from another IRMP, Dr Williams. He provided a report on 14 July 2011. Dr Williams said,

> "Mrs Goulding had been unable to work for four years because of widespread pain. She has had most of the recognised treatment modalities but there is no evidence she has had one of the key treatment (*sic*) which, if she accepts and engages with it, would be expected to help significantly.
>
> Now that she has had symptoms for a prolonged period she is unlikely to make a full recovery, and on balance of probabilities she is unlikely to regain sufficient fitness to work actively as an Assistant Care Manager. I would, however expect her to be able to regain sufficient fitness and confidence to work in a mostly sedentary administrative role that is less physically demanding within three years.
>
> I do not therefore support her application for early release of pension benefits."

16. Barnsley wrote to Ms Goulding, on 12 August 2011, saying that they had reviewed her case at stage one of the IDR procedure. They quoted from Dr Williams. Barnsley declined Ms Goulding's appeal, but said that she could appeal further if she was dissatisfied with their decision.

17. Ms Goulding submitted a stage two appeal. She said that she had undergone Cognitive Behavioural Therapy (**CBT**) on two separate occasions and separately received counselling. In support of her appeal, Ms Goulding submitted a letter from a senior occupational therapist at the pain management group she had

attended in 2010. The occupational therapist confirmed that the sessions Ms Goulding had attended were based on cognitive behavioural techniques.

18. The stage two appeal was considered by SYPA. They decided that Ms Goulding's case should be referred back to Barnsley for reconsideration because Dr Williams' opinion had been based on an assumption that she had not received CBT. Barnsley notified Ms Goulding, in October 2011, that her deferred benefits would be paid with effect from 24 March 2009.

19. Ms Goulding then wrote to Barnsley saying that she believed that she had applied for ill health retirement. She said that she had had limited information at the time her employment had been terminated and had been unable to attend her dismissal hearing because of her poor health. Ms Goulding said that she had asked Dr McKenzie at the time, but all he had said was that it was not his decision. In response, Barnsley said that they had asked SYPA to review her case. Extracts from the relevant LGPS Regulations are provided in an appendix to this document.

20. Ms Goulding's case was referred back to Dr Williams. He wrote to Barnsley, on 4 April 2012,

> "I prepared a report on Mrs Goulding dated 14th July 2011 in which I assessed her eligibility for early release of preserved benefits following prolonged treatment for chronic widespread pain.
>
> I have now been asked to assess her eligibility for early payment of pension benefits as of the date at which she left work, 1st December 2008.
>
> At 1st December 2008 she had some symptoms suggestive of fibromyalgia syndrome or chronic widespread pain, and was having treatment for her symptoms. At this point I would have expected, on balance of probabilities, a significant response to appropriate treatment as outlined in my report of 14th July 2011.
>
> I would not have considered her eligible for ill health retirement at that time."

21. Barnsley wrote to Ms Goulding saying that, on the basis of this advice, they could not support her application. Ms Goulding was told that she could appeal and she did so.

22. In support of her appeal, Ms Goulding submitted three letters written by her GP, in 2007 and 2008, to the local rheumatology department and the local pain management unit. She acknowledged that she did not have letters from the consultants, but said that their diagnoses were mentioned in the GP's letters. She said that she felt that this evidence confirmed that she had completed all treatment by December 2008. Ms Goulding also mentioned that she had paid to see a clinical psychologist privately.

23. Barnsley declined Ms Goulding's appeal, at stage one of the process, on the basis of Dr Williams' advice (see above). They said that she could appeal if she was dissatisfied with their decision. Ms Goulding contacted the Pensions Advisory Service (**TPAS**) for assistance.

24. On 8 February 2013, Ms Goulding's GP wrote an open letter in which he said that Ms Goulding's case appeared to have been decided on the basis of a diagnosis of fibromyalgia when it was unclear whether this was the correct diagnosis. He said that the conclusion currently being considered was a diagnosis of lupus. The GP went on to express the view that it had been clear from the beginning that Ms Goulding's response to the treatment for fibromyalgia was unlikely to be relevant because this was an unlikely diagnosis and there was no evidence to support it. Ms Goulding also approached her consultant, but he declined to comment on her condition in 2008.

25. Ms Goulding submitted a further appeal. She submitted a copy of her GP's letter and said that she was now on medication for lupus. Ms Goulding pointed out that she would not have responded to treatment for fibromyalgia because her condition had been lupus from the outset. She also said that she had previously submitted evidence that she had undergone all the treatment prior to December 2008. Ms Goulding also sent SYPA a copy of a sick pay certificate issued by her GP in April 2008 which stated that she was suffering from lupus.

26. TPAS wrote to Barnsley suggesting that Dr Williams could not be considered the appropriate IRMP to provide an opinion as to Ms Goulding's eligibility for ill health retirement under Regulation 20 because he had already given an opinion on the payment of her deferred benefits. Barnsley agreed to refer Ms Goulding's case to another IRMP, Dr Davies. Her IDR appeal was suspended until this had been done.

27. Dr Davies was asked "Would the change of condition alter the recommendation to permit ill health retirement at the date of leaving". She was provided with a copy of the GP's letter. Dr Davies responded,

> "It may transpire that at the time of leaving a post a person was unfit for their role but that the evidence did not support that they were permanently unfit. As time passes and a condition progresses, or is diagnosed, new evidence may become available, however this does not necessarily mean that the person would have fulfilled the criteria of the LGPS at the time of leaving their post.
>
> In my opinion, I would not be able to state that it would have altered the recommendation as even if the diagnosis was one of a different condition, this condition would have needed to be treated and the response to treatment assessed in order for there to be a prognosis given. As stated by the Consultant rheumatologist in March 2008 'the presence of the anti-nuclear antibodies in the past may suggest that she may have had mild lupus but at the moment I have no evidence that she has systemic disease and for that reason I am not going to comment on lupus prognosis'.
>
> A diagnosis of a different condition, in my opinion, would not have met the criteria of the LGPS Regulations on 1st December 2008 of 'on the balance of probabilities' the person is 'permanently incapable of discharging efficiently the duties of their employment because of ill health or infirmity of mind or body' …"

28. Dr Davies was also asked,

> "Assuming the condition of lupus was diagnosed at termination of employment … and the member had subsequently undertaken the available treatment for that condition, on the balance of probabilities for this condition, what is your opinion on the likelihood of the treatment being successful, and the subsequent effect of the recommendation. For example, does such treatment usually receive a positive response, and on balance, in what percentage of cases would this be likely."

29. Dr Davies responded that, if there was a diagnosis of lupus at the date of determination, the diagnostic label would not determine the outcome. She explained that the term 'lupus' was not specific and this made answering the question difficult. Dr Davies explained that the presentation and course for lupus were highly variable and management depended on the severity of the condition and its manifestations. She noted that the condition had not affected Ms

Goulding's organs and expressed the view that her symptoms were at the milder end of the scale. Dr Davies suggested that, had the question been asked at the time Ms Goulding's employment terminated, it is likely that her consultant would either not have been able to give a prognosis or, if he had, it would have been a good prognosis. She concluded that, if Ms Goulding's condition had been lupus at the time her employment terminated, she would not have met the criteria for ill health retirement.

30. Barnsley wrote to TPAS saying that, having considered Dr Davies' advice, they were unable to approve the payment of Ms Goulding's benefits from December 2008. They said that Ms Goulding could, however, appeal. Ms Goulding decided to appeal and submitted a report from a Specialist in Rheumatology, Dr Sharlala, dated 18 July 2013. He said that he had reviewed Ms Goulding. He also said that she had recently attended the local A&E for acute confusional state which may have been related to lupus or a TIA. Dr Sharlala said that Ms Goulding continue to suffer "fibromyalgic symptoms in addition to possible lupus". He thought that the recent possible TIA made it unlikely that she would be able to return to a full time job before age 65. Dr Sharlala said that he supported Ms Goulding's application for a full pension on grounds of ill health.

31. TPAS also asked Barnsley if they would consider paying Ms Goulding compensation for the way in which her case had been handled. Barnsley said that they acknowledged that Ms Goulding was not given the correct forms when her employment was terminated, but that this had made no difference to her eligibility and she had not suffered any financial loss. They did not consider that there were grounds for compensation.

32. SYPA undertook a stage two review. They determined that there were no grounds for them to remit the decision to Barnsley for reconsideration. SYPA expressed the view that Dr Davies had considered Ms Goulding's case "accurately and professionally". They said that her role was to provide an opinion based on the evidence provided and that, at appeal stage, the responsibility for providing the evidence rested with the appellant. SYPA noted the letter from Dr Sharlala, but said that Ms Goulding's recent visit to A&E was not relevant to the decision. They also noted that there still appeared to be some uncertainty around the diagnosis of lupus. SYPA referred to the question of compensation

and said that they had no power to require Barnsley to award compensation for distress and inconvenience in any case or under any circumstances.

Ms Goulding's Position

33. Ms Goulding submits:

- Dr McKenzie misled her when she enquired about ill health retirement.
- She was given the wrong forms initially and only became aware of this when the decision to release her benefits was made.
- If she had been given the correct information and forms in 2008, she would have been able to obtain a consultant's opinion that she could not work again. Her GP would have referred her to Dr Jarratt in 2008.
- Barnsley have not addressed the correct questions. For example, Dr Davies stated that, even if the diagnosis had been lupus in 2008, her condition would have needed to be treated and the response to treatment assessed in order for there to be a prognosis.
- Dr Davies also made the assumption that she was suffering from a milder form of lupus. It was not appropriate for Dr Davies or Barnsley to make assumptions about her condition; this should have been clarified with her doctors directly.
- The correct question is whether the likely outcome of the treatment options was such that she would have met the criteria for ill health retirement at the time her employment was terminated on the balance of probabilities.
- Barnsley have not considered whether it would be appropriate to offer her compensation for the way in which her application was handled.
- She has submitted letters from two consultants, in 2011 and 2013, stating that she cannot work again. She also submitted evidence that she had completed all treatment prior to December 2008.
- The term 'mild lupus' refers to the fact that there is no organ involvement; it does not take away from the severity of the pain she suffers. She does not feel that Barnsley believe the severity of her pain.

Barnsley's Position

34. Barnsley submit:

- It is acknowledged that Ms Goulding's case should have been treated as an ill health retirement case from the outset, rather than an application for the early payment of preserved benefits.
- As soon as the error came to light, they sought advice from SYPA and requested that Ms Goulding's case be re-assessed.
- Ms Goulding's case was assessed by an IRMP who expressed the view that she did not meet the criteria for an ill health pension. On this basis, they decided that Ms Goulding's application could not be supported.
- They subsequently agreed that Ms Goulding's case should be reviewed by Dr Davies. She advised that the criteria for access to an ill health pension were not met and, on this basis, they did not grant Ms Goulding's request for payment of ill health retirement benefits.
- They have been provided with four IRMP reports stating that Ms Goulding did not meet the criteria for ill health retirement at the point her employment terminated. They disagree with her assertion that she is entitled to an ill health retirement pension.

SYPA's Position

35. SYPA submit:

- Ms Goulding applied for the early payment of her preserved benefits in March 2009. Dr McKenzie did not consider her permanently incapable of carrying out the duties of her former post and Barnsley declined to release the benefits.
- Ms Goulding appealed and an opinion was obtained from Dr Oliver. On the basis of this opinion, her appeal was declined.
- Ms Goulding appealed further and submitted additional medical evidence. It was determined that Dr McKenzie did not have the authority to provide an opinion for the original decision and Dr Oliver's opinion and Barnsley's subsequent decision were reclassified as the original decision for IDR purposes.

- Dr Williams concluded that Ms Goulding was permanently incapable of carrying out the duties of her former employment but was capable of gainful employment within three years. Her appeal was declined.
- Ms Goulding appealed and provided evidence that she had undertaken the treatment which Dr Williams had thought was not undertaken. They remitted the decision for reconsideration by Barnsley who subsequently agreed to release Ms Goulding's benefits.
- Ms Goulding asked Barnsley to reclassify her case as ill health retirement from 1 December 2008. This request was declined on the basis of Dr Williams' advice.
- Ms Goulding appealed. The two IRMPs authorised by SYPA had already been involved so the case was referred to Dr Davies. On the basis of her advice, Ms Goulding's appeal was declined.
- Ms Goulding submitted additional medical evidence. This evidence referred back to her fibromyalgia condition as well as treatment for possible lupus. This evidence was not considered relevant to her condition in 2008.
- The decision as to the payment of benefits on the grounds of permanent ill health is for the employer.
- They believe that the employer has fully complied with the LGPS Regulations and considered Ms Goulding's appeal in a fair and appropriate manner.

Conclusions

36. Barnsley acknowledge that Ms Goulding's case should have been treated as retirement under Regulation 20 from the outset. In view of the fact that she had been on long term sick leave and had enquired about ill health retirement prior to the termination of her employment, Barnsley should have considered her eligibility under Regulation 20 in December 2008. They referred to ill health retirement in their letter of 28 November 2008 to Ms Goulding, but referred her to SYPA. Under Regulation 20, the decision as to eligibility for ill health retirement benefits is for the employer to make. Clearly, some thought had been given to Ms Goulding's eligibility for benefit under Regulation 20 because

Barnsley told her, in their previous letter, that Dr McKenzie had not recommended access to her benefits. The failure to give proper consideration to Ms Goulding's eligibility for benefit under Regulation 20 in December 2008 was maladministration on the part of Barnsley.

37. Ms Goulding approached Barnsley in January 2009 enquiring about early payment of her benefits on the grounds of ill health. This did not prompt Barnsley to review their handling of her case. Instead, they set off down the route of considering whether Ms Goulding should receive her benefits early under Regulation 31.

38. Despite the fact that Ms Goulding completed application forms in March 2009, little appears to have happened until January/April 2011 when Dr Oliver provided an opinion and Barnsley declined her application. The main reason for this extraordinary delay was the view taken by Dr McKenzie that Ms Goulding had to complete all treatment before an assessment of her eligibility could be made. This is not the approach required by the LGPS Regulations. Regulation 20 required Barnsley to make a decision at the time Ms Goulding's employment terminated. Before making that decision, they were required to obtain an opinion from an IRMP as to whether Ms Goulding was permanently incapable of discharging efficiently the duties of her employment with them because of ill-health or infirmity of mind or body. "Permanently incapable" is defined in the Regulations as meaning that the member will, *more likely than not*, be incapable until, at the earliest, her 65th birthday (my emphasis). The IRMP must, therefore, be asked to give an opinion as to the *likely* efficacy of any treatment, whether undertaken or proposed. Regulation 20 does not require a definitive determination by the IRMP. There is no necessity for the member to have completed all possible treatment options before a decision can be made as to their eligibility. The same holds true for Regulation 31 since the same definition of "permanently incapable" applies.

39. Following her appeal and SYPA's decision to refer the matter back to Barnsley, Ms Goulding's preserved benefits were paid under Regulation 31. It was at this point, some 33 months after her employment had terminated, that Ms Goulding realised that Barnsley had not considered her for ill health retirement. To their credit, when the situation was drawn to their attention, Barnsley did take steps to rectify matters.

40. Barnsley referred Ms Goulding's case back to Dr Williams and asked him if he would have considered her eligible for ill health retirement in December 2008. Setting aside for the moment the question of whether Dr Williams was able to give such an opinion because of his previous involvement, the question asked of him was, in my view, correct. In order to pay any benefits under Regulation 20, Barnsley needed to know whether, had they referred Ms Goulding's case to an IRMP in December 2008, the opinion would then have been that she was permanently incapable of discharging her duties with them. This then raises the question of what evidence that opinion should be based upon.

41. Had Barnsley dealt with Ms Goulding's eligibility for retirement under Regulation 20 in the proper manner, the evidence available to the IRMP would be that dating from 2008 or before. Ms Goulding's case has been complicated by the fact that it is being considered many months after the event and much of the evidence has only become available since. The decision should not be made with the benefit of hindsight; whether or not that would be to Ms Goulding's advantage. The only evidence which Barnsley and the IRMP can take into account is evidence which was either already available by December 2008 or which refers to Ms Goulding's situation as at December 2008. For example, the report provided by Dr Sharlala in July 2013 would not have been available in 2008 and does not relate to Ms Goulding's condition in 2008; it cannot be taken into account.

42. Dr Williams was not in a position to provide an opinion under Regulation 20. His only previous involvement in Ms Goulding's case had been to provide a Regulation 31 opinion which he should not have been asked for, but that still amounted to involvement. In any event, Barnsley agreed to refer the matter to another IRMP; Dr Davies.

43. Dr Davies was specifically asked to consider whether, had the diagnosis for Ms Goulding's condition been lupus in 2008, she would have said that she met the criteria for ill health retirement. This was prompted by the letter from Ms Goulding's GP in which he queried why her case had been decided on the basis of a diagnosis of fibromyalgia when it was unclear whether that this was the correct diagnosis. He went on to say that a diagnosis of lupus was currently being considered. The GP expressed the view that it had been clear from the beginning that Ms Goulding's response to the treatment for fibromyalgia was unlikely to be relevant because this was an unlikely diagnosis and there was no evidence to

support it. However, the medical evidence dating from 2008 and earlier does not support this assertion. Whilst lupus had certainly been considered, as evidenced by Dr Jassim's report and the GP's sickness certificate, the diagnosis from Dr Kilding at the time Ms Goulding's employment was terminated was one of fibromyalgia.

44. References to Ms Goulding suffering from fibromyalgia were not, therefore, incorrect. Nor was it incorrect to assess her eligibility for ill health retirement by reference to the likely outcome of treatment for fibromyalgia. Ms Goulding makes the point that she would not have responded to treatment for fibromyalgia because her condition had been lupus from the outset. However, this is the view taken by her doctors now, with the benefit of hindsight. The aim of any redress for the maladministration of not considering Ms Goulding for ill health retirement in December 2008 should be to put her in the situation she would have been in had the maladministration not occurred. In 2008, it would have been appropriate to acknowledge that there were other conditions under consideration and to consider what effect they might have. However, to discount fibromyalgia completely because, in 2013, the diagnosis had turned back towards lupus is not the correct approach; it is applying hindsight.

45. The question Barnsley should have put to Dr Davies was the same as that put to Dr Williams - had the question of eligibility been put to her in December 2008, would she have said that Ms Goulding met the criteria for ill health retirement on the basis of the evidence available at that time or relating to her situation at that time?

46. In her first response, Dr Davies said that she would not have altered her recommendation that Ms Goulding did not meet the criteria for ill health retirement even with a diagnosis of lupus. However, she went on to say that the condition would have needed to have been treated and the response to treatment assessed for a prognosis to be given. I have already explained that this is not the approach required by Regulation 20. It is understandable that doctors may prefer to wait until treatment has progressed or been completed before giving an opinion. However, they need only comment on the likely outcome, on the balance of probabilities. Dr Davies was asked to do this. She commented that the course of the condition was variable and that its management depended upon the severity. Dr Davies noted that Ms Goulding's condition had not affected her

organs and suggested that she was at the milder end of the scale. She advised that, had he been asked in 2008, Ms Goulding's consultant would likely have given either no prognosis or a good prognosis.

47. It has been suggested that Dr Davies should not have made assumptions about the severity of Ms Goulding's condition and that this should have been clarified with her own doctors. Dr Davies had been asked to give her opinion, as an IRMP. She did so on the basis of the evidence relating to Ms Goulding's symptoms at the relevant time and her advice is not inconsistent with the opinion given in March 2008 by Dr Jassim. There was no absolute requirement for Dr Davies to seek further comment from Ms Goulding's doctors; it was a matter for her professional judgment.

48. In reaching a decision as to Ms Goulding's eligibility for ill health retirement under Regulation 20, Barnsley were entitled to rely on the advice they received from the IRMPs, unless there was some compelling reason why they should not. For example, there was a factual error in the IRMP's report or the IRMP had failed to consider some relevant evidence. This is not the case here. Barnsley had received advice from Dr Williams that, in 2008, he would not have considered Ms Goulding permanently incapacitated for the purposes of Regulation 20 by reference to a diagnosis of fibromyalgia. They had received advice from Dr Davies that she would not have considered her permanently incapacitated by reference to a diagnosis of lupus. Taken together, this advice covers the probable advice from an IRMP which would have been proffered in 2008, when Ms Goulding's employment was terminated. It is not inconsistent with the medical reports dating from 2008. I do not find that it was maladministration on the part of Barnsley to accept the advice they received from the IRMPs. I acknowledge that Ms Goulding's GP takes a different view, but this is not sufficient for me to find that Barnsley should not have accepted Dr Williams' and Dr Davies' opinions.

49. Ms Goulding argues that, had she been given the correct information in 2008, she would have been able to obtain a consultant's opinion that she would not work again. At this remove, I do not think that can be said. Ms Goulding approached her consultant and he declined to give a view as to what his advice might have been in 2008. Her GP has given a view, but it would be fair to say that this is based on a certain level of hindsight. The medical evidence dating from the time

Ms Goulding's employment was terminated is not overly supportive of her assertion. In any event, it would still have been for Barnsley to decide what weight they placed on any evidence provided and they would still have been free to prefer the advice from the IRMP. I do not find that there are grounds for me to remit the decision to Barnsley for reconsideration.

50. I do, however, find that the delay in dealing with Ms Goulding's case does amount to maladministration. Ms Goulding has been paid her benefits backdated to 24 March 2009. However, I find that the time taken to consider her eligibility and the mistake in considering her under Regulation 31 rather than 20 will have caused unnecessary distress and inconvenience to Ms Goulding. It is appropriate that she receive some modest compensation for this. The amounts I award in such circumstances are intended to recognise that there has been injustice as a result of the maladministration I have identified which is not of a financial nature. They are not intended to act as a penalty or deterrent.

51. Whilst the decision as to Ms Goulding's eligibility for benefit was for Barnsley to make, SYPA had a role to play as the second stage IDR decision maker. They did refer Ms Goulding's case back to Barnsley when there was a query concerning the treatment she had received. However, they did not consider the delay in dealing with her case. SYPA took the view that they were unable to award compensation for distress and inconvenience.

52. SYPA's IDR decision was taken under Regulation 61 of the Local Government Pension Scheme (Administration) Regulations (SI2008/239) (as amended). There is no prohibition on the award of compensation under Regulation 61. If that were to be the case, the only recourse a member of the LGPS would have, in cases where compensation was warranted and no offer was made by the employing authority, would be to bring their case to me. That is not the intention of the internal dispute resolution requirements. I find SYPA were mistaken when they determined that they could not consider whether it would be appropriate for Ms Goulding to receive compensation for the way in which her case had been handled by Barnsley. However, this view did not add to the delay or to the distress and inconvenience suffered by Ms Goulding. I do not find that they should be required to compensate her for their mistaken view.

Directions

53. I direct that, within 21 days, Barnsley shall pay Ms Goulding £500 for the distress and inconvenience caused by the delay in determining her eligibility for ill health benefit.

Tony King
Pensions Ombudsman

1 August 2014

Appendix

Medical evidence dating from 2008 or earlier

1. Ms Goulding was referred to her local rheumatology department in 2007. In a subsequent letter, dated 23 July 2007, her GP noted that she had tested positive for ANF and DNA antibodies. He referred her back to the rheumatology department in August 2007.

2. Ms Goulding attended a medical at Barnsley's occupational health unit on 19 December 2007. The occupational health physician, Dr McKenzie, wrote to her manager, following the medical, stating that she had lupus and was receiving treatment from a specialist. He said that he had referred Ms Goulding for counselling. Dr McKenzie said that Ms Goulding was unfit for her duties at that time and he was uncertain when she would be fit. He had arranged to review her in two months' time.

3. On 29 January 2008, Barnsley's Occupational Health Physician, Dr McKenzie, wrote to them saying that Ms Goulding had attended a medical that day and had not made any progress since he had last seen her in December 2007. He said that she had seen a specialist and had attended counselling, but was continuing to experience problems with memory, concentration and energy levels. Dr McKenzie said that Ms Goulding had enquired about ill health retirement. He said that he had advised her to talk to Barnsley and SYPA and went on,

> "I explained that I would obtain some information from her hospital specialist, but as not all treatment options have been completed, we may not be able to make any decision on ill health retirement."

4. Dr McKenzie said that he was seeking information from Ms Goulding's specialist about her condition and likely treatment. He went on to say that she was not fit for work and he was unable to say when, if ever, she would be fit for work.

5. On 14 February 2008, Ms Goulding's GP referred her back to the rheumatology department. In his letter, he mentioned that there was some doubt over her diagnosis. The GP explained that Ms Goulding wished to claim an ill health pension and said that they would like a definite diagnosis/prognosis.

6. Ms Goulding was seen by a consultant rheumatologist, Dr Jassim, on 13 March 2008. He diagnosed fibromyalgia. Dr Jassim said that the presence of ANF antibodies in the past suggested that may have had mild lupus, but that he did not have evidence of a systemic disease at that time and would not, therefore, comment on the prognosis for lupus.

7. On 19 March 2008, Dr McKenzie wrote to Ms Goulding's manager saying that he had received a report from her specialist and that she had been diagnosed with fibromyalgia. He also said that tests had indicated the possibility of other conditions. Dr McKenzie went on to say that fibromyalgia could take a variable amount of time to settle and that Ms Goulding would not be fit for work "in the short to medium term". He went on to say,

    i. "What happens in the long term depends on the natural history of the disease and her response to treatment. This is very difficult to predict.

    ii. Should she wish to consider ill health retirement, I have to advise you and her that I would only consider this after she has completed all treatment. It is then possible that we may have to wait some time to see whether the condition settles."

8. On 29 April 2008, Dr McKenzie wrote to Barnsley saying that Ms Goulding had been diagnosed with fibromyalgia, but was also under investigation for lupus and Crohn's Disease. He said that it was important to know the diagnosis because that would affect her prognosis and treatment. Dr McKenzie noted that there was to be a meeting in May 2008 where matters, including ill health retirement, were to be explored. He said it was difficult to give definite advice, but he expected things to be clarified in the next couple of months. Dr McKenzie said that he hoped Ms Goulding would have a definite diagnosis by then and a prognosis could be known.

9. In August 2008, Ms Goulding underwent a 'Condition Management Programme' organised by her local Primary Care Trust. At the end of August 2008, Ms Goulding wrote to Barnsley concerning the support she was receiving during her sickness absence. Amongst other things, she mentioned that she was still undergoing tests for lupus and other related illnesses.

10. On 10 September 2008, Dr McKenzie reported to Barnsley. In a subsequent letter, they quoted him as saying that he did not think that Ms Goulding was capable for doing any work and he was unable to when or if she would be fit for work in the future.

11. In October 2008, Ms Goulding underwent a pain management programme organised by her local Primary Care Trust. Her GP also referred her to the local pain management unit. In his referral letter, the GP mentioned that Ms Goulding had been diagnosed with fibromyalgia, but said that her symptoms were more suggestive of arthritis and that lupus had been considered. He said that the rheumatologists did not seem to have anything further to offer her.

12. On 7 October 2008, Ms Goulding's consultant rheumatologist, Dr Kilding, wrote to Dr McKenzie saying that she had been seen in April 2008 and investigated for possible inflammatory arthritis. He said that the tests were normal and he had referred her to a gastroenterologist because he thought she might have irritable bowel syndrome. Dr Kilding concluded that he thought it likely that Ms Goulding's symptoms were due to fibromyalgia.

13. A further report was provided by Dr McKenzie on 14 October 2008. He said that he had received a report from Ms Goulding's consultant rheumatologist and had been told that all investigations were normal. Dr McKenzie said that the specialist thought that the likely diagnosis was fibromyalgia and had suggested medication. He also said that he had been told that Ms Goulding had seen a gastroenterologist for a mild stomach disorder which was unlikely to impede her return to work. Dr McKenzie went on to say,

> "Ms Goulding's main problems are the multiple pain symptoms that she has. She has had symptoms for over a year. I think it is unlikely that her condition will improve in the short term. Her recovery is likely to take many months. I am unable to give a definite time scale."

14. In 2009, Ms Goulding's GP referred her to the Sheffield Centre for Rheumatic Diseases.

Relevant LGPS Regulations

At the time Ms Goulding's employment was terminated, Regulation 20 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended) provided,

> "(1) If an employing authority determine …
>
> (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), (3) or (4), as the case may be.
>
> (2) If the authority determine that there is no reasonable prospect of his obtaining any gainful employment before his normal retirement age, his benefits are increased …
>
> (3) If the authority determine that, although he cannot obtain gainful employment within three years of leaving his employment, it is likely that he will be able to obtain any gainful employment before his normal retirement age, his benefits are increased …
>
> (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 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 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.
>
> …

(13) But if, in the case of a person who is a member before 1st April 2008, and who has attained the age of 45 before that date, the period to be added under paragraph (2)(b) or (3)(b) is less than the period that would have been added had regulation 28 of the 1997 Regulations applied, then his benefits are increased by adding the latter period.

(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 -

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; or

being an Associate, a Member or a Fellow of the Faculty of Occupational Medicine or an equivalent institution of an EEA State.

(15) Where, apart from this paragraph, the benefits payable to a member in respect of whom his employing authority makes a determination under paragraph (1) before 1st October 2008 would place him in a worse position than he would otherwise be had the 1997 Regulations continued to apply, then those Regulations shall have effect in relation to him as if they were still in force instead of the preceding paragraphs of this regulation."

As at the date of Ms Goulding's application for early payment of her benefits, Regulation 31 provided,

"(1) Subject to paragraph (2), if a member who has left his 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 he may ask to receive payment of his retirement benefits immediately, whatever his age.

(2) Before determining whether to agree to a request under paragraph (1), 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 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 that condition is likely to prevent the member from obtaining gainful employment (whether in local government or otherwise) before reaching his normal retirement age, or for at least three years, whichever is the sooner.

(3) In this regulation, "gainful employment", "permanently incapable" and "qualified in occupational health medicine" have the same meaning as in regulation 20."