PO-3667

Ombudsman's Determination

Applicant	Mr Javid Jeeva
Scheme	TFL Pension Fund
Respondent(s)	TFL Company Limited

Complaint Summary

Mr Jeeva's complaint is that the Trustee's decision not to award him retirement benefits on the grounds of ill health was flawed.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against the Trustee because they failed to apply the Rules correctly in their consideration of the likelihood of Mr Jeeva's condition being permanent. Furthermore, whilst untried treatment options were identified they failed to properly consider whether Mr Jeeva's ill-health was likely to improve if those options were undertaken.

Detailed Determination

Scheme Rules concerning ill-health retirement

1. Rule 19 says:

> "(1) Subject to Rule 19(5), a Member who leaves Service before Scheme Pension Age and, in the opinion of the Trustees and on production of such evidence as they require, is prevented by mental or physical incapacity from the performance of his duties shall be entitled to benefits under Rule 20 or alternatively under this Rule. If such incapacity is, in the opinion of the Trustees, the result of his own misconduct or neglect, the Trustees may at their discretion disqualify him from taking benefits under this Rule.
>
> (2) The benefit under this Rule shall be:
>
> (a) if Total Membership is less than two years, a lump sum of one quarter of Pensionable Salary, PLUS:
>
> (b) if he has completed at least two years' Linked Qualifying Membership, a pension payable from State Pension Age during his lifetime equal to his Guaranteed Minimum Pension. Rules 24, 25 and 26 shall not apply; or
>
> (c) if Total Membership is more than two years but less than five years, or more than 40 years, a pension calculated in accordance with Rule 17; or
>
> (d) if Total Membership is at least five years but less than 40 years, a pension calculated in accordance with Rule 17 as if Total Membership included an extra period of the shorter of 10 years and the period between the date of leaving Service and the date the Member will attain Scheme Pension Age, but with a maximum of 40 years. For the avoidance of doubt, the £10.10 per annum deduction for Existing Members will apply in respect of such period of Total Membership. The pension so payable in respect of such extra period shall not be exchangeable for a lump sum under Rule 22 except in the circumstances described in Rule 22(5).
>
> If at the date of leaving Service the Member was in Part-Time Service, the extra period shall be multiplied by the fraction C/D; where C is the number of his weekly contractual hours of work at the date of leaving Service, and D is the number of standard weekly contractual hours of

work of a full-time employee in the same or equivalent position (which in case of doubt shall be determined by the Participating Employer.)

(3) Subject to Rule 19(5), the pension payable under Rule 19(2) (b) or (c) shall be payable from the date of his leaving Service for the lifetime of the Member.

(4) Subject to Rule 19(5), if a Member who has elected to receive a deferred pension in accordance with Rule 20 becomes, before that pension commences, incapacitated from undertaking remunerative employment by bodily or mental infirmity he shall, on the production of such evidence as the Trustees may require, be entitled to receive immediately the benefits which would have been payable at or from Scheme Pension Age including any increase in the deferred pension accrued to date under Rule 28.

(5) The Trustees may in their absolute discretion vary or suspend the pension payable under Rule 19(2)(b) or (c) or 19(4) as they deem the circumstances justify if the Member:

(a) is, in the opinion of the Trustees, at any time (in the case of a Member leaving Service, whether before or after he leaves Service) capable of earning an income, or

(b) does not when so requested supply evidence of continued ill-health satisfactory to the Trustees

(6) A decision made by the Trustees under paragraph (1) of this Rule to disqualify a Member from taking benefits under this Rule may be reviewed at any time by the Trustees and if, after review, such decision to disqualify is reversed, the Member shall be entitled to take benefits under this Rule as if the decision to disqualify had never been made."

Tax legislation

2. In accordance with Pension Rule 1 in section 165(1) of the Finance Act 2004, a member of a registered pension scheme (as the Fund is) may only take their pension before their normal minimum pension age (presently age 55) if the "ill health condition" is met, unless tax penalties are to be incurred.

3. Paragraph 1 of Part 1 of Schedule 28 of the Finance Act 2004 says that the "ill-health condition" will be met if:

(a) the scheme administrator has received evidence from a registered medical practitioner that the member is (and will continue to be)

incapable of carrying on the member's occupation because of physical or mental impairment, and

(b) the member has in fact ceased to carry on the member's occupation.

4. Under paragraph 2(3) it is a condition (again, unless tax penalties are to be incurred) that a pension should be payable for life and should not reduce. However, under paragraph 4(a) the condition concerning reduction is disapplied if the reduction is in a pension payable because the ill-health condition was met. Under paragraph 2(4A) a reduction includes cessation, whether temporary or permanent.

5. The tax penalties referred to above would arise because the payments would be classed as “unauthorised payments” under the legislation.

6. Rule 2D of the Scheme says (in substance) that if the Trustees are required to make a payment that would result in an unauthorised payment, then that payment is subject to the Trustees’ discretion. It also says that where the Trustees or employers under the Scheme exercise a power or discretion they will do so in such a way as to avoid making an unauthorised payment.

Material Facts

7. Mr Jeeva’s date of birth is 21 November 1973. He had been employed by Transport for London (formerly London Underground Limited) since 4 March 1991.

8. Following a four year apprenticeship in engineering he qualified as a Technical Officer; a role that he carried out for eight years.

9. In 2001 due to medical reasons he lost his post and was offered either retirement or redeployment as a Customer Care Assistant (CCA).

10. He served as a CCA until September 2010 when he was told that because of organisational changes his role was to end and he was offered a number of alternatives instead. These included working as a Customer Service Assistant (CSA) but this would be on a rostered basis involving some very early and very late shifts. Other alternatives were seen as being part-time work, redeployment or medical termination/retirement.

11. Copies of medical evidence on file dating from 28 September 2010 to 16 February 2012 show that Mr Jeeva had been suffering from insomnia, anxiety, panic attacks and depression since September 2010. A London Underground Occupational Health (LUOH) report dated 28 September 2010 noted that he was restricted from track work, working on the platform edge, working with moving machinery and doing very early and very late shifts. A further LUOH report dated 28 July 2011 noted that his

medication was making him drowsy and that he was restricted from extreme shifts and live track work as a result.

12. A report by Dr Bhuvanendra, Psychiatrist/Associate GP, dated 6 October 2011, assessed Mr Jeeva as suffering with a panic disorder, with symptoms of anxiety and depression, since July 2011. It also said that he had suffered similar episodes dating back to 2000 and had been on antidepressant medication for some years. It noted that he was being referred to psychologists for cognitive behavioural therapy. It gave no opinion on the likely duration of Mr Jeeva's condition.

13. In a report dated 5 January 2012 LUOH said:

> "He [Mr Jeeva] has been referred by his GP to receive psychological support with cognitive behavioural therapy and although he does not feel that he has had a dramatic improvement he has noticed some benefits.

14. At present, he is not fit for his job as a Customer Service Assistant, in view of the length of time he has been symptomatic and the slow progress he is making I suspect he will remain symptomatic for the foreseeable future".

15. A letter dated 12 March 2012 from TfL Pension Fund said:

> "I have been advised that you left service with London Underground Limited on 3 March 2012 for medical reasons.
>
> You may be entitled to enhanced benefits from the TfL Pension Fund if satisfactory medical evidence is produced and I enclose a form for you to give me authority to request information about your medical condition and how it stops you from doing your job".

16. On 21 March 2012 TfL Pension Fund wrote to Dr Sri-Ganeshan, Mr Jeeva's GP, to ask him to complete a medical questionnaire. In answer to Question 3 on that questionnaire "Is Mr Jeeva permanently incapacitated from all work?" Dr Sri-Ganeshan answered "Yes because of his illness and the side effects of his medication, e.g. drowsiness".

17. On 28 May 2012 London Underground Occupational Health (LUOH) submitted a Pension Fund Report. In this they summarised his relevant medical history and under the heading "Prognosis" they said:

> "Mr Jeeva has longstanding anxiety, depression, insomnia and a panic disorder. There has only been recent evidence of secondary care and involvement including CBT and a referral to a psychiatrist. From the information provided to date I would not feel therefore that all treatment options have been exhausted, particularly the secondary care psychiatric route".

18. On 31 May 2012 an Ill Health Assessment was prepared for the Trustee by Dr Simon C Sheard, Consultant Occupational Physician. In his report he noted:

> "The occupational health service last saw Mr Jeeva in January 2012. At that time he was noted to have had some benefit from talking therapies but no dramatic improvement in his symptoms. It was thought he was unfit for his role as a customer service assistant and that he would remain anxious for the foreseeable future. It was, however, suggested that he could return to alternative work…
>
> …The occupational health service note that although Mr Jeeva has a long-standing anxiety, depression and problems with his sleep that there has only been recent evidence of any specialist care and treatment including talking therapies. They therefore conclude that all treatment options have not been considered or exhausted, particularly through secondary care specialist assessment. I agree with this assessment.
>
> Mr Jeeva's problems are long-term and have a substantial effect on his everyday life. In the circumstances it is likely he would be afforded protection under Disability Legislation. It is, however, for an employment tribunal or a higher court to give a definitive opinion.
>
> Mr Jeeva has my sympathy for his circumstances. It is unfortunate that a suggested change in working hours has resulted in this significant deterioration in his health. However, in my opinion, he has not exhausted all reasonable treatments and he has significant time to his normal retirement age. It is unclear to me why he will not be expected to respond to specialist intervention, which might include a different class of antidepressant medication, specific talking therapies to address any anxieties and other specialist management. Even on the balance of probabilities I could not support the general practitioner's view that this gentleman is permanently unfit for all work".

19. He concluded:

> "In my opinion, and on the balance of probabilities, while he may meet criteria for Rule 19(1) in that he left service before Service Pension Age as a result of mental incapacity from the performance of his duties he does not meet the criteria of the Finance Act 2004 in that his current level of incapacity is not necessarily permanent, nor is it likely, even on the balance of probabilities, to permanently prevent him from returning to his own work at some stage. The timescales for any return to work are not entirely clear but with energetic treatment and assistance it may be that Mr Jeeva could return to his own job in some three months or more".

20. In a letter dated 12 June 2012 the Senior Administrator for TfL Pension Fund advised Mr Jeeva that following a review of the medical evidence he was not entitled to receive enhanced benefits because the medical information supplied did not confirm that his incapacity was permanent as required under the Finance Act 2004.

21. On 31 October 2012 Mr Jeeva appealed under Stage 1 of the Internal Dispute Resolution (IDR) procedure against the decision not to award him an ill health retirement pension. He nominated his wife to act on his behalf. She said that her husband had exhausted all available options, including therapies and medication and pointed out that his GP had said that his condition had become worse.

22. Included with the appeal application was a medical report dated 4 October 2012 completed by Mr Felix Aenos, an Approved Disability Analyst, which assessed Mr Jeeva's condition for the purposes of Employment and Support Allowance. The report did not provide a prognosis for the likely duration of Mr Jeeva's condition.

23. Dr Sheard was again asked to review Mr Jeeva's application. In his report dated 22 November 2012 he said that whilst the analyst's report confirmed Mr Jeeva's ongoing ill-health it did not, in his view, suggest that ill health was likely to be ongoing until normal pension age.

24. He added that he would be happy to review the case in the light of a report from a Consultant Psychiatrist/Accredited Specialist who could explain why Mr Jeeva's condition was unlikely to improve sufficiently with National Institute for Health and Care Excellence (NICE) guideline treatments to allow a return to work in the considerable number of years until his pension age.

25. On 3 December 2012 the Trustee wrote to Mrs Jeeva to tell her that the Pensions Manager had decided not to make a formal decision at that time but instead requested that her husband attend a medical examination with an appropriate doctor of the Fund's Independent Medical Adviser.

26. In her response dated 17 December 2012 Mrs Jeeva raised a number of questions relating to the way in which her husband's case had been handled, concluding that:

> "the TfL pension fund has no intention of awarding an ill health pension to my husband Javid Jeeva, other than to prolong the process with differing demands although all the necessary paperwork has been provided."

27. The TfL Pensions Manager replied to Mrs Jeeva's letter on 11 January 2013. He answered her questions and concluded by saying:

> "Whilst I appreciate that you believe that there is sufficient medical evidence to support your husband's claim and there has been some dispute as to whether some of the evidence has come from a Specialist. The current position is that I

have offered your husband the opportunity to undergo an examination by a Psychiatrist/Accredited Specialist to ensure that I have all the relevant information before determining if your husband qualifies for an ill health pension as part of the Stage One Application of the IDRP."

28. Mrs Jeeva sought clarification regarding her husband's position in relation to a possible return to work. In his response dated 14 February 2013 the Pensions Manager referred to the Ill Health Assessment dated 31 May 2012 saying:

> "Although LUOH state that it was "unlikely that he was fit for his full duties on the day that he left service." their prognosis, which the IMA agrees with, is that your husband had not exhausted all treatment options available.
>
> I have interpreted from these reports that your husband may be able to return to his own job after he has explored other treatment options but I would like your husband to be reviewed by an Accredited Specialist before making a decision under Stage One of the IDRP. To comply with the Finance Act 2004 your husband must have a permanent condition which will render him incapable of carrying out his specific job role until age 65."

29. On 6 March 2013 Mr Jeeva attended an appointment with Dr Michael Forbes, on behalf of the Fund's Independent Medical Adviser.

30. On 7 March 2013 Dr Forbes wrote to Dr Sheard. He reported that Mr Jeeva's brother-in-law had said that Mr Jeeva's condition had deteriorated over the previous six months. His brother-in-law also said that after seven CBT sessions Mr Jeeva had been discharged, most probably because there had been little communication with the therapist. He also said that Mr Jeeva was not under psychiatric care. Dr Forbes' view was the same as Dr Sheard's that Mr Jeeva did not qualify for ill-health retirement as he had not had the benefit of professional psychiatric care and, because he was still relatively young, it was too soon to make any judgment on the permanence of his condition.

31. The resultant report to the Trustee dated 11 March 2013 was signed by Dr Sheard. It cited as medical evidence on file a number of documents, including:

- Occupational Health memos dating from 28 September 2010 to 23 May 2012;
- meeting notes dating from 11 October 2010 to 16 February 2012;
- a letter from Mr Jeeva's GP dated 13 June 2011 and a report from him dated 28 March 2012;
- a letter from Dr R Bhuvanendra, Psychiatrist/Associate GP dated 6 October 2011;

- emails from the Group Station Manager dated 12 October 2011 and 3 December 2011;
- the ill health assessment dated 31 May 2012;
- a letter from Mrs Jeeva dated 2 October 2012 and
- an Employment and Support Allowance medical report dated 4 October 2012.

32. Under the heading "Decision by medical practitioner" Dr Sheard said:

> "I do not confirm that based on evidence received that this member is unlikely to be able (otherwise than to an insignificant extent) to undertake gainful work (in any capacity) before reaching state pension age."

33. On 7 March 2013 Dr Forbes wrote to Dr Bhuvanendra. He said:

> "You are clearly aware of his ongoing problems of depression and anxiety, and Mr Jeeva's condition has reached the point where he had to be accompanied by his neighbour and his brother-in-law to the discussion. He was virtually mute and I had to discuss things with his brother-in-law who knows him well. He sat looking into the distance, rocking in the chair and occasionally making some mumbling words which I could not understand. His brother-in-law told me that he is restricted to home, he barely speaks to his wife, he has outbursts of violence and he talks to himself for large parts of the day, and somewhat worryingly he apparently is talking about killing himself. I was considerably worried by Mr Jeeva's condition.
>
> Regarding his ill health retirement, he will not qualify for it as he has apparently not undergone full psychiatric care, and it cannot therefore be said that his condition is permanent."

34. There are two further 'Opinions' by Dr Sheard on file, one dated 11 March 2013 and the second dated 25 March 2013. The latter of these appears largely to be an updated version of the former. In it Dr Sheard said:

> "I have now been provided with a copy of [Mr Jeeva's] General Practitioner's records dated 6th March 2013. Most of the information is not contemporaneous and, in some ways, the information throws up more questions than it answers. To better understand some of the information available, I have contacted the Surgery for clarification of the different Doctors involved in Mr Jeeva's care and their current status".

35. Dr Sheard went on to discuss the fact that Mr Jeeva had been under the care of a specialist psychiatrist, Dr Bhuvanendra. However, he noted that the medical records showed that in September 2012 Mr Jeeva was under another Specialist Psychiatrist, Dr Jabbar. He said that this information had not been disclosed to either him or Dr Forbes. He noted that it appeared that Mr Jeeva had been discharged from Dr Jabbar's clinic in the autumn of 2012.

36. He referred to Dr Forbes' letter of 7 March 2013 to Mr Jeeva's GP and said that in the circumstances Mr Jeeva may be back under the care of Dr Jabbar. Dr Sheard said that he was not minded to alter his earlier advice (that all reasonable treatment had not been considered or exhausted) but that he would be willing to review this in the light of any information that Dr Jabbar was able to provide.

37. A letter to Mr Jeeva from the Fund's Senior Administrator dated 2 April 2013 said that the Pensions Manager had decided that a decision would not be made at that point, but that he would await a report from Dr Jabbar.

38. A letter from Mrs Jeeva dated 15 April 2013 clarified that her husband had not been under the care of Dr Jabbar but had only been referred to him for a second opinion by Dr Bhuvenendra. This was confirmed in a letter from Mr Jeeva's GP dated 8 April 2013.

39. The letter from the GP said that Dr Bhuvenendra was a consultant Psychiatrist and that Mr Jeeva had been under his care for the past 8 to 10 years. Dr Bhuvenendra had recommended Cognitive Behavioural Therapy (CBT) and Venlafaxine, which had been agreed by Dr Jabbar.

40. A further opinion dated 26 April 2013 was provided by Dr Sheard. He apologised for the misunderstanding regarding the role of Dr Jabbar, but noted that the specialist had recommended ongoing antidepressant treatment and referral for high intensity CBT. He added that he had seen no evidence that the high intensity CBT had been provided nor of the effects of this treatment.

41. Dr Sheard concluded his report by saying:

> "I still have no evidence from any specialist psychiatrist or occupational physician that Mr Jeeva's health will not respond to reasonable treatments sufficient to allow him to return to work at sometime in the significant period until scheme pension age. However, the timescales for any return to work become increasingly lengthy if Mr Jeeva's health continues to deteriorate, and while apparently he does not receive specialist input as any return to work is entirely dependent upon intensive medical treatment.
>
> My opinion remains that while Mr Jeeva meets the criteria for Rule 19 (1) in that he left work as a result of mental incapacity and no return to work within a

reasonable period of his termination date, might have been anticipated there is no reasonable evidence, at this stage, that Mr Jeeva's condition will not respond to treatments planned in the period until his normal pension age and so he is unlikely to meet the criteria of the Finance Act 2004."

42. The Trustee wrote to Mr Jeeva on 9 May 2013 to tell him that his request for an ill health pension had been declined. This decision was based on the ill health assessments provided by the Fund's Independent Medical Adviser on 11 March 2013 and 25 March 2013 together with the letter from Mr Jeeva's GP dated 8 April 2013.

43. However, the Pensions Manager, on behalf of the Trustee, added that if Mr Jeeva were able to provide a copy of an assessment and covering letter from Dr Sabina Patel, referred to in another letter from Dr Patel dated 3 September 2012, he would be happy to review the decision again under Stage 1 of the IDR procedure.

44. On 15 May 2013 Mrs Jeeva wrote to the Trustee on her husband's behalf. She enclosed a report from Dr Patel which had not previously been submitted. She said that when her husband had seen Dr Forbes it had been made clear that TfL had a rule that would prevent her husband from qualifying for ill health retirement because of his age. She said that she found this discriminatory and that Dr Forbes had stated in his letter that Mr Jeeva was a cause for concern and should be referred to a mental health specialist urgently. She said that her husband was currently under the care and support of the Community Mental Health Team.

45. She also said that her husband's role was not that of a CSA but of a CCA, a role which she said had been assigned to him in order to accommodate his condition (medication, times of duty, etc.).

46. The Pensions Manager responded on 29 May 2013. His letter referred to Dr Sheard's assessment on 22 November 2012 when he had stated that he would review Mr Jeeva's case again following receipt of a Consultant Psychiatrist / Accredited Specialist report which explained why Mr Jeeva's condition was unlikely to improve sufficiently with NICE guideline treatments to allow him to return to work before age 65. The letter confirmed that Dr Forbes was an Accredited Specialist in Occupational Medicine.

47. Enclosed with the letter was a copy of a report from Dr Forbes, again dated 7 March 2013, but addressed to Dr Sheard. In addition to providing a summary of Mr Jeeva's appearance at the consultation, in much the same way as had been included in the letter to Dr Bhuvanendra, he also said:

"On the medical front, he continues on venlafaxine 75 mgs bid, but no other medications. His brother-in-law, who accompanied him to CBT sessions, said that after seven of them he was discharged, most probably because there was

little if any communication with the therapist. He is not under any psychiatric care".

48. The letter from the Pensions Manager referred to the fact that the report from Dr Sheard had confirmed that Mr Jeeva had not undergone high-intensity CBT or been referred to specialist care.

49. It continued by saying that Mr Jeeva's claim had been assessed against Rule 19(1) and the Finance Act 2004; and that it was the latter that it did not meet. The Pensions Manager explained that to meet this regulation Mr Jeeva would have to have a permanent condition which rendered him incapable of carrying out his specific job role until age 65. He said that he had no evidence of this as the medical information reviewed implied that Mr Jeeva "may" (his emphasis) improve with available treatment options.

50. With regards to which role Mr Jeeva was being assessed against, the Pensions Manager said that the Trustee had reviewed various reports outlining that he was either a CSA or a CCA; however, Mr Jeeva had stated that his job was as a CSA when he had completed the Access to Medical Reports and Records form on 14 March 2012. The letter said that the two roles had the same element of safety critical duties and therefore did not affect the earlier decision in regards to Mr Jeeva's claim for an ill-health pension. It also said that the report by Dr Patel did not provide any further evidence to support Mr Jeeva's claim.

51. On 28 August 2013 Mrs Jeeva applied on her husband's behalf to appeal under Stage 2 of the IDR procedure. In the application she summarised the sequence of events and medical evidence that had been provided to the Trustee. She asked how Dr Forbes could be considered to be independent as he appeared to report to Dr Sheard. And she questioned the statement that there was no evidence that Mr Jeeva had received either CBT or specialist care.

52. The decision of the Appeals Committee of the Trustee Board was sent to Mrs Jeeva under cover of a letter dated 8 October 2013. It concluded that there was insufficient evidence to confirm that Mr Jeeva's condition would continue to prevent him from carrying out his former duties with appropriate treatment. It added that Mr Jeeva could make a claim for early payment of his deferred pension under Rule 19(4) as it appeared that his condition had deteriorated since leaving service.

Summary of Mr Jeeva's position

53. The Trustee has received evidence from a registered medical practitioner, as required by the Finance Act 2004, regarding the permanency of his condition.

54. When he was examined by Dr Forbes he was very clearly told that based on his age alone there was no way the Fund and the Trustee would agree to an early retirement pension. He asks how such discriminatory criteria can be set.

55. He had had restrictions in place which involved safety critical work in the role of CSA. He had been temporarily accommodated by TfL carrying out the role of a CCA because of his medication and medical condition. This involved no safety critical work and duties, no extreme shifts and no live track work.

56. Dr Sheard cannot be considered independent since he (or his employer Health Management Limited) is retained for a variety of work by the Fund and/or the Trustee. Dr Forbes is similarly employed and requests for details of his accreditations were not answered; only that the Pensions Manager deemed him to be 'sufficient'.

57. His GP has stated that he does not see Mr Jeeva being able to return to his occupation and that this has also been reiterated by LUOH.

58. Dr Sheard has commented that it would be potentially possible for Mr Jeeva to return to work within three months post energetic treatment. This totally contradicts the findings of specialists who have confirmed otherwise.

Summary of the Trustee's position

59. This is an unfortunate case in light of the events that happened surrounding the termination of Mr Jeeva's employment and his medical condition and its handling. However, the Trustee has to assess each case objectively on its merits and in line with the provisions governing the Fund.

60. There is no rule that would prevent a member from qualifying for ill health retirement on the grounds of age and there is no evidence that Dr Forbes said this.

61. There is no difference between the permanence aspect of the Rules and the Finance Act 2004 ill-health condition so it does not matter whether the decision was expressed in terms of one or the other.

62. However, the test under the Rules is that the member must be incapacitated from the performance of his duties, whereas under the Finance Act 2004 ill-health condition it is a test of incapability to carry on the member's occupation. Mr Jeeva's duties (that is, those that his employer could require him to perform) included early and late shifts. The member's occupation Is not restricted to the duties that he could be required to perform.

63. The substantive issue arising in connection with Mr Jeeva's case relates to the opinion formed by the Trustee concerning the permanence of Mr Jeeva's condition. Under the Rules this is to be assessed as at the date he left pensionable service. At

that date he had not undergone intensive therapy or specialist psychiatric treatment. Such therapy/treatment was reasonably available for him to have pursued at the time and likely to have been effective.

64. As a result, and while sympathetic to the circumstances Mr Jeeva and his wife are facing, the medical evidence in this case does not go so far as to demonstrate on the balance of probabilities that the only reasonable opinion the Trustee could have reached is that Mr Jeeva's condition at the date he ceased employment would prevent him permanently from performing his duties and/or that he would continue to be incapable of carrying on his occupation up to normal retirement date because of physical or mental impairment.

65. The Trustee did properly consider the medical opinion of Mr Jeeva's GP and the fact that Mr Jeeva had been assessed by the DWP. It is accepted that Mr Jeeva's condition is serious and that it has worsened since his employment ended. Mr Jeeva claims that he should be paid an incapacity pension based on the evidence in support of his case that suggests his condition is permanent. However, the Trustee is required to consider the totality of the medical evidence when forming its opinion.

66. While it is accepted that there were some initial queries regarding the qualifications of Mr Jeeva's specialist GP and the ill health assessment process raised by Mrs Jeeva, these were addressed during the IDR process. These concerns did not affect the decision made which was made on the basis of due consideration having been given to all the substantive medical evidence and the permanence requirement.

Conclusions

67. I begin be noting that the Trustee and the Trustee's advisers have all recognised that Mr Jeeva suffers from a difficult and distressing condition. I do not doubt that they were trying to reach a proper conclusion and the observations that follow should be read in that context.

68. There are certain well-established principles which the Trustee should have followed in the decision making process. Briefly, it:

- must have taken into account all relevant matters and no irrelevant ones;
- must have directed itself correctly in law;
- must have asked the correct questions;
- must not have arrived at a perverse decision.

69. Under Rule 19(1), to qualify for an ill-health retirement pension Mr Jeeva had to be "prevented … from the performance of his duties" "in the opinion of the Trustees and on such evidence as they require".

70. Rule 19(5) also gives the Trustee discretion to vary or suspend the pension as they deem the circumstances justify.

Permanence under the Rules and the Finance Act 2004

71. In this case the key reason that the Trustee rejected Mr Jeeva's application for an incapacity pension was the question of whether or not Mr Jeeva's condition could be considered permanent.

72. Rule 19 does not contain an express requirement for permanence, although it is obvious from the context (i.e. the cessation of employment and the fact that the pension is normally payable for life) that the person must be "prevented…from the performance of his duties" more than just briefly.

73. It seems that the Trustee thought there was some difference between the Rule 19 requirement and the Finance Act 2004 definition of ill-health, with the latter being more stringent because when dealing with permanence it was said to be a requirement in the Finance Act 2004 that was preventing Mr Jeeva from receiving a pension.

74. So, Dr Sheard, in his reports of 31 May 2012, 22 November 2012 and 26 April 2013 said that Mr Jeeva did not meet the criteria of the Finance Act 2004 in that his level of incapacity was not necessarily permanent.

75. This was confirmed in the letter from TfL Pension Fund to Mr Jeeva on 12 June 2012 which said that he was not entitled to receive enhanced benefits because his incapacity was not considered permanent as required under the Finance Act 2004. It was repeated in the letter from the Pensions Manager dated 29 May 2013.

76. The problem with that approach is that the Finance Act 2004 does not override the Rules. It would be possible for rules to incorporate the Finance Act 2004 limits by saying that no benefit would be paid which was not an authorised payment under the Finance Act 2004. Rule 2D deals with unauthorised payments but does not go so far as to say that no unauthorised payment can be made. It gives discretion to the Trustee to decide against making an unauthorised payment. But the Trustee's decision does not say that this discretion was exercised, or why.

77. It is hard to see any difference as to the permanence requirement between Rule 19 and the Finance Act 2004. So it is unclear why the Finance Act 2004 was given as the reason for not consenting to a pension in Mr Jeeva's case rather than the Rules. It seems that the Trustee thought that the Rules definition was met, but the Finance

Act 2004 condition was not. There **is,** as the Trustee says**,** a difference in relation to what Mr Jeeva was to be regarded as prevented from doing, being "the performance of his duties" under the Rules and "the member's occupation" under the Finance Act. That, though, makes the Rules more restrictive, not the reverse.

78. On its own the apparent misapprehension about the relevance of the Finance Act 2004 might not have driven the Trustee to a potentially flawed conclusion. But I have other concerns about the way in which the case was handled.

Future treatments

79. Dr Sheard said in his report of 31 May 2012 that "on the balance of probabilities" Mr Jeeva's incapacity was not necessarily permanent nor was it likely to permanently prevent him from returning to his own work "at some stage". These statements are extremely vague and yet the Trustee did not question him about them or ask for clarification of what he meant by them.

80. Although earlier medical records are not available it is clear that Mr Jeeva had suffered from his condition for many years – he had lost his job in 2001 because of it – and yet Dr Sheard suggested that he might return to work in three months. There is a quite apparent inconsistency with the reports from Mr Jeeva's GP and specialist but the again Trustee does not appear to have questioned this conclusion.

81. Furthermore, Mr Jeeva's GP was clear that counselling would not help and there was no mention of any immediate plan for Mr Jeeva to undertake any new treatment or therapy. On that basis the Trustee should have, at the very least, clarified the position as regards possible future treatments. Had any been identified they would then have needed to consider what their likely effect would be. If Mr Jeeva's ill-health was likely (that is, on the balance of probabilities) not to be permanent if those treatments were undertaken, then they could reach a conclusion that it was probably not permanent at the time of the application.

82. Dr Sheard appears to have based his view on the fact that Mr Jeeva had "only recently" received specialist care and treatment including talking therapies. But the evidence from his GP showed that he had been referred to psychologists for CBT in October 2011, some six months previously.

83. And following Mr Jeeva's appeal both Dr Sheard and Dr Forbes largely based their conclusions on the fact that Mr Jeeva was not under the care of a specialist psychiatrist. But Mr Jeeva's GP confirmed in his letter dated 8 April 2013 that Mr Jeeva was under the care of Dr Bhuvanendra, a specialist psychiatrist, at that time (although I accept that it took some time for Dr Sheard to recognise that Dr Bhuvanendra was a specialist), and that he had been under his care for 8 to 10 years. But, again, the Trustee did not question Dr Sheard regarding this.

84. In the 31 May 2012 report Dr Sheard did allude to the possible effect of future treatments. After noting that he had not exhausted all reasonable treatments (which is not on its own a relevant test) he said "… it is not clear to me why he will not be expected to respond to specialist intervention …" and later "…with energetic treatment and assistance it may be that Mr Jeeva could return to his job in some three months or more." He concluded that he would need the opinion of a specialist confirming that Mr Jeeva was permanently unfit for work, before he could agree it. Those remarks, though, were made at a time when Dr Sheard (through no particular fault of his own) did not appreciate the care that Mr Jeeva had been under in the past.

85. Also, the indications are that whilst the CBT had some minor benefits it had not resulted in any significant improvement in Mr Jeeva's condition and had ceased after seven sessions.

86. In light of these facts the Trustee might have been expected to at least clarify with Dr Sheard why he felt so strongly that future treatments such as CBT and specialist intervention would be successful.

87. I have seen no evidence that the Trustee clarified the position with regard to possible future treatments and it cannot therefore be considered correct to have denied Mr Jeeva ill health benefits on grounds that there were untried treatments which might help him return to work.

Mr Jeeva's duties

88. Rule 19(1) requires that Mr Jeeva should have been "prevented … from the performance of his duties". The report completed by Dr Sheard on 11 March 2013 referred, under the heading "Decision by medical practitioner", to the member being unlikely to be able to undertake gainful work "in any capacity". This is at odds with Rule 19(1).

89. That said, Dr Sheard plainly did have Mr Jeeva's duties in mind. He said that Mr Jeeva had appeared to have done his job [Customer Services Assistant] with restricted hours, but without significant health problems until there was a need to consider the wider roster. Dr Sheard added that Mr Jeeva was able to hold down his role for some years on his medication and that it was only when there was a suggested change in his role that his illness became more significant.

90. As I mention above, Dr Sheard said "I note the general practitioner advises he is permanently unfit for all work, but the occupational health service and I would not agree and I would need the opinion of a specialist confirming he was permanently unfit for his work before I could agree the same"

91. But Dr Sheard acknowledged that the specialist, Dr Bhuvanendra, was located in the same practice as Mr Jeeva's GP and that he did not keep a separate file. So it would not have been unreasonable for him to have accepted the GP's view as reflecting that of Dr Bhuvanendra. Instead, he appears to be saying he could only rely on a report which he knew was not then available.

92. It is my view that the Trustee should have recognised that there were inconsistencies between Dr Sheard's view and those of Mr Jeeva's other medical advisers and questioned whether there was sufficient evidence for him to form a reasonable opinion. If there was not, more evidence should have been sought.

93. Mrs Jeeva has expressed concerns regarding the independence of Dr Sheard bearing in mind that Health Management Limited was retained for various work by the Fund and/or the Trustee. However, I would not say that a properly instructed physician working for the same practice that is used elsewhere by the organisation automatically loses independence as a result. In this case I have no reason to think that Dr Sheard cannot take a properly independent view, nor is there any evidence that he did not do so.

Overall findings

94. I do not doubt that the Trustee and its advisers had Mr Jeeva's best interests in mind and there is evident concern expressed for his circumstances. However looked at overall, the confusing references to the Finance Act 2004 definition as if it was different and automatically overrode the Scheme's Rules, taken with the observations above about future treatments and Mr Jeeva's duties lead to a conclusion that the decision was not made based on a correct understanding of the Rules and on all relevant and no irrelevant facts. I am therefore remitting it to the Trustee.

95. The need to do so and the events hitherto will have caused Mr Jeeva some distress for which he should be compensated.

Directions

96. I direct that within 56 days of this determination the Trustee shall decide whether Mr Jeeva should have received an ill-health pension at 3 March 2012 having taken into consideration

    - whether or not Mr Jeeva's condition at 3 March 2012 was such that he was prevented from carrying out his duties in accordance with Rule 19(1), which is no stronger a test than the Finance Act 2004 ill-health condition;

- what treatments Mr Jeeva undertook between October 2011 and March 2012 and the likely effects of those treatments on Mr Jeeva's medical condition in March 2012;

- what other medication or therapy was available; whether it was reasonable to have expected Mr Jeeva to undergo the treatment; what effect it would have had on his condition; and whether the specific treatment meant he would likely have recovered sufficiently to be able to perform his duties.

97. In the event that the Trustee decides in Mr Jeeva's favour, the Trustee shall, within 28 days from the date of the reconsideration, pay to Mr Jeeva a sum equal to the payments that would have been paid from 3 March 2012 to the date his benefits came into payment together with simple interest at the rate for the time being declared by reference banks from the due date to the date of payment.

98. In addition, I direct that within 14 days of this determination the Trustee shall pay Mr Jeeva £250.

Tony King

Pensions Ombudsman
23 March 2015