PENSION SCHEMES ACT 1993, PART X

DETERMINATION BY THE PENSIONS OMBUDSMAN

Applicant	Mrs Lisa York
Scheme	Local Government Pension Scheme (**LGPS**)
Respondent	Hertfordshire County Council (**Hertfordshire**)

Subject

Mrs York disagrees with the decision not to award her Tier 1 benefits on her retirement on the grounds of ill health.

The Pensions Ombudsman's determination and short reasons

The complaint should be upheld against Hertfordshire because they failed to make a determination under Regulation 20(2) of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 in a proper manner.

DETAILED DETERMINATION

Scheme Regulations

1. Relevant to this complaint are the Local Government Pension Scheme (Administration) Regulations 2008 (**the 2008 Regulations**) and the Local Government Pension Scheme (Benefits Membership and Contributions) Regulations 2007(**the 2007 Regulations**), both introduced with effect from 1 April 2008.

2. The relevant provision under the 2007 Regulations is contained regulation 20, set out in full at Appendix 1 to this Determination. There are three tiers of pension:

> Tier 1- Permanently incapable and no prospect of obtaining gainful employment before age 65 (can never work again). The pension is based on accrued membership plus enhancement of 100% of service to age 65.
>
> Tier 2 - Permanently incapable and no prospect of obtaining gainful employment within three years of leaving but likely to before age 65. The pension is based on accrued membership plus enhancement of 25% of service to age 65.
>
> Tier 3 - Permanently incapable of current job but able to obtain gainful employment within three years of leaving. The pension is based on accrued membership only with no enhancement. The pension would be suspended on re-employment and is subject to review after 18 months. The Regulations provide that Tier 3 benefits can be uplifted to Tier 2 benefits within three years of leaving employment.

3. The relevant provision under the 2008 Regulations is contained in regulation 56, set out in full at Appendix 2 to this Determination.

> 56.—(1) Subject to paragraph (1A), an independent registered medical practitioner ("IRMP") from whom a certificate is obtained under regulation 20(5) of the Benefits Regulations in respect of a determination under paragraph (2), (3) or (4) of that regulation (early leavers: ill-health) must be in a position to declare that—
>
> (a) he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested; and
>
> (b) he is not acting, and has not at any time acted, as the representative of the member, the employing authority or any other party in relation to the same case, and he must include a statement to that effect in his certificate.

Material Facts

4. Mrs York was employed by Hertfordshire County Council at Kings Langley Primary School until 28 March 2013 when her employment was terminated on the grounds of ill health capability.

5. On 4 January 2012 Mrs York's employer referred her to Occupational Health (**OH**) as there were concerns regarding her fitness for work. This service was provided by Serco Group plc (**Serco**).

6. Following an assessment on 30 January 2012 the Senior Occupational Health Adviser reported to Hertfordshire's Schools HR Advisory Team on 31 January 2012. In that report it was noted that Mrs York had been referred because of Meniere's Vertigo. The report concluded that Mrs York was not fit for any duties at that time but that ill health retirement was not appropriate at that stage as she was still progressing with treatment options.

7. Further telephone reviews took place on 5 March 2012, 2 April 2012 and 25 April 2012 which each concluded that Mrs York was not in a position to return to work.

8. On 21 May 2012 Mrs York together with her husband attended a review with the Occupational Health Adviser in which it was agreed that she would attempt a phased return to work from 11 June 2012, ultimately returning to her full time hours from 2 July 2012.

9. In an email on 13 September 2012 the school head teacher reported to the Schools HR Advisory Team that Mrs York's return to work had not gone "as easily as it might have" and that the situation had been quite stressful for everyone concerned. Mrs York had returned to work on 3 September 2012 following the summer holiday, but had phoned in sick on the day of the head teacher's email. The head concluded her email by saying "I am just really concerned that she is not fit for the job that we need her to do".

10. On 17 September 2012 Mrs York returned to work. The head teacher asked the Schools HR Advisory Team to refer her once again to Serco for a further assessment which took place on 1 October 2012.

11. The Occupational Health Adviser wrote to the Schools HR Advisory Team on 1 October 2012. She said that Mrs York had seen her ENT consultant on 25 September 2012 and had been given a repeat injection for Meniere's Disease. However, the side effects of this injection were similar to vertigo and Mrs York was feeling those effects currently. She had a further appointment with the consultant on 15 October 2012 to ascertain if the injection had been effective.

12. The Occupational Health Adviser wrote to the consultant on the same day to request a short medical report to include whether he felt that Mrs York was able to carry out her full normal job and the likely timescales for recovery. And if he felt that she was unable to undertake her full duties what other work she could carry out. She also asked for the consultant's prognosis, in other words his opinion on the time course of any incapacity.

13. The consultant responded on 9 October 2012. He reported that Mrs York had been suffering from left sided Meniere's Disease for approximately four years. He detailed the history and treatment and in answer to the specific questions put to him he said:

> "Work Capacity. She is certainly not capable of performing her job as a full time nursery nurse but with time I would hope that her balance system recalibration will take full effect but she will need a careful phased return to full time duties. She would be helped by having a role that doesn't require too much movement because when a patient is undergoing balance recalibration the more vigorous the movements, the more unstable the patient feels. We will be putting her through a rehabilitation programme.
>
> Prognosis. Hopefully in the fullness of time we will get control of the vertigo which will allow the vestibular system to recalibrate as part of her rehabilitation programme".

14. Following a further telephone review the Occupational Health Adviser wrote to the Schools HR Advisory Team on 31 October 2012. She said that she understood that Mrs York had met with HR on 16 October 2012 and it had been agreed that she would be given until 4 December 2012, the next appointment with her consultant, when the consultant would be able to ascertain her fitness to work. She continued by saying:

> "I note from Olufunlayo's email [I have not seen this, but assume it was from a member of the Schools HR Advisory Team] of October 24th that she

> requested me to confirm that Lisa is fully fit for the job for which she is employed. Unfortunately at this time, I am unable to do so – even her consultant in his report following her appointment in September was unable to predict a definite return to work date. Both he and I are hopeful that Lisa's condition will improve and it will be helpful to hear his opinion regarding this when he sees her in December".

15. In response the Schools HR Advisory Team sent an email dated 5 November 2012 in which they said:

> "Thank you for the report. However, we are a little concerned regarding some of the wording in this report. Lisa was given until 5th November to request a sabbatical and should she not choose this option then the school were going to proceed to a formal ill health capability hearing. The 4th of December date is when she is next seeing her consultant".

16. An internal email from Serco on 21 November 2012 said:

> "[Mrs York said that her GP] said that she isn't in a fit state to be attending the meeting with the school and he is going to send them a letter to that affect (*sic*). Lisa said she has received all the paperwork from the school and they will be terminating her contract. She said that it says they won't retire her on ill health grounds as she hasn't paid into the pension enough. I explained to her about the criteria for ill health retirement and as she has still got options with regards to her treatments she probably wouldn't meet it but if she wanted to go for it then it may be an option".

17. On 15 January 2013 the Schools HR Advisory Team sent an email to the Occupational Health Adviser which said:

> "Please find attached 3 documents we've received from Lisa re her current state of health. She would like to be consider (*sic*) for early ill health retirement. As you may be aware, an ill health capability hearing has been arranged for Friday 18th January. I know we may not have the reply by then but if the decision is to dismiss on the grounds of ill health capability and then qualify for ill health retirement we would support her application".

18. And on 16 January 2013 the Occupational Health Adviser acknowledged receipt of the email and said:

> "Thank you for this. I will put Lisa's notes to Dr when he comes in on Tuesday 22nd and will keep you informed as to his opinion re criteria for IHR".
>
> A handwritten note at the top of this email said "Dr Krishnan your opinion please".

19. An email dated 23 January 2013 from the Schools HR Advisory Team to Mrs York acknowledged her request for early ill health retirement and said that they had heard back from the OH Physician stating that in his opinion "There is no evidence that your underlying condition renders you permanently unfit for your role" and that therefore she did not meet the criteria for ill health early retirement.

20. Mrs York sent an email on the same day to the Occupational Health Adviser. In this she said that the information she had submitted was for the ill health capability hearing on 18 January 2013. She stated that the meeting notes said that the only reason for her not being granted ill health retirement was that she had not been in the LGPS for very long. She added that the notes also said that she was not fit for her job.

21. She noted that a further opinion had been obtained from an OH Physician which said "There is no evidence that your underlying condition renders you permanently unfit for your role". She said that she was unsure whether an Occupational Health organisation other than Serco had been consulted which she found odd as Serco were an independent adviser. She referred to the next rescheduled ill health capability hearing on 28 January 2013 and expressed concern that she would not have time to disagree with the new information. She said that she was very confused as on the one hand she was considered unfit for her role, but on the other hand she was not considered permanently unfit for work and was not being allowed time to recover and return to her job.

22. On 29 January 2013 the Chair of the Panel of Governors at Kings Langley Primary School wrote to Mrs York following the ill health capability hearing which had taken place the previous day. He said:

> "The panel could not make a decision on your eligibility for ill health retirement as that could only be taken by the Occupational Health Adviser, who has informed the school that you are not eligible for ill health retirement. Occupational Health have though informed us that you continue to be unfit for work and were unable to comment on when a return to work is likely".

23. Further, he reiterated that the decision as to whether ill health retirement could be granted at a future date could only be made separately through Occupational Health based on further and relevant medical information.

24. The panel concluded that Mrs York's employment with Kings Langley Primary School must be terminated on the grounds of ill health capability noting that Mrs York had submitted that the effects of her condition were unpredictable and that there was no guarantee that the treatments she was undergoing would work. It also noted that her consultant was also unable to predict when she would be fit for work.

25. On 19 March 2013 Dr Krishnan wrote to Mr Ian Bottrill, Consultant Otolaryngologist for Buckinghamshire Healthcare Trust to say that he had been asked to assess Mrs York for potential ill health retirement from the LGPS and to ask for further information regarding her underlying condition, treatments, work capacity and prognosis.

26. This letter was written on Serco headed notepaper.

27. Mr Bottrill responded on 9 April 2013. He concluded by saying:

> "I doubt she would be able to achieve full time work within the next year but would obviously hope to be able to allow her to get back into the work environment in the fullness of time but that time period is difficult to determine".

28. In an undated letter to the Senior HR Officer in the Schools HR Advisory Team Dr Krishnan said:

> "A further medical report has just been received from [Mrs York's] treating consultant and on carefully reviewing this subsequent report the specialist is of the opinion that longer term Mrs York is likely to have difficulty in a role that involves a lot of physical movement as a result of her condition. On the balance of probabilities the medical evidence would now support the view that she is likely to [be] permanently incapable of discharging efficiently the duties of her employment. However, there is a reasonable prospect that she would be capable of undertaking other gainful employment within the next three years and I believe the criteria for a tier 3 pension has (*sic*) been met at this stage".

29. Together with the letter Dr Krishnan submitted a medical certificate dated 16 April 2013 under standard form, reference LG103A. By ticking a series of boxes he certified that in his opinion Mrs York was suffering from a condition that, on the balance of probabilities, rendered her permanently incapable of discharging the duties of her employment, but that she was likely to be capable of undertaking gainful employment within the next three years.

30. Form LG103A also included in Part D the following statement:

> "…I am not acting, and have not at any time acted, as the representative of the employee named in Part A [Mrs York], the employer or any other party in relation to this case".

31. The final section of form reference LG103A is a "Declaration by the Employer" which in Mrs York's case was signed by the Schools HR Manager. This Declaration said "I agree to his/her pension coming into payment …in accordance with Regulation 20 (1) of the Local Government Pension Scheme (Benefits Membership and Contributions) Regulations 2007" and then set out the Tier 1, 2 and 3 criteria with, in Mrs York's case, the box next to Tier 3 ticked.

32. Mrs York appealed against the decision not to award her Tier 1 ill health retirement on 26 May 2013 under Stage 1 of the Internal Dispute Resolution Procedure (**IDRP**).

33. On 11 June 2013 Hertfordshire issued their response to her appeal. This was written by the Assistant Director of Finance. It stated that based on the NHS letter dated 9 April 2013 the writer had concluded that whilst Mrs York was permanently incapable of discharging the duties of her current employment her doctor had confirmed that she should be capable of undertaking gainful employment within three years of leaving Hertfordshire's employment.

34. The response emphasised that the meaning of gainful employment was not that Mrs York had the ability to be employed as a Nursery Nurse, but that she would have the ability to undertake any form of employment for 30 hours per week for a period of not less than 12 months.

35. Based on these criteria the writer said "It is therefore my finding that you do not meet the requirements of the First Tier and have been appropriately awarded Ill Health Retirement on the Third Tier."

36. Mrs York contested the findings of the Stage 1 IDRP by making a further submission under Stage 2 of the IDRP. She also wrote to the Pensions Advisory Service (**TPAS**) to enlist their help in resolving her complaint.

37. In her submission she stated that her consultant had stipulated on two occasions that she was no longer fit to carry out the duties of a nursery nurse and that therefore she would be unemployable for the career she had trained many years for.

38. In a response dated 1 August 2013 to an enquiry from TPAS, Hertfordshire's pensions team said:

> "It may be helpful to know that tier three ill-health retirements are automatically reviewed after eighteen months, to see whether the member is capable of undertaking gainful employment, and the original decision can be revisited at any time up to three years after the pension ceases. The employing authority may make a subsequent determination promoting the member to tier two if an independent medical practitioner (IRMP) certifies that they meet the criteria".

39. On 19 August 2013 Hertfordshire responded to Mrs York's appeal under Stage 2 of the IDRP. In a letter written by the Chief Legal Officer they said that they dismissed her appeal. In considering her appeal they had taken into account the relevant law; the facts of the case; and all the evidence available including the medical evidence, the submissions made by Mrs York and the matters relied on in reaching the initial decision and the decision at Stage 1 of the IDRP.

40. Under the heading "The Decision" the Chief Legal Officer said that in the response to Mrs York's Stage 1 appeal dated 11 June 2013 the position under the 2007 Regulations had been correctly set out in that whilst Mrs York was permanently incapable of discharging the duties of her former employment as a nursery nurse,

she should be capable of undertaking gainful employment within three years of the relevant date. This was supported by Dr Krishnan's medical report and by the letter from Mr Bottrill dated 9 April 2013. Therefore, the 2007 Regulations had been correctly applied and Mrs York had correctly been given ill health retirement at Tier 3.

41. In a letter dated 28 August 2013 the Senior Hearing Therapist treating Mrs York said:

> "It is impossible to predict the course and outcome of a rehabilitation programme, particularly if she requires further treatment. I feel it is unlikely she would be able to return to work for some time and may never manage a 30 hour contract".

42. This letter was submitted to Hertfordshire by TPAS on 16 October 2013. The TPAS adviser also questioned whether such updated medical evidence had been sought prior to the Stage 2 IDRP review.

43. In their response to this letter dated 31 October 2013 Hertfordshire said that as a formal decision had been given on Mrs York's case it would be inappropriate to comment further or review the decision in the light of the letter from the Therapist. If Mrs York wished to challenge that decision then the appropriate course would be to complain to the Pensions Ombudsman.

44. They added, however, that if Mrs York felt that her condition had significantly deteriorated it was open to her to request that a fresh assessment be carried out by her employer.

45. On 22 November 2013 Mrs York sent an email to Hertfordshire to say that she would accept a further assessment provided that she was seen by an independent, impartial Occupational Adviser who had no connection to Hertfordshire.

46. This further assessment process is currently being undertaken. However, in a letter dated 14 May 2014 Hertfordshire pointed out to Mrs York that this was quite separate from her complaint to the Pensions Ombudsman and that the further assessment could potentially lift her to Tier 2, but not to Tier1. They said that she could only potentially achieve Tier 1 ill health retirement if her complaint was upheld.

47. Mrs York says that Hertfordshire have chosen not to acknowledge reports from her Consultant, her Therapist and the first Occupational Health assessment which stated that she was 'likely to be disabled'.

48. She says that at the review meeting with Occupational Health on 21 May 2012 the adviser stated that she would support Mrs York as disabled. She also felt that the adviser was not independent but was influenced by the head teacher.

49. She says that all information gathered and correlated regarding her health was accessible to the Schools HR Advisory Team and to the IRMP to make a fair and accurate assessment of her overall condition.

50. She considers that the report from her consultant on 9 October 2012 highlights that she had already suffered from the condition for four years and had therefore already reached a three year threshold. She says that his use of the term "fullness of time" indicates that there is no definitive answer and so questions how the IRMP can reach a definitive conclusion.

51. She would like Hertfordshire to acknowledge that she will be unable to achieve 'gainful employment' and award her Tier 1 ill health early retirement.

52. She says that her condition has deteriorated since before, during and after her dismissal from her position as a Nursery Nurse and that that was why she was dismissed.

53. She says that the fact that drop attacks can occur without warning endangers not only her but those around her and that she would be considered a hazard if working with equipment, a liability during any fire scenario and a constant concern whilst working alongside colleagues.

54. She feels that Hertfordshire's position is contradictory. On the one hand she was dismissed as she was unable to undertake the duties of her post; and on the other hand the Occupational Health physician said that in his opinion there was no evidence that her underlying condition rendered her permanently unfit for her role.

55. She does not understand why the Schools HR Advisory Team supported her ill health retirement in their email dated 15 January 2013 and yet later retracted that support.

56. She feels that the email dated 23 January 2013 sent by the Schools HR Advisory Team anticipated the outcome, bearing in mind that a signed certificate had not been produced at that time and that this was before an ill health capability meeting had taken place.

57. She had a series of injections whilst she was employed which all resulted in her disease being ongoing and not under control.

58. Occupational Health failed to assess her on 10 December 2012 before her dismissal hearing so that the assessment of her situation at the time of her employment was never undertaken.

59. Dr Krishnan never physically assessed her so the situation at the time of her employment was not assessed properly.

60. She considers that she is incapable of being able to work a 30 hour week in any employment under the gainful employment regulation stipulated in the 2007 Regulations.

61. She says that she is astonished by Hertfordshire's stance on her predicament and that their perception of her disease is unfathomable. In her opinion they should abide by the 'gainful employment' regulation.

Summary of Hertfordshire's position

62. Hertfordshire considers that the 2007 Regulations have been applied correctly.

63. To the argument that medical evidence should have been updated prior to the Stage 2 IDRP review Hertfordshire says that the Stage 2 application had to be considered in relation to the situation pertaining at the time that Mrs York was still employed. The IRMP's certificate was dated 16 April 2013, was clear and was in line with a report from Mrs York's consultant. Therefore, there was no reason to seek another medical opinion in relation to the Stage 2 application.

64. They contend that whilst they were not bound by the medical evidence submitted by Dr Krishnan which was based on a report from Mrs York's consultant, they were entitled to rely on it.

65. And to an allegation made by TPAS that the original decision was not made by Hertfordshire, but by the IRMP Hertfordshire say that they do not accept this and refer to the fact that the IRMP submitted his certificate to Hertfordshire under cover of a letter to the Senior HR Officer. They add that even if this element of the process is flawed, which they do not accept, the matter has been reviewed at two stages of appeal under the IDRP.

66. They point out that the form used by Dr Krishnan was a standard one and that the wording refers to the employer agreeing to pension coming into payment. They say the use of the word "agree" indicates a separate and independent consideration of the matter by the employer.

Conclusions

67. In addition to their consideration of this complaint Mrs York's position is being reconsidered by Hertfordshire as part of the review process in accordance with the 2007 Regulations. At various times in her submissions to me Mrs York has referred to this review and questioned why it is not possible for her to be reassessed as eligible for a Tier 1 pension. I should make it clear that the 2007 Regulations do not allow for a Tier 3 pension to subsequently be reassessed as Tier 1 and I am not able to make directions that are contrary to the 2007 Regulations.

68. Mrs York would be entitled to Tier 1 benefits if Hertfordshire were to determine "that there is no reasonable prospect of [her] being capable of undertaking any gainful employment before [her] normal retirement age". The retirement benefits she would then receive would be higher than those she is currently entitled to. "Gainful employment" is specifically defined under the Regulations. The Regulations specify that it is for the "employing authority" (being Hertfordshire) to determine whether Mrs York meets the criteria for Tier 1 benefits.

69. Before making the determination, Hertfordshire were required to obtain a certificate from an IRMP qualified in occupational health medicine as to whether, in the opinion of the IRMP, Mrs York was suffering from a condition that rendered her permanently incapable of carrying out her role efficiently because of ill health and, if

so, whether as a result of that condition she had a reduced likelihood of being able to undertake gainful employment before her normal retirement age.

70. However, Hertfordshire would not be bound by the opinion given by the IRMP and should have come to a properly considered determination of their own. It may be rare for an authority to come to a different view to that proffered by the IRMP, but there should still be due consideration given to all of the available relevant information prior to making a determination.

71. It is a requirement that the IRMP should not have previously advised in the same case. In Mrs York's case the IRMP who signed the certificate was Dr Krishnan. The evidence points to his having had involvement with Mrs York's case before he was asked to provide a report in March 2013. The email from the Occupational Health Adviser on 16 January 2013 said "I will put notes to Dr when he comes in…" and the handwritten note "Dr Krishnan your opinion please" indicates that the doctor in question was Dr Krishnan. Then, on 23 January, the Schools HR Advisory team told Mrs York that the (unnamed) physician had said that she was not permanently unfit for her role.

72. In my view Dr Krishnan should not have given the required certification in April 2013 because he had already given advice on Mrs York's case.

73. In fact there was clear maladministration in January 2013 when Mrs York was told by email that she did not meet the criteria without the matter having properly been considered. Strictly the Regulations only require certification where a positive decision to pay ill-health benefits has been made. But in practice a decision could go either way. And anyway, there is no evidence that Hertfordshire had in fact made the purported decision at that point. (The writer merely repeated the unnamed doctor's view). Hertfordshire say that they had made a decision but concede they failed to issue a formal notification of that decision in accordance with the 2007 Regulations. Whether they had or not, they were at fault.

74. Turning to the actual rejection in March 2013 (and setting aside Dr Krishnan's apparent previous involvement) there is little evidence of an active decision by Hertfordshire. The certificate was provided by Dr Krishnan. He does not appear to

have provided any accompanying report and the certificate itself consists simply of a series of boxes to tick. So Hertfordshire had no way of knowing how he had reached his conclusion.

75. In order to give proper consideration to Mrs York's case, Hertfordshire would have needed to know more about Mr Bottrill's current views of a likely return to full time work. In his letter dated 9 October 2012 Mr Bottrill said that he hoped that with time Mrs York might return to full time duties but that she would need a careful phased return. He did, however, make it clear that she would not be capable of returning to her role as a Nursery Nurse. He said that he hoped to get control of the vertigo in the fullness of time and I agree with Mrs York that it is unclear exactly what this term means.

76. By March 2013 he said that he doubted she would be able to achieve full time work within the next year but would hope "to be able to get her back into the work environment in the fullness of time…" But again it is not clear what he meant by this and whether getting her back into the work environment meant that he envisaged her working full time.

77. Regulation 20 (2) refers to the authority (Hertfordshire) having to determine whether there is no *reasonable* (my italics) prospect of the member having to obtain gainful employment as defined (in effect of at least 30 hours a week for a year). It was therefore for Hertfordshire to question whether Mrs York's prospect of a return to full time employment was reasonable or not and there is no evidence to suggest they did so.

78. The flaws identified above were not corrected at either the Stage 1 or the Stage 2 IDRP review. Indeed all the reviewers appear to have done is consider whether the correct process had been followed without any consideration given at all as to the quality of the process or the tests applied to determine Mrs York's degree of incapacity. Although the Stage 1 decision appears to come close to a finding as to Mrs York's eligibility, it cannot have been a properly based decision since its only basis was that the IRMP had reached a view.

79. Finally, Regulation 57 of the Administration Regulations requires the body making the decision to notify the member of the decision in writing as soon as practicably possible and that notification must contain the grounds for the decision and the process and time limits for appealing the decision. In this case there is no evidence that Hertfordshire wrote to Mrs York in accordance with this Regulation.

80. For the reasons given above I find that Hertfordshire did not determine Mrs York's eligibility under Regulation 20(2) in a proper manner and I am upholding her complaint.

81. It is not my role to review the medical evidence and come to a decision of my own as to Mrs York's eligibility. The proper course of action is for me to remit the decision to Hertfordshire for reconsideration.

82. This is not to say that Mrs York is eligible for Tier 1 benefits. That decision has yet to be made and it may well be that, on proper consideration, Hertfordshire are still of the opinion that Tier 3 is the appropriate award.

83. In the circumstances, I also find that it would be appropriate for Mrs York to receive some modest redress for the distress and inconvenience she will have suffered as a result of Hertfordshire's failure to properly consider her for benefits under Regulation 20(2).

84. Mrs York has asked that the matter should be considered by an independent, impartial Occupational Health adviser who has no connection to Hertfordshire. I would not go so far as to make such a direction. Provided it is not Dr Krishnan, another doctor working for Serco would meet the Regulation 56 requirement and the fact that Serco are retained to provide Occupational Health advice does not mean that their doctors cannot meet the independence test.

Directions

85. I direct that, within 21 days of the date of this determination, Hertfordshire shall reconsider whether Mrs York was, at the time her employment ended, eligible for benefits under Regulation 20(2), obtaining the necessary certificate from an IRMP who meets the requirements under the 2008 Regulations. Having done so, they will provide Mrs York with a written decision setting out their reasons.

86. If Hertfordshire subsequently determine that Mrs York was eligible for Tier 1 benefits, she would be due the higher rate of benefit from 28 March 2013. Hertfordshire shall, therefore, pay her arrears (on the basis that she should have received Tier 1 benefit from 28 March 2013), together with simple interest at the rate quoted by the reference banks for the time being, from March 2013 to the date of payment.

87. Within the same 21 day period, Hertfordshire shall also pay Mrs York £300 for the distress and inconvenience resulting from the failure to consider her for Tier 1 benefits in the proper manner.

Tony King
Pensions Ombudsman

18 September 2014

Appendix 1

At the time of Mrs York's dismissal Regulation 20 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended) provided,

Early leavers: ill-health
20.—(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5.

(a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and
(b) that he has a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age,

they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2), (3) or (4), as the case may be.

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

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

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

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

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

(a) are those that he would have received if the date on which he left his employment were the date on which he would have retired at normal retirement age; and
(b) unless discontinued under paragraph (8), are payable for so long as he is not in gainful employment.

(5) Before making a determination under this regulation, an authority must obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine ("IRMP") as to whether in his opinion the member is suffering from a

condition that renders him permanently incapable of discharging efficiently the duties of the relevant employment because of ill-health or infirmity of mind or body and, if so, whether as a result of that condition he has a reduced likelihood of being capable of undertaking any gainful employment before reaching his normal retirement age.

(6) A person who receives benefits under paragraph (4) shall—

(a) inform the authority if he obtains employment; and
(b) answer any inquiries made by the authority as to his current employment status, including as to his pay and working hours.

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

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

(c) Sub-paragraph (a) does not apply where a person reaches normal retirement age.

(8) (a) The authority shall discontinue the payment of benefits under paragraph (4) if they consider—

(i) that the person is in gainful employment; or
(ii) in reliance on the certificate obtained under paragraph (7)(b), that he is capable of undertaking such employment

and may recover any payment made in respect of any period before discontinuance during which they consider him to have been in gainful employment.

(b) Subject to sub-paragraph (bb), the authority shall in any event discontinue the payment of benefits under paragraph (4) after they have been in payment to a person for three years.

(bb) Paragraph (b) does not apply where a person reaches the age of 65.

(c) The authority shall forthwith notify the appropriate administering authority of any action they have taken under this paragraph.

(9) A person in respect of whom the payment of benefits is discontinued under paragraph (8) shall be treated as a pensioner member with deferred benefits from the date the suspension takes effect, and shall not be eligible to receive benefits under paragraph (4) in respect of any future period.

(10) If a person in respect of whom the payment of benefits is discontinued under paragraph (8) subsequently becomes an active member of the Scheme, his earlier period of active membership in respect of which benefits were paid under paragraph (4) shall not be aggregated with his later active membership.

(11) (a) An authority which has made a determination under paragraph (4) in respect of a member may make a subsequent determination under paragraph (3) in respect of him.

(aa) A subsequent determination under paragraph (3) must be made within three years of the date that payment of benefits is discontinued under paragraph (8), or before the member reaches the age of 65 if earlier.

(b) Any increase in benefits payable as a result of any such subsequent determination is payable from the date of that determination.

(11A) Where an authority makes a determination of benefits under paragraph (2) or (3) ("the subsequent determination") in the case of a person—

(a) for whom a retirement pension had already been determined under paragraph (2) or (3) ("the initial determination"), and

(b) who subsequently became an active member of the Scheme,

his earlier period of active membership (calculated under the initial determination) shall not when aggregated with his later period of active membership (calculated under the subsequent determination), exceed the total membership he would have had, were the initial determination to have been made under paragraph (2).

(12) (a) Subject to sub-paragraph (b) and to paragraph (13), in the case of a member in part-time service, the period to be added under paragraph (2)(b) or (3)(b), as the case may be, is calculated in accordance with regulation 7(3) as if he had remained in such part-time service until his normal retirement age.

(b) If the certificate obtained under paragraph (5) states that, in the medical practitioner's opinion, the member is in part-time service wholly or partly as a result of the condition that has caused him to be incapable of discharging efficiently the duties of the relevant local government employment, no account shall be taken of such reduction in his service as is attributable to that condition.

(13) But in the case of a person who is an active member before 1st April 2008 and who—

(a) has reached the age of 45 before that date;

(b) has had continuous membership; and

(c) has not received any benefits in respect of that membership,

his benefits are increased by adding the period that would have been added had regulation 28 of the 1997 Regulations applied if such period is greater than the period to be added under paragraph (2)(b) or (3)(b).

(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
 ""an independent registered medical practitioner ("IRMP") qualified in occupational health medicine" means a practitioner who is registered with the General Medical Council and —

(a) holds a diploma in occupational health 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 section 55(1) of the Medical Act 1983; or

(b) is 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.

Appendix 2

The Local Government Pension Scheme (Administration) Regulations 2008

First instance determinations: ill-health

56.—(1) Subject to paragraph (1A), an independent registered medical practitioner ("IRMP") from whom a certificate is obtained under regulation 20(5) of the Benefits Regulations in respect of a determination under paragraph (2), (3) or (4) of that regulation (early leavers: ill-health) must be in a position to declare that—

(a) he has not previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested; and

(b) he is not acting, and has not at any time acted, as the representative of the member, the employing authority or any other party in relation to the same case,

and he must include a statement to that effect in his certificate.

(1A) Paragraph (1)(a) does not apply where a further certificate is requested for the purposes of regulation 20(7), 20(11)(a) or regulation 31(7) of the Benefits Regulations.

(2) If the employing authority is not the member's appropriate administering authority, it must first obtain that authority's approval to its choice of registered medical practitioner for the purposes of regulation 20 and 31 of the Benefits Regulations.

3) The employing authority and the IRMP must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation, and—

(a) in the case of the employing authority, when making a determination under regulation 20 of the Benefits Regulations; or

(b) in the case of the IRMP, when expressing an opinion as to the matters set out in regulation 20(5) and regulation 31(2) (early payment of pension: ill health) of those Regulations.

Notification of first instance decisions

57.—(1) Every person whose rights or liabilities are affected by a decision under regulation 55 must be notified of it in writing by the body which made it as soon as is reasonably practicable.

(2) A notification of a decision that the person is not entitled to a benefit must contain the grounds for the decision.

(3) A notification of a decision about the amount of a benefit must contain a statement showing how it is calculated.

(4) Every notification must contain a conspicuous statement giving the address from which further information about the decision may be obtained.

(5) Every notification must also—

(a) refer to the rights available under regulations 58 and 60;

(b) specify the time limits within which the rights under those regulations may be exercised; and

(c) specify the job title and the address of the person to whom applications under regulation 58 may be made.

Applications to resolve disagreements

58.—(1) This regulation applies where there is a disagreement about a matter in relation to the Scheme between a member (or an alternative applicant) and an employing authority or the administering authority.

(2) These persons are alternative applicants—

(a) a widow, widower, surviving civil partner or nominated cohabiting partner (as defined in regulation 25 of the Benefits Regulations) of a deceased member;

(b) a dependant of a deceased member or any other person to whom benefits in respect of him may be paid;

(c) a prospective member;

(d) a person who ceased to be a member, or to fall within any of sub-paragraphs (a) to (c) or (e), during the period of six months ending with the date of the application; and

(e) in the case of a disagreement relating to the question whether a person claiming to be a member or to fall within any of sub-paragraphs (a) to (d) does so, the claimant.

(3) The member or, as the case may be, the alternative applicant may apply to—

(a) the person specified under regulation 57(5)(c) to give a decision on the disagreement; or

(b) the appropriate administering authority for that authority to refer the disagreement to that person for a decision.

(4) An application for a decision must—

(a) set out the applicant's full name, address and date of birth;

(b) include a statement giving details of the nature of the disagreement and the reasons why the applicant is aggrieved;

(c) be signed by or on behalf of the applicant; and

(d) be accompanied by a copy of any written notification under regulation 57.

(5) An application by—

(a) a member or prospective member;

(b) a person who ceased to be a member or prospective member during the period of six months ending with the date of the application; or

(c) a person claiming to be a person within sub-paragraph (a) or (b),

must also set out his national insurance number (if any) and the name of his employing authority.

(6) An application by any other person must also set out—

(a) his relationship to the member; and

(b) the member's full name, address, date of birth and national insurance number (if any) and the name of his employing authority.

(7) An application must be made before the end of—

(a) the period of six months beginning with the relevant date; or

(b) such longer period as the person giving the decision on the disagreement considers reasonable.

(8) The relevant date is—

(a) in the case of a disagreement relating to a decision under regulation 55, the date notification of the decision is given under regulation 57; and

(b) in any other case, the date of the act or omission which is the cause of the disagreement or, if there is more than one, the last of them.

(9) Paragraph (7)(b) does not apply where an appeal has been made under regulation 63(2) in respect of a matter that is the subject of an application under this regulation.

Notice of decisions on disagreements

59.—(1) A decision on a disagreement to which an application under regulation 58 relates must be given by notice in writing to—

(a) the applicant;

(b) the employing authority; and

(c) if the employing authority is not the appropriate administering authority, to that authority,

by notice in writing before the expiry of the period of two months beginning with the date the application was received.

(2) But, if no such notice is given before the expiry of that period, an interim reply must immediately be sent to the persons mentioned in paragraph (1)(a) to (c) setting out —

(a) the reasons for the delay; and

(b) an expected date for giving the decision ("the expected decision date").

(3) A notice under paragraph (1) must include—

(a) a statement of the decision;

(b) a reference to any legislation or provisions of the Scheme on which the person making the decision relied;

(c) in a case where the disagreement relates to the exercise of a discretion, a reference to the provisions of the Scheme conferring the discretion;

(d) a reference to the right of the applicant to refer the disagreement for reconsideration by the appropriate administering authority under regulation 60 and to the time within which the applicant may do so; and

(e) a statement that the Pensions Advisory Service is available to give assistance in connection with any difficulty with the Scheme that remains unresolved including the address at which it may be contacted.

Reference of disagreement for reconsideration by appropriate administering authority

60.—(1) This regulation applies where an application about a disagreement has been made under regulation 58 and—

(a) notice of a decision has been given under regulation 59(1); or

(b) an interim reply has been sent under regulation 59(2) but no such notice has been given before the expiry of the period of one month beginning with the expected decision date; or

(c) no such notice has been given or interim reply sent before the expiry of the period of three months beginning with the date the application was made.

(2) The applicant under regulation 58 may, before the expiry of the period of six months beginning with the relevant date, make an application to the appropriate administering authority to reconsider the disagreement.

(3) The relevant date is—

(a) in a case falling within paragraph (1)(a), the date of the notice given under regulation 59(1);

(b) in a case falling within paragraph (1)(b), the date with which the period mentioned in that sub-paragraph expires; and

(c) in a case falling within sub-paragraph (1)(c), the date with which the period mentioned in that sub-paragraph expires.

(4) The application must—

(a) set out the applicant's full name, address and date of birth;

(b) set out details of the grounds on which it is made;

(c) include a statement that the applicant wishes the disagreement to be reconsidered by the appropriate administering authority;

(d) be accompanied by a copy of any written notification under regulation 57; and

(e) be signed by or on behalf of the applicant.

(5) An application by a member or prospective member or a person claiming to be such must also set out his national insurance number (if any) and the name of his employing authority.

(6) An application by any other person must also set out—

(a) his relationship to the member; and

(b) the member's full name, address, date of birth and national insurance number (if any) and the name of his employing authority.

(7) Where notice of a decision on the disagreement has been given under regulation 59, the application must also—

(a) state why the applicant is dissatisfied with that decision; and

(b) be accompanied by a copy of that notice.

(8) The appropriate administering authority must determine—

(a) the procedure to be followed when exercising its functions under this regulation;

(b) the manner in which those functions are to be exercised.

(9) For the purposes of this regulation, the appropriate administering authority is—

(a) in the case of an applicant who is a member or prospective member, the administering authority which is or was his last appropriate administering authority for the other purposes of these Regulations; and

(b) in the case of an applicant who is the widow, widower or surviving civil partner, nominated cohabiting partner or dependant of a deceased member, the administering authority which was that member's appropriate administering authority.

Notice of decisions on reconsideration of disagreement

61.—(1) The appropriate administering authority must give its decision on an application under regulation 60 by notice in writing—

(a) to the applicant; and

(b) if that authority is not the employing authority, to the employing authority,

before the expiry of the period of two months beginning with the date the application was received.

(2) But, if no such notice is given before the expiry of that period, an interim reply must immediately be sent to those parties setting out —

(a) the reasons for the delay; and

(b) an expected date for giving the decision.

(3) A notice under paragraph (1) must include—

(a) a statement of the decision;

(b) in a case where a decision was given under regulation 59, an explanation of whether and, if so, the extent to which that decision is confirmed or replaced;

(c) a reference to any legislation or provisions of the Scheme on which the authority relied;

(d) in a case where the disagreement relates to the exercise of a discretion, a reference to the provisions of the Scheme conferring the discretion;

(e) a statement that the Pensions Advisory Service is available to give assistance in connection with any difficulty with the Scheme which remains unresolved; and

(f) a statement that the Pensions Ombudsman may investigate and determine any complaint or dispute of fact or law in relation to the Scheme made or referred in accordance with the Pension Schemes Act 1993; and

(g) the addresses at which the Pensions Advisory Service and the Pensions Ombudsman may be contacted.

Rights of representation
62.—(1) An application under regulation 58 or 60 may be made or continued on behalf of the applicant by a representative nominated by him.

(2) Where a person who has the right to make or has made such an application dies, the application may be made or continued on his behalf by his personal representative.

(3) Where such a person is a minor or is or becomes incapable of acting for himself, the application may be made or continued on his behalf by a member of his family or some other person suitable to represent him.

(4) Where a representative is nominated before an application is made, the application must specify his full name and address and whether that address is to be used for service on the applicant of any documents in connection with the application.

(5) Where a representative's address is not to be so used the representative must nevertheless be sent a copy of—

(a) a notice under regulation 59(1) or 61(1); or

(b) an interim reply under regulation 59(2) or 61(2).

Appeals by administering authorities
63.—(1) This regulation applies where an employing authority—

(a) has decided, or failed to decide, any question falling to be decided by that employer under regulation 55 (otherwise than in the exercise of a discretion); and

(b) is not an administering authority.

(2) The administering authority maintaining the pension fund to which the employing authority pays contributions may appeal to the Secretary of State to decide the question.

(3) Such an appeal must be made by notice in writing given before the end of—

(a) the period of six months beginning with the relevant date; or

(b) such longer period as the Secretary of State considers reasonable.

(4) The relevant date is—

(a) in the case of an appeal relating to a decision notified under regulation 57(1), the date of the notification of the decision; and

(b) in the case of an appeal relating to a failure to decide any question, the date of that failure.

(5) For the purposes of paragraph (4)(b), an employing authority is to be taken to have failed to decide a question at the expiry of the period of three months beginning with the date on which the administering authority has requested a decision in writing.

(6) The Secretary of State must issue her decision on the appeal by notice in writing to the appellant and to any other person appearing to her to be affected by it.

(7) Paragraph (8) applies where any person other than the administering authority—

(a) has made an application under regulation 58 or 60 which has not been determined in respect of any of the matters which are the subject of an appeal under this regulation; or

(b) makes such an application—

(i) at the same time as such an appeal is made, or

(ii) after such an appeal is made and before it is determined.

(8) The appeal by the administering authority must be stayed—

(a) pending notification of a decision under regulation 59 or 61 in respect of the application under regulation 58 or 60; or

(b) until the application is withdrawn.