

Ombudsman's Determination

Applicant	Miss Ann Tracy
Scheme	Principal Civil Service Pension Scheme (PCSPS)
Respondent	Cabinet Office

Complaint Summary

Miss Tracy has complained that she has been refused an ill-health retirement pension and that there were delays in processing her appeals through the Internal Dispute Resolution (**IDR**) process.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld because there were flaws in the process adopted by the Medical Advisers for deciding whether Miss Tracy's incapacity was permanent or not.

Detailed Determination

Provisions of the rules of the Scheme

Rule 1.12 says:

"Retirement on medical grounds" means retirement from the Civil Service with a medical certificate issued by the Scheme Medical Adviser which states that the person concerned is prevented by ill health from discharging his duties, and that his ill health is likely to be permanent."

Permanent under the Rules means a breakdown in health until the member reaches pension age.

Material facts

1. Miss Tracy joined the DVLA and PCSPS on 19 September 2000. She went on long term sick leave from 25 August 2008. The DVLA referred her case to their occupational health advisers and they suggested a phased return to work.
2. Miss Tracy returned to work on a phased return basis on 21 April 2009. Miss Tracy went on sick leave again from 5 to 14 January and from 8 February 2010. DVLA referred her case to their occupational health advisers and in a report dated 3 September 2010 they suggested a "back to work programme with two sessions of about 2-3 hours per week."
3. On 12 October 2010 DVLA wrote to Miss Tracy to inform her that they had decided to terminate her employment on the grounds of inefficiency arising from her unsatisfactory attendance. She was given 13 weeks' notice and her leaving date would be 3 January 2011. The DVLA also informed Miss Tracy that they would pay her compensation of approximately £18,000 and that this decision did not preclude her from applying for medical retirement. If however her application for medical retirement was successful she would have to repay the compensation payment.
4. Miss Tracy appealed the decision to dismiss her and she was informed that this was unsuccessful on 23 December 2010.
5. On 14 January 2011 Miss Tracy applied for ill-health retirement on the grounds that she was suffering from Chronic Fatigue Syndrome (CFS). Initially she was told that she could not apply as she had already been dismissed. However DVLA applied to allow Miss Tracy to apply for retrospective ill-health retirement as she had not been told that she had to apply before she left service. The DVLA's application was accepted.
6. DVLA referred Miss Tracy's case to Capita Health and Wellbeing (CHW) who arranged for her to meet with Dr Gibson on 16 May 2011.

7. Dr Gibson issued his report on 23 May 2011 and said that “Miss Tracy would struggle with her previous job as a manager at the DVLA” and “At the current time Ms Tracy will not be able to do her previous job or an equivalent job.”
8. On 1 June 2011 Doctor Zubier of CHW wrote to DVLA and set out the medical evidence that had been considered to determine whether Miss Tracy met the criteria for Ill-health retirement. This included a report of 23 March 2011 from Miss Tracy’s GP, a report from Dr Gibson and reports from Miss Tracy’s Cognitive Behavioural Therapist (**CBT**).
9. Doctor Zubier said in his report:

“The cognitive behavioural therapist indicates in her most recent report that Ann Tracy has received appropriate specialist graded exercise therapy for her underlying condition. Overall she has made significant gains... In terms of prognosis for relapse the specialist indicates that it is difficult to be predictive although it is generally recognised that flare ups can be triggered by and/or exacerbated by increases in physical or psychological stress.

Dr Gibson offers an opinion that Ann Tracy would struggle to undertake the duties of her previous role as a manager. In my opinion this is contradictory with the information received from her treating cognitive behavioural therapist given the fact that significant improvement has been noted.

Having reviewed all the evidence on file and considering that she has 10 years of pensionable service ahead of her, it would be premature to conclude that the issue of permanent incapacity had been established at this stage.”

Dr Zubier therefore issued a medical retirement refusal certificate.

10. On 9 June 2011 DVLA wrote to Miss Tracy enclosing a copy of CHW’s report and provided information on the medical appeal process and that she had three months in which to make an appeal. Miss Tracy appealed the decision on 19 August 2011. She also provided new medical evidence from a clinical specialist at the Kent & Medway CFS/ME Service, a report from an Osteopath and copies of her Doctor’s certificates for the period 3 January to 14 November 2011.
11. The DVLA referred Miss Tracy’s appeal to Doctor Zubier of CHW who reviewed the case and the new medical evidence provided. Doctor Zubier issued his report on 9 September 2011 and said that he regarded the new medical evidence as not significantly adding to their understanding of the application. He also said:

“Whilst there may be evidence to suggest that Ms Tracy is likely to take time to improve, it is anticipated that further improvement will occur with ongoing support and treatment ...I remain of the opinion that it would be

premature to conclude on the balance of probability that the issue of permanent incapacity had been established.”

12. Doctor Zubier then referred the case to stage 2 of the medical appeal process.
13. The stage 2 medical appeal process was completed by Dr Birrell on 26 September 2011 who also considered the new medical evidence submitted by Miss Tracy. Dr Birrell said:

“Having comprehensively reviewed Miss Tracy’s appeal there is, in my opinion, reasonable evidence that she is prevented by ill health from discharging her duties.

The key issue in relation to Miss Tracy’s appeal is whether or not her incapacitating health problems are likely to be permanent. Having completed my review I advise that it is my opinion that there is no reasonable medical evidence to conclude that Miss Tracy’s incapacitating health problems are likely to be permanent.

...

The medical evidence on file confirms Miss Tracy’s diagnosis of CFS/ME by her general practitioner in 2008. She was subsequently referred to a specialist CFS/ME service and was first assessed in August 2010. She has been seen for individual treatment prior to attending a group treatment programme that began in November 2010 and she is due to attend this until the final meeting in November 2011. Her treatment includes cognitive behavioural therapy on a one to one basis and graded exercise therapy. She has been experiencing a degree of recovery but I note that she is still limited by her condition and continues to experience reduced energy and cognitive dysfunction. However from the information provided, it can be anticipated that further improvement will occur with ongoing support and treatment. Given that she has more than 10 years until normal retirement age, it would be in my opinion, premature to conclude that her current incapacity is permanent without sufficient and suitable evidence from her treating consultant i.e. a registered medical practitioner.”

14. The DVLA wrote to Miss Tracy on 4 October 2011 to tell her of the result of the stage 2 medical appeal process and to inform her she had three months to provide any additional evidence to support her appeal.

On 7th December 2011 Miss Tracey obtained a report signed by three treating specialists at Kent and Medway, including a Consultant Clinical Psychologist. This confirmed that Ms Tracy had now completed her treatment and been discharged from the service and there were no future treatment options. The letter also said:

‘Ms Tracy continues to implement the management strategies covered in the programme. Although she appears to have made some progress

towards recovery, it appears that her level of functional activity continues to be significantly reduced, when compared with pre-morbid levels. This is consistent with the CFS/ME Report to the Chief Medical Officer (2002) which states that prognosis is extremely variable. Although many patients have a fluctuating course with some setbacks, most will improve to some degree. However, health and functioning rarely return completely to the individual's previous healthy levels; most of those who feel recovered stabilise at a lower level of functioning than before their illness'.

Ms Tracy appears to have had a good response to treatment, however it appears that there continues to be a very significant gap in her tolerance and stamina for functional activity and the level required for even a very part-time return to work in her former role.

15. The DVLA forwarded this to CHW for review. On 11 January 2012 CHW reported on its review of the additional medical information that had been provided and confirmed that "there is no reasonable evidence to confirm that Ms Tracy's incapacitating health problems are likely to be permanent".
16. The DVLA wrote to Miss Tracy on 22 February 2012 and enclosed a copy of CHW's report of 11 January. The DVLA also confirmed that as the appeal process had expired on 4 January the appeals process was now concluded.

Miss Tracy invoked the IDR process on 27 March 2012 and was unsuccessful under both stage 1 and 2 of the IDR process before bringing her complaint to our service.

Summary of Miss Tracy's position

17. Miss Tracy says that the letters from her specialists on her condition have been misunderstood and misinterpreted by the doctors deciding whether or not the criteria for an ill health pension have been met.
18. Miss Tracy had obtained a further letter from her CFS specialist dated 13 February 2014. She says the Cabinet Office will not accept this of further proof of her eligibility for an ill-health pension. She also says that while she has had to stick to rigid deadlines during the course of her appeals there have been delays in responding to her, particularly the delay in responding to the second stage IDR process. Miss Tracy says she posted her second stage appeal on 29 November 2012 but did not receive a reply until 22 August 2013.

Summary of Cabinet Office's position

19. The Cabinet Office says that they investigated the circumstances of Miss Tracy's ill health retirement application and subsequent appeal. The results of those findings were set out in the stage 2 IDR process and concluded that they had seen no evidence to suggest that CHW's decision on whether or not to issue a medical retirement certificate was affected by any shortcomings in their or DVLA's handling of

the case. Miss Tracy had not provided the medical adviser with the evidence they needed to issue a medical retirement certificate.

20. They contend that the medical evidence that Miss Tracy submitted in February 2014 was not contemporaneous to her dismissal in January 2011 and was too late for the medical appeal that concluded in January 2012.

Conclusions

21. Miss Tracy has said that the letters from her specialists on her condition have been misunderstood and misinterpreted by the medical advisers to the PCSPS.
22. My role in this matter is not to decide whether Miss Tracy is or is not entitled to an ill health retirement - that is a matter for the Medical Adviser to decide. It is also not for an Ombudsman to agree or disagree with any medical opinion. The matter I need to consider is whether the decision has been reached in a proper manner, as provided by the law.
23. The reason given by Dr Zubier in September 2011, for rejecting Miss Tracy for an ill health pension was because she had "10 years of pensionable service ahead of her" and "it would be premature to conclude that the issue of permanent incapacity has been established at this stage."
24. Dr Zubier also rejected Miss Tracy's appeal for much the same reason that it was "premature to conclude that her current incapacity is permanent." The matter was also referred to Dr Birrell under the medical appeals process.
25. Dr Birrell reviewed the medical evidence and also concluded that it would be premature to conclude that Miss Tracy's incapacity was permanent.
26. But the question that all of the doctors were required to answer was whether on the balance of probabilities Miss Tracy's condition was likely to be permanent. By concluding that it was premature to decide that the incapacity was permanent the doctors were simply deferring the decision.
27. The doctors should have considered whether Miss Tracy's condition was likely to improve as a result of the treatment she was receiving (bearing in mind that this would be completed by November 2011) and, when, as a result, she was likely to be able to resume doing her job. Proper regard should also have been given to the speed with which any improvement might be expected. Given that Miss Tracy was within 10 years of her pension age when she was first considered, the improvement would have to be in that timescale. I can see no evidence that these considerations played a part in the decision making process either at the time she was first considered for ill health retirement by the Medical Adviser or on subsequent appeals. Therefore, in my view, the decision of the Medical Adviser and the appeals process were flawed.

28. I therefore uphold the complaint against the Cabinet Office and remit the decision to them for further consideration.
29. Miss Tracy has also complained about the length of time taken to address her second stage IDR appeal. I have taken this into account when recognising the distress and inconvenience she has suffered as a result of the flaws in the decision making process. I therefore make the following directions.

Directions

30. I direct that within 28 days of the finalisation of this determination the Cabinet Office will:
- remit the case back to DVLA to determine Miss Tracy's eligibility for an ill health pension at the time she was dismissed, i.e. 3 January 2011.
 - DVLA will as soon as reasonably practicable obtain the opinion of the scheme Medical Advisers using a different doctor not previously involved with the case.
 - pay Miss Tracy £500 for the distress and inconvenience she has suffered as a result of the flaws in the decision making process.

Karen Johnston

Deputy Pensions Ombudsman
3 November 2015