

PO-6196

Ombudsman's Determination

Applicant	Mrs Z Hussain
Scheme	Local Government Pension Scheme (LGPS)
Respondent(s)	Birmingham City Council (Birmingham)

Complaint summary

Mrs Hussain has complained that Birmingham did not consider her eligibility for ill health retirement, under Regulation 20 of the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007, in a proper manner.

Summary of the Ombudsman's determination and reasons

The complaint should be upheld against Birmingham because they failed to consider Mrs Hussain's eligibility for a pension under Regulation 20 in a proper manner.

Detailed Determination

LGPS Regulations

1. As at the date Mrs Hussain's employment terminated, Regulation 20 provided,
“(1) If an employing authority determine ...
 - (a) to terminate his employment on the grounds that his ill-health or infirmity of mind or body renders him permanently incapable of discharging efficiently the duties of his current employment; and
 - (b) that he has a reduced likelihood of obtaining any gainful employment before his normal retirement age,

they shall agree to his retirement pension coming into payment before his normal retirement age in accordance with this regulation in the circumstances set out in paragraph (2), (3) or (4), as the case may be.”
2. Paragraphs (2), (3) and (4) provided for the pension to be enhanced or not depending upon the level of incapacity. “Permanently incapable” was defined as lasting at least until the member's 65th birthday. “Gainful employment” was defined as “paid employment for not less than 30 hours in each week for a period of not less than 12 months”.
3. Before making a decision under Regulation 20, Birmingham were required (under paragraph (5) of Regulation 20) to obtain a certificate from an independent registered medical practitioner qualified in occupational health medicine (**IRMP**) as to whether, in his opinion, the member met the criteria in paragraph (1) above.
4. As at the date Mrs Hussain requested early retirement, Regulation 31 provided,
“(1) ... if a member who has left his employment before he is entitled to the immediate payment of retirement benefits (apart from this regulation) becomes permanently incapable of discharging efficiently the duties of that employment because of ill-health or infirmity of mind or body he may ask to receive payment of his retirement benefits immediately ...
 - (2) Before determining whether to agree to a request under paragraph (1), an authority must obtain a certificate from an independent registered medical practitioner ... as to whether in his opinion the member is permanently incapable of discharging efficiently the duties of the relevant employment ... and, if so, whether that condition is likely to prevent the member from obtaining gainful employment (whether in local government or otherwise) before reaching his normal retirement age, or for at least three years, whichever is the sooner.
5. Regulation 31 provided that "gainful employment" and "permanently incapable" should have the same meanings as in regulation 20.

6. Regulation 50 of the Local Government Pension Scheme (Administration) Regulations 2008 (SI2008/239) (as amended) provided,

“The first period for which any retirement pension under regulation 31 ... of the Benefits Regulations is payable begins on the date when the member became permanently incapable as determined under regulation 31 of those Regulations.”

Material facts

7. Mrs Hussain was employed by Birmingham until November 2009. Her employment was terminated on the grounds of “medical incapacity”. Mrs Hussain had been on sick leave prior to this.
8. On 21 May 2009, the Consultant Neurosurgeon treating Mrs Hussain, Mr Kay, wrote to her GP. He explained that an MRI scan had shown a moderate disc bulge at C5/6 but no compression of the cord or nerve roots. Mr Kay said a lot of Mrs Hussain’s symptoms were spondylolytic in nature and these tended to be less responsive to surgery. He said he would be happy to offer Mrs Hussain surgery but would be concerned that her symptoms would persist despite this. He also acknowledged that there were risks associated with surgery. Mr Kay said he had not made any arrangements for follow up but would be happy to see her if she wished to consider surgery. He suggested a referral to a local pain clinic.
9. On 1 October 2009, the Consultant in Pain Management treating Mrs Hussain, Dr Blaney, wrote to her GP. He said Mrs Hussain had been experiencing pain affecting her cervical spine, radiating into both arms, and into the occipital region. Dr Blaney said Mrs Hussain was experiencing frontal headaches and constant neck pain, the severity of which was related to activity levels. He described the treatment Mrs Hussain had received so far, including physiotherapy, a TENS machine and anti-inflammatory drugs. He referred to an MRI scan which had shown a small disc prolapse with some indentation of the anterior theca at C5-C6. Dr Blaney said surgery had been decided against and Mrs Hussain had been assessed by a pain psychologist. He said the psychologist had found that Mrs Hussain was “not willing to engage with any normal physical treatments” and had not arranged a follow up. Dr Blaney said he would arrange for Mrs Hussain to have some further physiotherapy.
10. Birmingham wrote to Mrs Hussain, on 12 November 2009, following a Final Case Hearing under their Managing Attendance Procedure. They said the purpose of the meeting was to consider a recent occupational health response, the impact and sustainability of her current absence, the reasons for her absence and the likelihood of her returning to work. Birmingham said their occupational health advisers had been unable to confirm that Mrs Hussain would be fit to return to work in the foreseeable future. They went on to say,
- “Over the last 12 months the level of your attendance has deteriorated further in line with the increased level of symptoms you have experienced. As you

yourself explained your medical condition is not curable and actually may deteriorate further at some stage.

Whilst I appreciate that the Pain Clinic is a tool to manage the level of pain you experience, it is not a cure.

The pain clinic treatment consists of medication, physiotherapy and counselling which you have already been receiving in different forms and has not worked for you. Therefore on the balance of probability this further treatment is unlikely to result in you maintaining the level of attendance required in line with the needs of the Service.

11. Birmingham said it was not possible for them to wait a further three months until the pain clinic treatment could be reviewed and they had no alternative but to terminate Mrs Hussain's employment. They said they wanted to leave the option of pursuing ill health retirement open to Mrs Hussain for a further six months.
12. Mrs Hussain wrote to Birmingham, on 7 January 2010, saying she would like to take ill health retirement. Birmingham responded, on 11 January 2010, saying they had been advised by their occupational health advisers that this was not possible. They said the opinion of the occupational health advisers was that Mrs Hussain did not meet the criteria for ill health retirement because her condition could improve following surgical intervention. Birmingham said Mrs Hussain might qualify for the early release of her deferred benefits on the grounds of ill health and gave her a contact name to write to if she wished to pursue this option.
13. Mrs Hussain wrote to Birmingham, on 26 January 2010, saying she wished to apply for ill health early retirement. She said she was enclosing letters from her Consultant Neurosurgeon, Mr Kay, Dr Blaney and her GP. Mrs Hussain said all three considered that surgical intervention would be of no benefit to her and may worsen her condition. She said they were prepared to provide further medical reports to help Birmingham make a decision. Birmingham responded by repeating the content of their letter of 11 January 2010.
14. Mrs Hussain's GP wrote to Birmingham, on 2 February 2010, pointing out that at no time had Mr Kay or Dr Blaney said that surgical treatment would be a solution for her. He offered to provide more comprehensive information. Birmingham wrote to Mrs Hussain, on 5 February 2010, repeating the content of their letter of 11 January 2010.
15. Mrs Hussain responded, on 9 February 2010, pointing out that Birmingham had said they would leave the option of pursuing ill health retirement open for six months. She said she wished to pursue this option and asked to be sent the appropriate application forms.
16. Mrs Hussain contacted the Pensions Advisory Service (**TPAS**) in December 2010. In response to an enquiry from TPAS, Birmingham said, prior to the termination of Mrs Hussain's employment, the question of ill health retirement had been investigated by an independent occupational health doctor. They said the LGPS Regulations required

the doctor to assess Mrs Hussain's capability to do her job but also to evaluate the likelihood of her being able to find any further employment before age 65.

Birmingham said it had been determined, based on medical information at the time, that Mrs Hussain did not meet the criteria. They said this decision had been sent to Mrs Hussain in January 2010 and, at the same time, it had been suggested that she might consider the option of having her deferred benefits paid early. Birmingham said they had not received a request to pursue this from Mrs Hussain. They said it was possible for Mrs Hussain to have her case reconsidered by their occupational health advisers and suggested that she make an application to start this process.

17. TPAS advised Mrs Hussain to begin the Scheme's internal dispute resolution (**IDR**) process. She wrote to Birmingham but was advised that, because more than six months had passed, she was not able to go down this route. Birmingham reiterated their advice that she apply for early payment of her deferred benefits. Mrs Hussain was told that she would need to complete application and consent forms and also that she would be required to pay associated medical costs up to £250.
18. In response to further enquiries by TPAS, Birmingham said Mrs Hussain had been seen by their occupational health advisers in September 2009. They said the advice received was that no decision could be taken regarding ill health retirement or medical redeployment because Mrs Hussain was still receiving treatment. Birmingham also said that, at an Employment Tribunal in May 2012, Mrs Hussain had said she was fit to work and asked to be reinstated in her former role.
19. TPAS wrote to Birmingham pointing out that, under Regulation 20, they were required to obtain a certificate from an independent registered medical practitioner (**IRMP**) before deciding whether Mrs Hussain met the criteria for ill health retirement. Birmingham subsequently agreed to consider an application for ill health retirement from Mrs Hussain. Mrs Hussain completed application and consent forms on 12 November 2012. The application form was annotated by hand "This is an application for ill health retirement from active service wef 10 November 2009".
20. Birmingham wrote to Mrs Hussain on 21 December 2012. They said they understood that she had been seen by Dr Southam at their occupational health advisers on 18 September 2009. Birmingham said Mrs Hussain had been deemed unfit for work at the time but had an appointment at a pain management clinic later that month. They said they were awaiting the outcome of treatment at the pain management clinic before making a decision regarding ill health retirement. Birmingham said Dr Southam had asked Mrs Hussain to notify her manager when she had completed treatment at the clinic, at which point he would have been prepared to commission the relevant report from the clinic. Birmingham explained that the report would have sought details as to the intended plan of management for her musculoskeletal condition and prognosis.
21. Birmingham went on to say Dr Southam had a copy of a letter from Mrs Hussain's neurosurgeon to her GP which indicated that it might be helpful for her to be referred to the local pain clinic to see if non-surgical strategies might help her symptoms. They

said, therefore, Dr Southam had determined that there was insufficient supporting evidence to demonstrate permanent incapacity for work and hence for ill health retirement. Mrs Hussain was informed that she could appeal.

22. TPAS requested sight of the IRMP's certificate, as required under Regulation 20. Birmingham sent them a copy of a letter, dated 13 December 2012, from Dr Southam. In this, he confirmed that he had seen Mrs Hussain on 18 September 2009 and that the outcome of treatment was awaited. He confirmed he had asked Mrs Hussain to notify her manager when she had completed treatment and that he would have commissioned a report at that point. Dr Southam referred to the letter from the neurosurgeon. He concluded,

“Therefore, in my opinion, there was insufficient supporting evidence to demonstrate permanent incapacity for work and hence ill health retirement when I saw this lady in September 2009 and my opinion remains unchanged.”

23. TPAS responded by pointing out that Birmingham had still not obtained the certificate required under Regulation 20. They also suggested that Dr Southam might not qualify as an IRMP for the purposes of Regulation 20 because of his prior involvement (Regulation 56 of the LGPS (Administration) Regulations 2008). Birmingham said they had been advised by the administering authority that it was not necessary for the IRMP to complete a certificate (M1) if ill health retirement was not supported.

24. In response to further correspondence from TPAS, Birmingham said (amongst other things) they had been advised by their occupational health advisers that it would not be practical to consider Mrs Hussain for ill health retirement now on the basis of her condition some four years previously. They said it could only be done by reference to a review of the occupational health notes which would elicit the same decision. Birmingham said, in addition to the difficulty of assessing how Mrs Hussain might have presented at that time, other considerations, such as adaptations or alternative work, were no longer available. They said their occupational health adviser, Dr Cathcart, had indicated he would not be able to carry out such an assessment. They said he would be able to assess Mrs Hussain's present condition and advise if she met the criteria for early payment of her deferred benefits. Birmingham said, if so, consideration could then be given to backdating the award if appropriate.

25. Acting on the advice of TPAS, Mrs Hussain opted to have an up to date assessment and for Birmingham to consider backdating her benefits. TPAS suggested there should be a two-tier assessment; one for 2009 and one for 2013. Mrs Hussain completed application and consent forms in April 2013.

26. Mrs Hussain's consultant neurologist, Dr Etti, wrote to Birmingham's Occupational Health Clinical Manager on 18 June 2013. He said he had first seen Mrs Hussain in January 2013 at the request of her GP. Dr Etti explained that Mrs Hussain had been under the care of Mr Kay and Dr Blaney. He said Mrs Hussain had been complaining of a variety of painful symptoms and a cervical spine MRI had shown minor degenerative changes. Dr Etti went on to say a brain MRI had shown some atrophy of

the front of Mrs Hussain's brain. He said it was not certain whether this was old or new and a further scan had been organised. Dr Etti said, if the scan revealed any abnormalities, Mrs Hussain would be referred to a psychiatrist, Dr Bentham, who had a particular interest in cognitive problems in people of working age. He suggested waiting for the results of the scan or an opinion from Dr Blaney. Dr Etti concluded,

"I cannot confirm at this time that [Mrs Hussain] is incapable of resuming the previous occupation and capable of undertaking gainful employment for at least three years. Mr Kay ... may be able to comment on this."

27. On the same day, Mrs Hussain's GP had also written to Birmingham's Occupational Health Clinical Manager. He outlined the history of Mrs Hussain's condition and explained the symptoms she was experiencing. The GP confirmed that he was awaiting the results of a scan but said Mrs Hussain had been referred for further brain imaging. He suggested this meant clarification was needed regarding the changes identified on the original scan. The GP concluded,

"Due to these medical problems, Mrs Hussain is incapable of resuming her previous occupation as a Social Worker. Future prospects for employment are dependent on the current investigations but for the foreseeable future, Mrs Hussain must be considered incapable of undertaking gainful employment."

28. On 4 July 2013, Dr Cathcart wrote to Mrs Hussain saying it appeared that Mrs Hussain was waiting for a brain scan and also to see a neurosurgeon about her neck. Dr Cathcart said he could not proceed with Mrs Hussain's application until she had had these appointments and the results were known.

29. Dr Etti wrote to Birmingham's Occupational Health Clinical Manager again on 1 August 2013. He said Mrs Hussain had had the scan and this had suggested she had a dysfunction of the brain which might account for her symptoms. Dr Etti said Mrs Hussain had been referred to Dr Bentham and expressed the view that it was unlikely that she would be able to return to gainful employment "any time soon".

30. On 14 August 2013, Dr Cathcart wrote to Mrs Hussain saying he had heard she was due to see Dr Bentham and asking her to notify him when she had.

31. Mrs Hussain saw Dr Bentham in November 2013. In a letter to Dr Etti dated 4 December 2013, Dr Bentham said Mrs Hussain had multiple physical and cognitive complaints, including memory and word-finding difficulty. He said he had been told that the cognitive problems had started approximately 18 months previously. Dr Bentham said he had been told that Mrs Hussain had had a fall down some stairs at work and sustained a neck injury, resulting in pain and weakness in her arms. He said she had ongoing problems with balance and co-ordination. Dr Bentham said Mrs Hussain had also had depression and was taking medication.

32. Dr Bentham went on to describe the outcome of cognitive tests undertaken on that day and also the results of an MRI scan undertaken in May 2013. He concluded,

“In summary, some aspects of Mrs Hussain’s clinical presentation are highly suggestive of physical brain disease, however she is significantly depressed and in pain, all of which might be significantly contributing to the cognitive deficit and her very poor ACE-R score. Both the MRI and SPECT scans strongly suggest an organic aetiology ...”

33. On 17 January 2014, Dr Bentham provided a report for Dr Cathcart. He provided the same information as in his letter to Dr Etti and went on to say,

“In summary, some aspects of Mrs Hussain’s clinical presentation are highly suggestive of physical brain disease. There is a history of cognitive and functional decline with very poor performance on cognitive testing that isn’t simply explained by language. Both the MRI and SPECT scans support an organic aetiology. There is also a history of early onset dementia in her father.

However Mrs Hussain is aged only 49 and the population prevalence of dementia at this age is only 3/10,000. Also the history suggests her father’s illness was due to stroke disease which can be confidently excluded as the cause of Mrs Hussain’s difficulties. Mrs Hussain obviously functions better than her very low cognitive score would predict, She is significantly depressed and in pain, all of which might be significantly contributing to the cognitive deficit and her very poor ACE-R score.

So to conclude, whilst there is no doubt that Mrs Hussain is significantly cognitively impaired, the cause of this currently remains unclear, consequently I am unable to give an opinion on her long term prognosis.”

34. In July 2014, on the advice of TPAS, Mrs Hussain submitted a complaint under the IDR procedure. This referred to both her eligibility for ill health retirement in 2009, under Regulation 20, and her application for the early payment of her benefits under Regulation 31. In response, Birmingham said she was out of time to submit a complaint about her eligibility in 2009. They said their occupational health advisers were still waiting for reports from Dr Blaney and Dr Benson (*sic*) in order to consider her eligibility under Regulation 31.
35. Dr Bentham wrote to Dr Cathcart again on 16 October 2014. He said he had seen Mrs Hussain on three occasions. Dr Bentham said Mrs Hussain had been seen by a Professor of Psychiatry who had confirmed that she had a depressive disorder but that it was secondary to an underlying physical brain disease. Dr Bentham explained that repeat tests had shown a decline in Mrs Hussain’s condition. He said he had concluded that Mrs Hussain had dementia due to a neurodegenerative brain disease. Dr Bentham said Mrs Hussain was significantly impaired both cognitively and functionally and was clearly unfit for work. He said there were no treatments currently available which had any prospect of improving her clinical state to the level at which she would be fit for any form of paid employment in the future.

36. On 27 October 2014, Dr Cathcart wrote to Birmingham,

“Please find enclosed the completed form M1(D) in respect of this lady. I have now received detailed specialist information confirming that very sadly Mrs Hussain has an irreversible brain disease which is likely to be progressive. In the circumstances it is entirely correct that she should be considered for early release of preserved pension benefits.”

37. On the form, Dr Cathcart had entered 26 April 2013 as the date on which Mrs Hussain had become permanently incapable of discharging efficiently the duties of her former employment.

38. Birmingham subsequently asked Dr Cathcart to consider whether the benefits should be backdated to 10 November 2009. He responded,

“I confirm that Mrs Hussain was indeed unwell when she left the council’s employ in 2009 but at that stage no diagnosis had been made and it is not the case that she would have met the criteria for ill health retirement at that point. Indeed it is only quite recently that we have established a definite diagnosis for her condition which brings with it the medical knowledge that her condition is permanent and she will remain permanently unfit for work in the future.”

Summary of Mrs Hussain’s position

39. Mrs Hussain says Birmingham have not considered her eligibility for benefits under Regulation 20 properly. In particular, she says that they failed to obtain a certificate from an IRMP as required by Regulation 20(6).

Summary of Birmingham City Council’s position

40. Birmingham have made the following points:

- Mrs Hussain was dismissed on the grounds of medical incapability on 10 November 2009. She had been on sick leave and was referred to their occupational health advisers. One of the questions that is always asked in such cases is whether it would be appropriate to start the ill health retirement process. In Mrs Hussain’s case, their occupational health advisers did not feel that the ill health retirement route was appropriate at that point and therefore it was not pursued. As ill health retirement was not considered the appropriate route at that time, a certificate from an IRMP was not required.
- Following the termination of Mrs Hussain’s employment, she was sent a statutory notification setting out the reason and date of her dismissal and confirming her benefits were deferred. This notification contained details of the right of appeal. They do not keep copies of individual letters; only a record of the date sent. They have provided a copy of the template.
- Mrs Hussain did not use the IDR process to appeal the decision to award deferred benefits within the required six months.

- Mrs Hussain's case was reviewed in 2012 and the IRMP was asked to consider ill health retirement as at 10 November 2009. He could not support this. Therefore the application was refused.
- Following the decision to pay Mrs Hussain's deferred benefits early, they asked the IRMP to consider whether this decision could be back dated to 10 November 2009. They refer to Dr Cathcart's response.
- The overriding criterion to qualify for ill health retirement is that the individual must be deemed to be permanently (to age 65) incapable of fulfilling his or her substantive role. For permanent incapacity to be demonstrated, all possible treatment options must have been fully and energetically explored. Where this is clearly not the case, there is no rationale for referring the case to an IRMP. This is how they have operated since the requirement for the IRMP was introduced in 2002. It is in accordance with guidance they have been given from the administering authority.
- They refer to a statement by Mrs Hussain, at an employment tribunal in May 2012, that she was fit to work.

Conclusions

41. In order for Mrs Hussain to receive a pension under Regulation 20, Birmingham had to determine to terminate her employment on the grounds that:
 - her ill-health or infirmity of mind or body rendered her permanently incapable of discharging efficiently the duties of her employment with them; and
 - she had a reduced likelihood of obtaining any gainful employment before her normal retirement age.
42. Before making this decision, Birmingham had to obtain a certificate from an IRMP as to whether, in his opinion, Mrs Hussain met the above criteria. Birmingham did not obtain such a certificate and say this was because ill health retirement was not considered the appropriate route at that time. However, this is, itself, a decision under Regulation 20 and an appropriately certified opinion from an IRMP should have been obtained before it was made.
43. Birmingham terminated Mrs Hussain's employment on the grounds that her level of attendance had deteriorated as a result of the symptoms she was experiencing. They said the pain management treatment she had been receiving had not worked for her and, on the balance of probability, this further treatment was unlikely to result in her maintaining the required level of attendance. On the question of ill health retirement, Birmingham said that they wished to leave the option open to Mrs Hussain for six months. There was no reference in Birmingham's letter to having determined that ill health retirement was not the appropriate option at that time or the reasons for this. Mrs Hussain was left with the impression that no decision had been made regarding

ill health retirement for her and that it was open to her to request this at some point in the following six months. This was not an appropriate way of dealing with her case.

44. If, as Birmingham now appear to suggest, they had determined that ill health retirement was not appropriate, Mrs Hussain should have been told this and given reasons. It would then have been open to her to appeal this decision. Birmingham say Mrs Hussain did not appeal the decision to award deferred benefits within six months. This is a reference to Regulation 58 of the Administration Regulations which provided for a member to apply to a specified person for a decision in a disagreement about a matter in relation to the LGPS; such an application should have been made within six months of the date of the decision about which there was disagreement. Mrs Hussain did not *appeal* within the six months because she was told that the option of pursuing ill health retirement had been left open. Consequently, she *applied* for ill health retirement within the six months. There was, in any event, provision, under Regulation 58, for the specified person to extend the six month period. Given the circumstances, it would have been appropriate to consider this.
45. When Mrs Hussain requested ill health retirement just two months after her employment had been terminated, she was told that this would not be possible. Birmingham said their occupational health advisers were of the opinion that her condition would improve with surgical intervention and, as a result, she did not meet the criteria for ill health retirement. Perhaps somewhat surprisingly, Birmingham suggested that Mrs Hussain might qualify for the early payment of her deferred benefits on the grounds of ill health. I say surprisingly because the qualifying conditions for early payment of deferred benefits were not so very different from the ill health criteria in Regulation 20; both required the member's incapacity to be permanent. If Birmingham were of the view that Mrs Hussain's condition was likely to improve, they could not have thought that she would be eligible for the early payment of her deferred benefits either.
46. When Mrs Hussain submitted evidence indicating that her treating physicians did not consider surgery appropriate, Birmingham simply repeated what they had already said. They gave no indication that they had even considered the additional evidence Mrs Hussain had provided. If they took the view that this additional evidence did not alter their decision, they should have explained this and given Mrs Hussain their reasons. As it was, the evidence suggests that Birmingham merely adopted the advice from their occupational health advisers without giving any thought to the alternative evidence. Whilst it was for Birmingham to make a decision under Regulation 20 and it was open to them to accept the advice from their own doctors, they should not have done so blindly.
47. At the very least, Birmingham should have satisfied themselves that their advisers had not made any errors or omissions of fact. They were then expected to weigh up the available relevant evidence before making a decision. They may, of course, attach little or no weight to some of the evidence, including the opinions of Mrs Hussain's own doctors. However, they should have reasons for doing so and be able

to explain these to Mrs Hussain. This is particularly so when they had decided to accept advice about treatment options from their own doctors which was contrary to the advice given by Mrs Hussain's doctors. There is no evidence that Birmingham went through this process.

48. I note that Birmingham informed Mrs Hussain that, in order to apply for early payment of her deferred benefits, she would have to complete forms and would be required to pay associated medical costs up to £250. Any question as to whether a person is entitled to a benefit under the LGPS must be decided by the employing authority which last employed him/her. In Mrs Hussain's case, this was Birmingham. The Regulations also required them to seek a certified opinion from an IRMP before making a decision. There was no provision for them to charge Mrs Hussain for any of the costs of seeking appropriate medical evidence in order that they should fulfil their statutory responsibility; that is, to make a properly informed decision in accordance with the Regulations.
49. In a response to enquiries by TPAS, Birmingham said Mrs Hussain had been seen by their occupational health advisers in September 2009. They said the advice received was that no decision could be taken regarding ill health retirement or medical redeployment because Mrs Hussain was still receiving treatment. This was not the correct approach. There is no requirement under the LGPS Regulations for the member to have completed treatment before they can be considered for ill health retirement. The IRMP should have been asked to give an opinion, on the balance of probabilities, as to the likely efficacy of any continuing or potential treatment.
50. In subsequent correspondence, Birmingham said that Mrs Hussain had been deemed unfit for work in September 2009 but was awaiting treatment at a pain clinic. They said they had been waiting for the outcome of this treatment before making a decision as to whether ill health retirement was appropriate. Birmingham said Dr Southam had asked Mrs Hussain to notify her manager when she had completed treatment at the clinic, at which point he would have been prepared to commission the relevant report from the clinic. I have already explained that it was not appropriate to defer making a decision on the grounds that treatment was ongoing. Moreover, in their letter of 12 November 2009, that Birmingham accepted that the treatment Mrs Hussain had and was receiving at the pain clinic was not going to result in her being able to resume her duties with them which was inconsistent with their earlier reasoning and should therefore have prompted a reconsideration of it.
51. Birmingham then said Dr Southam had seen a letter from Mr Kay to Mrs Hussain's GP in which he recommended she be referred to a pain clinic. They said it was for this reason that Dr Southam had determined that there was insufficient evidence to say that Mrs Hussain was permanently incapacitated. I note that the letter from Mr Kay recommending referral was dated May 2009; that is, some months before the decision to terminate Mrs Hussain's employment was made. Dr Southam confirmed this in his letter of 13 December 2012. Not only is this inconsistent with what was said

in Birmingham's November 2009 letter but, if this was the basis for Dr Southam's opinion, Birmingham should have asked him to obtain more up to date information.

52. I note Birmingham's comment that, at an Employment Tribunal in May 2012, Mrs Hussain had said she was fit to work and asked to be reinstated in her former role. Even if this was Mrs Hussain's contention, it does not amount to medical evidence about her state of health either at the time or in 2009.
53. In further correspondence with TPAS, Birmingham said that it would not be possible to consider Mrs Hussain for ill health retirement four years after her employment had terminated. They said it could only be done by reference to a review of the occupational health notes which would elicit the same decision. They also said Dr Cathcart had said he could not undertake such an assessment. There are clearly difficulties in assessing a member's eligibility for ill health retirement retrospectively. The doctors would have to be asked to give an opinion which does not rely upon the benefit of hindsight. However, where the employer has failed to make the decision properly at the appropriate time, as is the case here, the member should not be further penalised simply on the basis that the decision is now more difficult to make.
54. Nor should the evidence be confined to a review of existing occupational health records. It is the case that the evidence which can be taken into account must relate to the relevant date (November 2009). However, this does not preclude seeking additional evidence provided that it is made clear to the medical advisers that they are being asked to say (so far as is possible) what their advice would have been in 2009. This is, after all, what Dr Cathcart went on to do.
55. Dr Cathcart agreed Mrs Hussain had been unwell when her employment had terminated but said no diagnosis had been made at that time and, for this reason, it would not have been possible to say she was permanently incapacitated. Mrs Hussain had clearly been unwell for some time when the decision was made to terminate her employment. It is true that the current diagnosis of dementia due to a neurodegenerative brain disease had not been made by that date. However, lack of a definite diagnosis should not automatically be a bar to ill health retirement.
56. The questions posed by the LGPS Regulations can be summarised as follows:
 - Is the member more likely than not going to be unable to discharge efficiently the duties of his/her current employment by reason of ill health at least until age 65, and
 - Does he/she have a reduced likelihood of obtaining any gainful employment before normal retirement age?
57. It is undoubtedly easier for the doctors to answer these questions if they have a definite diagnosis. However, where a member is clearly unable to discharge their duties by reason of ill health at the time employment ceases, the question surely becomes how likely is it that their condition will improve sufficiently to enable them to

resume such duties. This does not appear to have been considered by Dr Cathcart and Birmingham did not seek clarification from him.

58. I do not find that Birmingham have given proper consideration to Mrs Hussain's eligibility which amounts to maladministration on their part. Mrs Hussain has suffered injustice because it has not been established whether or not she is entitled to benefits under Regulation 20. I am upholding her complaint on this basis.
59. The proper course of action is now for me to remit the decision as to Mrs Hussain's eligibility for a Regulation 20 pension for Birmingham to review; not to come to a decision of my own. My doing so should not be seen as any indication that I think Mrs Hussain should have been granted a pension under Regulation 20; that decision remains one for Birmingham to make. They will need to make a fresh decision and, before doing so, they will need to seek further advice from an IRMP who has not previously been involved in the case.
60. It has taken over four years for Mrs Hussain to reach this point and she now faces a further period of uncertainty while Birmingham review her case. This will, undoubtedly, have caused Mrs Hussain a great deal of distress and inconvenience. I find that it is only right that this should be recognised by payment of some modest compensation. I am directing payment of a sum which is higher than usual in recognition of the particular circumstances of Mrs Hussain's case and the fact that Birmingham have done so little to make things any easier for her.

Directions

61. Within 14 days of the date of this determination, Birmingham will obtain a further certified opinion from an IRMP. The IRMP should be asked to state whether, in his opinion, Mrs Hussain met the criteria set out in Regulation 20(1) in November 2009. If it is his opinion that she did not, he is to be asked to give reasons as to why he would, at that time, have considered it more likely than not that her condition could have been expected to improve before age 65 such that she could not be considered permanently incapacitated.
62. Within 14 days of the date of receipt of the IRMP's opinion, Birmingham are to review Mrs Hussain's case. They are to provide her with a written decision setting out their reasons.
63. If the decision is that Mrs Hussain was eligible to receive a pension under Regulation 20(1), Birmingham will need to determine the level of that pension. They will need to pay arrears back dated to November 2009, together with interest as provided for under the LGPS Regulations. Allowance can be made for any payments Mrs Hussain has already received.
64. Within 14 days of the date of this determination, Birmingham will pay Mrs Hussain £1,000 in recognition of the unnecessary distress and inconvenience she has suffered in consequence of the failure to properly consider her eligibility for a pension under Regulation 20.

PO-6196

Karen Johnston

Deputy Pensions Ombudsman
15 September 2015