PO-8431

Ombudsman's Determination

Applicant	Mrs S
Scheme	Local Government Pension Scheme (**LGPS**)
Respondents	Croydon Council (**Croydon**)

Outcome

1. I do not uphold Mrs S' complaint and no further action is required by Croydon Council.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs S has complained that she was not awarded ill health retirement when her employment was terminated in January 2014.

Background information, including submissions from the parties

Background

4. In November 2012, Mrs S slipped and injured her knee whilst at work. In December 2013, her employer (the **School**) wrote to Mrs S confirming their decision to terminate her employment on the grounds that her level of sickness absence was unacceptable and she was unable to fulfil the terms of her employment contract. Mrs S' employment was to cease on 11 January 2014. The School's letter recorded that it had been agreed that a request would be made to Croydon to consider ill health retirement, "subject to the agreement by Occupational Health".

5. At the time Mrs S' employment ceased, the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended), applied. Extracts from the relevant regulations are provided in Appendix 2.

6. As required by the LGPS regulations, Mrs S' case was referred to an independent registered medical practitioner (**IRMP**), Dr Hughes. Dr Hughes concluded that Mrs S' condition did not render her permanently incapable of discharging efficiently the duties of her employment with the School because there was scope for functional

improvement with treatment. He provided a report and ticked a box on a pro-forma to that effect. A summary of Dr Hughes' report is provided in Appendix 1.

7. On receipt of Dr Hughes' report and certificate, Croydon wrote to Mrs S saying Dr Hughes had found that she did not meet the criteria for any tier of ill health retirement under the LGPS. They provided a copy of Dr Hughes' report.

8. Mrs S appealed under the internal dispute resolution (**IDR**) procedure. She referred to a report provided by Croydon's occupational health adviser (Dr Cheng) dated 19 November 2013 (see Appendix 1). Mrs S said, in this report, Dr Cheng had said her symptoms were chronic and required long term input, and she was unlikely to be fit for meaningful work for the foreseeable future. She said Dr Hughes had said, in her meeting with him, that her condition was likely to last for several years. Mrs S also mentioned that she had been awarded a disability benefit, in January 2014, by the Department for Work and Pensions (**DWP**).

9. Croydon have appointed an external adjudicator to consider stage one applications under the IDR procedure. He issued a decision on 17 July 2014. Amongst other things, the adjudicator noted that Dr Hughes had completed an appropriately worded certificate indicating that, in his opinion, Mrs S was not permanently incapable of discharging efficiently the duties of her former employment. He noted there was no reference, in Dr Hughes' opinion, as to whether Mrs S had a reduced likelihood of being capable of undertaking any gainful employment before her normal retirement age. The adjudicator decided that Croydon should seek clarification from Dr Hughes as to whether Mrs S had a reduced likelihood of being capable of undertaking any gainful employment before her normal retirement age.

10. The adjudicator went on to say it was not clear to him whether Croydon had made the decision required of them by the LGPS regulation or had treated the IRMP as the final arbiter. He said he had considered previous determinations by the Pensions Ombudsman and referred to a number of these. The adjudicator said he had seen no evidence that Croydon had used Dr Hughes' opinion as one piece of evidence in coming to a decision of their own. He expressed the view that the decision to refuse Mrs S early payment of her benefits on the grounds of ill health had been taken solely on the basis of the IRMP's certificate and not all the circumstances of the case. He referred the case back to Croydon.

11. On 17 September 2014, Croydon wrote to Mrs S saying that a panel had met to review her case. They said the panel had taken into account medical reports provided by her GP and specialist, and also Dr Hughes' report. Croydon said the panel had upheld the decision not pay ill health retirement benefits on the grounds that there was scope for functional improvement with treatment.

12. Mrs S submitted a further appeal. Croydon declined this appeal on the grounds that the medical evidence from Dr Hughes was clear in saying that, whilst she could not return to former duties immediately, future employment was possible. They said there was no medical evidence which contradicted this opinion.

Mrs S' submission

13. Mrs S says she injured her knee in an accident at work and was initially told that she would qualify for ill health retirement. She says that view changed following a report from Dr Hughes, who said her injury would recover and she should see some improvement. Mrs S says she has since received advice, from Mr Mitchell, to the effect that she is unlikely to recover within her working lifetime and is unfit for work. She says it was only after subsequent visits to her GP and Mr Mitchell that she was told she would be unable to return to work; by this time, Croydon had made their decision based on Dr Hughes' report.

14. Mrs S says Croydon did not fully consider her case after the stage one IDR decision and their decision was not evidence based. She challenges the view that there was further scope for symptomatic and functional improvement with treatment. She points out that, after four years of visits to hospital, physiotherapist, pain management and her GP, her condition showed no functional improvement and has now spread to her entire leg.

15. Mrs S asks why Croydon terminated her employment on the grounds of her absence levels without discussing redeployment. She says she does not understand why Croydon did not refer her back to Dr Hughes or their occupational health team to assist with her treatment and review her position.

16. Mrs S feels that Croydon should accept responsibility for her condition and should not have retracted their previous agreement to ill health retirement.

17. Mrs S says she has not been able to seek further employment and has not been able to claim unemployment benefit. She has been in receipt of industrial injury benefit but points out that this is considerably less than her previous salary. Mrs S says she has become severely restricted in her personal life, activities, mobility and general wellbeing. She says she has since been given a disabled parking permit by Croydon and is in receipt of a personal independence payment. She has explained that she has undertaken physiotherapy and attended pain clinics, and spent over £3,000 on private treatment, without seeing any improvement.

Croydon's submission

18. Croydon say a decision to pay ill health retirement benefits can only be made where independent medical advice is to the effect that the member is suffering from a condition which renders them permanently incapable of discharging efficiently the duties of their employment because of ill health. They say it must also be the case that the member has a reduced likelihood of being capable of undertaking any gainful employment before reaching their normal retirement age. They point out that Dr Hughes' view was that future employment was possible for Mrs S and no medical evidence to contradict this has been produced.

Adjudicator's Opinion

19. Mrs S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Croydon Council. The Adjudicator's findings are summarised briefly below:

    - The evidence indicated that initially Croydon had simply adopted Dr Hughes' opinion without coming to a properly reasoned decision of their own. However, they had reviewed Mrs S' case following the IDR decision and this review had addressed the earlier maladministration.

    - Dr Hughes' report, when read with the pro forma he had completed, was sufficient for the purposes of regulation 20. It was reasonable for Croydon to have relied on Dr Hughes' opinion when coming to their decision.

    - Mrs S had said she had been told, by Mr Mitchell, that she is unlikely to recover within her working lifetime. However, Mr Mitchell had not expressed this view in the reports he provided at the time Croydon were required to make their decision. Croydon's decision should be assessed by reference to the evidence which was available at the time.

20. Mrs S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs S provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mrs S for completeness.

Ombudsman's decision

21. Mrs S disagrees with Dr Hughes' view that, at the time her employment ceased, there was scope for her condition to improve. She points out that, after four years of hospital, physiotherapist, pain management and GP input, her knee has not improved; in fact it has worsened. However, this is applying the benefit of hindsight. Croydon were required to make a decision in 2014, based on the expected likelihood of Mrs S recovering sufficiently so that she would be able to discharge the duties she had undertaken for them. It is a balance of probabilities decision based on the medical evidence which is available at that time. The fact that Mrs S' knee has not improved, as expected, since is not evidence that Croydon's decision was wrong (at the time) or amounts to maladministration.

22. It is open to Croydon to accept the advice they receive from the IRMP unless there is a good reason why they should not; or should not without seeking clarification. The kind of reasons I have in mind are errors or omissions of fact or a misunderstanding of the relevant regulations on the part of the IRMP. There is no evidence of such error or misunderstanding by Dr Hughes. There was no reason why Croydon should not have relied on his advice in coming to their decision. I note Mrs S' references to the advice she says she received from Mr Mitchell. However, she acknowledges that she

did not receive this until after Croydon had made their decision. It was not, therefore, part of the available evidence against which the decision must be assessed.

23. Mrs S has raised queries relating to Croydon's decision to terminate her employment. These are not within my remit and I make no comment on them.

24. The evidence indicates that, following the IDR decision, Croydon reviewed Mrs S' case in a proper manner. Therefore, I do not uphold Mrs S' complaint.

Anthony Arter

Pensions Ombudsman
18 October 2016

Appendix 1

Medical evidence

Mr Sharma (SHO), 8 May 2013

25. Mr Sharma wrote to Mrs S' GP following a consultation. He noted Mrs S had been complaining of knee pain for six months. He noted x-rays and MRI were done in December 2012 and showed no evidence of any bony or ligamentous injuries. Mr Sharma said, on examination, Mrs S had minimal effusion of her left knee and tenderness over the medial collateral ligament. He noted her range of movement was normal and said the consultant orthopaedic surgeon had advised referral for physiotherapy.

Mr Al-Khatib (consultant orthopaedic surgeon), 19 June 2013

26. In a letter to Mrs S' GP, Mr Al-Khatib said he had reviewed Mrs S. He referred to an MRI scan in December 2012 and said this had not revealed any abnormalities apart from slight effusion. Mr Al-Khatib said he did not feel surgical intervention was needed and Mrs S could be managed with painkillers and anti-inflammatory medication.

Dr Clery (GP), 21 June 2013

27. In a letter to Croydon's occupational health physician, Dr Clery said Mrs S had presented in November 2012 with knee pain. She said an x-ray had shown minor degenerative changes but no fracture. Dr Clery quoted the results of an MRI scan undertaken in December 2012. She said Mrs S had last been seen in May 2013 and had been given analgesia. Dr Clery said Mrs S had been certified unfit for work for two months at that time. She said she was unable to predict when Mrs S would be fit to return to work.

Mr Mitchell (consultant orthopaedic surgeon), 31 July 2013

28. In a letter to Mrs S' GP, Mr Mitchell noted there had not been any improvement in Mrs S' knee since her fall and she had not managed to return to work. He noted there was now a legal case against the School. Mr Mitchell said,

> "[Mrs S] has a combination of problems sadly.
>
> The knee is behaving as though there has been a bone bruise but I cannot definitely see this on the MRI scan. She has lateral patellar maltracking which is a longstanding problem. She also has very profound cutaneous hypersensitivity and really presents mostly with a picture such as reflex sympathetic dystrophy or causalgia.
>
> The treatment really needs to be intensive physiotherapy and referral to the local Pain Clinic …

> In the fullness of time, she may need treatment for the patellofemoral joint but the regional pain issues need to be much better than they are now before anyone would consider this."

Dr Cheng (consultant in occupational medicine), 19 November 2013

29. In a memo. to Croydon's HR department, Dr Cheng said it was Mr Mitchell's opinion that Mrs S' symptoms were likely to be chronic and require long-term input to relieve the impact on her functionality. He said Mrs S was unlikely to be fit for any meaningful work for the foreseeable future. Dr Cheng said there was unlikely to be a significant change in Mrs S' knee condition until she had intensive physiotherapy and input from a pain clinic.

Dr Hughes (IRMP), 11 April 2014

30. Dr Hughes noted there was a documented history of Mrs S having slipped whilst at work. He said she described having felt a sharp blow to her knee, followed by pain and numbness. Dr Hughes said x-rays and MRI had shown an incidental ganglion and some patella misalignment but no cartilage or ligament damage. He noted that, despite rest, analgesics and physiotherapy, Mrs S' symptoms of burning pain, paraesthesia and hypersensitivity had persisted. He noted evidence of hyperaesthesia on examination but said it was encouraging that Mrs S' knee movements were full if a little stiff. Dr Hughes said Mrs S' orthopaedic specialist had diagnosed reflex sympathetic dystrophy (or causalgia) and he said the evidence supported this.

31. Dr Hughes noted Mrs S was experiencing difficulty sleeping and walked with a stick. He said she could only stand for less than five minutes and was unable to kneel on the affected knee. He noted she could sit for half an hour before needing to stretch and move. He noted she drove an automatic car but had had to give up walking her dog and needed assistance with shopping. Dr Hughes concluded,

> "In short this lady has experienced an injury to the left knee at work and has subsequent to this event developed evidence of reflex sympathetic dystrophy. Whilst at present she is certainly unfit to return to her normal duties as a classroom teaching assistant and lunch time supervisor I think on the current evidence available and the balance of probability, there is further scope for symptomatic and functional improvement with treatment in the future. The greatest success I think is likely to be achieved by her engaging with a multi disciplinary therapeutic approach. She tells me that she has recently been given a 15% industrial injury assessment by the department for work and pensions following this incident. I think there is scope for improvement over the next few years. I would certainly not wish to completely write off her future employment chances on medical grounds at this stage including working with children."

Mr Mitchell (consultant orthopaedic surgeon), 2 March 2015

32. Mr Mitchell wrote to Mrs S' GP following a consultation. He said he could see no new signs of pathology on the latest scan. Mr M said Mrs S remained hypersensitive over the front of her knee and he expressed the view that causalgic type pain was the root of the problem. He noted that Mrs S' local pain clinic had said that she did not have any form of regional pain syndrome but said this view had been reached after a brief consultation and no examination. He recommended referral to a consultant anaesthetist.

Appendix 2

The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (SI2007/1166) (as amended)

33. At the time Mrs S' employment ceased, regulation 20 provided,

> "(1) If an employing authority determine, in the case of a member who satisfies one of the qualifying conditions in regulation 5 -
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> (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
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> (b) that he has a reduced likelihood of being capable of undertaking any gainful employment before his normal retirement age,
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> 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.
>
> …
>
> (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.
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> …
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> (14) In this regulation-
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> "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
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> "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.”