PO-9253

Ombudsman's Determination

Applicant	Mrs B
Scheme	Barclays Bank UK Retirement Fund (**the Fund**)
Respondents	Barclays Bank (**Barclays**)

Outcome

1. Mrs B's complaint is upheld and to put matters right Barclays shall consider again whether Mrs B satisfied the criteria for ill health retirement at the date her employment was terminated and pay Mrs B £500 for distress and inconvenience caused.

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

Complaint summary

3. Mrs B's complaint is that she has been refused ill health retirement from the date her employment ended.

Background information, including submissions from the parties

4. Mrs B joined Barclays in late December 1988 and is an After Work (**AW**) member of the Fund.

5. Mrs B commenced long term sickness absence in June 2010. Her condition was diagnosed as fibromyalgia.

6. In July 2011, Dr Byars, an independent examining doctor, reported to AXA PPP Healthcare (**AXA**), Barclay's occupational health adviser, that there had been little change in Mrs B's condition since his last report in October 2010. He concluded that there was little likelihood in the foreseeable future of Mrs B returning to her former occupation.

7. On 26 August 2011, Dr Gray, an AXA occupational physician, gave her opinion that while Mrs B's current disability was not disputed she was not permanently incapable of carrying out any employment.

8. Dr Gray said it was reasonable to expect further improvement in Mrs B's condition with both medical and psychological evidence based interventions from her pain management specialists over time. While Dr Byars and Mrs B's GP were of the opinion that there was little likelihood of her returning to her former occupation, as she was actively engaged with Pain Management treatment and given her relatively short history, it was premature to say that she was permanently unfit for work.

9. On 11 October 2011 Barclays wrote to Mrs B terminating her employment with immediate effect on grounds of capability due to ill health. In the same letter Mrs B was notified that Barclays Ill Health Retirement Decisions Committee (**the Committee**) had determined that she did not meet the criteria for an ill health retirement pension – a copy of Dr Gray's report was attached, but not the Committee's decision.

10. Mrs B requested Barclays to provide her with a copy of all the medical records, including Dr Byars 18 October 2010 report, together with any other supporting documentation.

11. Mrs B appealed the Committee's decision in September 2013. Mrs B says that she was unable to submit her appeal earlier because of her poor health and depression. The grounds on which she appealed were that Dr Byars' 18 October 2010 report had not been referred to in Dr Gray's report and had not been included in the papers from Barclays.

12. Barclays replied on 1 October 2013. Barclays explained that:

    - Dr Byars October 2010 report was held by AXA, but had not been considered key information in Mrs B's ill health assessment because more current medical evidence was available (Dr Byars July 2011 assessment and the GP's June 2011 report).

    - Because it did not hold Dr Byars' report and the subject access request was made in respect of itself rather than AXA it had not been included with the papers provided to Mrs B.

    - While it was its practice only to review decisions made by the Committee if new evidence was provided, given that Mrs B felt an important medical report had not been sufficiently brought to the Committee's attention it had agreed to move her case forward to appeal.

13. As an alternative Mrs B was offered the opportunity to make a new application for ill health retirement, mistakenly on the grounds that she was still an active employee of Barclays and an active member of the Scheme. This was corrected on 31 October 2013.

14. Barclays asked AXA to review the pension assessment that was completed in August 2011. In a December 2013 report Dr Mason, an AXA occupational physician,

concluded that there was no reason to alter the opinion that was expressed at that time.

15. AXA sent a copy of Dr Mason's report to Mrs B and requested that she submit any factual changes.

16. In February 2014 Mrs B submitted to Barclays letters from Dr Biamou (Specialist in General Medicine), dated 16 January 2014, Dr Abdeddaim (Rheumatologist), dated 21 January 2014 and Mr Picard (Masseur and Kinesiotherapist), dated 28 January 2014, giving their opinions on her medical condition. In a covering letter Mrs B listed the medication she currently took. She said at night she rarely slept uninterrupted for more than an hour because all of her joints hurt and most days she experienced overwhelming tiredness and had to lie down. She said since 2007 she had taken medication every day for the pain.

17. Barclays obtained the opinion of Dr Tremlett, an AXA occupational physician. After considering the available medical evidence, from 2008 to 2014, Dr Tremlett gave his opinion that Mrs B was currently incapable of carrying out her occupation, any reasonable occupation or alternative work, but not permanently to the Fund's normal retirement age (60).

18. Barclays turned down Mrs B's appeal on the grounds that the Committee had reached the correct decision in September 2011, based on the facts and evidence available. Barclays said Mrs B's overall current medical situation had not changed and there was an anticipation of improvement which would allow her to return to work in the future.

19. Mrs B engaged the services of the Pensions Advisory Service (**TPAS**). In October 2014 TPAS asked Barclays to reconsider Mrs B's original claim and a new claim for ill health retirement and enclosed a medical certificate from Dr Abdeddaim dated 26 September 2014.

20. Dr Westlake, an AXA occupational physician, gave his opinion that Mrs B was currently medically incapable of carrying out her occupation, any reasonable occupation, or an alternative role, but not permanently.

21. On 10 December 2014 Barclays wrote to TPAS. Barclays said in order to consider overturning the appeal decision it would need evidence that there was no anticipation of improvement in Mrs B's condition. Barclays said Mrs B had submitted a brief certificate from her rheumatologist. In the opinion of its medical advisers, whilst the doctor had stated that Mrs B's condition was chronic and permanent he had used no reasoned arguments to support the conclusion that Mrs B should be regarded as a handicapped adult and seen as an invalid. Instead the doctor had mentioned the need for regular rheumatology follow up, treatment with kinestherapy and balneotherapy. There was no mention of what effect these treatments were expected to have and how they might affect Mrs B's prognosis. Additionally, there was no reference to any form of treatment for Mrs B's anxiety and depression, or the ruling

out of potential treatment. As a result its medical advisers had been unable to see any reason to change their view that there was anticipation of improvement in Mrs B's condition.

22. Mrs B says Barclays have based its decision on incorrect and incomplete information.

23. The relevant medical evidence pertaining to this case is provided in Appendix 1.

24. The relevant Fund Rules are provided in Appendix 2.

Adjudicator's Opinion

25. Mrs B's complaint was considered by one of our Adjudicators who concluded that further action was required by Barclays. The Adjudicator's findings are summarised briefly below.

- Barclays decision rested on incomplete medical opinions from AXA doctors: Drs Gray; Mason; Tremlett; and Westlake.

- Dr Gray gave her opinion that: although Mrs B's current disability was not disputed she could not be considered permanently medically unfit for work, because it was reasonable to expect further improvement of her condition with both medical and psychological evidence based interventions from her pain management specialists over time. But Dr Gray did not specify the treatments she had in mind, the improvement she expected from these; why, and over what timescale.

- Dr Mason noted that while a return to work was not anticipated in the foreseeable future further treatment was planned. Dr Mason said it was reasonable to expect improvement in Mrs B's condition with this treatment plan, even given the progress detailed between Dr Byars' assessments of 18 October 2010 and July 2011. As with Dr Gray, Dr Mason failed identify the treatment or say why he expected it would improve Mrs B's condition sufficient to mean that she was neither permanently incapable of carrying out her current occupation or any employment.

- Dr Tremlett considered the medical evidence from 2008 to 2014. He disagreed with the prognosis of Mrs B's treating doctors. He said there was no evidence that Mrs B had ever received suitable psychological support or treatment (apart from medication) for the impact of her symptoms, which he considered to be medically appropriate. However, Dr Tremlett did not specify the psychological support or treatment he had in mind, or why he considered it would enable Mrs B to be capable of returning to her occupation, or any other employment, before age 60. Dr Tremlett said evidence from research demonstrated a realistic expectation that individuals diagnosed with fibromyalgia could regain a degree of adaptation to the symptoms compatible with working. This was a generalised comment. He needed to say whether this was likely to be the case for Mrs B and why. In respect of the test for Incapacity Dr Tremlett said while it was currently probable that Mrs B would not be able to provide a regular and efficient service as a counter manager

(or similar), it remained reasonably likely that Mrs B would be able to resume office-based work, or a role that included a combination of desk-based and other tasks that did not involve lifting or very repetitive activities, before age 60. But Dr Tremlett failed to explain why he was of that opinion

- Dr Westlake said whilst incapacity for work seemed in little doubt, where the options for further treatment had not been fully explored, it was premature to speculate that Mrs B's current level of disability was permanent. As with the previous AXA doctors, Dr Westlake's opinion did not go far enough.

- In December 2014 Barclays said to TPAS, that in order to consider overturning the appeal decision they would need evidence that there was no anticipation of improvement in Mrs B's condition. That is too stringent. Improvement may be anticipated, but the expectation needs to be sufficient to mean that Mrs B is not likely to be permanently incapable of returning to her occupation and or any other work.

- Commenting on Dr Abdeddaim's September 2014 certificate, Barclays said it was brief and he had given no reasoned arguments to support the conclusion that Mrs B should be regarded as a handicapped adult and seen as an invalid. Instead the doctor had mentioned the need for regular rheumatology follow up, treatment with kinestherapy and balneotherapy. Barclays said there was no mention of what effect these treatments were expected to have and how they might affect Mrs B's prognosis. Additionally, there was no reference to any form of treatment for Mrs B's anxiety and depression, or ruling out of potential treatment.

- Given the apparent difference of opinion between the AXA doctors and Mrs B's treating doctors it would have been prudent if Barclays had asked AXA to contact Mrs B's treating doctors for this information, their comments, and to confirm, following consideration of what was said, whether it changed their opinion.

- For these reasons Barclays had not made a proper decision and should therefore (i) reconsider whether Mrs B satisfied the criteria for either lower level or higher level ill health retirement at the date her employment ended and (ii) pay Mrs B £500 for the inevitable significant distress and inconvenience the whole matter had caused her.

26. Barclays did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Barclays provided its 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 Barclays for completeness.

Ombudsman's decision

27. Barclays cites the case of *Edge v Pensions Ombudsman (1999) 4 All ER 546.* It says its decision can only be overturned where a) it has asked itself the wrong question or misdirected itself in law, or b) considered irrelevant factors or failed to consider

relevant factors, or c) reached a decision that that no reasonable body of trustees could reach. Barclays says the Adjudicator's findings do not appear to be on any of these grounds.

28. The *Edge* principles refer to the exercise of discretionary powers. Determining whether Mrs B is incapacitated is a finding of fact rather than the exercise of a discretion; whether or not to agree to the Member's retirement is at Barclays discretion. It is for that reason that the Adjudicator did not refer to the *Edge* principles.

29. Barclays refers to the case of *Suffolk County Council v Wallis (2004) EWHC 788 (Ch),* saying: "the judge commented that "it is impossible in [his] view to see how it can be said that the acts of [a medical practitioner] …can be said to be lain at the door of the [person responsible for the management of the scheme] so as to find them guilty of maladministration". Barclays says, nor does omitting to ask a medical practitioner to provide more detailed evidence for their opinion amount to maladministration.

30. Barclays says it is simply required under the Rules of the Scheme to obtain evidence from a registered medical practitioner as to whether the Member satisfies the Incapacity test or the HMRC test and make its decision following the proper consideration of the available evidence. Barclays says it is not required to request that registered medical practitioners provide "evidence-based reasons" as to why they have reached a particular view.

31. As the Adjudicator said in his Opinion the concern is with Barclays' decision making process and the medical evidence is reviewed in that context. It is open to Barclays to accept the opinion of its own medical advisers, unless there is a cogent reason why it should not such as a factual error or omission, or misunderstanding of the Fund's Rules.

32. While Barclays is not responsible for the acts of its medical advisers it is required to understand the reason(s) for their opinions. If there is a shortfall, such as an omission, in the medical adviser's report Barclays should not blindly accept it. As the decision maker Barclays is required to make a properly informed decision and not simply rubber stamp the adviser's opinion. If the evidence upon which the decision is based is flawed then it follows that the decision has not been properly made - *Gallop v Newport City Council [2013] EWCA Civ 1583.*

33. Barclays accepted the opinions of Drs Gray; Mason; and Westlake, without knowing the treatments the doctors had in mind, the improvement they expected in Mrs B's condition from these, and over what timescale. It accepted Dr Tremlett's opinion without knowing why he was of the opinion that it remained reasonably likely that Mrs B would be able to resume office-based work, or a role that included a combination of desk-based and other tasks. Conversely, Barclays dismissed the opinions of Mrs B's treating doctors in France citing a shortfall of information, without asking AXA to contact Mrs B's doctors for this information or their comments and to confirm after

receiving the responses whether it changed their opinion. This amounts to maladministration by Barclays.

34. Therefore, I uphold Mrs B's complaint.

Directions

35. To address the matters identified above:

- within 14 days of the finalised Opinion Barclays shall:
    - request a medical report from another AXA medical adviser, not previously involved, as to whether Mrs B satisfies the criteria (under the Incapacity and/or HMRC Test) for ill health retirement from the date her employment ended. If it is the medical adviser's opinion that Mrs B is not permanently incapacitated he/she should be asked to provide evidence-based reasons for why sufficient recovery is to be expected.
    - pay Mrs B £500 for significant distress and inconvenience caused.
- within 21 days of receiving the medical adviser's opinion Barclays shall decide and notify Mrs B if she is entitled to pension benefits from the date her employment ended.

Anthony Arter

Pensions Ombudsman

19 January 2017

Appendix 1

Medical Evidence

Dr Byars, 29 July 2011

36. Dr Byars said there had been little change in Mrs B's condition since his report of 18 October 2010. He understood that since that time Mrs B had seen a professor of rheumatology in Bordeaux who had essentially confirmed the diagnosis of fibromyalgia. A change in Mrs B's medication had upset her and she had been returned to her previous medication. She had now been referred by her GP in France to a Pain Management clinic.

37. Dr Byars said there appeared to be two aspects to her condition – fatigue and physical aches and pains (trunk, upper limbs and neck) which distracted her from concentrating. Dr Byars said Mrs B had also reported that she was unable to spend more than 15 minutes at a computer and that she had generalised weakness in her hands.

38. Dr Byars said there was little likelihood in the foreseeable future of Mrs B returning to her former occupation.

Dr Gray, 26 August 2011

39. In her report Dr Gray listed the medical reports that she was aware of as: Dr Byars' 29 July 2011 report and the GP's report of 7 June 2011. Dr Gray said the reports confirmed Mrs B's current functional limitation due to symptoms of pain, fatigue and poor concentration due to fibromyalgia. Dr Gray noted that Mrs B had been referred to a Pain Management service and the opinion of Dr Byars and the GP that there was little likelihood of Mrs B returning to her former occupation.

40. Dr Gray gave her opinion that while Mrs B was currently unable to carry out her current occupation or any other employment, it was not permanent. In explanation Dr Gray said:

    "[Mrs B] has had a diagnosis of fibromyalgia made by a professor of rheumatology within the last year, although she has had symptoms of this condition prior to her diagnosis. She has limitation of day to day activities due to pain and fatigue associated with her condition. She takes antidepressant and pain relieving medication to manage her symptoms. She has declared difficulty with her concentration. She has been referred to a Pain Management Service by her GP in France. Her GP and the independent medical examiner both state that she is unlikely to return to work.

    In my opinion, although current disability is not disputed, [Mrs B] cannot be considered permanently medically unfit for work on the balance of probability. This is because it would be reasonable to expect further improvement of her condition with both medical and psychological evidence based interventions from her pain management specialists over time."

Dr Mason, 4 December 2013.

41. In his report Dr Mason noted the medical evidence he had reviewed as Dr Byars' 29 July 2011 report and the GP's report of 25 November 2010.

42. Dr Mason gave his opinion that there was no reason to alter the opinion expressed by Dr Gray on 26 August 2011. Dr Mason noted that while a return to work was not anticipated in the foreseeable future further treatment was planned. Dr Mason said it would have been reasonable to expect improvement in Mrs B's condition with this treatment plan, even given the progress detailed between the independent medical assessments of 18 October 2010 and July 2011. He noted that this was one of Mrs B's key concerns in her appeal. Dr Mason said:

    "The fact that a return to work in the foreseeable future was not anticipated by the Independent Assessing doctor, is not the same as anticipating a return to work prior to her normal pension date. This is especially relevant given that [Mrs B] has many years of working prior to her pension date."

Dr Biamou, 16 January 2014

43. Dr Biamou said there had been no improvement in Mrs B health since she came under his care in July 2010. Mrs B continued to present with chronic pain affecting particularly both shoulders with widespread joint and muscular pain.

Dr Abdeddaim, 21 January 2014

44. Dr Abdeddaim confirmed the diagnosis of fibromyalgia with widespread joint pain, unresponsive to treatment over several months.

Dr Picard, 28 January 2014

45. Noted continued pain affecting Mrs B's shoulders and hips, poor sleep and depression, with no sustained response to treatment since February 2013.

Dr Tremlett, 31 March 2014

46. Dr Tremlett gave his opinion that while Mrs B's condition meant that she was currently unable to carry out her occupation or other work he did not consider this was likely to remain the situation until normal pension date.

47. Dr Tremlett noted the medical evidence that he had considered, which dated from October 2008 to the newest reports from Mrs B's treating doctors in France.

48. Commenting on the various reports, among other things, Dr Tremlett said:

    - The diagnosis of fibromyalgia had been made and confirmed repeatedly and a poor prognosis had been given which he disagreed with.

- He was concerned that there was no documentation about the musculoskeletal problems that had been diagnosed and treated in the past that would have been relevant to the assessment.

- There was no evidence that Mrs B had ever received suitable psychological support or treatment (apart from medication) for the impact of her symptoms, although this seemed to be medically appropriate.

- While Mrs B's symptoms were persistent the evidence from research demonstrated that there was a realistic expectation that individuals diagnosed with fibromyalgia could regain a degree of adaptation to the symptoms compatible with working.

- In respect of the Incapacity test, while it was probable that Mrs B would not be able to provide a regular and efficient service as a counter manager (or similar) currently, it remained reasonably likely that Mrs B would be able to resume office-based work or a role that included a combination of desk-based and other tasks that did not involve lifting or very repetitive activities, at some point during the next 16 years.

Dr Abdeddaim, 26 September 2014.

49. On the medical certificate Dr Abdeddaim summarised Mrs B as suffering from a chronic permanent illness, associated with pain affecting multiple joints together with anxiety and depression. He said that Mrs B required regular rheumatology follow up, treatment with kinestherapy and baineotherapy. Dr Abdeddaim said Mrs B's chronic condition merited her being regarded as handicapped and an invalid.

Dr Westlake, 27 November 2014

50. Dr Westlake among other things said:

- Mrs B was currently incapable of carrying out her occupation, any reasonable occupation or any alternative work, but not permanently.

- Dr Abdeddaim's medical certificate portrayed Mrs B as having a chronic illness, requiring regular follow up and needing two treatments, neither of which appeared to be evidenced based. No reasoned arguments had been made to support the conclusion that Mrs B should be regarded as handicapped and seen as an invalid and there was no reference to any form of treatment for Mrs B's anxiety and depression.

- Whilst incapacity for work seemed in little doubt, where the options for further treatment had not been fully explored, it was premature to speculate that Mrs B's current level of disability was permanent.

Appendix 2

As relevant the Fund's Rules for AW Members

51. Rule F6.1(c) provides that an AW Member can retire from service:

> "at any age at the discretion of the Bank ... if retirement is due to Incapacity or the AW Member satisfies the HMRC Test".

Incapacity

52. The Fund's Rules define 'Incapacity' (and 'Incapacitated') in relation to:

> "…an AW Member, the situation where the Bank considers him or her permanently and totally unable to carry out any employment;"

53. Rule F7.8 sets out the benefits payable on retirement and also provides that,

> "Entitlement to a benefit under the Rule is conditional on the Member having ceased to carry on his or her occupation and the Trustees and the Bank ... receiving evidence from a registered medical practitioner that the Member is, and will continue to be, unable to work in order to satisfy the criteria for Incapacity."

HMRC Test

54. The "HMRC Test " is defined as:

> "…the Member is and will continue to be medically incapable (either physically or mentally) as a result of injury, sickness, disease, or disability of continuing his or her current occupation and as a result of the ill-health ceases to carry on the occupation."

55. Entitlement under Rule F7.10 is conditional on:

> "(a) the AW Member having ceased to carry on his or her occupation
>
> (b) the Trustees and the Bank (and the Scheme Administrator if neither the Trustees nor the Bank are the Scheme Administrator) receiving evidence from a registered medical practitioner that the Member satisfies the HMRC Test;"