PO-22432

The letter accompanying this document explains what your options are depending on whether or not you accept my opinion. Please read the letter carefully and take action by the date given, or the investigation might come to an end.

Opinion by adjudicator for the Pensions Ombudsman

Applicant	Miss E
Scheme	Local Government Pension Scheme (**LGPS**)
Respondents	Derby City Council (**Derby**)
	Derbyshire County Council (**DCC**)

Outcome

1. I am authorised by the Pensions Ombudsman to give an opinion on the merits of complaints, whether or not they can be upheld and, if applicable, what should be done to put matters right.

2. I agree that this complaint should be upheld and, to put matters right, Derby should reconsider its decision to award Tier 3 benefits. In addition, Derby and DCC should jointly pay Miss E £500.

3. My reasons for reaching this view are explained in more detail in the section, "My findings".

Complaint summary and background

Complaint summary

4. Miss E disagrees with the decision to award her tier 3 ill health retirement benefits.

Background

5. The sequence of events is not in dispute, so I have only set out the key points in my Opinion. I acknowledge there were other exchanges of information between all the parties.

6. The relevant regulations are the Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended) (the **2013 Regulations**). Extracts from the relevant regulations are provided in Appendix 1.

7. Miss E was employed by Derby until June 2017. She retired on health grounds and was awarded Tier 3 benefits. The 2013 Regulations provide for three tiers of ill health retirement benefit depending upon the degree of incapacity. Briefly, Tier 3 benefits are awarded when the individual is considered likely to be capable of undertaking gainful employment within three years of leaving the employment.

8. As required by regulation 36, Miss E's case was referred to an independent registered medical practitioner (**IRMP**), Dr McIlroy. He provided a report dated 31 May 2017[1], having seen Miss E on 26 May 2017. Dr McIlroy said he had reviewed two job descriptions[2], occupational health records, a report from Miss E's GP dated 7 June 2017 and a bundle of hospital reports provided by Miss E at the consultation. Summaries of the medical evidence relating to Miss E's case are provided in Appendix 2.

9. Dr McIlroy expressed the view that Miss E was currently not fit for any work. He said she was impaired by low mood, poor and reduced concentration, pain and fatigue. Dr McIlroy said he had considered the available treatment for Miss E's recurrent moderate depression and ongoing fatigue and pain. He expressed the view that a major ongoing factor was a dispute with her employer. He thought that, if this was concluded and Miss E was able to actively engage in treatment, her functional capacity "should improve to some extent". However, Dr McIlroy did not think that Miss E would improve sufficiently so that she would be capable of either of the two roles under consideration. Nor did he think that she was immediately capable of any gainful employment.

10. Dr McIlroy completed a proforma certificate indicating that, in his opinion, Miss E met the eligibility criteria for Tier 3 benefits.

11. Derby wrote to Miss E, on 24 August 2017, informing her of Dr McIlroy's opinion and confirming that her reason for leaving would be amended to ill health retirement backdated to 24 June 2017.

12. Miss E submitted an appeal. She raised the following points:-

    - Dr McIlroy had not adequately described her impairments. He had not mentioned her fibromyalgia, breast cancer or chronic fatigue.

    - Two months before her appointment with Dr McIlroy, she had been assessed for Employment Support Allowance (**ESA**). She had been deemed eligible for the support group on the basis of her fibromyalgia alone. This suggested that, if all her disabilities were taken into account, she would not be able to work for a long time.

[1] Dr McIlroy refers to having carried out his assessment on 27 June 2017; indicating that his report may be incorrectly dated.
[2] Miss E's role was being made redundant and she was due to be considered for another role. However, she had been unable to attend for interview.

- She had been placed in the ESA support group for three years, which is the maximum allowed before a further assessment is required. This suggested that she was not expected to be able to work for at least three years.
- She had informed Dr McIlroy about her ESA assessment but he did not mention this in his report.
- Fibromyalgia had no cure and she was on the maximum medication. She was still severely disabled despite taking the medication. She described her symptoms.
- Dr McIlroy's reason for recommending Tier 3 appeared to be an expectation that her recurrent moderate depression would improve if her dispute with Derby was resolved. This would take time and she did not believe she would improve enough to go back to work in any capacity or within three years.

13. Miss E provided details of her medication, a report from a specialist physiotherapist and her ESA assessment (see Appendix 2).

14. Derby dealt with Miss E's appeal under the two-stage internal dispute resolution (**IDR**) procedure. It issued a decision, on 16 October 2017, not upholding Miss E's appeal. Derby acknowledged that Miss E was struggling with a series of medical conditions. It gave the following reasons for not upholding her appeal:-

    - A consultant's review had indicated that, in Miss E's case, most fibromyalgia trigger points were non-tender and investigations had given a normal result. Miss E had been discharged from the hospital.
    - The ESA assessment had concluded that Miss E had limited capacity for work. However, this conclusion had been reached without a physical examination during a 20 minute assessment.
    - An earlier assessment had indicated a poor personal health regime. It had noted Miss E's restricted mobility and use of a stick. It had recommended a phased return to work.
    - A review of Miss E's medication had set out side effects which could exacerbate her symptoms.

15. Derby acknowledged Miss E's reference to fibromyalgia being a long-term, incurable condition but pointed to the consultant's report indicating a normal result for her fibromyalgia.

16. Miss E submitted a further appeal. She made the following points:-

    - The consultant referred to by Derby had agreed that she had musculoskeletal pain which would fall within "the realms of fibromyalgia". She was discharged because there was nothing the consultant could do other than recommend medication, which he had done.

- With regard to the normal investigation results, there was no test for fibromyalgia. Tests were undertaken to eliminate other conditions; such as MS and arthritis. She had severe constant pain in four different areas of her body which indicated that she had fibromyalgia.

- Derby did not appear to have consulted the IRMP. Its decision maker was unlikely to be aware of the diagnostic process for fibromyalgia and had picked out parts of the consultants reports which supported his conclusion.

- Her ESA assessment did not include a physical examination because she was in significant pain and fatigued. Dr McIlroy had also not undertaken a physical examination.

- The earlier assessment referred to had been undertaken in 2014 when she had been recovering from breast cancer. She had returned to work in July 2014 on a phased basis.

- She had since reduced the amount she drank and smoked and had improved her diet. However, this had not had any effect on her fibromyalgia or depression.

- She understood that the side effects of her medication might be making some of her symptoms worse. However, she had been unable to find any other medication which worked as well; despite trying different combinations. Her current combination was the best for contributing least to her drowsiness and fatigue. She required the medication for her pain, her breast cancer and her depression. If it was contributing to and exacerbating her symptoms, there was nothing she could do about it.

17. Stage two of the IDR procedure is undertaken by DCC. It issued a decision, on 23 March 2018, and said:-

- Its role was to consider whether the decision made at stage one had considered all relevant facts and regulations, and whether the decision made and procedures applied had been impartial.

- It referred to regulation 35 and 36 of the 2013 Regulations.

- It was sympathetic to Miss E's circumstances and the reasons for her application.

- The framework for complaints did not allow for a determination to be made outside the provisions of the LGPS regulations.

- It upheld the stage one adjudicator's decision.

- As Miss E had been awarded Tier 3 benefits, payment of her benefits was already in place. After 18 months from the date of commencement, Derby would review payment of Tier 3 benefits and would require another certificate

from an IRMP. If it was determined that the likelihood of her returning to gainful employment had deteriorated, Derby may award Tier 2 benefits from the date of such determination.

Miss E's position

18. Miss E submits:-

- Following her assessment by the IRMP, she submitted more information about her assessment for ESA. This had confirmed that she was eligible for the support group for three years. She argued that, if the DWP thought she could not work for at least three years, she should receive at least Tier 2 benefits.
- Derby did not consult the IRMP before making its stage one IDR decision. Instead, it referred to letters from her consultants and drew the wrong conclusions.
- The IDR stage one decision was made by Derby's interim director of finance, who did not ask the IRMP's opinion or seek any medical advice. She does not believe that her complaint should have been decided by an adjudicator alone when that adjudicator has no medical qualifications.
- She did inform Dr McIlroy that she had been put in the ESA support group but, at that time, she had not received the report.
- The IDR adjudicator's reasons for his decision include a number of incorrect conclusions and misunderstandings, which indicates he had little understanding of her conditions.
- DCC only seemed to concentrate on the process undertaken by Derby and not the IRMP's conclusions. It did not ask the IRMP to reconsider his conclusions in the light of the additional evidence.
- DCC did not provide any evidence to support its decision to uphold the stage one IDR decision.

Derby's position

19. Derby submits:-

- Miss E was referred to an IRMP in line with the 2013 Regulations. He met with Miss E and carried out a file review. The IRMP was of the opinion that Miss E was permanently incapable of discharging the duties of her employment with Derby. However, he stated that, whilst she was not immediately capable of undertaking any employment, she was likely to be fit for gainful employment within a period of three years.
- It accepted the IRMP's opinion and dismissed Miss E on the grounds of ill health early retirement. The IRMP's opinion met the criteria for Tier 3 benefits.

- The IDR stage one adjudicator reviewed the process to ensure that the statutory requirements of the 2013 Regulations had been complied with. The adjudicator reviewed the IRMP's decision, together with medical evidence provided by Miss E. This consisted of the ESA assessment, a report by Dr Lingard[3] dated 31 January 2014 and a report by Ms Pickering dated 13 March 2014 (see Appendix 2). The adjudicator informed Miss E of his decision and provided his reasons.
- It is satisfied that it has complied with the statutory requirements of the 2013 Regulations.
- The IDR adjudicator had access to and considered Miss E's ESA assessment report. In addition, Miss E informed the IRMP of the details of the assessment and its outcome.
- The role of the adjudicator is to consider a case on the basis of all the evidence submitted by all parties. If he considered that he could not make a decision on the information provided, he may seek the opinion of an IRMP. The adjudicator did not consider this necessary in Miss E's case.

DCC's position

20. DCC submits:-

- It refers to regulations 35 to 37 of the 2013 Regulations.
- Its role, at stage two of the IDR procedure, is to determine whether it is satisfied that the first stage decision was reached in a sound and impartial manner having considered all relevant facts and regulations.
- It reviewed the documents considered by the stage one adjudicator and concluded that the stage one decision had been made properly.

My findings

21. It may help if I begin by explaining it is not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to which tier of benefits Miss E should receive under regulation 35. The Ombudsman is primarily concerned with the decision-making process. The issues considered include: whether the relevant regulations have been correctly applied; whether appropriate evidence has been obtained and considered; and whether the decision is supported by the available relevant evidence.

22. Medical (and other) evidence is reviewed in order to determine whether it supports the decision made. However, the weight which is attached to any of the evidence is

[3] The report dated 31 January 2014 was addressed to Dr Lingard (Miss E's GP) but was written by Dr Mathew, consultant rheumatologist.

for Derby to decide (including giving some of it little or no weight[4]). It is open to Derby to prefer evidence from its own advisers; unless there is a cogent reason why it should not or should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant regulations by the medical adviser. If the decision-making process is found to be flawed, the appropriate course of action is for the decision to be remitted for Derby to reconsider. It is on this basis that I have reviewed Miss E's complaint.

23. I note that Miss E has expressed concern that decisions may be made by individuals who have no medical qualifications. Regulation 36 (see Appendix 1) requires a member's Scheme employer to make a decision as to whether the member is entitled to benefits under regulation 35 and, if so, which tier. Before doing so, the employer must obtain a certificate from an IRMP. There is no specific requirement that the IRMP, or another IRMP, be consulted during the IDR procedure. The necessity or desirability of seeking further medical opinion at any stage after the initial decision will, therefore, depend upon the circumstances of the case in question.

24. Under regulation 35, in order to be eligible for any tier of benefits, Miss E had to meet two conditions. It is agreed that she met both conditions. The disagreement lies in which tier of benefits she was entitled to. Briefly, the requirements for each tier are as follows:-

Tier 1 The member is unlikely to be capable of any gainful employment before normal pension age.

Tier 2 The member is unlikely to capable of any gainful employment within three years of leaving employment, but is likely to be capable before reaching normal pension age.

Tier 3 The member is likely to be capable of gainful employment within three years of leaving employment.

25. Derby decided that Miss E was eligible for Tier 3 benefits. In other words, it decided that she was likely to be capable of gainful employment (as defined) within three years of leaving her employment with it. Its initial decision was based on Dr McIlroy's opinion. Although required to obtain a certified opinion from an IRMP, Derby is not bound by the IRMP's opinion. It should come to an independent decision of its own. In Miss E's case, the evidence does not suggest that Derby did anything more than simply accept Dr McIlroy's opinion.

26. Dr McIlroy had been provided with copies of Miss E's occupational health records. In addition, Miss E had provided him with further reports and letters from her treating physicians. These were listed in Dr McIlroy's report. He did not list Miss E's ESA assessment report and she has explained that she had not received it by the time of her consultation with Dr McIlroy.

[4] *Sampson v Hodgson* [2008] All ER (D) 395 (Apr)

27. Dr McIlroy said Miss E was impaired by low mood, poor memory, reduced concentration, pain and fatigue. He did not specifically refer to fibromyalgia. Dr McIlroy went on to say he had considered the available treatment for Miss E's "recurrent moderate depression and her ongoing fatigue and pain". He did not mention which treatment he was referring to. Dr McIlroy expressed the view that the ongoing dispute between Miss E and Derby was a "major ongoing factor". He thought that, if this was concluded and Miss E actively engaged with treatment and rehabilitation, her functional capacity should improve to some extent. He then clarified this by saying he did not think it would improve sufficiently for her to return to her previous role. Dr McIlroy concluded by saying he thought Miss E would be fit for gainful employment within a period of three years.

28. When notifying Miss E of its decision, Derby said Dr McIlroy had considered carefully the likelihood of her capacity for gainful employment improving with ongoing treatment. Again, there was no indication of what treatment had been considered. Derby does not appear to have sought any clarification from Dr McIlroy. Therefore, it was not possible to tell from Dr McIlroy's report or Derby's letter whether the treatment he was referring to was something which Miss E had been offered or had already tried. This did not put Miss E in a position to fully understand why Dr McIlroy had come to this conclusion or to prepare an informed appeal.

29. At stage one of the IDR procedure, the adjudicator said:-

    - A consultant's review had indicated that most fibromyalgia trigger points were non-tender and investigations had given a normal result.
    - The ESA assessment had concluded that Miss E had limited capacity for work. However, this conclusion had been reached without a physical examination during a 20 minute assessment.
    - An earlier assessment had indicated a poor personal health regime. It had noted Miss E's restricted mobility and use of a stick. It had recommended a phased return to work.
    - A review of Miss E's medication had set out side effects which could exacerbate her symptoms.

30. It is not clear, from the first point, whether the adjudicator was saying that he had some doubts as to whether Miss E was suffering from fibromyalgia. The adjudicator referred to the consultant's report indicating a normal result for Miss E's fibromyalgia. This is not an accurate summary of the report. Dr Mathews had said that investigations for inflammatory markers, biochemistry and immunology were normal. Miss E has made the valid point that the tests referred to were intended to eliminate other conditions; there is no specific test for fibromyalgia itself. This apparent misunderstanding on the part of the adjudicator may well have influenced his decision.

31. The adjudicator did agree that Miss E's ESA assessment had found she had limited capacity for work. However, he appeared to be reluctant to accept this conclusion on the basis that the assessment had taken only 20 minutes and there had been no physical examination. He appeared to overlook the assessor's reference to Miss E being in too much pain for an examination.

32. It is usually the case that an assessment undertaken for the purposes of a state benefit, such as ESA, does not assist with an assessment for ill health retirement. This is because the criteria for each are different and, in particular, an ESA assessment is not considering permanency of incapacity. However, in Miss E's case, the key question concerned the likelihood of her being capable of undertaking gainful employment (as defined) within three years of ceasing her employment. This was also largely what the ESA assessment aimed to determine. The results of the ESA assessment were, therefore, relevant to Miss E's case. In my view, it was not appropriate for the IDR adjudicator to dismiss this evidence on the basis of the time taken and the lack of physical examination; particularly when a valid reason had been given by the medical professional undertaking the assessment. It would have been prudent for the adjudicator to seek advice either from Dr McIlroy or another IRMP in the circumstances.

33. The IDR adjudicator also referred to a previous assessment in which a phased return to work had been recommended. Miss E has pointed out that this assessment had been undertaken in 2014 when she had been recovering from breast cancer. She has pointed out that she did return to work, in July 2014, on a phased basis. It is not clear, therefore, what relevance this assessment had to Miss E's circumstances in 2017.

34. The adjudicator then referred to the fact that certain of Miss E's analgesic medication was thought to be having a detrimental effect on her mood. I note that Dr Tandon mentioned this in two letters. However, Dr Tandon also acknowledged that the medication in question was needed due to the severity of Miss E's pain. It is not clear, from the IDR decision, what point the IDR adjudicator was making. It seems unlikely that he was suggesting that Miss E should cease her analgesic medication in order that her depression might improve; particularly when her own treating psychiatrist had not suggested this. However, it is not clear what relevance this issue was thought to have to the adjudicator's decision.

35. As indicated above, Miss E raised certain valid points in response to the IDR stage one decision. Having reviewed DCC's stage two decision, I cannot see that these were addressed.

36. Under regulation 77(4), a stage two decision takes effect as a decision of the Scheme employer or administering authority, as the case may be, except where the matter concerns the exercise of a discretion. A decision, under regulation 35, as to the tier of benefits which is appropriate is not the exercise of a discretion. DCC was required to consider which tier of benefits Miss E was eligible to receive. This required it to do more than simply consider whether Derby had followed due process. It could

reasonably be expected to address the points which Miss E had raised in response to Derby's stage one decision.

37. In view of the above, it is my opinion that the evidence does not support a finding that Derby's decision to award Tier 3 benefits was reached in a proper manner. Nor is it possible to say that the flaws in the initial decision-making process were adequately addressed by the IDR procedure. It is not evident that Miss E has been in receipt of the appropriate tier of benefits. On that basis, her complaint can be upheld.

Putting matters right

38. In order to put matters right, Derby should reconsider the decision to award Miss E Tier 3 benefits. It should do so within 28 days of being notified if this opinion is accepted by all parties. In order to properly reconsider the appropriate tier of benefits, Derby should seek further advice from Dr McIlroy or another IRMP. It should ask Dr McIlroy to clarify what treatment he had in mind in his initial report and ask him to comment on the ESA assessment. If Dr McIlroy is unavailable, Derby should seek advice from another IRMP, including his or her comments on Miss E's ESA assessment. The IRMP should be asked to give reasons for any conclusions drawn.

39. In addition, it is my view that the circumstances of Miss E's case warrant a payment for non-financial injustice in line with the Ombudsman's current guidelines. Derby and DCC should jointly pay Miss E £500 for distress and inconvenience.

Caroline Leal (Mrs)
Senior Adjudicator

22 January 2019

Appendix 1

The Local Government Pension Scheme Regulations 2013 (SI2013/2356) (as amended)

40. As at the date Miss E's employment ceased, regulation 35 provided:

"(1) An active member who has qualifying service for a period of two years and whose employment is terminated by a Scheme employer on the grounds of ill-health or infirmity of mind or body before that member reaches normal pension age, is entitled to, and must take, early payment of a retirement pension if that member satisfies the conditions in paragraphs (3) and (4) of this regulation.

(2) The amount of the retirement pension that a member who satisfies the conditions mentioned in paragraph (1) receives, is determined by which of the benefit tiers specified in paragraphs (5) to (7) that member qualifies for, calculated in accordance with regulation 39 (calculation of ill-health pension amounts).

(3) The first condition is that the member is, as a result of ill-health or infirmity of mind or body, permanently incapable of discharging efficiently the duties of the employment the member was engaged in.

(4) The second condition is that the member, as a result of ill-health or infirmity of mind or body, is not immediately capable of undertaking any gainful employment.

(5) A member is entitled to Tier 1 benefits if that member is unlikely to be capable of undertaking gainful employment before normal pension age.

(6) A member is entitled to Tier 2 benefits if that member -

(a) is not entitled to Tier 1 benefits; and

(b) is unlikely to be capable of undertaking any gainful employment within three years of leaving the employment; but

(c) is likely to be able to undertake gainful employment before reaching normal pension age.

(7) Subject to regulation 37 (special provision in respect of members receiving Tier 3 benefits), if the member is likely to be capable of undertaking gainful employment within three years of leaving the employment, or before normal pension age if earlier, that member is entitled to Tier 3 benefits for so long as the member is not in gainful employment, up to a maximum of three years from the date the member left the employment."

41. Regulation 36 provided:

> "(1) A decision as to whether a member is entitled under regulation 35 (early payment of retirement pension on ill-health grounds: active members) to early payment of retirement pension on grounds of ill-health or infirmity of mind or body, and if so which tier of benefits the member qualifies for, shall be made by the member's Scheme employer after that authority has obtained a certificate from an IRMP as to -
>
> (a) whether the member satisfies the conditions in regulation 35(3) and (4); and if so,
>
> (b) how long the member is unlikely to be capable of undertaking gainful employment; and
>
> (c) where a member has been working reduced contractual hours and had reduced pay as a consequence of the reduction in contractual hours, whether that member was in part time service wholly or partly as a result of the condition that caused or contributed to the member's ill-health retirement.
>
> (2) An IRMP from whom a certificate is obtained under paragraph (1) must not have previously advised, or given an opinion on, or otherwise been involved in the particular case for which the certificate has been requested.
>
> (2A) For the purposes of paragraph (2) an IRMP is not to be treated as having advised, given an opinion on or otherwise been involved in a particular case merely because another practitioner from the same occupational health provider has advised, given an opinion on or otherwise been involved in that case.
>
> (3) If the Scheme employer is not the member's appropriate administering authority, it must first obtain that authority's approval to its choice of IRMP.
>
> (4) The Scheme employer and IRMP must have regard to guidance given by the Secretary of State when carrying out their functions under this regulation and regulations 37 (special provision in respect of members receiving Tier 3 benefits) and 38 (early payment of retirement pension on ill-health grounds: deferred and deferred pensioner members)."