

Ombudsman's Determination

Applicant	The Estate of Mrs S (the Estate)
Scheme	Principal Civil Service Pension Scheme (the Scheme)
Respondents	The Cabinet Office Highways England

Outcome

1. I partly uphold this complaint and, to put matters right, Highways England shall pay the Estate an additional £1,000 to make a total award of £3,000 in recognition of the exceptional non-financial injustice it caused Mrs S.

Complaint summary

2. Mr S, as the executor of the Estate, has complained that Highways England mishandled Mrs S' application for ill health retirement pension (**IHRP**). He considered that Mrs S incurred financial loss because she was not granted a serious ill health commutation lump sum.

Background information, including submissions from the parties

3. Mrs S worked full time for Highways England as a Charging and Enforcement Policy Advisor. Mrs S was a member of the Nuvos section of the Scheme from 2011 until 1 April 2015, when she moved to the Alpha section of the Scheme.
4. Mrs S was diagnosed with primary breast cancer in January 2009. In December 2014, she was diagnosed with recurrent cancer. She was initially on sickness absence from 8 January until 2 August 2015. She then attempted to return to work but was unable to maintain attendance due to continued progression of her illness.
5. On 1 May 2015, Mr S took out a personal loan to support him and Mrs S financially. This was due to Mrs S losing half of her salary with effect from 7 July 2015. On 2 August 2015, Mrs S returned to work but was still having treatment and taking medication. From 23 August 2015, Mrs S went on sickness absence and did not return to work.

6. From 7 January 2016, Mrs S was on “nil pay” and ceased accruing pension. In March, and then in May 2016, Mrs S asked Highways England about the possibility of taking retirement on ill health grounds.
7. On 16 May 2016, Highways England requested pension estimates from the Scheme administrator, MyCSP. On 2 June 2016, MyCSP sent Highways England estimates for “Lower” and “Upper Tiers”, assuming Mrs S’ employment would end on 30 June 2016. The estimates were calculated on the basis that Mrs S would continue working and accruing pension. The estimates were as follows:-
 - The Lower Tier estimate showed a Nuvos pension of £1,590.82 per annum and an enhanced Alpha pension of £440.28 per annum payable from 1 July 2016.
 - The Upper Tier estimate showed Nuvos pension of £1,590.82 per annum and an enhanced Alpha pension of £8,016.85 per annum payable from 1 July 2016.
8. The estimates warned that, if any of the data MyCSP held for Mrs S changed, the figures would also change. The estimates also warned that Mrs S should not enter into any financial commitments on the basis of the figures provided.
9. On 3 June 2016, Mrs S completed the member section of the IHRP application form (**the Form**). In her application, Mrs S requested that her manager arrange a telephone call, or home assessment, with Health Assured (**HA**), the employee assistance programme provider. She said that the chemotherapy treatments were affecting her mobility and immune system. She also said that her cancer had spread and was resisting treatment.
10. Mrs S did not indicate in the Form that she wanted to see her general practitioner’s (**GP**) medical report before it was shared with HA. On 21 June 2016, Highways England referred Mrs S to HA for assessment. HA contacted her GP for further information on 12 July 2016. Relevant sections from Mrs S’ medical evidence are set out in Appendix 1.
11. On 26 July 2016, a doctor at HA, Dr Yew, completed the remaining details in the member section of the Form. He issued a report saying that he did not consider Mrs S was currently in a position to return to work or would be able to return to work in the long term.
12. On 4 August 2016, Highways England emailed Mrs S. It said that, on 27 June 2016, it had requested that the Scheme Medical Adviser (**SMA**) obtain a specialist report. However, it appeared this had not been requested. Mrs S subsequently gave her consent for her application to be submitted without further specialist reports being obtained.
13. On 15 August 2016, Highways England completed the employer section of the Form. On the same day, it wrote to HA and referred to Mrs S’ application, including the medical evidence. It said that it would not be appropriate to obtain additional evidence as this would result in further delays.

14. On 1 September 2016, Dr Saravolac, a SMA, issued her report. She certified that Mrs S had “suffered a breakdown in health”, which had resulted in total incapacity for employment. She said that this was likely to continue until at least normal pension age. Consequently, the criteria for the Upper Tier threshold were “likely to be met”. Relevant sections from the report are set out in Appendix 2.
15. On 12 September 2016, Dr Saravolac sent a severe ill health assessment certificate (**the Certificate**) to Highways England confirming approval for Upper Tier IHRP.
16. On 15 September 2016, Mrs S left employment. On 22 September 2016, Highways England forwarded the Certificate to MyCSP. However, it did not include the “Request for Services” form, which would have notified it of Mrs S’ last day of employment. On the same day, Highways England confirmed to MyCSP, in a separate communication, that Mrs S had left employment on 15 September 2016.
17. On 25 September 2016, MyCSP identified that some of Mrs S’ pensionable earnings and salary increases were missing from its records. So, it contacted Highways England for the information.
18. On 10 and 24 October 2016, MyCSP followed up its enquiry with Highways England. On 17 October 2016, Mrs S telephoned MyCSP for an update. MyCSP subsequently received information from Highways England on 1 and 7 November 2016.
19. On 9 November 2016, MyCSP issued Mrs S with a final estimate for Upper Tier IHRP. Mrs S was asked to complete and return the Application Form (**the Application**) that it had enclosed so that payment could be made to her. The estimate showed lower figures when compared to the previous estimates issued on 2 June 2016. The estimate showed:-
 - Nuvos pension of £1,590.82 per annum and a Lower Tier Alpha pension of £307.16 per annum.
 - Upper Tier Alpha pension of £4,482.04 per annum payable from 1 July 2016.
20. Mrs S subsequently completed and returned the Application; it was received by MyCSP on 16 November 2016. She opted to take the maximum lump sum.
21. On 24 December 2016, Mrs S died.
22. In January 2017, Mr S telephoned MyCSP and asked whether a lump sum death benefit would be payable from the Scheme. MyCSP advised that under the Alpha section of the Scheme, the death benefit lump sum was calculated as five times the annual pension less any benefits already paid. MyCSP said that it was possible no further benefits were due, as Mrs S had chosen the maximum lump sum.
23. On 7 January 2017, MyCSP paid Mr S a survivor’s pension. Around March 2017, Mr S contacted MyCSP to query whether he should have received a death benefit lump sum in addition to the survivor’s pension. MyCSP incorrectly advised Mr S that he was not entitled to a lump sum.

24. MyCSP has said that it had written to Mr S, on 10 January and 20 May 2017, regarding his entitlement to a lump sum death benefit. Mr S said he did not receive the correspondence.
25. Between March and 18 July 2018, Mr S raised concerns with MyCSP regarding the discrepancy in the pension figures in the estimates when compared with the pension paid to Mrs S.
26. On 23 July 2018, MyCSP wrote to Mr S and addressed his concerns. In summary it said:-
 - 26.1 Mrs S' Alpha pension was overstated in the estimates, as Highways England had not advised that Mrs S had been on nil pay from 27 January 2016. Consequently, she had ceased accruing pension.
 - 26.2 However, as discussed with Mr S in the telephone call in January 2017, the way the Alpha IHRP benefits were calculated had changed. A member who moved from Nuvos to Alpha and had a period of reduced or nil pay during their first 12 months of Alpha service, now had 'assumed pay' used to calculate the Upper Tier enhancement.
 - 26.3 This ensured that transitional members were not disadvantaged following their compulsory move into the Alpha section.
 - 26.4 This change in the legislation was retrospective and had been backdated to 1 April 2015, when Alpha came into effect. As it had previously explained, this meant that Mrs S' benefits required revision. As a result, Mrs S would have been entitled to a higher Alpha Upper Tier IHRP and arrears were now due to the Estate for the period 16 September 2016 to 24 December 2016. The pension arrears amounted to £1,406.50 and the arrears in respect of the retirement lump sum amounted to £34,196.61.
 - 26.5 It noted there was also a small change to Mrs S' Nuvos pension. This meant that an additional lump sum death benefit of £24,240.90 was due to Mr S as the beneficiary of the Estate.
 - 26.6 Pension arrears, amounting to £4,970.94, were due to Mr S.
 - 26.7 While it confirmed, during the telephone call, that Mr S' enquiry would be raised with the appropriate team, it was reasonable for him to have concluded that no lump sum death benefits would be payable. In light of this, it offered Mr S an ex gratia payment of £250 for the distress and inconvenience caused.
27. In October 2018, Mr S raised a formal complaint under the Scheme's Internal Dispute Resolution Procedure (**IDRP**). In his submissions, he said in summary:-
 - 27.1 There were delays in dealing with Mrs S' application for an IHRP.
 - 27.2 Highways England did not provide sufficient support to Mrs S regarding managing her attendance.

- 27.3 As a result of the above issues, Mrs S had suffered considerable financial loss of £21,539.30 in respect of the pension she could have received. He arrived at this figure on the basis of the annual pension that was paid following Mrs S' application and on the estimation that she could have been granted this award one and a half years earlier.
- 27.4 Had Mrs S been aware of the correct value of her pension at the time she made her pension choices, she would not have chosen to commute her pension for a lump sum payment of approximately £27,000.
- 27.5 He estimated that the arrears of the death benefit lump sum would amount to £24,751.33, on the basis that Mrs S would not have commuted her pension for a lump sum payment.
- 27.6 The member section of the Form was completed by Mrs S' GP; both he and Mrs S were present at the time. The GP said:
- “patient expected to survive 12 months if the current treatment continues to work but unlikely to survive if the current treatment fails or stops working”.
- 27.7 Mrs S died four months after the SMA's report of August 2016, and nine days after the first payment of IHRP was made. He wanted to know what information the SMA considered when arriving at the decision that Mrs S would survive beyond 12 months. Presumably, the SMA had all the latest reports to hand. Those reports indicated that Mrs S could possibly live for less than one year.
28. On 23 January 2019, MyCSP sent Mr S a response under stage one of the IDR. In summary it said:-
- 28.1 It noted that Mr S previously raised concerns with MyCSP regarding the calculation of Mrs S' IHRP benefits and payment of the death benefits. He subsequently said that MyCSP had sufficiently addressed those concerns.
- 28.2 It did not receive any correspondence regarding IHRP prior to 15 May 2016, when it received Mrs S' application.
- 28.3 Information on the IHRP process should be provided by employers, as detailed in the “Ill Health Retirement Procedural Guidance for Employers” (**the Guidance**), and the procedures detailed in the Civil Service Management Code. The Guidance advised that employers and MyCSP must use the SMA as the single source of advice to access IHRP. (The relevant sections of the Guidance are set out in Appendix 2).
- 28.4 IHRP should be considered as a last resort once all alternative avenues have been explored in relation to a member employed in any capacity. Employers

also used the services of occupational health therapists to provide support and advice in managing sickness absence.

- 28.5 HA completed the assessment with the sole purpose of providing its opinion on whether reasonable adjustments needed to be made to Mrs S' working arrangements. HA did not provide an opinion on her eligibility for an IHRP.
- 28.6 The HA report said that a return to work may be achievable following appropriate treatments. In hindsight, it was clear that this was not the case. It appeared that on the basis of HA's advice, Highways England believed the application for an IHRP was not required due to the possibility of Mrs S returning to work. It considered that this was a reasonable assumption.
- 28.7 Although Highways England may not have considered that an application for IHRP was necessary, this did not mean it could not have advised Mrs S of the IHRP process.
- 28.8 The Guidance stated that employers must refer cases to the SMA when the manager of the person concerned considers that the cause of poor performance, or poor attendance, may make retirement on medical grounds appropriate. The Guidance also stated that employers must inform staff of their right to apply for IHRP and have their case referred to the SMA for medical assessment.
- 28.9 This was because the formal application for IHRP may be made by the employer or the member. Members applying for IHRP must do so through their employer. In these circumstances, it was not necessary for HA to recommend referral to the SMA. So, despite the HA's opinion, Mrs S could still have made an application for IHRP had she been aware of this.
- 28.10 It asked Highways England if it had previously informed Mrs S of the option to apply for IHRP. Highways England confirmed that it had no record of this option being suggested to Mrs S. It also confirmed that the first time it discussed this with Mrs S, was after she raised it in 2016. In light of this, it upheld this aspect of Mr S' appeal.
- 28.11 It then considered whether this would have had an impact on Mrs S' IHRP benefits. It referred to criteria for two tiers of IHRP:
- The criterion for Upper Tier was that a member would not be able to reasonably obtain any form of employment due to their medical condition. If Upper Tier was granted, the accrued pension benefits were paid inclusive of enhancement in respect of their employment they would have attained had they remained in it until their Normal Pension Age (**NPA**).
 - The criterion for Lower Tier was that a member's medical conditions prevent them from working in their current role but may be able to obtain employment in another capacity.

- 28.12 Based on the medical advice contained in the HA's report of March 2015, there was a chance that, had Mrs S applied for IHRP at the time, the severity of her condition may not have met the criteria for Upper Tier. But this was a hypothetical scenario.
- 28.13 It could be argued that the earliest Highways England should have considered an application for IHRP would have been the point that Mrs S had exhausted her sick pay, which was around January 2016.
- 28.14 Faced with the prospect of not receiving any further pay, it was reasonable to say Mrs S would have attempted to return to work, if she had been medically fit to return, to avoid potential financial hardship. The fact that she was not able to, in its opinion, should have prompted Highways England to consider retiring Mrs S on the grounds of ill health and initiate the IHRP process. This was also a hypothetical scenario.
- 28.15 The date Mrs S was granted IHRP had a direct effect on the length of service and length of time remaining to her NPA. Had she been granted IHRP at an earlier date, the Alpha pension she had accrued would have been lower than the pension at the time of her retirement.
- 28.16 It could not comment on the earliest date Mrs S would have been granted IHRP or on the amount of IHRP pension that would otherwise have been payable.
- 28.17 As Mrs S was on a period of nil pay towards the end of her employment, she would have only accrued benefits at the time she was receiving her salary and subsequent sick pay. Consequently, she was originally quoted IHRP pension of approximately £6,000.
- 28.18 However, due to amendments made to Alpha regulations, in periods of employment where a member had been on nil pay due to exhausted sick pay, assumed Alpha earnings should be used to calculate their Alpha pension. This was a retrospective amendment, meaning Mrs S' pension required a revision to reflect this. As a result, the IHRP pension that would have been payable to Mrs S had increased to approximately £14,000.
- 28.19 As Mrs S was a member of the Alpha section of the Scheme, who transitioned from the Nuvos section, a standard lump sum was not paid at retirement. If she had intended to take a lump sum, she would have needed to commute part of her annual pension.
- 28.20 In order for MyCSP to consider whether arrears of £24,751.33 were due in respect of the death benefit lump sum, Mrs S' award would have to be revised to reflect that she took her standard IHRP benefits. This would mean the lump sum payment she received through commutation would have to be recovered. Consequently, it could be argued that upholding this aspect of his complaint would be detrimental to the Estate financially, as the arrears Mr S had

calculated were less than the commuted lump sum which would need to be recovered.

28.21 Taking all of the points raised above into consideration, it was unable to recommend that Highways England make an ex gratia payment in respect of financial loss.

28.22 However, it was clear that the events leading up to Mrs S' retirement caused both Mr and Mrs S significant distress. It recommended that Highways England make an ex gratia payment of £1,000.

29. On 20 March 2019, Mr S appealed to the Cabinet Office under stage two of the IDR. He said in summary:-

29.1 He was not happy with the level of award that had been offered by MyCSP.

29.2 He wanted compensation for financial loss due to Highways England denying Mrs S access to her pension at a time when she was on half and then nil pay.

29.3 He provided evidence that Mrs S had approached Highways England for information regarding the option of medical retirement. It failed its duty of care to provide this information.

30. On 13 November 2019, the Cabinet Office sent Mr S a response under stage two of the IDR. It said in summary:-

30.1 It apologised to Mr S for the delay in issuing its decision.

30.2 It asked Highways England to show that it informed Mrs S of the option to apply for an IHRP when she requested this and that it had explained the process. Highways England failed its duty of care by not considering Mrs S' circumstances at the time. It upheld this aspect of the appeal.

30.3 If the SMA had decided that Mrs S met the criteria for IHRP at an earlier date, Mrs S' pension would have become payable from that date. However, the Guidance stated that employers should tell members of their right to apply for IHRP but it did not specify at what point this should happen. So, it agreed with MyCSP's conclusion that it was hard to identify a date on which that application should have been made.

30.4 However, it noted that the errors made by Highways England prevented Mrs S from making informed decisions at a critical time and affected her wellbeing. Consequently, the level of award for non-financial injustice should be severe. It recommended that Highways England pay an additional £1,000 to the Estate, to bring the total award to £2,000, in line with the Pensions Ombudsman's guidance on awards for non-financial injustice.

30.5 It also noted the administrative failings on the part of MyCSP when calculating and paying Mr S' death benefit lump sum. It directed MyCSP to pay Mr S a

further £250, to increase the total award to £500, for the significant distress and inconvenience it had caused him.

31. In his complaint, on behalf of the Estate, to The Pensions Ombudsman, Mr S said in summary:-
 - 31.1 He has accepted that the calculations of IHRP are complex due to the retrospective changes to regulations and assumed pay figure used. He will not raise the issue of financial loss in relation to a possible earlier claim for IHRP.
 - 31.2 Mrs S had to use a lump sum pension benefit, that had been incorrectly calculated, to repay the debt she had accrued since moving to half pay in July 2015 and then nil pay in January 2016.
 - 31.3 Mrs S incurred a financial loss because she was not awarded a serious ill health commutation lump sum. This would have been higher than the pension commencement lump sum (**PCLS**) that she was awarded in November 2016.
32. During the investigation, the Adjudicator asked the Cabinet Office to provide the following information:-
 - 32.1 The total pension, PCLS and lump sum death benefit that would have been payable to/or in respect of Mrs S if she had retired on 23 August 2015, less any half pay she received after 23 August 2015.
 - 32.2 The total pension, PCLS and lump sum death benefit paid to/or in respect of Mrs S.
 - 32.3 Whether Mrs S was given the option to take a serious ill health lump sum given that her life expectancy was less than 12 months.
 - 32.4 The serious ill health lump sum that would have been payable on 23 August 2015, and the impact this would have had on the other benefits payable under the Scheme.
 - 32.5 Evidence to show that the SMA had seen a copy of the member section of the Form. Also, the handwritten note that Mrs S' GP had made on that section of the Form.
33. The Cabinet Office provided details of the benefits that would have been payable to Mrs S had she retired on 23 August 2015 and the benefits that became payable on 15 September 2016. The figures are set out in Appendix 3. The Cabinet Office said:-
 - 33.1 It was clear that the benefits that would have been payable from 23 August 2015 were significantly lower than those paid to Mrs S from 15 September 2016.
 - 33.2 Mrs S was not given the option to take a serious ill health lump sum. In order to qualify for this, the SMA must issue a certificate that says the member has a life expectancy of less than 12 months.

- 33.3 If Mrs S had been awarded a serious ill health commutation lump sum on 15 September 2016, this would have amounted to £71,799.20. In accordance with Regulation 85 of the Alpha rules, this was calculated as five times Mrs S' total annual pension of £14,359.53.
- 33.4 It acknowledged that Mrs S' GP advised that Mrs S was expected to survive 12 months if the current treatment continued to work but was unlikely to survive if the current treatment failed or stopped working.
- 33.5 It was unable to provide a copy of the section of the Form that was filled in by Mrs S' GP. "This is most likely because it was placed in a medical in confidence envelope, which [it] did not have access to for confidentiality reasons." MyCSP did not have a copy for the same reason.
- 33.6 The SMA was appointed in 2017; the application was finalised before the SMA was appointed.
- 33.7 While it was unable to say for certain whether the note written by Mrs S' GP was passed to the SMA, the process would have been for any medical information to be passed on for consideration.
- 33.8 It noted that Highways England said in the employer's section of the Form that Mrs S did not have a life expectancy of less than 12 months. The SMA would have considered this when looking at the medical evidence.
- 33.9 It appreciated it would have been a very difficult time for Mr S and Mrs S. However, it noted that they seem not to have questioned whether the SMA considered the GP's note at the time.
- 33.10 If the serious ill health commutation option had been available to Mrs S, she would have received this instead of a pension and PCLS. Consequently, no death benefit lump sum would have been payable.
- 33.11 Even if the serious ill health commutation option had been available to Mrs S on 23 August 2015, this would have been dependent on the SMA issuing a certificate at the time. The amount of the serious ill health commutation lump sum would have been £56,298.55. This is lower than the PCLS Mrs S received on her retirement.
- 33.12 The calculation of the Upper Tier IHRP was complex, particularly as Mrs S went on to nil pay. However, the effect of the earlier medical retirement would be to reduce the amount of pension and all associated benefits. In other words, although Mrs S' pension would have been in payment from an earlier date, her overall benefits would have been significantly lower. Consequently, there was no evidence that the Estate has suffered financial loss and it did not uphold this aspect of his appeal.
34. Highways England accepted the outcome of the Cabinet Office's stage two decision and did not provide any submissions to my Office.

35. Mr S said that Mrs S should have been approved for a serious ill health commutation lump sum. He considered that Dr Saravolac's assessment did not take into account Mrs S' GP's opinion, that was included in the Form. On that basis, the assessment was incorrect and should have concluded that Mrs S had less than 12 months to live. Mrs S died in December 2016, four months after the date her retirement benefits became payable.
36. Mr S also said that MyCSP had only paid him a distress and inconvenience award of £250. He did not realise that an additional £250 was offered to him at stage two of the IDR.

Adjudicator's Opinion

37. This complaint was considered by one of our Adjudicators who concluded that further action was required by Highways England. The Adjudicator's findings are summarised below:-
 - 37.1 The Cabinet Office has agreed that Mrs S' application for an IHRP was not dealt with in a proper manner by Highways England. However, it said that had Mrs S been awarded IHRP before 15 September 2016, her overall benefits would have been significantly lower. Consequently, Mrs S would not have suffered any financial loss. However, it accepted that Mrs S would have suffered non-financial injustice as a result of the way her application was handled by Highways England.
 - 37.2 Dr Saravolac certified on 1 September 2016 that Mrs S was eligible for Upper Tier IHRP. Mrs S' benefits were processed in November 2016 and were backdated to the last day of her employment on 15 September 2016. The Adjudicator carefully reviewed the figures provided by the Cabinet Office. Specifically, the benefits Mrs S would have received on 23 August 2015 and the benefits that became payable on 15 September 2016. The figures demonstrate that as a result of the delay, the benefits payable to/or in respect of Mrs S were higher than the total benefits on 23 August 2015, which amounted to £84,447.85.
 - 37.3 Furthermore, if Mrs S had been approved for a serious ill health commutation lump sum, this would have amounted to £56,298.55 on 23 August 2015; and £71,799.20 on 15 September 2016. This demonstrated that the serious ill health commutation lump sum would have been lower than the total sum of the benefits that were paid in respect of Mrs S, which amounted to £107,696.44. Also, if Mrs S had opted for the serious ill health commutation lump sum, there would have been no death benefit lump sum payable. In the Adjudicator's view, there was no basis on which an award for financial loss could be paid as a result of Highways England's mishandling of her application.

- 37.4 Mr S argued that Dr Saravolac did not consider Mrs S' GP's opinion. It said that if the treatments did not work, Mrs S would not live beyond 12 months. However, if the current treatments continued to work she was expected to survive 12 months. The Adjudicator noted that Mrs S died four months after the date her IHRP became payable. This supported the view that her life expectancy was less than 12 months.
- 37.5 The Adjudicator empathised with Mr S' position and she had great sympathy for the situation he and Mrs S found themselves in at the time. However, it was a matter for Dr Saravolac, the SMA, to provide an opinion on Mrs S' eligibility for an IHRP. Dr Saravolac was of the opinion, based on the medical evidence presented, that Mrs S met the criteria for Upper Tier IHRP. Regarding the GP's opinion, that was provided in the Form, the Cabinet Office was not able to provide this. The Adjudicator noted that the SMA provider changed in 2017 and that the current provider did not hold a copy of the Form.
- 37.6 There was no evidence that the Form, that was completed by Mrs S' GP, was made available to Dr Saravolac. However, the Adjudicator believed that, on the balance of probability, Dr Saravolac would have been provided with the Form together with all the supporting evidence as this was the standard process in cases such as this. Furthermore, Dr Saravolac listed the medical evidence she had considered at the time.
- 37.7 The Cabinet Office would not be expected to see the medical evidence before a decision was made by the SMA. This was because the SMA, as the decision maker, was responsible for considering the evidence. The SMA had a similar role to trustees of a pension scheme in this regard. The Cabinet Office's role, in cases such as these, was to ensure that the SMA made the decision in the right way.
- 37.8 Turning to Mr S' point that Highways England did not handle Mrs S' application in a proper manner. The Guidance dealt specifically with cases where life expectancy was less than 12 months. The employer must tell its SMA straight away so the application is progressed urgently.
- 37.9 Under the Guidance, employers, such as Highways England, were tasked with providing their employees with the relevant information. In Mrs S' case, Highways England failed to do so. This potentially amounted to maladministration and a breach of duty of care in negligence.
- 37.10 In the Adjudicator's opinion, Highways England failed in its duty of care to refer the matter to the SMA within a reasonable timeframe. It also failed to treat Mrs S' application as urgent and deal with her case with the level of sensitivity that it deserved. Furthermore, Mrs S was put on half pay in August 2015, and then on nil pay in January 2016. This was as a consequence of Highways England's failure to consider whether her case should be referred to the SMA. This left Mrs S without any income during a period when she was terminally ill and

undergoing treatment for cancer. The Adjudicator recognised that this must have seriously added to the level of distress she was suffering during this very difficult period, even though the comparison of her benefits supports the view that she did not incur any financial loss.

- 37.11 There did not seem to have been any urgency on the part of Highways England when dealing with the application once the application process had commenced. Highways England should have been aware at the time that Mrs S was seriously ill.
- 37.12 During the IDRPs, the Cabinet Office directed Highways England to pay the Estate £2,000 in recognition of the severe distress and inconvenience it caused Mrs S because it failed to treat her application as a matter of urgency. In the Adjudicator's view, this amount was not sufficient given the severity of Mrs S' illness at the time. Generally, in the case of serious ill health any applications made are expedited. It appeared that in Mrs S' case, after the application was eventually submitted to the SMA, it took approximately five months for it to be progressed. The evidence indicated that Highways England failed to respond to Mrs S' initial request for information concerning IHRP. The Adjudicator noted that Mrs S made a second enquiry two to three months following her initial enquiry.
- 37.13 The guidance on awards for non-financial injustice, published on my Office's website, explains that for an award to be made for exceptional distress and inconvenience there will have to be aggravating factors. In Mrs S' case, the aggravating factors were:-
- Exceptionally grave consequences on her well-being by leaving Mrs S in limbo with no income once her sick pay had ceased.
 - Mrs S was terminally ill.
 - Highways England did not appear to have given any consideration, until late in the process, about whether an application for an IHRP should be submitted in accordance with the Guidance.
 - It failed to treat the application with the urgency it deserved.
 - The fact that Mrs S was initially on half pay, and then on nil pay, and left without any income for much of the period that followed, would have added to her level of distress at an already difficult time. In the Adjudicator's opinion, Highways England should pay the Estate an additional £1,000, to make a total of £3,000, in recognition of the exceptional distress and inconvenience it caused Mrs S.
- 37.14 While this complaint is brought on behalf of the Estate, the Adjudicator noted that at stage two of the IDRPs, the Cabinet Office directed MyCSP to pay Mr S an additional £250, to make a total award of £500.

37.15 Consequently, it was the Adjudicator's view, that this complaint should be partly upheld.

38. The Cabinet Office has accepted the Adjudicator's view. However, it provided evidence that Mr S had been paid the full amount of £500. The additional £250 was paid to Mr S on 10 January 2020. Mr S did not accept the Adjudicator's Opinion and provided several representations in which he reiterated his previous points. He further said in summary:-

- 38.1 He does not accept that the SMA had all of Mrs S' doctors' reports needed to assess her application for an IHRP. Specifically, the GP's opinion in the Form was not considered by Dr Saravolac.
- 38.2 He does not accept that the Cabinet Office was not able to provide a copy of the Form including the GP's opinion. If it was able to quote from other specialists' reports, he should have had sight of the GP's opinion in the Form.
- 38.3 He wants to be provided with a copy of the Form. He does not trust the explanation given that the GP report is missing. The GP's opinion has been ignored by the Cabinet Office and Dr Saravolac.
- 38.4 The new SMA was appointed in 2017 and Mrs S' application was finalised before that. So, he does not understand how the change of the SMA provider has affected the ability to provide a copy of the Form.
- 38.5 He noted that Highways England indicated in the Form that Mrs S did not have a life expectancy of less than 12 months. He doesn't consider that Highways England was qualified to make this judgment.
- 38.6 Dr Saravolac did not list the GP's opinion as part of the evidence considered in her assessment. On the balance of probabilities, she did not have sight of the GP's opinion.
- 38.7 He maintains that his own claim for financial loss or injustice should be upheld. His claim for financial loss has nothing to do with complex calculations or specialists' reports. He had to take out a loan to support Mrs S when her income ceased, which incurred fees.
- 38.8 Neither he nor Mrs S saw any benefit from the pension paid to her in November 2016, as they had to repay some of the pension benefit lump sum that was miscalculated. Mrs S was not able to use the full value of her benefits, because of negligence by her employer.
- 38.9 The Adjudicator asked him on 1 July 2021 if there were any borrowing costs associated with the loan he took out. He replied and said what the costs were which represented approximately one years' gross salary for Mrs S. The loan was taken out in his name as the bank would not have accepted Mrs S as she was about to lose her income.

- 38.10 They did not have enough money to repay the loan and repay the debt she had which was approximately £5,800. He does not have any documentation to prove this amount as Mrs S had settled her financial affairs shortly before she died.
- 38.11 He was in a position to repay the loan in his name in full after July 2018, when he complained about the death benefit calculations. They would not have had to take out a loan were it not for Highways England's negligence.
- 38.12 He does not believe that a further award of £1,000 recommended by the Adjudicator is adequate for the harm caused.
- 38.13 An apology is missing from the Cabinet Office and Highways England. They apologised for the delays but not for the harm their negligence caused him and Mrs S.
39. I have considered the additional points raised by Mr S and the Cabinet Office but I agree with the Adjudicator's Opinion.

Ombudsman's decision

40. There is no dispute between any of the parties that there was maladministration. Highways England should have, undoubtedly, taken steps earlier on in the process. However, I find there was no financial loss regarding the delay in paying out the benefits to Mrs S. This is because the pension she would have received, had there been no delay by Highways England, would have been lower than the actual pension that was payable to Mrs S in November 2016. I consider that any shortfalls that arose during the complaint process, were later settled by the Cabinet Office, and paid to the Estate.
41. In the absence of any legal financial loss I can still make a non-financial injustice award to the Estate as a result of Highways England's failure to treat Mrs S' application with reasonable urgency. It is clear that there were aggravating factors in this case, as identified by the Adjudicator, which would have caused Mrs S exceptional distress and inconvenience before her death. I find that the award of £2,000 the Cabinet Office directed Highways England to pay to the Estate is not sufficient given the circumstances of the case. I find that the recommended additional £1,000 to increase the award to £3,000, is sufficient award for the exceptional distress and inconvenience suffered by Mrs S before her death.
42. Mr S has also raised arguments regarding the GP's opinion included in the Form, that the Cabinet Office said it was unable to provide. This is because the SMA provider had changed and the copy of the Form is no longer held on its system. I do not find that it is unreasonable that the SMA no longer holds the record of the Form, as there was a different SMA dealing with Mrs S' application. If Mr S is not satisfied with this, he will need to raise this issue directly with the SMA as this is not a matter for me to consider. However, there is no evidence to suggest that the SMA did not have all the

relevant supporting medical evidence. It was for the SMA to have considered all the evidence and issue their opinion on Mrs S' eligibility for an IHRP. If the SMA required more information, they would have requested such information at the time. In the absence of such a request, I consider that the SMA would have had sufficient information on which to base their opinion.

43. Mr S is claiming that he has been caused financial loss in respect of the loan taken out in his name while Mrs S was without income and suffering from serious ill health. I have no doubt that Mr S and Mrs S were in a difficult situation when Mrs S lost her income. However, I am not able to make any award to Mr S in respect of any loss incurred by him during that period. This is because the loan was in Mr S' name and not in Mrs S' name. Any award I make in respect of this complaint shall be paid to Mr S as executor of the Estate, not to him personally.
44. I partly uphold this complaint.

Directions

45. Within 28 days of the date of this Determination, Highways England shall pay the Estate an additional £1,000, in addition to the award of £2,000, in recognition of the exceptional non-financial injustice it caused Mrs S.

Anthony Arter

Pensions Ombudsman
11 April 2022

Appendix 1

Medical Evidence

46. In his report dated 9 February 2016, Dr Ritzenthaler said:-

“Since she is currently tolerating Pregabalin I told her to continue with the full dose of 300mg twice daily for the time being, although she does not feel it made a lot of difference to her pain. In addition I advised her to increase the dose of Morphine up to 100mg twice daily. She still complains of allodynia over the inner aspect of her hand. I therefore prescribed Mirtazapine, a drug we have locally studied and has shown to be effective in patients with neuropathic pain...I will review this lady in clinic at Russells Hall Hospital on Tuesday 16 February 2016.”

47. In his report dated 30 March 2016, Dr Ritzenthaler said:-

“Mrs S has started brachial plexus radiotherapy and is due to complete it on 01 April 2016. She will have 10 fractions in total. She has been taking Oramorph 30mg about 20 minutes prior to radiotherapy and this has helped to have the radiotherapy. She is currently taking Zomorph 12mg twice a day, Oramorph 30mg ‘as required’, Mirtazapine 45mg at night and Pregabalin 300mg twice daily. This is controlling her pain very well and I have no suggestions to make today on her medication.

I warned her that at some point in the next three months she may get an improvement in her pain and as a consequence the dose of Morphine may become excessive. We will at that point need to reduce the dose of Zomorph”.

48. In his report dated 11 May 2016, Dr Ritzenthaler said:-

“The pain in the arm of this lady has much improved since she had radiotherapy. Unfortunately she still needed to take a lot of Oramorph especially when she is very active. On further questioning her it transpires the main pain is in the spine. She is tender over several levels of the thoracic spine and also complains of pain around the low back and over the right sacroiliac joint. I think that her bone disease is progressing despite the regular Zoledronic acid infusions. She also told me that her tumour marker has been increasing. She therefore needs to resume chemotherapy and may also need another staging CT scan. However more urgently she required an MRI scan of the whole spine in order to exclude an impending cord compression. It was kindly scheduled by Dr Phillips on my request for the following day. I gave this lady a leaflet describing the symptoms of cord compression that could subsequently develop but I reassured her that if there were anything we will have caught it up [sic] in good time. I will review this lady in 2 weeks time”.

49. In his report dated 1 June 2016, Dr Ritzenthaler said:-

“Her pain in the right arm is much better now that she is taking Pregabalin and Zomorph. However she still requires 3 doses of Oramorph 40mg in a 24 hour period. I therefore advised her to increase the dose of Zomorph. I am planning on reviewing this lady at the end of June 2016.”

50. In her report dated 12 July 2016, Mrs S' GP, Dr Love said:-

“Unfortunately Mrs S will be unable to return to work. Her complete wrist drop prevents her from being able to work her computer and Mrs S has progressive disease requiring on-going treatment. Her chemotherapy at one point resulted in an admission to hospital for neutropenic sepsis and her immune system is weakened by this.

I am unable to provide an accurate prognosis for Mrs S as this is notoriously difficult in younger individuals whose bodies are otherwise strong apart from their malignancy. However, Mrs S is, as mentioned previously, aware that her condition is incurable and that it is progressing. I would therefore advise you that it would be inappropriate for her to attempt to return to work. I would anticipate that this would be the case from now onwards and that the situation is unlikely to reverse.”

51. In her report dated 1 September 2016, Dr Saravolac said:-

“Mrs S' application for ill health retirement has been passed to me for consideration.

...

On this occasion I have reviewed:

- A report from her GP received via Occupational Health Dr Love, dated 12 July 2016;
- Reports from Dr Ritzenthaler Consultant Palliative Medicine, dated 03 February 2016; 09 February 2016, 16 February 2016, 09 March 2016, 30 March 2016, 11 May 2016, 01 June 2016;
- Report from Occupational Health Nurse Advisor (OHNA) dated 26 July 2016;
- Report from Occupational Health Physician Dr Yew, dated, 21 June 2016.

...

The medical evidence is that Mrs S is currently unfit for work because of ill health.

I can identify no adjustments that would enable Mrs S to return to work.

The nature of Mrs S' condition is such that she would satisfy the definition of disability contained in the Equality Act. However, this is legal determination and only an adjudicating body can provide a definitive opinion.

Having considered the application and evidence there is, in my opinion, reasonable medical evidence that Mrs S has suffered a breakdown in health involving total incapacity for employment. The key issue in relation to the application is whether or not Mrs S' incapacity is likely to be met.

...It is anticipated that her condition is progressive in nature that treatment is symptomatic...

Considering the nature of the health issues it appears likely that without any treatment this lady will be permanently incapacitated for any work. I note that she has been in receipt of optimum treatment whilst her condition continues to progress. It appears likely that despite further available medical treatment activities she would continue to experience significant functional limitations and remains incapacitated for any work until retirement age. So further available medical management activities are unlikely to alter her permanent incapacity for any work.

In my opinion, Mrs S has suffered a breakdown in health involving total incapacity for employment. This incapacity is likely to continue until at least normal pension age. The upper tier payment threshold is therefore likely to be met.”

Appendix 2

Ill Health Retirement – Procedural Guidance for Employers

“2.3 When to refer a case to the Scheme Medical Adviser

Employers must refer cases to the SMA ‘when either management or the person concerned, consider that the causes of poor performance or poor attendance may make retirement on medical grounds appropriate’ (Civil Service Management Code (CSMC), 2009, para. 6.3.2c).

Such considerations will include investigating if there are underlying health problems in the first instance (that may make ill health retirement appropriate) and also, if the employee meets the scheme ill health retirement qualifying service and eligibility conditions. [...]

Employers must also inform employees of their right to:

- have their case referred to the medical services adviser appointed by the Scheme Manager for provisions relating to the Civil Service Pension Schemes; and
- apply for medical retirement (CSMC, 2009, para. 6.3.2d).

An employee may be dismissed for efficiency ‘where performance or attendance does not improve and medical retirement is inappropriate’ (CSMC, 2009, para. 6.3.3), or where an application for Ill Health Retirement has not been supported by the SMA.”

Appendix 3

	Estimated benefits Last day of service: 23 August 2015	Actual benefits Last day of service: 15 September 2016
Total Lump Sum	£48,255.90	£61,540.84
Pension Payable	£9,670.67	£2,531.15
Lump Sum Death Benefit	£26,521.28	£43,624.45
Total Benefits Payable	£84,447.85	£107,696.44