

## Ombudsman's Determination

<b>Applicant</b>	Ms N
<b>Scheme</b>	Safeway Pension Scheme ( <b>the Scheme</b> )
<b>Respondent</b>	Wm Morrison Supermarkets PLC ( <b>Morrisons</b> )

### Complaint Summary

1. Ms N's complaint against Morrisons is that it refused to grant an enhanced ill health retirement pension (**IHRP**).

### Summary of the Ombudsman's Determination and reasons

2. The complaint is upheld because the evidence does not indicate that Morrisons took the correct approach in considering Ms N's application. To put matters right, Morrisons should reconsider its decision whether to grant Ms N an enhanced IHRP, and pay £1,000 to her for the serious non-financial injustice she has suffered.

### Detailed Determination

#### Material facts

3. Ms N worked as a Pharmacy Manager for Morrisons, having previously joined Safeway as a pre-registration student in August 1994. In July 2015, her employment was terminated on the grounds of ill health as she was suffering from several health conditions. At the time, she was already a deferred member of the Scheme, which had previously closed to future accrual.
4. On 29 July 2015, Ms N wrote to the Trustee of the Scheme and requested the early payment of her pension from 1 January 2016, on ill health grounds, on an unreduced basis. Ms N explained her deteriorating health conditions which were an underlying connective tissue/autoimmune disease, complications following leg fracture in 2010, and syndrome of inappropriate antidiuretic hormone secretion. She explained weight loss which caused her to be seriously ill and hospitalised for four weeks and gave consent for examination of her medical records.

5. Her application fell to be considered under Rule 12(C)(I) which says:

“An Active Member ceasing to be an Active Member after Revision Date on grounds of Incapacity may at any time prior to Normal Pension Age request the Trustee that he be paid an Immediate Pension and if the Principal Company directs the Trustee to grant such request an Immediate Pension will be payable to the Member and shall continue to be paid at the absolute discretion of the Trustee (having regard to any evidence of health required by the Trustee pursuant to Rule 23(B)).”

6. The Scheme administrators passed the request to Mr H, who was both Morrisons' Head of Pensions and Secretary to the Trustee. On 25 August 2015, he asked the Scheme administrators to obtain details of the cost of enhancement noting: “I think it is unlikely that the Company will accept the cost of the enhancement and it would not therefore be agreed by the trustees”.
7. On 26 August 2015, the Trustee sought advice from Dr Orton, the Scheme's medical adviser (**MA**).
8. On 27 August 2015, having obtained “factors from the Actuary”, the administrators confirmed “the cost of the enhancement for [Mrs N's] benefits would be £160,033”.
9. On 28 August 2015, Mr H sent an email to Ms N in response to her request. He explained that the Rules required the definition of incapacity to be satisfied, and that Morrisons must direct the Trustee to grant the enhanced IHRP that it looked at each case on its merits, and generally: “will limit such directions to cases where it is satisfied that the life expectancy of the member is materially impacted (such that the additional cost of paying an enhanced pension is expected to be counter-balanced by such pension being payable for a far shorter period than would typically be anticipated).”

“In the Trustee's experience, taking into account your medical condition as confirmed in your letter (I have not of course received the opinion of the Company Medical Practitioner) and the cost of granting you an enhanced ill-health early retirement pension which the Scheme administrators have confirmed would cost the Company well in excess of £150,000 based on previous cases the Company is most unlikely to make such a direction in your case and so your request...would not then be granted. The above is based on my opinion and is just an informal note to manage your expectations as to the requirements for being granted an enhanced ill-health early retirement pension. I can of course proceed with processing your request if you wish...”

10. Mrs N replied confirming that she wished to pursue the application, explaining that she had only given very brief details of her medical condition in her letter. Ms N was subsequently referred to Dr Orton, for assessment.

11. On 28 September 2015, the CMA wrote a medical report that concluded Ms N was permanently incapable of undertaking any work. It added that:

“She is 57 years old. She suffers from several severe conditions. She has an underlying immune condition that seems to attack her joints and blood vessels. This causes severe mobility issue and pain. Her most recent illness has been a flare up of Anxiety and Depression. This has led to a severe life threatening eating disorder...Her GP’s report is optimistic that she may recover in the future. In my opinion I do not think this will happen. The damage to her joints, blood vessels and nerves is not likely to improve”.

12. On 3 October 2015, Ms N emailed Mr H with additional medical information. She said:

“I am writing to ask if I can make an additional statement to the original request for early medical retirement, please, for due consideration by the Trustees and Actuary...I am embarrassed about admitting to, but my doctor is willing to confirm in writing if necessary. I have finally admitted this to myself and am no longer in a state of denial. For many years, I have suffered from chronic anorexia nervosa, but since Christmas have been in a worsening acute relapse, to the point where I am taking prescribed nutritional supplements. To quote my GP, these are to prevent my passing away. My BMI is 13.2.”

13. On 5 October 2015, Mr H emailed Ms N in response to her email. He reiterated that Morrisons would be unlikely to agree to the enhancement request made by the Scheme Trustee.

14. On 6 October 2015, Ms N emailed Mr H to let him know that her GP will issue an updated medical report regarding her anorexia nervosa condition, if it was not evident to the CMA.

15. On 16 November 2015, Morrisons’ occupational health (**OH**) adviser sent an email to Dr Orton, asking if he had seen the attached GP report and querying whether he would benefit from an updated one. Dr Orton replied that he had seen the report and disagreed with its conclusions in that he did not think that Ms N would improve. He considered she was permanently unfit and that a new report would not alter his opinion.’

16. On 18 November 2015, Mr H, in his capacity as Head of Pensions, sent an internal email to Morrisons’ Head of HR that said:

“Due to the cost (and also the fact that Company contributions to the Scheme have now ceased and the Scheme has made no allowance for the cost of such enhancements) the Trustee will only agree to payment if the Company pays the full cost of the enhancement. This has been the case prior to the acquisition of Safeway by Morrisons...The Company medical practitioner has submitted a report on her illness and confirmed that she will be unable to work

again. Life expectancy does not appear to be affected ...We get a number of such requests each year and the criteria taken into account by the Company takes into account such things as life expectancy and the cost of the enhancements. Where life expectancy is not reduced, the Company has previously not been prepared to fund the cost. Nevertheless, each case still has to be considered on its merits.

In the case of [Ms N], who was previously a pharmacist with the Company, she is aged 57 and left the Company on 16<sup>th</sup> July 2015 on the grounds of ill health. The Company Medical Practitioner has submitted a report on her illness and confirmed that she will be unable to work again. *Life expectancy does not appear to be affected.*” (My emphasis).

“The Trustee has informed her that she is able to take an immediate pension but that the Company would need to bear the cost of any enhancement and that, bearing in mind the additional cost, the Company was not likely to agree to any enhancement. Despite informing [Ms N] of this, she has confirmed that she wishes to proceed with her request and I therefore need to ask the Company if they are prepared to pay the cost of the enhancement.

“The cost to the Company as estimated by the actuary would be £160,333. Could you please confirm whether the Company would pay the cost of the requested enhancement?”

17. On 25 November 2015, the Trustee notified Mrs N of its decision to grant her an immediate IHRP, but not on an enhanced basis. This explained:

“Based on the available medical evidence and the additional cost incurred in granting any enhancement, the Company has declined to instruct the Trustee to pay a pension on enhanced terms”.

18. On 27 November 2015, Morrisons’ Head of HR responded to Mr H’s email of 18 November 2015, and said:

“The Company have considered your request and unfortunately we cannot approve it.”

19. In December 2015, Ms N appealed against the Trustee’s decision by invoking the Scheme’s two-stage internal dispute resolution procedure (**IDRP**). She said her present health situation was so bad her doctor was in fear of her life and complained that no updated medical evidence about her condition had been obtained from her GP.

20. On 28 January 2016, HR emailed occupational health for the attention of Dr Orton, requesting that:

“Mr H has asked if you would please confirm if Ms N’s current medical condition would reduce her life expectancy.”

21. Dr Orton replied by return and said "There is no indication from the GP's report that she has a significantly reduced life expectancy".

22. The same day, Mr H sent an email to Head of HR saying:

"The request from Ms N for an enhanced pension was turned down, primarily on grounds of cost (this is in excess of £160,000 and therefore outside the criteria acceptable to the Company).

"Ms N has appealed the decision...and I now need to send her a response. However, the Trustee [sic] legal advisers have suggested that, should this case proceed to the Ombudsman, we should have evidence that the report provided by Dr Orton...should have been considered by the Company. As it was an early retirement from service, the Company has full details of Ms N's medical condition and I wouldn't normally submit the medical report provided to the Trustee. However, as the advice is to provide evidence that Ms N's medical condition was taken into account by the Company (as well as the Trustee) I have attached Dr Orton's report for your consideration.

"I would be grateful if you [sic] could you please confirm that you have reviewed the attached and that it does not or does change the original decision."

23. Also on the same day, the Trustee sent Ms N a response under stage one of the IDRP that said:

"...based on your medical condition and the very significant cost to the Company of granting an ill health early retirement pension, the Company confirmed that it will not direct the Trustee to grant an enhanced ill health early retirement pension in respect of you at the current time."

24. Ms N invoked stage two of the IDRP.

25. On 6 February 2016, Dr Orton wrote an email to the Trustee saying that when he provided his September 2015 report, he had based it on the report OH had got from the GP in June/July 2015. He said "Clearly the GP was not considering life expectancy at that time. It was the only report I had. I would suggest the way forward is to write to the GP for an update to address her current health and life expectancy". On 8 February 2016, the Trustee wrote to Ms N telling her that stage two of the IDRP was on hold while the latest medical evidence was obtained.

26. On 16 February 2016, Morrisons' Head of HR, sent a one line email to Mr H replying to his of 28 January 2016. It said: "I have reviewed this and I think our decision still stands".

27. On 14 March 2016, the Trustee sent Ms N a letter telling her that it was still waiting for updated medical reports and the decision was still under review by Morrisons. It also informed her that if she started claiming her standard ill health pension before

the appeals process was completed, it may not be able to enhance her pension at a later date if her claim was successful. The letter added that:

“The Trustee would need to consider whether there would be an unauthorised payment issue in terms of revisiting a pension already in payment if it is determined that a higher amount should have been paid from the date it was put into payment and that a different amount should have been paid as a pension commencement lump sum. This may require approaching HMRC to check whether they would accept that such an approach would not give rise to any unauthorised payments being made. Alternatively, if the pension in payment was simply to be increased for payments going forwards without any adjustment to the payments already made, it is not clear that any adjustment to the amount of the pension commencement lump sum could be made without raising unauthorised payment concerns and again this may require an approach to HMRC.”

28. On 17 March 2016, an internal email from Morrisons' OH to Mr H gave him an update on medical reports for Ms N. It said that her updated GP report had been sent to Dr Orton on 10 March 2016, and that it was still being chased.

29. On 7 April 2016, in response to a challenge from Ms N's independent financial adviser (**IFA**), the Trustee clarified that its concern about unauthorised payment would be limited to any lump sum increases.

30. On 12 May 2016, the Trustee sent a response under stage two of the IDRP that said:

“The Company considers the individual circumstances of each member requesting an enhanced ill-health pension, but...it will not generally direct the Trustee to grant an enhanced ill health early retirement pension unless satisfied that the life expectancy of the member is materially impacted (such that the additional cost of paying an enhanced pension is expected to be counter-balanced by such pension being payable for a much shorter period than it would typically be anticipated)...In your case, the Trustee understands that the Company has been advised by its Medical Adviser that you are not... expected to die within the next 5-10 years, and that it is not possible to be specific about the extent to which your life expectancy will be reduced by your medical condition...The Trustee would reiterate that it has no ability to bring an enhanced ill health early retirement pension into payment in the absence of a direction from the Company.”

31. On 2 June 2016, Ms N, in a letter to Mr H, said that:

“Following the rejection of my claim for an enhanced ill health pension I wish to proceed with taking the pension on a standard early retirement basis as soon as possible.”

32. Mrs N subsequently completed and signed her application form on 26 June 2016, with the date of her retirement being 16 June 2016. She was subsequently awarded standard ill health pension which was paid after some delay, and backdated to 16 June 2016.
33. In August 2016, Ms N brought her complaint to the Ombudsman.
34. On 19 September 2016, Morrisons sent a formal response to us that said:

“We made our decision based on two key issues, cost and precedent...the cost of awarding the enhanced benefits in this case was £160,333...This is a significant cost and one that we did not feel able to agree to given the cost pressures that we are currently facing within a highly competitive retail industry. The second reason ...is linked to the fact that we employ over 110,000 colleagues and as you would expect with such a large population, we receive many requests for financial support from colleagues on a wide range of issues...as such we have to be mindful of setting a precedent when making decisions on spending such a large amount of money in favour of any colleague.”
35. Morrisons sent us a copy of the “Process for pension requests on the grounds of incapacity” guideline. It informs members that “If agreed, the Company to authorise any enhancement”. However, the document does not provide any further information on how the decision is made by Morrisons and what criteria it follows.
36. Morrisons also provided us with a copy of the “Early Retirement on Grounds of Incapacity” guideline used by the Trustee when considering IHRP applications. Again, this document does not include any information on how Morrisons makes decisions when considering enhanced IHRP requests.

### **Summary of Ms N's position**

37. Further comments from Ms N's representative are set out below: -
  - Ms N, being physically unwell and mentally vulnerable, has been badly treated by Morrisons. She believes she deserves some compensation for the significant distress and inconvenience suffered.
  - Mr H's conduct and statements are disingenuous and fall below the standards expected of a person in his position. Mr H acted improperly by giving a fairly clear steer to Ms N, that she is wasting her time in applying for an enhanced pension.
  - Mr H made incorrect comments with regard to HMRC's rules, as HMRC confirmed to Ms N that an unauthorised payment problem would not arise, unless an additional tax free lump sum was paid more than 12 months after the first one. It was only due to incorrect advice from Mr H, that Ms N did not take her standard pension earlier.

- Morrisons' requirement that Ms N must be expected to die within 5 to 10 years before she can claim an enhanced pension, has no actuarial validity. Given that Ms N's own doctor has said Ms N's life span is much reduced, the refusal to pay the enhancement is in breach of Morrisons' own policy. Life expectancy should have been properly considered when assessing whether Ms N's enhanced pension would have truly been a burden to the Scheme.
- Ms N referred to PO-9309, a Determination previously issued by the Pensions Ombudsman. Similarly, to Ms N's case, the employer suggested cost as a factor for declining to pay an ill health pension, but it was determined that it had not properly assessed the cost to the Scheme. Ms N considers that the same decision should be reached here against Morrisons.
- Morrisons, being the employer, should act in good faith with the members of the Scheme. Ms N offered to pay an actuarial fee to obtain the true cost to the Scheme, however it has not responded.
- Ms N has more than one chronic condition including Anorexia which on its own causes a six-fold increase in mortality.
- As a profitable company with increasing annual profits, Morrisons can easily afford enhanced ill health pension but simply chooses not to do so. Even on its flawed assessment of cost, it would be less than 1/10th of a percentage of the Scheme's surplus to Ms N's enhancement of benefits.

### **Summary of Morrisons' position**

38. Further comments from Morrisons are set out below: -

- Morrisons does not understand Ms N's various comments and accusations made in respect of Mr H's conduct and his dual capacity as Secretary of the Trustee, and Head of Pensions.
- Morrisons rejected Ms N's enhanced pension based on two key issues, cost and precedent. The cost of £160,333, calculated by the Scheme actuary cannot be negotiated upon. It does not feel able to agree to Ms N's request, given the cost and pressures that it is currently facing within a highly competitive retail industry. As Morrisons employs over 110,000 employees, it receives many requests for financial support from employees, many of which it has sympathy for, but it does not have the finances or budget to support all requests.
- As part of its plans to transform the business, the company commenced a material restructure during 2014/2015, which led to many redundancies during 2015. This decision was one of many difficult decisions that had to be made and is continuing to be made, as part of the company's attempt to turnaround its performance.



- Morrisons does not make decisions for enhanced pensions lightly and considers medical evidence, impact on pension benefits, cost to the company and precedent, in making its decision. In light of this, Morrisons does not believe that it acted incorrectly, or that it acted outside of its remit. It has also followed the Scheme rules correctly.
- There is no formal company policy as to how it makes decisions on ill health discretionary basis. However, the company considers each case on its own merits, based on a variety of factors including the actual illness, life expectancy and whether the individual is a current or former employee.
- To provide the actuarial cost to the Scheme, that Ms N requested, would involve paying a fee as the information is not held by the Trustee and will need to be provided by Aon, as actuaries to the Scheme, and they would charge the Trustee for provision of this information in line with the contractual terms in place.
- As the medical evidence did not suggest that there was a shortened life expectancy, the Trustee does not believe that it could have decided what a reasonable request of the Scheme Actuary should be, given the uncertainty of Ms N's condition. As any request for a reduced augmentation cost would have involved a reasonable amount of guesswork, this would risk the Scheme receiving an insufficient cost for the benefits that would be provided.
- Following advice from its legal team, the Trustee said that the Morrisons and not the Scheme should bear the risk of a member's life expectancy being different than the cost of the enhancement, especially with the uncertain nature of the medical evidence provided.
- The Trustee provided the medical evidence and cost to the company and it was aware of the basis of the calculation. Whilst the cost was a major factor, it was not the only factor involved in its decision. It did not give an indication to the Trustee that it would have made a direction authorising the Trustee to pay an enhanced pension, if the cost had been materially less.
- Morrisons can confirm that it would have made the same decision if the cost of enhancement had, as it has been suggested by some that it could have been, significantly lower to allow for a lower expectancy. Morrisons did decline requests for enhanced benefits in 2015 and 2016 on cost and precedent grounds, for members whose cost of enhancement was less than any alternative lower calculation of cost is likely to be in this case.

## Conclusions

39. My role is to consider whether the decision reached by Morrisons, was reached in a proper manner. There are some well-established principles which a decision-maker is expected to follow in exercising its discretion. In this case, Morrisons must

- take into account all relevant matters and no irrelevant ones;
- must direct itself correctly in law (in particular, it must adopt a correct construction of the Rules/Policy terms and conditions);
- must ask itself the correct questions; and
- must not arrive at a perverse decision.

A perverse decision is taken to mean a decision which no reasonable decision maker, properly directing itself, could arrive at in the circumstances. If the above principles have not been properly followed, there would be grounds for me to direct Morrisons to review its decision.

40. The decision whether or not to award an enhanced ill health retirement pension lies with Morrisons under the Rule 12(C)(I). The Trustee cannot grant an enhanced pension unless directed by Morrisons.

41. It is evident that Mr H's dual role affected Morrisons' decision making process. In some of his correspondence with Ms N, he acts and signs himself as "Head of Pensions" and in other correspondence, as "Secretary to the Trustee". I do not make a criticism of his acting in two capacities, for both Trustee and Morrisons but I consider that it may have contributed to a lack of procedural clarity. It appears from the internal correspondence that the decision maker for Morrisons under Rule 12(C)(I) was its head of HR. From correspondence between her and Mr H, I am not persuaded that she actually exercised the discretion or, if she did so, that she had before her the necessary material to exercise it properly.

42. I find no evidence that Morrisons, as a decision maker, had in fact applied the criteria that Mr H in his capacity as Secretary of Trustee, told Ms N, had been applied. In his email to the Head of HR, dated 18 November 2015, Mr H said that "life does not appear to be affected" and the cost to the company calculated by the actuary would be £160,333. In her responses, the Head of HR appears to have accepted what she was told about both those matters. I accept that the cost of an enhancement is not open to bargaining with the scheme actuary. Nevertheless, it is sensitive to life expectancy and in this case, the evidence shows that nobody had discussed life expectancy with the actuary at the point of obtaining a cost.

43. Even in March 2016, Dr Orton had not expressed an opinion on that point. One was plainly needed if Morrisons was to apply the policy as it had been set out by Mr H. The Trustee had been advised to provide Morrisons with relevant medical opinion. Yet at the time that the second IDRPs decision was notified to Ms N, it appears there

was no such opinion available. The only evidence which could have been considered by Morrisons was Dr Orton's September report. That did not speak to life expectancy at all.

44. The chronology indicates that what Morrisons decision maker was told about life expectancy and cost was at worst inaccurate, and at best incomplete. It demonstrates that the decision maker did not have access to the relevant evidence necessary to apply the stated policy.
45. Morrisons should have considered the impact of Ms N's reduced life expectancy on the cost estimate to the Scheme, before considering her request for enhancement. I find that in order to do so, Morrisons needed an update from Dr Orton, and the Scheme actuary, but it did not request one.
46. Further, in his communications with Ms N, Mr H advised her that if she started claiming her standard ill health pension before the appeals process had been completed, it may not be possible to enhance it later, if she was successful with her claim. I find that this is procedurally wrong and amounts to maladministration.
47. Ms N contends that due to Mr H's advice, she did not submit her application to draw her pension earlier. Ms N initially requested that her pension be paid from 1 January 2016. It took some pressure from her IFA to produce the clarification that the potential tax issue only arose in relation to a second lump sum payment. That occurred in April 2016. However, she only applied to draw her pension in June 2016, at the end of the IDRP process. I therefore cannot see a direct link between the timing of her application and what she was told, but I accept that she was caused additional distress and inconvenience by that misinformation.
48. Ms N has suffered injustice because of the instances of maladministration by Morrisons. She was in a very stressful and vulnerable situation as she repeatedly made clear. As Morrisons did not follow the correct process, she has undoubtedly suffered serious distress and inconvenience and I make an award to recognise that fact.
49. To put matter right, Morrisons must reconsider the matter and reach a fresh decision whether to exercise the discretion to award an enhanced IHRP. Before it does so, Morrisons should give Ms N an opportunity to present any evidence that she wants Morrisons to consider. Morrisons should then obtain updated medical evidence from its CMA about her life expectancy and ask the scheme actuary to consider its implications for cost before making its decision. Morrisons should provide its reasons for directing or not directing enhancement to the Trustee in writing, with reference to any policy which it has applied to that decision.
50. I have considered the further representations made by the Trustee and do not consider that they raise any new matters which should alter the outcome proposed in the provisional determination. I find that the medical evidence and Ms N's representations at the time flagged an outstanding issue about the impact of her

condition on her life expectancy. Fairness required that issue to be resolved before Morrisons could make a decision based to any material degree on the cost of enhancement. The directions below are intended to ensure procedural fairness in the way that Morrisons reaches its decision. They do not predetermine what that decision should be nor do they require the Scheme to bear the additional cost of any decision which may be made by Morrisons in a way which may reduce security for its other members. They do require an unfettered exercise of discretion by Morrisons with sight of medical evidence that takes full account of Ms N's condition, including its likely impact on her life expectancy, and actuarial evidence about cost of enhancement which has been formulated with sight of that medical evidence about life expectancy.

51. Therefore, I uphold Ms N's complaint.

## **Directions**

52. Within 28 days of the date of the final Determination, Morrisons shall:

- pay Ms N £1,000 award in recognition of the serious distress and inconvenience caused by its maladministration as identified above;
- initiate the process of reconsidering Ms N's application afresh by obtaining the medical evidence relevant to the criteria which it will apply to its decision and an updated cost estimate from the Scheme Actuary;
- inform Ms N of when its decision is likely to be made, then inform her of its reasoned decision with reference to the medical and actuarial evidence that has been obtained and any policy which has been applied;
- In the event that a decision is made to grant enhanced IHRP, I direct that within 28 days of the date of the decision, Morrisons shall pay Ms N a lump sum, plus interest, equal to the outstanding instalments of her pension and pay to the Scheme any ongoing costs of enhancement. The interest referred to above shall be calculated at the base rate for the time being quoted by the Bank of England.

**Karen Johnston**

Deputy Pensions Ombudsman  
24 April 2019