

## Ombudsman's Determination

Applicant	Miss R
Scheme	Cadbury Mondelez Pension Fund ( <b>the Fund</b> )
Respondents	The Trustee of the Cadbury Mondelez Pension Fund ( <b>the Trustee</b> )

## Outcome

1. I do not uphold Miss R's complaint and no further action is required by the Trustee.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Miss R's complaint against the Trustee concerns its decision to refuse her an enhanced ill health pension under Rule 2.8.2 of the Final Salary section of the Fund.

## Background information, including submissions from the parties

4. Miss R worked for Cadbury Limited (**the Employer**) and was a member of the Final Salary section of the Fund. In June 2007, Human Resources (**HR**) sent Miss R a letter that said:

"We believe that Dr Kanas has spoken to you regarding ill-health retirement. However, we just wanted to ensure you were aware that he did look into this option and the Pensions Department confirmed they would be unlikely to consider this as an option, unless an individual was close to retirement. This is because somebody suffering from Chronic Fatigue Syndrome will eventually get better. The problem is being able to predict [sic] the time recovery will take place. If you do recover to a point where you feel able to apply for alternative roles within the business, please do let us know as soon as you can in order that we can work with you to identify any such roles. I had been sending you the updated jobs vacancies each week for you to review..."

5. On 10 August 2007, Miss R attended a meeting with HR to discuss her redundancy. In a letter to Miss R, dated 16 August 2007, HR said:

“As due to ill-health, you have been unable to apply for roles within the new structure and have not been able to work with us to identify any suitable alternative roles within the Company we have no alternative but to give you 13 weeks’ notice of the termination of your employment. The Company proposes to make a redundancy payment to you of £16,082 on termination of your employment.”
6. On 16 November 2007 Miss R’s employment was eventually terminated on grounds of redundancy. She became a deferred member of the Fund, which was confirmed to her in correspondence from the Employer, dated November 2007.
7. On 16 February 2016, Miss R made an application for an ill health pension from deferred status, due to serious illness that prevented her from working, for more than 10 years. Following the Fund’s request, Miss R submitted an up to date GP’s report, dated 29 April 2016, which said:

“She has tried lots of different medications to improve her symptoms but unfortunately all have failed to help...Unfortunately this is an ongoing problem that has not changed over the years and I do feel that Mrs R is definitely unfit to return to work and under these circumstances and the likelihood that she will not improve further, she should be allowed access to her pension fund. I would support her application completely.”
8. Miss R’s application was referred to the Fund’s medical adviser, Dr Mutalik, who issued a report, dated 1 July 2016 that said:

“According to the available medical evidence and on balance of probabilities, [Miss R] is likely to remain permanently incapable of undertaking duties of her previous role or any other gainful employment regularly and effectively. Future treatment is less likely to alter the situation. Therefore, the definitions of Pensions Scheme are likely to be met.”
9. On 12 October 2016, the Trustee sent Miss R a decision letter that said:

“Following the agreement by the Trustees to award you an Ill Health pension, I enclose details of the estimated options available to you with effect from the 01 July 2016.”
10. Miss R contacted the Pension Manager to request a copy of the Fund Rules, which she received in an email dated 1 December 2016. She was informed that the relevant rule applicable to her application was Rule 2.16.2. An extract of this provision is set out in the Appendix.
11. In January 2017, Miss R’s solicitor raised an enquiry with the Pension Manager with regard to her ill health pension. In the letter dated 28 January 2017, the solicitor said:

“It appears that you may have awarded a value of ill-health pension to her which is lower than she had reason to expect, and this may be calculated on a mistaken basis. This is an issue of whether the correct rule has been applied, or if the wrong provision was considered by the Trustees when making the award. We refer you to rule 2.8.2 Total Incapacity [relevant section of Rule 2.8.2 is set out in the Appendix] ...The reason for our client leaving service was the medical condition...Our Client has requested a pension. Her request was not for an actuarially reduced pension under rule 2.16.2...Our client meets the definition of Total Incapacity. It is clear that her incapacity is permanent and she cannot do work of any kind...It was her serious and permanent illness which ended her employment...”

12. On 21 March 2017, the Pension Manager responded to Miss R’s solicitor in a letter that said:

“Although Miss R’s former employer acknowledges that she was diagnosed with a chronic condition in 2006 there is no record that Miss R made an application for retirement on the grounds of ill health. Miss R was subsequently made redundant in November 2007 and became entitled to a deferred pension...the Rules of the [Fund] make specific provision for former employees who are entitled to a deferred pension under Rule 2.16.2...Rule 2.8...only applies to members of the [Fund] retiring from active employment. As Miss R was no longer in active employment the provisions of this rule do not apply to her. In view of the above I can confirm that the Trustee is unable to agree to your request to grant an enhanced pension as requested.”

13. On 11 May 2017, the solicitor sent a letter to the Pensions Manager that said:

“...my client did discuss and raise with her employer at that time her ill-health as a possible ground for retirement. This was extensively discussed with the Human Resources Department, who indicated to my client that, in view of relative youth at the time, and the nature of her medical condition, an application for ill-health retirement...could not (or would not) be progressed...by reason of her ill-health, her employment was terminated, and while the ostensible ground of such termination was redundancy, her employment was, nonetheless, terminated by reason of her ill-health...”

14. In June 2017, the Employer sent the solicitor a letter confirming that its records indicate that the reason for Miss R’s departure was redundancy. The solicitor subsequently wrote to the Pensions Manager maintaining its stance and requesting that the Trustee reconsider the matter.

15. On 25 July 2017, the Trustee responded to the solicitor in a letter that said:

“I believe therefore that the issue at hand is the reason for Miss R’s leaving Service/employment. As stated above the Trustee was notified by Miss R’s former employer that the reason for leaving Service was redundancy and not

Incapacity or Total Incapacity. As a result, I believe this is an employment issue as opposed to a Trustee one...”

16. The Employer then sent the solicitor a letter saying that:

“Ms R left the business on the grounds of redundancy...You were able to send a copy of Ms R’s redundancy letter signed by Ms L [HR Manager] ...Ms L remains with the business. She recalls supporting Ms R at the time of her long term absence working closely with Occupational Health and also the circumstances of Ms R’s redundancy. She has confirmed that it was clear...at the time of her departure from the business, Ms R did not meet eligibility for an application on the grounds of ill health retirement. Ms L has also confirmed that given the length of time Ms R had been absent from work, the next step the business were [sic] considering was to initiate a process to assess as to whether dismissal through capability was appropriate. At the time however, the function was due to go through some transformation and we were therefore, having gone through our recognised internal process and in conjunction with Ms R, able to secure a redundancy route instead of a dismissal route for your client.”

17. In October 2017, Miss R raised a formal complaint by invoking the Fund’s two-stage Internal Dispute Resolution Procedure (**IDRP**). In her submission, Miss R said that she was never told that accepting redundancy would prevent her from applying for an enhanced ill health pension in the future. Miss R also contended that there was nothing in the Rules that specifically precluded an ill health pension claim where the member had left by reason of redundancy.

18. On 28 November 2017, the Trustee sent Miss R a response under stage two of the IDRP that maintained its previous stance and added that:

“The Trustee can only apply the Fund Rules and as it was informed that you left employment due to redundancy, Rule 2.8.2 of the Final Salary Section does not apply. As the Trustee was not privy to the conversations you had with your former employer, nor the circumstances around your leaving employment, the Trustee would not be best placed to discuss this matter with your former employer. If you wish to pursue a complaint with your former employer, I suggest you contact them directly.”

19. In October 2017, Miss R brought her complaint to this Office.

20. On 17 August 2018, the Trustee sent this Office a formal response that maintained its previous stance and added:

“...the Trustee has no record of any conversation with the company doctor regarding a potential application for ill health retirement in 2007, so again is unable to comment.”

## **Adjudicator's Opinion**

21. Miss R's complaint was considered by one of our Adjudicators, who concluded that no further action was required by the Trustee. The Adjudicator's findings are summarised below: -
- The Trustee had abided by the Fund's Rules and considered all of the relevant evidence.
  - Essentially, Miss R's application for an ill health pension fell under Rule 2.16.2- Early Payment because she was a deferred member of the Fund at the time of her application in February 2016. In order for Miss R to be entitled to an ill health pension benefits from active status, where Rule 2.8.2 Total Incapacity applied, her employment would have to have been terminated on grounds of total incapacity, not redundancy. As the Adjudicator understood this was not the case, Miss R was not eligible for enhanced pension benefits.
  - Miss R felt that she was not given proper advice on the consequences of signing the dismissal letter. However, in the Adjudicator's opinion, these issues were employment matters and therefore not within this Office's jurisdiction. Therefore, the Adjudicator did not comment on whether Miss R should have been awarded active service ill health benefits, as the two matters are interlinked.
  - It was therefore the Adjudicator's opinion that this complaint should not be upheld.
22. Miss R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Miss R provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Miss R for completeness.
23. Miss R referred to discussions between HR and Dr Kanas at the time her employment was terminated on grounds of redundancy. She provided an extract from Dr Kanas' clinical notes that said:
- "Since prognosis for Chronic Fatigue is difficult to predict, and on balance most cases do improve in time to level of health compatible with work, Trustees are unlikely to consider the award of an Ill-Health Retirement pension."
24. Miss R said that she asked the Trustee to review her OH reports and it failed to do so. The Trustee and the Employer also failed to explain an ill health pension process to her.
25. She believes that the original decision in 2007 not to refer Miss R for an ill health pension was flawed as it was based on insufficient medical evidence and flawed process.

**Ombudsman's decision**

26. My role is primarily to decide whether the Trustee has correctly applied the Fund's Rules, considered all of the relevant evidence (it is for the Trustee to decide what weight, if any, to attach to that evidence) and made a decision which is not flawed. By flawed, I mean a decision which no other decision maker, properly advising itself, would come to in the same circumstances.
27. Essentially, in order to be eligible for an ill health pension, a member must leave service due to total incapacity and "is entitled on request with the Trustee's consent to the payment of the Normal Pension". Miss R's employment was terminated on grounds of redundancy and not on grounds of ill health. It was Miss R's decision to accept the redundancy package and I have seen no evidence of her appealing that decision at the time. Under these circumstances, there is no provision under the Fund's rules to allow for a member to be considered for an enhanced ill health pension. So, I do not find that Miss R was eligible to apply.
28. I understand that Miss R feels that the Trustee has not considered her medical evidence properly when considering her for an ill health pension. I note that Dr Kanas considered Miss R's health condition and was of the view that, on the balance of probabilities, her condition would improve; therefore, she did not meet the criteria to apply for an ill health pension. She was subsequently offered alternative roles within the company.
29. I am unable to consider what advice Miss R received from her employer with regard to signing the dismissal letter. As explained by the Adjudicator, these issues are employment matters and therefore not within my jurisdiction.
30. Turning to Miss R's point with regard to the Employer's failing to give advice with regard to an ill health pension, Miss R may wish to consider raising this issue with the Employer if she has not already done so.
31. Therefore, I do not uphold Miss R's complaint.

**Karen Johnston**

Deputy Pensions Ombudsman  
5 February 2019

32.

## **Appendix**

### **2.8 Early Retirement (Incapacity)**

2.8.2 Total Incapacity: If a Member who has been a Member for at least one year leaves Service due to Total Incapacity he or she is entitled on request and with the Trustee's consent to immediate payment of the Normal Pension but this is increased by taking into account the Pensionable Service the Member could have completed from the date Service ended to Normal Pension date.

### **2.16 Deferred Pension**

2.16.2 Early Payment: A Member entitled to a deferred pension from Normal Pension Date may, with the consent of the Trustee elect instead to receive a reduced pension from an earlier date which may not be before age 50 unless the Member has retired from employment due to serious sickness or disability. The Trustee must be reasonably satisfied that the pension has the same overall value as the deferred pension otherwise payable at Normal Pension Date. The stepped pension option described in general Rule D12 is available to the Member.