

## Ombudsman's Determination

Applicant	Mr N
Scheme	Tesco PLC Pension Scheme ( <b>the Scheme</b> )
Respondent	Tesco Pension Trustees Limited ( <b>the Trustee</b> )

## Outcome

1. I do not uphold Mr N's complaint and no further action is required by the Trustee.

## Complaint summary

2. Mr N has complained that, in February 2019, the Trustee refused his request to increase his limited ill-health retirement (**IHR**) pension payable from the Scheme since August 2013 to a full IHR pension.

## Background information, including submissions from the parties

3. Mr N was employed by Tesco Plc (**Tesco**) as a maintenance manager.
4. He suffered a nervous breakdown in November 2012 and was absent from work for around nine months. Tesco applied for IHR benefits from the Scheme on Mr N's behalf, but the application was declined in July 2013. Tesco also unsuccessfully tried to find suitable alternative employment for him.
5. Tesco dismissed Mr N in August 2013 on the grounds of ill-health. At the time, Mr N had been diagnosed as suffering from generalised anxiety disorder.
6. Mr N re-applied for IHR benefits in September 2013, but this application was also unsuccessful.
7. Mr N was unhappy that the Trustee had rejected his IHR application in 2013.
8. He subsequently made a complaint under the Scheme's Internal Dispute Resolution Procedure (**IDRP**) in 2014.
9. In her Stage One IDRP decision letter dated 23 October 2014, Ms M, the Pension Administration Manager of the Scheme at the time, informed Mr N that the Trustee

did not uphold his complaint because it considered that it had made the correct decision in 2013.

10. However, following the involvement of The Pensions Advisory Service (**TPAS**), the Trustee decided to uphold Mr N's complaint at Stage Two IDRPs in October 2015. It awarded him a limited IHR pension from the Scheme, backdated to the date he left Tesco on 13 August 2013. The review period to look at whether his IHR pension should continue in the future was set at two years. The Trustee also informed Mr N that if he was unhappy with this decision, he could complain to The Pensions Ombudsman (**TPO**). It provided Mr N with TPO's contact details and the website address in its Stage Two IDRPs decision letter dated 28 October 2015.
11. In 2015, Mr N accepted the Trustee's decision and received a limited IHR pension from the Scheme.
12. In his letter dated 20 December 2018, Mr N asked the Trustee to consider awarding him a full IHR pension. He submitted new medical evidence with his request including:-
  - A letter dated 18 December 2018 from his GP stating that Mr N was suffering from two ongoing and long-term conditions. The first, a generalised anxiety disorder which despite medication he remained significantly impaired. The second, chronic fatigue syndrome (**CFS**), diagnosed in 2017, albeit he may have had some early symptoms dating back to 2014, for which he needed frequent periods of rest and sleep during the daytime after short periods of moderate activity. The prognosis for this condition was less certain but likely to continue for the foreseeable future.
  - A fitness for work statement dated 14 December 2018 showing that he was currently unfit for work, with a further review required in three months' time.
13. Mr N also said that:-
  - He had developed symptoms of CFS: (a) only after being dismissed on the grounds of ill-health by Tesco; and (b) prior to being awarded a limited IHR pension from the Scheme by the Trustee.
  - He had only been able to work as a self-employed taxi driver after leaving Tesco in August 2013. His "working day" was reduced to two short stints of 90 to 120 minutes. He slept for about two hours after each working period. His earnings from this job were minimal.
  - Working in this way was detrimental to his health and exacerbated his CFS.
  - He would be unable to work in "general employment" because of his illnesses.

14. In his letter dated 14 February 2019, Mr P, the Pension Administration Manager of the Scheme, informed Mr N that the Trustee, after carefully considering the new evidence, had decided that:
- his limited IHR pension should continue to be paid from the Scheme; and
  - the review period should be increased from every two to every five years.
15. The Trustee's reasons for not awarding him a full IHR pension were:-
- Its decision must be based on Mr N's medical condition at the time he left Tesco on 13 August 2013. Changes in Mr N's health after this date were irrelevant.
  - He had undertaken paid employment after being awarded a limited IHR pension from the Scheme.
16. Mr N disagreed with this decision and made a new complaint under the IDRPs in November 2019. He summarised his complaint as follows:
- “(1) I believe that the delay in making the initial award has contributed entirely to a deterioration in my health.
- (2) That as there was a delay between my date of dismissal and the date of the initial award, health conditions occurring between these dates should fall into the scope of the Scheme.
- (3) Scheme rules are biased in favour of the Scheme in that pensions (level of award) can be reduced or withdrawn but never increased.
- (4) To remedy this situation, I would request that my pension is increased from limited ill-health to full ill-health from 14/12/2018.”
17. Mr N's new complaint was not upheld at both stages of the IDRPs.
18. In his Stage One IDRPs decision letter dated 21 February 2020, Mr P replied on behalf of the Trustee as follows:-
- The Scheme's Trust Deed and Rules (**the Scheme Rules**) set out when the Trustee could pay an IHR pension to a member. The amount depended on whether it was a full IHR pension or a limited IHR pension.
  - Broadly, a full IHR pension was payable only if the member could show that he/she could not “take on any paid employment” before age 65. This test had to be met at the time the member left Tesco because of ill-health, and not later. If this test was not met, a limited IHR pension might be payable instead.
  - Based on the evidence that Mr N provided in 2015, the Trustee could not award him a full IHR pension from the Scheme because he did not meet “the full IHR pension test” at his date of leaving Tesco.

- He had accepted the Trustee's decision in 2015 so the matter was closed.
  - His new complaint was different to the one which he had made in 2015 that concerned whether he was eligible to any IHR pension from the Scheme.
  - His concerns about the delay in payment of his IHR pension from the Scheme had been dealt with at Stage Two IDRPs of his original complaint by the Trustee.
  - After careful consideration and taking legal advice, the Trustee would not be increasing his limited IHR pension to a full IHR pension because: (a) the Scheme Rules had "clear medical criteria for who is eligible to receive a full IHR pension"; and (b) his medical condition did not meet these criteria at the time he left Tesco.
  - In particular, Mr N had told it that he worked as a taxi driver after leaving Tesco and the GP's notes did not indicate that he met the requirements for a full IHR pension from the Scheme at his leaving date.
  - The ill-health provisions in the Scheme Rules were not unusual and, in fact, were more generous than those offered by many other pension schemes.
  - In any case, it must follow what the Scheme Rules say when making its decision.
19. Mr N was unhappy with this decision and applied for his complaint to be considered by the Discretions Committee (**the Committee**) of the Trustee at Stage Two IDRPs.
20. In his Stage Two IDRPs decision letter dated 10 June 2020, Mr P informed Mr N that: (a) the Committee had carefully reviewed his complaint after considering all the available evidence and taking legal advice, and (b) it did not uphold his complaint for the same reasons given in the Stage One IDRPs decision letter.
21. The letter also said that:

"Each application for an IHR pension is assessed based on the requirements of the Scheme Rules and the evidence provided by the individual. It could not comment on "anyone else's circumstances, the frequency of their case review or severity or existence of medical conditions."

### **Mr N's position**

22. He had experienced financial difficulties since 2013 so it was "better than nothing" to accept a limited IHR pension from the Scheme in October 2015, backdated for two years.
23. He was led to believe that if he could offer further evidence supporting his claim for a full IHR pension, it would be looked at.

24. He worked as a self-employed taxi driver after leaving Tesco in August 2013, despite having been certified as unfit for work, to earn money to pay the mortgage on his home.
25. If the Trustee had reached its decision to award him a limited IHR pension in 2013, he would not have worked as a taxi driver.
26. The drastic reduction to his earnings following his dismissal by Tesco and the delay in awarding him an IHR pension exacerbated his stress and anxiety. In his view, this triggered the onset of CFS in 2014.
27. The Trustee made a mistake in 2013 by originally deciding to decline his IHR application. So, it should “take responsibility for the period between 2013 and 2015” and treat the date on which it awarded him an IHR pension in October 2015 as his “de facto leaving date”. As the deterioration in his health commenced before the Trustee awarded a limited IHR pension to him, it should be taken into account by the Trustee when reviewing its decision.
28. There is a “fundamental flaw” in rule 4.4 of the Scheme Rules “where a pension can be removed if an individual’s health improves but cannot be reviewed and adjusted if there’s a deterioration or further evidence becomes available.”
29. He dealt with some IHR cases while working as a dismissing officer at Tesco and knew of three former colleagues who received ill-health pensions that did not comply with the IHR criteria specified in the Scheme Rules. This knowledge has impacted his mental health and led to his belief that decisions are made subjectively.
30. He says that:

“In hindsight I do not believe that I was fit to work when I left Tesco in 2013. Due to the circumstances ...I was effectively forced to return to work while I wasn’t fit. To be able to work you need to be employable, I do not believe that someone who cannot commit to work more than an hour or two at a time or consecutive days is employable.”
31. The Trustee has applied the “any paid work” rule in his case without considering the reality of his situation, that is, “extremely low hours worked in very short stints, per day, across a week and for a fraction of basic minimum pay.”
32. His condition has now deteriorated to the point where he is no longer able to work.
33. The constant worry about his IHR pension being withdrawn following each review has caused him further unnecessary stress. In his view, it is logical and reasonable for the Trustee to make his IHR pension permanent without further review when he is still suffering from the same conditions after more than 10 years.

## The Trustee's position

34. Rule 4.4, "Incapacity retirement"<sup>1</sup>, of the Scheme Rules, provides that a member who leaves employment before Normal Pension Age (**NPA**) age 65 because of "Incapacity" may, with the consent of the Principal Employer, Tesco, choose to receive an immediate pension from the Scheme.
35. Incapacity is defined as:
- "...physical or mental impairment that prevents (and will continue to prevent) the Member from following his or her normal occupation and is likely to do so at least until the Member reaches NPA. Before deciding whether a Member is suffering from Incapacity, the Trustee must obtain evidence from a registered medical practitioner that the Member is (and will continue to be) incapable of carrying on his or her occupation. The Trustee's decision as to whether a Member is suffering from Incapacity will then be final."
36. A full IHR pension is payable only:
- "If the Trustee is satisfied that the Incapacity is such that the Member will be unable to take on any paid employment before NPA..."
37. Mr N met the definition of Incapacity but not the full IHR pension eligibility test at the date he left Tesco's employment. So, it awarded him a limited IHR pension backdated to August 2013 from the Scheme.
38. It refutes Mr N's contention that it had "a degree of flexibility when making decisions" and had not always applied the IHR criteria described in the Scheme Rules when awarding IHR pensions from the Scheme. The former colleagues mentioned by Mr N were tested against the same criteria and, if eligible for a full IHR pension, it was awarded.
39. Under the 'Review of ill-health pensions' section of rule 4.4, it can require evidence of a member's continued Incapacity or inability to take on any paid employment from time to time until age 65. If it is not satisfied that the relevant eligibility requirements continue to be met, it can reduce or suspend an IHR pension.
40. The Scheme Rules do not allow a member's limited IHR pension to be increased to a full IHR pension on review. Even if they did, Mr N would still have not met the eligibility requirements for a full IHR pension at the date he left Tesco.
41. It is only able to review Mr N's limited IHR pension to assess whether it continues to be payable. It took Mr N's new medical evidence into account in its decision about the review period. The GP said that he expected Mr N to suffer from generalised anxiety disorder in the long term but did not say it was permanent. The fitness for work statement showed that Mr N was only unfit for work for a brief period, that is, three

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<sup>1</sup> This rule has been reproduced in the Appendix below.

months. It showed “flexibility” by deciding to extend the review period to five years, as permitted under the Scheme Rules.

42. The reviews remain in place for Mr N as mental health conditions are “often fluctuating conditions” and the Scheme Rules allow his limited IHR pension to be reduced if his circumstances change.
43. Mr N does not agree with the way the Scheme Rules work. However, it is legally bound to follow the Scheme Rules as they are written. They are “very clear about the conditions that must be met before someone can be paid a full IHR pension.”
44. The Scheme Rules are applied appropriately to all members to ensure consistent outcomes and there is no moral consideration that overrides this legal obligation.
45. Many of the issues which Mr N has raised concern its decision made in October 2015 which is not under review by the Ombudsman.
46. “The Trustee directors are all held to an appropriate standard of knowledge and understanding and must make decisions in line with the Rules and their powers and duties. The Trustee took specialist pensions law advice to help it address Mr N’s concerns in 2019 and ensure that it was following the Rules exactly.”

### **Adjudicator’s Opinion**

47. Mr N’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 set out in paragraphs 48 to 64 below.
48. The duties and responsibilities of the Trustee are laid by the law and by the Scheme Rules. The Trustee’s fundamental duty is to give effect to the provisions of the Scheme Rules. Failure to do so would amount to a breach of trust.
49. Rule 4.4, of the Scheme Rules, stated that if the Trustee was satisfied that Mr N’s Incapacity at the date he left Tesco was such that he would be unable to take on any paid employment before NPA 65, a full IHR pension could be paid to him from the Scheme.
50. However, in 2015, the Trustee considered that Mr N only satisfied the definition of Incapacity and did not meet the eligibility test for a full IHR pension at his date of leaving Tesco. In accordance with the Scheme Rules, it could only award Mr N a limited IHR pension from the Scheme backdated to his leaving date in August 2013.
51. Rule 4.4 also clearly stipulated that the Trustee could: (a) periodically request medical evidence from Mr N to ensure that he continued to meet the definition of Incapacity; and (b) reduce or suspend his IHR pension from the Scheme if he did not.
52. Mr N asked the Trustee in December 2018 to consider increasing his limited IHR pension to a full IHR pension as his health had deteriorated since the award was made in October 2015. He submitted new medical evidence with his request.

53. It was clear, however, from rule 4.4 that the Trustee could not have considered this request. The rule only permitted it to review, from time to time, whether payment of Mr N's limited IHR pension should continue and change the frequency of its reviews if deemed appropriate.
54. Although the Adjudicator could understand why Mr N felt that the IHR provisions in the Scheme Rules were unfair, it was not for the Pensions Ombudsman (**the PO**) to impose the criteria that must be met for IHR benefits to be paid from the Scheme. The PO would only look at whether the Trustee had followed the Scheme Rules.
55. Furthermore, when considering how a decision had been made by the Trustee, the PO is primarily concerned with the decision making process only and would generally look at whether:
  - the appropriate evidence had been obtained and considered;
  - the applicable scheme rules have been correctly applied; and
  - the decision was supported by the available relevant evidence.
56. Providing the Trustee had acted in accordance with the above principles and within the powers given to it by the Scheme Rules, the PO could not overturn its decision merely because he might have made a different decision. It is not the PO's role to review the medical evidence and come to a decision of his own as to Mr N's eligibility for a full IHR pension from the Scheme.
57. The Adjudicator agreed with the Trustee's position that most of the issues which Mr N had raised in his new complaint concerned its original decision made in October 2015 to award him a limited IHR pension from the date he left Tesco's employment.
58. Mr N said that he had to accept the Trustee's decision because he was experiencing financial difficulties at the time following his dismissal by Tesco and the delay in awarding him an IHR pension by the Trustee.
59. However, if Mr N had been unhappy with this decision and the way in which the Trustee reached it, he could have requested that payment of his limited IHR pension be made on a without prejudice basis and continued with his complaint by referring it to TPO in 2015.
60. There are time limits within which complaints need to be brought to TPO. In most cases, applications needed to be made within three years of the event being complained about, or, if later, within three years of when an applicant was aware of this issue or should have been aware of it.
61. Those parts of Mr N's complaint concerning the Trustee's decision in October 2015, in the Adjudicator's view, could not be investigated by the PO as they were made outside these time limits and so were not within his jurisdiction.



62. In any case, only Mr N's complaint that the Trustee had improperly decided in February 2019 to decline his request to increase his limited IHR to a full IHR pension from the Scheme had been accepted for investigation by TPO.
63. In the Adjudicator's opinion, the Trustee did carefully consider the new medical evidence submitted by Mr N and applied the Scheme Rules correctly when conducting its review in 2019. Its decision to continue paying him a limited IHR pension from the Scheme, and to increase the review period to five years, was supported by the evidence and within the bounds of reasonableness.
64. The Trustee had a duty to pay benefits in accordance with the Scheme Rules and this was what had happened in Mr N's case.
65. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his further comments which do not change the outcome.

### **Mr N's further comments**

66. Mr N submits:-

- He was unaware that he could have added "a caveat" stating that he wished to continue with his complaint in 2015 when requesting payment of his limited IHR pension from the Scheme. Nobody informed him that he could do this.
- He is dubious that the Trustee received appropriate training on mental health issues to make "an informed decision" on his IHR application.
- The Department for Work and Pensions (**DWP**) assessed him as being unfit for work. DWP recognises that individuals might be able to work "a small amount of hours for minimum pay". This supports his argument that during the time he was working as a taxi driver, he was unfit for work and virtually unemployable.
- In December 2018, his GP said that he was suffering from long term generalised anxiety disorder. The Patients Association defines a long-term condition as an illness that "cannot be cured" but "can usually be controlled with medicines or other treatments."
- "I have concerns that the rules are applied consistently, concerns that in 2013 and to some extent ongoing that mental health issues are dismissed as 'performance management' issues. That it appears that one person, Ms M, may have played several roles in my case, that comments, assumptions and misunderstandings, such as 'job too big', 'long term, not permanent' and not knowing or noticing that a fitness for work note can have a review date, indicating ongoing. I was subsequently classed as unfit for work following the issue of that note, by the DWP..."

I believe that the medical evidence I supplied between 2013/15 was sufficient to prove that I'm unfit for work. The low hours worked, in small stints and low income from taxi driving should be inconsequential to my

case. In most cases a mental health condition is not a reason to stop driving a car.”

- He has identified a lot of information provided by Tesco in response to his Subject Access Request (**SAR**) made in January 2023 which he believes has prejudiced his ongoing complaint. He would consequently like to request a review of the “2013 original application” by an Ombudsman.

67. I note the additional points raised by Mr N, but I agree with the Adjudicator’s Opinion.

### **Ombudsman’s decision**

68. Firstly, Mr N has requested to extend his complaint to include that the Trustee failed to properly consider his IHR application in 2013.

69. Regulations made by Parliament impose strict time limits on complaints which may be investigated by my Office. Regulation 5 of The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (SI 1996 No.2475), states:

“(1) Subject to paragraphs (2) and (3) below, the Pensions Ombudsman shall not investigate a complaint or dispute if the act or omission which is the subject thereof occurred more than 3 years before the date on which the complaint or dispute was received by him in writing.

(2) Where, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the Pensions Ombudsman, unaware of the act or omission referred to in paragraph (1) above, the period of 3 years shall begin on the earliest date on which that person knew or ought reasonably to have known of its occurrence.

(3) Where, in the opinion of the Pensions Ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under paragraphs (1) and (2) above, the Pensions Ombudsman may investigate and determine that complaint or dispute if it is received by him in writing within such further period as he considers reasonable.”

70. Mr N was awarded limited IHR in October 2015 backdated to August 2013 after initially being refused IHR in September 2013. So, regardless of whether the “act”, that is the refusal to award Mr N full IHR, is the date of the 2013 decision or the date of the 2015 decision, Mr N’s request to extend his complaint is out of time under regulations 5(1) and 5(2).

71. It remains for me to consider whether it would be reasonable to exercise discretion to allow the extension of Mr N’s complaint under regulation 5(3).

72. Mr N says that he only accepted a limited IHR pension from the Scheme in October 2015 backdated for two years because he had been in financial difficulties since

2013. He says he was unaware that: (a) after receiving the Trustee's Stage Two IDR decision letter of 28 October 2015, he could have taken limited IHR on a without prejudice basis and complained to my Office; and (b) of the time limits imposed on complaints that I may consider.

73. However, this information could have been readily obtained by Mr N if he had either asked the Trustee or contacted my Office. Contact details for my Office were included in the Trustee's 28 October 2015 letter to Mr N. So, I do not consider that it is reasonable to exercise discretion under regulation 5(3).
74. With regard to the complaint that has been accepted for investigation. Namely, that the Trustee improperly refused Mr N's request, in February 2019, to increase his limited IHR pension to a full IHR pension.
75. In this matter, I am primarily concerned with the decision-making process:
- (a) whether the applicable Scheme Rules have been correctly interpreted;
  - (b) whether appropriate evidence has been obtained and considered; and
  - (c) whether the decision is supported by the available relevant evidence.
76. Rule 4.4 provides that until NPA, the Trustee may from time to time require evidence of a member's continued Incapacity. If not satisfied, the Trustee may reduce a member's pension, or suspend it for any period or periods before NPA. There is no provision for increasing a limited IHR pension to a full IHR pension.
77. I concur with the Adjudicator's opinion that the Trustee considered the new medical evidence submitted by Mr N and applied the Scheme Rules correctly when conducting its 2019 review of Mr N's continued Incapacity. I find its decision to continue paying Mr N a limited IHR pension from the Scheme and increase the review period to five years, was properly made.
78. As the evidence does not support a finding of maladministration by the Trustee in coming to its 2019 decision, I do not uphold Mr N's complaint.

**Anthony Arter CBE**

Deputy Pensions Ombudsman  
22 March 2023

## **Appendix**

### **Relevant Excerpt from the Scheme Rules dated 31 May 2012 for the Final Salary Section**

#### **“4.4 Incapacity retirement**

##### **Qualification for ill-health pension**

A member who leaves Service before Normal Pension Age because of Incapacity may, with the consent of the Principal Employer, choose an immediate pension under this Rule. However, no pension will be payable under this Rule if an Employer offers the Member alternative employment which the Member could be reasonably expected to accept, in spite of the Incapacity.

##### **Limited ill-health pension**

Unless the Member qualifies for a full ill-health pension, the pension will be calculated as described in Rule 4.1. The part of the pension that is attributable to Pensionable Service on or after 1 June 2012 will be reduced as described in Rule 4.1.2 but only by the same amount as if the pension were starting at Normal Pension Age. The part of the pension that is attributable to Pensionable Service before 1 June 2012 will not be reduced.

##### **Full ill-health pension**

If the Trustee is satisfied that the Incapacity is such that the Member will be unable to take on any paid employment before Normal Pension Age, the pension will be calculated as described in Rule 4.1, but as if Pensionable Service included the period between the Member's leaving and Normal Pension Age.

The part of the pension that is attributable to Pensionable Service on or after 1 June 2012 (including the pension attributable to the extra Pensionable Service credited for the period to Normal Pension Age) will be reduced as described in Rule 4.12, but only by the same amount as if the pension were starting at Normal Pension Age.

##### **Review of ill-health pensions**

Until Normal Pension Age, the Trustee may from time to time require evidence of the Member's continued Incapacity or inability to take on any paid employment. If not satisfied, the Trustee may reduce the Member's pension, or suspend it for any period or periods before Normal Pension Age (in which case the pension may also be reduced). The Trustee may adjust any benefits payable on the Member's death as it considers appropriate.”