

Ombudsman's Determination

Applicant	Ms E
Scheme	Universities Superannuation Scheme (USS)
Respondents	The Society of College, National and Universities Libraries (SCONUL) Universities Superannuation Scheme Limited (USS Ltd)

Complaint Summary

1. Ms E said she was made redundant by SCONUL on 16 November 2012. She alleges that SCONUL subsequently incorrectly informed USS Ltd that she had left by mutual agreement and was therefore not entitled to an unreduced immediate early retirement pension from the USS.
2. Ms E has also complained that USS Ltd provided her with insufficient and misleading information about her pension rights available on redundancy, which resulted in her failure to apply for an unreduced pension from the USS in November 2012.

Summary of the Ombudsman's Determination and reasons

3. The complaint is not upheld. While the restructure proposal was a trigger for Ms E to seek a settlement and her role was expected to diminish, the termination of her employment was "wholly or mainly attributable to" her poor working relationship with Mrs R, the effect this was having on her health and that with legal support she felt comfortable to seek a Compromise Agreement.

Detailed Determination

4. Ms E applied for permission to appeal the Pensions Ombudsman's Determination of 18 July 2018 (PO-7946). This was granted but limited to:

“(a) that the Ombudsman took too narrow an interpretation of ‘redundancy’ for the purposes of rules 1.1 and 11.2.1 of the Scheme Rules by addressing whether or not a formal redundancy process had started or whether the termination of the Appellant’s employment was at SCONUL’s instigation or the Appellant was coerced into the Compromise Agreement;

(b) the wording of the Compromise Agreement should have led the Ombudsman to conclude that the Appellant’s eligible employment was terminated by reason of redundancy within the meaning of rule 11.2.1.”

High Court Judgment¹

5. Johnson J allowed the appeal on ground (a) but dismissed the appeal on ground (b). On ground (a), Johnson J said in paragraph 85:

“My conclusion is that the Ombudsman’s analysis had a misplaced emphasis on the question whether the termination of [Ms E’s] employment arose at the instance of SCONUL (including the question whether she was coerced), and that in consequence the Ombudsman did not properly or sufficiently address the relevant elements of the test for redundancy in USS Rule 1.1, namely:

- a) Had SCONUL’s requirements for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

And -

- b) Was the termination of [Ms E’s] employment wholly or mainly attributable to any such actual or expected cessation or diminution?”

6. On the submission that the terms of SCONUL’s 19 October 2012 email and its attachment gave rise, in and of themselves, to the conclusion that the test for redundancy was met, Johnson J commented in paragraph 86:

“... I do not think that the meaning and effect of either document can be stretched that far, although I agree that they are consistent with the idea that the test for redundancy *might* have been met at that time. I say that because, as noted above, both the email and the attachment indicate an intention to put in place a new structure, and for the “*main differences*”^[2] to be “*in the focus of*

¹ Gail Downe v Universities Superannuation Scheme and The Society of College, National and University Libraries [2019] 2403 EWHC (ChD).

² Taken from SCONUL’s 19.10.12 email.

the new roles within the structure and a change in the balance between work carried out internally as opposed to being outsourced”^[3]. Such statements certainly support an argument that a redundancy situation *had* arisen, but in and of themselves they do not determine that question, because they do not enable any conclusions to be drawn as to what the new roles were in fact expected to be, or as to what the expected change in the balance between work carried out internally and outsourced work was intended to be, or indeed whether SCONUL’s planning had progressed far enough for there to be an *expectation* (within the language of the Rule) that SCONUL’s requirements would cease or diminish. It seems to me that such matters should be addressed in light of the relevant evidence as a whole, which in turn may involve any contested issues of fact being resolved (which might include, for example, determining whether Mrs R did in fact present a confidential paper in September 2012^[4] which reinforced SCONUL’s commitment to outsource accounts, and the weight (if any) to be attributed to [Ms E’s] statement that she was told by HR in August 2012 that “*accounts work may be something that could change quite radically quite quickly*”^[5]).

7. On the interpretation of “redundancy” under the USS Rules, Johnson J agreed that only the second limb of the definition, Rule 1.1(b), was relevant; as there was no suggestion that SCONUL was ceasing or intending to cease its activity, whether at Ms E’s place of work or at all.
8. As to the second limb, Johnson J said in paragraphs 53, 55-59, 64, 72, 79(iv), 84:-
 - This required three questions to be determined:-
 - i) Has the employment terminated?
 - ii) Have the requirements of the employer for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
 - iii) Was the termination of employment wholly or mainly attributable to an actual or expected cessation or diminution?
 - As Ms E’s employment had terminated, the issues for the Ombudsman were questions ii) and iii). These corresponded to the two factual questions put forward by Lord Irvine in *Murray v Foyle Meats* [1999] ICR 827 ⁶.

³ Taken from SCONUL’s 19 October 2012 email.

⁴ ‘EB Paper September 2012: Making the most of our resources’.

⁵ Taken from ‘Notes of a meeting held at 11.00 a.m. on 1 August 2012’.

⁶ In the case of *Murray v Foyle Meats*, Lord Irvine said: “My Lords, the language of paragraph (b) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exist. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation.”

Having regard to the first of the factual questions

- The relevant question was: “What were the reasons the Compromise Agreement came about and more specifically, was its existence, looked at objectively, wholly or mainly attributable to SCONUL’s requirements for employees to carry out work of a particular kind having ceased or diminished, or being expected to cease or diminish?”
- There had been no analysis by the Ombudsman of the intended reorganisation and what it might actually involve, and specifically of whether it justified the conclusion that SCONUL’s requirements for employees to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish. In other words, “there is no analysis of what Lord Irvine in *Murray v. Foyle Meats* described as the question whether the requisite state of economic affairs existed, or not”.
- This was despite the 19 October 2012 email, which explained the main differences under the new structure were to be “...in the focus of the new roles...and a change in the balance between the work carried out internally as opposed to being outsourced”
- The fact that overall staff members were expected to stay the same did not necessarily mean that no redundancy situation had arisen. It was entirely possible for the test to be met where the overall number of employees remained the same, but the type of work required to be undertaken by those employees was expected to change. An important part of Ms E’s case was that just such a situation had arisen because (amongst other things) the intention was for her accounting role to be outsourced. SCONUL’s position was that that was not an intended effect of the reorganisation. This had not been analysed or resolved by the Ombudsman.

Having regard to the second of the factual questions - the causation issue

- On the question whether Ms E’s termination of employment was “attributable” to a change in SCONUL’s business requirements, there was no analysis in the Ombudsman’s Determination of issues which might be relevant to that question – for example, what work was Ms E doing at the time her employment was terminated; how such work might be affected (or might be expected to be affected) by the intended reorganisation; and if it was to be affected, then whether under her contract of employment Ms E could be required to do something else.
- The idea that the Compromise Agreement was either a mutual agreement or alternatively was instigated by Ms E was not necessarily incompatible with the ideas that either a) there existed a redundancy situation within the meaning of Rule 1.1 (of the USS Rules) and or b) that such a redundancy situation was the sole or main cause of the Compromise Agreement coming about.
- The USS Rules had adopted a test for redundancy which borrowed directly from the language of employment legislation, but minus any requirement (which quite

easily could have been incorporated if that had been intended) that the employee should have been dismissed.

- He could see no reasoned assessment in the Ombudsman's Determination of the question whether the reorganisation, even if in its early stages and therefore falling short of a formal redundancy process, nonetheless still met the test for redundancy in the USS Rules, or not. The Ombudsman had only gone as far as saying that it had not progressed as far as SCONUL calling for volunteers.
- Determining the causation question posed by the USS Rules required, in particular, an assessment of what the reorganisation really did mean for Ms E and whether in fact some or all of the work she had previously carried out was to be outsourced; and if so (cf *Murray v Foyle Meats*, per Lord Irvine at p. 831 C-D) whether she could be required under her contract of employment to perform other tasks.
- On its proper construction, the terms of the Compromise Agreement were of no real assistance in conducting the inquiry contemplated by the test for redundancy in the USS Rules.
- The "studied neutrality" of the Compromise Agreement, even with its reference to "Enhanced Redundancy Pay", made it impossible to say that it was of any real value in determining whether the cause of termination of Ms E's employment was in reality redundancy or something else.

Material facts

9. Extracts from the USS Rules are provided in the Appendix.
10. Ms E was the Assistant Secretary in the SCONUL team. Her November 2008 contract of employment states:

"You are employed as SCONUL's Assistant Secretary.

An outline of the role is contained in your job description. SCONUL reserves the right to require you to perform other duties from time to time for which you are considered capable and which could reasonably be expected of this role. Additional training would be provided as appropriate as necessary."
11. Ms E had a poor working relationship with her manager, Mrs R.
12. In April 2012, Ms E commenced a period of long-term sickness absence citing "stress at work" as the reason.
13. In July 2012, an Investigation Report (the **Report**) was prepared on the difficulties between Ms E and Mrs R. The Report found "clear relationship difficulties...based upon a lack of trust and a breakdown in communication", but Ms E's allegation of harassment and bullying was not substantiated. The Report recommended:-

- More direct involvement by SCONUL Officers and Trustees to ensure legal compliance.
 - Mrs R needed explicit support from the Executive Board (the **Board**), possibly the Vice Chair, in relation to staffing issues which would arise from the change management agenda.
 - SCONUL's HR Consultant should routinely handle welfare issues associated with staff members when these could not be resolved directly by Mrs R.
 - Greater emphasis placed on team working, regular one-to-one meetings and documented team meetings and more pre-planning of activities to avoid acute pressures prior to events or Board meetings.
 - Mrs R to spend more time in the office to facilitate improved communication and oversee team building initiatives.
 - A team building programme using external trainers.
 - Possible mentoring for Ms E and the Secretarial Assistant.
 - The review of team members' roles in the context of the change management agenda with greater clarity about role, responsibilities, accountability and authority. The provision of appropriate training and development to enable post-holders to undertake their responsibilities to the required standard.
 - Mediation to address the current lack of trust between Ms E and Mrs R and to enable them to move their relationship forward.
14. On 1 August 2012, the Chair of SCONUL (**Ms H**) and the HR Consultant separately met Ms E and Mrs R to discuss the Report. Notes of the meeting with Ms E who was accompanied by Ms L record that:-
- Ms H said:-
 - She wanted to look at the next steps to discuss Ms E's return to work and proposed that she discuss a return-to-work plan with Mrs R that afternoon.
 - Ms E's return to work would be based on the Report's recommendations, which included the need to recognise and accept the need for SCONUL to move forward and change.
 - The need to make changes had been discussed at a recent strategy awayday and would involve changes in terms of roles and responsibilities. The question was whether Ms E was prepared to discuss her return to work on that basis.
 - Ms E said she needed more time to digest the Report before she could comment.
 - The representative asked what Ms E might expect to be different in the office in practical terms.

- The Report's recommendations were worked through to identify the changes that needed to be applied. Namely:-
 - Officers to take a more active role in supporting staff in moving forward the change agenda. A small project team would be established to move forward the necessary change in terms of structure, roles and activities. This needed to happen over the next few months.
 - IT systems, processes and approaches to work would need to be reviewed. Accounts and finances would require particular attention.
 - The first point of contact for any staff member with a grievance issue would be the HR Consultant.
 - More team working, better communications and more pre-planning of activities. It would also help to have clarity over who did what and when.
 - It was possible that new roles under a revised structure may look very different to current roles.
- Ms E welcomed the recommendations regarding team building and mentoring.
- The HR Consultant said accounts work might be something that could change quite radically quite quickly due to the efficiencies identified by the accountancy temp who had covered Ms E's work while she had been off sick.
- Ms E said she was broadly aware of the cover arrangements that had been in place while she was away.
- Ms L said that there had been talk about events and the possibility of bringing in a part-time person to cover that work, bringing it in-house.
- Ms H said she wanted to discuss with Mrs R and the Board any proposed structural and role changes. She said it was necessary to identify roles and responsibilities at appropriate levels, as some work was clearly in the wrong place and this needed to be worked through.
- Ms E asked if the degree of re-jigging of jobs might lead to the downgrading of roles and whether the Report could go against her in anyway when it came to look at roles.
- Ms H said the Report served just one purpose, and that was to address the problems identified in the working relationship between Ms E and Mrs R. The discussion about new roles was a separate issue and she was not able to say what new roles may look like.
- Ms H said based on her experience of how a restructure typically worked, Mrs R would need to propose an ideal set of roles and responsibilities to achieve SCONUL's objective and have these approved by the Board. "It was likely that

new roles may look quite different to current". There would then be an analysis of what was currently being done, an assessment of the degree to which current and new roles matched, the degree to which new skills would be required and the extent to which training and development could be put in place to enable individuals to move to where they would be needed.

- The HR Consultant said Ms E needed to engage positively with capability issues and Ms E and Mrs R needed to put their previous disagreements behind them to constructively move forward.
 - Ms E confirmed that she was agreeable to mediation.
 - It was agreed that Ms E be given more time to consider the Report and its recommendations.
 - The HR Consultant explained that he had previous experience of cases where there was a difficult dispute between an employee and their manager and sometimes an amicable separation took place where the employee felt unable to return to work. The HR Consultant said if Ms E felt unable to return to work based on the changes required from her, then SCONUL might be prepared to discuss an "amicable separation" on a "without prejudice" basis. But made it clear this was not a proposal and it was preferable that Ms E returned to work and engaged positively with Mrs R in the change agenda.
 - Ms H suggested that Ms E return to work shortly after Mrs R and the Secretarial Assistant returned from forthcoming holidays in September 2012. As Ms E's current sick note ran to 13 August, there was a discussion about whether Ms E might wish to take some annual leave before returning to work or whether her period of sickness would be extended. It was agreed that Ms E took annual leave until 9 September 2012.
15. On 8 August 2012, Ms E wrote to Ms H. She said she acknowledged the recommendations made in the Report in the interest of further the work of SCONUL.
16. On 6 September 2012, an EB paper titled "Making the most of our resources" (the "**EB Paper**") was presented to the Board. Under the heading "For Decision" the paper proposes restructuring the SCONUL Team and identifies associated benefits and challenges. The paper contains the following comment:
- "the EB is asked to consider these proposals and to agree to proceed to the next stage – the development of an implementation plan".
17. On 10 September 2012, Ms E returned to work on a phased basis. The week before her return the HR Consultant emailed Ms E. The email explained the temp would continue to work on accounts during the first few weeks so that Ms E could concentrate on events and her own emails/paperwork. After two weeks Ms E could start to pick up on Board associated work (the next Board meeting was scheduled for 18 October), and then accounts work a few weeks later. This would also allow time

for Ms E to arrange and take part in some training activities. Mrs R would discuss with her training needs and the types of courses that could be booked in the first week.

18. On 11 October 2012, Ms E contacted the HR Consultant with concerns about her interaction with Mrs R since returning to work. The HR Consultant replied:-

- He had spoken with Mrs R who was disappointed that she had concerns about their interaction. Mrs R felt she had been trying hard to make sure that she was being eased back to work and adequately supported.
- There were some differences again in Mrs R's view of how matters had been addressed.
- Mrs R agreed that it might be wise to extend her return-to-work plan. He suggested four extra weeks be added to the timetable, attached the proposed amendment, and asked if she agreed with it. He said, if she did, he would check it with Mrs R to approve the change.
- Mrs R was also of the opinion that they should focus on the core training needs – “such as Word, Excel, Minutes, etc”. It made sense that she receive training on minute taking before she took the next Board minutes.
- He understood that she would be receiving information about coaching in the next week or so. He felt it was important that she start a coaching arrangement as soon as possible.
- Mrs R had informed him that “the team exercise has been scheduled for 7th March” and that shadowing arrangements had been arranged and it was just a question “of getting some dates in the diary”.
- He hoped his intervention would be of some help.

19. On 16 October 2012, Ms E emailed the HR Consultant. The next day the HR Consultant replied to Ms E:

“...I am sorry that you still feel that Mrs R is treating you in an inappropriate manner and that you do not feel supported. It is our intention to make sure that you do feel supported during your phased return and, whilst arrangements have not been put in place very swiftly, I hope that the coaching arrangements will provide you with very specific and direct support.

I do not intend responding to the details of your e-mail, as the issues are very similar to many of those addressed...in the investigation... We could, if you wish, arrange a three-way meeting with you, me, and Mrs R, to see if we can help move forward with these issues. Please let me know and I will then discuss it with Mrs R.

You mention...that you feel you need counselling urgently. That is not something we have discussed before...Is that something that your GP has

recommended...It was not something that was highlighted in the occupational health report earlier this year so I am unsure whether that is something you would look to SCONUL to support you with – in which case I will look into it for you.

Also, you did not say whether you agreed with my proposed extension to your phased return – please could you clarify?”

20. The same day, the Director of Learner Support Services at the University of Bradford emailed Ms E about a proposal to start a coaching relationship.
21. On 19 October 2012, Ms H emailed Ms E with the title “SCONUL secretariat restructure proposals” setting out proposals to restructure the SCONUL team. In the email, Ms H commented:

“At yesterday’s Board meeting, [Mrs R] put forward a paper for approval setting out the basis for a new structure. The proposal is to create a structure which will be aligned to the strategy within the current budget and with no overall reduction in staff numbers. The main differences will be in the focus of the new roles within the structure and a change in the balance between the work carried out internally as opposed to being outsourced.

The Board gave its approval to this proposal and over the coming month, [Mrs R] supported by [HR]... will be putting together the details of the new structure in terms of job descriptions...Once that work has been completed, this will be shared with you and [the Secretarial Assistant] and there will be a period of consultation with both before final decisions are made. During the consultation period you will be able to fully engage with the process, and ask any questions and make any suggestions you may have.

I have attached the outline process and indicative timetable.

At this stage, we are not in a position to give you any more detail on what new posts there would be under the new structure and the implications for you personally. That will follow towards the end of November. But I wanted to ensure that you were kept up to date with developments and were aware of the planned timetable.”

22. The timetable detailed:

“Date	Activity
18th October	Restructure plans approved by Board.
19th Oct – 23rd November	Preparation of job descriptions/person specs and details of the proposed new structure.

w/c 26th November	Meeting with staff to set out restructure proposal in detail. Written paper to be provided to staff containing the background, rationale, process, implications and timescale. This is the start of the consultation period.
26th November – 11th January	A series of individual consultation meetings with affected staff. Due consideration given to issues and questions raised and responses provided in writing.
11th January	End of the consultation period.
w/c 14th January	Proposal confirmed (with any amendments arising as a result of consultation).
After 14th January	New structure implemented"

23. The EB Paper, approved on the 18 October 2012, comprised of six sections:

1. 'The current position';
2. 'Proposed new structure';
3. 'Summary of costs and estimated current focus of activity';
4. 'Risk factors';
5. 'Next steps'; and
6. 'Appendix 1: Detailed analysis of functions under the current and proposed structure and associated costs'.

24. In section two of the EB Paper, the proposed restructure is described as follows:

"I propose that we restructure the SCONUL office to divert effort from what might be considered backroom functions to services to members and out-source some of the functions currently carried [out] in-house...

The restructured SCONUL would have four staff, fulfilling the following roles

- **Executive Director**, focusing on leadership development; stakeholder relationships; member relationships and communications; supporting the [Board]; fundraising and strategic direction. Would share responsibility with the new Head of Policy for supporting working groups; project management and policy development.
- **Head of Policy**, with responsibility for supporting the working groups; policy development including managing responses to consultations; project

management where appropriate; drafting communications with members and maintaining the content of the website.

- **Office Manager**, with responsibility for day-to-day finances, premises management and ensuring the smooth function of web and office, plus diary support.
- **Events Officer**, (part-time post, possibly a term-time contract) with responsibility for supporting the organisation of conferences and other events, and for diary and website support.

We would also require the following external staff:

- IT consultant – on an ad hoc basis
- Accountant – one day a week with additional time in the run-up to year-end audit.”

25. In section three, Ms E’s role is broken down as: Supporting the Board (15%), supporting working groups and other groups (10%), Events organisation (32%), handling post, invoices and making payments (28%), preparing accounts (10%) and premises and office management (5%).

26. In respect of Ms E’s role, Appendix 1 says:-

Function	Estimated cost and comments on quality of service	Proposal	Estimated cost or efficiency saving
Supporting the Board	“This currently takes up around 20% of my [Mrs R’s] time, and a small amount of time of other staff... This appears to me to be an overestimate of the time staff members	“This is given priority at present but there is definitely scope for a more professional and effective service in this area.”	“The main benefit of the change would be to deliver a smoother service to the EB.”

	spend on this.”		
Events organisation	“There is an appetite among members for more events on a wide variety of topics. The Events Group has developed an events programme, but we lack the resources to deliver this to the standard that members would like...”	“The Executive Director and Head of Policy should sit on the Events Group and should ensure that the content is as high quality as it can be. The administration of events should be overseen by the Office Manager and delivered by a part-time Assistant.”	“Given that we include administration costs within the fee for events, this post should pay for itself. In addition, an improved events programme is likely to result in increased income from corporate sponsors. The new website will allow us to streamline handling registration for events.”
Handling post, invoices and making payments	“Simply handling SCONUL’s accounts takes up a huge amount of our staff resource...It is not clear why this is, given that much of the work is routine. It is clear that current staff lack the expertise to use Sage	“The day-to-day recording of remittances should be the responsibility of the Office Manager. We should outsource account management; payments and the production of management accounts (on a quarterly basis) to an independent accountant working with the Executive Director (who is also Company Secretary) and	“SCONUL’s accounts are relatively straightforward and should become more so as we increasingly move to on-line transactions. Moving to the Proposed arrangements would save a considerable amount of resource to devote to member-facing activities.”

	software to operate efficiently and to undertake analysis of our spending.”	Honorary Treasurer”.	
Preparing accounts	We do not have expertise internally to carry out basic preparation of our accounts in any substantive way. The role of the Assistant Secretary is supporting in this regard...”	“This would be the responsibility of the independent accountant liaising with the Executive Director and Honorary Treasurer.”	“Again, this would release time for more member-facing activity. The cost would be roughly equivalent to the current post.”
Premises and office management,	“This takes up about 5% of each of the Assistant Secretary’s and Secretarial Assistant’s time...”	“Responsibility for these tasks would fall to the Office Manager.”	“There would be a small reduction in cost because this was being carried out by a less senior member of staff.”

27. On 31 October 2012, Ms E’s legal representative (**Mr Harding**) contacted the HR Consultant to discuss possible severance terms. Following the telephone discussion, Mr Harding sent the HR Consultant an email in which he said:-

“I should also say that [Ms E] as you know feels aggrieved as to the way she has been treated by [Mrs R] since her appointment. She also would want any settlement package to reflect her last few years experiences in some way as

consideration of her not bringing an employment tribunal claim were the process to make her redundant and her to still feel aggrieved.

Her instructions to me is that she would accept a package around the £40,000 mark however."

28. Mr Harding's statement of truth, dated 16 August 2017, also recalls his telephone call to the HR Consultant on 31 October 2012, commenting: "that it appeared to me redundancy was inevitable given the documents sent to Ms Downe and the history of her working relationship".
29. On 1 November 2012, the HR Consultant informed Mr Harding that SCONUL had agreed Ms E's proposal regarding a severance package. The HR Consultant provided a breakdown of the payment, comprising an 'Enhanced redundancy payment', a '3 months' PILON', an 'Additional payment' and 'Outstanding holiday'. Mr Harding forwarded the email to Ms E for consideration.
30. The terms of a Compromise Agreement (the **Compromise Agreement**) were negotiated and agreed. Ms E's employment ended on 16 November 2012 and the Compromise Agreement was entered into on 30 November 2012.
31. On 17 January 2013, Mr Harding emailed the HR Consultant asking if he could confirm that the reason for the Compromise Agreement was redundancy so that Ms E "can take advantage of certain pension benefits" – an enhanced pension from USS.
32. The HR Consultant replied to Mr Harding that he could not. Ms E had not been made redundant. Mr Harding had initiated the process by calling him on 31 October 2012 and explaining that Ms E wanted to leave. The HR Consultant said:

"You set out a suggested framework for a package which included a sum that you called a redundancy payment and we were happy to progress our discussions with you using that sort of short hand for payments, but that does not mean that [Ms E] was redundant."

Queries raised with SCONUL by my Office

33. Subsequent to the High Court's ruling, my Office asked SCONUL:-
 - (i) At the time Ms E's employment was terminated what work was she doing?
 - (ii) Following Ms E's departure, did the role/responsibilities of the job she had been employed to do pass to another SCONUL employee?
 - (iii) Was any aspect of the job changed and/or outsourced when the new structure was implemented?
34. SCONUL replied:-

On the first question

- Ms E returned to work from sick leave in September 2012. On return she was following a phased return-to-work plan.
- An accountant had been hired on an interim basis to cover the accountancy basis of Ms E's work while she was off sick and was retained to cover accounts for the period of Ms E's phased return, after which Ms E was expected to resume accountancy work.
- Ms E began her phased return on shortened hours and only carried out events/personal organisation work, with the aim that she would build up to her full workload, including accounts work, towards the end of November and Board work shortly thereafter.
- Ms E's employment ended on 16 November 2012, prior to when she was due to resume accountancy work.

On the second and third questions

- All of Ms E's accountabilities/responsibilities remained intact and were kept in-house, including the accounting aspect of her role. Her functions were ultimately distributed amongst other roles.
- There was no overall reduction in headcount. Headcount increased because of the employment of part-time staff.
- PR, conference support and additional accountancy support were brought in-house. Events work was redistributed between the SCONUL Coordinator and the part-time Events Assistant. Accounts work was allocated to the part-time Finance Assistant. Support for the Board became the responsibility of the Head of Policy and Member Engagement.

35. Ms E commented on SCONUL's responses as follows:-

- The EB Paper approved by the Board confirmed under 'Handling post, invoices and making payments': "We should outsource account management; payments and the production of management accounts (on a quarterly basis) to an independent accountant..."
- All the documented evidence and communications confirmed the agency accountant as being part of SCONUL's plans. She remained in post well into 2013.
- Events management had already been outsourced permanently to the Events Committee/Group. Previously, she had full responsibility for delivering events. Subsequently, her role was reduced to taking notes for the Events Committee/Group.

- Revisions to the original work plan were made by SCONUL. There was no evidence that SCONUL was sincere about implementing it or its agreed recommendations, that specifically included mediation. All were overtaken by the Board's 18 October 2012 decision to approve the restructure proposal followed by Ms H's 19 October 2012 email to formalise the redundancy of the Assistant Secretary's post.
- Prior to the email, her job description was wholly withdrawn. She was prevented from carrying out her full duties; and instructed to take a holiday/stay at home. By this time, most of her functions had been outsourced.
- The terms of the restructuring were "within the current budget", to outsource accounts, to hire an Events Assistant and a Head of Policy and with no reduction in the number of staff. Clearly, SCONUL wanted to do more within the current budget, with an inevitable reduction in wages for the Assistant Secretary.
- A reduction in headcount was not necessary for redundancy. A reduction in hours and/or pay was enough.
- Had she not been misinformed of her accrued pension rights the Compromise Agreement would have looked very different and she would have been able to claim for unfair dismissal.
- The Report omitted her evidence to the investigation. The Report said she had supplied a chronology of 46 pages, when in fact she had submitted a four-page covering letter and 62 pages of chronology. In effect the latter and Mrs R's refusal to carry out staff appraisals "was a deliberate and calculated act by SCONUL to not acknowledge my good work and capabilities – an unambiguous breach of duty of good faith in the light of allegations made in the [Report]".
- The HR Consultant colluded with Mrs R to create a constructive dismissal at "the-clear-the-air-meeting 25th April 2012". This was shocking and made her ill. At the 1 August 2012 meeting, the HR Consultant threatened her and insisted that she not argue about the Report, while in the same breath invited her to consider "giving up my statutory employment rights in a possible exchange for money".
- She believed "these acts were meant to damage the employment relationship in order to coerce me into the proposed compromise agreement that the SCONUL Board had, on the balance of probabilities, decided upon at the Strategy away day and was offered to me on 1st August 2012".
- It was disingenuous for SCONUL to argue (*PO-7946*, paragraph 44) that the February 2011 proposal was obsolete, when all elements of the proposal were in fact implemented.

- Even USS Ltd had informed her⁷ that the advisory committee noted that SCONUL were considering a restructuring proposal which might have “led to the requirements of the activity for the purposes you were employed ceasing or diminishing”. Clearly, there was an expectation of redundancy and no evidence of alternative employment.
- Section 139, subsection (6), of the Employment Rights Act 1996 (**ERA**) provided:
“In subsection (1) “cease” and “diminish” mean cease and diminish either permanently or temporarily and for whatever reason.”

This did not allow SCONUL to “reason” away the fact that the Assistant Secretary’s functions were mainly outsourced.

- The combination of events noted above created the same circumstances described in *Sanders and Others v Ernest A Neale Limited*, 1974 EW Misc. 111/61/74:

“41. By contrast a situation can arise in which due to a recession in trade it is found that the business is much over-staffed. The employer can either continue with his existing labour force sharing out the available work and paying reduced wages or he can halve the size of the labour force by dismissals. If the employees will not agree to work-sharing and some are in consequence dismissed, the case may be said to be one “self-induced redundancy”. But this aspect is irrelevant. The question remains, “Were the applicants dismissed wholly or mainly by reason of the redundancy?” The answer will depend upon an exact analysis of the facts, but if the employees could not reasonably be expected to accept the proposed reduction in wages any tribunal would be almost bound to find that the dismissals were wholly or mainly attributable to redundancy and that the dismissed employees were entitled to redundancy payments.”

- Moreover, in *Safeway Stores plc v Burrell* [1997] it was ruled that “The correct approach” to defining redundancy was:

“...by looking at the statute and construing the words free of authority...We would summarise it as follows:

There may be a number of underlying causes leading to a true redundancy situation; our stage 2. There may be a need for economies; a re-organisation in the interests of efficiency; a reduction in production requirements; unilateral changes in employees’ terms and conditions of employment. [In this instance there was an increase in staff numbers to be carried out “within the current budget”]. None of these factors are themselves determinative of the stage 2 question. The only question to be asked is was there a diminution/cessation in the employer’s requirement for employees to carry out work of a particular kind, or an

⁷ At Stage Two of the Internal Dispute Resolution Procedure.

expectation of such cessation/diminution in the future? [redundancy]. At this stage it is irrelevant to consider the terms of the applicant employee's contract of employment. That will only be relevant, if at all, at stage 3 (assuming that there is a dismissal)."

- In the future SCONUL was to increase staff numbers "within current budget" while outsourcing accounts and events management. It was not credible for SCONUL to retain her as well as keep "within the current budget". Her contract of employment was no more, the Assistant Secretary functions were mainly outsourced, there was no offer of redeployment and none was possible on the "exact analysis" of the restructuring email of 19 October 2012.
- In taking up SCONUL's offer of without prejudice discussions, SCONUL agreed to pay her "redundancy" payments to reflect the employment situation.
- This was a redundancy situation, the pain of which was avoided by the Compromise Agreement. Her post afterwards ceased to exist.

36. SCONUL has further commented:-

- It does not feel that Ms E has raised any points which SCONUL has not previously responded to.
- Ms E's original complaint referred to another EB paper dated February 2011. This was never implemented and was obsolete before Ms E left SCONUL. It was a confidential document and not circulated to Ms E.
- The Board agreed to set up the Events Committee at its meeting on 4 October 2011. Two Board members were identified to lead the Events Committee at that time, along with the Executive Director and the Assistant Secretary who were expressly named as proposed core members. Its creation did not 'take over' Ms E's functions in this area. She remained fully involved as part of the Events Committee and that, in relation to events, her role remained the same, that is in relation to administration tasks pertaining to events, which continued. Ms E's administrative responsibilities (or indeed any other events-related responsibilities) were not taken over by the Events Committee (of which in any case she was a member). The function of the Events Committee was to oversee and steer, as opposed to delivering the events themselves, responsibility for which remained with the SCONUL office. The Events Committee did not take on responsibility for any areas of work which had previously been the responsibility of the SCONUL office.
- It does not dispute that there was an agency accountant in place in June 2012. This arrangement was made to cover Ms E's sickness absence.
- After her letter of 8 August 2012, Ms E made further allegations of inappropriate treatment against Mrs R. Despite SCONUL's best efforts it was clear that the investigation and the Report's recommendations had not had the desired effect and the working relationship remained the major issue.

- It took significant action to attempt to retain Ms E and facilitate her return to work. This included: offering support, proactively instigating the independent investigation, providing officer support in the review meeting, developing a phased return to work plan, undertaking extensive work to identify coaches for Ms E and Mrs R to resolve their professional issues; and considering ongoing training and upskilling for both.
- Ms E was not provided with the EB paper dated September 2012.
- Any exact analysis of the restructuring email was premature, the proposal had been approved by the Board but there was still consultation to carry out and in fact a different structure to the one proposed in September 2012 was eventually implemented.
- It would have continued to act in good faith to attempt to match Ms E to a new role within the structure, had she chosen not to leave. If this had not been possible, then a redundancy process and appropriately worded agreement may have followed, albeit this is speculation.
- All of Ms E's accountabilities/responsibilities remained intact and were kept in-house, including the accounting aspect of her role. Ultimately, her functions were distributed amongst other roles. Ms E's job description was not changed or withdrawn prior to her leaving. The last update was made in April 2011 when Mrs R became Ms E's manager.
- Mr H's 31 October 2012 email to the HR Consultant made significant reference to "the way [Ms H] had been treated by [Mrs R] since her appointment" and "her experiences over the past few years", with only a passing reference to the possibility of redundancy. Quite some time after the Compromise Agreement was signed, Mr H contacted the HR Consultant on 17 January 2013 to raise the question of redundancy, specifically so that Ms E could seek to take advantage of any associated pension benefits.
- A number of Ms E's arguments rely upon the interpretation of the wording of the Compromise Agreement. But this was dealt with and dismissed by Johnson J. In his judgment he made clear that "...the terms of the Compromise Agreement, when properly construed, do not assist with the inquiry contemplated by the test for redundancy..."

37. Ms E has requested an oral hearing and has further commented:-

- She enjoyed her job and delivered a high standard in a positive manner.
- There is no cogent evidence that she resigned.
- In anticipation of the eventual redundancy of the Assistant Secretary's post the Events Committee was proposed and approved by the Board in late 2011. Events

management was permanently outsourced. In practice her role in events was reduced to taking minutes and instruction from the Events Committee.

- There was a proposal to outsource accounts in February 2011. In May 2012, while she was on sick leave, SCONUL outsourced accounts under the guise of “cover”. In previous years, when she had taken four weeks holiday, no agency accountant was hired.
- Her working relationship with Mrs R was addressed and settled at the 1 August 2012 meeting, and her letter of 8 August 2012 confirmed her agreement to the Report’s recommendations. But there was no implementation or sincerity regarding the recommendations.
- During the meeting on 1 August 2012, she was told that accounts would change radically and that SCONUL were to hire an Events Assistant.
- She did not see the September 2012 EB paper prior to leaving SCONUL. She was provided with a copy by my Office.
- The September 2012 EB paper proposed “we should outsource account management, payments and the production of management accounts” and there is no reference to bringing events management in-house. The restructuring was “within the current budget” and increasing staff numbers as follows: Executive Director (FT⁸), Head of Policy (FT), Office Manager (FT). Events Assistant (0.5 to 0.8 FTE⁹) and Accounts (0.2 to 0.4 FTE), a total equivalent of at least 3.7 up to 4.2 staff. SCONUL was to hire at least 1.7 FTE staff with the equivalent cost to that of her role. It is perverse for SCONUL to argue that the restructuring was embarked upon to award her with equivalent new functions.
- Ms H’s restructuring email of 19 October 2012 confirmed that there would be “new roles” and a “new structure”. The email was the catalyst for seeking redundancy as the reason for the Compromise Agreement.
- SCONUL had already eliminated the Assistant Secretary’s post and outsourced the post’s functions, while she was in pensionable service without any comparable post in the new structure and she took up without prejudice discussions.
- Had she claimed for unfair dismissal it was reasonable, relying on ERA s139(6)¹⁰, for SCONUL to argue redundancy.
- Judge Johnson ruled that he could not see why the idea that the Compromise Agreement was either a mutual agreement or instigated by herself should necessarily be incompatible with the idea that there either existed a redundancy situation within the meaning of the USS Rules and/or that such a redundancy

⁸ Full-time.

⁹ Full-time equivalent.

¹⁰ Employment Rights Act 1996.

situation was the sole or main cause of the Compromise Agreement coming about.

- Having initiated a restructuring/redundancy process, SCONUL volunteered to pay compensation for the redundancy of the Assistant Secretary's post for her 20 years of entitlement under legislation. There is no other reason for the termination of her employment.
- There was no disagreement on her part concerning the terms of the Compromise Agreement. The problem lies with SCONUL's refusal to accept the agreed terms. The natural and ordinary meaning of the agreed terms should be applied.
- The Compromise Agreement paid her "compensation" for loss of office by way of "Enhanced Redundancy [Pay]" as well as Pay in lieu of Notice with all its connotations of dismissal.
- It was not unusual for an employee, with their legal adviser, to recognise the inevitable and negotiate compensation for the redundancy of their post. Or, alternatively, for the employer to volunteer to compensate an employee for the redundancy of their post, rather than face a drawn-out grievance process ending with a claim for unfair dismissal.
- The restructuring proposal was brought into effect in January 2013 as stipulated in the timetable. All the documented evidence at the time of the restructuring show that SCONUL, wished to, did, and continued to outsource accounts. Events management remained permanently outsourced to the Events Committee.
- The meaning of the termination words and documents changed in 2013 after she claimed for an unreduced pension.
- If SCONUL is saying redundancy was not the reason for the Compromise Agreement, then it implies that she has surrendered her unreduced pension under the USS.
- SCONUL should have informed her that she was giving up her unreduced pension and/or that redundancy was not the reason for the termination of her employment. SCONUL should be estopped from denying that redundancy was the reason for the termination of her employment. This triggers the second part of her complaint.
- She did investigate her pension during the termination discussions. SCONUL and the University of London (**UoL**) refused to discuss it.
- She did not claim her unreduced pension because she was misinformed of her pension rights. In the Spring of 2012, she was in receipt from UoL of the 'Guide for members – Final salary section' which states:

"If you retire before the scheme's NPA (excluding retirement due to ill health), any pension you receive will be reduced because taking your

benefits early means they will be paid for a longer period of time. There is one exemption to this for those members aged 55 or more on 1 October 2011, retiring from age 60 with their employer's consent."

Subsequently, in January 2013, USS Ltd sent her pension details with a document 'Leaving the scheme', which informed her that:

"Leavers before 1 October 2011 – Redundancy. If you were made redundant but chose not to draw your pension at that time, you still have the right to draw your pension in full before your NPA. The Trustee Company must pay your benefits immediately on request if, after having been in USS for at least five years, you left eligible employment at age 55 (50 in some cases) or over and were made redundant or were dismissed at the request of your employer, in circumstances in which there was no good cause to do so."

and:

"Up until 1 October 2013, the same rules apply to benefits as for leavers before 1 October 2011. However, if the redundancy occurs after 1 October 2013, any pension payable will be reduced for its earlier payment."

- As she was compensated for redundancy, she is entitled to draw an unreduced pension.

Conclusions

Oral Hearing

38. I will begin with Ms E's request for an oral hearing. I acknowledge receipt of Ms E's emails of 1, 21 and 30 April and 17 May 2021.
39. I have the power to hold an oral hearing under the procedural discretion contained in Section 149(4) of the Pension Schemes Act 1993. However, I tend not to exercise my discretion unless I am of the view that a complaint cannot adequately and appropriately be determined without me hearing directly from the parties. For example, I might require clarification of the parties' statements or there is some ambiguity in the evidence presented to me.
40. After careful consideration I have decided that an oral hearing is unnecessary as the evidence available to me, including Ms E's written submissions, is sufficient to determine Ms E's complaint.

On Ms E's complaint

41. Johnson J has remitted this case back to me to determine two questions in order to decide whether Ms E's employment ended on grounds of redundancy in accord with

USS Rule 1.1b. Namely:-

- (i) Had SCONUL's requirements for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
- (ii) Was the termination of Ms E's employment wholly or mainly attributable to any such actual or expected cessation or diminution?

On the first question

42. Determining whether a work reorganisation involves redundancies is not straightforward and there are many cases and employment tribunals that are fact specific when determining whether a redundancy situation has occurred.

Murray v Foyle Meats [1999] ICR 827

43. As referred to by Johnson J, this House of Lords case made it clear that the reference, in section 139 of the ERA 1996, to "work of a particular kind" did not mean work for which a particular employee was employed and that the focus should be on the requirements of the business for employees to do work of a particular kind rather than its changing contractual requirements in relation to a particular employee or particular employees.
44. Applying this test and assessing the SCONUL proposal I consider that the type of work that could have been expected to be undertaken by its employees was likely to change. The EB Paper detailed Ms E's role, including her function in respect of handling various aspects of the accounts, including making payments and managing the accounts. It is proposed in respect of this part of her role that:

"We should outsource account management; payments and the production of management accounts (on a quarterly basis) to an independent accountant working with the Executive Director (who is also Company Secretary) and Honorary Treasurer."

45. This is one example of the proposed changes that I consider aimed to increase efficiency by reallocating work to reflect the skill levels within the SCONUL workforce, this objective having been summarised in the title of the EB Paper – "Making the most of our resources'.

Barot v London Borough of Brent UKEAT/0539/11

46. Miss Barot worked as an accountant in the finance section in Brent's Children and Families Directorate. A government initiative prompted a review of the Directorate which resulted in a decision to restructure it, moving from outdated systems to a more modern system of working. While it still needed to carry out its usual tasks, there would be a reduction in lower-level tasks ("number crunching and data collection")

creating an increase in capacity for senior tasks that required strategic advice and implementation. The tribunal found that there was a redundancy situation. On the evidence, while almost all the work would continue to be done and there was to be no reduction in the number of people working in the department the restructure had led to there being less need for employees at Miss Barot's grade, carrying out the particular kind of work that she did.

47. I consider this case is applicable as SCONUL's work in the proposed restructure was being divided up with the implication being that some of the new roles were of a higher grade/skill level than the current positions, while other work was at a lower skill level.

Missirlis v Queen Mary University of London ET/3202937/2012

48. In this case an employment tribunal found that a dismissal prompted by the reorganisation of a University's School of Biological and Chemical Science was by reason of redundancy, even though there was no diminution of work and the new structure involved more, not fewer employees.
49. This confirms that a redundancy situation can arise even where no employees are lost in a restructure.

Noble v House of Fraser (Stores) Ltd EAT/686/84

50. In this case the claimant was employed as a cleaner. She and the other members of the cleaning staff were dismissed, and they were replaced by contract cleaners. The employer submitted that this was not a redundancy situation as the requirement for cleaning work had not ceased or diminished but would simply be met from another source. The EAT rejected this argument, holding:

"If an employer chooses to engage outside contractors instead of employees to do work of a particular kind he no longer requires employees to do it. That in our view clearly falls within the definition of redundancy".

51. This case supports the view that if SCONUL had outsourced the accountancy function as undertaken by Ms E her role would have been made redundant.

Ms H's email dated 19 Oct 2012 and the EB Paper

52. The EB Paper detailed the roles in the existing and proposed new structure of the SCONUL team as:

Existing Structure	Proposed New Structure
Executive Director	Executive Director
Assistant Secretary	Head of Policy

Secretarial Assistant	Office Manager
	Events Officer
	External staff:- IT Consultant Accountant

53. It is clear from the proposal that the role of Assistant Secretary would no longer exist under the new structure and that the work undertaken by Ms E would be shared out if the proposal were put into place, even though Ms E may have been retained in another role. However, I consider that the work of a particular kind undertaken by SCONUL employees would potentially diminish.
54. I have considered the fact that the proposal had not been implemented at the time of the Compromise Agreement. But the wording of Rule 1.1 (a) refers to “they expected cessation or diminution” (my emphasis) and based on the content of Appendix 1 of the EB Paper (see paragraph 26 above) it is apparent that the work undertaken by Ms E would change.
55. Considering the content of the proposal, the timetable for its introduction and the fact that the EB paper had received Board approval leaves me in no doubt that it was reasonable for Ms E to understand that her future employment with SCONUL would change subject to consultation.
56. On that basis, I conclude that the answer to the first question is, ‘Yes’.

On the second question

57. Considering Rule 1.1(b) and the factors that caused the termination of Ms E’s employment Johnson J commented in paragraph 79(iv):
- “Concluding that [Ms E] acted without coercion when she instructed Mr Harding to contact HR, because she jumped to her own conclusion about what the proposed reorganisation might mean for her and therefore “instigated the termination of her employment” (Determination at paragraph 99), does not answer that question. To my mind, determining the causation question posed by the USS Rules involves a much broader inquiry, including in particular an assessment of what the reorganisation really did mean for [Ms E], and whether in fact some or all of the work she had previously carried out was to be outsourced, and if so (cf *Murray v. Foyle Meats*, per Lord Irvine at p. 831C-D), whether she could be required under her contract of employment to perform other tasks.”

The proposed reorganisation

58. General details of SCONUL’s proposed reorganisation were set out in the Report and this information was discussed with Ms E at the meeting on 1 August 2012 with the

Chair of SCONUL and the HR Consultant. I appreciate that Ms E may have been unsettled by these proposed changes, however, both SCONUL and Ms E in her letter dated 8 August 2012, show a commitment to make the agreed phased return to work a practical solution.

59. Unbeknown to Ms E at the time the wording of the proposed structure set out in the EB Paper made no reference to potential redundancies, although it was made clear to Ms E in the email dated 19 October 2012 that she would be fully engaged with the consultation exercise that would be commenced and that she could ask questions at any time.
60. Taking these facts into consideration I am not convinced that Ms E would not have had a role within SCONUL after changes were implemented, as the proposed consultation exercise may well have seen changes to the proposal, one of the new roles may have been given to Ms E or her existing role may have been adapted.
61. As set out in the EB Paper, Ms E's role would not continue if the proposed restructure were implemented, with some, if not all, of her accountancy work outsourced, and a significant part of her events work handed to the new Events Officer. However, most, if not all the work she was undertaking was still required by SCONUL and the full proposal contained in the EB paper was never actioned, meaning that it cannot be assumed that, had Ms E not agreed to leave employment under the terms of the Compromise Agreement, she would subsequently have lost her job.

Ms E's return to work and the outsourcing of her functions

62. After taking annual leave Ms E's returned to work on a phased basis under her employment contract starting with a two-day week commencing 10 September 2012, with the intention of working up to a five-day week commencing 5 November 2012. During this time the areas of work that Ms E covered were events and personal organisation only. She did not undertake any accounts prior to the termination of her contract, although, she was scheduled to do so from November 2012.
63. From 2 May 2012 into 2013 SCONUL provided cover for Ms E's accounts function, on an interim basis, by way of an agency accountant, to cover sick leave, annual leave, the phased in work period and then the period after Ms E left SCONUL's employment. I do not consider this to represent an outsourcing of this function of Ms E's role, as it was reasonable for SCONUL to pursue this temporary approach bearing in mind its business needs.
64. While SCONUL established an Events Committee to determine strategy, I am not convinced that this dramatically reduced Ms E role in respect of the organisation, management implementation and administration of all events as directed by the Events Committee. The Events Committee itself consisted of two Board members, the Executive Director and included Ms E; I do not agree with the suggestion that this function of Ms E' role was outsourced.

65. It is, of course, impossible for me to establish with certainty how the consultation exercise would have progressed and what the final employment structure would have looked like if Ms E had remained employed. A number of the existing functions of the Assistant Secretary's role are included in the Office Manager's role and some of her events work role would be handled by the new Events Officer if the proposed structure was introduced. It may have been the case that, subject to further consultation, Ms E's role may have changed to include elements of the Assistant Secretary role plus other duties. What is clear is that the structure set out in the EB Paper was not implemented by SCONUL with all of the functions undertaken by Ms E remaining in-house.

Legal advice

66. My understanding is that Ms E received legal advice throughout the Compromise Agreement process; and that until January 2013 the question of whether she had been made redundant had not been raised, other than to ensure that she received a preferential payment.
67. Ms E did not accept the HR Consultant's tentative proposals of a without prejudice conversation in August 2012. Instead, she chose to return to work on a phased basis on the understanding that Mrs R had accepted the findings of the Report and was committed to her return to work.
68. It was not until 31 October 2012 that Mr Harding contacted SCONUL's HR department to discuss possible severance terms. In an email to the HR Consultant, Mr Harding commented that Ms E would want any settlement package to reflect her experiences in some way "as consideration of her not bringing an employment tribunal claim were the process to make her redundant and her to still feel aggrieved".
69. This wording confirms that Ms E considered that she could be made redundant but was prepared to avoid the risk of this or her continued employment in a new role if a settlement agreement could be reached. As part of the negotiations of the Compromise Agreement Mr Harding placed emphasis on Ms E's past work experiences, how she was allegedly treated by Mrs R¹¹, and that any settlement should reflect her experiences. This wording does not reflect the fact that it is the role of "Assistant Secretary" that is potentially being made redundant and the possibility that Ms E may have remained employed by SCONUL.
70. I consider that Mr Harding's statement separates the Compromise Agreement process and the question of redundancy, as Ms E is looking to agree a financial settlement that would terminate her employment. At the time of Ms E's departure a consultation exercise had not commenced, no decision had been made on whether her role would or should be made redundant and she voluntarily entered into the Compromise Agreement.

¹¹ See paragraph 27.

71. The terms of the Compromise Agreement were negotiated, and the agreement was completed on the 30 November 2012. I agree with Johnson J's comments in respect of the wording of the Compromise Agreement, in that I do not consider it confirms one way or another whether Ms E was made redundant. What the Compromise Agreement does do is confirm that Ms E agreed the terms of the termination of her employment contract.
72. In addition, I note Ms E's comments that she feels that had she not, in her opinion, been misinformed about her pension rights, the Compromise Agreement and by implication the negotiations would have looked very different. However, based on her understanding of her pension options there was no indication that she was unhappy with the Compromise Agreement.
73. While, not unusual, I do consider it to be significant that Ms E's legal adviser instigated the negotiations of the Compromise Agreement with SCONUL on the basis that Ms E wanted to leave her employment. The provision of legal advice and the attraction of a financial settlement provided Ms E with sufficient confidence to go ahead with her decision to seek an agreement with SCONUL.

Employment relationship and employment contract

74. Ms E had a poor working relationship with Mrs R, who prepared the EB Paper setting out the proposed restructure. Issues concerning the work environment were reviewed at two informal meetings on 27 July 2011 and 25 April 2012, during which Ms E made a number of allegations in respect of Mrs R's behaviour towards her. On 26 April 2012 Ms E commenced a period of long-term sickness absence citing "stress at work" as the reason.
75. The Report found "clear relationship difficulties...based upon a lack of trust and a breakdown in communication", but Ms E's allegation of harassment and bullying was not substantiated. The Report made several recommendations on how this relationship could be managed and the support that could be made available to Ms E. Prior to returning to work on a phased basis, Ms E had a meeting with the SCONUL HR team. The HR Consultant tentatively suggested a without prejudice conversation and an amicable separation if Ms E felt unable to return to work.
76. On her return to work in Sept 2012 Ms E began shortened hours and only carried out events/personal organisation work, with the aim that she would build up to her full workload, including accounts work, towards the end of November and Board work shortly thereafter. Other than to show that it was the intention of both parties to return to the position where Ms E undertook all of her functions prior to the consultation exercise, it is difficult to say how this working pattern, at the date Ms E's employment was terminated, reflects on SCONUL's future intentions.
77. I do note, that having returned to work, Ms E considered it necessary to contact the HR Consultant, on the 11 and 16 Oct 2012, as she felt that she was being treated in

an inappropriate manner by Mrs R and that she was not receiving sufficient support. I consider that this is a further reflection on Ms E's work environment and the continued difficulties that she encountered with her manager.

78. With reference to Ms E's employment contract, SCONUL did have the right to require Ms E to perform other duties from time to time, for which she was considered capable and which reasonably could be expected of her role. Additional training would be provided as appropriate or necessary.
79. I consider the fact that Ms E did not have a good working relationship with Mrs R and that she had not been well were driving factors in her choice to seek a settlement with SCONUL. The email to Ms E dated 19 October 2012, confirming Board approval for the restructuring proposal referred to different working patterns, new roles and a change in the balance of work; this is likely to have caused concern for Ms E, leading her to seek legal advice, if she had not already done so, in respect of her working relationship with Mrs R and her role with SCONUL.
80. While the restructure proposal advised to her by email on 19 October 2012, was a trigger for Ms E to seek a settlement as her role was expected to diminish, my view is that the termination of her employment was "wholly or mainly attributable to" the poor working relationship with Mrs R, the effect this was having on her health and that with legal support she felt comfortable to seek a Compromise Agreement.
81. On that basis, I conclude that the answer to the second question is 'No' and, therefore, the termination of Ms E's employment does not satisfy the definition of redundancy in USS Rule 1.1(b).
82. As I have decided that Ms E was not made redundant as defined in the USS Rule, I do not need to consider the second part of her complaint.

Anthony Arter

Pensions Ombudsman
3 September 2021

Appendix

USS Trust Deed and Rules

83. As relevant, Rule 11, 'Early Retirement at the Instance of the Employer', provides:

"11.1 Members to whom this rule applies

This rule applies to a member:

- 11.1.1 who has 5 or more years' *pensionable service*...;
- 11.1.2 who has attained *minimum pension age* [55];
- 11.1.3 has not in respect of that *eligible employment* become entitled to a pension under any rules 8 (Benefits at normal retirement age), 10 (Late retirement) and 13 (Early pensions on incapacity); and
- 11.1.4 to whom rule 11.2...applies.

11.2 Applicable circumstances of retirement

This rule applies to a member:

- 11.2.1 whose eligible employment is terminated by reason of redundancy; or
- 11.2.2 whose employment is terminated in the interests of the efficient exercise of the institutions functions...and the employer gives its consent to payment of the benefits; or
- ...

11.3 Benefits

A member to whom this rule applies may elect to receive from the day after the date of retirement:

...[an unreduced pension]."

84. The definition of 'redundancy' is in Rule 1.1, and provides:

"Redundancy" means cessation of *eligible employment* attributable wholly or mainly to:

- (a) the *employer* ceasing, or intending to cease, to carry on the activity for the purpose of which the *member* was employed, or ceasing, or intending to cease, to carry on that activity in the place in which the *member* worked; or

(b) the requirements of that activity for employees of the *employer* to carry out work of a particular kind, or for employees of the *employer* to carry out work of a particular kind in that place, ceasing or diminishing, or being expected to cease or diminish.

If within one month of such cessation of eligible employment the *member* is offered a comparable post entitling the *member* to continued membership, or if any successor to the business or functions of the *employer* offers the member comparable employment such as to disentitle the member to a redundancy under ERA, there shall be deemed to be no redundancy.”

85. “ERA” means the Employment Rights Act 1996.