

## Ombudsman's Determination

|            |                                                           |
|------------|-----------------------------------------------------------|
| Applicant  | Mrs N                                                     |
| Scheme     | Universities Superannuation Scheme ( <b>the Scheme</b> )  |
| Respondent | Universities Superannuation Scheme Ltd ( <b>the USS</b> ) |

### Complaint Summary

1. Mrs N's complaint concerns the transfer of her benefits currently held by the Teachers Pensions Scheme (**TPS**) to the Scheme. She would like her benefits transferred so that she can start receiving a pension, in relation to these benefits, from the Scheme.

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

2. The complaint is upheld against the USS because:
  - The USS failed its duty of care to Mrs N, to reinstate her into the Scheme since 2014.
  - This situation has caused Mrs N serious distress and inconvenience for which she shall receive an award.

## Detailed Determination

### Material facts

3. Mrs N first joined the TPS in 1983. She had various full and part-time posts in further education colleges, in various capacities. The various capacities in which she was employed were treated differently in terms of her eligibility to pay pension contributions to the TPS. The TPS is administered by Teachers Pensions (**TP**).
4. In January 1995, Mrs N made a complaint to an Employment Tribunal (**ET**) against one of her former employers, in relation to the unlawful exclusion from the TPS. Mrs N left the TPS and became a deferred member in September 1997.
5. Arrangements to allow previously excluded part-time employees access to their occupational pension schemes are known as the "Preston arrangements". This resulted from the test case that was put before an ET<sup>1</sup>.
6. On 1 August 1997, Mrs N became employed by the University of Southampton. In November 2002 she joined the Scheme.
7. In November 2003, at Mrs N's request, her benefits in the TPS were transferred to the Scheme on a club basis which provided a year-for-year service credit. Mrs N left active membership of the Scheme in July 2004.
8. In 2007, Mrs N's claim in the ET was successful and she was awarded benefits for a period that she was employed on a part time basis (**Preston Benefits**). This resulted in Mrs N and her previous employer making the relevant payments to TP to enable Mrs N to receive these benefits.
9. In December 2011, TP transferred the cash equivalent transfer value of Mrs N's Preston Benefits (the **CETV**) to the Scheme, as Mrs N was no longer a member of the TPS. So, she had no entitlement to benefits from it. The USS accepted the transfer but not on a club basis.
10. In 2013:
  - 10.1. Mrs N made a complaint to The Pensions Ombudsman (**TPO**) against the USS concerning the USS not accepting the CETV on a club basis.<sup>2</sup>
  - 10.2. Mrs N made a complaint against TP to TPO<sup>3</sup>. This complaint concerned the administrative and procedural problems she had experienced in respect of the transfer of the CETV from the TPS to the Scheme.
11. On 4 June 2014, while both complaints were waiting to be determined by the Pensions Ombudsman (**the PO**), Mrs N wrote to the USS and said:

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<sup>1</sup> Preston and others v Wolverhampton Healthcare NHS Trust and others (No.2) [2001] HL

<sup>2</sup> The reference number for this complaint is: PO-14751.

<sup>3</sup> The reference number for this complaint is: PO-1576.

“...I understand that the fund transferred to USS under my name is not invested by USS in the usual way and no annual increments are added. As already discussed I believe the fund amount is incorrect. Under the circumstances I would be grateful if you could return the fund to TPS as soon as possible until the ombudsman has deliberated upon my complaint. Please can you let me know when this has been completed...”

12. The next day, the USS sent TP a cheque returning the CETV. The cover letter sent with the cheque stated:

“...Mrs [N] has confirmed that she wishes for the transfer value to be returned to [the TPS] whilst she pursues her ongoing complaint with [TPO]...”

13. On 12 July 2017, the PO completed his formal Determination on Mrs N’s first complaint, reference PO-1576. In relation to the transfer of the CETV to the USS, the PO said:

“Mrs N’s additional benefits, as a result of her Preston claim, could not have been transferred within two years of her joining the USS in 2003. The reason for this is because the ET’s judgment on her Preston claim was not issued until May 2007. It then required a calculation of her additional benefits and the contribution to be paid by both Sparsholt and Mrs N before the transfer could proceed.

TP did not require Mrs N’s agreement in respect of the 2011 transfer because the pension that was being transferred was in respect of her Preston claim and her retrospective part-time service. As stated above, this pension had to follow the benefits that were transferred to the USS in 2003 and therefore there was no need for her to agree before the transfer was made in 2011.”

14. Following the PO’s Determination of PO-1576, TP tried to return the CETV to the USS. This resulted in further exchanges between TP, the USS and Mrs N, concerning why the USS was unable to accept the transfer. TP also explained to the USS that if it did not accept the CETV, it would have no alternative but to refund the contributions Mrs N had paid to the TPS, in respect of these benefits.

15. On 30 January 2020, the PO completed his Determination on a second complaint, reference PO-14751. In relation to the club transfer, the PO found that the Memorandum issued by the Cabinet Office relating to the Public Sector Transfer Club (the **Memorandum**)<sup>4</sup> was not binding on the USS. So the USS did not have to accept the transfer on a club basis.

16. On 19 June 2020, TP contacted the USS and said:

“In an effort to avoid returning Mrs [N’s] monies to her, and the probability of a further complaint with [TPO] against the USS, [TP] is prepared, exceptionally, to add interest to the payment incorrectly returned to the scheme on 9 June

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<sup>4</sup> Relevant sections of the Memorandum are in Appendix 1.

2014. The USS had held the monies since 15 December 2011 when the return was made, without interest. We would therefore be prepared to pay interest at Base Rate from 9 June 2014 to the date payment is made. In this way, USS will be in exactly the same position it would have been in, had it processed the 'follow-on' transfer value upon receipt in December 2011. Mrs [N] could then be paid her additional benefits from the USS."

17. On 22 September 2020, the USS replied to TP and said:

17.1. The difficulty it had was that it was being asked to do something that it did not have the power to do. It also appeared that there were two Determinations that did not align with each other.

17.2. The PO agreed that it did not have to accept the CETV on a club basis but no order was made in relation to it accepting the CETV.

17.3. Under the Rules of the Scheme (**the Rules**), it did not have an express power to accept a transfer in respect of a deferred member. There was no general overriding power to accept the transfer in respect of Preston Benefits, which were awarded after an earlier transfer.

17.4. To further complicate matters, even if it could accept a transfer in respect of a deferred member, the transfer could only be accepted into the defined contribution (**DC**) section of the Scheme, as defined benefit (**DB**) transfers were no longer accepted into the Scheme.

17.5. Given the situation, it wondered if there would be any merit in approaching TPO to ask how it thought this matter should be taken forward. For example, had all of Mrs N's complaints been considered collectively, and a Determination was made requiring it to accept the CETV, even though Mrs N is a deferred member, it would be able to comply with that Determination. Notwithstanding there is no express power under the Rules for it to do so.

17.6. Its view was that all parties were keen to reach an appropriate resolution, and avoid this matter being the subject of a further complaint. But it could only act within its powers and could not take action which could jeopardise its status as a master trust.

18. Subsequently, there were further exchanges between TP and the USS concerning the transfer of the CETV and why the USS was unable to accept the transfer.

19. On 28 July 2021, Mrs N made a complaint through the Scheme's Internal Dispute Resolution Procedure (**IDRP**). Her complaint concerned the USS' refusal to accept the transfer of the CETV.

20. On 12 November 2021, the USS replied to Mrs N under stage one of the IDRP, not upholding her complaint. In summary it said:-

- 20.1. The transfer of the CETV on 15 December 2011 was a unilateral act by TP. It initially accepted the payment and engaged constructively in discussions to provide benefits on terms which were funded by the payment received and acceptable to Mrs N. But she had asked for the monies to be returned to the TPS.
  - 20.2. On the basis that Mrs N was not an active member, it did not have the power to accept the transfer of the CETV into the Scheme.
  - 20.3. Even if it had such a power, the CETV had not been transferred within 12 months of her joining the Scheme in 2003. So the transfer would not have been completed on a club basis.
  - 20.4. It noted that Mrs N had accepted that it was upon her instructions that the follow-on transfer was returned to the TPS, in June 2014. It is required to administer the Scheme in accordance with the Rules, and it could not now accept the CETV from TP.
21. On 16 February 2022, Mrs N appealed the USS' decision through stage two of the IDRPs. In summary she said:-
- 21.1. The current stalemate in payment of a pension from her Preston Benefits, for 11 years, centred around: (i) her request for the USS to return the CETV to the TPS whilst her PO-1576 and PO-14751 complaints were being considered by TPO; and (ii) the refusal of the USS to accept the transfer after PO-1576 was Determined.
  - 21.2. The USS explained that technical issues prevented it from receiving the CETV. However, at no time did the USS advise her of the possible consequences of returning the CETV to the TPS .
  - 21.3. Given the responsibilities that the USS already had to her as an existing member of the Scheme, she considered its failure to warn her of the consequence of returning the CETV to the TPS, an act of negligence and materially instrumental in bringing about the current impasse.
  - 21.4. She could categorically state that had she been told or cautioned by the USS at the time of her request to return the CETV to the TPS, she would not have requested its return. She would also not have been in her current position of no income from that pension for over 11 years.
  - 21.5. The USS should be held accountable for that failure, and accept the return of the CETV, including its accumulated interest from 2008 until the date of transfer. It should also pay her a back dated and future pension.
  - 21.6. She hoped it would address her IDRPs stage two complaint with urgency as she had recently been diagnosed with stage three Alzheimer's, and been told that her life expectancy was limited.

22. On 21 March 2022, the Advisory committee, on behalf of the USS replied to Mrs N's stage two IDRPs complaint. In summary it said:-
- 22.1. The USS was not in a position to advise her of the consequences of returning the CETV to the TPS. The USS had no role in, or control over, how the TPS is administered. How the return of the CETV would be treated under the TPS was a matter between TP and Mrs N. Moreover, her entitlement to benefits under the TPS were subject to a complaint between herself and TP.
  - 22.2. The USS was not party to that complaint. That complaint (PO-1576) was Determined by the PO in July 2017, three years after the CETV was returned to the TPS. The USS was therefore not negligent in not warning her of the consequences of returning the CETV to the TPS.
  - 22.3. The USS was not in a position to comment on what decision Mrs N would have taken, had she been aware in 2014, of how TP would treat the return of the CETV. It would also not have been appropriate for the USS to have done so, considering the ongoing dispute between TP and Mrs N in relation to her entitlements under the TPS.
  - 22.4. The USS is required to administer the Scheme in accordance with the Rules. It could not accept the transfer of the CETV from the TPS.
  - 22.5. It had considerable sympathy for Mrs N's personal circumstances and convened a special meeting to deal with her IDRPs stage two application quickly. However, taking all of the facts and factors into account it concluded that her complaint should be not upheld.
23. The CETV is currently with the TPS.

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

24. Mrs N said:
- 24.1. She became eligible to claim her pension in 2011. She has been receiving a pension from the USS based on the transfer from the TPS to the Scheme in 2003. The USS has not paid her any benefits in relation to the CETV. Increases have also not been applied to these benefits.
  - 24.2. TP categorically told her that she could have a pension from the TPS based on the Preston Benefits, on what seemed to be better terms than she would have received from the USS. She agreed to be paid a pension from the TPS. TP commenced paying her a pension at aged 60, in January 2011. TP later reneged on that agreement and sent the CETV to the USS.
  - 24.3. In 2014 she asked the USS to return the CETV to the TPS. The USS did not object to the transfer, nor did it advise her of any difficulties that might ensue. The PO subsequently ruled that TP had committed maladministration and directed TP to return the CETV to the USS.

- 24.4. She was unaware, until 2017, that the USS had not accepted the CETV. She corresponded with the USS in November 2017 on this issue, and thought the matter had been resolved. It was only after she made a complaint to TPO about the USS (PO-14751) that she became aware that her Preston Benefits were still with TP.
- 24.5. TP has been trying to transfer the CETV to the USS for many years, as legally it should be with the rest of her transferred benefits. However, the USS has refused to accept the transfer.
- 24.6. The USS asserts that it does not have the discretion to accept transfers into the USS for a person who is not an active member of the Scheme. However, it is her view that the USS had set a precedent in accepting a transfer into the Scheme by a non-active member when it initially accepted the CETV in 2011.
- 24.7. She has done all in her power to enable this transfer without success. She would like TP and the USS to agree to the transfer of her Preston Benefits to the Scheme. So, that she could receive a pension, in relation to those benefits, from the Scheme, along with interest and relevant increments, backdated to July 2011.

### **Summary of the USS' position**

25. The USS has said:-

- 25.1. The Scheme is currently governed by Rules dated 19 November 2015, as amended (**the 2015 Rules**). The 2015 Rules came into force on 1 April 2016. The relevant provisions of the 2015 Rules in relation to individual transfers-in are set out at Rule 47.<sup>5</sup> Under the 2015 Rules, the definition of member does not extend to a deferred member or pensioner.
- 25.2. It is sympathetic to Mrs N's circumstances and acknowledges the position she finds herself in through no fault of her own. It is aware of her personal circumstances and, in light of these, considered and issued a determination quickly in relation to her stage two IDRPs complaint. However, it's primary position is that it is not required to accept the CETV because there is no legal requirement for it to accept it, and the 2015 Rules do not allow it to do so. The 2015 Rules are also silent on how any benefits deriving from the CETV would be calculated.
- 25.3. There is no overriding legislative provision that requires pension scheme trustees to accept a transfer payment. This is widely reflected in the industry, for example:
  - the Memorandum accepts there is no obligation for a receiving scheme to accept a top-up payment in relation to Preston claims;

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<sup>5</sup> This Rule is set out in the Appendix 2.

- in the context of GMP equalisation, the PASA Guidance “GMP Equalisation Working Group Supplemental Guidance on Transfer Payments” issued in August 2021 (**the PASA Guidance**) states, “There’s no legal obligation on a Receiving Plan to accept the top-up.”; and
  - the PO’s previous Determination in relation to Mr A S Barnett PO-76149/1)<sup>6</sup>.
- 25.4. It considers the practical consequences of requiring pension scheme trustees to accept transfer payments (or top-ups to previous transfers in the context of Preston Claims or GMP equalisation) would be considerable. This could include schemes being required to accept top-up payments in relation to the failure of the transferring scheme to equalise for the effect of GMPs.
- 25.5. As the PASA Guidance sets out, “There’ll be administration costs involved in accepting a top-up payment and converting it into additional benefit and these could exceed the top-up payment actually received.” Practical issues would also arise in circumstances where schemes had purchased buy-in policies.
- 25.6. It acknowledged that in May 2012, it had confirmed to Mrs N that it was prepared to accept the CETV on a non-club basis. As this was over ten years ago, it was unable to definitively confirm its reasoning at the time for confirming this to Mrs N.
- 25.7. In 2011 the Scheme did participate in the Transfer Club. It had powers under Rule 44.5.4 of the Rules dated 30 April 2009 (as amended) (**the 2009 Rules**), to enter into special arrangements with schemes participating in the Transfer Club.<sup>7</sup> This included accepting, in certain circumstances, a transfer on a non-club basis, from another scheme participating in the Transfer Club.
- 25.8. The 2009 Rules reflect the governing provisions of the Scheme on 15 December 2011, the date the Scheme received the CETV from the TPS. There are no substantive differences in the transfer provisions applicable to deferred members between the 2009 Rules and the 2015 Rules.
- 25.9. It’s alternative position, without prejudice to its primary position is that, should the PO determine that it must accept the CETV, it seeks a direction that the additional pension is calculated on actuarially neutral terms. Or a determination that otherwise provides direction on the terms on which any additional pension is put into payment or provided, for example as money

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<sup>6</sup> <https://www.pensions-ombudsman.org.uk/decision/2010/761491/allianz-retirement-death-benefits-fund-fundteachers-pension-scheme-761491>

<sup>7</sup> This Rule is detailed in Appendix 3.



purchase benefits under the Investment Builder, the Scheme's money purchase section<sup>8</sup> and not on a club basis.

25.10. In respect of interest being applied to the CETV, its position is that the value of the CETV is a matter between Mrs N and TP.

## Conclusions

26. After careful consideration of the evidence that the parties to the complaint have provided, I find that the correct treatment of Mrs N's Preston Benefits was for it to have followed the original transfer to the Scheme. The Preston Benefits would automatically have been transferred to the USS, had Mrs N been awarded those benefits at the time that she had transferred in 2003. So, it follows that, after Mrs N obtained a right to these benefits, they should have been forwarded to the USS to be added to Mrs N's existing benefits within the Scheme.
27. TP transferred the CETV to the Scheme in December 2011. The CETV was returned to the TPS, following Mrs N's request in 2014. The letter that Mrs N sent to the USS, outlined in paragraph 11 above, explained that she was requesting the return of the CETV to the TPS while she awaited the outcome of her complaint that was with TPO.
28. As it was Mrs N's decision to return the CETV to the TPS, there was no obligation on the USS to inform her of any consequences of her returning the CETV to the TPS. At the time, it would not have been aware of the outcome of my PO-1576 Determination. It would also not have been aware of how the TPS would have treated the returned CETV. I find there was no maladministration by the USS in this regard.
29. Mrs N is now in a position where her CETV is in limbo as she is unable to receive a pension from the TPS in relation to these benefits, and the USS has not agreed to accept the return of the CETV to date.
30. The USS asserts that the 2015 Rules do not allow it to accept the transfer of the CETV, as Mrs N is not an active member of the Scheme. It acknowledged that in May 2012, it had confirmed to Mrs N that it was prepared to accept the CETV on a non-club basis. Although due to the time lapse, it could not definitively confirm its reasoning for agreeing to do so. It noted that in 2011, the Scheme participated in the Transfer Club and that it had powers under Rule 44.5.4 of the 2009 Rules, to enter into special arrangements with schemes participating in the Transfer Club. This included accepting, in certain circumstances, a transfer on a non-club basis, from another scheme participating in the Transfer Club.
31. Rule 2.3 of the 2015 Rules states:

“Benefits payable to or in respect of any *former member* who does not have any *service* on or after 1 April 2016 shall be governed by the previous rules in

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<sup>8</sup> It noted that TP had previously informed Mrs N that it could not pay the CETV to a DC (money purchase) pension arrangement.

force (or treated as having been in force) at the date when the *former member* last left service (as then defined for the purposes of the *scheme*)." (Original emphasis).

32. Mrs N became a deferred member of the Scheme in July 2004. At the time, the rules in force were the 2003 Rules. I have considered the 2003 Rules and find that, although the wording concerning Club Transfers to the Scheme is different to those of the 2009 Rules, the meaning of the rules concerning Club Transfers into the Scheme in the 2003 Rules, was broadly equivalent to Rule 44.5.4 of the 2009 Rules.<sup>9</sup> So under the 2003 Rules, the USS would have had the same powers to accept the transfer of the CETV in 2011.
33. I have considered whether the USS breached the duty of care it owes to Mrs N, as a pensioner member of the Scheme, by not accepting the transfer of the CETV into the Scheme.
34. The Courts have developed a number of tests for establishing whether a duty of care exists, whilst acknowledging that whichever test is applied, the result should be the same. The principal test applied in cases of economic loss is a three-fold test established by the House of Lords in *Caparo Industries v Dickman* [1990] 2 WLR 358. The three-fold test requires: foreseeability; proximity and fairness. In other words, was it:
- (i) reasonably foreseeable that the defendant's conduct would cause loss to the claimant;
  - (ii) was there a sufficient degree of proximity or a special relationship between the claimant and the defendant; and
  - (iii) would it be fair, just and reasonable to impose a duty of care in the circumstances?
35. I find that, having accepted the CETV in 2011 and keeping it until 2014, the USS accepted that Mrs N had a right to a pension from the Scheme, in relation to those benefits, on non-club terms. The USS now not accepting the transfer of the CETV is unreasonable, and this is a breach of its duty of care, which it accepted from 2011.
36. In its formal response to the complaint, the USS said that there is no overriding legislative provision that requires pension scheme trustees to accept a transfer payment. This is widely accepted in the industry. On its own, this statement is correct. But, it does not acknowledge or take into consideration, that the USS had previously accepted the transfer of the CETV from the TPS and that it had negotiated a pension on a non-club basis with Mrs N.
37. As the USS had previously accepted the transfer of the CETV in 2011, and offered Mrs N a pension based on a non-club basis, I find no reason why it cannot accept the transfer of Mrs N's benefits from the TPS now. I consider the USS' refusal to accept

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<sup>9</sup> Relevant sections of the 2003 Rules are in Appendix 4.

the transfer is flawed and unreasonable. It should accept the transfer of the CETV and award Mrs N an equivalent pension.

38. In correspondence to TPO concerning another related complaint Mrs N has against TP, TP commented that, following the introduction of the Pension Freedoms in 2015, it was unable to transfer the funds into a DC scheme.
39. In its formal response to this complaint, the USS proposed that if I uphold this complaint, the pension awarded to Mrs N should be paid on an actuarially neutral basis, or that I should direct the pension is paid from the Scheme's money purchase section.
40. I have taken into consideration, the points raised by both TP and the USS when setting out my directions.
41. I find that the length of time this matter has been ongoing, coupled with Mrs N's health issues, has and continues to cause her serious distress and inconvenience. She shall receive an award in recognition of this.

### **Directions**

42. Within 28 days of the date of this Determination, the USS shall:-
  - 42.1. Request the transfer of Mrs N's CETV from TP. Once received, the CETV should be reinstated into the Scheme's DB section on a non-club basis.
43. Pay Mrs N £1,000 for the serious distress and inconvenience this situation has caused her.
44. Within 28 days of receipt of the CETV from TP, the USS shall:-
  - 44.1. Calculate the pension payable to Mrs N from the date she was due to commence receiving a pension from these benefits. This pension should then be backdated and paid to Mrs N, in accordance with the Rules that were applicable in July 2004.
45. If the USS is unable to reinstate the CETV into the Scheme's DB section, it shall:-
  - 45.1. Provide Mrs N with equivalent benefits by means of another arrangement or from the DC section of the Scheme.

**Anthony Arter CBE**

Deputy Pensions Ombudsman

28 February 2023

## **Appendix 1**

### **46. Relevant sections of the March 2012 (PSTC5) version of the Memorandum by the Cabinet Office about the Public Sector Transfer Club.**

“7.21 ‘Preston’ cases. In cases where a previously deferred member of a Club scheme has been granted additional service credit following a successful “Preston” claim and applies for a transfer of those benefits to another Club scheme, the sending scheme should calculate the additional transfer value using current factors, relevant date and age and allowing for pension increase. Given the background to these cases, it may not be possible for the members to comply with the time limits set out in paragraph 4.1 but it is hoped that receiving Club schemes would take a sympathetic approach to such cases.”

## Appendix 2

### 47. Relevant sections of Rule 47 of the 2015 Rules

“47.1 The *trustee company* may at the written request of a *member* accept a transfer payment into the *fund* in respect of rights of that individual under a *transfer arrangement*.

47.2 Subject to sub-rules 47.3 to 47.5 any such transfer payment which is accepted into the *fund* on or after the *effective date* shall be credited to the *member's DC account* on such terms as the *trustee company* may decide...”

## Appendix 3

### 48. Relevant sections of Rule 44 of the 2009 Rules

#### “44. INDIVIDUAL TRANSFERS IN

...

44.5 The *trustee company* may on *actuarial advice*:

...

44.5.4 enter into any special arrangements with schemes participating in the *transfer club* where the balance of advantage would not be equitable between this *scheme* and any other such schemes...”

## Appendix 4

### 49. Relevant sections of the 2003 Rules

#### “5.3 Club transfers

For the purpose of facilitating transfers between schemes participating in the *transfer club* the *trustee company* shall have the following powers, to be exercised, where appropriate, after taking *actuarial advice*:-

...

- (d) power to enter into any special arrangements with schemes participating in the *transfer club* where the balance of advantage would not be equitable between this *scheme* and any other of such schemes...”