

Ombudsman's Determination

Applicant	Professor E
Scheme	Universities Superannuation Scheme (the Scheme)
Respondents	Universities Superannuation Scheme Ltd (USS)

Complaint Summary

Professor E has complained that his decision to take an enhanced opt out (**EOO**) in March 2016, and cease pension contributions to coincide with the end of the Final Salary Scheme, meant that he lost a 0.5% late retirement factor (**LRF**) uplift from April 2016 which was not made clear to him in the literature available at the time. He believes USS should now compensate him by applying the 0.5% per month LRF to his pension benefits from 1 April 2016 until his eventual retirement, at a date to be decided between now and June 2025.

Summary of the Ombudsman's Determination and reasons

The complaint is upheld against USS because it failed to provide sufficient and accurate information to Professor E, at the time he made his decision to opt for EOO, about the impact it would have on his entitlement to LRF. Consequently, he made an uninformed decision which has caused him an injustice. USS also failed to respond to Professor E's IDRPs complaint correctly thereby causing him additional serious distress and inconvenience.

Detailed Determination

Material facts

1. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
2. USS says that following the introduction of the lifetime allowance (LTA) in 2006, the Scheme's Rules (the Rules) were amended to allow members of the Scheme who were pursuing HMRC LTA protection to cease to be an active member and, instead, pay a lower contribution to retain death and incapacity cover. This was known as the EOO. This prevented members from accruing further benefits and invalidating their HMRC LTA protection.
3. Additionally, in 2015, changes were made to the Scheme's benefit structure so that, also with effect from 1 April 2016, the final salary section of the Scheme would close, and all active members would then accrue career revalued benefits.
4. Professor E joined the Scheme in 1986 and since April 2016 has been a deferred member. He is in full-time employment at Cardiff University.
5. On reaching normal pension age (NPA) of 65 on 20 June 2015, Professor E chose to continue to work but to not draw his pension. He continued to contribute to the Scheme and accrue further pension. He also became entitled under the Rules to an enhancement of his pension to reflect the fact that it was being paid later than NPA. This enhancement, the LRF, amounted to an increase of 0.5% of his benefits for each complete month from NPA to his actual date of retirement.
6. Prior to the closing of the final salary section of the Scheme, Professor E applied for and was granted EOO from the Scheme, effective from 1 April 2016. The effect of EOO was to end his service and accrual of benefits, but he retained the right to death and incapacity cover. He continued to pay a lesser contribution, 2.5% of his salary, towards the cost of the death and incapacity cover.
7. On 17 January 2016, Professor E completed an EOO Application Form (the Application). Under the Rules, as Professor E became a deferred member, he lost his entitlement to LRF once he took EOO.
8. Professor E claims that he was unaware that this was the effect of the Rules. He says that, had he known about the loss of the LRF, he might have taken a different view of his situation. He points to factsheets which USS made available to explain the Rules, in particular Factsheet 9, which explain the way in which the LRF works and makes no mention that LRF will be affected by EOO.
9. Professor E also points out that the Application makes no reference to the effect of EOO on the LRF, although a later iteration of the form (not seen by him at the material time) does make that effect clear. He also claims that the Rules are not clear regarding the effect of EOO on the LRF so, even if he had checked the Rules, he still would have been unaware of the impact of his decision to apply for EOO.

10. He has pointed to the fact that, after the date of his EOO, in addition to the EOO Application, the Scheme's other guidance material was amended to make explicit reference to the loss of the LRF on taking EOO.
11. Professor E says he first became aware of the situation in December 2019, when he checked on the value of his pension and discovered it had only increased by an inflationary factor, and no LRF had been applied after March 2016. At this point he came across the updated factsheet, which he says made it clearer that the LRF would not apply.
12. In response to Professor E's query, an email, dated 4 December 2019, to him from USS said:

"I am writing regarding you (sic) recent email to Rebecca at the University of Cardiff. I confirm that as you chose to undertake Enhance Opt Out (EOO) no late retirement factors will be applied to your benefits on retirement."

"With regards to the factsheet you attached to your email, this is relevant to an active member of the scheme who is retiring. The Application did not originally make mention of the late retirement factor, wording was added at a later date to bring this to a members attention."

"I apologise for any confusion that may have been caused by this matter."
13. Professor E invoked Stage 1 of the Scheme's two stage Internal Dispute Resolution Procedure (IDRP) on 9 April 2020. He said that:-
 - He was not informed that the EOO election would affect the LRF in any way.
 - Factsheet 9 contained a section on late retirement which stated that he could remain in service after NPA and, if he did so, the benefits he accrued before NPA would be increased by an LRF of 0.5%. He understood this to apply to him if he became an EOO member and there was nothing in the factsheet to suggest otherwise.
 - The Rules did not mention that an LRF uplift would be forfeited as a result of making an EOO election. Therefore, even if he had checked these at the time, he would still have assumed that he would be entitled to a LRF uplift irrespective of making an EOO election.
 - USS failed to provide accurate and unambiguous information that enabled him to make a fully informed decision about major changes to his pension entitlement with negative consequences for his finances on retirement.
 - USS should compensate him by applying the 0.5% LRF to his pension until his date of actual retirement.

14. Professor E says the dispute was not resolved. For its part, USS says the complaint was not upheld for the following reasons:-

- The benefits payable to an EOO member are determined by reference to the benefits the member had accrued up to the day before the EOO became effective. Any LRF that would then have been payable, will continue to be payable.
- There is no provision under the Rules for an LRF uplift to be applied to deferred benefits or benefits after the election of an EOO.
- The LRF cannot be forfeited if an EOO election is made. This is because the LRF has not accrued and is not, therefore, forfeited. Instead, the benefits become deferred, and there is no provision for deferred benefits to receive an LRF uplift in any circumstances.
- USS had applied the Rules correctly when providing an LRF only for the period up to the EOO becoming effective;
- The EOO option form explained that pensionable service would cease from the first day of the EOO and that, even if a member were to re-join at a later date, all benefits accrued prior to the first day of the EOO would be deferred and treated as preserved in accordance with the Rules.
- Factsheet 9 dealt with retirement from active status. There was a separate factsheet with information in relation to deferred benefits. There was nothing in Factsheet 9 which indicated that making an EOO election would not impact on benefits, and it was reasonable to expect Professor E to check this point, rather than make an assumption.
- The Scheme's website (where Professor E had obtained the Application and Factsheet 9), had clearly displayed under the "Tax considerations" section, a subsection "Tax option FAQs", which included numerous FAQs relating to an EOO.
- The "Tax considerations" section also contained a factsheet entitled "Options for members affected by the allowances". This factsheet was supplemented in January 2016 with a series of mini factsheets covering the separate tax mitigation options within USS, including the EOO factsheet. The Trustee also asked employers to inform their members about the new factsheets, as there were tight timescales for members who wanted to utilise any of the options before April 2016.
- The EOO mini factsheet included the following:
 - o "If I elect for EOO after age 65, will I still receive any late retirement augmentation?"
 - o Yes, you keep the late retirement increases which have been applied up to the date of your election. No further allowance for late retirement will be added for the period following the date of your EOO election up to retirement."

Professor E's position

15. He would not have taken the action he did if he had been in possession of all relevant information. It made no financial sense whatsoever. He acted in good faith based on the information presented to him. It is an act of extremely bad faith that USS now refuses to make good, having clearly provided misleading information. This is compounded by the disrespect it has shown him in the way it has dealt with his complaint.
16. He has never received a response to the IDRPs Stage 1 procedure. His formal complaint to USS was submitted on 9 April 2020. No IDRPs stage 1 determination was forthcoming by 22 July 2020, despite a series of written promises from USS officers. A USS officer had informed his representative, in writing, that the turnaround time for IDRPs Stage 1 complaints was two months. He had waited over three months by the time a USS officer said, in writing, that he would receive the USS response on 22 July 2020. But he received no such response. Since USS has never conveyed to him any determination under USS' IDRPs procedure at all, he has been denied the entitlement, within the USS IDRPs procedure, to respond to USS' determination under Stage 1, which, according to its own procedural guidelines, should have informed USS' final determination under stage 2.
17. The lawyer contracted by USS to respond on its behalf claims that there were 'conclusions' to the IDRPs procedure and specifies what they were. He had no knowledge of these 'conclusions', prior to being given sight of the USS lawyer's response document on 2 December 2021. In summary, if there ever was an IDRPs Stage 1 determination, USS did not follow its own stated 'statutory IDRPs procedure' by informing him or his representative.
18. The lawyer claims it to be a 'material fact' that USS informed him about receiving no LRF uplift after his election to take EOO became effective from 1st April 2016. No evidence is submitted to warrant this claim. It is not a 'fact', as USS did not inform him until he enquired, in December 2019, what his pension was worth by then, over three years after taking EOO.
19. The lawyer's statement of the 'respondent's position' claims that 'the relevant provisions under the Rules are set out in the Rules dated 19 November 2015, as amended'. However, the linkage between EOO and loss of LRF is never made explicit in the relevant section of the Rules themselves set out in the lawyer's response. There is no statement of this linkage in the Rules, yet the USS claims that they are definitive. The Rules did not make explicit that taking EOO would result in losing LRF, nor did the Application or Factsheet in the versions available to him at the time of his application.
20. The USS guidance document available to him at the time contains the rider that it is not a legal document and, if there is any discrepancy between what is stated in these documents and the Rules, the latter will prevail. But there was no discrepancy

because the linkage between loss of LRF and EOO was not mentioned in any of these documents.

21. The lawyer claims that USS does not have a duty of care to inform members about 'every eventuality' that may arise from its decisions in respect of USS scheme benefits. The lawyer further asserts that Professor E would also have assumed that to be the case. However, the lawyer provides no evidence to back this claim. Whether it constitutes a duty of care or not, Professor E did and does assume that USS has a legal and moral duty to provide all basic factual information embodied in a major financial decision involving members entering into a new contract with USS. The loss of entitlement to LRF as a result of EOO has a major impact on pension and cannot be set aside in the phrase 'every eventuality'.
22. The announcement by USS that it would close its Final Salary Scheme on 31 March 2016 forced him to decide whether to join the new and much less generous scheme that replaced it, or whether to stop making pension contributions. He wished to continue in full-time employment, and to continue financially protecting his family in case he were to die while still employed. He was informed by his employer's pensions administrator that he had the option to stop making pensions contributions when the Final Salary Scheme terminated and to continue providing financial protection for his family if he were to die in service by electing to take EOO.
23. As evidenced in his complaint, the USS documentation to which he had access did not mention that taking EOO would entail the loss of the LRF (to which he had been entitled since reaching retirement age in June 2015). It is highly germane to his complaint that USS did subsequently start to provide information about the linkage between EOO and loss of LRF in guidance documentation and later versions of the EOO election form. These changes, according to the dates marked on the documents, were introduced a few months after his EOO had come into effect.
24. He assumes that USS had, by then, realised that the lack of information on this linkage had been an omission, so it took action to rectify it. But if these documents were even available at the point when he submitted the Application (which is unclear), he had no way of knowing, having already checked all of the documents and not knowing that any might be updated in a material way in the days before his submission (if even by then). When preparing his original complaint in early 2020, he had managed to find these new documents via Google searches.
25. Notwithstanding USS' original failure to provide accurate information to him, the subsequent inconvenience and distress has been significant.

USS' position

26. It informed Professor E that, while he would receive an LRF uplift on his benefits up to the date the EOO became effective, he would not receive any further LRF uplift for the period from 1 April 2016.

27. The relevant provisions are set out in the Scheme Rules dated 19 November 2015, as amended (**the Rules**). Rule 12.1.2 – Late Retirement Benefit provides as follows:

“Where the prevailing normal pension age has been attained and service has continued thereafter, the member shall be entitled to receive, from the day after the date of retirement in respect of that individual’s active membership, the accrued pension amount and the accrued lump sum amount, with that part of each of the accrued pension amount and the accrued lump sum amount, which is attributable to pensionable service accrued or credited prior to that normal pension age increased by such amount as the trustee company may decide on actuarial advice”

28. Paragraphs 1 to 3 of schedule 14 of the Rules, ‘Enhanced Opt Out (Option to continue death in service and incapacity benefits and options to pay contributions to the member’s DC account and/ or MPAVCs after withdrawal from membership)’ provides as follows:

“1. This schedule shall apply to a member who makes an election under paragraph 2 and to an individual who has given due notice of an election under schedule 17 to the rules of the scheme as they stood on 31 March 2016 to all employers by reference to whose eligible employment that individual was a member of the scheme on 31 March 2016 in accordance with those rules. That election shall take effect, or, as the case may be, but the benefits payable to and in respect of that individual shall be calculated in accordance with these rules.”

“2. A member may elect to discontinue accrual of annual accrued pension amounts and annual accrued lump sum amounts by giving not less than 28 days’ prior written notice to the trustee company and to the employer, or such other notice period as the trustee company may require. Such a notice shall take effect from the end of the month in which the notice expires. Such a member shall continue to contribute to the scheme, and to be entitled to benefits under the scheme, in accordance with this schedule, with effect from the first day of the month following month in which the notice expires.”

“3. A member’s election under paragraph 2 shall, on taking effect, terminate that member’s service, but shall not terminate that person’s membership. The benefits payable to or in respect of the member shall, subject to paragraphs 5 to 7 below, be determined by reference to the member’s accrued pension amount and accrued lump sum amount accrued up to and including the last of the month in which the notice under paragraph 2 expired.”

29. Paragraphs 5 to 7 referred to in paragraph 3 of schedule 14 of the Rules set out above do not impact Professor E’s circumstances.

30. Rule 1.1 sets out the definitions relevant to paragraphs 1 to 3 of schedule 14 of the Rules as follows:

“Accrued Pension Amount” means:

in relation to a member...that person's opening credit so far as it relates to the accrued pension benefit that is...prospectively payable to that person...;"

and

"Opening Credit" means

in relation to a final salary member, the benefits accrued to or in respect of the final salary member under the scheme in respect of the period up to and including 31 March 2016 based on pensionable service up to and including that day and pensionable salary at that day, as if the final salary member had ceased on 31 March 2016 to be in service (as defined by the rules of the scheme in effect on that date)".

31. It is clear that:-

- Professor E made an election in accordance with paragraphs 1 and 2 of schedule 14 of the Rules.
- The effect of this election is that:
 - o there was a discontinuance of accrual of Professor E's benefits from the election date, 31 March 2016;
 - o he would continue to pay contributions;
 - o he would continue to be entitled to benefits under the Scheme but his service would terminate and those benefits payable to or in respect of him are determined by reference to his accrued pension amount and accrued lump sum as at 31 March 2016;
 - o the interpretation of "Accrued Pension Amount" and "Opening Credit" under the Rules has the effect of terminating any LRF that would otherwise may have applied; and
 - o any accrual up to 31 March 2016, including the application of any LRF, would be used to calculate Professor E's pension benefits.

32. Having indicated his wish to withdraw on 17 January 2016, Professor E was no longer entitled to Late Retirement Benefits under Rule 12.1.2 with effect from the date of the election, which is 31 March 2016.

33. USS complied with the provisions of the Rules and relevant principles at all times and refutes any suggestion of having acted otherwise.

34. It also refutes any suggestion that Professor E was not adequately informed and/or provided with appropriate resource for him to have been adequately informed. USS submits that it has at all times been reasonable and diligent in corresponding with Professor E.

35. In particular, the EOO option form clearly explained that pensionable service ceased from the first day of the EOO, and that, even if a member were to re-join at a later date, all benefits accrued prior to the first day of the EOO would be deferred and treated as preserved in accordance with the Rules.

36. Factsheet 9 clearly sets out at page 2:

“Late retirement

You may remain in service after the Scheme’s NPA.

If you cease contributions at your NPA, on your retirement you will receive a pension and lump sum calculated using your pensionable service accrued to NPA and your pensionable salary at your actual date of late retirement, increased by 0.5% for each complete month from your NPA to your actual date of retirement. For members reaching NPA on or after 1 April 2016, this factor will reduce to 0.35% for each complete month for all service from your NPA to your actual date of retirement.

If you choose to continue contributions then, in addition to the above increase to benefits at your NPA, you will continue to build up further benefits in USS based on the additional pensionable service and pensionable salary when you eventually retire. In any case, you must draw your benefits before age 75.” Whilst page 9 contained the following warning:

This publication is for general guidance only. It is not a legal document and does not explain all situations or eventualities. USS is governed by a trust deed and rules and if there is any difference between this publication and the trust deed and rules the latter prevail. Every effort has been made to present accurate information at the date of publication and members are advised to check with their employer contact for latest information regarding the scheme, and any changes that may have occurred to its rules and benefits.”

37. USS submits that at all times communication in relation to the EOO has been clear and transparent. Furthermore, Professor E cannot seek to rely on Factsheet 9 exclusively as other information was readily available at the time which dealt with late retirement augmentation following an EOO election.

38. The complaint is based on the assumption that USS has a duty of care to Professor E to inform him about all the consequences that may arise in respect of decisions made about Scheme benefits. It also suggests that USS is required to pre-empt his decision making and to consider each and every eventuality that may arise from this. USS does not agree that it is under this duty. On the contrary, it considers it is not responsible for the decisions the Scheme members make with regard to their benefits in the Scheme.

39. The courts have been reluctant to impose a general duty of care on trustees and employers to advise members about their pension rights or alert them to potentially

detrimental decisions. Also, and importantly, trustees and employers must avoid making any suggestion which may constitute "financial advice" if they are not authorised to do so by the FCA rules.

40. Furthermore, the decision of *Scallly v Southern Health and Social Services Board* [1992] (**Scallly**), is commonly referred to as the applicable standard to be applied in complaints of this nature, but applicable to employers. The House of Lords held that an employer has a duty to take reasonable steps to inform an employee of a contractual term in order for them to take advantage of it where all of the following conditions apply:
 - the terms of the contract have not been negotiated with the individual;
 - the particular term in question makes available a valuable right contingent upon the individual taking action to avail himself of it; and
 - the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention.
41. The *Scallly* case, and subsequent case law, provides this duty on employers. There is no case law to suggest that trustees of occupational pension schemes have a similar duty to that of employers as prescribed under *Scallly*.
42. Even if this standard does apply to trustees, USS is strongly of the view that it has provided the required information/literature to satisfy the standard.
43. It does not accept that there was assumed responsibility, particularly given the disclaimers on, and the general nature of, the literature provided to Professor E and the whole structure of the information provided to members. Furthermore, it does not agree the literature provided to members had a misstatement or was insufficiently clear at least to ensure a reader should ask further questions.
44. It considers it has complied with its statutory disclosure requirements in terms of the information to be provided to pension scheme members as set out under The Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013.
45. Additionally, it notes that previous Pensions Ombudsman's decisions in matters PO-7038, PO-7035, PO-7036, PO-7037, PO-11989, PO-11998 and PO-12029 (concerning the Police Pension Scheme) confirmed that employers are not duty bound to draw members' attention to unfavourable tax consequences arising from benefit options the members are entitled to take.
46. USS specifically points to the finding in a previous determination of a case arising within the Scheme with what it considers very similar facts (PO-23357). It says that in that case the then Pensions Ombudsman found there was no assumption of responsibility by the Respondent arising from the issue of a similar suite of communications.

45. USS says it has adhered to the Rules and overriding fiduciary duty and submits that any claim for compensation is unfounded.

Adjudicator's Opinion

46. Professor E's complaint was considered by one of our Adjudicators who issued an Opinion on 14 March 2023 (**the Opinion**).
47. In the Opinion, the Adjudicator concluded that there had been maladministration on the part of USS on the basis that there had been negligent misstatement. He considered that Professor E should be offered the option to be reinstated to the Scheme as an active member from 1 April 2016. However, if Professor E chose this option, he would be required to pay any arrears of employee contributions that were due.
48. The Adjudicator's view was that USS should provide details of the arrears of employee contributions payable by Professor E (this figure to make due allowance for the contributions of 2.5% of salary Professor E had made towards the cost of the death and incapacity cover since 1 April 2016). If Professor E subsequently confirmed to USS that he wished to be reinstated to the Scheme as an active member, and that he was prepared to pay the arrears of employee contributions, USS should restore him as an active member of the Scheme from 1 April 2016, the date he opted out.
49. Following receipt of the Opinion, USS responded, through its lawyer, to say that it disagreed with the finding of negligent misstatement. In summary it said that:-
- USS does not accept that it assumed responsibility given the disclaimers on, and the general nature of, the literature provided to Professor E. Further, it does not accept that the literature provided had a misstatement or was insufficiently clear at least to ensure the reader should ask further questions.
 - The communications were written in general terms and signpost other circumstances which may apply, for example using wording such as "Please see the "Options on leaving factsheet"". This clearly sets out that there was a framework of factsheets that applied to different scenarios.
 - There were statements such as "If you require further information please contact the Trustee Company" and "Further information can be found on the USS website..." which not only directed members to ask questions but created the impression that not all circumstances were covered in the communications.
 - The EOO completed by Professor E made clear statements of what was happening to his benefits, that is:
 - o discontinue accrual of pensionable service;
 - o prescribed contributions would continue to maintain death in service and incapacity cover;

- o if Professor E retired other than through incapacity his benefits would be calculated based on service up to and including the day prior to the first day of EOO; and
 - o all benefits accrued prior to the EOO would be deferred and treated as preserved benefits in accordance with the Rules.
- While there was no specific mention within the Application of LRF discontinuing it was clear that all accrued benefits were becoming deferred, and if it was not clear it was more than adequately explained for Professor E to have asked questions.
 - The fact that changes to the communications were subsequently made to clarify the position should not be taken to mean that the previous communications were in breach of any legal duty or were otherwise legally unsound. Improvements to documentation can sometimes be simply that.
 - There has been little evidence provided to reflect Professor E's intentions in making his decision or that he took into account the LRF going forward. If it was so important to him it raises the question of why he did not ask for clarification.
 - There is no analysis or evidence of any sustained injustice or evidence to show that Professor E was more likely than not to have continued his membership had he known the LRF would not continue if he opted for EOO.
 - Due to the structure of the funding, the proposed redress would require the employer to pay material additional contributions and the employer is not party to the complaint. The proposal is not therefore binding on the employer as it has not been given the opportunity to make representations.
50. Professor E responded to the Opinion to say that he thought there was a third option (**the third option**), which seemed to have been overlooked. He said that when he made his original decision based on the misleading information, he also had the option to stop paying contributions, but not take the EOO, in other words he could buy separate life insurance if relevant and keep the LRF.
51. He submits that EOO was an option for members who ceased paying contributions, not compulsory. He points to the wording of the EOO mini factsheet which refers to 'election', 'option' and 'choose'.
52. Although he acknowledges the EOO mini factsheet was not available to him at the time he maintains there has been no change in the status of EOO as an option and, as such, it follows that it was possible to cease paying contributions and to not take EOO. The consequence of this would be to lose the death in service benefit, but had he known that by taking EOO he would lose the LRF he would have declined the EOO and taken out a separate life insurance policy.
53. He asserts that the wording of Factsheet 9 (see paragraph 36 above) indicates that it is possible to both cease paying contributions and retain the LRF and cease paying contributions and not take the EOO.
54. As a consequence, he considers that he can be restored to the status of:

- having ceased paying contributions at the end of March 2016; and
- retaining the monthly uplift from April 2016 to the time he eventually crystallises his pension, as if he had not taken the EOO.

55. He would then terminate his EOO cover and make alternative arrangements for life insurance starting from the settlement date.
56. Following the responses to the Opinion, both Professor E and USS were invited to make further comments.
57. Professor E reiterated that his complaint was that USS had failed to provide key information in its guidance documentation and the Application necessary for him to make an informed decision, resulting in him incurring an unintended and significant financial loss. USS has acknowledged that there was no specific mention of LRF discontinuing in the EOO documentation.
58. He says the financial loss he has incurred is twofold: he has lost the monthly LRF uplift to the value of his pension from April 2016; and he has incurred the additional monthly payment of 2.5% of his salary for EOO since April 2016, which would not have happened otherwise.
59. He opted to take EOO only as an afterthought after being made aware of it as an optional benefit. His aim was to keep the LRF while ceasing to contribute to his pension. Had he been informed that by taking EOO he would lose his future entitlement to the LRF he would not have taken that course of action.
60. For its part, USS asserts that the Rules do not permit the third option and therefore cannot be provided. The damages that should be awarded if negligent misrepresentation is determined would be to place Professor E in the position he would have been in had the misrepresentation not been made. On this basis he can only be provided with the choices that were available at the time which were: to continue with higher contributions and accrue benefits; continue with lower contributions and elect for an EOO; or to opt out of the Scheme altogether.

Conclusions

61. I acknowledge the arguments put forward by USS with regard to the wording and application of the Rules. However, this case is about the provision of sufficient and accurate information to Professor E for him to make an informed decision regarding his benefits under the Scheme and the options open to him. Furthermore, it is not a question of USS providing advice, it is about USS providing correct information.
62. The basic principle for negligent misstatement, in the absence of any additional legal claim, is that a scheme is not bound to follow incorrect information, for example retirement quotes, transfer values or early retirement. A member is only entitled to receive the benefits provided for under the scheme rules, but which are those based on correct information accurately reflecting the scheme rules.

63. I will provide redress if it can be shown that financial loss or non-financial injustice has flowed from incorrect information given. I will also consider whether it is more likely than not that a member relied on the incorrect information to their detriment and that it was reasonable for them to do so.
64. So, the starting point in misinformation cases is that members are only entitled to the benefits which the scheme rules provide. If a trustee, employer or scheme administrator provides incorrect information to a member about that entitlement, that does not alter the entitlement and I will not direct otherwise. That is not to say, of course, that the misinformation will not constitute maladministration.
65. Maladministration can arise where an employer, trustee or scheme administrator breaches a legal duty it owes to a member. In this case, the legal duties which USS may owe to Professor E include a duty of care in the law of negligence under what is known as negligent misstatement.
66. In negligent misstatement cases parties in a close relationship, where one party (perhaps with special skill and knowledge) assumes responsibility towards the other party, may find that the law will impose a duty on the first party to ensure that information it gives to the other party is accurate and reliable. Where the information is inaccurate or unreliable in some material respect, the party assuming a responsibility towards the other party will be in breach of that duty. If the breach causes financial loss to the party who has reasonably relied on the information to their detriment, and that loss is reasonably foreseeable as a consequence of the breach, then the loss is recoverable in damages.
67. In this case, I am persuaded that USS assumed responsibility to provide Professor E with accurate information about his entitlement to the LRF and also about his right to apply for EOO. I find that the information which USS provided accurately described the entitlement to the LRF and accurately described Professor E's right to apply for EOO but omitted to draw his attention to the relationship between these two entitlements. Thus, the information provided to him, while not incorrect, was arguably incomplete and therefore misleading.
68. The Rules are complex and lay persons, such as Professor E, will reasonably rely upon the information which USS gives to them: how the Rules apply to them, and what a member is and is not entitled to under the Scheme. In the absence of contradictory information from any other source, it is reasonable for Professor E to have relied upon the information contained in the EOO mini factsheet in determining his financial affairs. In this case, his financial affairs included the important question of whether he should apply for EOO and continue to work without claiming his benefits.
69. Further, the Application completed by Professor E on 17 January 2016, contained no explicit reference to the loss of LRF. If I compare this to a later version of the form, version 2.2 dated September 2019, this clearly states "In the event that I retire after

normal pension age, my benefits will not be increased by a late retirement factor for any period beyond the first day of enhanced opt-out”.

70. I have also reviewed a version of the EOO mini factsheet which says, in answer to the question “If I elect for EOO after age 65, will I still receive any later retirement augmentation?”:

“Yes, you keep the late retirement increases which have been applied up to the date of your election. No further allowance for late retirement will be added for the period following the date of your EOO election up to retirement.”

71. However, again this version of the EOO factsheet is dated July 2016, six months after Professor E elected to take EOO. It is acknowledged in USS’ email of 4 December 2019, that the earlier version of the EOO factsheet contained no such warning.
72. I am not persuaded by USS’ argument that these improvements to the documentation should be considered as simply that. The absence of any warning that opting for EOO would have the effect of removing entitlement to LRF is a clear deficiency. I am of the view that it is more likely than not this was later identified by USS and the additional wording inserted to address the shortcoming.
73. Further, USS could have reasonably foreseen that, if the information about the effect of EOO on Professor E’s entitlement to the LRF was not explicitly drawn to his attention, then he may not be aware of the valuable right he would give up by applying for EOO and would potentially suffer financial loss as a result.
74. USS seeks to put the onus back on Professor E to have asked questions if he was not sure about the effect taking EOO would have on the LRF, but I do not accept this argument. There was nothing in the documentation available to Professor E at the time which might reasonably have led him to think that he would lose the LRF if he opted for EOO. Therefore, he had no reason to ask any questions regarding this.
75. While USS correctly argues that Professor E is only entitled to receive the benefits provided for under the Rules, those have to be based on correct information accurately reflecting the Rules and in this case the information provided was not accurate.
76. Consequently, I find that Professor E has a reasonable argument that he has been subject to a negligent misstatement at the hands of USS which amounts to maladministration. Professor E made an uninformed decision to apply for EOO as a result of that maladministration. The issue remaining is what he would have done had he known the actual position at the time.
77. USS has questioned the issue of Professor E’s reliance on misinformation to which he was subject. The suggestion here is that there is a lack of evidence to suggest that Professor E would have remained in the Scheme had he been fully aware of the

effect of EOO. I acknowledge that this is a difficult point, but I consider that, on a balance of probabilities, he would have remained in the Scheme.

78. Professor E has consistently maintained that, had he known that electing EOO led to the loss of LRF he would not have done so. He had previously elected to continue to contribute to the Scheme and accrue further benefits after his NPA some seven months prior to completing the Application so this would appear to support the argument that maintaining his pension was a primary concern.
79. The EOO was aimed at members who were approaching or had exceeded their LTA. Professor E has not explicitly said whether concerns with exceeding the LTA applied to him, although, when asked, he has subsequently reiterated that he would not have opted for EOO had he known about the loss of LRF and that he wishes to be reinstated to active membership. This would appear to suggest that the LTA is not an issue for him.
80. Professor E has maintained that he wished to take advantage of EOO as he believed the Scheme would offer worse benefits after 1 April 2016. I acknowledge he would have continued to accrue further benefits had he remained an active member, albeit those may have been on a less generous basis than previously. However, I am not persuaded that this would have been a sufficiently strong reason for him not to opt for EOO had he been aware of the consequences of doing so.
81. Consequently, I conclude that, but for USS' maladministration Professor E would not have opted for EOO and would, more likely than not, have remained in active membership of the Scheme.
82. Professor E says that when he made his original decision based on the misleading information, he also had the option to stop paying contributions, but not take the EOO (the third option). In other words, he could buy separate life insurance if relevant and keep the LRF. He submits that EOO was an option for members who ceased paying contributions, not compulsory. He says that the wording of Factsheet 9 (see Paragraph 36 above) suggests that it is possible to both cease paying contributions and retain the LRF and cease paying contributions and not take the EOO.
83. I do not accept Professor E's argument. His complaint is that in opting for EOO he unwittingly lost entitlement to LRF. There was never a question of him simply ceasing to pay contributions at that time and given that he had decided to continue to accrue benefits and pay contributions at his NPA just seven months earlier, I am not persuaded that this was a consideration had it not been for the offer of EOO.
84. I agree that the EOO was an option, but it was a binary one, either to continue as an active member of the Scheme paying normal contributions, or to opt-out and to start making special contributions of 2.5% of salary to maintain death-in-service and

incapacity cover. There is no option to cease the payment of normal contributions and not opt for EOO.

85. Of course, Professor E always had the option to cease contributions and become a deferred or retired member, but that is not relevant here. It would certainly have been an option for him at NPA under Rule 12.1.1 yet he chose not to take it. Had he done so this would not be an election under the EOO option and Rule 12.1.2 (see Appendix) regarding Late Retirement would have applied such that only that pension accrued prior to NPA would receive the LRF.
86. Benefits have to be paid in accordance with the Rules. In accordance with Rule 12.1.2 (see Appendix), in order to receive the benefit of LRF, Professor E would have to be reinstated to the Scheme as an active member for his service to be considered as continuing. This would involve him accruing further benefits and having to pay any arrears of contributions due from him.
87. I cannot advise Professor E on whether it would be advantageous or not for him to be reinstated into the Scheme as an active member, thereby accruing further benefits under the amended scheme design and having to pay arrears of personal contributions. He may wish to take independent advice on how reinstatement would affect his financial position before he decides if this is the route he wishes to pursue, making due allowance for the payment of arrears of personal contributions should he seek to be reinstated.
88. With regard to financial loss, Professor E's submissions present what he considers his likely financial losses, albeit he does not attempt to quantify his losses. Furthermore, I note he has said nothing of any attempts which he has made to limit or reduce his losses since he became aware of the misinformation.
89. That said, I do not agree that Professor E has incurred a loss by having to pay 2.5% of his salary to maintain death and incapacity cover. Had he needed to make a claim under the provisions of this cover I consider it more likely than not this would have been paid. As he has said, had he not opted for EOO he would have had to make other arrangements for this cover, and it is entirely possible that this would have cost him more than 2.5% of his salary.
90. I have considered whether Professor E could have mitigated his loss once he was aware of the position in December 2019. He subsequently raised a complaint under Stage 1 of the Scheme's IDRP on 9 April 2020, which was the proper and correct thing to do. No doubt Professor E hoped that the complaint would be resolved to his satisfaction. However, I consider that it would have been reasonable for Professor E to have assessed how he might have mitigated his losses in the event that the complaint was not resolved, including by diverting discretionary income into other investments – but there is no evidence that he did so.

91. As for the IDRП process itself, USS operates a two stage IDRП. Under Stage 1, the complaint is considered by one of USS' senior officers. If the complainant remains dissatisfied with the determination, they can then ask for the complaint to be considered under Stage 2 and the matter will be referred to USS' Advisory Committee, a special committee comprised of members appointed by both Universities UK and the University and College Union.
92. USS says that Professor E's complaint was considered under Stage 1 of IDRП and as part of our investigation it set out what the conclusion was.
93. On further enquiry, USS has now produced a copy of its response to Professor E's stage 1 IDRП complaint, dated 24 July 2020. From this I note that despite the fact his address is clearly shown on the IDRП Application, the response has been incorrectly addressed. In view of this I am inclined to accept Professor E's assertion that he never received a response. I am concerned that this potentially raises the question of a data protection breach, but as that is not part of the complaint, I have not considered this further.
94. I also consider this failure to effectively communicate the outcome of the IDRП to Professor E to be maladministration. Furthermore, the lack of communication meant that USS did not advise Professor E of his right to make a further appeal under the second stage of IDRП.
95. Therefore, in view of the fact that Professor E was left totally unaware of the position with regard to his complaint, he would have been hampered in his attempts to decide how best to mitigate his losses and it is difficult to criticise the actions he did take to try to resolve the dispute.
96. I have considered USS' argument that any directions for redress cannot be binding in view of the fact that would involve the employer as it will have to meet the cost of that redress, and the employer has not been given the opportunity to make representations. However, I disagree. The complaint has been properly brought against USS as the trustee of the Scheme. In this role it is ultimately responsible for the management of the Scheme, including the provision of benefits to members, the application of the Rules and the provision of accurate and complete communication. The employer had no part to play in the maladministration about which Professor E complains and it would therefore be inappropriate to ask it to comment in any way on Professor E's complaint. This Determination does not bind the employer. The fact that the employer may have to fund any compensation under the trust deed and rules is a matter between USS and the employer and is something which they can resolve between themselves without the involvement of Professor E or myself.
97. As for USS' submission that previous Pensions Ombudsman's Determinations have held that trustees and employers have only limited legal duties to provide members with information - that, with respect, is a subjective view. The Determinations relating

to the provision of information vary according to the facts and merits of each complaint.

98. For example, in the cases PO-15168 & PO-15171, the Ombudsman took the view that the failure of the employer to warn one of the complainants about the effect of re-employment on their protected pension age amounted to maladministration. And in PO-3750, the then Deputy Ombudsman found that the applicant was seeking information and that the employer and the Trustee had a duty of care to ensure that she was provided with accurate information which enabled her to make an informed decision about whether to opt out of a pension scheme.
99. USS' submission that the Opinion suggests that a trustee has a duty in certain circumstances to provide full details within its communications of all consequences, for example tax, benefit options and otherwise, misrepresents the Opinion. The issue in the present case is internal to the Scheme's own rules and does not involve USS doing anything more than explain to a member what she or he gives up by choosing EOO. The simplicity and narrowness of the point is amply illustrated by the straightforward action the Trustee has since taken to amend its literature.
100. Case law indicates that whether responsibility is assumed by a defendant to a claim in negligent misstatement is not dependent upon the defendant's subjective intention but is assessed objectively. For example, Zacaroli J in *McClellan v. Thornhill* [2022] EWHC 457 cited the Judgment of Sir Brian Neill in *Bank of Credit and Commerce International (Overseas) Ltd v. Price Waterhouse* [1998] BCC 617 where Sir Brian noted that in *Caparo v. Dickman* [1990] 2 AC 605, Lord Oliver had made it clear that even an expressed intention that advice should not be acted upon by anyone other than the immediate recipient could not prevail against "actual or presumed knowledge that it is in fact likely to be relied upon in a particular transaction without independent verification."
101. I consider that this aptly describes the situation in which USS supplied information to members about EOO and its relationship with the LRF.
102. USS' submissions place considerable emphasis on the presence of disclaimers in the Scheme literature. In the context of negligent misstatement, the case law is clear that the presence or absence of a disclaimer is but one of the facts which a court (or the Ombudsman) should note when deciding whether, as a matter of law, a defendant assumed responsibility towards a claimant. It is important to note that a disclaimer is not, of itself, determinative of whether a defendant owes a legal duty of care towards a claimant in any given situation (see the Court of Appeal's decision in *McCullagh –v- Lane Fox & Partners* [1996] 1 EGLR 35). The test of whether a defendant (such as USS) has assumed responsibility to a claimant (such as Professor E) is an objective test (see paragraph 62 of the decision of the Privy Council in *JP SPC 4* and another – v- *Royal Bank of Scotland International Ltd* [2022] UKPC 18).

103. What this means (among other things) is that the state of mind of USS (that is whether or not it intended to assume responsibility) is not determinative of its liability. What matters are things said and done by USS in its dealings with Professor E and whether it is reasonable for Professor E to rely on USS to provide information with reasonable care and skill.
104. I find that there is sufficient evidence, that:
- it was reasonable for Professor E to rely on the expertise of USS to draw attention to the important relationship between the provisions of the Scheme rules in circumstances where this relationship is not obvious and might lead a member to give up valuable rights; and
 - in circumstances of a continuing relationship between a professional trustee and a scheme member, that USS assumed responsibility to provide accurate and reasonably complete information about the Scheme to Professor E.
105. Having concluded that Professor E has suffered an injustice, it is necessary to consider whether he has proven, on a balance of probabilities, that he has suffered loss, and then to consider how any redress for that loss should be calculated.
106. In negligent misstatement cases, redress seeks to put the applicant in the position in which they would have been had the incorrect or misleading information not been given to them. In Professor E's case, had he been given a full explanation of the effect of EOO on his right to a LRF, he would not have applied for EOO and would have earned additional benefits as a result of the LRF.
107. USS questions whether Professor E has, in fact, been made worse off as a result of loss of the LRF. But that is to miss the point. Professor E's complaint is that had it not been for USS' maladministration he would not have taken the EOO and so would have remained in the Scheme, thereby continuing to enjoy the benefit of the LRF. While the quantum of loss of the LRF is unknown, and will remain so until Professor E retires, he has been denied the opportunity to benefit from the LRF by USS' maladministration.
108. I cannot say whether active membership of the Scheme beyond 1 April 2016 is the correct decision for Professor E or whether it will create tax or other liabilities for him and I make no finding in that regard. Professor E has confirmed that he wishes to be reinstated to active membership of the Scheme and that he accepts the need for him to pay the arrears of personal contributions that will fall due as a result.
109. USS has referred to the previous case reference PO-23357. As a matter of first principles, I approach each complaint on its own facts and determine each complaint on its individual merits. While I have regard to the substance of past Determinations, these do not bind me, USS has noted as much in its own submissions. The position is different, of course, with regard to the binding effect of legal principles. Case-law (see

for instance Henderson -v- Stephenson Harwood [2005] OPLR 21), is clear that the Ombudsman must decide complaints in accordance with established legal principles. That is why the Opinion must and, in my view, did carefully consider the law relating to negligent misstatement and estoppel.

110. In terms of the similarities between this case and PO-23357, it is true that the Determination in PO-23357 concerned the operation of the LRF and the application of the LRF to deferred benefits in the Scheme. It is also true that that Determination reflected the Ombudsman's view that there was no maladministration in the Trustee choosing not to provide information about the effect of opting out of the Scheme on the LRF. However, there is a difference in the facts and merits of the current complaint. This is because, in PO-23357, the complainant, through his independent financial adviser (IFA), made specific written inquiry of the Trustee about the effect of deferment on the LRF but failed to receive any response.
111. Two conclusions emerge from that fact. The first is that the complainant in PO-23357 was not relying solely on the Trustee for information about his pension entitlements. The second, and distinguishing, conclusion is that the complainant in PO-23357 was aware that there was a reason to clarify the impact on the LRF of opting out of the Scheme but failed to follow up the query which had been raised about it. In the current case, there is no suggestion that Professor E was aware of any possible impact. In the circumstances, and unlike the position in PO-23357, there cannot be any criticism of Professor E for failing to press the Trustee for more information about his entitlement to the LRF.
112. I find that USS failed to provide sufficient and complete information to Professor E at the time he made his decision to opt for EOO concerning the impact it would have on his entitlement to LRF. This failure will undoubtedly have caused him distress and inconvenience. USS also failed to apply its IDRPs correctly thereby causing Professor E additional distress and inconvenience.
113. Finally, I want to make clear that, while not every point made by the Trustee has been commented upon expressly in this Determination, all submissions have been properly considered and my Determination has been arrived at in the light of them.
114. I uphold Professor E's complaint.

Directions

120. To put matters right, within 28 days of the date of this Determination:-

- USS shall provide to Professor E details of the arrears of employee contributions payable by him. The contributions of 2.5% of salary Professor E has made towards the cost of the death and incapacity cover since 1 April 2016 shall be deducted from this figure.

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- If Professor E confirms to USS that he wishes to be reinstated to the Scheme as an active member from 1 April 2016, and that he is prepared to pay the arrears of employee contributions, within 28 days of receipt of this confirmation, USS shall restore Professor E as an active member of the Scheme from 1 April 2016, the date he opted out.
- USS shall pay Professor E £1,000 for the serious distress and inconvenience its handling of his complaint will have caused him.

Anthony Arter CBE

Deputy Pensions Ombudsman
16 November 2023

Appendix

Rule 12.1.1 Member contribution election at normal pension age

...a member who was in service immediately before the prevailing normal pension age may either:

12.1.1.1 elect to cease to pay contributions at that age; or

12.1.1.2 continue to pay contributions until the earlier of retirement and cessation of service.

Rule 12.1.2 Late retirement benefits

Where the prevailing normal pension age has been attained and service has continued thereafter, the member shall be entitled to receive, from the day after the date of retirement in respect of that individual's active membership, the accrued pension amount and the accrued lump sum amount with that part of each of the accrued pension amount and the accrued lump sum amount which is attributable to pensionable service accrued or credited prior to that normal pension age increased by such amount as the trustee company may decide on actuarial advice.