

Ombudsman's Determination

Applicant	Mrs N
Scheme	Universities Superannuation Scheme (the Scheme)
Respondents	Universities Superannuation Scheme Limited (USS)

Outcome

1. I do not uphold Mrs S' complaint and no further action is required by Universities Superannuation Scheme Limited.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

1. Mrs N's complaint concerns USS refusing to reimburse the legal fees she incurred when applying for ill health retirement. Mrs N says that she needed legal assistance due to the emotional strain and complexity of the issue. Mrs N also believes that unnecessary delays and errors were made by USS.

Background information, including submissions from the parties

2. Mrs N suffered from a number of complex medical issues. From November 2005 she was employed at York University (**the University**). In February 2013, due to her illness, Mrs N started medical leave at the University. At some point during her leave Mrs N began to consider retiring on the grounds of ill health.
3. Concerned that she was going to be dismissed because of her absence, Mrs N sought the legal assistance of Raworths Solicitors (**Raworths**). She was also mindful that if she were to be dismissed prior to her ill health retirement application being approved, her ill health retirement benefits would not be enhanced as per the scheme rules.
4. In February 2014 the University's occupational health department applied for ill health retirement on behalf of Mrs N. In May 2014 her employment with the University ended on the grounds of incapacity.

5. In April 2014 USS turned down her application for ill health retirement. In a letter to the University's occupational health department, it quoted USS' panel of medical advisors who said:

“We have carefully considered the medical information presented with the application and the more up to date letter from Mr Dixon dated 19 February 2014. From Mr Dixon's communication to Dr Moss there appears to be the option of further surgery which, in his view, should have a good functional result. Since there is scope for improvement, it is difficult to conclude at this stage that Mrs N suffers from long term incapacity in performing the duties of her post.”

6. Mrs N underwent surgery in July 2014, but due to her medical condition the operation was unsuccessful.
7. Mrs N again enlisted the services of Raworths, who formally appealed USS' decision to turn down Mrs N's application for ill health retirement in October 2014.
8. In December 2014 USS upheld the appeal based on the submission of further medical evidence. It agreed to pay Mrs N's ill health retirement benefits from 5 December 2014 onwards, but did not agree to enhance her benefits or backdate them to the date Mrs N's employment was terminated. Ms N did not agree with the outcome of the appeal, so again referred the matter to Raworths, who wrote to USS in January 2015 arguing her ill health retirement benefits should be backdated to May 2014 and enhanced.
9. In February 2015 USS responded to Raworths, explaining that as Mrs N was a deferred member when her ill health retirement application was approved, she was not entitled to enhanced benefits. There is a provision under scheme rules (see appendix) which states a members' benefits can be enhanced even if they are a deferred member. But to apply this rule it said:

“USS requires the permission of your former employer, the University of York. I have contacted the University and they are not willing to support the application of this rule by withdrawing the USS leavers form they have already submitted, and sending to me a USS retirement form.”

10. Raworths again argued that Mrs N's ill health retirement benefits should be backdated and enhanced, so invoked USS' Internal Dispute Resolution Procedure (**IDRP**). Raworths also wrote to The Pensions Advisory Service (**TPAS**) in March 2015 requesting that TPAS review the case and refer it to this office if Mrs N did not get an IDRP decision in her favour.
11. In July 2015 USS wrote to Raworths with its IDRP stage 2 decision (even though Mrs N had not had an IDPR 1 decision, USS agreed to review the matter under IDRP stage 2). USS had contacted the University who confirmed that Mrs N's employment ended due to incapacity, and gave no reason why backdated enhanced benefits should not be awarded. On this basis, USS agreed to award Mrs N enhanced ill health retirement benefits backdated to May 2014.

12. Mrs N subsequently wrote to USS asking it reimburse her legal costs, which had amounted to £14,409.60. In her letter she said:

“As I am sure you can appreciate this has been a difficult and protracted process which could have been avoided had USS not fail[ed] to recognise that full incapacity was initially established whilst in employment in May 2014. The failure of the USS to recognise this error is now very well documented by my legal team. The resulting legal complexity and emotional strain of this error by the USS combined with my on-going serious ill health issues meant I had no alternative other than to employ an expert solicitor to intervene which caused me severe financial hardship.”

13. Mrs N did not receive a response from USS so contacted TPAS. After a prolonged period of discussions with TPAS and our office, the matter was referred to USS who initiated a new IDRPs response regarding her legal fees.

14. In May 2016 USS wrote to Mrs N with its IDRPs stage 1 response. It did not uphold her complaint. A brief summary of the reasons it gave are set out below:-

- IDRPs is intended to provide an accessible dispute resolution function without the need for legal counsel.
- If a complaint is not upheld at IDRPs 2, members may then refer the complaint to The Pensions Ombudsman.
- The decision to turn down Mrs N’s application for ill health retirement in April 2014 was not incorrect, it was based on the available evidence at the time.
- USS exercised its discretion when choosing to award Mrs N enhanced retirement benefits from May 2014. Its original decision was not wrong.
- The fact USS changed its stance about backdating Mrs N’s benefits did not amount to maladministration.

15. Mrs N did not agree with the IDRPs 1 outcome so requested an IDRPs 2 decision. The complaint was again not upheld, so the matter was brought to our office.

Adjudicator’s Opinion

16. Mrs N’s complaint was considered by one of our Adjudicators who concluded that no further action was required by USS. The Adjudicator’s findings are summarised briefly below:

- It should be possible to bring a complaint to this office without professional help, unless, for example, the case was particularly complex and it was reasonable for legal help to be sought. However, the Adjudicator did not believe this case was particularly complex, especially to the extent that legal advice was required.

- Mrs N had already decided that she required Raworths to represent her prior to her application for ill health retirement. So it was the Adjudicator's view that, regardless of the complexity of the matter, Mrs N was always going to use the services of Raworths if she did not get an outcome in her favour.
 - The Adjudicator accepted that the matter became more complicated when the new dispute arose regarding USS not enhancing Mrs N's ill health retirement benefits. However, there was nothing to stop Mrs N from contacting TPAS, who offer free advice and could have dealt with the complaint on her behalf from the start. But Mrs N chose to continue to pay for the services of Raworths.
 - Just because legal assistance was involved does not necessarily mean that any maladministration had occurred. Mrs N's application for ill health retirement was later accepted on the submission of further medical evidence, and USS' decision to enhance Mrs N's benefits was only after it exercised its discretion. The Adjudicator did not believe that simply because USS changed its stance on both occasions amounted to maladministration.
 - If USS had turned down the Mrs N's ill health retirement application after she appealed its initial decision, she would have been able to go through IDRPs, and if the outcome was still not in her favour she could have brought the dispute to this office at no cost to her. The Adjudicator believed that the same principle applied to USS' decision not to originally enhance Mrs N's ill health retirement benefits.
17. Mrs N not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs N provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion, and I will therefore only respond to the key points made by Mrs N for completeness.

Ombudsman's decision

18. Mrs N maintains that it was reasonable for her to seek legal help given her ill health and the complexity of the case. She says that she found the case overwhelmingly difficult and had USS accepted her ill health retirement application in April 2014, then the resulting complexity could have been avoided.
19. Mrs N says that both she and Raworths approached TPAS for further guidance but found "there was no forthcoming advice despite relentless requests for them to do so".
20. Mrs N also feels that there were delays and errors made by USS which should have been avoided, and therefore its actions amount to maladministration. Mrs N noted that the NHS Pension Scheme had accepted her ill health retirement application with ease.
21. TPAS became involved in March 2015, just under a year after USS had turned down her original application for ill health retirement. She had no experience of using TPAS

to assist her prior to this point. So it cannot be said that Mrs N had a reason not to use TPAS when USS turned down her initial application for ill health retirement in April 2014.

22. Furthermore, it cannot be said that simply because NHS Pension Scheme accepted Mrs N's application for ill health retirement automatically means that USS should. NHS Pension Scheme has a different set of Scheme Regulations which sets out how it should consider an ill health retirement application.
23. Whilst I understand the reasons why Mrs N felt the need to seek legal assistance and do not doubt that she was going through a difficult period, I do not find that Mrs N attempted to mitigate her losses in anyway. As explained, there was nothing to prevent Mrs N from using TPAS from the very start when appealing for ill health retirement. This would have relieved her from the stress of having to deal with the issue herself. Instead, Mrs N chose to pay for the services of Raworths.
24. In addition, I agree with the Adjudicator that Mrs N would have more than likely sought the legal aid of Raworths as she had already used their services when dealing with her employment tribunal.
25. Simply because USS turned down Mrs N's initial application for ill health retirement does not mean this was incorrect, as Mrs N contends. The decision was based on the medical evidence which had been presented at the time. USS reversed its decision when further evidence was submitted. This does not amount to maladministration.
26. With regard to the issue of enhanced benefits, the Scheme rules state that Mrs N's benefits could only be enhanced after the gaining the permission of her employer to do so. This is not an automatic right, however, USS exercised its discretion to allow Mrs N's benefits to be enhanced.
27. Therefore, I do not uphold Mrs N's complaint.

Anthony Arter

Pensions Ombudsman
20 July 2017

Appendix

Scheme rules from 1 October 2011 incorporating all Deeds of Amendment up to and including the fifteenth Deed of Amendment dated 9 December 2014

28. Rule 13.5:

“Where a member has ceased to be in eligible employment before the trustee company has determined that the member is, and was on last ceasing to be in that eligible employment, suffering from incapacity, and the member has retired or ceased that eligible employment on the grounds of incapacity, the trustee company may, after consulting with the employer, decide that the member shall benefit under this rule from the date of cessation of eligible employment. Any amount that has as a result of that cessation of eligible employment been paid to the former member shall be deducted from the benefits payable to that individual under this rule.”