

## Ombudsman's Determination

Applicant	Dr R
Scheme	Universities Superannuation Scheme ( <b>the Scheme</b> )
Respondents	Universities Superannuation Scheme Limited

## Outcome

1. I do not uphold Dr R'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

3. Dr R has made the following complaints about USS:
4. USS has breached an Additional Voluntary Contributions (AVC) added years' benefits contract which was to secure final salary benefits equivalent to four years' service.
5. USS has breached Scheme Rules 76.2 and 76.7.1 by retrospectively changing the AVC contract, and by prejudicing members with salary increases above indexing compared to those with salary increases below and in line with indexing after 31 March 2016.
6. USS has misrepresented the AVC added years benefits in factsheets, sales presentations to members and their online website, as they all made reference to final salary benefits.

## Background information, including submissions from the parties

7. Dr R purchased an AVC added years benefit beginning on 1 March 2010, with an end date of 1 February 2039. The contract includes details of the AVC rate at 3.36% based on Dr R's age at the time of joining. This would buy an additional four years of pensionable service.

8. The declaration section of the AVC contract says, "I authorise my employer for the time being to deduct the contributions from my salary and I understand that the additional voluntary contributions shall continue until the due to end date indicated on this form, or my earlier exit from the scheme."
9. A factsheet titled "Increasing your benefits by paying Additional Voluntary Contributions (AVCs)" under the heading "Added years AVC" states: "The added years AVC is part of the main scheme and is a final salary type arrangement. This means that the benefits you receive are linked directly to your service and pensionable salary at retirement or leaving."
10. The USS Scheme Rules dated 30 April 2009, applied to Dr R when he signed the contract. They provided that members who joined before 1 October 2011 accrued benefits on a final salary basis and members who joined on or after that date received career revalued basis (CRB) benefits.
11. In November 2015 USS made amendments to the Rules and the AVC contracts. The changes came into effect from 1 April 2016.
12. The final salary section closed to future accrual and all members would accrue future benefits on a CRB basis. All final salary benefits accrued before 1 April 2016 would be calculated by reference to a member's pensionable salary as at 31 March 2016. Any benefits attributable to added years AVCs paid before 1 April 2016 would be based on pensionable salary as at 31 March 2016, increased by Consumer Price Index.
13. Members could no longer purchase additional pensionable service by way of AVCs or enter into new monthly added years AVC contracts. All existing final salary added years AVC contracts would continue on existing terms unless a member terminated their contract.
14. The terms of the AVC contracts would otherwise remain the same including the rate of contributions from actual salary and the amount of pensionable service accrued by the contract end date.
15. Members with final salary added years AVCs could cease paying further AVCs at any time on giving one month's notice. They would be credited with a pro rata amount of pensionable service based on AVCs paid to the date of termination.
16. In relation to amendments to the Scheme Rules, Rule 76.6 states, "Any modification of the Scheme must satisfy the requirements of sections 67 to 67I of the Pensions Act 1995" which provides that any changes which affect members "subsisting rights" must meet strict requirements. USS says subsisting rights were not changed or affected and therefore, the requirements have been satisfied.
17. Scheme Rule 76.2 states "No amendment shall prejudice or affect any pension or annuity payable at the date of such amendment under the Scheme..."

18. Scheme Rule 76.7.1 states “Where...recommends to the Trustee Company any amendment to the Rules, the Trustee Company shall, in accordance with this rule, take steps to implement the recommendation, unless it appears to the Trustee Company, acting on Actuarial Advice, to...prejudice unfairly any one or more groups of Members or Former Members when compared with another or other groups.”
19. USS says it has received very clear legal advice that the amendments made to the Scheme Rules are permitted within the framework of the Rules, the AVC contract, pensions legislation and trust law. The Rules provide that AVCs may be paid to the Scheme to purchase added years of pensionable service under the Scheme and such pensionable service is used to calculate benefits by reference to “pensionable salary”.
20. USS says the key point is the definition of pensionable salary under the Rules. There is no statutory provision which precludes the amendment of the definition of pensionable salary.
21. USS concludes that it has satisfied its duties under the amendment power as the changes did not prejudice any group of members unfairly and ultimately, the security of the funding of the benefits of all Scheme members was improved. The amendments only affected future accrual or increase of benefits of members while in active service. They did not prejudice accrued or subsisting rights.

### **Adjudicator’s Opinion**

22. Dr R’s complaint was considered by one of our Adjudicators who concluded that no further action was required by Universities Superannuation Scheme Limited. The Adjudicator’s findings are summarised briefly below:-
  - Under the Scheme Rules, USS has the power to amend its Rules. The basic principle is that subject to satisfactory notice, certain requirements and protective provisions, a Scheme has the power to vary any of its terms and benefits. This equally applies to AVC arrangements as they provide an additional pension benefit. Benefits accrued up to the date of any change, are protected.
  - Dr R believes USS has breached the AVC contract by not linking his contributions to his salary and by not calculating his benefits with reference to pensionable salary at the time of retirement. Having looked at the AVC contract, it does not specify that Dr R will be entitled to an additional four years of pensionable service based on a final salary or salary at retirement. As set out above, the Scheme is entitled to amend its terms and therefore, the Adjudicator did not consider there was a breach of contract.
  - The Adjudicator reviewed the Scheme Rules and did not consider USS had breached Rules 76.2 and 76.7.1.

- Rule 76.2 protects a member's rights at the date of any amendment. As the benefits will be calculated by reference to pensionable salary as at 31 March 2016, Dr R's rights are protected up to 31 March 2016. Those rights not be prejudiced by the changes which took effect on 1 April 2016.
  - Rule 76.7.1 states that any amendment to the Scheme Rules should not prejudice unfairly any one or more groups of members when compared with another group. The Adjudicator did not consider that USS had prejudiced members with salary developments above indexing compared to those with salary developments below and in line with indexing after 31 March 2016. This is because members are not obliged to continue making contributions until the end of the contract and can end the agreement at any time if they believe that they are not receiving value for money.
  - In summary, the Adjudicator found USS was entitled to amend its Rules and has not breached Rules 76.2 and 76.7.1, as it has not retrospectively changed the AVC contract. The contract remains the same and the changes only apply to future accrual of benefits on and after 1 April 2016.
  - Furthermore, there is no guarantee that Dr R's salary will continue to grow at a higher rate than the revaluation rate. Dr R does not have to continue with the AVC contract and can end it any time by giving USS one month's notice. In line with pension law, contributions made up to the point of the amendment on 31 March 2016, are protected and calculated with reference to the pensionable salary on 31 March 2016.
  - Having considered the fact sheets, sales presentations to members, and the online website, the Adjudicator did not consider that USS has misrepresented AVC contracts. The literature was relevant and correct at the time it was produced. In any case, such information is not legally binding and would always be subject to the Scheme Rules. If there is any discrepancy between the literature and the Scheme Rules, the Scheme Rules prevail.
23. Dr R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr R provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Dr R for completeness.

### **Ombudsman's decision**

24. Dr R says a material change of contract occurred when USS reneged from its contractual commitment to provide final salary benefits on the added years' contributions. He says, although the commitment was not explicit in the AVC contract, it was implicit in the literature and therefore forms part of the contract. If the information provided in the factsheets was not legally binding then this would be misrepresentation as attention was not drawn to what the actual legal terms were. Dr

says at no point did USS give reason to believe that AVC benefits were subject to change if the USS Scheme Rules changed. An array of information stated that benefits would be provided on a final salary basis.

25. Dr R has pointed out that some of the literature gave disclaimers in small print which said: "...if there is found to be any discrepancy between the factsheet and the USS scheme, then the latter will take precedence." Dr R says there was no discrepancy between the Rules and the factsheet at the time of writing and the discrepancy only arose when USS amended its Rules. If the factsheet had been subject to future changes of the Rules, this should have been made clear to members. Anything else is a misrepresentation of facts for an ordinary member who will not have read or have been advised of the importance of, and the necessity to look at, the Scheme Rules. USS should have made it clear that the factsheets were subject to change and amendment and this should have been repeated on the AVC application form.
26. Generally speaking, it would be a member's responsibility to ensure that they have taken advice relating to any pension benefits. As the AVC contract was a pension benefit, the Rules of the Scheme apply. A scheme is allowed to amend its rules in accordance with its amendment provisions.
27. A scheme would be expected to inform members of any changes prior to any changes taking place and I am satisfied that USS did this. Even if USS had told Dr R that the AVC benefits were subject to change should the USS Scheme Rules be amended, I cannot speculate to what extent this would have influenced his decision. USS would have been unable to foresee further Scheme changes.
28. I appreciate that Dr R is unhappy with the changes however, the Scheme Rules allow changes to be made, and the AVC benefits are subject to the Scheme Rules.
29. Dr R says that USS should have considered updating its factsheets and pensions modeller website to include a clear explanation of the nature of benefits other than them being final salary benefits.
30. However, members were provided with information about the changes prior to them being made. In addition, the literature is not legally binding and therefore, updating the factsheets would not have made any difference to Dr R's situation.
31. Dr R says USS accepts the changes are detrimental to the majority of members. However, the changes are allowed under the Rules and benefits up to the point of the amendment on 31 March 2016, are protected and calculated with reference to the pensionable salary on 31 March 2016. I appreciate Dr R believes unfair but as USS have acted within the Scheme Rules, I do not uphold the complaint.
32. Dr R believes that the changes unfairly prejudice certain groups of members, as they make reference to individual circumstances such as career progression and promotional salary awards. He explains that USS could have made the changes fairer by linking contributions to the revalued salary and this would have avoided the breach of scheme rule 76.7.1 because it would have left members with different salary

increases in the same position after 31 March 2016. Members with a salary increase above indexation would effectively make additional contributions.

33. I can see why Dr R believes that the situation is unfair as the changes are likely to be detrimental to his particular situation. However, the AVC contracts are all based on individual circumstances and this has always been the case. The changes to the AVC contracts have been made in order to protect the security of the fund following actuarial and legal advice. As the Adjudicator explained, members are not obliged to continue with their contributions if they do not believe the benefits to be gained represent value for money.
34. Therefore, I do not uphold Dr R's complaint.

**Anthony Arter**

Pensions Ombudsman  
14 March 2017