PO-13912

Ombudsman's Determination

Applicant	The Estate of the late Mr H (**the Estate**)
Scheme	Universities Superannuation Scheme (**the Scheme**)
Respondents	Universities Superannuation Scheme Limited (**the Trustee**)
	University of Stirling (**the Employer**)

Complaint Summary

The Estate has complained because the late Mr H was not awarded full commutation of his Scheme benefits on grounds of serious ill-health. The complaint is brought by Mrs H, sister-in-law of the deceased and an executor of the Estate.

Summary of the Ombudsman's Determination and reasons

The Trustee

In summary, the complaint should not be upheld against the Trustee because:-

- It did not receive the full application until after Mr H died, by which time it had no power under the Scheme rules to fully commute his benefits;
- It has discretion under the Scheme rules to fully commute the benefits but could have reasonably decided not to; and
- Its application process was neither unclear nor onerous.

The Employer

In summary, the complaint should not be upheld against the Employer because:-

- There was sufficient information available to the Estate, Mr H and his representatives, before his death, about how to apply for full commutation. Therefore, they could have followed this guidance or contacted the Trustees for further information;
- The Employer did not have, and did not assume, a duty of care to assist Mr H with an application for full commutation prior to 9 January 2015. Although it provided incomplete information regarding the format and requirements of the commutation application, it made reasonable efforts in discharging its limited role of assisting with this process; and

- Even if the full application had reached the Employer and Trustee some days earlier than it did, it would in any event have come too late for the discretionary process required by the Scheme rules to be completed because the Trustee's medical panel was not due to meet until 16 January 2015, which was after Mr H's death.

Detailed Determination

Scheme rules

1. Section 13 of the Scheme rules (**the Rules**) ("Early Pensions on Incapacity"), provides that an ill-health pension can be paid where:

> "13.1.1 The member has either (a) completed 2 years' active membership; (b) completed 2 consecutive years in aggregate of active membership and membership of any comparable scheme in the continuous employment throughout of one or more institutions and during which there has been no material break; or (c) been a member of a comparable scheme after 10 December 1999 by virtue of incapacity qualifying employment and would have been entitled, on retirement on the date of ceasing eligible employment while satisfying the ill health, infirmity or incapacity requirements under that scheme, to an immediate early pension under that scheme, without actuarial reduction.
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> [where] [13.1.2] in the employer's opinion the member is suffering from incapacity at the date of the relevant cessation of eligible employment.
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> [13.1.3] The trustee company determines that the member is suffering from total incapacity or partial incapacity.
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> [13.1.4] The trustee company determines that the member has retired or ceased one or more eligible employments on the grounds of total incapacity or partial incapacity before normal retirement age and, in a case of total incapacity, without continuing in any other eligible employment.
>
> [13.1.5.] The member applies to the trustee company, in a form acceptable to the trustee company, for benefits under this rule, unless the trustee company determines that regulation 8(3) of the Preservation Regulations is satisfied.
>
> "13.2 Non-enhanced incapacity benefits
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> A member who retires or ceases an eligible employment on the grounds of partial incapacity or total incapacity shall be entitled from the day after such retirement or cessation of eligible employment to:
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> > a pension for life at the annual rate of [13.2.1] … and a lump sum of 3 times that annual pension [13.2.2].
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> 13.3 Enhanced incapacity benefits

A member, who either last became an active member 5 or more year ago… or, having last become an active member 2 or more years before ceasing active membership, had no known medical condition, and who retires or ceases to be eligible on the grounds of total incapacity, shall be entitled from the day after such retirement to:

> a pension for life at the annual rate of [13.3.1] … and a lump sum of 3 times that annual pension.

Such a member shall also be entitled to a pension and lump sum based on the number of years' supplementary service (if any) calculated as follows…"

2. Under section 51.1 of the Rules ("Total Commutation of Benefits for Serious Ill Health") (**Rule 51**), the following benefits are potentially available:

"Where the trustee company receives a medical opinion that a member or former member is expected to live for less than one year from the date of the medical opinion, and no pension has become payable to that individual by virtue of an arrangement under the scheme, the trustee company may at its discretion commute the benefits referred to below for a lump sum whose value shall not exceed: [calculation not included]"

3. Under section 1 of the Rules ("Definitions"), "Incapacity" means:

"…either partial incapacity or total incapacity."

4. "Partial incapacity" means:

"… ill-health of, or injury to, a member or former member, not amounting to total incapacity, which causes that individual to be able for the long term to discharge the duties of neither: (a) an eligible employment currently held by that individual or held immediately before last ceasing to be an eligible employee; nor (b) any other employment (whether or not available) which has a scope and a nature similar to that in (a)."

5. "Total incapacity" means:

"… ill-health of, or injury to, a member or former member, not amounting to total incapacity, which causes that individual to be able for the long term to discharge the duties of neither: (a) the employment currently held by the member as an eligible employee or which was held by the individual immediately before last ceasing to be an eligible employee; nor (b) any other employment for which an employee would be likely to pay the individual more than a small fraction of the amount which would but for the cessation of eligible employment have been that individual's salary."

6. "Medical Opinion" means:-

"…an opinion on the available evidence and on the balance of probabilities which is received by the trustee company from one or more of the registered

medical practitioners (or other medical advisers determined by the trustee company to be suitably qualified) who are appointed by the trustee company."

7. "Member" means:

"(a) an eligible employee who is a member of the scheme in accordance with rule 5 (Terms of entry); or (b) an individual who immediately before the effective date was a member of the scheme by virtue of its rules then in force, who would have remained so on the effective date had those rules not been superseded, and who has in either case not withdrawn under rule 36 in respect of eligible employments, and "Membership" has a corresponding meaning."

8. Under section 74 of the Rules ("Liability of institutions"), it says:

"No institution shall have any liability in connection with the scheme, except as expressly provided in the rules and except for any liability incurred under PA95 [the Pensions Act 1995] or other duty which may not by law be excluded."

9. The Trustee publishes various Scheme documents, which are made available on the Scheme website, or on request, including "Incapacity retirement: taking your pension early if you are ill and unable to work". Among other things, this says:

"…The trustee has discretion to commute for a lump sum the total incapacity pension payable from the scheme to a member who is in circumstances of extreme ill-health. Tax is not normally payable on this lump sum unless the value is in excess of the Lifetime Allowance…Applications to commute pension can only be considered where: the member is expected to live for less than one year; and the member can demonstrate that he or she has taken independent financial advice on the financial merits or otherwise of fully commuting his or her pension for a lump sum…An application for full commutation cannot be considered until the trustee has approved the member's retirement on the grounds of total incapacity…"

10. A document called "Full commutation in the event of a serious illness" was also made available. It says:

"The Trustee discretion in relation to commutation will normally be exercised where: You have not already begun to receive your pension benefits from the scheme; The required medical evidence has been provided expressing the opinions that you are expected to live for less than one year from the date of the relevant medical opinion (note: it is helpful if the medical evidence from your medical adviser is submitted with the initial incapacity application to USS, if applicable; An application has been made during your lifetime by yourself, the institution contact or your representative, in the appropriate form. In the unfortunate event of your death after an application is submitted but before approval of the application is given and payment is made, then the full commutation cannot proceed…An application for full commutation of benefits

requires the Trustee to compile all the evidence received, and although this application request is given priority and dealt with as a matter of urgency a reasonable period of time is required in order to seek the necessary recommendations and approvals."

Material facts

11. Initially, Mr H was a member of the Scheme. In the middle of 2014, he started the process of retiring and taking benefits. On 10 September 2014, he e-mailed his head of school, Professor LR, formally confirming his intention to retire. At around the same time, he was approved for retirement, with his benefits due to come into payment in March 2015.

12. On 6 November 2014, in the morning, staff at Forth Valley Royal Hospital diagnosed Mr H with cancer of the kidney and informed him that he had a life expectancy of three months. According to the Estate, on the same day, in the afternoon, a telephone call lasting eight and a half minutes took place - between a mobile phone belonging to Mr H and another phone number which it believes belonged to Professor LR). Receipt of that call by Professor LR is denied by the Employer.

13. On 13 November 2014, Mr H visited the Beatson West of Scotland Cancer Centre. There is evidence he discussed this with an ex-colleague at the Employer. On 14 November 2014, an e-mail exchange took place within the Employer which said:

    "…We have some good news…[Mr H] spoke to [RG]…[Mr H] is starting a course of drugs (not sure what type) in the next 4/5 days that he will continue to take for the rest of his life. They plan to leave the kidney and manage the cancer. He'll also undertake a course of radiotherapy to deal with the cancer on his hip/back bones and lungs. The cancer in these areas is at early stage. They are talking about 10 years life expectancy. He is going to call me over the weekend, so I will know more next week. But the best we could have hoped for. Have a good weekend. [Professor LR]"

14. On 18 November 2014, a "Statement of Fitness for Work" was completed and signed by a doctor. It said Mr H was "… not fit for work" on account of "Hospital treatment"; it was dated stamped as being received by the Employer on 20 November 2014.

15. There is no additional evidence regarding what the Employer was told in relation to Mr H's condition, or what it asked him, at the time. Nor is there additional evidence that he informed the Trustee, or that it asked him, about his condition. Mr H started treatment on 27 November 2014, however the treatment was stopped in December 2014 when his condition deteriorated.

16. On 7 January 2015, Mr H was transferred to a hospice and his son (**EB**) informed the Employer. Following that, the Employer received a statement of fitness for work, signed and dated 8 January 2015 by Mr H's GP, saying that he would be unfit for work for eight weeks.

17. On 9 January 2015, the Employer contacted EB about Mr H applying for incapacity retirement and full commutation of his Scheme benefits (**full commutation**). On the same day, at 12.45, there was an internal e-mail within the Employer and the following conversation is recorded:

> "… [EB] appreciates [the Employer's] wishes to do the best it possibly can for [Mr H] and his family considering the circumstances. He has requested the financial forecast figures outlined below so that [Mr H] and his family can consider the best option moving forward:
>
> - [Mr H's] pension fund on completion of full service
> - [Mr H's] pension fund relative to death in-service
> - [Mr H's] pension fund to commutation of pension."

18. At 13.13, the Employer e-mailed EB and said:

> "As requested, I have provided some pension illustrations below for information only. Please note that these are my calculations and not calculations provided by USS and I have completed these very quickly.
>
> I have attached a link to the USS website where you will find a USS Factsheet on Death in Service benefits and Full Commutation - let me know if you have problems accessing this information. I hope that this will help explain things in a wee bit more detail for your Dad, [Mr H], yourself and the family and help you to reach a decision…
>
> Please note that the decision whether to grant full commutation lies with [the Trustee]. [The Employer] cannot make a commitment to full commutation of benefits until [the Trustee] have decided to agree to this or not and that ill health has been granted. Please refer to the USS Factsheets for further information…
>
> [EB] – I really do hope this information is useful, please contact me if you have any questions at all – happy to help… We can also put you in touch with a Financial Advisor who has experience of [the Scheme] if you would find that useful. Please feel free to contact me again and also please let your dad know that I am asking after him…"

19. On the morning of 12 January 2015, EB spoke with a financial adviser about Mr H's case. Later, the Employer told EB that advice was a requirement for applying for full commutation, and it would require evidence of this. So, EB went back to the adviser and requested a letter containing this information, which was sent to the Employer by first class post the same day.

20. Simultaneously, EB set about submitting the remainder of the application for the Trustee's consideration. The "USS Medical Consent (ME5)" form was signed by Mr H and returned to the Employer on 12 January 2015. This was then provided to the

Employer's occupational health physician, Dr Mounstephen, the same day, along with contact details for Mr H's consultant, Dr Miller, so that a medical report about Mr H's condition could be obtained. Dr Mounstephen e-mailed Dr Miller on the same day, to request the required information. In the morning of 13 January 2015, after receiving the information from Dr Miller, Dr Mounstephen e-mailed this to the Employer.

21. On 14 January 2015, having received confirmation of financial advice, the Employer advised EB that the letter should explicitly detail that the option of full commutation had been considered and that specific wording should be used. It offered to contact the adviser directly to inform it of the required wording. EB arranged this and then a revised letter, containing the correct wording, was sent by the adviser, again by post at the Employer's insistence, on the same day.

22. The "USS Member's application for full commutation of benefits" was sent to EB on 14 January 2015; Mr H signed it and it was returned on the same day, including the financial adviser's statement dated 12 January 2015. The "Notification of Retirement" form, to be completed by the member once retirement was granted, was provided to EB on 14 January 2015, which was completed and returned to the Employer on the same day. The relevant section of the same form, to be completed by the Employer upon granting of retirement, was completed by the Employer, on 14 January 2015.

23. On 15 January 2015, Mr H died.

24. The Employer was notified of Mr H's death on the same day and it informed the Trustee. At that point, no formal application for full commutation had been received by the Trustee. EB asked for the application to be sent to the Trustee for consideration. The complete application was received by the Trustee on 16 January 2015. There was no discussion of Mr H's application in the scheduled meeting of the Trustee's medical panel on 16 January 2015. The Trustee decided Mr H should be treated as dying in service, so only death in service benefits were payable.

25. Mrs H, on behalf of the Estate, did not accept the lump sum, as it was lower than it would have been had the application been accepted and commutation granted prior to Mr H's death. The contingent widow's pension was however accepted and paid.

26. In February 2015, MacRoberts LLP, on behalf of Mrs H, complained to the Trustee under the Scheme's internal dispute resolution procedure (**IDRP**). In July 2015, the Trustee responded under stage one of the IDRP but rejected the complaint. Briefly, this was because no formal application was received from Mr H prior to his death. So, the Trustee had no power under the Rules to exercise discretion and commute his benefits. Further, it could reasonably have decided not to exercise discretion.

27. The stage one IDRP decision was appealed then, in November 2015, the Trustee responded under stage two of the IDRP and rejected the complaint again for broadly the same reasons.

28. In August 2016, dissatisfied with the Trustee's responses, Mrs H referred the complaint to us.

Summary of the Estate's position

29. About the Employer

- The Employer acted incorrectly when it failed to tell Mr H about full commutation in November 2014, after he initially informed it of his prognosis. Had it done so, there would have been sufficient time to have submitted a full commutation application.

- Between 6 and 14 November 2014, the Employer had been told and understood Mr H's condition to be terminal. Specifically, Mr H called his line manager - Professor LR - on the morning of 6 Nov 2014, and informed her of his diagnosis. There is also evidence, in the form of testimony from Mr H's secretary at the time, that a call between Mr H and Professor LR took place; and, that his diagnosis was discussed during that call. Finally, the secretary claims that Mr H's "direct reports" were informed of his diagnosis on the same day. The Employer therefore had a duty to tell him about his commutation option at that time.

- Mr H visited a cancer centre later in November 2014 then joined a clinical trial seeking to treat his cancer. But it was made clear the cancer would remain terminal. At no point during the consultation was a prognosis of ten years given by a medical professional. Nor could this have been known, as it was wholly dependent on how Mr H responded to treatment. The Employer's later information, which indicated that Mr H's prognosis had improved substantially, was third-hand and did not reflect what was communicated to him and his family by the consultant.

- The Employer did not tell Mr H or his family about full commutation until January 2015. By that time, his condition had deteriorated and he had transferred to a hospice. So, there was insufficient time to arrange the required evidence and submit the application.

- Mr H had already been approved for retirement, to start in March 2015, so it would not be expected he would acquaint himself with a different option (namely ill health commutation). Both Mr H and his wife had been diagnosed with, and were being treated for, cancer in or around November 2014. At such a difficult time, during which Mr H was preoccupied with both his and his wife's health, it was not reasonable to expect him to discover full commutation for himself.

- The Employer then provided incorrect information to Mr H's family on the application process, which delayed matters. Specifically, the Employer failed to fully and correctly outline the advice requirement when it spoke with EB on 9 January 2015. Had it done so, correct advice could have been obtained and the application could have been provided on 9 January 2015 rather than on 15 January 2015. The Employer also informed them that a medical report could be submitted by e-mail; in fact, the Trustees required a signed hard copy, which delayed matters. Had the Employer advised correctly, the medical report could have been provided on 13 January 2015.

- Given that the Employer advised the late Mr H about the full commutation process on 8 and 9 January 2015, it is more likely than not, a completed application could have been lodged with the Scheme before 14 January 2015.

- All communication with the Scheme regarding Mr H's application was instigated and carried out by the Employer. It was made clear that the Employer had the expertise and it was also made clear that it was for the Employer to take the application forward on Mr H's behalf. It was on this understanding that Mr H's family relied on the information from the Employer as being accurate and complete.

- Mr H's family and the Trustee had acted quickly after full commutation was mentioned, so it would have been possible for the application to be made in time for the Trustee to exercise discretion. But for these delays, the application could have been submitted before Mr H died. The benefits would be "real provision" for Mr H's family; it would be unfair for them to be penalised for errors and delays caused by the Employer.

- The Employer failed to discharge its duty to safeguard its employee's interests in relation to ill health benefits. Because of these failures, Mr H's family would suffer a significant financial loss in the amount of the difference between the full commutation lump sum (about £668,000) and the death in service lump sum (about £190,000).

- In the Ombudsman case PO-403, it was found that the employer was required to give members notice of "adverse changes to ill-health pensions". Clearly, the Employer had failed to meet this requirement in Mr H's case.

- The Employer's "delay, misinformation, negligence and piecemeal approach" when advising an employee during a difficult and time-sensitive process resulted in a large financial loss. In case of terminal illness, it was reasonably foreseeable any incorrect information could have a "profound impact".

- The Employer has said that we have no jurisdiction over the complaint as there was no written notice of a decision in respect of the complaint. The Estate disagrees. On 24 May 2016, a law firm acting for the Employer told the Estate: "… there is no basis in law to your client's claim". That was a clear decision "in respect of a complaint or dispute" against the Employer. Also, the Estate exhausted the Scheme's IDRP.

- The Employer disputes that Mr H's doctor, Dr Miller, could have produced a medical report in the same time she sent an e-mail to the Employer's occupational health physician, due to an "extremely full schedule". But Dr Miller was in "daily" contact with Mr H's family, EB told Dr Miller the situation was urgent, and she responded to the initial request from the Employer for a medical report on 13 January 2015. If she took longer to respond to a later request it was because she thought she had adequately responded to the Employer's request, following the incorrect guidance provided by the Employer. In addition, she responded to the initial request promptly.

- While Dr Miller was not available on 12 January 2015, she was available on 8 and 9 January. There were also other medical practitioners at the hospice, who could have provided medical evidence prior to the independent registered medical practitioner (**IRMP**) giving his opinion to the Trustee.

- It is untrue that EB had a "target date" of 16 January 2015. This was the earliest date, in line with what the Employer told him, that the full commutation application could be

considered. In any case, EB tried to meet the application requirements as soon as possible. Technology could have been used by the Employer to ensure this happened.

- It is also untrue that an e-mail sent by Mr H to a colleague back in September 2014 showed that he was aware of the Scheme benefits. That was ten months before his retirement and before his terminal diagnosis in November 2014. He was only aware of the Scheme benefits in general; he did not know about full commutation or how to apply for it. The Employer took it upon itself to advise Mr H. In doing so, it gave him incorrect information, and breached a duty of care to him.

- The Employer says it gave EB contact details for an employee of the Trustee, on 12 January 2015. However, this was only to cover another employee's absence. All communication about the application went through the Employer. Furthermore, the Employer told EB that it had previously dealt with that employee in relation to full commutation applications; and, it was reasonable for him to rely on this.

- Despite what the Employer says, the list of requirements on the "Member's application for full commutation of benefits" is not exhaustive. While the financial advice in respect of the application might have been insufficient, it was given on the basis it was urgent.

- It is unreasonable to suggest any omissions in the advice would have been avoided if Mr H had obtained advice from the financial adviser it recommended. Furthermore, the adviser used by EB had knowledge of Mr H. Nor would getting advice from the recommended adviser have avoided the deficiencies in the Employer's information. EB had provided details of the adviser; and, the Employer said it had used him before.

- The first financial advice letter was sent on 12 January 2015, and the revised letter was requested, prepared and sent on 14 January 2015. But the revised letter would have been unnecessary had the Employer's advice been correct on 9 January 2015.

- As the Employer accepts, it received a "Statement of Fitness for Work" dated 18 November 2014, indicating unfitness for work for eight weeks. Before that, on 6 November 2014, Mr H informed the Employer of "…his diagnosis, his life expectancy and the fact that he would not return to work". As such, the Employer ought to have known Mr H's life expectancy was short.

- The Employer received an additional "Statement of Fitness for Work" dated 8 January 2015, indicating unfitness for work for eight weeks. While the Employer says that there was no suggestion that Mr H's death could be imminent, it had been aware of this since November 2014 and nothing had changed.

- The information contained in the e-mail of 14 November 2014 was third-hand and the prognosis did not reflect the information given to Mr H at the time. At no point was a prognosis of ten years given by a medical professional; this depended on how he responded to experimental treatment.

- Nor could the e-mail of 14 November 2014 detract from the fact that the Employer was previously informed, on 6 November 2014, of Mr H's initial prognosis, ie that he had an

incurable condition and was expected to live only three months. Accordingly, and given that the Employer had agreed Mr H would leave and not return to work, it ought to have raised full commutation on grounds of serious ill-health.

- The Employer says after it informed EB of the full commutation option on 9 January 2015, there was an internal e-mail exchange. Within this, it was noted that the Employer had made EB aware that (1) it could provide contact details of an adviser with knowledge of the Scheme and (2) full commutation could only be granted once incapacity retirement was approved. But while advice was mentioned, it was not made clear this was a requirement of the application. Nor was the form of advice made clear.

- It was not made clear that an application for incapacity retirement would have to be made first, before full commutation, despite the fact the Employer was aware of this.

- On 13 January 2015, a representative of the Trustee reminded the Employer that it (the Trustee) would have to receive the full application, to progress the application. Yet it took until the following day for the Employer to explain the requirements to EB; and, this was done "piecemeal", which contributed to the delays.

- While members are required to complete an "application for full commutation of benefits" the form was not available on the Scheme's website and the Employer did not provide it to Mr H's family until 14 January 2015. Although the Employer provided factsheets, including information on the commutation process, and referred Mr H's family to the Trustee for more information, the guidance notes were brief. In any case, the notes could not detract from the Employer's subsequent "incomplete, piecemeal, slow and negligent advice".

- The Employer's "negligence" included providing incomplete and incorrect information about material aspects of the full commutation process, eg that certain wording was required; that advice had to be sought; and, that the application had to be made in a certain format. All this information was provided in a "slow and piecemeal" manner, which resulted in a "significant and entirely avoidable delay".

30. About the Trustee

- Mr H had been approved for retirement, in September 2014, with benefits due to come into payment in March 2015. And, the Trustee received evidence of his life expectancy before he died. Under the Rules, there was no connection between ill-health and full commutation for serious ill health, so the Trustee could and should have granted this.

- Neither the Scheme rules nor HMRC regulations required full commutation applications to be considered before a member's death; it was sufficient for him to be suffering from serious ill-health, and for his benefits not yet to be in payment.

- The Trustee acted unreasonably by not granting full commutation, as members should receive "fair value" of their benefits. There being no reasonable prospect Mr H would receive any benefits in his lifetime, full commutation was the only "equitable" option.

31. About causation

- While material financial loss, existence of a duty of care and breach of such a duty are disputed, the main issue is causation. It is accepted this is not clear cut. However, to rely on what the Trustee would have done had it received a completed application on 14 January 2015, is "unfounded" and "insufficient" for several reasons.

- First, it is more likely than not a complete application could have come together before 14 January 2015, as the option was first raised with EB on 8 and 9 January 2015. And second, the ill-health commutation process has considerable speed in-built. By its own admission, the Trustee can prioritise applications and decisions can be made within 24 hours. This should be factored into deciding what might have happened.

- The Trustee could have expedited this matter by holding a meeting sooner. The reason it did not do so is it did not receive a completed application before Mr H's death, due to the Employer's "negligence".

- To prove causation on the balance of probabilities, it would be "sounder" to consider that both the Employer and the Trustee agreed that the application process offers a "great degree of flexibility and speed".

- Even acknowledging the uncertainty about causation, a percentage reduction of damages is the correct way to approach that issue.

Summary of the Employer's position

32. In summary, the Employer submits that:

- It only facilitates membership of the Scheme for members and has little involvement with administration. There is nothing in Rule 51, the Scheme rules or the Scheme guide which requires it to take any particular action or exercise discretion.

- The "Incapacity Retirement" and "Full Commutation" factsheet explain when and how members' benefits can be commuted for serious illness and outlined the requirements for making an application. These were made available to Mr H when he joined the Scheme and would have been available via the Scheme's website or on request. Also, it would have been reasonable for Mr H and his family to have accessed or requested information about the commutation application process from November 2014 onwards.

- In November 2014, the Employer was made aware that Mr H's prognosis was "relatively positive" and he had about ten years to live. So, there was no reason why it would or should have provided him or his family with information about applying for commutation on grounds of serious ill health.

- The phone number in the photo of the mobile phone is a general phone number and there is nothing to show that a person on the call was in fact Professor LR. Professor LR has denied speaking with Mr H on 6 November 2014, or at any other time in November or December 2014.

- Until 7 January 2015, it had been processing a normal retirement application for Mr H, with an expected retirement date of March 2015. The onus was on him, and on all members, to apply for retirement; it was not reasonable for the Employer to initiate and drive this.

- Its administration responsibilities only begin once members have applied for ill health retirement. Further, a reasonable period of time is required to consider an application. In this particular case, there was little time between when it was made aware of the seriousness of Mr H's condition and his death. It could not have known that his death would occur so quickly.

- It liaised with Mr H's family, from 7 to 14 January 2015, in order to have the application submitted to the Trustee in time. The forms were completed and returned to it on 14 January 2015 and forwarded to the Trustee on 15 January 2015 by next day delivery. It does not know what more it could have done to expedite the application. Once it was made aware of Mr H's condition, it took immediate steps to assist with the application.

- We have no jurisdiction over the complaint because the Employer did not receive, under reg 3(1) of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 (**TPO Regulations**) a written notice of a decision in respect of the complaint or dispute that is now made to us against the Employer. In its letter of 28 July 2015, the Trustee responded substantively to two complaint letters, dated 13 February 2015 and 12 March 2015. But its response made no mention of the Employer. Nor does the stage two IDRP letter, issued by the Trustee on 15 November 2015, mention the Employer. The key jurisdiction question is whether the stage two IDRP letter is sufficient to cover the complaint against the Employer. In the view of the Employer, per USS Ltd v (1) Ian Scragg and (2) University of Dundee [2019] EWCA 51 (Ch); Pens L R 13 at para 32, it is insufficient.

- Nor does the subsequent correspondence, after the complaint was brought to us, satisfy the terms of reg 3(1) (SI 1996/2475), which provides that the notice must have "first been issued by the trustees or managers of the scheme". The issuing of relevant notice is a prerequisite of our jurisdiction. Correspondence in relation to the complaint after the fact would not satisfy reg 3(1) of TPO Regulations.

- There was no "culpability" by the Employer. In Mitre Pensions Ltd v [TPO] (2000) OPLR 349, delay must be "culpable and unjustified" to amount to maladministration. Imposing a duty of care that an employer had to avoid "unnecessary delay" is too high a burden .

- It is in any case protected from liability by rule 74 of the Rules, which provides that: "No institution shall have any liability in connection with the scheme, except as expressly provided in the rules and except for any liability incurred under PA 95 or other duty which may not by law be excluded." The Estate's case, that the full application could have been provided by 13 January 2015, does not assist it because the Trustee's medical panel was not due to meet until 16 January 2015.

- It is the fact that Mr H died on 15 January 2015, before the Trustee was due to meet, rather than any delay caused by the Employer (which in any case is denied) that caused loss of opportunity to have the application considered by the Trustee.

- There is insufficient evidence that Dr Miller could have completed her report in the same time she sent her e-mail, ie the following day, due to a very full schedule.

- The medical report from Dr Miller was not a Rule 51 Opinion, as she was not appointed by the Trustee. Nor was Dr Mountstephen appointed by the Trustee and he was not an IRMP, instead, he was an occupational health consultant (**OHC**) appointed by the Employer. So, neither a medical opinion from him nor from Dr Miller would have satisfied the Rule 51 requirement which requires an opinion from an expert appointed by the Trustee before commutation is granted.

- Production of a medical report by Dr Miller, or anyone else, on 13 January 2015 would have made no difference to the outcome, because the Trustee was not due to meet until after Mr H's death, ie on 16 January 2015. There is no evidence that the Trustee's panel could have met on 14 January 2015 or before 16 January 2015; it could have arranged a meeting sooner but did not do so.

- There is insufficient evidence that the full application would have been submitted by 14 January 2015. Further, there is insufficient evidence that the Trustee would have exercised discretion and actually granted full commutation.

- There is no causal link between (i) any failure by the Employer (which, in any case, is denied) and (ii) non-consideration of the application by the Trustee. As in Baugniet v Capita, it cannot be said that "but for" the conduct of the Employer, the Trustee would not have failed to consider the application and grant commutation.

- The complaint is not "pure maladministration"; it is about the Employer's legal rights, as per Webber v Department for Education.

- Its only duty was to take "reasonable care" discharging its limited role of assisting with the commutation application; there was no failure of that duty.

- Its only function was accepting, or not, the member was suffering from incapacity and the member had to apply for benefits in a format that was acceptable to the Trustee. Documents outlining the acceptability of an application came from the Trustee; only it was responsible for their content.

- It only assisted informally with the application. It did not "advise" on "the options for full commutation"; it only gave illustrations for different benefits. Nor did it assume responsibility, voluntary or otherwise, for the application or its successful completion . Further, it made clear that full commutation was not something it had discretion over; and, that the decision whether to grant full commutation was the Trustee's.

- In response to EB's request of 9 January 2015, it provided a link to the "USS Factsheet on Death in Service Benefits and Full Commutation", which set out the requirement to

obtain financial advice as part of a full commutation application. There is no evidence EB did not receive this. Further, any further information it provided to EB on 12 January 2015 was more than the information contained in the factsheets. In any case, even had the Employer not provided factsheets, which is denied, any duty to provide information is satisfied by the Trustee, ie via provision by it of factsheets; there is no duty on the Employer to provide information which was available to Mr H or EB via other means.

- In general, the guidance documents are clear in outlining that a reasonable period of time is required to consider a full commutation application. The idea of delay, and the corresponding extent of any duty, must be understood in the context of the Scheme rules and the ordinary timescales applicable to ill-health applications, which usually take about eight weeks to process; the Employer responded to all requests from EB promptly and did not cause any material delays.

- It provided EB with the Trustee's contact information, which he could have used to make further enquiries regarding the application. However, he did not do so. Nor did EB seek advice from the adviser it recommended, who had knowledge of the Rules; had he done so, any deficiencies in the information it provided (which, in any case, were denied), would have been avoided.

- The only loss is the loss of opportunity to have the application considered. And, the correct remedy is re-decision, which does not guarantee commutation will be granted.

- There was no medical evidence available to it at the time of the application which suggested that Mr H's death was "imminent".

- Dr Miller's response did not arrive before Mr H died, which supports its argument that it is only surmise she would have produced a full medical report on 13 January 2015 (ie the same timeframe in which she produced her e-mail to Dr Mountstephen about Mr H's health).

- There is insufficient evidence that the full application would have come together on 12 January 2015; or, that the Scheme's medical adviser could have given an opinion the same day. Also, an opinion was required from Dr Miller, Mr H's consultant, but she was unavailable until 13 January 2015. Further, an opinion was also required from Dr Mountstephen, but he could not have provided his opinion until reviewing Dr Miller's.

- There is no timeline for completing such applications referred to in either the Rules or in published guidance.

Summary of the Trustee's position

33. The Trustee submits that:

- The Rules clearly give it discretion whether to grant full commutation in the event of serious ill health; it could reasonably have decided not to do so.

- In order to consider full commutation, it first had to establish that the member had been approved for retirement on total incapacity by its medical panel. But if a member died

before an application for ill health retirement/full commutation was received, then full commutation could not be considered.

- The Rules require that, before it can consider exercising its discretion, it has to receive an opinion, from its medical adviser, which confirms that the member has a life expectancy of less than one year. But the necessary paperwork was not received before Mr H's death. So, no medical opinion could be provided by its medical adviser and, as such, it had no power to grant full commutation.

- After he died, Mr H was neither a member nor a former member. So, full commutation could not be granted. Under the Rules, discretion can only be exercised in favour of a member or a former member, and Mr H was neither.

- Even if the Rules did give it the power to grant full commutation after death, Rule 51.1 provided commutation was of "all benefits payable (or contingently payable) to the individual under the arrangement". After Mr H's death, no benefits were payable to him that could potentially be commuted. Further, even if the power did exist, or had not ceased to exist, it could reasonably have decided not to exercise the power. In any case, there is no sign that it caused any delays in the submissions or processing of Mr H's application.

34. In the course of the investigation, the Trustee was asked to explain what would have been the process, had it received a complete application for Mr H on 14 January 2015, what it would have done next and what the turn-around time would have been. The Trustee was also asked to clarify which Medical Practitioners were required to provide a valid Rule 51 opinion. It said:

- There are two stages to a full commutation application. It presents any medical evidence to its medical panel. Then, if the panel considers that the member is expected to live less than 12 months, the member is informed he can apply, or if he has already done so, it is asked whether to approve the application. The panel meets on Friday afternoons. All applications received in the week are presented to the panel, which reviews the medical evidence and gives its opinion, and then the Trustee processes the application the following week.

- Where an application is received, and the panel has given an opinion supporting it, the Trustee's retirement administration team checks the paperwork and issues a memorandum to the persons with delegated power to consider the application on the behalf of the Trustee, ie the Head of Pensions Operations, and Chair of USS's Advisory Committee, an appointee of Universities UK or the University and College Union. In order to expedite matters, the application is e-mailed to the Chair; if the application is approved by the delegates before the member dies, it treats the application as approved.

- Had the application been received on 14 January 2015, this would have been presented to the panel on 16 January 2015. Had the medical panel been of the view that the member was expected to live for less than 12 months, it is "probable" that the

paperwork would have been checked and a request for full commutation issued to the delegates late morning of 19 January 2015. The delegates prioritise applications and would likely have given their decision in 24 hours. Assuming that the application was properly completed, including financial advice, it is "reasonably likely" the delegates would have given approval to the application on 20 January 2015.The Trustee has a panel of three medical practitioners, appointed to give opinions on ill-health applications. Two of the medical panel meet weekly, with the third considering applications as part of the Trustee's appeal process. From time to time, the third member may be asked to give an opinion on the initial application if the other two are unavailable.

Conclusions

35. The Estate's complaint is that Mr H was not awarded full commutation of his Scheme benefits on grounds of serious ill-health. Rather, he was treated as being "in service" at the date he died. The dispute is whether or not the application for full commutation was treated with all due expedition, and in particular whether it could have been completed and considered before Mr H died on 15 January 2015.

Jurisdiction in respect of the Employer

36. The Employer says that in line with 3(1) of the Pensions Ombudsman Regulations, our jurisdiction may only be exercised in respect of a specific complaint or dispute that is the subject of a written notice of a decision in respect of that complaint or dispute. It says there was no written notice of a decision in respect of a complaint or dispute against the Employer. In particular, it considers that the stage two IDRP response, issued by the Trustee on 15 November 2015, was insufficient to cover the complaint against it. Accordingly, it maintains there is no compliance with regulation 3(1) so far as the complaint against the Employer is concerned and therefore we lack jurisdiction. I disagree that we lack jurisdiction for the following reasons.

37. S.146(1) of the Pension Schemes Act 1993 allows us to investigate any complaint against the manager of the Scheme which in this case includes the Employer. Rule 13 requires the Employer to form an opinion about incapacity before the Trustee determines whether it is total or partial. The Employer also has a duty under Rule 56 to disseminate to members that information which the Trustee is required to disclose or may deem necessary or desirable to disclose to members.

38. Reg 3(2) provides:

> "Where, in a case to which section 50 of the 1995 Act applies, an application concerning a complaint or dispute has been made to an occupational pension scheme under the arrangements required by that section, the Pensions Ombudsman may investigate and determine that complaint or dispute in advance of written notice of a decision being issued in respect of it under section 50(2)(a) or (b) of that Act provided he is satisfied that—

(a) there is no real prospect of a notice being issued within a reasonable period from the date on which the complaint or dispute was received by him in writing; and

(b) it is reasonable in the circumstances that he should investigate and determine the complaint or dispute."

39. I am satisfied that the Employer had the chance to respond to the complaint before the Estate referred it to us. The Estate's lawyers, MacRoberts LLP, wrote to the Employer on 14 March 2016 and outlined substantially the same facts and allegations which it set out in its letter of complaint to us dated 13 August 2016. Under "Summary", it said: "The Executors believe [the Employer] failed in its duties as [Mr H's] employer, and as a direct result, [Mr H] and his family have suffered significant financial loss." That done, and having received no response, MacRoberts e-mailed the Employer on 24 May 2016, saying: "We refer to your letter of 1st April 2016 and cannot trace having received further correspondence from you. Our client's position is set-out at length in our letter of 14th March 2016 (copy enclosed) and we should be grateful for your response as soon as possible. As more than two months have now elapsed since the date of our letter, please provide your response by close of business on Monday 30th May. Otherwise, our client will have no option but to initiate proceedings."

40. The Employer was thus aware, or ought to have been aware, of these issues when we wrote to it on 26 September 2016 attaching details of the complaint. Furthermore, in response to our letter of 26 September 2016, the Employer issued its formal response to the complaint. I find that the Employer had the opportunity to inform us at that time if it felt it had not previously been given the chance to consider the Estate's complaint against it. There is no sign it did so. The Estate had exhausted the Scheme's IDRP before bringing its complaint to us. Even if I were to conclude that there had been no compliance with Reg 3(1), there was no real prospect of a further notice being issued to the Employer by the IDRP decision maker and I am satisfied that it was reasonable in the circumstances to investigate and determine the complaint against it.

41. Having decided that this complaint is within our jurisdiction, I now turn to whether the Trustee's and/or the Employer's acts or omissions amount to maladministration.

The complaint against the Trustee

42. The Trustee did not receive a complete, full commutation application before Mr H died. Mr H died on the morning of 15 January 2015, yet the application did not reach the Trustee until 16 January 2015. Having considered the application, it treated Mr H as having died in service, meaning only death in service benefits were payable. I find no fault with that conclusion. I agree with the submission that even if discretion in respect of a 'former member' can survive the death of that member, there were no further benefits due to Mr H at that point which remained capable of being commuted.

43. At the time of Mr H's death, his ordinary benefits had not come into payment. The Trustee required another application before it could grant incapacity/serious ill-health benefits. That was the application that was in the process of being made, but which had not been completed, at the time Mr H died. As such, I cannot conclude that the Trustee acted in error by declining to grant ill health benefits with full commutation. I have considered the Trustee's process and I cannot see that it acted incorrectly. There is no evidence of unreasonable or onerous requirements within the process. It made available various pieces of information about the process and requirements for commutation. These were provided to members in the form of guidance documents, which were made available in hard copy and on the Scheme website. There is no sign that the Trustee failed to explain the process; that it provided any incorrect, unclear or misleading information; or, that it imposed unnecessary formalities or caused delay.

44. To grant the application, the Trustee would have needed to receive all necessary paperwork, to have obtained a medical report from a Rule 51 qualifying medical practitioner, and a decision from its delegated decision maker before 15 January 2015. I conclude it did not have an application in time for it to complete that process before 15 January 2015 through no fault of its own.

45. I consider below whether any breach of duty or maladministration by the Employer caused that situation to arise.

The complaint against the Employer

46. The Estate maintains that the Employer had a duty of care which it breached. Specifically, it says the Employer acted in error when it failed to tell Mr H about commutation in November 2014, after he informed it of his prognosis. It says had it done so, there would have been enough time for his family to have submitted a full application for consideration by the Trustee.

47. I disagree with this understanding of the Employer's duty. Commutation is part of the Rules that trustees have to explain and members are expected to acquaint themselves with. There is no general duty on an employer to bring commutation to members' attention unless there is no reasonable way for them to discover it. The Estate says that Mr H would not have been in a position to discover commutation for himself, for two main reasons. First, in November 2014 he had been approved for retirement, with benefits due to be paid from March 2015, so he would not be expected to acquaint himself with a different option. Second, Mr H and his wife had been diagnosed with, and were having treatment for, cancer in or around November 2014. As a result, they were both preoccupied and in no position to research other options.

48. I sympathise with the position Mr H and his wife were in but, I do not consider that the Employer therefore came under a duty to explain commutation to them on 6 November 2014 or any later date unless and until it voluntarily accepted one. The

Employer's duty was to disseminate the information provided by the Trustee, which it did.

49. To the extent that the Employer voluntarily assumed a duty in January 2015, that duty was to take reasonable care when assisting Mr H and his family with the full commutation application. There was no duty to advise. On 7 January 2015, the Employer chose to provide certain information about the process to Mr H's family. Its duty at that point was to take reasonable care to make sure that any information it provided about the process was accurate and not to cause culpable and unjustified delay in the process required to bring an application to the Trustee decision maker.

50. The Employer has explained that it provided factsheets to EB, which explained the commutation process, and that it also referred him to the Trustee for additional information. I have considered these points. Having done so, I agree that the content of documents outlining the application process are the responsibility of the Trustee, not the Employer. If the factsheets were given to EB, I agree that this would usually be sufficient to satisfy the Employer duty.

51. The Estate contends that after factsheets were provided, the Employer provided "incomplete, piecemeal, slow and negligent advice" and it cannot rely on the factsheets to remove any liability flowing from its subsequent conduct. However, there is simply no evidence that the Employer contradicted any of the guidance in the factsheets and I am not persuaded that the assistance provided by the Employer fell below the standard of reasonable care.

52. I acknowledge the Estate's assertion that the Employer held itself out as having "expert knowledge" of the application process and the Estate was therefore entitled to rely upon what it was told. I do not consider that the Employer held itself out as expert. It was plainly relying on guidance provided by the Scheme and passing this on to EB. I do not think it had more than a duty to take reasonable care when assisting with the application. This it did by providing general factsheets, contact details for the Trustee, inviting EB to contact it (the Employer) with any further questions and processing the flow of information and forms with expedition. I do not find that anything done by the Employer constituted maladministration or breach of legal duty.

53. In order to be able to uphold the complaint and provide the remedy the Estate seeks, I would need to be satisfied that the Employer's conduct prevented the Trustee from reaching a decision to grant full commutation of ill health benefits. The Estate maintains the Employer caused the Trustee's decision to be delayed. I disagree for the reasons set out below.

54. The Trustee explained its usual process and timescales and clarified that neither of the doctors who had advised at the point Mr H died was in fact appointed by it. I am satisfied that while their advice would have been sought, and their availability has to be factored into the procedural timeframe, neither an opinion from Dr Miller or Dr

Mountstephen would itself have satisfied the Rule 51 requirement. That requirement could only be satisfied by the appointed expert of the Trustee's medical panel.

55. The Employer says that the application could not have been considered before 15 January 2015 because the medical panel was not due to meet until 16 January 2015. Having considered the evidence from the Trustee about its process and timescales, I agree with the Employer's submission. Even if the Employer had provided full information on 9 January 2015 - and the financial evidence, medical consent form and opinion of Dr Mountstephen had been submitted on 12 January 2015 - if the same steps had been followed in order to complete the application, it would still have been necessary to obtain an opinion from Dr Miller (which was available on 13 January 2015), to complete the application form (which was done on 14 January 2015), and to obtain a further medical opinion sufficient to satisfy the Rule 51 requirement. The Rule 51 medical opinion part of the process was scheduled for 16 January 2015. The timetable was already compressed and was being actioned within a preorganised schedule. There is no evidence that the Trustee would or could have brought the medical panel forward if it had received the application earlier.

56. Moreover, obtaining a Rule 51 opinion was not the only step that was outstanding on 15 January 2015. In order to be able to complete the decision-making process before Mr H died, the Trustee would have needed to have foreseen the date on which his death was likely to occur and responded to the risk by convening both the medical panel and the Trustee decision-maker on an emergency basis. There is insufficient evidence that the Trustee would have done that even if the application had come together some days earlier.

57. The Estate says reliance cannot be placed on the Trustee's answer to a hypothetical question about timing of the process steps which would have been necessary, asserting that the Trustee is conflicted in this particular instance and I should therefore treat its explanation of the process with scepticism. I see no reason to doubt the Trustee's explanation of the process steps. If I were to find that the Employer had delayed that process, it would be the Employer who would be liable for any consequences.

58. The Estate argues that the application would probably have come together earlier than 14 January 2015 if complete information about the process had been provided in the first instance. I disagree. I am mindful that the evidence indicates the Employer first informed EB of full commutation option on 9, not 8, January; and, that the 10 and 11 January 2015 fell on a weekend. Therefore, using 14 January 2015 allows only two full working days, 12 and 13 January 2015, in which to assemble the necessary parts of a commutation application, including appropriate financial advice in the correct format and supporting evidence from Mr H's doctors, and to submit the completed application to the Trustee for its consideration. I am mindful of the acknowledged flexibility and speed that can be introduced into the process, but this process was moving at pace with an imminent meeting of the medical panel in mind and on these facts I cannot see a reason why the Employer should have acted with even greater expedition than it did.

59. Mr H was transferred to a hospice on 7 January 2015 and EB informed the Employer on the same day. Sadly, Mr H's condition deteriorated rapidly and he died on the morning of 15 January 2015. In this particular instance, I do not consider that the Employer could reasonably have foreseen that Mr H would die so quickly that it was necessary to ask the Trustee to convene an extraordinary medical panel between those scheduled for the 9 and 16 January 2015. In the circumstances, and without the benefit of hindsight, it would have been extraordinarily difficult to plan what that intermediate date ought to be.

60. Taking everything into consideration, even if the Employer had provided complete and accurate information on 9 January 2015, I conclude it is more likely than not that a complete application would not have been submitted to the Trustee in time for it to be considered before Mr H's death. There was simply insufficient time to allow (1) the relevant advice to be obtained, (2) the Trustee to obtain its own medical opinion from a medical expert practitioner appointed by it and (3) a reasonable period of time for the application to be considered by a Trustee decision maker.

61. Finally, I have considered the Estate's argument that the Employer should have told Mr H or EB about full commutation in November 2014. There is no evidence from the Estate to substantiate the assertion that Prof LR was told that Mr H's condition was terminal in November 2014. Plainly a call was placed to someone at the Employer, but neither the phone records nor the e-mail correspondence indicate that Prof LR took the call. Moreover, the Estate has provided no witness evidence from Mr H's secretary about what its content was.

62. Even if I accepted that it was agreed at the time that Mr H would leave work and not return, that is not the same as the Employer's having medical evidence that Mr H's condition was terminal at that time. On the available evidence, I take the view that the Employer agreed to Mr H's bringing forward his leaving date, in circumstances where he was undoubtedly ill and his retirement had been agreed. The Estate cannot prove on the balance of probabilities that the Employer was put on notice, in November 2014, that his condition was terminal.

63. The e-mail exchange of 14 November 2014 indicates the Employer subsequently came to understand that Mr H might live for a further ten years. How that state of understanding came about is unknown. I accept that it does not reconcile with the understanding of Mr H's family. I sympathise with their frustration that the application process was not initiated earlier. Nonetheless, the e-mail of 14 November 2014 is the best evidence of what the Employer believed at the time and I do not consider that it came under any additional duty to inform or advise because of what it then understood.

64. For the reasons stated above, I do not uphold this complaint.

Karen Johnston

Deputy Pensions Ombudsman
13 December 2019