

Ombudsman's Determination

Applicant	Professor N
Scheme	University Superannuation Scheme (the Scheme)
Respondent	USS

Outcome

1. I do not uphold Professor N's complaint and no further action is required by USS.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Professor N's complaint is that USS failed to provide her with adequate information regarding the Scheme Pays facility, including that there was a deadline by when the election for Scheme Pays for tax year 2013/14 had to be received by USS.

Background information, including submissions from the parties

4. The Annual Allowance (**AA**) charge reclaims the tax relief that an individual is not entitled to above the AA limit that applies to them in a particular tax year. The calculation of the tax charge is the responsibility of the individual and their adviser.
5. If the AA is exceeded and the total tax liability exceeds a prescribed amount the individual can ask the scheme he/she is a member of to pay part or the whole of the amount (known as 'Scheme Pays') to HMRC on his/her behalf in return for an appropriate reduction in their pension benefits.
6. All registered pension schemes must offer a 'Scheme Pays' facility. However, an individual must meet certain statutory conditions to opt for it, including the notice for 'Scheme Pays' must be made within the timescale permitted.
7. The statutory deadline for a scheme to receive a notice for 'Scheme Pays' is 31 July in the tax year after the tax charge has arisen.
8. Where a member does not meet the conditions for 'Scheme Pays' to apply then the scheme may decide to pay the member's AA charge on a 'voluntary basis'. But there is no requirement for the scheme to do so.

9. USS is the corporate trustee responsible for the management and administration of the Scheme.
10. In October 2014 USS issued an AA statement for tax year 2013/14 to Professor N. USS notified Professor N:-
 - She had received the statement because she had exceeded the AA in respect of her USS benefits.
 - She may be subject to a tax charge and if so it was her responsibility to report it to HMRC.
11. The statement encouraged her to seek the assistance of a suitably qualified tax or financial adviser to help her assess whether she would be subject to an AA charge.
12. The statement included two key dates. The first, 31 January 2015, the date by when Professor N was required to inform HMRC that she had exceeded the statutory AA and intended to pay the AA charge by Scheme Pays. The second, 31 July 2015. In respect of the latter date the statement advised:-

“If you want USS to pay the tax charge for you (Scheme Pays, explained in the factsheet enclosed) you indicate this on your self assessment tax return and you do not then pay the tax charge directly to HMRC. You must then notify USS by 31 July in the year following the year in which the tax charge arose that you want USS to pay the tax charge for you. So, if you have a tax charge for the year 2013/14 you need to have arranged for USS to pay the charge by 31 July 2015.”
13. The accompanying factsheet notified Professor N:

“If you want to use Scheme Pays you indicate this on your self assessment tax return. You must then notify USS by 31 July in the year following the year in which the tax charge arose. So, if you have a tax charge for the year 2013/14 you need to have arranged for USS to pay the charge by 31 July 2015.

Once you know what your tax charge will be in respect of USS benefits you can use the Scheme Pays calculator to work out how much the deduction will be from your USS benefits. This will also produce the form required.

The form to use to inform USS is produced from the Scheme Pays calculator:
www.uss.co.uk.”
14. Under the heading ‘Financial advice’ the factsheet said:

“USS is not able to provide advice, nor is it able to assist with the calculation of your carry forward allowance and potential tax charge.

You may feel able to undertake this yourself or you may wish to appoint a tax or financial adviser.”

15. On 22 December 2014 Professor N emailed USS that after taking financial advice she wished to request the AA charge to be paid by the Scheme. She asked USS to confirm that this was possible and said she would then inform HMRC.
16. A representative of USS' 'Technical Pensions Team' replied on 5 January 2015:-
 - Page 8 of the factsheet should answer her questions on Scheme Pays – a direct link to the factsheet was provided.
 - If she qualified for Scheme Pays then she should complete the Scheme Pays election form – a direct link to the form was provided.
 - Since issuing the AA statement it had been notified of a salary update from 1 August 2013, which would alter the figures that had been provided. It said a revised statement would be issued within the next two working days.
 - If she required further assistance to contact him.
17. The same day a revised AA statement was issued to Professor N which showed that Professor N's AA usage had increased.
18. Professor N completed her self-assessment tax return for 2013/14 indicating that the Scheme would pay the AA charge, but she did not complete the Scheme Pays election form required by USS.
19. In February 2015 USS provided Professor N's employer with the requested value of her lifetime allowance as at 5 April 2015.
20. On 26 April 2015 Professor N emailed USS. She said it was very likely that she would exceed the AA again and may also exceed the recent reduction in the maximum savings level. Referring to additional voluntary contributions and a Prudential AVC she asked for direction about the possibility of ending these payments. She asked: "Presumably USS will contact me re the reduced maximum savings level?".
21. The next day USS replied to Professor N that she should contact her employer's pension department to arrange the cessation of her Prudential AVC policy. USS notified Professor N that the AA had dropped to £40,000 from 1 April 2014 and that its practice was to send AA statements to all active USS employees and to those who had exceeded the AA for tax year 2014/15 before the statutory deadline. Nevertheless if she required a statement showing her AA usage for tax year 2014/15 before that time to let it know,
22. In October 2015 USS issued an AA statement for tax year 2014/15, showing that Professor N had exceeded the AA for that year.
23. Later that month Professor N submitted a Scheme Pays election form to USS for year 2013/14. USS informed Professor N that the deadline date for the election had elapsed.

24. Professor N submitted a corrected Scheme Pays form for the 2014/15 AA charge and asked for confirmation that her AA charge for 2013/14 had been paid by the Scheme. USS notified Professor N that it had not done so as it had not received a completed Scheme Pays election from her before 31 July 2015.
25. Professor N unsuccessfully complained to USS that the Scheme should have paid the AA charge for 2013/14.
26. Relevant extracts from the Finance Act 2004 (**the Act**), and The Registered Pension Schemes (Notice of Joint Liability for the Annual Allowance Charge) Regulations 2011 (**the 2011 Regulations**), are provided in the Appendix.

Professor N's position

27. Professor N says:-

- Her 22 December 2014 email to USS, requesting Scheme Pays, made her intention entirely clear.
- USS' 5 January 2015 email directed her to more complex information and a form, but also suggested that her salary had not been fully declared by her employer and therefore further clarification was necessary. She therefore did not complete the form. The email did not alert her to the deadline date to complete the form.
- At this point she was extremely anxious about the situation. She did not find the information easy to understand and suggests that no normal person would have realised that the form could be completed without establishing her exact salary amount.
- Subsequent contacts with USS about pension tax issues did not result in USS alerting her about the deadline date for submitting the election notice.
- When she received the AA statement for 2014/15 she did go onto the USS website and completed the Scheme Pays election form for 2013/14 and 2014/15. The 2013/14 form was therefore still available on the USS website three months after she had been informed that an internally imposed deadline had elapsed.

USS' position

28. USS says:-

- It is required to administer the Scheme in accordance with the Scheme Rules. The Rules do not allow a member to use Scheme Pays. Consequently, it would have been a breach of trust if it allowed a member to do so unless a member had exercised their statutory Scheme Pays rights.
- Under Section 237B of the Finance Act 2004 a member may give the scheme administrator a notice, not later than 31 July in the year following that in which the

tax year ended, on receipt of which the scheme administrator and the individual become jointly and severally liable to pay the AA charge.

- The 2011 Regulations sets out the information and declarations that must be contained in the notice. If the notice does not comply with the 2011 Regulations then it is not valid.
- A form of notice for members to complete, which complies with the 2011 Regulations, was accessible to members on its website.
- There was no requirement on USS to inform members of the statutory deadline for submitting a Scheme Pays notice. The AA charge is a personal tax matter and it is going beyond what the Act and the 2011 Regulations require to impose a duty on a scheme administrator to ensure that potentially affected members were mindful of the 31 July deadline. Nevertheless, USS did refer to the deadline in its literature.
- Professor N's emails in December 2014 and January 2015 did not satisfy the notice requirements of the 2011 Regulations.
- Professor N did not submit a Scheme Pays election by 31 July 2015 and there is no power under the Scheme Rules allowing USS to voluntarily meet the tax charge. Consequently, it was not possible for USS to allow her to use Scheme Pays for the AA charge for 2013/14.
- There was no maladministration by USS which caused Professor N to miss out on the opportunity to submit a valid Scheme Pays notice for year 2013/14.
- The 2013/14 AA statement and factsheet contained considerable information to assist members: highlighting the 31 July deadline, explaining that members should obtain a form from its website to utilise Schemes Pays, and encouraged members to seek the assistance of a suitably qualified tax or financial adviser to assess whether they would be subject to an AA charge.
- Its January 2015 email referred Professor N to page 8 of the factsheet and the requirement to complete the Scheme Pays election form and provide a direct link respectively to the factsheet and the form.
- It issued a corrected AA statement in January 2015 after receiving revised salary information from Professor N's employer.
- Professor N's assertion that it should have subsequently informed her before 31 July 2015 that it had not received a completed Scheme Pays notice from her for year 2013/14 is unreasonable and quite beyond the scope of its duties. It had provided her with adequate information about the need to submit the form and there was nothing in her subsequent communications that suggested USS assumed a further responsibility to ensure that she submitted her election before 31 July 2015.

- Professor N had ample opportunity between January 2015 and the deadline date to enquire as to whether it had given effect to her Scheme Pays request, but she did not do so.
29. While it has considerable sympathy with members who are subject to the financial impact of a significant AA charge, it is the individual's (or their adviser's) responsibility to ensure that any statutory requirements are complied with if they wish to use the Scheme Pays facility.

Adjudicator's Opinion

30. Professor 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:-
- To elect Scheme Pays for tax year 2013/14 Professor N had to submit a completed election notice by 31 July 2015 to USS. On 22 December 2014 Professor N emailed USS that she wished to request that the AA charge be paid by the Scheme. She asked USS to confirm that this was possible and said she would then inform HMRC. Professor N says this made her intention for the Scheme to pay the AA charge entirely clear.
 - But the request did not amount to a notice for Scheme Pays and did not provide the necessary information to be included in the notice, as set out in the 2011 Regulations (see Appendix 2).
 - The factsheet that accompanied the 2013/14 AA statement was clear that USS required Professor N to complete an election notice. The factsheet (and the statement) notified Professor N that she needed "to have arranged" for USS to pay the charge by 31 July 2015.
 - In early January 2015 USS replied to Professor N's enquiry, repeating the requirement to complete the election notice (and provided a direct link to the form on its website) and issued the revised AA statement. Professor N then had until the end of July 2015 to complete and submit the required form.
 - Professor N says she found it difficult to understand the information that USS had referred her to and therefore did not complete the form. But she could have consulted again with her financial adviser – her request for Scheme Pays followed her seeking independent financial advice. Alternatively, she could have asked USS for clarification. But she did neither.
 - Professor N says USS failed to alert her of the deadline date for submitting the election notice for tax year 2013/14 when USS was contacted about her subsequent pension tax issues. The first concerned the value of her lifetime allowance and the second was about the AA for 2014/15 and ceasing AVCs. As

these matters did not concern Scheme Pays for 2013/14 there was no reason for USS to mention it.

- USS provided Professor N with the required information about Scheme Pays and that it required a completed election form for 2013/14 by 31 July 2015.
- Professor N is in an unfortunate position, but the Ombudsman cannot direct USS to allow her request for Scheme Pays for the 2013/14 AA charge.
- While pension schemes can allow access to the Scheme Pays facility where one or more of the statutory conditions have not been met, it is not a requirement.

31. Professor N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Professor 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 Professor N for completeness.

Professor N's further comments

32. Professor N says:-

- She is aware of other people who have been allowed access to the Scheme Pays facility where one or more of the statutory conditions have not been met.
- If the deadline date is so crucial to USS why was the form for electing Scheme Pays for tax year 2013/14 still available to be completed on its website?
- Further consideration should be given to the way that USS treats its customers. She says to date she has not had an acknowledgement of her complaint sent to USS eleven months ago.

Ombudsman's decision

33. Professor N says she is aware of other people who have been allowed Scheme Pays, but I can only consider the particular merits of her case. I am satisfied that USS provided Professor N with sufficient information to enable her to elect Scheme Pays for tax year 2013/14.
34. Professor N asks if the deadline date is so crucial to USS why has the form for electing Scheme Pays for tax year 2013 /14 remained on its website.
35. The deadline date is not imposed by USS. It is a statutory deadline. If there had been maladministration by USS, which prevented a member using Scheme Pays, there may be grounds to allow a member to use Scheme Pays. But that is not the case here.
36. Professor N opines that USS failed to acknowledge her complaint. While that amounts to maladministration by USS it has not caused Professor N an injustice.

37. Regulation 3(2) of The Personal and Occupational Pension Schemes (Pension Ombudsman) Regulations 1996 (SI 1996/2475), allows, in certain circumstances, this office to investigate complaints that have not been formally considered under a pension scheme's internal dispute resolution (**IDR**) procedure. As USS failed to respond to Professor N's complaint within a reasonable period of time it was decided to investigate her complaint without the usual requirement that it first be considered under IDR. As a consequence our consideration of Professor N's complaint has occurred at an earlier stage than would otherwise have occurred.
38. For the reasons I have given I do not uphold Professor N's complaint.

Anthony Arter

Pensions Ombudsman
2 November 2017

Appendix

The Finance Act 2004

39. Chapter 5, section 237A, 'Liability of individual' says:

(1)The individual is liable to the annual allowance charge

(2)The individual is liable to the annual allowance charge whether or not-

(a) the individual, and

(b) the scheme administrator of the pension scheme or pension schemes concerned, are resident or domiciled in the United Kingdom.

40. As relevant, section 237B, 'Liability of scheme administrator', says

(1)This section applies if-

(a) the amount of the individual's liability to the annual allowance charge for a tax year exceeds £2,000, and

(b) the pension scheme input amount in the case of the individual in relation to a registered pension scheme for the tax year exceeds the amount of the annual allowance specified in section 228(1) for the tax year.

...

(3) The individual may give a notice to the scheme administrator of the pension scheme specifying that the individual and the scheme administrator are to be jointly and severally liable in respect of so much of the annual allowance charge arising in the case of the individual as-

(a) does not exceed the amount of the annual allowance charge which would be chargeable on the excess mentioned in subsection (1)(b) if it were charged at the relevant rate, and

(b) is specified in the notice,

("the joint liability amount").

...

(5) The notice-

(a) must be given not later than 31 July in the year following that in which the tax year ends ...,

(b) must be made in such manner and form, and contain such particulars, as may be prescribed by regulations made by the Commissioners for Her Majesty's Revenue and Customs,...

...

(7) On receipt by the scheme administrator of the notice the scheme administrator and the individual become jointly and severally liable to pay the joint liability amount...”

41. As relevant section 237E, ‘Consequential benefit adjustments to be reasonable etc’, says

(1) Where the scheme administrator of a pension scheme satisfies a liability under section 237B in respect of the individual, consequential adjustment must be made to the entitlement of the individual to benefits under the pension scheme on a basis that is just and reasonable having regard to normal actuarial practice...”

The Registered Pension Schemes (Notice of Joint Liability for the Annual Allowance Charge) Regulations 2011

42. As relevant, ‘Particulars to be included in the notice’, says:-

“2.—(1) An individual must include the following particulars in the notice—

(a) the individual’s title, full name and address (including post code, if applicable),

(b) the individual’s national insurance number, subject to paragraph (4),

(c) the amount of the annual allowance charge for which the individual and the scheme administrator will be jointly and severally liable, and

(d) the tax year in which the annual allowance charge arises.

(2) Where the amount specified in the notice is £2,000 or less, the individual must confirm in the notice that the amount of the individual’s liability to the annual allowance charge for the relevant tax year exceeds £2,000.

...

(5) The notice must be in writing, signed and dated by the individual.

(6) Where the notice is in an electronic format, the requirement in paragraph (5) that the notice must be signed will be satisfied if the notice includes a statement that the individual has personally submitted the notice.”

43. “Declaration to be included in the notice

3.—(1) The individual must declare in the notice that the individual understands that—

(a) the notice cannot be revoked, and

(b) future benefits to be paid to the individual from the pension scheme will be adjusted to take account of the payment of the annual allowance charge made by the scheme administrator.

(2) The individual must declare that the amount specified in the notice has been calculated at the correct relevant rate as described in section 237B(4) of the Finance Act 2004.”