

## Deputy Ombudsman's Determination

Applicant	Dr T
Scheme	Universities Superannuation Scheme ( <b>USS</b> )
Respondent	Universities Superannuation Scheme Limited ( <b>USS Ltd</b> )

### Outcome

1. Dr T's complaint against USS Ltd is partly upheld. USS Ltd is able to recover overpayments made on and after December 2011 by way of repayment, but not those made earlier. However, USS Ltd may recoup the full amount from Dr T's future pension in payment.
2. My reasons for reaching this decision are explained in more detail below.

### Complaint summary

3. Dr T's annual pension and lump sum have been overpaid between September 2009 and March 2013. He states that as a result of this, he is being asked to repay £83,185.48 and his pension going forward has been reduced by 60%. Dr T is arguing that he changed his position based on the higher amounts and therefore should not be made to repay the overpayment.

### Background information, including submissions from the parties

4. Dr T originally joined the USS on 1 January 1986 and transferred in previous service from the Local Government Pension Scheme of 7 years and 123 days, plus 72 days from an additional voluntary contributions contract. He then became a deferred member of the USS on 20 January 1994.
5. On 28 March 1996, Dr T transferred all of his benefits (with a value of 15 years and 214 days) out of the USS to the National Council for Vocational Qualifications Pension Scheme (which later became part of the Principal Civil Service Pension Scheme (**PCSPS**)).

6. Dr T rejoined the USS on 1 September 2000 and, in 2001, asked for a transfer value of his PCSPS benefits into the USS. Dr T was sent a cash equivalent transfer value from the PCSPS showing his service as 21 years and 282 days. On 23 July 2001, Dr T signed a USS Ltd form stating that he did not wish to proceed with a transfer into the USS.
7. Dr T began receiving benefits from the PCSPS in 2003. On 22 July 2009, USS Ltd received a request from Dr T for a retirement benefit quotation, followed by a retirement notification form. USS Ltd sent a statement of retirement benefits to Dr T on 27 August 2009 which stated that he had a total of 24 years and 68 days. It also listed Dr T's pensionable salary between January 1986 and June 2009. The statement was incorrect, as it included the 15 years and 214 days previously transferred out in 1996. Dr T retired from the USS on 31 August 2009, taking a tax free cash lump sum of £58,561.20 and a gross monthly pension of £1,626.70.
8. On 27 March 2012, HMRC wrote to USS Ltd (following a telephone conversation on 6 March) regarding Dr T's guaranteed minimum pension. The letter states, "... our records show that the benefits held in the above scheme, including a transfer in from Local Government Scheme, have transfer to NCVQ Pension Scheme."
9. USS Ltd first contacted Dr T regarding the overpayment on 1 March 2013. It explained that there had been an overpayment of benefits due to the incorrect inclusion of previously transferred out service. Instead of 24 years and 68 days service in the USS, Dr T was only entitled to 8 years and 219 days. It explained that going forward Dr T's annual pension would be reduced to £7,519.56. The letter did not state the amount of the overpayment to be recovered, but suggested that the money could be repaid, over a period of time, without interest. It also apologised for the error caused.
10. Following a telephone call from Dr T on 4 March 2013, USS Ltd sent further information on 5 March. This stated that the overpayment was £83,185.48 and asked Dr T to contact it to arrange a repayment plan (following the further advice Dr T wanted to take).
11. Dr T responded on 10 April 2013 to say that he was unable to repay the overpayment as he did not have any savings and had entered into long term financial commitments based on the original, higher, amounts. He also argued against the reduction in his pension benefits going forward.
12. Following this, USS Ltd asked Dr T to provide further financial information, which he did on 11 June 2013. In this, Dr T provided a breakdown of his state pension (£5,959.20 per annum), his PCSPS benefits (£15,866.45 per annum) and details of his mortgages on three properties (£2,453.41 per month), plus insurance policies (£213.32 per month) and a car repayment plan (£368.43 per month until November 2016).
13. On 4 August 2013, USS Ltd asked for further information in relation to Dr T's finances. Dr T replied on 8 September and 18 November 2013 with further details of

how he repays the mortgages on his properties, as well as details of his wife's annual income. Dr T reiterated that he was unable to repay the overpayment.

14. Based on the information Dr T provided, on 23 May 2014, USS Ltd wrote to him saying that it had calculated that he had a residual income of £1,450 per month. It also asked for details of any freelance work Dr T was undertaking. Dr T did not reply and USS Ltd wrote to him again on 3 July, 1 October and, in its letter of 14 November 2014, asked Dr T to provide details of the possible sale of two of his properties and whether the equity could be used to repay the outstanding amount.
15. Dr T replied on 8 December 2014 that his intention was to sell two properties and use the funds to repay the mortgage on his main residence.
16. USS Ltd wrote again to Dr T on 10 March 2015 in relation to the sale of the properties. It suggested that as a sale had, at that stage, been agreed, that Dr T use the equity to repay the overpayment. USS Ltd argued that this would not place Dr T in a worse financial position. Dr T replied on 14 April 2015 to say that the properties had not been sold, provided additional spending information and made no offer regarding the overpayment.
17. On 2 June 2015, USS Ltd wrote to Dr T and suggested that a charge be put on his main residence, meaning that in the event of the sale of the property, USS Ltd would be entitled to recovery of the funds plus interest from Dr T's or Mrs T's estate (should Dr T pre-decease her). Dr T replied on 13 October 2015 stating his reluctance to such a charge and requested details of the USS' policy on overpayments and appeals. This was provided to Dr T on 28 October 2015 and he requested an internal dispute resolution procedure (**IDRP**) form on 17 November 2015.
18. On 18 March 2016, USS Ltd's legal advisors, DLA Piper, wrote to Dr T regarding a repayment plan. It stated that USS Ltd would prefer to come to a mutual agreement, however, it reserved the right to take the matter to court to seek recovery. It asked Dr T to respond by 14 April 2016.
19. DLA Piper sent a follow-up letter on 9 June 2016 and Dr T responded on 16 June 2016. Within this letter, he explained that he changed his position in reliance on the original, higher amount. He argued that he had taken the higher figure in good faith and, as a result, had entered into long term financial commitments. He explained that as USS Ltd is responsible for the overpayment, it cannot demand that he repay the funds. He mentioned his right to take the complaint through the USS IDRP and asked for copies of the relevant scheme documents.
20. DLA Piper responded on 7 July 2016. It reminded Dr T of USS Ltd's fiduciary duty to seek recovery of the overpayment and asked for details of his argument regarding change of position. Details of USS' IDRP was also provided.
21. Dr T did not respond and DLA Piper chased him on 31 August 2016. Dr T replied on 10 September 2016 to say that he had been away overseas but would make an IDRP application, which he did on 13 November 2016. In his first stage IDRP request, Dr T

stated that he was not aware of the error until contacted by USS Ltd in March 2013. He confirmed that he was in receipt of his PCSPS benefits since his 60<sup>th</sup> birthday in 2003 and that this was for £2,420.75 per annum and thus he relied on his USS benefits as his main source of income. He argued that he took his benefits from the USS in good faith and that, having provided details of his and his wife's finances, he was in no position to repay the funds.

22. USS Ltd gave its decision under the first stage of the IDRPs on 28 January 2017. It did not uphold Dr T's complaint. It agreed that due to its error, the overpayment did occur and that this amounts to maladministration. However, it was of the opinion it was reasonable that Dr T ought to have known of the error before his retirement. It argued that the service statements Dr T received would have shown that his service was recorded as more than his actual service since rejoining the USS in 2000 and:

"In addition, at the point of retirement, the letter that USS Ltd issued to you contained a breakdown of your pensionable service which showed a period far greater than your period of USS service since you re-joined USS in 2000, being 24 years 68 days rather than 8 years 219 days. Again, it is not unreasonable for USS Ltd to expect you to have reviewed this and to have contacted USS Ltd or your employer to clarify why you had been credited with a prior period of transferred out service."

23. USS Ltd said it had a duty to recover the overpayment and noted that, due to the length of time and Dr T's reluctance to agree to a repayment plan, it would need to take more formal steps to recover the overpayment. However, it gave Dr T a further opportunity to put forward a plan before doing so.
24. Dr T did not respond and USS Ltd wrote to him again on 7 August 2017 asking him to submit a proposal to recover the overpayment, mentioning possible legal action. Dr T then submitted a second stage IDRPs request on 21 August 2017. In this application, he argued that due to the length of time and the number of transfers in and out of the USS, he was "largely indifferent to pension matters as there did not seem to me to be anything untoward until the USS error came to light in 2013." As such, he disagreed with USS Ltd's opinion that it was his responsibility to identify the error. He also mentioned the distress caused by the demands for repayment.
25. Dr T also provided an update on his financial position (that the two properties had been sold and the equity was used towards the mortgage on his main residence). He was also continuing to work, that his expenditure was high and that he had no other savings, shares or assets. He also made mention of a court case involving his son and that he met those costs, which were not recoverable (although he did not specify what those costs were).
26. USS Ltd considered the IDRPs appeal on 19 September 2017 and did not uphold the complaint. As Dr T remained unhappy, he made an application to this office and USS Ltd were informed of the complaint on 9 November 2017. DLA Piper, acting on behalf of USS Ltd, responded to the complaint on 6 December 2017.

27. As part of the investigation process, DLA Piper have confirmed that USS Ltd wished Dr T to repay the overpayment by immediate lump sum, if he is able to do so. Should there be a successful limitation defence against the recovery via a lump sum payment, it has requested that the overpayment be recouped from Dr T's pension in payment. It also did not consider it appropriate to offer a payment for any distress or inconvenience Dr T may have incurred as a result of the original error.
28. Dr T was also asked for further comment. He maintained that a limitation defence should apply and he noted that he would not be able to make any cash repayments as his financial position remained the same. In relation to recoupment, he added:
- “Secondly, as regards DLA Piper’s argument that recovery via “recoupment” from future pension payments is not subject to limitation, even an adjustment of accounts in future is an equitable right that remains subject to a consideration of what is fair and equitable in the circumstances of my particular case (*Burges v BIC UK Ltd*). Given the delay by USS in asserting its claim for the overpayment, it would appear that the doctrine of laches applies and it would be practically unjust to allow recoupment due to the lapse of time caused by USS’s own neglect and failure to undertake proper due diligence at the time I retired (*Lindsay Petroleum Co v Hurd*). As a result of this delay, I changed my financial circumstances in reliance on the overpaid benefits such that it would be unjust to grant the USS’s new claim for recoupment.”

## Adjudicator’s Opinion

29. Dr T’s complaint was considered by one of our Adjudicators who concluded that USS Ltd were entitled to recoup or recover the overpayment. The Adjudicator’s findings are summarised briefly below:-
- As there was no dispute that an error had occurred, the Adjudicator considered whether Dr T had a defence against recovery, including whether he had changed his position based on the higher amount, as well as the application of the Limitation Act 1980 (**the Act**).
  - The Adjudicator’s view was that Dr T did not have a successful claim on the basis that he changed his position, based on the statement he was sent prior to retirement in August 2009. This was because he knew at the time that he was in receipt of his PCSPS benefits and ought to have questioned why his service and salary records dated back to 1986 and why he had 24 years service, when he knew he had transferred out and should have had a much lower amount of service in the USS (eight years). As the discrepancy in the pensionable service was so high, Dr T ought to have noticed this and queried it with USS Ltd at the time.
  - However, against the recovery of the overpayment, Dr T had a partially successful claim under the Act. This was on the basis that with reasonable due diligence, USS Ltd also should have noted the error prior to paying Dr T his benefits. As per Section 5 of the Act, USS Ltd were required to bring a restitutionary claim within

six years from the date of the first overpayment and Section 32(1) did not apply to extend the period of recovery.

- In court proceedings, the “Limitation Act clock” stops when the claim form is issued. In the case of a complaint referred to the Pensions Ombudsman, the High Court has decided that the ‘cut off’ date is the date when the Ombudsman receives the respondent’s response to the complaint. In this case, the Ombudsman received USS Ltd’s response to Dr T’s complaint on 6 December 2017. Therefore, it was the Adjudicator’s opinion that USS Ltd could not recover the sums paid to Dr T before 6 December 2011 and are only entitled to seek recovery of overpayments made after 6 December 2011. This would mean that USS Ltd are only entitled to recover via repayment the sum of £16,840.48.
- The Adjudicator also considered whether an award should be made to Dr T to recognise any non-financial loss. However, as Dr T was potentially gaining because of a procedural technicality in USS Ltd’s failure to take the matter to court earlier, it would not be reasonable to make an award to Dr T in recognition of any non-financial injustice.
- DLA Piper (on behalf of USS Ltd) argued that, should Dr T’s limitation defence be upheld, USS Ltd should be entitled to recoup the overpayment from future pension payments being made to Dr T. As the courts have decided that recoupment is an equitable self-help remedy on the basis that it relates to payments in the future, rather than the past, recoupment of an overpayment is not subject to the six year limitation period under the Act. USS Ltd is therefore entitled to seek recovery via recoupment.
- Dr T argued that the legal defence of laches should apply to any recoupment on the basis of delays caused by USS Ltd. However, the Adjudicator disagreed, as while USS Ltd had caused delays, Dr T was also responsible for delays in responding to USS Ltd’s requests for information and repayment of the overpayment. Therefore, if USS Ltd decide to recoup the overpayment, it is not entitled to apply interest; it can only take sums from future payments; the sums can only be recovered over the same time period as the overpayment (in this case three years and six months); and the payments must be fair, just and reasonable.

30. Dr T responded to the Opinion and stated that he was in agreement to the repayment of £16,840.48. He made no further comments in relation to recoupment of the remainder of the overpayment.

31. Following the Opinion, DLA Piper questioned whether it could recover the overpayment of £16,840.48 and recoup the remaining balance from Dr T’s future pension payments. It was highlighted to them that in doing so the rate of recoupment would have to be affordable and the fact that Dr T had already repaid a large sum would also need to be taken into consideration. When asked about how USS Ltd has assessed Dr T’s financial ability to repay the funds in this way, it only referred to previous correspondence relating to how it attempted to obtain financial information from Dr T.

32. Dr T was forwarded with details of USS Ltd's request to recover the overpayment via a repayment of £16,840.48 and recoup the remainder from his pension going forward, but did not comment further.
33. As Dr T did not comment on the possible recoupment of the overpayment and DLA Piper have raised a further question as to the further recovery of the overpayment, the complaint was passed to me to consider.

### **Ombudsman's decision**

34. I agree with the Adjudicator that the effect of the Act is to limit the amount USS Ltd can claim by way of repayment, but any recoupment from future payments is not subject to the six year limitation period.
35. While Dr T has only commented on his ability to repay the £16,840.48, DLA Piper have also questioned how much USS Ltd can seek should it receive the repayment and decide to also recoup the remaining overpayment.
36. USS Ltd is entitled to recoup the full amount of the overpayment from pensions in payment. Should it seek repayment of £16,840.48 by lump sum or by instalment it may recover the remainder by way of recoupment. However, should it do so, USS Ltd must take into consideration a rate of recoupment that is affordable bearing in mind any repayments and the overall impact upon Dr T's finances.
37. In relation to how the funds are to be repaid and/or recouped, I would expect the parties to agree a reasonable and fair course of action.

## **Directions**

38. Within 21 days of the date of this Determination, USS Ltd shall ask Dr T for the information which it requires in order to assess an affordable rate of repayment and/or recoupment.
39. USS Ltd's entitlement to repayment shall be limited to:
  - £16,840.48 (the amount of overpayment accrued on and after 6 December 2011).
  - The residual overpayment may be recouped from future pension payments.
  - Any repayment and/or the rate of recoupment demanded by USS Ltd must take account of overall affordability in light of any information which Dr T chooses to provide. USS Ltd must reasonably consider Dr T's financial circumstances and apply fair time periods bearing in mind the length of time the overpayment has taken to come to light.

**Karen Johnston**

Deputy Pensions Ombudsman  
17 September 2019