

Ombudsman's Determination

Applicant	Professor I
Scheme	Universities Superannuation Scheme (USS)
Respondent	Universities Superannuation Scheme Ltd (USS Ltd)

Outcome

1. Professor I's complaint against USS Ltd is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) USS Ltd shall pay Professor I £500 in recognition of the significant distress and inconvenience caused by providing him with incorrect retirement quotations and information relating to his pensionable pay and pensionable service.

Complaint summary

2. Professor I's complaints are:
 - he disagrees with USS Ltd's decision that he is not entitled to Late Retirement Factors (**LRFs**) following his decision to opt out of the USS, even though he stayed in employment until his retirement date at the end of 2017; and
 - USS Ltd provided erroneous information in relation to the calculation of his benefits, including incorrect retirement quotations and information relating to his pensionable service and pensionable pay.

Background information, including submissions from the parties

3. Professor I joined the USS in 1992 and reached his normal retirement age (**NRA**) in January 2010. He continued to work for his employer, the University of Cambridge (**the University**), until December 2017.
4. Professor I had informal discussions with his independent financial advisor (**IFA**) over a number of years. On 23 March 2014, the IFA emailed USS Ltd and asked:

"If client does not take benefits in Jan 15 when he attains 70 and has 45 years' service and defers pension will he still benefit from the late retirement factor and benefit from annual increases, could not find details on site regarding this."

5. USS Ltd did not reply and the IFA did not chase a response.
6. Professor I explains that, as it was likely that his USS benefits would be overfunded, and with members being enrolled in a career average scheme from 1 April 2016, he decided to opt out of the USS. When asked if Professor I sought advice prior to making this decision, he said, "I have consulted with my financial advisor on an ad hoc basis over the past several years ... As it later became evident that I was likely to be over-funded, it seemed advisable to discontinue building up further benefits". He has submitted an email between his wife and his IFA in November 2015, stating that as per a discussion, Professor I had agreed to cease paying contributions to the USS.
7. On 14 January 2016, Professor I wrote to the University, saying:

"I would like to discontinue any further USS contributions with the last contribution being deducted from my March 2016 salary."
8. The University acknowledged Professor I's letter via email on 26 January 2016, mentioning that paperwork would be sent to USS Ltd after he had left the scheme on 31 March 2016. USS Ltd would then write to him directly in due course with his options.
9. In February 2016, the University wrote to members who may be affected by the lifetime allowance limits (**the February 2016 document**). This was following a letter from USS Ltd to employers regarding changes to taxation of pension benefits, along with mini-factsheets on the election of specific options. The letter was detailed and gave Professor I two options: Enhanced Opt Out (**EOO**) and Voluntary Salary Cap. An election of EOO would allow a member to cease further pension accrual, but pay a mandatory contribution of 2.5% of salary to retain death in service and incapacity benefits. He says his wife emailed the IFA regarding this and was informed that he did not need to apply.
10. The February 2016 document also included a HTML address to the USS Ltd mini-factsheets. In relation to EOO, the factsheet says:

"If I election for EOO after age 65, will I still receive any late retirement augmentation?"

Yes, you keep the late retirement increases which have been applied up to the date of your election. No further allowance for late retirement will be added for the period following the date of your EOO election."
11. Professor I explains that he decided not to make an election of either of these options. He says that the EOO drew his attention to keeping an entitlement to death in service and injury benefits, which he did not feel were relevant to him. He did not

consider that the Voluntary Salary Cap was an option as it only limited, rather than ceased, future pension accrual.

12. Following a retirement quotation request from Professor I's IFA, sent on 4 March 2016, but not answered, and followed up on 12 April 2016, with a reminder by the IFA, USS Ltd provided a provisional retirement quotation via the University, calculated with active membership and a retirement date of 31 March 2016. USS Ltd has since clarified that the LRFs included in the quotation was correct, but that the quotation contained errors in relation to pensionable service.
13. On 5 April 2016, USS Ltd received Professor I's scheme leaver notification from the University confirming that he had opted out with effect from 31 March 2016. Professor I's IFA also confirmed to USS Ltd on 22 April 2016 that Professor I did not want to be a member of USS' new career average scheme.
14. On 3 June 2016, USS Ltd's leavers' team issued a deferred member statement. This showed Professor I's benefits without the LRFs, as this increase was lost on deferment. However, USS Ltd later explained that the calculations used in this statement were incorrect. This was followed by USS Ltd's active retirement team issuing an active retirement quote on 5 July 2016, assuming that Professor I was retiring from active service on 31 March 2016. This quotation correctly included the LRFs, but had not taken into account that Professor I had opted out of the USS, and was not retiring.
15. The IFA provided USS Ltd with Professor I's HMRC Individual Protection 2014 certificate on 14 November 2016, and asked for a revised retirement quotation. USS Ltd's deferred retirement team provided this on 6 January 2017. It confirmed that the quotation sent in July 2016 was based on retirement from active service and did not take into account that Professor I had opted out of the USS. USS Ltd highlighted that the new revised quotation from deferred status did not include LRFs.
16. The IFA raised a complaint on Professor I's behalf on 27 January 2017. The letter stated that the LRFs were confirmed on more than one occasion (via previous quotations) and that there was nothing in the February 2016 document, including the factsheets, that mentions forfeiting LRFs. The IFA's view was that Professor I had been encouraged to opt out of the USS.
17. USS Ltd responded on 19 February 2017, saying that there was nothing within the scheme rules that require LRFs to apply up to retirement and that it only applied from active service. USS Ltd said that there was no evidence to show advice was given to Professor I to opt out of the USS, or that it would be in his best interests to do so.
18. The IFA continued to pursue Professor I's complaint and asked USS Ltd to specifically state where in the scheme documents it says that LRFs do not apply in deferment. USS Ltd replied stating that it was seeking external legal advice.
19. During this period, the University issued a letter to members who had opted out of the USS regarding its policy for a supplement in lieu of pension (**the June 2017**

document). This followed further recent changes to pension taxation rules and allowed members to opt out of the USS and apply for a cash supplement, up to 12%, if certain eligibility criteria are met. The document stated that there were consequences for accepting the cash supplement. In relation to EOO, it said, "...without Enhanced Opt Out, you are not entitled to the USS late retirement uplift if you draw your pension after normal pension age". This was sent to Professor I on 30 June 2017.

20. On 24 July 2017, USS Ltd emailed the IFA confirming that it was still waiting for legal advice. However, it also highlighted that Professor I had mentioned re-joining the USS before his proposed retirement in December 2017. USS Ltd stated that this was possible if he was an eligible employee, but that the LRFs would not apply. The IFA confirmed on 14 August 2017 that Professor I would not re-join the scheme.
21. On 3 October 2017, USS Ltd confirmed to the IFA that the legal advice it had received was that there is no requirement under any legislation or the USS rules to provide LRFs once a member had opted out of the USS. USS Ltd followed this up with a deferred member quotation, with a retirement date of 1 January 2018, on 12 October 2017.
22. Professor I remained unhappy and on 30 October 2017 made a complaint under the first stage of the internal dispute resolution procedure (**IDRP**). He says:

"Based on information available at the time I was prompted to opt out of the scheme as I was reaching a point of overfunding so my last contribution was made in March 2016. In doing so I had no reason to believe, based on the information available at the time I made this decision, that the late retirement increases would be withdrawn not only for future deferral but for past deferral back to my normal retirement date.

Throughout the ensuing correspondence that I and my financial advisor have had with the USS they have not been able to demonstrate that sufficient information was provided about treatment of late retirement increases where an opt out was taken. In fact, as far as we can tell no such information was available at the time. Therefore, at the time of opt out there was insufficient information for me to make an informed decision."

23. USS Ltd provided updated retirement options on 18 January 2018, and the next day issued a response under stage 1 of the IDRP. USS Ltd did not uphold the complaint, because:
 - the relevant scheme rules¹ make no provision for LRFs to apply to deferred members nor is there any relevant legislation that requires the rules to include such a provision. Therefore, Professor I was receiving his correct entitlement in accordance with the scheme rules; and

¹ See Appendix I

- it appeared that Professor I was not aware of the consequences of opting out of the USS, but USS Ltd did not consider that it was in breach of its duty to members. It considered that it would be impractical for the scheme literature to cover all retirement scenarios, but pointed out that the IFA was aware there may be an issue with LRFs and queried this in March 2014. However, on failing to receive a response, neither the IFA or Professor I took the matter further.
24. While the main part of the complaint was not upheld, USS Ltd apologised for the benefit calculation errors made in the quotation issued in March 2016 and the statement in June 2016.
25. On 9 June 2018, Professor I appealed USS Ltd's decision and raised further comments, including:
- USS Ltd first informed him of the loss of the LRFs in January 2017. This is a serious failure of duty of care. It was also a failure not to have drawn his attention to the loss of LRFs. USS Ltd should have clarified with him what his intentions were;
 - the information provided on LRFs prior to March 2016 did not make it clear in relation to his position. Furthermore, USS Ltd has not been able to provide examples of any documents showing the loss of LRFs on deferment;
 - the February 2016 document was an opportunity for USS Ltd to clarify the position in relation to the loss of LRFs;
 - it is unfair that other members were made aware of the loss of LRFs in the June 2017 document and that he is now being penalised; and
 - all quotations sent between March 2016 and October 2017 contained errors.
26. On 10 August 2017, USS Ltd issued its Stage 2 IDRPs response, upholding its previous decision.
27. Professor I raised a further query with USS Ltd about his benefit and was provided with basic information and salary details on 13 November 2018. Professor I raised a further query about the accuracy of the salary details used. On 11 December 2018, USS Ltd replied, apologising for sending incorrect salary and pensionable service details.
28. Professor I remained unhappy and made a complaint to this Office.
29. In the formal response, DLA Piper (USS Ltd's legal adviser) said that the complaint should not be upheld because:
- there was no failure in a duty of care to provide Professor I with specific information relating to his personal circumstances. DLA Piper noted that the Courts are reluctant to impose a general legal duty of care on trustees and

employers to advise members about their pension rights or to make them aware of any possible decisions that would not be in the member's best interests;

- if such a duty existed, it would not be practical to comply with it, due to the large number of members and the onus this would put on USS Ltd to consider the personal circumstances of each and every member;
- while the USS member booklet mentions LRFs, it does not state that these will continue in deferment, either under the section relating to late retirement or on leaving the scheme. In any case, the booklet has a disclaimer that the rules will take precedence over the booklet where there is a difference between the booklet and the rules;
- while the February 2016 document was issued by the employer, it was not intended to provide details of the various benefit options and any potential consequences. Instead, it was merely a tax alert in response to a legislative change. Regardless of this, DLA Piper notes that the information was sent after Professor I had already made the decision to opt out of the scheme; and
- Professor I had not relied on the incorrect information when making any financial decisions.

30. Professor I's comments to USS Ltd's formal response are, in summary:

- USS Ltd had admitted that there was no explicit information concerning LRFs, but is not accepting responsibility for this;
- he refutes the suggestion that LRFs is an issue specific to his circumstances;
- he was not seeking financial advice from USS Ltd, his complaint is about a lack of information in the public domain; and
- he asked about re-joining the scheme, but USS Ltd refused his request. USS Ltd is now telling him that he would have been entitled to join at the time he enquired.

Adjudicator's Opinion

31. Professor I's complaint was considered by one of our Adjudicators who concluded that errors had been made by USS Ltd. The Adjudicator's findings are summarised below:-

- Professor I (and/or his IFA) had a responsibility to follow up requests for information. Had USS Ltd continually failed to provide a response, then Professor I would have a stronger case that he had not been provided with adequate information to make a decision and that this was to his detriment. However, it was more likely than not that if the 2014 query had been chased, USS Ltd would have provided the information Professor I needed in January 2016, in order to make an informed choice.

- Professor I was already aware, prior to his decision to opt out of the USS, that insufficient information on LRFs in deferment had been provided to members. He therefore made the decision to opt out with the knowledge that he was not fully aware of the position in relation to LRFs.
- USS Ltd is not able to provide information that could be construed as advice, including that which relates to a member's specific circumstances, selected retirement or membership options. There is an obligation on members to take ownership of their own financial decisions and raise questions relating to their specific circumstances.
- USS Ltd were not aware of Professor I's reasons for wanting to leave the scheme and it was not aware of his decision until it received the leavers documentation from the University in April 2016. Therefore, any information provided after this date would have been irrelevant, as Professor I was no longer an active member of the USS.
- Professor I made reference to the February 2016 document not containing information about LRFs while the June 2017 document does. The Adjudicator noted that these documents were issued by the University, who is responsible for their content. The University is not a party to the complaint brought to this office and therefore the Adjudicator could not comment on the contents of the information provided in these documents.
- Professor I had been provided with details in order to access the mini-factsheets, which did make a specific mention of LRFs. Although the main purpose of the factsheet was to link EOO with death in service and injury benefits, it ought to have alerted Professor I to the fact that he did not have sufficient information in relation to his circumstances. It also ought to have prompted him to clarify the position with USS Ltd before his last contribution payment in March 2016.
- It was the Adjudicator's view that Professor I is receiving his correct entitlement from the USS, but that USS Ltd did provide him with incorrect information on at least three occasions. Therefore, in recognition that this caused Professor I significant distress and inconvenience, USS Ltd should pay him £500.

32. Professor I did not agree with the Opinion and provided additional comments, in summary they are:-

- To have his complaint treated fairly, only information available before January 2016 should be taken into consideration.
- The EOO information clearly raised a warning in relation to the loss of death in service and injury benefits and therefore there is no reason as to why USS Ltd could not have done the same in relation to LRFs.
- The complaint made by his IFA in January 2017 shows that information confirming his right to retain LRFs was sent on more than one occasion.

- He says USS Ltd were aware of his decision to opt out of the scheme prior to receiving the documents from his employer, as the IFA emailed to confirm this and ask for a quotation on 4 March 2016.

33. As Professor I did not accept the Adjudicator's Opinion, the complaint was passed to me to consider and his further comments 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 I for completeness.

Ombudsman's decision

34. Professor I has said that information he was provided with before January 2016 should be taken into account in order for me to come to a fair decision in relation to his complaint. Looking at the information provided, it has been agreed between all parties that this does not contain the information relating to the LRFs that Professor I was seeking.
35. However, I agree that it is not reasonable, nor is there any obligation under any legislation or the scheme rules, for USS Ltd to provide specific information to members on every retirement scenario. Professor I, with his IFA acting on his behalf, knew in 2014 that there was no information relating to LRFs in deferment, otherwise the question would not have been asked. It is regrettable that USS Ltd did not answer this query at the time, but Professor I should also take some responsibility to have sought an answer to this, rather than to make an assumption that no information meant that he would retain his LRFs in deferment.
36. I also note that although he made the decision to cease contributions in January 2016, he did not become a deferred member until 31 March 2016. Therefore, he still had an opportunity, on receiving the February 2016 document, to have questioned the position with USS Ltd, but he did not do so.
37. Professor I has also said that the February 2016 document did include a warning about the loss of death in service and injury benefits if EOO was not adopted and this was an opportunity for USS Ltd to do the same regarding LRFs in deferment. While USS Ltd could have done this, again, there is no legislative obligation for it to do so. As DLA Piper mentioned, in its response to the complaint, the Courts are reluctant to impose a general duty on trustees to make members aware of when the member may make a decision that is not necessarily in their best interests. There is no maladministration in USS Ltd choosing not to provide such information, whether this is because it felt that it could be construed as advice, or that it would affect only a very small amount of its membership.
38. Professor I's IFA also said to USS Ltd, that the provision of retirement quotations, which on more than one occasion included the LRFs, shows that this had confirmed the position to his client. However, retirement quotations are just estimates of benefits. I note that the letter provided with the July 2016 quotation states, "Your actual benefits will be calculated in accordance with the scheme rules, legislation and

factors in force at the date of your retirement.” Incorrect quotations were provided to Professor I on two occasions. LRFs were included in the quotations because they were based upon Professor I continuing to be an active member until retirement. Therefore, Professor I cannot rely on those quotations as a guarantee that the LRFs still applied.

39. I agree that USS Ltd was contacted by Professor I's IFA on 4 March 2016 and that it did not respond, which is additional poor service from USS Ltd. However, I do not see that this makes a material difference to the outcome of Professor I's complaint. USS Ltd was still unaware of the reasons behind Professor I's decision (the email only refers to him ceasing contributions in March 2016 and wanting a retirement quotation), nor had it received the required documents from the employer that confirmed such a decision had been made. Even if it had responded to the email, it would not have informed Professor I's IFA of the loss of LRFs on deferment; it would have merely provided the information requested by the IFA. Professor I would have needed to raise a specific query to have been alerted to a possible loss of LRFs.
40. I agree with the Adjudicator that USS Ltd provided erroneous information to Professor I on more than one occasion. While I do not uphold the first part of his complaint, I uphold the second part and USS Ltd should pay Professor I an award in recognition of the significant distress and inconvenience this caused.

Directions

41. Within 21 days of the date of this Determination, USS Ltd shall pay Professor I £500 in respect of the significant distress and inconvenience which he has suffered.

Anthony Arter

Pensions Ombudsman
29 July 2019

Appendix I

Rules of the USS dated 19 November 2015

12. LATE RETIREMENT

12.1 DB benefit

...

12.1.2 Late retirement benefits

Where the prevailing *normal pension age* has been attained and *service* has continued thereafter, the *member* shall be entitled to receive, from the day after the date of *retirement* in respect of that individual's *active membership*, the *accrued pension amount* and the *accrued lump sum amount*, with that part of each of the *accrued pension amount* and the *accrued lump sum amount* which is attributable to *pensionable service* accrued or credited prior to that *normal pension age* increased by such amount as the *trustee company* may decide on *actuarial advice*.