

## Ombudsman's Determination

<b>Applicant</b>	Dr Dawn Naylor
<b>Scheme</b>	Universities Superannuation Scheme ( <b>the Scheme</b> )
<b>Respondent(s)</b>	The University of Warwick ( <b>the University</b> ) Universities Superannuation Scheme ( <b>USS</b> )

### Complaint summary

Dr Naylor has made the following complaints against the University:

1. The University initially refused to process her ill-health application and said that the application form should be submitted after she had left employment which would have significantly reduced the pension (due to it being based on part-time service).
2. The University accepted the application before she had left employment but the short timescale involved meant the specialists had "no time" to write a detailed report, as the specialist did not see her medical records, which resulted in the application being unsuccessful.
3. The University has failed to acknowledge that the reason she left employment was due to ill-health/incapacity.

The following complaint against USS:

4. Following a successful appeal against USS's original decision to refuse ill-health retirement from the University, she should receive the pension she would have been awarded if the original application in February 2011 had not been rejected (i.e. future service credit should not be reduced for part-time service).

And the following complaint against the University and USS:

5. She has ended up paying a lot more tax than she would have done if the pension issue had been resolved earlier.

## **Summary of the Ombudsman's Determination and reasons**

The complaints against the University should not be upheld as it was reasonable for them to conclude that Dr Naylor's contract of employment was terminated due to redundancy and not incapacity at the time that she left service.

The complaint against USS should also not be upheld as they would only be able to award Dr Naylor an ill health pension based on full time service if the University were to confirm that the reason she left employment was incapacity. I also find that it was Dr Naylor's decision to delay payment of her pension and USS, or the University, cannot be held responsible for any income tax consequences that may follow from that decision.

## Material Facts

### Rules

1. The relevant Scheme rules are those dated 30 April 2009, as amended (**the Rules**). Rule 13 deals with early pensions on incapacity. Rules 13.1 and 13.5 in particular are relevant to Dr Naylor's complaint.
2. Rule 13.1 sets out the conditions that must be met before an incapacity pension can be awarded, being:

#### Rule 13.1.2:

"In the employer's opinion the member is suffering from incapacity at the date of the relevant cessation of eligible employment."

#### Rule 13.1.3:

"The trustee company determines that the member is suffering from total incapacity or partial incapacity."

#### Rule 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 pension age and, in a case of total incapacity, without continuing in any other eligible employment."

#### Rule 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."

3. Rule 13.5 allows a retrospective decision to be made for a member who has ceased to be in eligible employment. It says:

"Where a member has ceased to be in eligible employment before the trustee company has determined that the member is, and was on last ceasing to be in that eligible employment, suffering from incapacity, and the member has retired or ceased that eligible employment on the grounds of incapacity, the trustee company may, after consulting with the employer, decide that the member shall benefit under this rule from the date of cessation of eligible employment. Any amount that has as a result of the cessation of eligible employment been paid to the former member shall be deducted from the benefits payable to that individual under this rule."

4. Total Incapacity is defined as follows:

“Total Incapacity” means ill-health of, or injury to, a member or former member 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 employer 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.”

5. The definition of Partial Incapacity is:

“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).”

6. Incapacity is defined as meaning either partial incapacity or total incapacity.

7. A pension payable on account of Total Incapacity includes a credit for future service, that is, from actual retirement to the normal retirement date under the Scheme.

**Material Facts**

- 8. Dr Naylor was employed on a two year fixed term contract with the University commencing on 9 February 2009, and ending on 8 February 2011. Dr Naylor also had a part-time post with the University of Wales, which continued after she left the University.
- 9. Dr Naylor was absent from work in the early part of 2010, noted by her GP as being due to “work related stress and exhaustion”. She returned to work in July 2010.
- 10. Dr Naylor says that when she returned from sickness in July 2010 her hours were reduced against her will by the University on account of her ill health.
- 11. During the latter part of 2010 Dr Naylor explored with the University the possibility of her continuing employment after 8 February 2011, but no suitable posts were

available. Dr Naylor says there were suitable posts available shortly afterwards but she was too ill to apply.

12. On 4 January 2011, Dr Naylor contacted Dr Southam, the University's occupational physician, in relation to her deteriorating health and an application for ill health retirement. He replied on the 11 January, 2011, and asked Dr Naylor to contact Human Resources. She says she visited the Human Resources office but the HR Adviser was away.
13. Dr Naylor says that between 4 and 20 January 2011, she made several phone calls to the Pensions Department at the University who initially told her that there was insufficient time to put an application for ill-health retirement through. She adds that they also said that the application form should be submitted after she had left employment, which would have significantly reduced the pension (due to it being based on part-time service).
14. Dr Naylor submitted an application on 11 January 2011. Between 11 January and 27 January 2011, Dr Naylor corresponded with the Medical School and Human Resources Office regarding the application and medical information required for an ill health pension.
15. On 27 January 2011, the University sent Dr Naylor forms to process an ill health pension. Dr Naylor obtained the necessary medical information and returned the forms within five days.
16. On 28 January 2011, Dr Naylor was signed off work with "Pains under investigation".
17. On 1 February 2011, Dr Naylor attended a meeting with Dr Southam in relation to her ill health application. Dr Southam reported on the meeting to the Human Resources Department and said:

"Thank you for asking me to see Dr Naylor once more in Occupational Health, she attended on 1 February 2011. As you know, Dr Naylor's health has continued to deteriorate and at present, she remains unfit for work. Your referral letter indicates that Dr Naylor's contract is due to complete 8 February 2011, and there is no suitable alternative employment available for her within the University. Dr Naylor has requested to be considered for ill health retirement.

I have completed the medical report in relation to the application for ill health retirement, but I am unable to conclude that her functional loss is permanent, in the absence of supporting medical evidence. I am uncertain with the current deadline whether reports from her treating specialists will be available for my consideration."

18. The University submitted Dr Naylor's application for an ill health pension to USS on 2 February 2011.

19. Dr Naylor's application for ill health retirement was refused by USS on 8 February 2011, on the grounds that the medical evidence did not give a definitive diagnosis and there was no evidence of focused treatment by a multi-disciplinary team specialising in chronic fatigue syndrome. The letter from USS also said that the panel of USS medical advisers had considered the reports carefully and had made the comment that "there remains a reasonable chance that with the passage of time and appropriate treatment her symptoms will improve."
20. On 8 March 2011, the University notified USS that Dr Naylor had left employment due to redundancy.
21. On 31 May 2011, when no longer employed by the University but still employed on a part-time basis at the University of Wales, Dr Naylor submitted an appeal to USS against the rejection of her application for ill health retirement. The appeal was successful and Dr Naylor was awarded a total ill health pension in September 2011, commencing at that date. The credit for future service only took account of part-time service at the University of Wales; not future service with the University.
22. Although, Dr Naylor's appeal was successful she did not draw her pension until March 2014, when she also received the arrears of pension backdated to September 2011, and incurred a tax liability of over £12,000. She has estimated that her tax liability between 7 September 2011, and 5 April 2014, would have been £1,338.57, whereas when the arrears of pension were paid in March 2014, she incurred a total tax liability that year of £12,542.65. She, therefore, says that the pension issue has cost her £11,204.08 of additional tax liability which would otherwise not have been payable.
23. As they considered that Rule 13.5 allowed USS to retrospectively determine ill health retirement provided Dr Naylor was suffering from incapacity when she left employment and had left for that reason, USS contacted the University on several occasions to confirm the reason Dr Naylor left employment. The University had confirmed on each occasion that Dr Naylor left employment due to the expiry of her fixed term contract and not due to incapacity.

### **Summary of Dr Naylor's position**

24. Dr Naylor says that due to the University's delay in providing the necessary forms she had limited time to obtain all the necessary medical evidence and it left no time for the specialists to write their reports. Even Dr Southam, the University's occupational health specialist, had no time to write a detailed report as he had not seen all the medical records and has said in his letter of 1 February 2011, that he was unable to conclude that her functional loss was permanent as he had not seen all the medical reports.
25. Dr Naylor says that if there had been more time to obtain medical evidence then it is reasonable to expect that her application would have been positively considered.

26. She says the University also refused to acknowledge her ill health when USS contacted them following her successful appeal and insisted that her reason for leaving was redundancy even though she was on sickness absence when her contract finished. It was disingenuous for the University to argue that she had no right to a full ill health pension because she was no longer employed by the University. The cessation of her employment was a product of delays caused by the University in processing the application.
27. Dr Naylor also contends that the evidence clearly shows that the University did not do everything it could to process the application as quickly as possible. One of the reasons for turning down her application was that she had not been seen by a multi- disciplinary team for her chronic fatigue syndrome. The appeal had subsequently shown that she had in fact been under such a team and it was not a valid reason for turning her down. It is reasonable to suspect that if her GP had had more time, including a full review of her medical notes he would have included this fact in his report.
28. Dr Naylor's says that as she won her appeal against USS's original decision to refuse her an ill health pension, they should have put her back in the position as if she had been granted it initially. The problem has arisen because her contract with the University had come to an end by the time the appeal was heard. She was, however, still employed by the University when the original application was submitted and turned down. She is still too ill to work three years later and was, therefore, clearly ill when the original application was made.
29. Dr Naylor also says that as a result she has paid considerably more tax than she would otherwise have done. She has provided some calculations to show that if the pension had been paid in the relevant tax year she would have paid little or no tax. She has also estimated that her tax liability between 7 September 2011, and 5 April 2014, would have been £1,338.57, whereas when the arrears of pension were paid in March 2014, she incurred a total tax liability that year of £12,542.65.
30. Dr Naylor agrees that she decided to defer drawing the pension but there were valid reasons for this. It would have been unreasonable to make such an important decision that would affect the rest of her life without having the full facts and figures. She did seek financial advice at the time and was told that it would be impossible to decide on the best option for her situation without knowing what the final figures would be.
31. The appeal was successful in September 2011, and at this point Dr Naylor presumed everything would be fine and that she would be paid her full ill-health retirement pension within the next month. There was then a delay before USS sent details of the options because they were speaking with the University. The options were not received until December 2011, and it became clear at that point that the pension was only being calculated on her part-time service at Bangor University.

32. Due to the Christmas break Dr Naylor could not contact USS to query the position until early 2012. USS again asked the University to confirm the reason for leaving which the University said was redundancy. USS then said the calculation could not be changed due to the University's response. As more than six months had already elapsed by then Dr Naylor decided to contact the Pensions Advisory Service (**TPAS**). Dr Naylor still presumed the problem could be resolved reasonably quickly and was not unduly concerned about the tax issue.
33. USS had said that if Dr Naylor accepted payment straight away she could not change her pension option if she later won her case. It was impossible for Dr Naylor to decide what proportion of pension to take as a lump sum and what proportion as an annual pension if she did not know what the final total or options would be. She originally thought that the case would have been sorted relatively quickly so the impact would have been minimal but the University took months to respond to TPAS.
34. In 2014, USS changed its mind and said that if her complaint were upheld they would allow her to change her option so long as she repaid any difference between the options. It was for this reason that she decided to take the pension which was paid in March 2014.

### **Summary of the University's position**

35. The University's responsibilities in relation to the submission of the ill health retirement application on behalf of Dr Naylor were limited to confirming its support of the application (following receipt of medical advice); and providing to USS the reason for the termination of Dr Naylor's employment. The University discharged its duties in this regard.
36. The University acted reasonably and appropriately in the circumstances and every effort was made by staff to ensure that Dr Naylor's application was processed properly and in a timely manner whilst she remained employed by the University.
37. The University had begun consultation with Dr Naylor about the termination of her contract due to redundancy in the latter part of 2010. However, Dr Naylor did not enquire about the possibility of ill health retirement until one month before her fixed term contract with the University was due to come to an end.
38. It is standard practice that when an individual makes an enquiry through the Pensions team about incapacity benefit, s/he is referred to the relevant employing department to seek the necessary approval. Clearly, the Pensions team is not in a position to make a decision about an individual's health and nor is it able to process an ill health retirement application until it has received confirmation from the relevant department that such an application is supported by the University.



39. There is no evidence that the University's Pension Department said that it would be impossible to process Dr Naylor's application in time, as alleged, given that her fixed term contract was due to expire on 8 February 2011.
40. Dr Naylor enquired about ill health retirement in January 2011. The University's pension team received clearance from the Medical School on 27 January 2011, to begin processing the application and did everything it could to expedite matters for Dr Naylor. The application was submitted to USS on 2 February 2011.
41. Given that such an application typically takes a number of months to be processed, the University considers that the timescale in which the application was collated and submitted was more than reasonable in the circumstances. The University, therefore, disagrees that there was any delay on its part and suggest that it was Dr Naylor's responsibility to expedite matters.
42. Even if the University had been responsible for a delay of 11 working days between 4 January and 20 January 2011, as has been suggested by Dr Naylor, it does not accept that it would have made any difference had the medical documentation been processed at an earlier stage. The University cannot comment on, nor was it responsible for, the quality of the medical evidence provided. It is evident from the appeal process in relation to Dr Naylor's application that it took several months to collate the medical evidence which led to the application being approved.
43. Dr Naylor's employment with the University terminated on 8 February 2011, by reason of redundancy, due to a lack of funding for her post.
44. Although, Dr Naylor had been absent from work for a few months in the early part of 2010, noted by her GP as being due to "work related stress and exhaustion", she had returned to work in June 2010. At this time [June 2010], Dr Naylor's GP confirmed that she was fit for work, although, it was suggested that some adjustments be made, which were implemented, including working from home and keeping stress to a minimum. She then continued to work without any further periods of absence until 28 January 2011, when she was signed off for the final two weeks of her contract. Furthermore, during her period of sickness absence from the University between January and June 2010, she had continued to work for Bangor University.
45. The Medical School began consulting with Dr Naylor in the latter part of 2010, about the expiry of her contract and the reason for its non-renewal, that reason being redundancy and not ill health. It is clear from the notes of the consultation meetings, that Dr Naylor met with Human Resources to explore redeployment within the University. There is no reference to Dr Naylor's health in the documentation surrounding the expiry of her contract with the University.

46. It would be entirely inappropriate for the University to change the reason for the termination to capability/ill health as this would not accurately reflect the circumstances from the University's perspective. Furthermore, the University is mindful that it does not wish to set an improper precedent for future cases of a similar nature.
47. The University later clarified its response which is summarised below:

“The University’s responsibilities in relation to the submission of the ill health retirement application on behalf of Dr Naylor were therefore two-fold, namely to:

  1. determine whether Dr Naylor was suffering from incapacity at the date of termination of her employment; and
  2. provide to USS the reason for the termination of Dr Naylor’s employment.”
48. At the time of Dr Naylor’s application, the medical evidence available to the University was very limited. The medical report dated 1 February 2011, received at the time of the cessation of her employment in February 2011, confirmed that she was "under the care of a neurologist ... to try and establish a diagnosis". Furthermore, the letter from Dr Southam to the University dated 1 February 2011, confirmed that he was "unable to conclude that her functional loss [was] permanent".
49. USS was unable to approve the incapacity retirement application based on the medical evidence available in February 2011. The medical evidence which the University has subsequently seen relating to Dr Naylor's appeal largely post-dates her employment with the University and refers to her condition at that time rather than at the time her employment with the University terminated.
50. In the light of the above, the University has been unable to determine with any certainty that Dr Naylor was suffering from incapacity at the relevant date of the cessation of her employment. Nevertheless, it is plain that it did put forward her application, at her request.
51. The University confirmed to USS in February 2011, that the reason for the termination of Dr Naylor's employment was redundancy. Subsequently, when USS contacted the University In November 2013, the University reviewed and confirmed its position in this regard.
52. The University would like to make it clear that it did not take account of the possibility of other cases when carrying out the assessment of Dr Naylor's ill health.

## **Summary of USS's position**

53. Dr Naylor was in dual employment with the University and the University of Wales, Bangor when she made an application for ill-health retirement in February 2011.
54. Dr Naylor's application for ill-health retirement was rejected by USS following advice from its medical panel.
55. Dr Naylor left the University on 8 February 2011, the date on which her fixed term contract expired, and from that date was employed solely by the University of Wales, Bangor on a part-time basis.
56. Dr Naylor appealed USS's decision to reject her application for ill-health retirement on 31 May 2011. At the time of the appeal, she was still eligible for incapacity retirement, as she was working part-time for the University of Wales, Bangor and was an active member of the Scheme.
57. USS would be willing to exercise its power under Rule 13.5, and calculate Dr Naylor's future service credit on a full time basis, in the event that the University confirms to USS that she left employment on the grounds of incapacity.
58. As the University has confirmed that Dr Naylor's employment ceased due to the expiry of her fixed term contract, and not her ill-health, USS does not have the power under the Rules to exercise its discretion to grant an incapacity pension based on full-time employment with effect from the date on which the member ceased eligible employment with the University.

## **Conclusions**

### **The initial application**

59. Dr Naylor has provided a great deal of information concerning her ill health and how she sought to continue working even though her health was deteriorating. The first part of Dr Naylor's case is that an ill-health application ought to have been prompted by the University in 2010. However, the University had no particular reason to do that when Dr Naylor was at work – and indeed for some of the time exploring working beyond the end of the existing contract.
60. Dr Naylor says that initially the University refused to process her application; the University denies this. I can understand Dr Naylor's view that if this was correct it would also have contributed to the short timescale to obtain the medical reports. I do not know what was said, but later events show that the University did progress the application and I do not think any delay for a short period in January had a material effect on the eventual outcome.

61. The University says it obtained clearance from the Medical School on 27 January 2011, and then provided the necessary forms to Dr Naylor in order to obtain medical reports. The timeline to obtain the reports was very short but despite this Dr Naylor managed to obtain these and they were submitted to USS.
62. The reason her application was turned down was that USS's medical advisers thought there was no evidence of a multi-disciplinary team specialising in chronic fatigue syndrome being involved and so there was a reasonable chance that with the passage of time and appropriate treatment her symptoms would improve. Dr Naylor suggests that if there had been more time the medical report from her GP would have mentioned that a multi-disciplinary team was involved. But for that argument to succeed I would have to find that, not only had the University delayed the application unnecessarily (which I do not), but also that, if there had been more time, the GP would have made a fuller report which would have resulted in USS deciding in Dr Naylor's favour. I cannot make such a finding. The assumption about what would have been in the medical report is no more than an assumption – I do not find this on the balance of probabilities.
63. Therefore, I do not uphold Dr Naylor's first and second complaints against the University.
64. Dr Naylor's third complaint is that the University has failed to acknowledge that the reason she left employment was due to ill health/incapacity. The evidence shows that when Dr Naylor applied for an ill health pension in January 2011, the University supported her application and under Rule 13.1.2 would have agreed that "in the employer's opinion the member is suffering from incapacity at the date of the relevant cessation of eligible employment." It was also on that basis that USS carried out its investigation as to whether Dr Naylor was eligible for an ill health pension.
65. The initial application was unsuccessful but Dr Naylor did qualify for a full ill health pension on appeal payable from September 2011. USS then asked the University whether they would agree that the reason that Dr Naylor left employment was due to incapacity. The University has refused, saying that the reason for leaving was redundancy.
66. The University also said in their initial response, that it was mindful of setting an improper precedent for future cases. When questioned over this response the University has said that it did not take account of the possibility of other cases when carrying out the assessment of Dr Naylor's ill health, but it was concerned that if it were to change its reason for the termination of Dr Naylor's employment from redundancy to ill-health in retrospect, this would not accurately reflect the circumstances as the University saw it both at the relevant time, and having reviewed its original decision, based on the evidence which was available in January/February 2011, and subsequently.

67. I find this explanation from the University unnecessarily convoluted. The University has cast doubt over its original decision to support Dr Naylor's original application for an ill health pension. It says in its letter of 14 September 2014 "the University has been unable to determine with any certainty that Dr Naylor was suffering from incapacity at the relevant date of the cessation of her employment. Nevertheless, it is plain that it did put forward her application, at her request."
68. Rule 13.1.2 requires the University (as employer) to give an opinion. It is not for the University to consider the degree of incapacity, it has to decide on the balance of probabilities whether Dr Naylor was suffering from incapacity at the time she left employment. The report from the Occupational Health adviser Dr Southam said that, "Dr Naylor's health has continued to deteriorate and at present she remains unfit for work."
69. Dr Naylor had had previous periods of ill health and the University had made arrangements to accommodate her ill health and had reduced her hours because of this. Therefore, I find, on the balance of probabilities, that Dr Naylor was suffering from incapacity at the date that she left employment. However, the following question is crucial: what was the reason she left employment?
70. USS say that they are willing to exercise its power under Rule 13.5 and calculate Dr Naylor's future service credit on a full time basis if the University confirms that she left employment on the grounds of incapacity. I have looked at the wording of Rule 13.5 which says:

"Where a member has ceased to be in eligible employment before the trustee company has determined that the member is, and was on last ceasing to be in that eligible employment, suffering from incapacity, and the member has retired or ceased that eligible employment on the grounds of incapacity, the trustee company may, after consulting with the employer, decide that the member shall benefit under this rule from the date of cessation of eligible employment."
71. The wording above is unclear and on the one hand could be interpreted as allowing the trustee company to decide if the member left employment on grounds of ill health and, if so, it can exercise its discretion after it has consulted the University. But on the other hand the wording also says "the member has retired or ceased that eligible employment on the grounds of incapacity" which I conclude means that the University has to confirm that the member has left employment on the grounds of incapacity.
72. In this case the University has remained adamant that the reason Dr Naylor left employment was due to redundancy and not incapacity. USS has asked the University on a number of occasions the reason why Dr Naylor left employment and it has remained steadfast that the reason was redundancy.

73. Dr Naylor says that the University failed to acknowledge that she left employment due to ill health/incapacity. Whilst I am sympathetic to Dr Naylor's condition I have to consider whether the University's position was reasonable.
74. The University say that they consulted with Dr Naylor about the termination of her contract in the latter part of 2010 due to redundancy as a result of lack of funding for her post. The University also say that they explored with Dr Naylor the possibility of redeployment but this did not result in any new post materialising. Dr Naylor submitted her application for ill health retirement in January 2011, which the University supported, but her contract was due to terminate on 8 February due to redundancy.
75. I have considered this sequence of events carefully and find that the position taken by the University is not unreasonable and that Dr Naylor's contract of employment did terminate due to redundancy. I, therefore, do not uphold Dr Naylor's third complaint against the University.
76. In the absence of the University's agreement that Dr Naylor left employment due to incapacity then USS is unable to exercise its power under Rule 13.5. Therefore, I do not find that USS acted incorrectly, or that Dr Naylor's incapacity pension should be calculated to allow for the future service credit that she would have received if she remained employed by the University.
77. Dr Naylor has said that she has ended up paying a lot more tax than she would have done if the pension issue had been resolved earlier. I can sympathise with Dr Naylor's predicament here as due to the delay in drawing her pension she has ended up with a bigger income tax liability than would otherwise be the case. However the initial decision to defer drawing the pension was her decision and the subsequent timescale and outcome of the complaint was impossible to predict. USS did ask the University to clarify its position on the reason for leaving service and did provide the pension options before the end of the tax year. I, therefore, do not find USS, or the University, responsible for the tax that Dr Naylor has had to pay on her arrears of pension in 2014. USS had to comply with HMRC's requirement to deduct tax on the amount paid. Dr Naylor should take the matter up with HMRC to see if any of this tax can be recouped.

**Anthony Arter**

Pensions Ombudsman  
28 October 2015