

Ombudsman's Determination

Applicant	Ms B
Scheme	Universities Superannuation Scheme
Respondent(s)	Universities Superannuation Scheme (USS) University of Cambridge (the University)

Complaint Summary

Ms B has complained that USS and the University refused to award her ill health retirement benefits from active service.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against both the University and USS as I have found maladministration in their consideration of Ms B's retrospective application for ill health retirement benefits from active service.

Detailed Determination

Scheme rules

The relevant rules of the Scheme are the ones dated 1 October 2003 (the **Rules**). Rule 10.4 titled “Enhanced and non-enhanced incapacity pensions” says:

“(a) This rule 10.4 provides for two categories of pension as follows:

(i) an *enhanced incapacity pension* calculated according to and payable in the circumstances provided in paragraphs (k) to (m), (q) and (r) below;

and

(ii) a *non-enhanced incapacity pension* calculated according to and payable in the circumstances provided in paragraph (d) below.

(b) This rule 10.4 applies to any *member* who:

(i) has satisfied one of the requirements of paragraph (c) below; and

(ii) is in the opinion of the *employer* suffering from *incapacity*; and

(iii) is determined by the *trustee company* to be suffering from *total incapacity* or *partial incapacity*; and

(iv) *retires* or ceases one or more *eligible employments* on the grounds of *total incapacity* or *partial incapacity*, as the case may be and as determined by the *trustee company*, before *normal retirement age*, and in a case of *total incapacity*, without continuing in any other *eligible employment*; and

(v) applies to the *trustee company*, in a form acceptable to the *trustee company*, for benefits under this rule 10.4, unless the *trustee company* determines that the requirements of regulation 8(3) of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 are satisfied.

(c) The requirements of this paragraph (c) are that the *member*:

(i) has completed two years’ *active membership*; or

(ii) has completed two consecutive years in aggregate of *active membership* and ...; or

...”

Under the Rules “incapacity” is defined as meaning either partial or total incapacity. Partial incapacity means

“...ill health of, or injury to, a *member* or former member which does not amount to *total incapacity* and which causes the *member* or *former member* to be able for the long term to discharge the duties of neither:

(a) an office, post or employment which is currently held by the *member* as an *eligible employee* or which was held by a *member* or *former member* immediately before last ceasing to be an *eligible employee*; nor

(b) any other office, post or employment which has a scope and a nature similar to that described in paragraph (a) above of this definition, whether or not that office, post or employment is available.”

Total incapacity means:

“...ill health of, or injury to, a *member* or former member which causes the *member* or *former member* to be able for the long term to discharge the duties of neither:

(a) an office, post or employment which is currently held by the *member* as an *eligible employee* or which was held by a *member* or *former member* immediately before last ceasing to be an *eligible employee*; nor

(b) any other office, post or employment for which an employer would be likely to pay the *member* or *former member* more than a small fraction of the amount which would but for the cessation of eligible employment have been the aggregate of the salaries, or in respect of *part-time service* the full-time equivalent of the salaries, of the *member* or *former member* in respect of the *member* or *former member*’s eligible employments immediately before benefits under rule 10.4 or rule 9.5(a) first became payable to the *member* or *former member*.”

Factsheet on retirement on the grounds of permanent ill-health

The factsheet dated August 2003, states that all applications for a member to retire on the grounds of permanent ill-health or infirmity requires the approval of USS. It also says that to be eligible for retirement on these grounds, the member must:

- be under the age of 65, and
- have completed two years’ active membership in the Scheme at the proposed date of retirement, and
- be in the opinion of your employer suffering from permanent ill health or infirmity.

Material facts

1. In May 2000, Ms B commenced full-time employment with the University and joined the Scheme at the same time.
2. From November 2000, Ms B was absent from work due to illness. She returned to work on a part-time basis in May 2001.

3. In the six years up to 31 July 2007, Ms B attempted to resume her former working capacity but due to her illness she could not do so.
4. On 12 February 2007, Dr Baxter at the Occupational Health service for the University wrote to Dr Bateman, at the Oliver Zangwall Centre, saying that Ms B was considering a change of career and train to be a Public Health specialist. Dr Baxter asked Dr Bateman for a view on Ms B's neurological limitations and implications for her working in a high level career.
5. On 2 March 2007, Dr Baxter wrote to Professor G, Ms B's line manager, stating that Ms B was making good progress and by the end of March she would be able to work her full hours, as long as there was some flexibility while she continued to be investigated and treated for her chronic lower back pain.
6. In a report on Ms B, dated 30 April 2007, Dr Bateman concluded:

"In summary of the above assessments and observations, it would appear that in addition to the previous documented difficulties of PTSD, depression, chronic fatigue and vestibular dysfunction...[Ms B's] fatigue symptoms may be understood from a variety of perspectives and I would expect at least in part be amenable to further treatment that might include medical management, CBT and fatigue management training...Further work with a clinical neuropsychologist may be helpful in exploring her beliefs about her capabilities and adjustments to manage difficulties. Assessment by neuro-ophthalmology and sleep clinic may yield further insights into this somewhat complex presentation.

In light of her assessment and current circumstances, at our first appointment, we concluded that she should complete the CBT course that was already scheduled. A further course of psychological and occupational therapy may eventually be possible at the Oliver Zangwill Centre depending on staff availability and local NHS commissioning arrangements...I think that our recent research into fatigue management after brain injury is particularly relevant and support from our team to try to help her to improve her management of fatigue would appear to be worth trying...

With regard to the impact of her condition on work, it is clear that despite the catalogue of wide ranging difficulties [Ms B] has completed complex tasks consistent with intact intellectual capacity (e.g. grant submission). However her achievements have been at the expense of substantial fatigue and limited satisfaction due to the impact on her home life due to needing to rest. Her visual restrictions including nausea on simple eye movement tasks are currently a barrier to a job that requires visual scanning (eg., close visual work) and driving."

7. In a letter dated 27 May 2007, to Dr Baxter, Dr Neal, a Clinical Psychologist treating Ms B, gave a summary of the work he had done, and the outcomes. He said that he did not assume that the future for her would be problem free as she has much to adjust to. However, she seemed prepared to meet these challenges and was much better at caring for herself.
8. In July 2007, Ms B resigned from the University and started a new full-time job as a Specialist Registrar (**SpR**) in Public Health. When she left the University she was entitled to deferred benefits under the Scheme.
9. On 30 July 2007, Dr Cosgrove a specialist Occupational Physician at the NHS, wrote to Dr Baxter saying that he had seen Ms B for a pre-employment assessment as a SpR in Public Health. Dr Cosgrove asked for a short report on Ms B based on her records outlining her relevant medical history, the recommendations made and implemented in rehabilitating her work in the University. Dr Cosgrove said that he had advised that she was fit for the post, but was unfit for prolonged sitting as a result of her coccydynia, unfit nights and driving for more than 15 minutes.
10. On 21 August 2007, Dr Baxter replied to Dr Cosgrove saying that he understood Ms B had withdrawn from the course in Public Health. He said that he agreed that she was fit for the post with the proviso that Dr Cosgrove had mentioned.
11. In early 2008, following independent financial advice, Ms B contacted USS and enquired about ill health benefits. She submitted an application for the early payment of her deferred benefits on grounds of incapacity. However, due to personal issues she did not submit the application until 2009.
12. On 24 July 2008, Dr Baxter wrote to Ms B saying that USS had asked him to write to her because it had no experience of dealing with applications for early payment of deferred benefits. He said that, as he recalled, she was able to work in a research job as long as there were reasonable adjustments made. As a career move, she had applied and was successful in getting on a Public Health Career Development course, but she seemed to have withdrawn from that. He said that he was not sure as to how she would be assessed, given the complexity of her health issues, and he would be taking further advice on the matter.
13. In May 2009, Ms B was granted early payment of her deferred benefits on grounds of incapacity.
14. In June 2009, Ms B asked USS whether she could be considered for ill health retirement from active service backdated to 31 July 2007. The reason for this was because her injury was sustained when she was an active member of the Scheme, but was unaware at the time of the possibility of retiring early on the grounds of incapacity. Initially she was informed that her pension could not be backdated to July 2007.

15. An undated note of a telephone conversation shows that Ms B contacted USS again about backdating her pension and was informed that she should contact the University. She was told that it may consider an application from the University if she had been retired rather than leaving the University.
16. An email from the University, dated 11 March 2010, to their medical advisers about Ms B reads:

“The above named was employed by the University from May 2000 until July 2007 and I understand that she was seen by Occupational Health on and off for the majority of the period of her employment following a brain injury in November 2000. Ms B has been in touch with us as she is now in receipt of an ill health pension from USS, which she started to receive in May 2009, because she feels that she should have applied for early retirement on health grounds back in 2007 rather than resigning, but was not aware that this option was open to her.

USS has suggested to her that she could now make a retrospective application for early retirement on health grounds but that we would need to co-ordinate this and obtain the medical evidence to show that she was permanently incapable of undertaking any work in July 2007. I have spoken to Ms B and it seems that at the time she resigned she was not ready to accept that her condition meant that she would not be able to work again and so it may be that the option of early retirement on health grounds was mentioned to her...but she did not want to think about it rather than it not having been mentioned. Are you able to check your records to see if it would be possible to produce an Occupational Health report based on Ms B's condition as at July 2007?

I am minded to start this off as a retrospective application and once I have the other medical and managerial reports suggest that Ms B attends for an appointment with Occupational Health so that the Occupational Health report can be prepared in the light of the information you already hold and any information in the other reports and then submit the application to USS and see what they have to say.”

17. On 28 May 2010, Dr Baxter wrote to Dr Neal informing him that Ms B had made a retrospective application for her pension to be backdated to July 2007. Dr Baxter asked for a report answering the question of whether Ms B was likely to have been permanently unfit in July 2007.
18. In July 2010, Dr Baxter wrote to the University saying that Ms B's neuro-cognitive and visual problems had been well established by 2007. It may not have been fully clear at that time whether there could be any improvement with neuro-rehabilitation, but he did think that it was already evident that her neurocognitive deficits were of a profound nature as far as future work was concerned. He said that her job at the

University had been difficult for her to hold down as she was unable to work in a consistent, full-time way without becoming excessively tired. Her on-going working arrangements would have to be flexible enough to take this into account, so it was clear at that stage in 2007 that she was not able to sustain full-time employment for the foreseeable future.

19. On 13 August 2010, the University wrote to USS enclosing medical reports they had obtained for Ms B around July 2007. They said that she "...was granted early retirement on grounds of ill health in May 2009, but following discussions with USS earlier this year it came to light that an application for early retirement on health grounds may have been appropriate at the point Ms B ceased employment with the University in July 2007".
20. On 23 August 2010, USS wrote to the University saying that their medical panel had reviewed the evidence and confirmed that should an application have been made for Ms B in 2007, it would not have been successful. They added that their medical panel would have recommended that they await the treatment advised by Dr Bateman.
21. On 25 August 2010, the University wrote to Ms B enclosing a copy of USS's letter of 23 August, and saying that it was unlikely that the USS's medical panel would have approved an application made in 2007 for early retirement on health grounds.
22. Ms B complained and her complaint was dealt with by USS under the Scheme's internal dispute resolution procedures (**IDRP**) in January 2014. The decision under stage one of IDRP was not to uphold her complaint. It said that as the medical panel had decided that she did not meet the criteria for incapacity retirement on 31 July 2007, it had correctly applied the Rules that determined that when she left the Scheme she was entitled to deferred and not incapacity benefits. Her deferred benefits were brought into payment before her normal retirement age under rule 9.5, and there is no provision under this rule to enhance her pension.
23. On 29 December 2013, Dr Neal, (**Dr Neal's Opinion**) wrote to Ms B saying:
 - He did not receive a referral letter from Dr Baxter in May 2010, asking him to offer an opinion on her retrospective application. He had moved house early in May 2010, and it seems that the letter was addressed to his previous address.
 - If he had received Dr Baxter's letter he would have referred to his letter of 27 May 2007. His letter stated that while progress had been made with regard to the treatment of PTSD, she remained symptomatic and was still clearly vulnerable, and these symptoms alone would have had a negative impact on her capacity to work in May 2007.
 - Whether these symptoms in themselves would have left her in a position of total incapacity is difficult to determine. In his opinion the symptoms, linked to the brain injury she sustained in 2000, had an impact on her capacity to work.

- Neuropsychology is not his area of expertise, but on reflection given the injuries she sustained in 2000, the fact that in May 2007, she was still experiencing residual symptoms of PTSD, he has little doubt that she was indeed suffering from total incapacity in July 2007.
- With regard to her having Cognitive Behavioural Therapy (**CBT**), he does not think that such treatment after May 2007 would have changed her functional capacity for employment or altered the fact that she appeared, based on the evidence available, to be suffering from total incapacity as defined in the Rules.

24. Dr Neal's Opinion was passed on by my investigator to both the University and USS in May 2015 for their comments. Their comments are set out below.
25. As Ms B was unable to resolve her complaint with the University and USS, so she brought her complaint to me.

Summary of Ms B's position

26. The University say that as she was no longer an employee in 2009, she needed to apply direct to USS. This is in contrast to USS's telephone note that the University needed to apply to USS.
27. The University deferred all responsibility for gathering information to their Occupational Health team (**OH**). However, since OH provide a service to the University, it is reasonable to conclude that the responsibility for submitting the information to USS lies with the University.
28. It is difficult to determine who bears the duty to manage the administration of pension applications and whether this varies according to the applicant's status as a deferred, active or 'deferred requesting backdating to active' member. What is clear is that both the University and USS implicate each other as the responsible party. The University have now relinquished responsibility to OH.
29. Her retrospective application was not dealt with properly. USS failed in its duty to properly investigate her state of health at 2007, and, therefore, it has not validly exercised its discretion. Its decision to decline her retrospective application is perverse.
30. She feels aggrieved by the implicit accusation that she is attempting to inappropriately obtain funds from her pension scheme and the ongoing suspicion surrounding the bona fide sequelae of her brain haemorrhage. She is also distressed by the careless and dismissive manner in which her retrospective application and IDRP complaint have been dealt with.
31. USS had ignored Dr Neal's Opinion. The reason given for rejecting her retrospective application was that there were outstanding treatments. The opinion that further

treatment would not change her ability to perform her role would have been available in 2007.

32. USS states that Dr Neal makes no reference to permanent health issues or symptoms of brain injury in his 2007 letter. This is incorrect. He refers to her need to adjust to her neuropsychological limitations and comments that she has much to adjust to.
33. USS says that it applied the Rules correctly and that IDRP is not perverse. However, there is no new evidence in support of this conclusion. Moreover, it has overlooked, ignored or attempted to conceal, the relevant evidence by selectively editing various quotes. Irrelevant evidence has been used as a basis for its decision.
34. USS has been inconsistent regarding the timing of medical opinion. It has used medical evidence from 2009, as a basis for its discretion despite insisting that it is inappropriate to take into account medical evidence post 2007.
35. USS ignored medical opinion it deemed irrelevant, yet Dr Cosgrove's opinion is selected preferentially. The definition of medical opinion states that USS determines whether or not the medical advisor is suitably qualified. Dr Cosgrove was 'unqualified' in that he lacked knowledge of her medical history when he gave his opinion.
36. The absence of an opinion regarding incapacity from Dr Neal's 2007 letter is not synonymous with an opinion that she was not incapacitated. The letter of 2007 was about her care and not her incapacity.
37. USS has placed a great deal of weight on the need for an opinion from the University as to whether she was suffering from incapacity in 2007, arguing that she does not meet the criteria because it has not received this opinion. If USS did not receive the information it required from the University, it has a responsibility to ask for it and not dismiss the application on grounds of insufficient information.
38. In 2010, USS provided the University with medical form ME5(A) to complete which stated: "USS requests that you do not venture an opinion on whether the member fulfils criteria for incapacity retirement; this is a decision for the trustee company". Therefore, the University's medical practitioner is instructed not to offer an opinion regarding incapacity. There is no record of what USS requested from the University in terms of opinion regarding incapacity, thus it is unclear on whom the burden of proof is being placed. However, since the discretionary power resides ultimately with USS, it is reasonable to conclude that it had a duty to obtain the information it requires in order to be able to exercise that power.
39. There is evidence of administration inconsistency. In 2009, Dr Baxter completed part III of the application form for deferred benefits on behalf of the University. Based on the contents of this form USS made the decision that she was suffering from Total Incapacity. Nowhere on the form did USS ask the University to provide an opinion

regarding her eligibility for incapacity retirement. USS was satisfied with the information provided and formed its own opinion.

40. With regard to Dr Neal's Opinion, she says:

- he provided an opinion that she was suffering from total incapacity in July 2007;
- Dr Baxter had requested Dr Neal's opinion, because he regarded the latter to be that appropriate professional from whom to seek an expert opinion;
- USS selectively accepts Dr Neal's Opinion by, on the one hand, dismissing his opinion regarding incapacity on grounds of alleged lack of expertise and, on the other hand, valuing his opinion in his letter of 2007;
- it is incorrect to state that Dr Neal's Opinion differed substantially from the opinion he gave in 2007, since in 2007 he does not provide an opinion regarding her fitness for work;
- USS ignores Dr Neal's Opinion regarding the likely outcome of future treatment.

Summary of the University's position

41. Ms B has pointed out that when she asked for an application for early retirement on health grounds to be considered she was referred back to USS. This is correct as she was no longer employed by the University when she made the initial application in 2009, and so the request needed to be made direct to USS.
42. The responsibility for gathering the medical evidence to be submitted in 2010, with Ms B's retrospective application, lies with their OH team. USS does not obtain the medical evidence as it is not a medical expert and for reasons of confidentiality.

Summary of USS's position

43. Whilst Ms B would ordinarily be time-barred from bringing her complaint to the Pensions Ombudsman, it understands that the Pensions Ombudsman has exercised discretion to review the complaint based on her inability to bring the complaint sooner due to her ill health. The decision to allow the complaint to be heard outside the time limit, does not take into account that she ought reasonably to have known of the ability to apply for partial or total incapacity from the time of she left the University in 2007. The time limit for bringing the complaint should have started from August 2007, and in any event from early 2009 when she knew her options. It has been decided previously by the Pensions Ombudsman that where there is a comprehensive range of literature and information on a website accessible to any member, it is reasonable to determine that a member ought reasonably to know their options on retirement. Consequently, the Pensions Ombudsman is asked to reconsider the jurisdiction issue in this matter.

44. Ms B did not leave the employment of the University to retire or due to ill-health, but instead left to pursue a new career. In May 2007, it received no notice that she had left due to incapacity.
45. Medical evidence immediately before and after she left the University concluded that she was fit to pursue a new career.
46. When she left the University she became a deferred member and it was not until May 2009, that she applied for total incapacity retirement from deferred status, and was successful.
47. She cannot be considered to have satisfied the requirements of incapacity retirement when she left service as she did not meet the following requirements in the Rules:
 - the employer did not opine that the member was suffering from incapacity;
 - it did not determine that she was suffering from total or partial incapacity;
 - she did not leave due to incapacity, but to pursue a different position with another employer;
 - she did not apply in the form prescribed by it.
48. It could not reasonably have done anything different in relation to Ms B on the following basis:
 - she had left employment of the University to pursue a new career, in May 2007, and it had received no notice that she had left due to incapacity;
 - the University did not determine that she left due to incapacity;
 - she, therefore, became a deferred member;
 - it was not until May 2009, that she applied for total incapacity retirement from deferred status, and this was successful;
 - when she applied in August 2010, for a retrospective application for total incapacity from active membership, it confirmed that:
 - the Rules did not allow retrospective application from deferred status;
 - there was no rule which allowed a retrospective application: and
 - even it had considered the application at the date of leaving service, based on the evidence, the application would not be successful.
49. There is insufficient evidence available to show that she would have been unable to continue her role with the University.
50. It is not now relevant, or appropriate, to seek further medical evidence to determine whether or not she was suffering from incapacity in July 2007.
51. Its medical panel confirmed that there was a clear lack of evidence to support her application for ill health from active status.
52. There are no reasonable grounds why it should question the medical panel's decision.

53. The University has not confirmed that she was suffering from incapacity, and to the contrary, left the decision for it to determine.

54. The Finance Act 2004 provides that:

“No payment of pension may be made before the day on which the member reaches normal minimum pension age, unless the ill-health condition was met immediately before the member became entitled to a pension under the pension scheme.

1 For the purposes of this Part the ill-health condition is met if:

(a) the scheme administrator had received evidence from a registered medical practitioner that the member is (and will continue to be) incapable of carrying on the member’s occupation because of physical or mental impairment, and...”

As administrator of the Scheme, it must be in a position to be able to determine whether or not the evidence received by it satisfies the test for incapacity retirement as set out in the Finance Act 2004.

55. If the Rules required that it could only determine total or partial incapacity, it may be required to pay an unauthorised payment if the evidence it receives from the medical practitioner is not sufficient to meet the Finance Act 2004 tests.

56. The Rules do not allow a retrospective application once a member becomes a deferred member; there is no rule which allows a retrospective application; and even if it had considered the application at the date of leaving service, based on the evidence presented, the application would not have been successful.

57. With regards to Dr Neal’s Opinion, it says:

- it did have a copy of the letter when making its decision under IDRP;
- in his 2007 letter Dr Neal does not mention that Ms B has any permanent health issues nor that she is suffering from total incapacity nor that she cannot work;
- Dr Neal states it is difficult to determine whether Ms B’s symptoms relating to her PTSD left her in a position of total incapacity;
- Dr Neal suggests that the greater impact on Ms B’s capacity to work are the symptoms linked to her brain injury, however there is no reference to this in his 2007 letter; and
- Dr Neal is a Clinical Psychologist and therefore admits that he does not have the expertise to comment on Ms B’s brain injury.

Conclusions

58. USS has asked for Ms B's complaint to be reconsidered with regard to the three year time limit, as set out under Regulation 5 of The Personal and Occupational Pension Schemes (Pension Ombudsman) Regulations 1996 (SI 1996 No. 2475). It says that the time limit should have started in 2007, or in 2009 at the latest, when she knew her options.
59. I do not need to consider whether or not the time limit for Ms B's complaint started in 2007. The reason for this is because both the University and USS had agreed to consider her application as a retrospective application made in 2009/2010. In addition, USS's reason for rejecting her application is not because it had not been made in 2007 but because there was an untried treatment, as recommended by Dr Bateman, and which she had not undergone.
60. Ms B was not informed of USS's decision that her retrospective application was unsuccessful until August 2010. Her complaint application was received by us in June 2014. Given her state of health, I can see no good reason to change the initial decision which was to exercise discretion and accept her complaint for investigation.
61. In cases such as this, my role is not to agree or disagree with the decision-maker's decision or the prognosis of the medical adviser. My role is to consider whether the correct process has been followed. There are some well established principles which decision makers are expected to follow. Briefly they must:
- take into account all relevant matters and no irrelevant ones;
 - ask themselves the correct question;
 - direct themselves correctly in law (in particular, they must adopt a correct construction of the Rules); and
 - not arrive at a perverse decision.
62. Rule 10.4 of the Rules which covers the provisions of enhanced (total incapacity) and non-enhanced (partial incapacity) incapacity pensions says that it applies to any member who satisfies all of the criteria below:
- have completed two or more years active membership of the Scheme;
 - is in the opinion of the University suffering from incapacity (which is defined as either total or partial incapacity);
 - is determined by USS to be suffering from either total or partial incapacity;
 - retires or ceases employment on grounds of total or partial incapacity, as determined by USS, before normal retirement age, and in the case of total incapacity, without continuing in any other eligible employment; and

- applies to USS, in a form acceptable to it, for benefits under rule 10.4, unless USS determined that the requirements of regulation 8(3) of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 are satisfied.
63. Under the Rules, the University first decides whether or not an active member is incapacitated. If the member is, in the opinion of the University, incapacitated, the application is sent to USS. USS decides whether the member is either totally or partially incapacitated, as defined in the Rules. Provided that the member is either totally or partially incapacitated and their employment ceases before normal retirement age, USS arranges for the appropriate benefits to be paid from the Scheme. Therefore, the decision as to whether a member is incapacitated is made by the University and USS only considers whether the member is either totally or partially incapacitated.
64. I cannot agree that if USS only determines whether a member was totally or partially incapacitated, it may be required to pay an unauthorised payment. There is nothing in the Finance Act 2004 which states that the scheme administrator has to make the decision that the member meets the criteria for ill health retirement; it merely states that has to receive evidence of this from a registered medical practitioner. That evidence can come from a registered medical practitioner appointed by the employer, which in this case will be the University.
65. The Rules clearly state, in rule 10.4(b)(ii), that the member has, in the opinion of the employer, to be suffering from incapacity. The Rules also state, in rule 10.4(b)(iii), that USS determine whether the member is suffering from total or partial incapacity. If, as USS has suggested, the Rules required it to determine whether a member was incapacitated, they would have said so.
66. In addition, if the Rules intended that USS decide whether a member satisfies the criteria for incapacity retirement, then there would be little point in requiring the University to also decide on this matter. There would need to be provisions in the Rules for deciding who makes the final decision.
67. If Ms B had not applied in the form prescribed, why did USS not tell her so before reaching their decision? There was nothing in the decision given by USS to say that her application had failed because she had not applied in the form prescribed.
68. The reason given by USS in their letter of 22 August 2010, for rejecting Ms B's retrospective application was not because there are no provisions for a retrospective application in the Rules, but because if the application had been made in 2007 it would have been unsuccessful due to untried treatments. The Rules do not specifically state that retrospective applications cannot be made – they are silent on this matter.
69. There is no dispute that the reason Ms B left the service of the University in May 2007, was to pursue a new career and when she left she became a deferred

member. However, when she enquired with USS in 2009, about backdating her pension she was informed that it may consider an application from the University if she had retired rather than left service. In addition, in their email of 11 March 2010, to their medical advisers, the University said that USS had suggested that Ms B could make a retrospective application for early retirement on health grounds. It would, therefore, appear that USS had agreed that a retrospective application would be acceptable provided Ms B had retired and not left service in 2007.

70. The August 2003 factsheet states that all applications for retirement on grounds of permanent ill-health requires the approval of USS. However, this is not what the Rules say and the factsheet cannot over-ride them.
71. Ms B had completed more than two years' service as a member of the Scheme when she left the University. In 2009, the University obtained the relevant medical reports and sent these to USS for consideration. In my view, the University should have made a decision whether they considered her to be incapacitated in 2007 and if they considered that she was not incapacitated, they should have told her so and not passed the matter on to USS to decide. The University's failure to make that decision is maladministration.
72. USS says that the University did not confirm that she was suffering from incapacity but left the decision for it to determine. I would agree that the University should have first decided that she was incapacitated and confirmed this to USS. However, USS could and should have obtained the University's confirmation on this matter before proceeding, which it did not. USS's failure to do so is maladministration.
73. USS's decision to refuse to backdate Ms B's ill health benefits to 2007 was that there was an untried treatment. The question USS had to ask itself is whether she was either totally or partially incapacitated and not whether her ill health benefits should be backdated to 2007.
74. With regard to untried treatment, the question to be answered here is whether, on the balance of probability, Ms B's health would improve if she had undergone this treatment. If it can be said that her health might improve, as a result of the treatment, so that she could potentially resume doing her job, then the view might well be taken that the definitions of total or partial incapacity under the Rules were not satisfied.
75. Dr Bateman in his report dated 30 April 2007, mentions a number of treatments such as medical management, CBT and fatigue management training. However, he does not say that these treatments would, if tried, improve Ms B's health so that she could potentially resume her job. So a decision that she did not meet the criteria for an ill health pension, because there were treatments which she had not tried, would, in my view, have been flawed.

76. For the reasons given above, I find that there has been maladministration on the part of both the University and USS and uphold the complaint against them.

Directions

77. Within 21 days of the date of this determination, the University will decide, based on the medical evidence and advice they have obtained, whether they consider Ms B to have been incapacitated when she left their employment in 2007, and inform both her and USS of this decision.
78. If the University's decision is that Ms B was incapacitated in 2007, USS will within 21 days decide, based on the medical evidence presented by the University, whether she was either totally or partially incapacitated. The benefits payable will be backdated to July 2007, when she left the University, and interest will be added calculated on the bank base rate from that date to the date payment is made.
79. I recognise that Ms B has suffered non-financial injustice in the form of significant distress and inconvenience as a consequence of the maladministration I have identified above. Therefore, within 21 days of the date of this determination, both the University and USS will each pay her £500.

Anthony Arter

Pensions Ombudsman
16 September 2015