**PO-7946**

# Ombudsman's Determination

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| **Applicant** | Mrs E |
| **Scheme** | Universities Superannuation Scheme (**USS**) |
| **Respondents** | The Society of College, National and Universities Libraries (**SCONUL**)<br><br>Universities Superannuation Scheme Limited (**USS Ltd**) |

## Complaint Summary

1. Mrs E says that she was made redundant by SCONUL on 16 November 2012. She alleges that SCONUL subsequently incorrectly informed USS Ltd that she had left by mutual agreement and was therefore not entitled to an unreduced immediate early retirement pension from the USS.

2. She also complains that USS Ltd provided her with insufficient and misleading information about her USS pension rights available on redundancy which resulted in her failure to apply for an unreduced pension from the USS in November 2012.

3. In order to put matters right, Mrs E would like:

   a) USS Ltd to pay her an unreduced early retirement pension from 17 November 2012; and
   b) SCONUL and USS Ltd to award her suitable compensation in recognition of the considerable distress and inconvenience which she has suffered in dealing with this matter.

## Summary of the Ombudsman's Determination and reasons

4. The complaint should not be upheld against SCONUL and USS Ltd because having carefully considered all the available evidence, I consider that Mrs E was not made redundant by SCONUL and she was therefore not entitled to an unreduced early retirement pension from the USS.

## Detailed Determination

### Material facts

5. Rule 11 of the USS Trust Deed and Rules (**USS Rules**) concerns "Early Retirement at the Instance of the Employer". It provides that in the event of a member who has at least five years' pensionable service leaving the USS after attaining the minimum pension age 55 but before his/her Normal Retirement Date (**NRD**), he/she may elect to receive his/her full benefit unreduced by the application of an early retirement factor (**ERF**) if:

   a) the member's employment was terminated by reason of redundancy (Rule 11.2.1); or
   b) the member's employment was terminated in the interests of the efficient exercise of the employer's functions (unless the employer dismissed the member for good cause other than by reason of physical or mental incapacity of the member or redundancy) and the employer gives its consent to payment of the benefits (Rule 11.2.2).

   Where the benefits are paid unreduced, the member's employer has to pay a charge (**ERFC**) to meet the cost of USS not applying an ERF reduction.

6. To be eligible for the above benefit, the circumstances of the member's termination of employment must therefore satisfy the definition of "redundancy" under the USS Rules, i.e.

   > "…cessation of eligible employment attributable wholly or mainly to:
   >
   > (a) the employer ceasing, or intending to cease, to carry on the activity for the purposes of which the member was employed, or ceasing, or intending to cease, to carry on that activity in the place in which the member worked; or
   > (b) the requirements of that activity for employees of the employer to carry out work of a particular kind, or for employees of the employer to carry out work of a particular kind in that place ceasing or diminishing, or being expected to cease or diminish..."

7. Mrs E's date of birth is 14 March 1957.

8. Mrs E joined the USS in August 1985 whilst employed by the University of London (**the University**). After a short period of absence, she resumed membership of the USS when she began working for SCONUL in 1992 as Assistant Secretary. The University remained her employer for the purposes of the USS.

9. Mrs E had a poor professional working relationship with her manager Mrs R who joined SCONUL as Executive Director in 2010.

10. In July 2011 and again in April 2012, Mrs E asked SCONUL's Human Resources adviser (**HR**), to attend informal meetings with her and Mrs R because she was unhappy with the way Mrs R had been treating her at work, which she felt on occasion amounted to "bullying and harassment". Mrs R denied these allegations and countered that she sometimes found Mrs E's behaviour to be inappropriate.

11. Mrs E went on long term sick leave on 27 April 2012. SCONUL subsequently investigated the difficulties between her and Mrs R and prepared an investigation report.

12. On 1 August 2012, HR met with Mrs E to discuss the conclusions and recommendations of the report. During the meeting, HR suggested to Mrs E, in the most general of terms, the possibility of a "without prejudice" conversation and an "amicable separation" if she felt unable to return to work because of the difficulties. No specific proposal was put to Mrs E and it was made clear that her return to work was preferable.

13. Mrs E did not take up the offer and went back to work in September 2012, on a phased return basis after accepting the "return to work plan".

14. In her e-mails, dated 11 and 16 October 2012, Mrs E informed HR that she was having problems again dealing with Mrs R. She also complained that the training, coaching, team building and mentoring opportunities previously discussed to support her return to work, had yet to be implemented in a staged manner.

15. HR replied, in an e-mail dated 17 October 2012, as follows:

> "...I am sorry that you still feel that Mrs R is treating you in an inappropriate manner and that you do not feel supported. It is our intention to make sure that you do feel supported during your phased return and, whilst arrangements have not been put in place very swiftly, I hope that the coaching arrangements will provide you with very specific and direct support.
>
> I do not intend responding to the details of your e-mail, as the issues are very similar to many of those addressed…in the investigation... We could, if you wish, arrange a three way meeting with you, me, and Mrs R, to see if we can help move forward with these issues. Please let me know and I will then discuss it with Mrs R.
>
> You mention…that you feel you need counselling urgently. That is not something we have discussed before…Is that something that your GP has recommended…It was not something that was highlighted in the occupational health report earlier this year so I am unsure whether that is something you would look to SCONUL to support you with – in which case I will look into it for you.

> Also you did not say whether you agreed with my proposed extension to your phased return – please could you clarify?"

16. On 19 October 2012, SCONUL sent Mrs E an e-mail detailing a possible restructure at the organisation. This e-mail said that:

> "At yesterday's Board meeting, Mrs R put forward a paper for approval setting out the basis for a new structure. The proposal is to create a structure which will be aligned to the strategy within the current budget and with no overall reduction in staff numbers.
>
> The main differences will be in the focus of the new roles within the structure and a change in the balance between the work carried out internally as opposed to being outsourced.
>
> The Board gave its approval to this proposal and over the coming month, Mrs R supported by [HR]… will be putting together the details of the new structure in terms of job descriptions…Once that worked has been completed, this will be shared with you and Ms N and there will be a period of consultation with both before final decisions are made. During the consultation period you will be fully able to engage with the process and ask any questions and make any suggestions you may have.
>
> At this stage, we are not in a position to give you any more detail on what new posts there would be under the new structure and the implications for your personally."

17. On 31 October 2012, at Mrs E's request, , her legal representative, Mr Harding, contacted HR. Following a telephone discussion, Mr Harding sent HR an e-mail which said that:

> "…Mrs E as you know feels aggrieved as to the way she has been treated by Mrs R since her appointment.
>
> She…would want any settlement package to reflect her last few years experiences in some way as consideration of her not bringing an employment tribunal claim were the process to make her redundant and her to still feel aggrieved.
>
> Her instructions to me is that she would accept a package around the £40,000 mark…"

18. Between 31 October and 12 November 2012, Mr Harding and HR negotiated and agreed the severance terms as set out in the Compromise Agreement, between SCONUL and Mrs E, dated 30 November 2012.

19. According to the Compromise Agreement:

    - Mrs E's employment with SCONUL terminated on 16 November 2012;
    - she received a total severance payment of £45,324.84 (gross) including £30,000 which was non-taxable comprising of a statutory redundancy payment of £20,848 and an ex gratia payment of £9,152; and
    - there were deductions for overpaid salary, tax and National Insurance contributions from this gross payment.

    Mrs E received a net severance payment of £39,486.24.

20. The following announcements were made by SCONUL about Mrs E to her colleagues after the Compromise Agreement was finalised:

    > "We say goodbye this month to Mrs E…whose dedication and commitment over the years have been greatly appreciated. I am sure that those who know Mrs E will join the Executive Board in wishing her all the best for the future."
    >
    > "After 20 years working for SCONUL, Mrs E has decided to move on to pastures new. We wish her well for the future."

21. The University subsequently informed USS Ltd that Mrs E's reason for leaving SCONUL was dismissal and SCONUL did not support payment of unreduced early retirement benefits for her.

22. USS Ltd sent Mrs E a benefit statement in January 2013 showing that her whole deferred pension would only be payable unreduced from her 65th birthday in March 2022.

23. On 11 January 2013, Mrs E decided to apply for an unreduced pension payable from 17 November 2012 because she had received with the benefit statement a USS booklet entitled "Leaving the scheme: A guide to your options, Final Salary Section" which showed that:

    > "The Trustee Company must pay your benefits immediately on request, if after having been in the USS for at least 5 years, you left eligible employment at age 55 (50 in some cases) or over and were made redundant or were dismissed at the request of your employer in circumstances in which there was no good cause to do so."

24. On 17 January 2013, Mr Harding e-mailed HR as follows:

    > "Mrs E is having a discussion about her pension with Senate House and can take advantage of certain pension benefits if she can confirm that she was made redundant. Would you be able to confirm that the reason for the compromise agreement (reflected with the enhanced

redundancy payment) was redundancy? Then she can take advantage of this?"

25. HR replied:

"I am sorry but I cannot confirm that the reason for Mrs E's compromise agreement was redundancy. She was not made redundant. If you recall, you initiated this process by calling me on 31 October 2012 and explaining that Mrs E wished to leave. You set out a suggested framework for a package which included a sum that you called a redundancy payment and we were happy to progress our discussions with you using that sort of short hand for payments but that does not mean that Mrs E was redundant."

26. USS Ltd subsequently informed Mrs E, in March 2013, that there was a mistake on the benefit statement and she would be entitled to unreduced pension from age 60 for that part attributable to her service prior to 1 October 2011. The remaining part of her pension would be subject to an ERF if taken before age 65.

27. USS Ltd explained that the ERF applying to her benefits accrued after 1 October 2011, was introduced as part of the USS Rules changes on that date and did not affect "exempt members", i.e. those who were age 55 or over on 1 October 2011. Mrs E was not an "exempt member" because she was 54 on 1 October 2011.

28. USS Ltd confirmed to Mrs E, in June 2013, that the reason for her leaving SCONUL was dismissal.

29. USS Ltd informed Mrs E, in July 2013, that it required the University's consent to pay her retirement benefits early on an unreduced basis. Despite considering this to be unnecessary because of what was shown in the USS booklet, Mrs E gave USS Ltd her permission to contact the University.

30. The University confirmed to USS Ltd that Mrs E's reason for leaving was dismissal. SCONUL's solicitors subsequently notified USS Ltd, in September 2013, that Mrs E had left "on private terms which did not include payment of the ERFC".

31. USS Ltd informed Mrs E accordingly and suggested that if she had any queries, she should contact SCONUL directly because it was an employment and not a pension issue.

32. In January 2014, USS Ltd explained to Mrs E that:

a) as SCONUL did not give its consent to pay her unreduced benefits from the USS, they could only be paid if she was made redundant; and
b) the available evidence was inadequate to demonstrate this but it would be willing to make further enquiries if she could supply evidence substantiating her redundancy claim.

**Summary of SCONUL's Position**

33. Mrs E's termination of employment was mutually agreed following an approach on her instructions with a specific proposal for a managed exit from Mr Harding on 31 October 2012.

34. Mrs E had signed the Compromise Agreement in order to avoid a restructuring process and a return to a work situation which had not been easy in the past. Her actual reason for leaving, i.e. mutual agreement, could not be shown on the Compromise Agreement because the label of "Enhanced Redundancy Pay" had been used in order to maximise the tax-free slice of her severance payment of £30,000. The "Pay in lieu of Notice", "Annual Leave" elements were correctly subject to tax and National Insurance contributions. There had to be a clear apportionment of the constituent parts of the severance payment for tax reasons. The term "redundancy" was not used as the reason for termination of Mrs E's employment.

35. It went along with Mr H's initiative to include a redundancy payment in the severance package without challenge because it was happy to support a process that would allow Mrs E a dignified exit without having to go through the restructure process and a return to work in whatever eventual capacity given that her relationship with Mrs R appeared unlikely to improve.

36. Commonly when negotiating settlements for any reasons, the starting point is to consider what somebody would receive if they were redundant on the basis of it feels fair to do so.

37. It had intended to try matching existing staff to new posts. However, it was unable to explore this with Mrs E because she chose to initiate the "without prejudice" discussions shortly after receiving notification of the restructure process.

38. It is clear from the statutory definition of "redundancy" in section 139 of the Employment Rights Act 1996 and also its definition in the USS Rules that Mrs E was not dismissed from her employment on the grounds of redundancy. The termination of her employment was not attributed wholly or mainly to the circumstances set out at (a) or (b) in paragraph 6 above. Mrs E consequently never enjoyed the legal right to receive a redundancy payment under section 135 of the Employment Rights Act 1996.

39. As a matter of fact and of law, reorganisations do not necessarily give rise to redundancy situations. The proposal in this case involved an increase in the actual headcount because functions which had been outsourced were brought back in house.

40. The reorganisation was not fully implemented until 14 January 2013. At the time the Compromise Agreement was being negotiated and agreed in November

2012, no decisions had yet been made about the outcome of the reorganisation and no redundancies had been proposed.

41. In fact, no redundancies were implemented as part of the reorganisation process.

42. There had not been any diminution in the requirement for employees to carry out the type of work undertaken by Mrs E. She would have undertaken her roles in events management and maintaining the accounts in the usual way but for her sickness absence. It recruited an agency accountant on a temporary basis simply to provide cover during Mrs E's sickness absence to ensure that this key role (which has never been outsourced) was carried out.

43. The impetus for Mr H's approach to SCONUL on 31 October 2012, would logically appear to be the fact that: (a) Mrs E had a difficult relationship with Mrs R resulting in her taking significant amounts of sick leave and the preparation of the investigation report; and (b) Mrs E had incorrectly assumed that the proposed reorganisation would inevitably lead to her redundancy.

44. Mrs R's February 2011 proposal document (see paragraph 63), was confidential and never presented to the SCONUL Board for consideration. Mrs E should not have had access to this document which, in any case, by late 2012 became obsolete.

45. Mrs E has negatively interpreted matters relating to her employment with SCONUL Although it accepts that there had been a poor working relationship between Mrs E and Mrs R, it took appropriate action to try resolve the issues between them. At all times HR's interventions as an external HR consultant with Mrs E and Mrs R were undertaken in good faith and intended to improve communication, understanding and professional relationship between the two. There was no "collusion" between HR and Mrs R in the process which applied equally to her and Mrs E.

46. It was very cautious about Mrs E's return to work given her extended sick leave on stress related grounds. It consequently proposed and agreed a phased return to work plan with her. There was a plain desire on its part to manage the process professionally and carefully. It also proposed professional coaching for both Mrs E and Mrs R.

47. The investigation report was prepared in good faith only after all relevant evidence had been considered carefully. There were subsequently separate meetings held with Mrs E and Mrs R about it in August 2012. During the meeting with Mrs E, there was some discussion about her accounts function but this was only in relation to doing things differently and more efficiently with appropriate training if necessary.

48. It was committed to implementing the recommendations set out in the investigation report and had started the process.

49. Mrs E's job duties had not been outsourced and she had not been constructively dismissed or "made redundant constructively". Mrs E had no entitlement to any additional payments from SCONUL and effectively been contracted out of her statutory employment rights when she entered into a Compromise Agreement.

50. As envisaged in the employment tribunal case, ***Birch and Humber v University of Liverpool*** [1985] IRLR 165 (**Birch**), (please see paragraph 87 below for further details), Mrs E's employment was terminated by mutual agreement. There was no dismissal or redundancy situation.

51. The suggestion that the events of this complaint should be considered "cumulatively" is wrong and would not in any case lead to a different outcome.

52. In August 2012, HR did no more than raise the possibility of a severance package. Matters would not have progressed had it not been for Mr H's substantive approach in October 2012.

53. It refutes Mrs E's claim that when she returned to work she had "no functions". The requirement for employees to carry duties of Mrs E's role had not ceased or diminished. As she was returning on a gradual phased basis, it should be expected to take some time for Mrs E to resume all her duties.

54. The e-mail sent on 19 October 2012, to all individuals including Mrs E who might have been affected by possible restructure clearly did not say that there would be no role for Mrs E in the new structure. Her role would have been determined as part of a consultation process which became unnecessary following Mr Harding's approach.

**Summary of the Position of USS Ltd**

55. It is required to administer the USS in accordance with the USS Rules taking into account the facts relevant to Mrs E. The main issue relates to the termination of Mrs E's employment and whether she was made redundant by SCONUL for the purposes of the USS and thereby eligible to receive an immediate unreduced pension.

56. There were competing arguments as to whether there was a redundancy situation. It had to make a decision after carrying out appropriate enquiries and was unable to conclude that the cessation of Mrs E's employment was redundancy because, on the balance of probabilities, she had entered into a mutual arrangement to leave service. The definition of redundancy in the USS Rules had therefore not been satisfied.

57. Although it has a duty to act in the best interests of the USS members, this does not mean that it had to accept Mrs E's statements in preference to what SCONUL said was the reason for her leaving.

58. It did not fail to provide Mrs E with information relating to her pension rights on redundancy. If she had wanted this information prior to leaving service, she could have obtained it either by request or directly from USS website.

59. The increase to a minimum pension age was introduced by the Finance Act 2004 with effect from 6 April 2006. However, in certain situations members may continue to have an earlier "Protected Pension Age" (**PPA**) from which they can receive benefits. Payment of unreduced benefits in the event of redundancy is one such exception and these benefits continue to be payable on or after age 50 subject to satisfaction of certain conditions.

60. Mrs E has not been adversely affected by any change to the USS Rules relating either to her PPA or redundancy terms.

61. Completion of a compromise agreement introduces a new intervening and separate reason for the termination of the employment relationship. If the relevant agreement expressly states that the termination of employment has not arisen as a result of redundancy and the parties to the agreement acknowledge and agree, this would determine the cause of the termination.

**Summary of Mrs E's Position**

62. She clearly met the criteria for redundancy as defined in the USS Rules. It was a matter of fact that two of her major roles, accounts (40% of her job) and events management (33% of her job) were no longer carried out by SCONUL employees. It is possible for there to be a restructuring proposal and for one particular role to become redundant which is what has happened here. The question of whether there was a redundancy in the statutory sense is irrelevant.

63. The document "Making the most of our resources" produced by Mrs R in February 2011 proposed a complete restructuring of SCONUL's functions and recommended making her post and most of her functions redundant. Under the heading "Risk Factors" it stated that (a) current roles did not map neatly onto the new roles and it could not be taken as given that current staff would be suitable candidates for the new posts (b) there was consequently potential for redundancy and a risk of losing "both staff", i.e. Mrs E and Ms N. Subsequent events show that these proposals were carried out in full and a substantial part of her functions was outsourced without her agreement.

64. If SCONUL had genuinely intended to retain her in its employment, the remedial measures recommended in the investigation report should have been implemented and there should have been attempts to rein in the antagonistic behaviour of Mrs R on her return to work in September 2012.

65. By the time she received the announcement in October 2012, about the restructure at SCONUL when she was on sick leave again, she was already traumatised by its treatment of her and had lost all trust in its ability to act fairly.

She was consequently left with no choice but to accept the offer made by HR on 1 August 2012 of "without prejudice discussions".

66. The severance negotiations were conducted by experienced HR professionals with the assistance of a specialist employment lawyer. It is unlikely that they would have used the term "redundancy" without understanding the implications.

67. She has always believed that she was made redundant because "redundancy" was mentioned in all relevant correspondence to her such as SCONUL's letter dated 4 December 2012, and the University's payslip dated 20 December 2012, in addition to the Compromise Agreement.

68. There was no intention on SCONUL's part to try to match her to one of the new posts that she would have been capable of fulfilling and it was clear that she had no future at SCONUL.

69. Termination of her contract was not either by mutual agreement or at her instigation. SCONUL had coerced her to resign. She had therefore effectively been constructively dismissed by SCONUL.

70. Mrs E also says that:

> "In October 2010 Ms R threatened me with dismissal. She followed this up with a confidential "at risk paper" in February 2011, in which she pre-selected my position for elimination…This proposal remained so in the September 2012 paper. On 4th October 2011, the Board approved to permanently outsource events management…During this time I was subjected to documented false allegations and numerous verbal assaults…When I was made ill by the persistent aggravation and an attempt at constructive dismissal at the "clear the air meeting"….an agency accountant was taken on within 3 working days. The detailed evidence of the aggravation that I experienced and the good work I had consistently achieved in my role was suppressed from the investigation report. "Changes" were discussed at the strategy away day by the SCONUL Board. Based on the investigation report which was both deficient and contained false allegations, I was invited to consider giving up my statutory employment rights in exchange for possible monetary consideration based specifically on the "changes" expected of me. In response, I disagreed with the allegations…but I accepted the specific "recommendations" as outlined in the investigation report. After my return to work and by mid-October 2012 I had no functions left. When I complained, I was asked to take a holiday. In fact, the invitation to discuss was just a holding tactic since it was overtaken by the SCONUL Board's approval of restructuring next day: Ms R had already 'confidentially" presented her paper in early September 2012…before I returned to work that reinforced SCONUL's commitment to outsource accounts. On 1

August 2012, HR informed me that “accounts work may be something that could change quite radically quite quickly”. Clearly a decision had been made not to return the accounts to me as proposed by Ms R in February 2011. My email exchange of 11th-17th October 2012 with SCONUL also shows that…agency accountant was to stay in place and she was to be a part of the new structure…Critically Mr Etherington’s last statement on 17 October 2012 demanded that I “agree with [his] proposed extension to [my] phased return”. There is no such agreement from me. By contrast in his return to work plan…I was told that “After two weeks you can start to pick up the Board associated work (the next Board meeting is on 18th October).” At this moment I remained with no functions and my functions remained mainly outsourced and re-allocated…

The restructuring email…that followed the deletion of my contract of employment declared that “At yesterday’s Board meeting, Ms R put forward a paper for approval setting out the basis for a new structure…” (a clear declaration that the old structure was deleted with the agency accountant and Ms N in situ). “The basis for a [new] structure…” was to be “…within the current budget…” as well as to “outsource accounts” and there was also no reference in Ms R’s September 2012 paper, that was approved by the Board, to returning events management to me. Given Ms R’s threat in October 2010 and the concurrent events of my employment history, the implications for me would not be in doubt to any court: that SCONUL had in fact “reduced, or expected a reduction in, the type of work for which I was employed”. This is not a mutual termination under any circumstances: I did not one day decide to walk away from my job. In fact, I had no functions left, the old structure was deleted and I was paid for “distressed caused” in the without prejudice discussions.

There is no other written agreement replacing my contract of employment other than that completed on the 30th November 2012 that supersedes all else.

When the SCONUL Board initiated the…restructuring/ “redundancy process” in October 2012, in taking up SCONUL’s “idea”, with my legal advice,” SCONUL offered me “enhanced redundancy pay without statutory cap”. My written contractual terms with SCONUL and the University (based on the without prejudice discussions, the completed compromise agreement and the payslip) state that I am entitled to an unreduced “accrued” pension under Rule 11 without my employer’s consent. SCONUL have since changed their mind that I was not to be dismissed by the reason of redundancy, they have clearly misrepresented the final terms of the compromise agreement given the employment facts.

…my accrued pension rights remain inalienable and a court cannot restrain me from accessing these pension rights (Pensions Act 1995 s91).

> These accrued pension rights have not been compromised in any way by the terms of the Compromise Agreement or the final written agreement that supersedes all else."

71. She has consequently demonstrated beyond any reasonable doubt that her employment was terminated wholly or mainly because of a diminution in SCONUL's requirements for employees to do work of the kind that she was employed to do.

72. USS Ltd failed to take reasonable care in providing her with information about the USS. It sent her literature which was out of date and misleading on the criteria that had to be met in order to retire early on an unreduced pension. In particular, during the spring of 2012, she received a USS Booklet entitled "Guide to Members" with a covering letter which said that the booklet incorporated scheme changes effective from 1 October 2011 and it had been sent to her for reference only so she did not have to take any action. Page 12 of this booklet stated that:

> "If you retire before the Scheme's NPA (excluding retirement due to ill health) any pension you receive will be reduced because taking your benefits early means they will be paid for a longer period of time. There is one exemption to this for those members aged 55 or more on 1 October 2011, retiring from age 60 with their employer's consent."

This mistake has caused her financial loss and also significant distress and inconvenience.

73. USS also failed to keep her updated about critical changes to the USS Rules in relation to her protected pension age (**PPA**) even though changes were planned in advance. USS Ltd failed to inform her that there was an extension to claim early retirement on the grounds of redundancy from 1 October 2011 to 1 October 2014.

74. In her view, she was therefore led to believe by USS Ltd that she was not entitled to unreduced early retirement benefits from the USS.

75. She had no intention of retiring when the Compromise Agreement was being negotiated in November 2012, because she was unaware that she could have retired with an unreduced pension from the USS.

76. SCONUL should have drawn her attention to this possibility and by failing to do so, denied her the opportunity to explore her pension rights in the USS available on redundancy.

77. When she eventually discovered, in January 2013, that she had been entitled to an unreduced pension under PPA, it was too late for her to do anything apart from seeking explicit confirmation that she had been made redundant.

78. Mr Harding has submitted a witness statement in which he said that:

a) it was clear from the history of Mrs E's working relationship with Mrs R at SCONUL that it was very likely that she would be made redundant;
b) he therefore contacted HR and discussed the possibility of Mrs E signing a Compromise Agreement to end her employment;
c) at all times, the Compromise Agreement was negotiated on the basis that Mrs E was going to be made redundant which was why it showed that enhanced redundancy payments would be paid;
d) Mrs E signed the Compromise Agreement to avoid the requirement for a protracted and mutually painful redundancy process; and
e) if SCONUL now disputes that there was a genuine redundancy situation at the time, then Mrs E was induced into entering a Compromise Agreement on false pretences and she would need to consider whether or not she should now seek to bring a belated employment tribunal claim.

**Conclusions**

79. Mrs E's complaint centres on the reason for the termination of her employment with SCONUL. If Mrs E had been made redundant by SCONUL on 16 November 2012 for the purposes of the USS Rules, she would be eligible to receive an immediate unreduced pension from the USS.

80. SCONUL contend that as Mrs E was not dismissed but left by mutual agreement, her leaving was not at its instance. As there was no dismissal, SCONUL says that the reason for termination was therefore not redundancy as defined in Rule 11 of the USS Rules.

81. Rule 11 is titled: "Early retirement at the instance of the employer". Rule 11.2 allows for receipt of an unreduced pension if "*eligible employment* is terminated by reason of *redundancy*". Redundancy is a defined term and I do not think its definition precludes termination by agreement. Unlike the redundancy definition in section 139 of the Employment Rights Act 1996, the definition in the USS Rules does not use the word "dismissal".

82. No formal redundancy process had started. I have seen no documents showing otherwise, which one would expect, e.g. an 'at risk letter'. Reorganisations are not always redundancies. It depends on the facts and whether the definition is met – i.e. substance not form (see [68] of ***Agco Ltd v Massey Ferguson Works Pension Trust*** [2003] EWCA Civ 1044) (**Agco**).

83. Furthermore, I do not think that on 31 October 2012 Mrs E had accepted the offer of a termination package that HR made on 1 August 2012. A lot of time had passed and this offer was in very general terms, although I would accept that the offer may have given Mrs E the idea.

84. Employment Tribunals often find that voluntary redundancies were dismissals (and so at the instigation of the employer). Had a formal redundancy process been underway and volunteers invited, I would say that was a dismissal / the

contract ended at SCONUL's instance without any hesitation. In employment tribunal claims for redundancy payments, there is a presumption that the reason for dismissal was redundancy unless shown otherwise: s163 (2) Employment Rights Act 1996. An employee agreeing does not stop it being a dismissal though: ***Burton, Alton and Johnson Ltd v Peck*** [1975] ICR 193.

85. In Agco, the Court of Appeal considered whether a voluntary redundancy was, per the Rules, "at the request of the employer". The Court of Appeal found that acceptance of voluntary redundancy at the invitation of the employer is "early retirement at the request of the employer".

86. The following paragraphs in the Agco judgment are useful in determining whether a termination is redundancy:-

- [11] – on the facts, there was a round of 'redundancies' in 2001 which came about because the trade union requested a voluntary redundancy programme and the employer said they would offer £10,000 to those who chose to leave. Per Rix LJ: "That 2001 round of reductions in the payroll took place pursuant to an entirely consensual scheme outside the statutory redundancy framework, since those employees who took up the offer were not dismissed."
- [65] – provision was intended to enable the employer to offer early retirement on preferential terms. Preferential terms are the quid pro quo for employee's agreement to retire. In my view, the same could be said of Rule 11.
- [70] – "the practicalities are that if an employer wants to have a programme of early retirement, whether entirely consensual or through the medium of voluntary redundancy, <u>then he has to take the first step and issue his invitation or make his request</u>" (my emphasis)
- [74] is Rix LJ's conclusion and states that the provision was met when an employee had "volunteered and been accepted for redundancy <u>at the invitation of the employer.</u>" (my emphasis)

87. The employment tribunal case, ***Birch and Humber v University of Liverpool*** [1985] IRLR 165 (**Birch**), is also helpful and an extract from the judgment is set out below:-

- [28] – it was submitted on behalf of C that the mere fact of expectation of diminution should mean it was not possible in law to say the contract was terminated by mutual consent. The judge then gives an example of an employer who envisages at some time in the future (eg because of new technology) the need to slim down his workforce and makes an offer to those who are prepared to resign rather than wait to volunteer for redundancy and supports that offer with a financial inducement which is far in excess of what is likely to be obtained under the redundancy legislation. The judge said: "it seems to me clear that in such a situation,

assuming no coercion of any kind, that if that offer is accepted there can be no question of there having been a dismissal." (Quoted approvingly in Agco)

- [43] "However, the highest it can be put on the facts of the present case is that the University had given implicit warnings of possible redundancies to come. This is not, on its agreed facts, a case where the employees had been told that they were personally no longer required in their employment, or where they had been expressly invited or placed under pressure to resign."
- [44] "Two points, in my view, are of considerable importance in considering [what the ET said about this]. First, there was no evidence, or finding by the Tribunal, that the appellants were in any way led to believe that they would be compulsorily retired before normal retiring age, if they did not voluntarily apply for premature retirement under the [Scheme]. Secondly, there is no finding that the University led the appellants to believe that they would be entitled to a redundancy payment if they applied for premature retirement under the Scheme."

88. In reviewing the caselaw, Mrs E's case seems to me to be comparable to the 2001 'redundancies' in ***Agco*** and the hypothetical example in ***Birch*** and therefore not at SCONUL's insistence.

89. I must consider therefore, whether there was any coercion on Mrs E such that the termination may be treated as at SCONUL's insistence.

90. Having examined all the available evidence and analysed carefully what the parties have said, I consider that the arguments, proffered by the Respondents to refute Mrs E's complaint, are credible and convincing. I therefore, concur with their stance that the cessation of Mrs E's employment was not redundancy.

91. Before the restructure announcement in October 2012, Mrs E had been following a phased return to work and not taken up a termination offer from SCONUL. She had therefore intended to continue working on the proviso that she would receive the necessary support from SCONUL, as discussed during the meeting on 1 August 2012, and detailed in HR's letter to her of 13 August 2012.

92. On her return, she was disappointed to learn that Mrs R's behaviour towards her at work, in her view, had not improved and SCONUL had not carried out the proposals made in the investigation report to support her at work.

93. The evidence is clear, however, that SCONUL was prepared to deal with the concerns which she had raised in her e-mails of 11 and 16 October 2012.

94. HR, in its e-mail dated 17 October 2012, clearly offered to help resolve her work problems with Mrs R by offering to arrange a meeting to discuss matters. HR also informed her that SCONUL was slowly putting in place the arrangements to support her return to work and would provide her with the counselling which she

requested, if appropriate. It also mentioned that SCONUL was looking to extend the period of her phased return.

95. In my view, if SCONUL were looking to make Mrs E redundant in the near future, it would not be trying its best to retain Mrs E in its employment.

96. It was somewhat unfortunate that the announcement about a possible restructure at SCONUL was made so soon after Mrs E had expressed her concerns and before the positive effects of the arrangements being put in place could be felt by Mrs E at work. In my view, Mrs E's perception that nothing had changed on her return was chiefly responsible for her belief that the proposed reorganisation would ultimately lead to her redundancy.

97. In my opinion, SCONUL would have done its best to secure alternative employment for Mrs E following the restructure and her belief that she would inevitably be made redundant cannot be considered as coercion.

98. Mrs E's decision to ask Mr Harding to contact HR in order to discuss the possibility of signing a Compromise Agreement based on her flawed perception that she was going to be made redundant prevented SCONUL from trying to match her to one of the new posts in the organisation following the restructure.

99. On that basis, I consider that Rule 11.2 was not satisfied because Mrs E instigated the termination of her employment and there was no coercion on SCONUL's part to instigate termination.

100. As I have concluded that Mrs E was not made redundant, the second part of her complaint does not need to be considered by me.

101. I do not uphold Mrs E's complaint.

**Anthony Arter**

Pensions Ombudsman
18 July 2018