

Ombudsman's Determination

Applicant	Mr G
Scheme	Universities Superannuation Scheme (the Scheme)
Respondent(s)	Universities Superannuation Scheme Limited (USS) University of Dundee (the University)

Complaint Summary

Mr G has complained that USS refused to award him ill health retirement benefits.

Summary of the Ombudsman's Determination and reasons

The complaint is upheld against USS because it has not interpreted the Scheme Rules correctly when considering Mr G's application for ill health retirement benefits. There is no finding of maladministration against the University, so the complaint against it is not upheld.

Detailed Determination

Material facts

1. On 1 November 1988, Mr G joined the Scheme.
2. The University applied, on Mr G's behalf, for the immediate payment of his Scheme benefits on the grounds of ill health.
3. On 12 May 2016, Mr G's application for incapacity retirement was presented to the USS' medical panel, who decided that there was insufficient medical evidence to conclude that Mr G was suffering from long term incapacity to carry out the duties of his current role, or one of similar scope and nature.
4. On 16 May 2016, USS considered the findings of its medical panel and held that Mr G did not satisfy the definition of "incapacity" under the Scheme Rules. It said, that its panel of medical advisers considered the medical reports and decided that:

"Having carefully appraised the medical details presented including the report from psychiatrist and Psychologist, it is considered there is insufficient evidence to conclude that [Mr G] suffers from long- term incapacity in carrying out the duties of his current post or one of similar scope and nature.

Furthermore there appears to be scope for improvement in his condition in the future with further psychological therapy and possible different medication, which may allow him to continue working."
5. On 19 May 2016, Mr G raised a complaint which was dealt with under the Scheme's internal dispute resolution procedures (**IDRP**). Mr G said that USS had not applied Rule 15, (see appendix), correctly as it is the University who first decides whether a member is incapacitated. He said that once the University is of the opinion that a member meets the criteria for "incapacity", then it submits the application to USS and it is solely USS' role to determine the type of incapacity (partial or total) and not to re-consider whether the member met the criteria for "incapacity". Mr G referred to a previous Pensions Ombudsman determination, PO-5467, which he says supports his view.
6. On 12 August 2016, the decision under stage one of the IDRP was not to uphold Mr G's complaint. The decision maker said that, as the medical panel had decided he did not meet the criteria for partial or total incapacity, it had correctly applied the relevant Scheme Rules and although Mr G had already satisfied Rule 15.1.2, in order to be eligible to retire on the grounds of incapacity he must also satisfy 15.1.3 and 15.1.4 of the Scheme Rules.
7. USS said that Rule 15, which is relevant to Mr G's circumstance, had changed and USS is not simply determining the type of "incapacity", but whether there was any "incapacity" at all. It said Rule 15 makes it clear that USS is not required to determine

the type of “incapacity” but the fact that for incapacity retirement to be authorised USS must determine that there is incapacity.

8. USS addressed Mr G’s reference to the previous determination PO-5467 and disagreed with the position of the Pensions Ombudsman. It said that the Rules relevant to Mr G’s circumstances have changed. It was previously suggested by the Pensions Ombudsman that there is a sequence of events where the employer determines whether or not there is incapacity and then USS is required to determine the type. However, these provisions have changed in the new Scheme Rules. USS says it is no longer establishing only partial or total incapacity, but must now, under Rule 15.1.3, “determine that member is suffering from total incapacity or partial incapacity.”
9. In addition, USS said that the new Scheme Rules under Rule 15.1.4, stated:

“The Trustee Company determines that the member has retired or ceased one or more eligible employments on the grounds of incapacity or partial incapacity before normal pension age and, in a case of total incapacity without continuing in any other eligible employment.”
10. On 16 August 2016, Mr G appealed under stage two of the IDRPs. He reiterated the arguments made in his appeal at IDRPs stage one and said the 2009 Rules do not require USS to determine whether the member is suffering from incapacity and the Pensions Ombudsman’s decision, reference PO-5467 confirms this.
11. On 4 November 2016, USS issued its stage two IDRPs response to Mr G. Its decision was not to uphold his complaint. It said:

“Rule 15.1.3 is a pre-condition which must be satisfied before a member can receive incapacity retirement benefits and there is nothing in Rule 15.1.3 that states that USS Ltd cannot determine that a member is not suffering from either ‘total incapacity’ or ‘partial incapacity’;

Rule 15.1.3 can only be construed as prohibiting USS Ltd from determining that a member is not suffering incapacity if the wording, ‘and cannot determine that the member is not suffering Incapacity’ is implied and there is no reasonable basis for doing this. Furthermore, any such reading of Rule 15.1.3 would contravene the express requirements of Rule 15.1.4;

Rule 15.1.4 states that any decision made by USS Ltd must be made on the balance of probabilities, having regard to a medical opinion received from one or more of its appointed registered medical practitioners. Consequently, USS Ltd would be acting outside the Rules if it were to determine that a member was suffering from incapacity without an opinion from its medical panel which supported this determination”.
12. On 27 December 2016, Mr G left the Scheme.

Summary of Mr G's position

13. USS has not applied the Scheme rules correctly as under 15.1.2, it is for the employer to determine whether Mr G is incapacitated or not. As the University was satisfied that he met the definition of incapacity, it is then for USS to decide, under rule 15.1.3, whether he is suffering from total or partial incapacity.
14. The Pensions Ombudsman's previous determination reference PO-5467 confirms that the 2009 Rules do not state that USS may determine whether he is suffering from incapacity but it is for USS to decide whether he is suffering from total or partial incapacity.

Summary of USS' position

15. The 2009 Rules have materially changed since the Pensions Ombudsman determination, reference PO-5467, and therefore the interpretation of the 2009 Rules needs to be considered afresh.
16. A key issue was not taken into account in PO-5467 that is relevant to Mr G's complaint, which is that USS is required to base its determination under rule 15.1.3 on the balance of probabilities having regard to a medical opinion. In Mr G's case, USS did not receive advice from registered medical practitioners that was sufficient for it to be able to determine that Mr G satisfied incapacity, let alone total or partial incapacity.
17. Based on the Scheme Rules, USS is required to make a totally separate decision on whether or not there is incapacity, rather than relying on the University's opinion.
18. Rule 15.1.1 confirms that ill health early retirement only applies to a member who has satisfied the service requirement. Rule 15.1.3 is not an instruction as suggested by the Pension Ombudsman in PO-5467 but is a new condition that is only met if USS, in assessing Mr G's case, determine that he satisfied total or partial incapacity.
19. If the Scheme Rules required that USS could only determine total or partial incapacity, it would have been worded to say so.
20. Rule 1.2.2, within the Scheme Rules, states that "neither the arrangement of these Rules nor any headings or sub-headings shall affect the interpretation of the Rule". USS say that the headings within the Scheme Rules must be ignored and Rule 15.1.3 should be read as a "stand-alone provision and not subservient to Rule 15.1.2".
21. Rule 15.1 sets out the pre-conditions which must be satisfied if a member is to be eligible to receive an early pension on incapacity. The Scheme Rules are clear and there is no ambiguity that Rule 15.1.3 is a separate pre-condition and is not dependent on any other Rules.

22. 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 terms of the Finance Act 2004.
23. The Rules since 1994 make it clear that there is a condition that for ill-health retirement to be provided the Trustee Company has to give its approval. It does not matter at all that partial or total incapacity was not provided at the time, the Trustee Company needed to give its support for any ill health retirement.
24. If the Rules required order or sequence it would start with an application otherwise those participating in it may be doing so with the member possibly not taking the matter forward.
25. The Trustee Company under the Rules provides consistency and impartiality for both other participating employers and the Scheme's members, regardless of their employer.
26. The role of the Trustee Company is entirely separate to that of the employer and requires the Trustee Company to act on advice it has received by someone it has appointed.

Conclusions

27. Rule 15.1, is broken down into five headings. Rule 15.1 states, "This rule applies to a member who satisfies all of the following conditions". Then each heading covers each sub rule. These are: -
 - 15.1.1 – Service, this covers the member's eligibility to apply.
 - 15.1.2 – Employer agrees incapacity – the employer's opinion must be that the member is suffering from incapacity.
 - 15.1.3 – Trustee company agrees incapacity type - the trustee must determine whether member is suffering from total incapacity or partial incapacity.
 - 15.1.4 – Reasons for retirement or cessation of eligible employment - the trustee determines that the member has retired or ceased employment on grounds of total or partial incapacity.
 - 15.1.5 – Application to the trustee company – the member must make an application in an acceptable form to the trustee.
28. USS argue that each sub Rule of Rule 15.1 should be read independently and not in sequence, and that the 2009 Scheme Rules, changed the criteria compared to the 2003 Rules.
29. I disagree with USS' approach to the interpretation of Rule 15.1. Rule 15.1 must be read in its entirety in order to establish whether Mr G has an entitlement to an incapacity pension or not. Mr G meets the first condition, as stated within Rule

15.1.1, he has sufficient service accrued. If he does not, then neither the employer nor USS need consider the matter further.

30. Rule 15.1.2, states that the Employer, in this case the University, must come to an opinion whether the member i.e. Mr G, is suffering from incapacity. The University duly sought its own medical advice and reviewed Mr G's medical records before coming to the conclusion that he was suffering from a medical incapacity.
31. The next stage in the process is for USS, in accordance with Rule 15.1.3, to determine whether the member is suffering from total or partial incapacity. The wording is clear, Rule 15.1.3 does not provide a power to override the decision made under Rule 15.1.2, that Mr G is suffering from a medical incapacity. This conclusion has already been reached by the University under Rule 15.1.2.
32. USS has reached a perverse determination as there is no power provided under Rule 15.1.3 that grants it authority to decide anything other than total or partial incapacity. Therefore, I find that USS has erred in its interpretation of Rule 15.1.3.
33. Rule 15.1.4 states that USS must establish whether the reason for leaving employment was for either total or partial incapacity and to ensure that the member has not taken up employment since being retired on medical incapacity by the employer. The University has provided USS with confirmation that the reason for Mr G's retirement, was medical incapacity and not for some other reason; it is for USS to decide the degree of incapacity under Rule 15.1.3. The Rule also requires that USS ensure that the member is not working elsewhere if total incapacity is paid. Again Rule 15.1.4 refers to one of two grounds, not whether or not the member is suffering from a medical incapacity, which has already been determined under Rule 15.1.2, but to which degree. This is important because of the additional requirement to ensure that the member has not resumed employment if granted total incapacity.
34. Mr G met the conditions under Rule 15.1.5, as the application was submitted by the University, which was in a suitable format.
35. USS has declined the application because it has determined that Mr G is not incapacitated. The Scheme Rules do not provide the USS with the authority to make such a determination. Under the Scheme Rules it is for the employer to decide whether a member is medically incapacitated; the employer, in this case being the University.
36. Although, I accept that neither the arrangement of the Rules, nor any headings/sub headings shall affect the interpretation of the Rules (Rule 1.2.2), I find it interesting that the heading highlighting the purpose of each Rule, in shorthand, refers to: Rule 5.1.2 as, 'Employer agrees incapacity; and Rule 15.1.3 'Trustee company agrees incapacity type'. If, when the revised Rules were drafted it was intended that the Rules provided for the Trustee to either agree or disagree with the employers' decision one would have thought that the Rule heading would not simply refer to 'incapacity type'. So, I find that the 2009 sub Rule headings in Rule 15 reinforce, what

is, in my view, the unambiguous wording of 15.1.2 and 15.1.3. If it were the case that the decision on whether a member was incapacitated was one for the Trustee to make then it is completely unnecessary for that decision to have already been taken by the employer. The first decision to be made is whether the member is medically incapacitated: Rule 15.1.2, and the second decision to be taken by USS on the level of the award: Rule 15.1.3. I do not agree that the sub Rules are to be read independently of each other but rather in a logical manner.

37. There is nothing in the Finance Act 2004 which states that the scheme administrator has to make the decision whether or not the member meets the criteria for ill health retirement. The Finance Act 2004 states that it has to receive evidence of ill health from a registered medical practitioner. I do not agree that if USS only determines whether a member was totally or partially incapacitated, its decision could potentially lead to an unauthorised payment being made.
38. USS may want to review the process employers follow when establishing incapacity, or seek to amend the Rules, but this is a separate matter for it to consider and it should not affect the outcome of Mr G's complaint.
39. I uphold the complaint against USS. However, I do not uphold any aspect of the complaint against the University, as I have not identified any grounds for me find it has made an administrative error.
40. I have no doubt that USS has caused Mr G significant distress and inconvenience because of its maladministration and I shall direct that an award be made to Mr G in recognition of this.

Directions

41. Within 21 days of the date of this Determination:

- USS shall decide, whether Mr G was either totally or partially incapacitated. The benefits payable shall be backdated to the date he left the University, and interest shall be added to the payment, calculated using the rates as quoted by reference banks from application date to the date that payment is made.
- USS shall pay £500 to Mr G for the significant distress and inconvenience that he has suffered.

Anthony Arter
Pensions Ombudsman
23 March 2018

Appendix

Scheme Rules (as relevant)

The relevant section within the Scheme rules (2009 Rules) is found in section 15, titled “Early pension on incapacity”, the section states:

“15.1 Application of this rule

This rule applies to a member who satisfied all of the following conditions:

15.1.1 **Service**

The member has either:

completed 2 years’ active membership;

completed 2 consecutive years in aggregate of active membership and membership of any comparable scheme in the continuous employment throughout of one or more institutions and during which there has been no material break; or

been a member of a comparable scheme after 10 December 1999 by virtue of incapacity qualifying employment and would have been entitled, on retirement on the date of ceasing eligible employment which satisfying the ill health, infirmity or incapacity requirements under that scheme, to an immediate early pension under that scheme, without actuarial reduction.

15.1.2 Employer agrees incapacity

In the employer’s opinion the member is suffering from incapacity at the date of the relevant cessation of eligible employment,

15.1.3 Trustee company agrees incapacity type

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

15.1.4 Reason for retirement or cessation of eligible employment

The trustee company determines that the member has retired or ceased one or more eligible employment 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.

15.1.5 Application to the trustee company

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.

...

15.8 Retrospective determination

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 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 15 from the date of cessation of eligible employment. Any amount that has as a result of that cessation of eligible employment been paid to the former member shall be deducted from the benefits payable to that individual under this rule.

Under the Rules "incapacity" is defined as meaning either partial or total incapacity. Partial incapacity is defined as,

"...ill health of, or injury to, a member or former member not amounting to total incapacity and 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)."

Total incapacity is defined as:

"...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 employment currently held by the member....or which was held by the individual immediately before last ceasing to be an eligible employee; nor

(b) any other employment 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."