

Ombudsman's Determination

Applicant	Mr E
Scheme	Universities Superannuation Scheme (USS)
Respondents	Universities Superannuation Scheme Limited (USS Ltd) University of Ulster (the University)

Outcome

1. Mr E's complaint against USS Ltd and the University, is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld), USS Ltd shall review its 2008 decision not to award Mr E total incapacity benefits. In addition, it shall pay Mr E £750 for distress and inconvenience.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

Complaint summary

3. Mr E has complained that his pension has not been calculated by reference to the pensionable salary agreed in 2010. He has explained that the University submitted a salary figure of £29,870, which was his 2009 salary, but USS Ltd used a 2005 figure of £25,195. He says this is contrary to the terms on which he accepted retirement. Mr E has complained that the University refused to pay backdated contributions which would have allowed the higher salary to be used.
4. Mr E says the use of his 2005 salary means that his pension is not fully index linked. He believes the decision not to index link his salary from 2005 may amount to discrimination. He argues that members suffering from ill health and/or disability should not be treated in the same way as members who take time out of employment for other reasons. He feels he has been penalised for delaying his retirement in the hope of being able to return to work.
5. Mr E says he was misled by annual benefit statements which led him to believe that the University was paying contributions towards his pension.
6. Mr E argues he was unable to return to his place of work because of harassment. He suggests that, in the circumstances, it was reasonable for him to assume that the University was continuing to pay contributions. The University did not advise him about the effects of non-payment on his pension. He was satisfied by the statements

from USS Ltd that all was in order. If he had been aware that it was not, he would have applied for ill health retirement; as he had done under his other pension scheme. As soon as he became aware, he immediately applied for ill health retirement.

7. Mr E says he cannot see why there is a problem with having a few hundred pounds per year added to his pension. He is of the view that USS Ltd should have required the University to stand by the incorrect information.
8. The University offered him ill health retirement based on his 2009 salary. It should be required to honour this.
9. If he had been aware his benefits would not be based on a 2009 salary, he would have continued to ask for workplace adjustments to be made in order to enable him to return to work.
10. Mr E has also complained about the delay in dealing with his ill health retirement. He considers there was medical evidence available when he first applied for ill health retirement which would have enabled his application to have been agreed in July 2008. He points out that an ill health retirement pension was paid from another pension scheme in 2006.

Background information, including submissions from the parties

Background

11. Mr E was employed by the University and joined the Scheme in July 2000. He commenced long term sickness absence in March 2005. The University paid six months' full pay and six months' half pay. Mr E's salary ceased being paid in February 2006.
12. In February 2007, USS Ltd issued a "Service Statement". This showed Mr E had 6 years and 243 days' pensionable service. In October 2007, Mr E requested a pension forecast, current pension status, service details and contributions paid. The University provided salary details to USS Ltd in an email dated 5 November 2007. These included salaries as at August 2006 (£26,402), February 2007 (£26,666) and August 2007 (£27,466).
13. On 6 November 2007, the University submitted an absence notification to USS Ltd saying Mr E had commenced a period of unpaid sickness absence on 5 February 2007 [sic]. The University indicated it would not be paying contributions during Mr E's absence. USS Ltd wrote to Mr E, on 17 November 2007, notifying him that it had been informed his status was non-pensionable due to absence from 5 February 2007. It referred to an enclosed factsheet relating to absence. It also quoted an annual pension of £2,226.18 and a lump sum of £6,678.54 based on pensionable service of 6 years and 219 days and pensionable salary of £26,984. USS Ltd have explained

that it cannot now tell when the figures were prepared, whether before or after it had been notified of Mr E's absence.

14. It appears that the University informed USS Ltd by telephone, on 4 December 2007, that there was an error in the absence notification form. USS Ltd have confirmed it does not have a record of this telephone conversation. However, it has a file note, dated 5 December 2007, referring to the error. It also notes that Mr E referred to it having been notified on 4 December 2007 in his email to the University on the following day.
15. On 20 December 2007, USS Ltd wrote to Mr E quoting an annual pension of £1,646.68 and a lump sum of £4,940.04, based on a pensionable salary of £23,524 and service of 5 years and 219 days. It explained that these were his benefits as at 4 February 2006; the last day for which he had paid contributions.
16. During the period January to May 2008, Mr E continued to correspond with USS Ltd on the matter of his pension benefits and ill health retirement. He submitted a complaint, under the internal dispute resolution procedure, to USS Ltd relating to the reduction in his pensionable service. This was declined and USS Ltd advised Mr E to take the matter up with the University. USS Ltd also provided Mr E with information about ill health retirement, both as an active and as a deferred member. Ill health retirement as an active member is covered by rule 13 of the USS rules. Details are provided in Appendix 2.
17. Mr E signed an application form for ill health retirement on 3 July 2008. Medical evidence was provided by Mr E's GP and his psychiatrist in the form of answers to questions set out in the form. Mr E's GP also provided a copy of a letter written to the University's medical adviser (Dr Glasgow) in May 2008. The form was also completed by the University's occupational health adviser. Brief summaries of the medical evidence obtained in relation to Mr E's case are provided in Appendix 1.
18. USS Ltd informed Mr E that it agreed to his retirement on the grounds of partial incapacity. He enquired about appealing this decision in October 2008. USS Ltd sent Mr E an appeal form, which he completed; dating it 2 October 2008. USS Ltd have confirmed that it received the form in February 2009.
19. USS Ltd obtained advice from a psychiatrist, Dr Curran. He saw Mr E on 20 February 2009 and provided a report for USS Ltd. Mr E's appeal was declined on 31 March 2009. USS Ltd gave the following reasons:-
 - Mr E was suffering from a number of physical complaints but was receiving appropriate treatment and these were likely to stabilise. However, his mental health difficulties were exacerbating these and could impact adversely on the stability of his physical conditions.
 - Mr E was suffering from a Chronic Anxiety Depressive Neurosis (Agitated Depression Disorder F31). His symptoms seemed to result from work stress and he had not been able to return to work.

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- Mr E was receiving appropriate medical help from his GP, psychiatrist and the community mental health team. There appeared to have been little improvement to date. Mr E continued to feel upset by the way he believed he had been treated and he continued to pursue the issue via a number of routes. Evidence suggested that a patient would fail to respond to treatment until the legal situation was resolved to their satisfaction.
 - Dr Curran was of the view that Mr E was unfit at present, and for the following year, to undertake his role with the University or any other employment. He agreed that Mr E met the criteria for partial incapacity.
 - Mr E remained under the care of a specialist and a number of further interventions were planned. On that basis, it had not been established that his incapacity was permanent.
20. Mr E submitted a further appeal. USS Ltd declined Mr E's appeal but offered him the option to have a further medical assessment by Dr Curran. Mr E attended a further appointment with Dr Curran on 27 November 2009. Dr Curran provided a second report for USS Ltd.
21. USS Ltd wrote to the University, on 21 December 2009, confirming that it had agreed to Mr E's retirement on the grounds of total incapacity, with effect from 18 December 2009. It said this was the earliest possible date from which retirement could take place.
22. Mr E's employment with the University ceased with effect from 18 December 2009; this date was agreed between them by emails dated 15 January 2010. In his email, Mr E said he accepted the 18 December 2009 date and "details as per ME5". He said he would prefer it if his benefits could be backdated to 2006 when his wages ceased. The University had included a salary from 1 August 2009 of £29,870 in the form ME5, which it had completed for USS Ltd. It had sent a copy to Mr E.
23. USS Ltd provided quotations for incapacity retirement based on pensionable service of 14 years and 22 days (5 years and 219 days actual service, and 8 years and 168 days incapacity addition). Mr E was awarded the equivalent of his service from February 2006 to July 2014. USS Ltd used a pensionable salary of £25,195. This provided an annual pension of £4,428.12.

Submissions from USS Ltd

24. The formal submission received on behalf of USS Ltd is summarised below:-
- Mr E's application was reviewed by a member of its medical panel, who had been provided with relevant notes detailing the rules and definitions for partial and total incapacity.
 - The panel member concluded that the partial incapacity definition had been satisfied but not that for total incapacity. This requires a conclusion that the

member will not be able to conduct any work, other than for a small fraction of the remuneration he was receiving.

- Mr E was asked to provide further information, which was reviewed by the panel member. It did not change the opinion held.
- Mr E's case was reviewed under the appeals process by an independent member of the medical panel. The reviewer was given relevant notes detailing the rules and the tests for partial and total incapacity. The reviewer concluded Mr E did not meet the criteria for incapacity retirement.
- USS Ltd concluded that total incapacity had not been evidenced. It took into account the views of the medical panel.
- In particular, it took into account the fact that Mr E was under the care of a specialist and a number of further interventions were planned. It is conscious that it needs to consider the likelihood of success of any further planned treatment and took this into account.
- Mr E remained in suspended pensionable service. Time was allowed for a further application to be submitted in 2009, when the total incapacity test was satisfied.
- The Scheme rules are clear that, where contributions have been suspended, pensionable salary should be calculated by reference to the date of suspension.
- The trustee of an occupational pension scheme is bound to provide benefits in accordance with the rules of that scheme. The only exceptions are "change of position" and overriding legislation.

25. Having received an opinion from an Adjudicator, USS Ltd provided the following further comments:-

- It had reviewed Mr E's medical condition on five occasions.
- The initial medical reports centred on the stress caused to Mr E by association with the University. The view was that much of Mr E's functional impairment was caused by continued involvement with the University. It was thought that it would be difficult to assess the lasting effects of his condition until this involvement ceased.
- Its appeal process is an informal, non-statutory process whereby the member is given the opportunity to question the decision made in relation to an ill health retirement application. Under this process, further assessment of Mr E's condition was undertaken resulting in Dr Curran's report.

- The key conclusions in Dr Curran's report are:-
 - At the assessment, a significant amount of time had been taken with issues Mr E had with the University. Mr E was highly stressed and preoccupied about his employment.
 - Alcohol abuse related to Mr E's frustrations about his employment.
 - Mr E accepted that he needed to resolve the situation with the University because it triggered stress.
 - Mr E was suffering from a chronic anxiety depressive neurosis appearing from stressors in the workplace.
 - Mr E's return to work or the possibility of him functioning effectively in the workplace had to be ruled out at this time.
 - The mental health team had planned further interventions over the coming months.
 - The vast array of medication gave an indication of Mr E's complicated mental and physical health and was a negative factor.
 - The prognosis was bleak given the chronicity of Mr E's condition and his failure to accept his circumstances and past events.
- Its medical panel assessed Dr Curran's report and concluded Mr E did not fulfil the criteria for total incapacity for the reasons given in its letter of 31 March 2009 (see paragraph 19 above).
- Its appeal process is an informal review of a decision which has already been made and builds on information and conclusions already reached by the trustee company. The medical panel are all trained on the implications of the ill health application procedure, the appeals procedure and the USS rules.
- The significant emphasis throughout all of the assessments was that the continuing stressors related to Mr E's continued involvement with the University. It was clear that, with this stress being removed, Mr E's mental health could improve with the planned interventions and there would be a knock on effect on his physical health.
- It was reasonable for its medical panel to pass judgment and recommend partial incapacity.
- There was no flaw in the process. What has been questioned is its judgment. Dr Curran was asked for an opinion. Regardless of whether he was aware of the relevant rules, it and its medical panel are fully conversant with the rules and can assess the opinion provided. Its judgment was and remains reasonable.

- The fact that it came to a different decision six [*sic*] months later does not call into question its original decision. There were key differences in Dr Curran's November 2009 opinion, as follows:-
 - Mr E seemed in much better spirits and more affable.
 - He was much better for his wife having retired.
 - He seemed much calmer in relation to the issues with the University, but still fragile on some stimulation in this regard.
 - The interventions referred to in his March 2009 report had either been concluded or finished with little success.
 - Mr E had stated that, the longer it went on, the worse things got and the more despondent he became.
 - Although Mr E's issues with the University seemed to have abated, his depression and dependency seemed to be getting worse. The conclusion that Mr E's mental and physical difficulties would improve with separation and time from the University did not seem to be proving sound.
 - There was a dependency on his spouse which precluded separation for new employment.
- The change in circumstances and opinion in the six [*sic*] months enabled it to conclude Mr E now met the criteria for total incapacity.

Submission from the University

26. The submission received from the University is summarised below:-

- The onus is on the employee to maintain their contributions if they wish to. Mr E did not maintain his contributions. As a result, his pension was based on his 2006 pay.
- The ME5 form showed an effective retirement date of 18 December 2009 and a salary of £29,870. Mr E accepted this as his effective retirement date. He also asked the University to consider backdating his pension payments to 2006.
- It was explained to Mr E, prior to his retirement, that his 2006 salary would be used to calculate his benefits. The confusion appears to have been exacerbated by listing salaries up to 2009 on the ME5 form and by a member of USS Ltd staff telling Mr E that the salary quoted on the form would be used to calculate his benefits. It is not able to comment on whether or not the staff member was aware of the history of Mr E's case at the time.

Adjudicator's Opinion

27. Mr E's complaint was considered by one of our Adjudicators who concluded that further action was required by USS Ltd. The Adjudicator's findings are summarised briefly below:-

- Under the terms of the USS rules, there is no requirement for the University to pay contributions during a period of suspended membership; payment is optional. Nor had Mr E provided any evidence that the University gave an undertaking to pay any such contributions in his case.
- Mr E had said he was misled by annual benefit statements which led him to believe that the University was paying contributions towards his pension. The service statements issued in February and November 2007 did show Mr E having more pensionable service than he had, at that time, accrued. At the time of providing these service statements, USS Ltd had not been notified that Mr E was no longer receiving any salary from the University. The incorrect pensionable service quoted in the service statements does not amount to maladministration on the part of USS Ltd.
- The University did not notify USS Ltd that Mr E had ceased to receive salary from it until November 2007; some 21 months after the event. In addition, it gave USS Ltd an incorrect date. This did amount to maladministration on its part. However, it was not clear what, if any, injustice Mr E suffered as a consequence. On receipt of the February 2007 statement, he may well have been under the impression he was still accruing pensionable service. On the other hand, he would have known that he was not paying any contributions and he had received no undertaking from the University that it would do so on his behalf. Mr E did not appear to have sought any clarification. As it turned out, Mr E did benefit from the pensionable service he would have accrued during this period when he was awarded additional service on retirement. The University's tardiness in notifying USS Ltd that Mr E was no longer receiving a salary from them and their provision of an incorrect date did not cause Mr E any injustice.
- The University's decision not to pay contributions for the time when Mr E was no longer receiving a salary meant that his membership of the USS was suspended. Rule 39 provides for his benefits to be calculated as if he had left service on the day before his membership was suspended. USS Ltd were, therefore, required to use the salary which applied in February 2006. This was the basis upon which it calculated the benefits quoted to Mr E in December 2007. He would have been aware from that date, at least, that the University were not paying contributions on his behalf.
- Mr E was of the view that his retirement benefits should be calculated by reference to a notional salary as at the date his employment was actually terminated. The USS rules do not provide for this. Strictly, Mr E was only

entitled to receive the benefits provided for under the USS rules. He was relying on the information contained in the ME5 form submitted to USS Ltd by the University in 2010. The University had quoted a 2009 salary on the form and they sent a copy of the form to Mr E. However, this did not amount to an unambiguous statement to the effect that Mr E would receive benefits calculated by reference to the 2009 salary. The form was clearly intended to provide information for USS Ltd and did not amount to a promise, on the part of the University, to provide any benefits other than those provided for under the USS rules.

- In his email of 15 January 2010, Mr E referred to accepting the proposed termination date and the details in the ME5 form. This raised the question of whether there was a contract between Mr E and the University to provide the benefits he is now seeking. For a contract to exist, the essential elements of offer, acceptance, consideration and an intention to enter into legal relations must all be present. The required elements for a contract did not appear to exist; in particular, Mr E did not give any consideration (i.e. something given in exchange for the alleged promise) and there was no intention to enter into legal relations on the basis of the ME5 form.
- At most, it might be possible to say the ME5 form contained incorrect and/or misleading information about Mr E's salary. However, for Mr E to receive compensation for this, he would have to be able to show that he relied to his detriment on the incorrect information and that it was reasonable for him to have done so. In view of the fact that Mr E had applied for ill health early retirement on the basis of total incapacity, it would be difficult to find that he had decided to retire on the basis of the information contained in the ME5 form. There is no evidence that he entered into any other commitments at this time. Mr E would not yet have been aware of the additional service award. This resulted in him receiving a higher pension than he might have expected on the basis of his actual pensionable service (5 years and 219 days) and the 2009 salary; £4,428 compared with £2,090.
- Mr E had said that the use of his 2005 salary means that his benefits are not index-linked. However, because Mr E's pensionable service ceased in February 2006 and his benefits were not paid until December 2009, he was treated in the same way as a member with preserved benefits for that period. This means that Mr E's pension and lump sum were subject to revaluation for the period in question. This was explained to him, by USS Ltd, in an email dated 22 February 2008. It did not mean that his total retirement benefits should be calculated by reference to a 2009 salary. Mr E was never in receipt of this salary and no contributions were paid to the USS by reference to this salary.
- Mr E had suggested that the way in which his benefits have been calculated might amount to discrimination. Under the Equality Act 2010, an occupational

pension scheme is deemed to include a non-discrimination rule (section 61). However, Mr E had not shown how he was treated less favourably in the way in which his benefits were calculated.

- Mr E was also of the view that it should have been possible for USS Ltd to agree to him receiving total incapacity benefits in July 2008.
- It was for USS Ltd to determine whether a member is suffering from total or partial incapacity.
- It is not the role of the Ombudsman to review the medical evidence and come to a decision of his own as to Mr E's eligibility for total incapacity benefits. The Ombudsman is primarily concerned with the decision making process. Medical (and other) evidence is reviewed in order to determine whether it supported the decision made. The issues considered by the Adjudicator included: whether the relevant rules have been correctly applied; whether appropriate evidence has been obtained and considered; and whether the decision is supported by the available relevant evidence. However, the weight which was attached to any of the evidence was for USS Ltd to decide (including giving some of it little or no weight). It is open to it to prefer evidence from its own advisers; unless there is a cogent reason why it should not, or should not without seeking clarification. For example, an error or omission of fact or a misunderstanding of the relevant rules by the medical adviser.
- USS Ltd initially decided Mr E met the definition of partial incapacity. Its reasoning was set out in their response to Mr E's appeal. In brief, USS Ltd decided Mr E was not suffering from total incapacity because his physical health was likely to stabilise with treatment and further treatment was planned for his mental health. It said Dr Curran was of the view that Mr E was unfit at present, and for the following year, to undertake his role with the University or any other employment. It also said he agreed that Mr E met the criteria for partial incapacity.
- Having reviewed Dr Curran's report of 20 February 2009, it was not possible to identify where Dr Curran expressed such a view. He had suggested a return to any work, even on a part time basis, should be "ruled out at this time". He noted that there were no plans to discharge Mr E from psychiatric review. He commented that Mr E's limited response to past therapeutic interventions was a negative aspect of his case. Dr Curran had concluded that the prognosis in Mr E's case was bleak. He had not used the terms partial or total incapacity in his report. Dr Curran's reference to Mr E's current and future (for the next year) functional capacity in relation to his former occupation and any other employment was noted. This appeared to be as close as he had come to referring to the USS criteria for partial or total incapacity and it was not entirely accurate. If USS Ltd wished to rely on Dr Curran's report, it would have been

prudent for it to have sought clarification from him as to his understanding of the eligibility criteria.

- However, it was not clear, from the reasoning provided in its appeal response, that USS Ltd itself had approached the consideration of Mr E's eligibility in the correct manner. It had noted he was receiving treatment for his physical complaints and hoped these would stabilise. It noted the effect Mr E's mental health was having on his physical health and said he was receiving appropriate treatment for this. USS Ltd concluded that, because Mr E was under the care of a specialist and further treatment was planned, it had not been established that his condition was permanent. There was no discussion as to Mr E's capacity for work, which was the key to his eligibility for ill health retirement, and no discussion as to the likely efficacy of the planned treatment. USS Ltd's approach to the question of Mr E's eligibility for total incapacity benefits was flawed.
- In response to his further appeal, USS Ltd offered Mr E the option of another assessment by Dr Curran. On the basis of Dr Curran's second report, USS Ltd agreed that Mr E now met the criteria for total incapacity benefits. Dr Curran provided reports in February and November 2009; nine months apart. Having reviewed both reports, it was difficult to identify what had changed in the nine months between the two reports, such that USS Ltd could determine that Mr E now met the criteria for total incapacity. If anything, Dr Curran reported that Mr E's mental health had improved because of his wife's retirement. The additional evidence did not explain USS Ltd's change of view and suggested their earlier decision should be reviewed.
- USS Ltd could not begin to pay Mr E his ill health retirement benefits until his employment with the University had ceased. This did not happen until December 2009. This was, therefore, the earliest date from which it could pay the USS benefits. Even if USS Ltd were to review its 2008 decision and conclude that the evidence available at the time did support a total incapacity award for Mr E, it could not backdate his USS benefits.
- It seemed more likely than not that, had total incapacity retirement been agreed in July 2008, the University would have terminated Mr E's employment at that time; since this is what happened in December 2009. Whilst USS Ltd could not backdate Mr E's benefits, it could provide equivalent compensation for financial loss incurred by Mr E for the period in question. In other words, USS Ltd could pay Mr E a lump sum equivalent to the pension he would have received from July 2008 to December 2009, together with interest on his tax free lump sum. However, Mr E had a responsibility to mitigate any loss and it was open to him to accept the partial incapacity benefits whilst he appealed. He would then have been in receipt of the lower benefits over the period in question and, if his appeal had succeeded, his total incapacity benefits could have been backdated. Any compensation should be limited to the difference

between the partial incapacity benefits offered to Mr E in July 2008 and the total incapacity benefits he might have received, with interest. This, of course, rested on the outcome of USS Ltd's review of its earlier decision.

- In order to put matters right, USS Ltd should review its 2008 decision to award Mr E partial incapacity benefits. If USS Ltd concluded that the evidence available in 2008/9 supported a determination of total incapacity, it should pay Mr E compensation calculated on the basis described above. In any event, USS Ltd should pay Mr E £500 for distress and inconvenience arising out of their failure to give proper consideration to his eligibility for total incapacity benefits under rule 13.

28. Neither Mr E nor USS Ltd accepted the Adjudicator's Opinion and the complaint was passed to me to consider. Mr E and USS Ltd provided further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr E and USS Ltd for completeness.

Ombudsman's decision

29. In the absence of any undertaking by the University to pay contributions during his absence, I do not find that it was reasonable for Mr E to make an assumption that it would. I accept that his annual statements showed additional pensionable service, but he would have known that he was no longer paying contributions himself. I find this to be sufficient to alert him to, at least, the possibility that contributions were no longer being paid by the University either. He did not make any attempt to clarify matters. I do not find that there was any commitment on the part of the University which it can be required to honour or that USS Ltd could enforce.
30. The key question for USS Ltd was whether Mr E was, on the balance of probabilities, permanently incapable of undertaking any employment for which an employer would be likely to pay him more than a small fraction of his former salary. At the time the question arose, Mr E was considered unfit for all work. The question therefore became whether it was more likely than not that he would recover sufficiently before his normal retirement age to be able to undertake the requisite paid employment. The fact that Mr E was receiving treatment was not, in and of itself, sufficient grounds to say he was not totally incapacitated; there had to be an expectation of sufficient recovery. This was where USS Ltd's initial decision making process fell short.
31. USS Ltd relied heavily on Dr Curran's first report in coming to its decision to award partial incapacity benefits. However, Dr Curran gave no indication that he was expecting Mr E to achieve the kind of recovery which would enable him to undertake the requisite employment in the future. In fact, he said the prognosis in Mr E's case was bleak given the chronicity of his condition and his failure to accept his circumstances and past events. I cannot find that the available evidence supports the decision reached by USS Ltd at that time.

32. I would not disagree that the mere fact that USS Ltd reached a different decision some nine months later is not sufficient to call its previous decision into question. However, given the relatively short passage of time between the two decisions, it would be reasonable to expect there to have been some significant change in Mr E's condition/prognosis in the interim. Otherwise, a volte face does cast some doubt over the earlier decision.
33. USS Ltd argue that such a change can be seen in Mr E's condition and it refers to Dr Curran's second report. However, if anything, Dr Curran appeared to be saying there was an improvement in Mr E's condition since his previous report. I have not been able to identify the kind of significant change in expectation about Mr E's recovery that would explain such a change in view on the part of USS Ltd over the nine months in question.
34. This is, however, something of a side issue. The fact remains that USS Ltd failed to give due consideration to Mr E's eligibility for total incapacity benefits in 2008. Its later decision merely serves to reinforce this finding.
35. Therefore, I uphold Mr E's complaint.
36. In the circumstances, the appropriate course of action is for me to remit the matter to USS Ltd for review. Should it decide that the evidence supports an earlier award of total incapacity benefits, it will have to compensate Mr E for the delay in paying his benefits. Since his employment, and hence his active membership of the USS, was not terminated until December 2009, his USS benefits cannot be paid from the earlier date. Any compensation will, therefore, have to be based on the pension he would have been paid for the period in question, together with interest on his lump sum. I note the suggestion that Mr E could have mitigated his loss by accepting the partial incapacity benefits as an interim measure. In the circumstances, I find Mr E's actions to be reasonable and that no mitigation was required.

Directions

37. Within 28 days of the date of this determination, USS Ltd shall review its 2008 decision not to award Mr E total incapacity benefits. It shall notify Mr E of the outcome of its review and provide him with reasons for its decision. If necessary, Mr E is to be afforded the same opportunity to appeal this decision as before, including making a fresh application to me.
38. If USS Ltd decide an earlier award of total incapacity benefits would have been appropriate, it is to pay Mr E compensation in the form of a lump sum comprising the pension payments he would otherwise have received, together with simple interest, plus simple interest on his lump sum. Interest is to be calculated as the base rate for the time being quoted by the reference banks.

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39. In addition to the above, I find that it would be appropriate for Mr E to receive some compensation for non-financial injustice arising out of the failure to consider his case in a proper manner. USS Ltd shall pay Mr E £750 for the significant distress and inconvenience which he has suffered.

Anthony Arter

Pensions Ombudsman
5 May 2017

Appendix 1

Medical evidence

Ill health retirement form ME5A

Dr Scott, psychiatrist

40. In response to the questions set out in the ill health application form, Dr Scott said she had known Mr E since January 2006. She said he had been experiencing low mood, anxiety, loss of confidence, poor concentration, reduced sleep and thoughts that life was not worth living since March 2005. Dr Scott provided information about Mr E's medication. In response to a question on the effects of Mr E's illness, Dr Scott said it had a marked effect. She said Mr E was unable to engage in his usual activities and stayed in his house, preoccupied with his problems. She expressed the view that he would not be able to do his job because of anxiety, poor concentration and poor confidence. Dr Scott said there had been little progress in the three year period she had been seeing Mr E and expressed the view that his condition was "likely to run a chronic course".

Dr Gibson, GP

41. Dr Gibson said she had known Mr E for four to five years. She provided a list of Mr E's conditions: anxiety and depression, diabetes, hypertension, mild concentric ventricular hypertrophy, and prostate cancer. She also listed his medication. In response to the question on the effects of Mr E's illness, Dr Gibson said Mr E's anxiety and depression caused restrictions on his activities and he suffered from panic attacks when dealing with the University. She expressed the view that this was likely to be ongoing for "years to come".
42. Dr Gibson also provided a copy of a letter written to the University's medical adviser (Dr Glasgow) in May 2008. In this, she explained that Mr E's sickness absence had begun in March 2005 as a result of alleged bullying at work. She said Mr E remained preoccupied with the situation which had had a detrimental effect on his mental health. Dr Gibson outlined Mr E's symptoms and said he had been referred to Dr Scott. She went on to describe Mr E's other conditions and listed his medication. Dr Gibson mentioned that Mr E had been referred to a speech and language department for assessment in 2005 and given some advice.

Dr Glasgow, occupational health adviser

43. Dr Glasgow said the effect of Mr E's anxiety had meant he had been unable to return to the University's campus and he experienced poor concentration and panic feelings. With regard to reasonable adjustments to facilitate a return to work, Dr Glasgow said the persistent and severe nature of Mr E's mental health condition and his doctor's management of it had meant it had not been possible to resolve the perceived work related matters. With regard to loss of function, Dr Glasgow said Mr E was unable to communicate effectively by word of mouth or computer.

Additional medical evidence

Dr Curran, consultant psychiatrist, 20 February 2009

44. Dr Curran set out a comprehensive medical history for Mr E, précis of the reports from Drs Scott, Gibson and Glasgow, and details of his examination of Mr E. He concluded,

“[Mr E] presents as a man with an underlying chronic agitation/anxiety and a fluctuating lowered mood. Given the ongoing fragility of [Mr E’s] psyche and his impaired emotional state, the possibility of the patient being able to return [to] or even function effectively/productively in the workplace even on a part-time basis has to be ruled out at this time.

From his own comments the mental health team have planned further interventions/strategies and therapies over the next number of months – there are certainly no indications at present of a possible discharge from psychiatric review is planned.

The vast array of prescribed medication perhaps gives some indication of this man’s complicated physical and mental health – the limited response to the past therapeutic interventions that have already been offered is another negative aspect.

To conclude in my professional judgement and with reference to the patient’s current and future (for the next year) functional capacity in relation to the occupation of ... and any other employment - the prognosis in this case is bleak given the chronicity and failure to accept his circumstances and past events which continue to preoccupy his thoughts – the declining physical health is an additional factor in the formulation – I suspect that [Mr E] is also attempting to minimise the amount of alcohol he consumes – perhaps the lack of motivation and interest accounts for his inability to focus on his obesity despite a diagnosis of diabetes.”

Dr Curran, 27 November 2009

45. Dr Curran set out the results of his examination of Mr E. He concluded,

“I am pleased to report there has been a definite improvement in [Mr E’s] mental state.

I think the most significant reason would be the presence of his spouse permanently at his side over the last six months since her retirement. I suspect that a dependence on the spouse has arisen over the years. This comment can be referenced with the fact that the Crisis Team hasn’t been summoned for six months to intervene. However, there is still a team of various professionals who continue to review the patient ...

There is still a certain degree of fragility in the patient's psyche and I recorded his subjective complaints of interrupted sleep, flashbacks/dreams in respect of past exchanges referred to in my previous report when engaging with his Manager etc. – mood however is less prone to fluctuate currently.

I was however suitably impressed by the considerable array of medications prescribed ... to the patient which perhaps reflects his compromised physical condition. I note he remains on a sleeping tablet, antidepressant in a fairly substantial dosage.

In conclusion undoubtedly [Mr E's] mental state has improved quite significantly but I personally would harbour significant doubts if this man would be able to effectively and productively work even on a part time basis in the work place."

Appendix 2

USS Rules effective from 1 May 2009

46. Rule 13 provides payment of an early pension for incapacity if (amongst other things) the employer agrees the member is suffering from “incapacity” at the date employment ceases and USS Ltd determines that the member is suffering from “total incapacity” or “partial incapacity”. A member is required to apply to USS Ltd for benefits under rule 13.
47. “Incapacity” is defined as either partial incapacity or total incapacity.
48. “Partial 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 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).”
49. “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) the 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 for which an employer would be likely to pay the individual more than a small fraction of the amount which would but for the cessation of eligible employment have been that individual’s salary.”
50. Rule 13 also provides for a member retiring on the grounds of total incapacity to receive enhanced benefits. These benefits are calculated by reference to “additional pensionable service” and “supplementary service”.
51. Rule 39 covers temporary absence. It provides that, during a period of absence which is due to (amongst other things) sickness, membership is not suspended whilst the member is in receipt of any remuneration from the employer. A member who is receiving Statutory Sick Pay, but not other remuneration, may opt to continue to pay contributions but is not obliged to. If the member ceases to receive remuneration from the employer, the rules provides,

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“the employer with the consent of the member and the trustee company may pay the contributions which would have been payable by the member but for the absence, so that membership is not suspended and pensionable service continues to accrue as if the member was not absent. On the member resuming employment, the employer, with the consent of the trustee company, may recoup any such contributions plus reasonable interest by a reduction in the member’s remuneration or a deduction from the benefits payable to the member.”

52. If contributions are not paid, membership and pensionable service are suspended until contributions are again made. However, the rule provides that the suspension of membership does not break the continuity of membership or the accrual of pensionable service or mean that the member leaves service. If the member ceases employment on the grounds of incapacity during a period of suspension, the rule provides,

“the pension under rule 13 ... shall be payable from the day after the date of cessation of that eligible employment ... but calculated as if that eligible employment had ceased ... on the day before the suspension started.”