



Pensions Ombudsman Update
May 2021

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Mr R (PO-39731) - Trustee decision not to act upon an unsigned transfer application upheld

The Pensions Ombudsman (the **Ombudsman**) dismissed Mr R's complaint that the trustee should have acted upon his unsigned form and transferred him out of a scheme which was likely to enter the Pension Protection Fund (**PPF**).

Facts

Mr R was a member of the British Steel Pension Scheme (**BSPS**). Due to the restructuring of Tata Steel (UK) Limited, BSPS members were offered the choice to either transfer into a new scheme (**New BSPS**), or remain in the BSPS, which was likely to enter the PPF.

The trustee of the BSPS appointed Real Digital to assist with communicating this choice to members. On 2 October 2017, Real Digital wrote to Mr R setting out his options and providing an option form for him to complete by 11 December 2017. The document explained that, if a completed option form was not received before this date, the member would stay in the BSPS and his benefits transferred into the PPF.

On 22 November 2017 the trustee sent a newsletter to BSPS members reiterating the deadline. On 30 November 2017 Real Digital sent Mr R another option form and said the deadline was now 22 December 2017. Another reminder was sent on 12 December 2017.

Mr R's option form was received on 19 December 2017. Although it confirmed he would like to move to the New BSPS, the form was unsigned. The trustee wrote to Mr R on 21 December 2017 saying that the unsigned option form was not sufficiently clear, and provided Mr R with a new option form to choose an

option, sign, and return. On 23 January the trustee informed Mr R that, as it had not received a completed option form, Mr R would remain in BSPS and his benefits would move into the PPF.

In March 2018, the trustee was replaced by Open Trustees. In April 2018, Mr R received his first payment of reduced benefit following BSPS's move into the PPF.

Mr R complained under Open Trustees' internal disputes resolution procedure and subsequently to the Ombudsman that he should have been transferred to the New BSPS.

Decision

The Ombudsman did not uphold Mr R's complaint. Although expressing sympathy with Mr R's position, the Ombudsman found that Real Digital had communicated the requirement to sign the option form adequately, and that the trustee could not consider an unsigned form.

The Ombudsman also noted that the trustee had acted quickly when it informed Mr R that the form he had submitted was unclear and incomplete and he should complete and sign another.

Impact

Entering the PPF can mean a significant reduction to a member's benefits. In this case, Mr R cancelled his retirement and returned to work as a consequence.

Trustees should ensure that where members have an option of transferring to an alternative arrangement, the members are well-informed of this option and they know how to make a valid decision. The Trustees should then act upon the member's choice and act swiftly in respect of any procedural irregularities.

Here, the trustee's communications to the member were clear and the member was fully informed of the consequences of his actions. Because of this, despite the loss suffered by Mr R, the Ombudsman made no award for distress as there was no maladministration. This shows that clear communication is of benefit to the member and also provides a robust defence to a complaint from a member who fails to act upon the information provided.

Mr S (PO-39893) - Member's reasonable expectations of discretionary increases not upheld

The Ombudsman dismissed Mr S's complaint that he was unfairly discriminated against by his employer not using its discretion to provide increases to his pension.

Facts

Mr S was employed by GCP Applied Technologies UK Limited (**GCP**) and was a member of the company's pension plan (**the Plan**) from August 1966 to January 1995.

At the time that Mr S left the Plan, the deed and rules governing the plan granted a discretionary power to GCP to increase any pension or annuity payable out of the Plan, having regard to the rise in the retail prices index and the financial position of the Plan's fund.

Mr S elected to take early retirement from the Plan when his pensionable service ceased in 1995. At that time, the Plan's rules provided that increases to pensions in payment were at GCP's discretion.

Statutory increases for pensions earned on and from 6 April 1997 were introduced under the Pensions Act 1995. This statutory increase was incorporated into the Plan's rules, but did not apply to service pre-April 1997, such as that of Mr S.

In October 2018, Mr S complained to the Plan's trustee that he was being unfairly discriminated against by GCP failing to increase his pension, noting that the Plan was in a strong financial position and that he did not benefit from the statutory increases which were being applied in respect of post-April 1997 pensionable service. Mr S

said that GCP had built up a considerable expectation that it would, from time to time, increase pensions in payment relating to pre-1997 pensionable service. Following communications between Mr S and GCP, where Mr S's request for increases to be applied had been dismissed, Mr S complained to the Ombudsman.

Decision

The Ombudsman did not uphold Mr S's complaint. The Ombudsman, in its determination, held that GCP did not act unreasonably in not awarding discretionary increases to Mr S's pension and that GCP gave specific reasons for its decision. These included the fact that funding such increases to approximately 900 pensioners with pre-April 1997 service would be prohibitive and threatened the Plan's financial security.

GCP was entitled to act in its own interests, provided it had regard to the reasonable expectations of the members of the Plan. GCP had consistently informed members that increases were discretionary and not guaranteed. As no discretionary increase had been made for 17 years, the Ombudsman found that Mr S had not shown he had a reasonable expectation of receiving any such increase. GCP had not discriminated against Mr S, as the differing treatment for post-April 1997 service was a result of a statutory requirement, not a decision made by GCP.

Impact

Although in this case the Ombudsman did not find that the member had a reasonable expectation of receiving a discretionary increase, the decision is an important reminder to employers and trustees that, even where a power is discretionary, it may become enforceable when a reasonable expectation is created. Since the *IBM v Dalgleish* judgment in 2014, there have been a number of cases where members have sought to demonstrate that their reasonable expectations of the receipt of certain benefits had been breached. However, in this case it was clear that the threshold was not satisfied, given the clarity with which members had been advised that increases were discretionary.

Again, this emphasises to trustees and employers the need for clarity precision in communications with members, to ensure there is absolutely no ambiguity of the terms upon which their benefits are to be calculated. This is particularly so in relation to the application of discretionary benefits, to make sure members are clear that such benefits are not guaranteed.

Mr Y (PO-24361) - Refusal to effect overseas transfer held to be maladministration

The Ombudsman partially upheld Mr Y's complaint in relation to the Trustee's refusal to transfer his benefits to an overseas scheme.

Facts

Mr Y was a deferred member of the Simon Group Pension Fund (**the Fund**). Mr Y asked the Fund's third-party administrator (**the Administrator**) for a cash equivalent transfer value (**CETV**).

The Administrator provided the CETV to Mr Y in December 2017 and Mr Y submitted a transfer form to the Administrator in March 2018. As the scheme Mr Y wished to receive the transfer (**the Receiving Scheme**) was based overseas, if it did not satisfy the requirements to be a qualifying recognised overseas pension scheme (**QROPS**) then both Mr Y and the Fund might be liable for substantial tax charges.

The Administrator therefore carried out a due diligence exercise, which included a request to review the Receiving Scheme's rules. Following the due diligence exercise, the Fund's Trustee (**the Trustee**) refused the transfer because, *"notwithstanding the material before it, the fact that HMRC would not guarantee that a scheme appearing on the list of overseas pension schemes (**ROPS**) was a QROPS meant that it could not approve the transfer"*.

Mr Y complained to the Ombudsman on the grounds that the Administrator's due diligence was "excessive" and "erroneous" and caused delays, and that the Trustee should not have refused the transfer.

Decision

The Ombudsman partially upheld Mr Y's complaint.

In respect of the Administrator's due diligence, the Ombudsman found that the requests for information were not unreasonable. The Administrator sought to establish whether the Receiving Scheme's rules allowed Mr Y to access his benefits before aged 55 except in cases of ill health, and whether the Receiving Scheme's rules satisfied the legal requirements of a QROPS.

In respect of the Trustee's refusal to grant the transfer, the Ombudsman found that Mr Y had triggered his statutory right to a transfer under the Pension Schemes Act 1993 by completing the relevant documentation and returning it to the Administrator. The Trustee then had to decide whether the Receiving Scheme was a QROPS.

The Ombudsman held that the Trustee's refusal to grant the transfer based upon HMRC's inability to guarantee the Receiving Scheme's status as a QROPS amounted to maladministration. The Ombudsman noted that, whilst HMRC's position added a greater degree of uncertainty to the Trustee's deliberations, this cannot be used to negate a member's right to a transfer under overriding legislation.

The Ombudsman directed the Trustee to pay Mr Y £1,000 for the serious distress and inconvenience caused and to decide whether the Receiving Scheme was a QROPS. In reaching this decision, the Trustee was directed to not take into account the possibility that HMRC might decide to withdraw QROPS status from the Receiving Scheme in the future, as this was irrelevant.

Impact

This complaint is a reminder of the difficulties that arise when a member has a statutory right to a transfer and requests a transfer to an overseas scheme.

Trustees must take reasonable steps to satisfy themselves that the transfer is not a pensions liberation attempt and they must also protect the scheme from incurring tax charges.

Conversely, trustees must generally follow a member's instructions regarding their unqualified right to a statutory transfer. The consequence of not doing so may be the finding of maladministration from the Ombudsman.

Where a member does have a right to a CETV, but the receiving scheme is not a QROPS, HMRC will treat the transfer as an unauthorised member payment. The member will be liable for tax on the transfer at a rate of 40%, and may also be liable for an unauthorised payments surcharge. The scheme administrator may be liable for a scheme sanction charge of up to 40% of the transfer payment. Given these risks, proper due diligence is necessary to satisfy the trustee that the QROPS requirements are satisfied; legal advice may be required.

Mr R (PO-28256) - No maladministration where clear scam warnings had been provided

The Ombudsman dismissed a complaint brought by Mr R, a member of the Legal & General (**L&G**) Personal Pension Plan (the **Plan**), in relation to pension liberation.

Facts

In 2014, First Review Pension Services, an unregulated firm, contacted Mr R and advised him to transfer his pension to a single member occupational pension scheme (the **Scheme**) to benefit from wider investment opportunities. In August 2014, L&G received Mr R's request to transfer his pension benefits in the Plan to the Scheme. The administrator of the Scheme informed L&G that Mr R had received the Pension Regulator's Scorpion leaflet and that Mr R confirmed he was aware of the pension liberation issues.

L&G provided Mr R with the transfer paperwork and a covering letter referring to the Pension Regulator's Scorpion leaflet, expressing concerns regarding the investment advice received by Mr R and the risks of an overseas investment.

Despite the warnings, Mr R completed the relevant forms to proceed with his transfer request and a CETV of £36,000 was paid from the Plan to the Scheme. The proceeds of the transfer were then invested in a commercial property in Cape Verde.

Mr R later suspected that his investment was a scam and filed a formal complaint against L&G stating that, had L&G warned him about the risks of the transfer, he would not have transferred his pension benefits to the Scheme. L&G were then asked to reinstate Mr R's pension benefits in the Plan.

Decision

The Ombudsman dismissed the complaint stating that L&G provided Mr R with sufficient warning and information on pension liberation. The Ombudsman added that Mr R also received the Scorpion warning from the administrator of the Scheme and that Mr R confirmed that he was aware of the pension liberation issue, which he considered before making his decision to transfer.

On these grounds the Ombudsman held that it was more likely that not that Mr R would have requested the transfer even if L&G directly contacted him to echo the risk of that transfer.

Impact

Trustees and administrators have a major role to play in the battle against scams and pensions liberation. Here, the administrator provided the member with the Scorpion leaflet and raised its concerns about the investment advice and the risks of an overseas investment. Ultimately, this protected it from any responsibility.

Due to the member's statutory right, the Trustee had to make the transfer. In the future, there may be new grounds for a Trustee to refuse a transfer. The Pension Schemes Act 2021 provides that a member may not exercise their right to a CETV unless additional restrictions (to be set out in regulations) are complied with. In particular, a member may need to demonstrate an employment link regarding an occupational pension scheme to which they wish to make a transfer. This may provide trustee boards with a legitimate means of refusing a member's CETV request.

In the meantime, the Pensions Regulator (**TPR**) has asked trustees, providers and administrators to pledge to do what they can to protect scheme members and follow the principles set by the Pension Scams Industry Group.

TLT's Pension Dispute Resolution Team

Pensions disputes have become a key issue for many employers and trustees. TLT's Pensions Dispute Resolution team are first and foremost pensions lawyers.

We understand the issues facing companies and trustees, and provide clear and realistic solutions based on commercial and practical realities to help clients, whether employers or trustees, achieve the right result.

The team is experienced in dealing with complaints to the Pensions Ombudsman, acting on behalf of individuals as well as employers and trustees.

Disputes involving members and disputes between trustees and employers require careful handling and a pro-active approach.

Most disputes the team have been involved in have not become public knowledge as we pride ourselves on pro-active case management to resolve matters at an early stage, avoiding wherever possible the unwelcome cost exposure involved in full blown litigation.

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“They are the best pensions lawyers I have ever dealt with: they are responsive and practical,” says an impressed source.

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