

Ombudsman's Determination

Applicant	Mr Julian Baust
Scheme	Kodak Pension Plan (the Plan)
Respondent	Trustees of the Kodak Pension Plan (the Trustees)

Complaint Summary

Mr Baust has complained that the Trustees:

- caused delays during the valuation and transfer of his funds to Partnership (an annuity provider) which resulted in a lower annuity amount being payable; and
- refused to confirm and reassure him that his transfer value out of the Plan was not disadvantaged by the subsequent transfer of other Plan members to the new Kodak Pension Plan (no. 2).

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld only in relation to Mr Baust's first complaint. The Trustees did not act to seek the necessary clarification following receipt of information from HM Revenue and Customs (**HMRC**) and this led to a decrease in the annuity he was subsequently able to purchase.

Detailed Determination

The Plan's Rules

1. Rule 39.2 (Transfers to another scheme) says:

“The Trustees may if they think it fit and subject to this Rule and to the approval of the Principal Employer transfer to the trustees or managers of another fund scheme or arrangement to which a transfer may be made without prejudicing Approval (“the other scheme”) all the assets of the Fund or such part thereof as shall be determined by the Trustees to be just and equitable, having regard to the advice of the Actuary and the Contracting-out Requirements, upon the footing that persons in respect of whom the transfer is to be made, being entitled or contingently entitled to rights and benefits under the Scheme, shall be entitled or contingently entitled under the other scheme to such benefits (consistent with Approval) in respect of such transfer as the Trustees may in their discretion arrange with the trustees or managers of the other scheme...”

2. Rule 39.3 of the Plan Rules provides that:

“Any person in respect of whom transfer is made under this Rule shall cease to be entitled to any benefits under the Scheme in respect of the assets so transferred and the Trustees shall not be in any way responsible for or required to enquire into the use and application of the assets so transferred.”

Material facts

3. Mr Baust retired in March 2010 aged 52 and was a pensioner member of the Plan.
4. On 19 January 2012, the parent company of the Plan's sponsoring employer filed for Chapter 11 bankruptcy protection in the United States. Following this announcement, Mr Baust requested a transfer value quotation from the administrators of the Plan. On 30 January, a quotation was issued and Mr Baust was informed that the total transfer value was £1,358,207 which was guaranteed until 30 April 2012. (A 30% reduction had been applied to the transfer value due to the Plan's under-funding. The unreduced total transfer value would have been £1,940,296.) At this time, Mr Baust's annual pension from the Plan was £62,354.
5. Mr Baust contacted HMRC on 9 February 2012, to seek guidance on what would constitute a legal transfer given the fact that his pension was in payment and whether he could buy an annuity with his transfer value. After a number of email exchanges, on 24 April 2012, HMRC informed Mr Baust of the following:

“In order to fulfil the ‘like for like’ criteria of a transfer the transfer would have to be to another annuity. This is the only point of concern we have in the circumstances.”

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6. HMRC sent a further email on 9 May 2012, and said the following:

“I can confirm that in order to satisfy our like for like criteria for a transfer it is sufficient to arrange for the transfer to go to another annuity (RPSM14106010). The actual rate of the annuity would not be a consideration with such a transfer.”

7. Mr Baust forwarded this email to the Trustees on the same day and the following is a timeline of the subsequent events that took place:

- 10 May 2012 – The Trustees sent HMRC’s confirmation to the administrators saying that confirmation needed to be given to Mr Baust about his transfer.
- 17 May 2012 – The Trustees’ solicitors wrote to HMRC and asked whether; (a) a scheme pension in payment can be transferred to purchase an annuity with an insurance company and (b) whether following a transfer out, a new scheme or the annuity can be paid at a rate which is lower than the original scheme pension.
- 8 June 2012 – the solicitors sent HMRC an email requesting a response to their earlier letter.
- 14 June 2012 – HMRC provided the following response to the solicitors:

“Although there is generally no advantage in transferring a scheme pension due to charges etc being deducted, any new scheme pension would nonetheless be expected to be of at least the same amount as that provided immediately before the transfer (RPSM14106010). Such a transfer would have to be a scheme pension in order to fulfil the ‘like for like’ criteria mentioned in RPSM14106010. Provided that any decrease was not substantial...there are no other requirements that may actually hamper such a transfer.”
- 19 June 2012 – Mr Baust received a quotation from Partnership for a joint lifetime annuity benefit of £68,874.72 (based on a purchase price of £1,353,207). The annuity benefit was guaranteed until 17 July 2012, but only if accepted within 14 days of issue, by 3 July 2012.
- 24 July 2012 – Following Mr Baust’s request that HMRC review the quotations he had received, HMRC informed him that their role was not to “rubber stamp individual transfers” and that it was for the Plan administrators to be satisfied that all the requirements were met.
- 25 July 2012 – Mr Baust sent an email to the administrators informing them of HMRC’s position in relation to approving his transfer. He asked that approval be obtained from HMRC so that his pension could be transferred.

- 31 July 2012 – A Trustee meeting was held where Mr Baust’s case was discussed. It was noted that his transfer value quotation had expired but the Trustees agreed that further clarification was required from HMRC in relation to their letter of 14 June 2012, before Mr Baust’s transfer could be approved.
 - 1 August 2012 – The solicitors telephoned HMRC to clarify the meaning of “like for like” transfer and whether an annuity paid by an insurance company can be a “scheme pension”. HMRC clarified that the requirements were that the annuity will provide a pension for life and that the rate must not be less than the original pension. The fact that the annuity will not provide the same or any indexation did not prevent it from being a recognised transfer.
 - 2 August 2012 – the solicitors sent a follow-up email to HMRC to clarify the information that had been given the previous day.
 - 7 and 13 August 2012 – The solicitors sent email chasers to HMRC requesting a response to their email of 2 August.
 - 17 August 2012 – HMRC confirmed that the email of 2 August was a correct reflection of the earlier conversation.
 - 5 September 2012 – A Trustee meeting was held where Mr Baust’s transfer out of the Plan was approved on the basis of the initial transfer value he had received in January. At his request, the Trustees’ approval was informally communicated to him by email on the same day.
 - 6 September 2012 – Partnership issued Mr Baust a new quotation for a joint lifetime annuity benefit of £66,854.64 (based on a purchase price of £1,353,207).
 - 10 September 2012 – Mr Baust was issued with a transfer of benefits pack and it was confirmed that the initial transfer value issued in January 2012, would be honoured. He signed the transfer application form on 22 September 2012.
 - 4 October 2012 – Payment of £1,353,207 was made to Partnership and Mr Baust’s transfer out of the Plan was completed. He subsequently accepted the quotation of 6 September 2012, and purchased an annuity of £66,854.64.
8. In April 2013, the Trustees agreed a settlement with the parent company, the sponsoring employer and the regulatory bodies in respect of the Chapter 11 process. As there had been a real risk that the Plan would enter the Pension Protection Fund (PPF), the Trustees agreed to set up a new pension plan – the Kodak Pension Plan (no.2) (KPP2). This plan would offer less generous benefits than the original Plan but more generous than the benefit that would be payable through the PPF.

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9. Mr Baust wrote to the Trustees in June 2014 (following a period of ill health). He said that the reduction in his transfer value was unreasonable given that the Trustees continued to pay full benefits whilst moving to KPP2. Further, the Trustees' delay in obtaining the right information from HMRC resulted in a loss to his pension of £2,020 per annum for life. He requested that the Trustees transfer £582,089 to top up his annuity and put in place a pension of £2,020 per annum followed by 50% for his wife on his death.
10. The Trustees responded under the Plan's internal dispute resolution procedure on 31 July 2014. Mr Baust's complaint was not upheld. They decided that they had acted appropriately and that he did not have a legal entitlement to further benefit. They informed Mr Baust of the following:
- transfers out of the Plan had been reduced since 2010 due to the Plan's funding situation and the 30% reduction applied to his transfer value was appropriate because "it ensured that a member taking a transfer value did not take more than his share of the fund";
 - his transfer was implemented after the guarantee period had expired but they honoured the quote even though they were not required to;
 - had they refused to honour the transfer value quote, the value would have reduced further because a higher reduction of 46% was applicable at the time of his actual transfer;
 - KPP2 offers lower benefits than the Plan because it provides lower pension increases so he is incorrect in saying the members of KPP2 received full benefits;
 - KPP2 Trustees apply a reduction to transfer values because it remains under-funded;
 - they accept that there was a delay in approving his transfer but this was not caused by the Trustees;
 - the transfer was completed quickly once they received the appropriate guidance from HMRC;
 - his request of 25 July 2012, to transfer was considered at the Trustee meeting of 31 July 2012, where it was decided that further clarification was required from HMRC;
 - HMRC were contacted the next day on 01 August and they received clarity from them on 17 August;

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- the transfer was then approved at the first available Trustee meeting on 5 September; and
 - following his transfer out of the Plan, they have been legally discharged from any obligation to provide him with any benefits.
11. Mr Baust appealed this decision and asked for written assurance that the 30% reduction applied to his transfer value in 2012 was not higher than the reduction applied to other members who transferred out of the Plan to KPP2. He maintained that the delay in approving his transfer was not solely due to HMRC and he said that they took no action from 14 June 2012 to 31 July 2012. Mr Baust withdrew his request for a pension of £2,020 per annum and instead asked for a lump sum of £52,723. (This was based on his calculation using 2010 mortality rates and the assumption that he had a life expectancy of 24.48 years.)
12. In addition, Mr Baust said that had the Trustees followed the same procedure following their receipt of HMRC's letter of 14 June 2012, they would have received the necessary clarity from HMRC by 1 July 2012. He would then have been able to accept the June annuity quotation from Partnership by the deadline of 3 July 2012.
13. In their subsequent response, the Trustees informed Mr Baust that their decision had not changed.

Summary of Mr Baust's position

14. Mr Baust says that:
- the Trustees did not fulfil their duty to do the best for the Plan members by failing to seek clarification from HMRC in January 2012 following the parent company's filing for Chapter 11 protection;
 - he provided a copy of HMRC's final confirmation to the Trustees on 10 May but accepts that they wanted their own confirmation;
 - had the Trustees taken the action they eventually took on 1 August 2012, earlier on 11 May 2012, (following receipt of his email), they would have had the answer they required sooner and the June quotation would not even have been required;
 - the Trustees did not review his case following receipt of the HMRC's letter of 14 June 2012, which caused a delay that led to the expiration of the June annuity quotation from Partnership;
 - the Trustees did not act promptly between 14 June 2012 and 31 July 2012, and could have been more prompt in chasing HMRC;
 - the Trustees acted with a lack of urgency and their inactivity led to the delay which ultimately caused a loss to the annuity that he is now receiving;

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- the Trustees should not be able to “walk away from their failure to administer the Plan and manage the issue as they have done” but should make good for the loss they caused;
- the Trustees’ reluctance to inform other affected members of HMRC’s position in relation to the annuity implies that they were not interested in facilitating transfers from the fund and this may have influenced their attention to his case;
- the Trustees were aware of the urgency of the situation because he emailed them frequently asking for them to obtain clarification from HMRC, they knew that there was a real possibility that the Plan could enter the PPF and they would have been aware that annuity quotations are time limited;
- they met five times between 14 June 2012 and 31 July 2012 and chose not to discuss his case which shows that they did not place any importance on his predicament or the urgency that was required;
- from his experience, it would have been possible to convene a Trustee meeting via telephone conference or make urgent decisions by email outside of scheduled meeting times, it was therefore possible that the Trustees could have met to approve his transfer before the June quotation expired;
- he was living under the threat of losing over 60% of his pension (if the Plan went into the PPF due to the cap), it was a stressful time for him and the Trustees did not help him during this difficult time;
- the loss to him is £2,020 per annum and a further £1,010 to his wife following his death and he would like to be compensated by receiving a lump sum payment of £52,723.

Summary of the Trustees’ position

15. In addition to their position as set in paragraph 8 above, the Trustees maintain that the delay was due to the misleading and inaccurate information provided by HMRC. It was not the fault of the Trustees or their solicitors.
16. The Trustees will not incur the cost of determining the level of reduction that would have applied had Mr Baust transferred to KPP2 because it is not a like for like comparison; both transfers were very different.
17. Mr Baust did not notify the Trustees of any specific deadlines in respect of his annuity quotation.
18. The Trustees regret the impact on Mr Baust but they do not think the timing of dealing with his request was unreasonable. They had an “enormous workload” and had to deal with other urgent deadlines (relating to the filed chapter 11 bankruptcy) around the time HMRC’s letter of 14 June 2012 was received.

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19. The Trustees took action after receiving Mr Baust's email of 9 May 2012. They referred the matter to their legal advisors the next day who then promptly wrote to HMRC requesting clarification.
20. The Trustees do not think they could have obtained a response from HMRC more quickly following the call of 1 August 2012.
21. Had a response been received from HMRC on 2 July 2012, the Trustees say that it would not have been possible to hold a quorate trustee meeting on 3 July 2012. This is because members of the board lived in different countries and time zones. Even if it had been possible to hold a meeting, it would have been held in the afternoon. The Trustees question how feasible it would have been for the outcome of the Trustee meeting to be communicated to Mr Baust before the close of business in time for him to accept the June quotation from Partnership.

Conclusions

22. Mr Baust was already in receipt of his pension when he requested a transfer value quotation. Transfers of this type are rare but can be permitted.
23. Mr Baust's complaint is about the delay in transferring his annuity from the Plan to Partnership. The Trustees have accepted that there was a delay in approving Mr Baust's transfer to Partnership. They have however attributed this delay to HMRC. I do not agree for the reasons set out below.
24. I will not make a finding on whether the Trustees should have been seeking clarification from HMRC in January 2012 on behalf of all the Plan members. I can only concern myself with their actions in relation to Mr Baust's case alone.
25. It is evident that Mr Baust was eager to avoid a significant loss to his pension that was already in payment. He contacted HMRC shortly after receiving the transfer value quotation and obtained annuity quotations around the same time. He wanted to be sure that his proposed transfer would comply with the relevant requirements but ultimately, it was the Trustees who were responsible for approving his transfer out of the Plan.
26. Mr Baust forwarded HMRC's confirmation to the Trustees on 10 May 2012 and I do not find it unreasonable that the Trustees sought their own clarification from HMRC. They did this promptly and their solicitors sent a letter to HMRC on 17 May.
27. Although HMRC did not respond until 14 June, it is the Trustees' inaction following receipt of this letter that caused the delay. The Trustees say they were not satisfied with HMRC's response. In my view it is not unreasonable to expect further clarification to have been sought. However, this did not take place. Further, there is no evidence that this matter was discussed at the next Trustee meeting which took place on 19 June 2012.

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28. It was not until Mr Baust sent his email of 25 July 2012 that the Trustees took some further action albeit the Trustees appear to have treated this email as the first time that Mr Baust requested approval for his transfer which cannot be right as Mr Baust had been communicating with the Trustees and had provided them with copies of his prior communications with HMRC. It was therefore apparent that Mr Baust wanted the Trustees' approval to transfer out of the Plan.
29. Following the Trustee meeting of 31 July 2012, it took the Trustees 12 working days to obtain the clarification they required from HMRC, even after chasing them on two occasions. It then took a further 21 days for the transfer to be completed and the money paid to Partnership. I find this to be a reasonable time frame on both accounts.
30. Applying the time frame identified above, I find that clarification could have been obtained from HMRC by 2 July 2012. Although, this was still within the acceptance period for the June annuity quotation, Mr Baust would not have been able to accept it in the absence of the Trustees' approval.
31. In a recent letter to my investigator, the Trustees provided the dates of Trustee meetings held between February and August 2012. The first Trustee meeting after 2 July that the Trustees would have been able to approve the transfer was 6 July. This means the money could have been paid to Partnership on 6 August to complete the transfer.
32. As the June annuity quotation would no longer be guaranteed after 3 July, my investigator asked Mr Baust to obtain a quotation from Partnership. Partnership confirmed that if a quote had been obtained on 10 July 2012 based on the terms of the final policy, the annual benefit would have been £67,315.87. This new quotation is £1,558.85 less than the June quotation and £461.23 more than the September quotation that was finally accepted. On this basis, Mr Baust's loss can only be calculated on the difference between the July quotation and the September quotation, namely £461.23.
33. It is not for me to speculate on why the difference between the June quotation and the July quotation is significantly higher over what appears to be a shorter period of time. Having established that the June 2012 quotation could not have been accepted within the acceptance period, the Trustees cannot be held liable for the reduction of the annuity during this time. Their delay however led to the further decrease of £461.23 and I make the relevant direction below.
34. I will now turn to Mr Baust's complaint that the Trustees refused to give him the assurance that the Plan members who transferred to KPP2 did not receive a lower reduction than he did.

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35. Rule 39.3 of the Plan Rules confirms that once the transfer out of the Plan was completed on 4 October 2012, the Trustees' obligations towards Mr Baust came to an end. This is further confirmed by the declaration that Mr Baust signed on 22 September 2012, acknowledging that he understood that the Trustees will not owe him, his family or dependants any benefits in the plan once the transfer value is paid. In view of this, the Trustees are not obliged to provide Mr Baust with the assurance and information he is seeking.
36. For the reasons given above, I uphold Mr Baust's complaint, but only in relation to his first complaint concerning the transfer delay.

Directions

37. Within 28 days of this Determination, the Trustees are to pay Mr Baust a sum representing his total loss from 6 August 2012, to the date of payment (at the rate of £461.23 per annum) plus simple interest at the base rate for the time being quoted by the reference banks.
38. Within 28 days of this Determination, the Trustees are to buy an annual annuity from Partnership for £461.23 on the same terms as Mr Baust's current annuity, or pay a capital sum if such an annuity cannot be purchased.

Anthony Arter

Pensions Ombudsman
22 July 2015