

Ombudsman's Determination

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| Applicant | Mr K |
| Scheme | Brandrick Holdings Ltd 1989 RBS (the Scheme) |
| Respondent | The Trustee of the Brandrick Holdings Ltd 1989 Retirement Benefits Scheme (the Trustee) |

Outcome

1. I do not uphold Mr K's complaint and no further action is required by the Trustee.

Complaint summary

2. Mr K has complained that the trustees (**the former Trustees**), failed to provide him with a full list of the assets and values used to calculate his transfer value, and any assets that remained within the Scheme to which he might be entitled.

Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. The Scheme is a Small Self-Administered Scheme (**SSAS**).
5. On 14 February 2008, the then Pensions Ombudsman issued a Determination in relation to the asset share of the Scheme (**the 2008 Determination**).
6. On 24 April 2008, Mr K was removed as a trustee of the Scheme.
7. In 2009, Mr K requested a transfer of his pension entitlement to a different pension arrangement. An actuarial report dated 12 June 2009 (**the Report**) was completed, and a transfer was made by the trustees.
8. Over the intervening years, Mr K has regularly received Investment Statements from Baring Fund Managers Limited regarding an investment holding (**the Baring Investment**). The Joint Holders were listed as Mr K, another former trustee and Hazell Carr Pension Services Limited.

9. On 15 April 2019, Mr K's Independent Financial Adviser (**IFA**) wrote to the Former Trustees of the Scheme, saying:

"I attach a letter of authority from [Mr K] regarding his membership of the above pension scheme, as a reminder that I continue to represent [Mr K] regarding his membership of the above pension scheme.

As [Mr K] is approaching his Normal Retirement Date under the scheme, we would like to finalise his benefit entitlements under the scheme and would therefore ask you to kindly provide us with the following information:-

1. A full list of each of the assets and values that were used to calculate the transfer value within your letter dated 19th June 2009.
2. A full list of each of the assets and values that remain within the pension scheme and for which you believe [Mr K] may have a pension entitlement."

10. On 27 June 2019, Mr K's IFA chased this information, requesting the matter be reviewed in line with the Scheme's Internal Dispute Resolution Procedures (**IDRP**).

11. On 2 July 2019, the Former Trustees responded to the IFA saying:

"[Mr K] has had ample opportunity to raise any questions about the transfer value and, in the absence of any query and after a period of over ten years, the trustees do not have that information readily to hand.

As you are aware [Mr K] transferred his non insured benefits to James Hay and, as explained previously, the earmarked policy [xxxxxxx] was assigned into his own name. [Mr K] therefore has no entitlement to benefits from the scheme."

12. On 8 July and 28 August 2019, Mr K's IFA chased the information again.

13. On 28 August 2019, a letter was sent by recorded delivery by Mr K's IFA to the Former Trustees. This was returned, not signed for. The letter said:

"We feel that you have now had sufficient time to collate and provide the information requested. If we have not received the information requested within 30 calendar days from the date of this letter then we will take further action."

14. On 3 September 2019, the Former Trustees wrote to the IFA saying:

"The assets comprised insured policies and cash. The insured policies were, effectively earmarked for the respective members. The policy earmarked for [Mr K] was, as you know, assigned into his own name. The share of the cash attributable to [Mr K] is explained in the actuary's report, a copy of which is attached herewith."

15. The Former Trustees provided a copy of the Report, which set out the shares of non-insured assets attributable to each member, showing 36.45% in Mr K's favour, 15.91% to another member and a residual amount of 47.64%, to be treated as surplus funds. There was also comment on a member's attempt to assign benefits to Mr K and that the Former Trustees would need to forfeit that entitlement, discussed in the 2008 Determination.
16. On 27 September 2019, Mr K submitted a complaint to The Pensions Ombudsman (**TPO**) stating:

"I am due to retire next year and want to check that I receive the full payment of my benefits. Through my financial adviser I have therefore requested from [the Trustees] a full list of the assets and values that were used to calculate the transfer value, and a full list of the assets and values that remain within the pension scheme. The first request was made by post on 1st April 2019, [the Trustees] replied on 2nd July 2019, stating they did not have information to hand. A further letter was sent on the 8th July requesting that the information be sent as requested, The Trustees were asked to respond in accordance with The Schemes [sic] Internal Dispute Resolution Procedure. They have done neither. A further letter was sent on 28th August recorded delivery to the Pensions registered address, this was returned, not signed for."
17. On 2 September 2020, the complaint was accepted by TPO based on the complaint set out in paragraph 16 above.
18. On 30 October 2020, the Former Trustees provided comment on the complaint. In summary, the Former Trustees said:-
 - They had responded fully to Mr K's requests for information on 2 July and 3 September 2019.
 - On notification of the complaint from TPO, they had again written to the IFA. If that information was not what was requested, the IFA should clarify this, and the trustees would attempt to provide the information to the extent that the Scheme Rules allowed it.
 - The Former Trustees provided the information that they had been asked for: "the assets contained in the pension scheme were confirmed as comprising insured policies and cash, and that [Mr K] does not have an entitlement to any assets that are currently held by the scheme."
 - Although the letter dated 28 August 2019 was not received, the Former Trustees' letter dated 3 September 2019 post-dated this, and the Former Trustees received no response or further correspondence.
 - Mr K transferred out of the Scheme in 2009 and ceased to be a beneficiary. No correspondence was received in the interim, until 15 April 2019.

19. Also on 30 October 2020, the Former Trustees wrote to Mr K confirming that at the point of transfer, the Scheme had total non-insured assets of £407,897.18. Mr K's 36.45% share of this was £148,678.52. In addition, the insured policy in Mr K's name, and two other insured policies were held by the Scheme. The Former Trustees confirmed that Mr K's non-insured and insured assets had been transferred and he had no entitlement or beneficial interest to any of the remaining assets within the Scheme.
20. On 5 November 2020, Mr K responded to the Former Trustees, making the following points:
 - The summary of non-insured assets does not include the Barings Investment. It still exists and was not taken into account in the 2009 partial transfer valuation.
 - What are the details of the 'expense reserve' of £55,000 mentioned in the 30 October 2020 letter?
 - The Scheme's property was valued at £850,000 in June 2008, why was this not reflected in the summary of non-insured assets?
 - There appears to be rent income missing from the Scheme's non-insured assets.
 - In 2001 there was a cash balance of £78,435 and a mortgage of £81,408.
 - The Report refers Rule 8A(a) which was incorrect as it had been superseded by subsequent legislation.
 - The dates of Mr K's employment were wrong in the Report.
 - The Report showed an incorrect contribution history for Mr K.
 - The Report did not take into account the 2008 Determination, which stated that:

“any split (of non-insured assets) between [Mr K and another member trustee] is a matter capable of resolution between them.”
21. The letter went on to make a number of enquiries, as set out in the Appendix below.
22. There followed a significant number of exchanges between the parties that elaborated on these issues.
23. On 17 February 2021, the Former Trustees resigned, and a new sole Trustee was appointed by the Principal Company by way of Deed of Appointment.
24. During the Adjudicator's investigation, Mr K added that he:

“was aware of the content of the actuarial report in 2009 and

 - a) Upon receipt of the partial transfer value, he immediately asked James Hay to return the transfer value to the trustees and which [sic] the trustees refused to accept.

- b) Immediately on sight of the draft report, he requested sight of the instructions that were presented to the actuary, in order that he could raise questions with the actuary who drafted the report and also requested a signed copy by the actuary. Disclosure was refused.
- c) The legal representatives of [Mr K] wrote on 10th October 2008 to the legal representatives of the Scheme raising a multitude of issues requiring clarification including the payment of legal fees, VAT, the allocation of non-insured scheme assets, the Ombudsman's adjudication, the outstanding rent, transfer values, conflicts of interest and the appointment of an independent trustee. [Mr K] never received a response to this letter.
- d) [Mr K] has never accepted the 2009 transfer value as a full and final transfer value."

Adjudicator's Opinion

25. Mr K's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustee. The Adjudicator's findings are summarised below:-

- The focus of the opinion is solely the complaint that was submitted to TPO, as set out in paragraph 16 above.
- There is a dispute about a particular asset that Mr K says is an asset of the Scheme and which he should have benefited from at the point of transfer but did not. The Adjudicator's view was that this dispute was not part of the original complaint submitted, despite Mr K's knowledge of it, and so it should not be addressed as a part of this complaint.
- If Mr K had other concerns about the Scheme they should be submitted to the Trustee for consideration. If they are not resolved by the Trustee, they can be submitted to TPO as a new complaint and subject to the necessary jurisdiction checks.
- In respect of the complaint as submitted, the Adjudicator acknowledged that it took some time for the Former Trustees to provide the requested information, but they did respond to Mr K on 3 September 2019. In this correspondence the Former Trustees confirmed that Mr K's transfer value was based on an insured policy and a share of the Scheme's cash. The Former Trustees also provided a copy of the Report.
- The Adjudicator noted that this response was issued after the IFA's letter of 28 August 2019, and instead of Mr K making further enquiries of the Former Trustees if he thought that the information was unclear, he immediately referred it to TPO. The Adjudicator's view was that if Mr K remained unsure of how the transfer value was calculated it was reasonable to think he would have made additional enquiries of the Former Trustees.

- It was unclear whether the Scheme was required to have an IDR, as this depended on the membership of the Scheme. Mr K now asserts that he is a continuing member of the Scheme and so an IDR should have been completed. The Adjudicator's view was that the Former Trustees' decision not to follow an IDR, based on its belief that Mr K had transferred from the Scheme in 2009, had not been detrimental to Mr K in this case because the Former Trustees had responded to his complaint, albeit after four months. While this took a period of time to elicit a response, the delay did not justify a distress and inconvenience award.

26. Mr K did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr K provided further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mr K, summarised below:-

- As not all of Mr K's assets were transferred in 2009, he continues to be a non-trustee member of the Scheme and is entitled to the information requested and for his complaint to be treated under the IDR, both of which the Trustee has declined.
- A deferred member is an individual who has left service but is entitled to a deferred pension. As the value of the Barings Investment is capable of providing pension benefits to Mr K, he is legally a deferred member, and has rights to information and for his concerns to be addressed via the IDR.
- The Former Trustees ought to have been aware of the Barings Investment as it was an asset of the Scheme since his appointment as a trustee in 1998.
- The Former Trustees cannot claim that they were unaware of unpaid rental income on Scheme assets. They should be aware that it is an asset which forms part of Mr K's entitlement.
- Any legal costs should have been paid by the principal employer and so that debt is an asset of the Scheme and Mr K has an entitlement to it.
- The Former Trustees must: adhere to the Trust Deed and Rules; act prudently, responsibly, and honestly; act in the best interests of the beneficiaries; act impartially; and provide relevant and timely information.
- The Former Trustees were asked to respond according to the IDR, and provide the information requested, not just partial transfer values and assets. They failed to provide all the requested information that Mr K is entitled to and the information that was provided was delayed.
- Mr K is a member of the Scheme and has not transferred his full entitlement. He meets the HMRC and Money and Pensions Service's definition of a member and the initial complaint did set out that the enquiry was in relation to Mr K's membership of the Scheme.

- There was no declaration made that the transfer was in full and final settlement. The Scheme contains assets that he has not benefited from.
- Any statutory discharge of liability is ineffective if the Trustee knowingly or through maladministration fails to include all assets in the transfer value.
- Mr K's decision not to respond to the Former Trustees' letter dated 3 September 2019 does not absolve them of the responsibility to respond as required.
- There was no acrimony on Mr K's part, and all correspondence has been courteous and professional. Mr K wishes to avoid acrimony as he suffers from anxiety.
- The Former Trustees ought to have provided Mr K with a full current list of scheme assets and values following his request on 19 April 2019.
- Mr K could not challenge his entitlement without first receiving details of what remained in the Scheme. These remain undeclared.
- The Former Trustees' letter of 3 September 2019 confirmed the assets and cash used for the transfer of benefits, but it did not detail the asset's values or mention the debt that was used in the calculation. This lack of detail justifies Mr K's referral to TPO.
- Mr K has now gone beyond his normal retirement date and still has no idea of his full entitlement to benefits, despite his courteous and professional manner. This same courteousness has not been extended to Mr K by the Trustee, and so it has failed to act in a fit and proper manner.
- Should the Trustee continue to fail to meet its obligations further complaints will follow to enable Mr K to assess his full entitlement to benefits.
- Mr K cannot have known that the Barings Investment was not included in his partial transfer value until the Former Trustees failed to provide details of the assets used in the partial transfer value.
- He also cannot have complained earlier because he assumed the Former Trustees were acting responsibly and impartially in his best interests until the Former Trustees provided him with a list of assets that showed that they were not.
- Mr K's complaint is about his rights to information about the Scheme.
- Since the appointment of the Former Trustees in 2008 they have broken the law and failed to follow the necessary rules and regulations given Mr K's continuing status as a non-trustee member of the Scheme.
- At the point of the Former Trustees' appointment, all members of the Scheme should have been trustees. If not all the members were involved in the investment

decisions of the trustees, then there could be FCA consequences for the Former Trustees deemed as having provided investment advice.

- Mr K was not made aware of the Scheme's Trust Deed and Rules, executed in 2008, prior to his transfer, until a letter from the Former Trustees dated 6 April 2021. This version of the Rules is likely to have adopted post A-Day rules and may have broken the link between service and final pay. This may have enabled the actuary to sign-off on 100% of the non-insured assets as being the transfer value.
- Mr K continues to be a member of the Scheme and had the right from 28 December 2020, the day after his normal retirement date, to access his full benefit entitlement. He has given the Former Trustees adequate opportunity to resolve the issues. The Trustee is deliberately depriving Mr K of his benefits for its own gain, the potential penalties for which include possible imprisonment. It would therefore be in the interests of all parties to resolve the matter through the Ombudsman.
- This complaint is about the legal duty of the Trustee to provide Mr K with accurate and full information in good time, which it is yet to fulfil.
- In choosing not to consider whether Mr K was a member of the Scheme the Adjudicator's opinion lacks legal basis and process. For the Trustee to be obliged to provide information a view must be taken on whether Mr K is a member. An opinion cannot be reached without this point being established.
- The Adjudicator's opinion has persuaded the Trustee that it has acted appropriately when it is clear it did not. In doing so this has influenced the Trustee to continue to act unhelpfully, and not in the best interests of the members.
- Have the new Trustee's credentials been confirmed by referring to the 2008 Trust Deed and Rules?
- By refusing to transfer the Barings Investment to the Trustee, Mr K is acting responsibly by requesting evidence that the Trustee has been properly appointed in accordance with the 2008 Trust Deed and Rules. To not do this would be legally incorrect and irresponsible.
- The complaint about the failure to supply Mr K with a copy of the 2008 Trust Deed and Rules would be in time because Mr K only became aware of this in April 2021 when the Trustee referred to it in submissions.

Ombudsman's decision

27. Mr K's original correspondence with the Former Trustees in April 2019 was a request for confirmation of the assets and values used when calculating Mr K's transfer value in 2009, along with confirmation of any assets within the Scheme to which Mr K might have a continuing entitlement.

28. The Former Trustees' response was on the basis that Mr K had transferred out of the Scheme and had no further entitlement to assets from the Scheme. In response to this Mr K did not seek to challenge the trustees' understanding that he was no longer a member of the Scheme. This was despite Mr K being aware of the Barings Investment and a number of other factors that have been raised in the subsequent correspondence, which he says supports his position that he is a member of the Scheme. As Mr K did not challenge the trustee's position on this matter at the point of referring the complaint to TPO, I do not intend to determine that issue here.
29. In September 2019, the Former Trustees confirmed that Mr K's transfer value was based on his share of the cash in the Scheme and the insured policy in his name. The Former Trustees provided a copy of the Report to show how his share of the Scheme's assets was calculated. Although it took four months to provide this information, I note that the Former Trustees had explained that the information was in archive, and it had been ten years since Mr K had transferred.
30. Having received the Former Trustees' letter in September 2019, Mr K referred the matter to TPO for consideration. It was accepted for investigation, and subject to a jurisdiction check on the basis that the complaint was in relation to a perception that the Former Trustees had failed to provide timely and full information in response to his query in April 2019.
31. The complaint, as stated, can clearly be said to be within TPO's jurisdiction time limits. However, since then, a very significant number of new and distinct issues have been brought to TPO's attention which focus on Mr K's belief that he is still a member of the Scheme and that he retains an ongoing entitlement to the Scheme's assets.
32. The Trustee was given no opportunity to address these complaints in advance of the case being referred to TPO and, given Mr K's transfer in 2009, some or all of these issues, may have been brought outside of the time limits for my jurisdiction. In these circumstances, I find that it is not appropriate for me to widen the scope of the current complaint to address those issues as a part of the current complaint. To do so might allow a complaint regarding recent events to be used to circumvent my jurisdiction on issues that may not be within my remit. So, I make no finding on the jurisdiction of Mr K's wider concerns.
33. If Mr K wishes me to consider these wider issues, they should first be put to the Trustee for consideration, which I understand has now happened. If an agreement to resolve the new complaints cannot be reached, then Mr K can refer them to TPO.
34. With regard to the present complaint, and the timeliness and accuracy of the Former Trustees' response to the April 2019 information request, it is relevant that the Former Trustees were of the belief that Mr K was no longer a member of the Scheme. In this context, there was no reason for the Former Trustees to provide Mr K with information about the current assets and valuation of the Scheme. If Mr K had asserted his belief to the Former Trustees at the time, that he was a deferred Scheme member, then I would have considered that particular issue as a part of this

complaint, but in the circumstances I consider it was reasonable for the Former Trustees to limit their response to information about the assets and transfer value in 2009.

35. Mr K requested confirmation of the assets and values used to calculate his transfer value in 2009. The Former Trustees confirmed that the assets as at 2009 were an insured policy and cash, and provided the Report which showed the proportion of the Scheme allocated to Mr K. I acknowledge the Former Trustees did not provide a valuation attributable to those assets as at 2009, but I would expect Mr K to have been aware of this at the point of transfer. The insured policy will have had a specific value, and the cash balance of the transfer will have been detailed in his new pension arrangement. If he disputed the accuracy of those figures, which now appears to be the case, I would suggest he ought to have raised those concerns in 2009.
36. Mr K has suggested that he did raise concerns in 2009, to which the Former Trustees failed to respond. I have not seen evidence of this, but if he had knowledge of the Former Trustees' perceived errors in 2009, then it is likely that those complaints would now be out of time for me to consider.
37. Irrespective, although the Former Trustees did not provide a specific figure for the cash assets used in the transfer, between the transfer value that was provided to him in 2009 and the Report, Mr K will have had access to the information he requested. The Former Trustees could have been more specific, but I do not consider it amounts to maladministration in these circumstances.
38. Mr K has also challenged the fact that the Former Trustees did not consider his complaint under the Scheme's IDRP. I cannot see how the Former Trustees' approach to Mr K's complaint, whether by way of a formal IDRP or through informal correspondence has caused him any loss or disadvantage. Mr K was able to make a complaint, it was responded to by the Former Trustees and he has brought it to TPO to Determine.
39. Mr K has argued that he is a member of the Scheme and so the complaint ought to have been addressed through the IDRP, but he only asserted this after the complaint was accepted by TPO. The Former Trustees believed he was no longer a member, and so in the circumstances a formal IDRP was not necessary.
40. I appreciate Mr K is dissatisfied with the position that his wider complaints have not been included as a part of this complaint but given the range of issues he has raised since the matter was accepted by TPO, I find that it is necessary that he engage with the Trustee on those matters before a complaint is referred back to TPO for any further consideration.

41. I do not uphold Mr K's complaint.

Anthony Arter

Pensions Ombudsman
29 September 2021

Appendix

Mr K's letter to the Scheme Trustees dated 5 November 2020:

"In order to understand these issues and [Mr K]'s remaining benefit entitlement, we would ask you to kindly provide us with the following: -

- a) Copies of each set of annual accounts for the scheme since you have taken over as principal trustee for the scheme.
- b) Full details of the 'expense reserve' of £55,000.
- c) A copy of the formal valuation of the property when it was sold from the pension scheme.
- d) A full correction to the report to the trustees dated 12th June 2009.
- e) Copies of the scheme's investment strategy and statement of investment principles since 2009.
- f) Copies of the scheme's trust deed and rules.
- g) Copies of actuarial valuations since 2009.
- h) Copies of annual reports since 2009.
- i) Evidence of the payment of rental income to the pension scheme from 2002 to 2009."