

Ombudsman's Determination

Applicant	Mr S
Scheme	BMW (UK) Operations Pension Scheme (the Scheme)
Respondent	BMW (UK) Trustees Limited (the Trustee)

Outcome

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

Complaint Summary

2. Mr S's complaint is that the Trustee failed to carry out sufficient due diligence checks before transferring his benefits to the Uniway Systems Retirement Benefit Scheme (**the Receiving Scheme**).
3. Mr S has also said that, at the time of the transfer, he did not hold a statutory right to a transfer. So, the Trustee should not have agreed to the transfer.

Detailed Determination

4. Mr S was a member of the Scheme, a defined benefit occupational pension scheme, administered by Aon Hewitt (**Aon**), by virtue of a previous period of employment.
5. On 14 February 2013, The Pensions Regulator (**TPR**) launched a new awareness campaign regarding pension liberation schemes. Part of this campaign involved issuing cautionary documentation informing members about the potential risks of pension scams. This comprised of:
 - 5.1. a two-page warning note, which TPR wanted administrators and pension providers to include in the information they provided to members who requested a transfer;
 - 5.2. an information leaflet (the **Scorpion Leaflet**), which contained a number of warnings directed at members who were thinking of transferring; and
 - 5.3. a "fraud action pack" for pension professionals (the **2013 Action Pack**).

6. Page 8 of the 2013 Action pack provided a number of warning signs/red flags that pension providers should be on the lookout for:
 - 6.1. the receiving scheme is not registered, or is only newly registered, with HM Revenue and Customs (HMRC);
 - 6.2. the member is attempting to access their pension before age 55;
 - 6.3. the member is pressuring the Trustee or administrator to carry out the transfer quickly;
 - 6.4. the member was approached unsolicited;
 - 6.5. the member being informed that there is a legal loophole; and
 - 6.6. the receiving scheme was previously unknown, but is now involved in more than one transfer request.

If any of these red flags were present, then it was recommended that direct contact should be made with the member to query the reason for the transfer, the nature of the receiving scheme and how they came to know of it.

7. The Scorpion Leaflet included examples of real-life pension scams and explained that the warning signs of a potential scam could be:
 - 7.1. receiving an unsolicited call about a free pensions review;
 - 7.2. the promise of accessing a pension before age 55, through the provision of an advanced loan payment, or cash bonus, upon the completion of the transfer;
 - 7.3. the promise of a unique investment opportunity in overseas property, which would make it harder to trace the transfer; and
 - 7.4. the use of a courier service to pressure members into signing transfer documents quickly.
8. On 1 April 2014, Mr S appointed Henderson Carter Associates Limited, an independent financial advisory firm (**the IFA**), to assist him in a potential transfer of benefits. Mr S signed a letter of authority (**LOA**) allowing the IFA permission to request information in relation to his Scheme benefits.
9. On 30 April 2014, the IFA wrote to Aon and said, “we have been approached by the above policyholder to give advice about their financial affairs”. The IFA requested details about Mr S’ Scheme benefits and provided a copy of the signed LOA. The IFA also asked for the cash equivalent transfer value (**CETV**).
10. On 19 May 2014, Aon sent the IFA an illustration of a CETV, guaranteed until 19 August 2014, for £103,656.88, along with the necessary discharge forms. The CETV illustration stated:

“Before deciding to transfer, the member should get independent financial advice. The member should also take a few minutes to read the enclosed leaflet from [TPR] entitled “Predators stalk your pension” as it contains important information about possible severe tax consequences that could apply in certain circumstances.”

One of the transfer declaration forms included the following statements:

“I have read the enclosed “Predators Stalk your Pension” and understand that there could be serious tax consequences for my pension benefits if I transfer to a scheme or arrangement that is later deemed to have committed Pension Liberation Fraud.”

11. The CETV also included information about the death benefits available under the Scheme. These included a dependant’s pension, payable for life, which amounted to 50% of the member’s deferred pension. Alternatively, if the member was in receipt of their pension at the date of their death, the 50% dependant’s pension was based on the member’s pre commutation pension. These benefits would be lost upon the completion of a transfer.
12. In July 2014, the 2013 Action Pack was updated (**the 2014 Action Pack**). The updated guidance included:-
 - 12.1. A section on “proactive member communication”. This advised trustees, administrators, and pension providers to provide members with regular information on pension scams, this could be included within annual benefits statements or transfer quotes.
 - 12.2. It provided a checklist (see Appendix 1) to utilise if any of the following features of pensions scams were present:
 - 12.2.1. the use of phrases like one off investment opportunities, free pension reviews, legal loopholes, cash bonus and government endorsement;
 - 12.2.2. the member was approached out of the blue for a pensions review by a cold call, text message, or by an individual going door to door;
 - 12.2.3. transfers to overseas investments;
 - 12.2.4. access to pension benefits before the normal minimum pension age of 55;
 - 12.2.5. no available scheme documentation; and
 - 12.2.6. members being encouraged to speed up the transfer to the receiving arrangement.
 - 12.3. The guidance noted that answering yes to any of the questions included within the checklist did not automatically indicate that the receiving arrangement was

a scam. Though, if one or more of the checklist questions resulted in a yes, the 2014 Action Pack stated that the trustee/administrator should:-

- 12.3.1. Directly contact the member by telephone, email, or letter, to answer any applicable checklist questions and to ask if they understand the type of scheme they are transferring into;
 - 12.3.2. Direct the member to Action Fraud if the receiving arrangement might be a scam, or refer them to The Pensions Advisory Service to discuss the implications if the receiving scheme is not authorised; and
 - 12.3.3. If concerns remain and the member still wishes to proceed with the transfer, the trustee/administrator should contact Action Fraud themselves.
13. On 24 September 2014, Mr S provided his authority for Deuten Services Limited (**Deuten**), the Receiving Scheme's Administrator, to contact Aon to request information on his Scheme benefits.
14. On 3 October 2014, Mr S signed his transfer request form that stated he understood and agreed that:
 - 14.1. BMW (UK) Trustees Limited, BMW Group or any of its subsidiaries or any person representing the same will not be in any way responsible for, and will not be required to enquire into, the use and/or application of the assets transferred.
 - 14.2. I have received no advice from BMW (UK) trustees limited or any of their agents or associated entities.
15. On 14 October 2014, Deuten returned the necessary transfer discharge forms, completed, and signed by Mr S, to proceed with the transfer. The forms included confirmation of the Receiving Scheme's registration status with HMRC, as at 20 March 2013. The Receiving Scheme was registered under the pension scheme tax reference (**PSTR**) 00797494RW.
16. On 28 October 2014, Aon wrote to the IFA and said that before the transfer could proceed, it required some additional information from Mr S and that it would write to him directly.
17. On 30 October 2014, Aon wrote to Mr S and said that it was unable to confirm what type of arrangement the Receiving Scheme was. Aon asked Mr S to complete the enclosed questionnaire and said: "complete questions 1-5 if the transfer is to your current employer's occupational pension scheme and questions 6-12 if the transfer is to a pension scheme that is unrelated to your current employer". Aon included a new transfer member declaration form for Mr S to complete and return if he wished to proceed with the transfer.

18. On 4 November 2014, Mr S completed questions 1-5 of the transfer questionnaire, rather than questions 6-12 as appropriate and completed a member declaration. Referring to "Receiving Scheme information" the questionnaire comments: "To allow us to verify the receiving scheme and complete this transfer please confirm the following information". In completing the questionnaire, Mr S said that he was not employed by the company that set up the Receiving Scheme, nor was he actively contributing to it.
19. In completing the transfer member declaration forms, Mr S accepted the following statement:

"I have read and understood the enclosed leaflet "A lifetime's savings lost in a moment" and understand that there could be serious tax consequences for my pension benefits if I transfer to a scheme or arrangement that is later deemed to have committed Pension Liberation Fraud".
20. On 8 December 2014, Aon wrote to Mr S directly and said that he needed to complete questions 6-12 of the transfer questionnaire, before the transfer could proceed.
21. On 15 January 2015, Mr S returned the completed transfer questionnaire answering questions 6-12. In doing so, Mr S said "I believe so" when asked if the Receiving Scheme's administrator was regulated by the Financial Conduct Authority (**FCA**). He also said that his reason for the transfer was to achieve a "better turnout", however, he had not received a quote to confirm what his benefits in the Receiving Scheme might be.
22. On 12 February 2015, Aon received another copy of the transfer questionnaire, with all 12 questions answered by Mr S, dated 4 November 2014. In answering question 12, reasoning for the transfer, Mr S said "Better income not losing pension on death".
23. On 24 February 2015, Aon wrote to Deuten and said that, before the transfer of Mr S' benefits could proceed, it required additional information. The Receiving Scheme was noted as an occupational arrangement, but Deuten described it as a simplified defined contribution scheme. This type of scheme disappeared in April 2006; however, the Receiving Scheme was registered in 2013. Deuten should clarify the position.
24. On 26 February 2015, Deuten responded to Aon to clarify the type of arrangement the Receiving Scheme was. Deuten also provided additional information about the Receiving Scheme. It provided a copy of the Receiving Scheme's Definitive Trust Deed and Rules (**the Rules**) and said:-
 - 24.1. Uniway Systems Limited (**the Company**) was the sponsoring employer for the Receiving Scheme. The Company was actively trading as demonstrated by its Companies House webpage.

- 24.2. The Receiving Scheme was an occupational arrangement governed by the Rules. Rule 2.2.2 provided that an “eligible person” may apply to become a member of the Receiving Scheme with the agreement of the Trustees. An “eligible person” was defined in accordance with section 150(5) of the Finance Act 2004.
- 24.3. Section 150(5) of the Finance Act 2004 sub-defines an occupational pension scheme in this way: “Whether or not it also had or is capable of having effect so as to provide benefits to or in respect of other persons”. This provision allowed Mr S to join the Receiving Scheme, despite not being employed by the Company.
- 24.4. The HMRC tax manual said that: An employer (or employers) establishing a pension scheme may specify, for example, that the membership is for employees in a group of companies plus self-employed individuals who work with them. The use of the word “may” allowed the employer to decide who was eligible for membership of an occupational scheme. The tax manual also stated:
- “the employer will be recognised as a ‘sponsoring employer’ under section 150(6) of the Finance Act 2004 where one or more of its employees are members and the scheme benefits for those members are directly related to their employment with the employers in question”.
- 24.5. Deuten believed that if only employees were eligible for membership within an occupational arrangement, there would be no requirement for this provision in the tax manual.
- 24.6. The Rules provided different levels of categorisation rates for members who were not employed by the Company. This was evidenced by separate rules relating to the contribution rates for employed/unemployed members. Further, rule 2.2.2, “eligible person” was contingent on the Receiving Scheme’s registration status not being impacted. If it was, the “eligible person” could not join the Receiving Scheme.
- 24.7. Clause 10.2 of the Rule states: “For the avoidance of doubt, no loan may be made to the Member out of the Member’s Personal Account and no loan may be raised against a Member’s Personal Account in order to acquire investments”. This rule acted as a means to prevent members from accessing funds before reaching age 55.
- 24.8. Rule 17.4 provided that the Trustees of the Receiving Scheme would not permit a transfer where it was felt that the funds might be used to achieve pensions liberation by exchanging funds as a cash bonus/loan on the completion of the transfer. Rule 23.2 stated: “...will not include the payment of any cash bonus or any other form of payment to the Member”.

- 24.9. The Trustees went to great lengths to ensure that the Receiving Scheme was compliant with any applicable legislation. The Rules, Receiving Scheme booklet and application forms were approved/drafted by Hugh James Solicitors.
25. On 16 March 2015, the Pension Scams Industry Group introduced a voluntary code of practice guide, the “Combating Pension Scams a Code of Good Practice” (**the 2015 Practice Guide**).
26. On 21 April 2015, Aon transferred £119,042.62 to the Receiving Scheme.
27. On 4 January 2018, it was established that the underlying assets for each of the Receiving Scheme’s remaining investments had been severely impacted. Subsequently, for the time being, the Receiving Scheme was unable to pay any pension commencement lump sums, allow for the draw down of benefits, nor could it agree to transfers out.
28. On 12 January 2018, the Trustees of the Receiving Scheme wrote to Mr S and explained that one of the scheme’s investments had entered into insolvency.
29. In February 2019, Mr S appointed Tynebank Claims Ltd, a claims management company (**the CMC**), to act on his behalf in submitting a complaint against the Trustee. Subsequently, the CMC submitted a subject access request to obtain all the information Aon held on Mr S.
30. On 13 March 2019, Aon sent the CMC a bundle of documents it held for Mr S.
31. On 27 November 2019, the Financial Services Compensation Scheme (**the FSCS**) awarded Mr S £50,000 due to the poor advice he received from the IFA.
32. On 17 February 2020, the CMC submitted a formal complaint, on behalf of Mr S, to the Trustee about the level of due diligence undertaken at the time of the transfer. It said:-
- 32.1. A copy of the Scorpion Leaflet was not included with a bundle of documents provided to the CMC from Aon in March 2019. So, it believed that Mr S was not provided with the Scorpion Leaflet in 2014/2015.
- 32.2. The Pension Schemes Act 1993 (**the 1993 Act**), section 99, states: “the trustees of the scheme have done what is needed to carry out what the member requires”. This was not adhered to when the Trustee failed to send Mr S a copy of the Scorpion Leaflet and relevant pensions liberation materials.
- 32.3. It was unclear what due diligence checks were performed against the Receiving Scheme. If sufficient checks were undertaken, it would have seemed suspicious that Mr S wanted to transfer to an occupational arrangement where he was not an employee; the Receiving Scheme was unknown to Aon; the company attached to the Receiving Scheme was

dormant in 2014; and the company was based in London, 130 miles away from where Mr S lived.

32.4. Based on the answers Mr S gave in response to the transfer questionnaire he was sent on 8 December 2014, Aon should have contacted Mr S directly, as:

32.4.1. Mr S believed that Deuten was regulated by the FCA, which it was not;

32.4.2. Mr S indicated that he had not received a quote from the Receiving Scheme to confirm what benefits he might receive at his retirement age; and

32.4.3. Mr S said that the main reason for the transfer was for a “better turnout”, this should have acted as an immediate cause for concern.

32.5. When the IFA advised Mr S to transfer to the Receiving Scheme, Mr S was unemployed, and, at the time, he was only in receipt of employment support allowance (**ESA**). This was due to a medical condition, cervical spondylosis, which prevented him from returning to employment.

32.6. To hold a statutory right for a transfer, Mr S required the ability to purchase transfer credits in the new scheme as he was transferring from one occupational arrangement to another. The 1993 Act defines transfer credits as “the rights allowed to an earner under the rules of an occupational pension scheme...”. The 1993 Act states that “earner” and “earnings” are given the meaning in accordance with sections 3, 4 and 112 of the Social Security Contributions and Benefits Act 1992 (**the SSCB Act**). The SSCB Act states that earnings “includes any remuneration or profit derived from an employment; and earner “shall be construed accordingly”.

32.7. Mr S’ case was similar to two previous Determinations made by the Pensions Ombudsman (**the PO**). In particular, PO-12763¹, relating to the failure to provide a Scorpion Leaflet, and PO-21489², where a member did not hold a statutory right to a transfer. Based on the evidence available, it was neither reasonable, nor fair to allow Mr S to transfer his benefits to the Receiving Scheme based on the warning signs present during the transfer.

32.8. Mr S’ benefits should be re-instated within the Scheme. However, the Trustee should note that Mr S had received £50,000 from the FSCS regarding poor advice from the IFA.

33. Aon did not provide a response to the CMC’s complaint of 17 February 2020.

34. On 9 July 2021, the CMC asked for Mr S’ complaint to be investigated under stage one of the Scheme’s Internal Dispute Resolution Procedure (**IDRP**). The CMC

¹ [The Police Pension Scheme \(PO-12763\) | The Pensions Ombudsman \(pensions-ombudsman.org.uk\)](#)

² [Local Government Pension Scheme – Hampshire Pension Fund \(PO-21489\) | The Pensions Ombudsman \(pensions-ombudsman.org.uk\)](#)

provided a hypothetical value of what Mr S' transfer value might be at the current date, which was £219,559.67.

35. On 8 September 2021, the Secretary to the Trustee (**the Secretary**) did not uphold Mr S' stage one IDRPs complaint and explained that:-

35.1. It was part of Aon's standard policy to include a copy of the Scorpion Leaflet with any CETV illustration. So, the CMC's assumption that a Scorpion Leaflet was not included with the CETV illustration of 19 May 2014 was incorrect. The Scorpion Leaflet does not contain personal information, so it was not included with the bundle of documents sent to the CMC through its subject access request.

35.2. The PO's Determination PO-12763 was not applicable in Mr S' case. PO-12763 was upheld as the member was not provided with any pensions liberation material, while Mr S was, and insufficient due diligence was undertaken in that case. Mr S also confirmed on his transfer discharge forms that he "read the pensions liberation leaflet "A lifetime's savings lost in a moment"".

35.3. There was no requirement for Mr S to receive financial advice to enable the transfer, however, it was recommended that he should consider it. He did. The IFA that Mr S appointed was FCA registered at the time and responsible for advising Mr S on the appropriateness of the transfer and Receiving Scheme.

35.4. It noted that the CMC had referenced the answers that Mr S provided to questions 7, 8 and 12 of the transfer questionnaire. It did not agree that Mr S' answers to these questions raised any red flags as:-

35.4.1. Question 7 related to the FCA authorisation status of an intermediary/administrator, to which Mr S answered, "I believe so". However, Deuten not being authorised by the FCA was irrelevant as providers of occupational pension schemes, and their administrators, were not subject to FCA jurisdiction.

35.4.2. Question 8 related to whether an individual had received a quote from the receiving arrangement to indicate what benefits the scheme would provide. Mr S' answer was "No" however, the onus was on him to obtain a quote to this effect to satisfy himself of what benefits he would receive after the transfer.

35.4.3. Question 12 related to the reason for the transfer, to which Mr S answered, "better turnout". A second version of the transfer questionnaire completed by Mr S said that his reason for the transfer was "better income not losing pension on death". The CMC's argument was that Mr S was unaware of the benefits he would lose upon the completion of the transfer. However, Aon provided information, in the

CETV illustration, confirming what Scheme benefits Mr S held, and what would be lost, and this included death benefits.

- 35.5. Prior to the completion of the transfer by Aon, the transfer discharge forms, recommended that Mr S should obtain a statement of benefits from the Receiving Scheme. By signing the “members application to the Trustee” form, Mr S agreed that he understood and accepted that: there might be a difference between the benefits available from the Scheme and the Receiving Scheme; the benefits payable under the Receiving Scheme might be more, or less, than those provided by the Scheme; and after the transfer, his family/dependants would no longer be entitled to any Scheme benefits.
- 35.6. Mr S signed the “transfer to an occupational pension scheme” form. In doing so, he had agreed with the Receiving Scheme the basis upon which his benefits would be provided. This contradicted his answer to question 8 of the transfer questionnaire.
- 35.7. The due diligence undertaken by Aon included checking the Receiving Scheme’s HMRC registration status, whether the Receiving Scheme was able and willing to accept the transfer, and the Receiving Scheme was able to accept Mr S as a member, despite not being employed by the Company. Aon was not provided with any information to indicate that Mr S was unemployed at the time, or in receipt of state benefits.
- 35.8. If Mr S did not hold a statutory right to a transfer, the Trustee held a discretionary power to agree to a non-statutory transfer. Aon carried out appropriate due diligence checks allowing the Trustee to exercise its discretion to allow the transfer, discharging its duties towards Mr S.
36. On 19 October 2021, Mr S asked for his complaint to be investigated under stage two of the IDRP.
37. On 8 December 2021, the Trustee did not uphold Mr S’ complaint and agreed with the reasoning provided under the Secretary’s stage one IDRP response.
38. On 27 January 2025, the PO issued a Preliminary Decision on Mr S’ complaint and gave both parties the opportunity to comment.
39. Both Mr S and the Trustee by way of their respective representatives made further submissions as set out below. I considered these additional submissions and the extent (if any) that they affected my earlier conclusions, and, on the 15 September 2025, I issued a Second Preliminary Decision.
40. The Trustee’s made no further submissions in response to my Second Preliminary Decision, while Mr S by way of his representative provided additional submissions in the form of a final appeal against both my first and second Preliminary Decisions.

Summary of Mr S’ position, as provided by the CMC

41. Mr S received a cold call which resulted in a free pension review with the IFA, during which he was informed that a transfer was in his best interest. Mr S was not familiar with pensions/investment, so he accepted the advice he was provided with by the IFA.
42. The IFA was FCA regulated. So, by association, Mr S also believed that Deuten was also FCA regulated, which it was not at any point before, during, or after the transfer.
43. Mr S was told that by transferring to the Receiving Scheme his pension benefits would increase in value. He was not offered any form of incentive to transfer to the Receiving Scheme.
44. At the time of the transfer, he was not working, and he was in receipt of ESA of about £78 per week due to his condition, Cervical Spondylosis.
45. Mr S did not carry out any background checks on the IFA, Deuten, or the Receiving Scheme as the IFA was FCA regulated.
46. In 2019, he received £50,000 from the FSCS based on the advice he received from the IFA. The FSCS told him that his losses were £151,638.46 in excess of what it could pay him.
47. Mr S did not receive a copy of the Scorpion Leaflet, nor was he directly contacted about the transfer.
48. While Mr S did not inform the Trustee that he was unemployed and in receipt of ESA, there was no requirement for him to do so. It formed part of the Trustee's duty of care/due diligence checks to make reasonable enquiries with Mr S about his employment status. It was not sufficient to place the burden on Mr S.
49. If the transfer was made on a discretionary basis, the Trustee should have informed Mr S that his transfer was being considered as a discretionary one, as opposed to a statutory transfer.

Summary of Comments Following the Preliminary Decision

50. Mr S was not an "earner" as defined by the case of Hughes v Royal London [2016] EWHC 3191 (Ch) (**Hughes**) and the Trustee had no authority to approve a statutory transfer as Mr S was not an "earner" under the law.
51. The Trustee cannot use discretion to override Mr S' statutory right to a transfer or in the alternative, if the Trustee, genuinely applied its discretion, it should have given Mr S formal notification of this. The failure to provide clear and timely information raises a legitimate concern over whether discretion was actually exercised or whether the reference to the discretionary transfer is used retrospectively as a defence.
52. The Trustee allowed a transfer to proceed despite numerous red flags that warranted additional scrutiny under the 2014 Action Pack and the failure to identify and act upon these warning signs constitutes a breach of fiduciary duty.

53. The assumption that the IFA was FCA regulated is legally and factually incorrect.
54. The Preliminary Decision is legally flawed under *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 as it is unreasonable, as it fails to take into account relevant considerations and/or is based on irrelevant ones. For example, the assumption that Mr S would have transferred anyway is speculative.

Response to my Second Preliminary Decision

55. On the 29 September 2025, Mr S' representative confirmed a number of its earlier comments and submitted additional points not previously raised:
- 55.1. Mr S's pension originally derived from Land Rover and he did not recall receiving a new BMW Scheme booklet, an omission that deprived him of knowledge of the applicable rules and discretionary powers.
- 55.2. Where a discretion exists, trustees must exercise it lawfully, the Trustee never told Mr S that his transfer was discretionary, and its actions were procedurally unlawful.
- 55.3. The Trustee had strict fiduciary duties of prudence and loyalty to act in Mr S' best financial interests. These duties were heightened as Mr S was disabled and a vulnerable member.
- 55.4. Pension transfers are consumer contracts subject to the Consumer Rights Act 2015 and a tortious duty of care arises where reliance is foreseeable.
- 55.5. That in accordance with the Court of Appeal case of *Adams v Options UK Personal Pensions LLP*³ the Trustee assumed responsibility for the scam risks as any warnings were insufficient.

Summary of the Trustee's position

56. A copy of the Scorpion Leaflet was provided to the IFA along with the CETV illustration on 19 May 2014. It was reasonable to believe that as the IFA was authorised, and regulated, the IFA would forward the Scorpion Leaflet onto Mr S along with the CETV illustration. This approach was accepted by the PO, in a previous Determination CAS-74470-Y3J1⁴. Mr S also acknowledged that he had read and understood the Scorpion Leaflet by signing the member transfer discharge forms.
57. Aon undertook a sufficient level of due diligence checks, in line with the applicable TPR guidance, for the time. That is, checking that the Receiving Scheme held the necessary registration with HMRC for tax relief, which it did from 20 March 2013.

³Adams v Options UK Personal Pensions LLP (formerly Options Sipp UK LLP and Carey Pensions UK LLP)

(Financial Conduct Authority intervening) [2021] EWCA Civ 474

⁴ [Standard Life Personal Pension One Plan \(CAS-74470-Y3J1\) | The Pensions Ombudsman \(pensions-ombudsman.org.uk\)](#)

58. There was nothing to suggest that:

- Mr S was approached, or received a cold call, about the transfer;
- there was no pressure from Deuten or Mr S to speed up the completion of the transfer;
- at the time, Mr S was age 57, so he was not looking to access his benefits before age 55;
- there was nothing in the documentation provided by Deuten indicating any legal loopholes attached to the Receiving Scheme; and
- there was no evidence that the Receiving Scheme was involved in more than one transfer, from the Scheme, having been previously unknown to Aon.

59. The Rules provided by Deuten included a number of provisions to counteract any attempts at pensions liberation. Namely clause 10.2 and rules 17.4 (pensions liberation) and 23.2 (terms of transfer).

60. Before Aon agreed to proceed with the transfer, it requested additional information from Mr S and Deuten. In response to these information requests, Deuten provided a thorough explanation of why Mr S did not hold an employment link to the Receiving Scheme. So, there was no cause for concern as to the geographical distance between the Company and Mr S.

61. Overall, Mr S received advice from the IFA, who, at the time, was regulated by the FCA. So, it was reasonable to assume that prior to the transfer, Mr S was provided with appropriate investment advice from an authorised adviser. Therefore, there was no requirement for additional due diligence checks.

62. The Trustee held the necessary discretion to agree to a non-statutory transfer. The Scheme's Trust Deed and Rules (**the Scheme Rules**) stated:

"18(c) If a member leaves Service, or remains in Service but ceases to be in Pensionable Service, at any time in circumstances where he has accrued rights to benefit under the Scheme but does not require or exercise a statutory right to [CETV], the Trustees may, at the written request of the Deferred Member, apply an amount equal to the amount that would have applied if the Deferred Member had been entitled to a [CETV...]"

63. By signing the "transfer to an occupational pension scheme" form, Mr S agreed that his transfer request was made "in accordance with the option under the Rules of the ...Scheme" and "in so far as my request relates to my statutory option under section 95(2)(a) of the Pensions Act 1993...". So, Mr S agreed that his transfer was either made under the Scheme Rules, or in accordance with UK legislation.

64. The Trustee should not be held accountable for the failure of the Receiving Scheme's investments. Mr S was provided with advice on the Receiving Scheme and its

investments by the IFA, not the Trustee as it is not permitted to provide advice on such matters. The payment of compensation from the FSCS supported the view that it was the IFA's poor advice that led to Mr S' decision to transfer to the Receiving Scheme.

65. Section 1(1)(a)(ii) of the 1993 Act makes it clear that occupational pension schemes can provide benefits to an employee and "to, or in respect of, other people". This was also reflected in section 150 of the Finance Act 2004 which allowed for the admission of people who were not employed by the sponsoring employer into an occupational arrangement.
66. The rights that Mr S received in the Receiving Scheme were "transfer credits" as defined under section 181 of the 1993 Act, insofar as they were the same as the rights allowed to earners. These rights already acquired did not become something else on onward transfer as they continued to be a transfer credit even if Mr S ceased to be an earner.
67. The use of the term "transfer credits" under section 73(2)(a) of the 1993 Act was likely used for convenience and was unlikely to be intended to import a requirement for members to be earners before being able to take a discretionary transfer. Doing so would bar people who might benefit from a discretionary transfer, such as those who had retired, but were not claiming a pension, or had been made redundant. There was no policy intent that it was aware of that discretionary transfers to occupational/personal plans should be treated differently.
68. Occupational pension arrangements are permitted to allow non-employed members. So, there is no reason why a non-employed individual should be prevented from transferring into an occupational scheme. It was reasonable for the Trustee to be satisfied that it was appropriate for Mr S to transfer into the Receiving Scheme, pending any due diligence checks by Aon.
69. Mr S received express warnings about being cold called and signed a declaration confirming that he had read and understood this warning. The fact that Mr S read and understood warnings about being cold called, reinforces the conclusion that he was set on proceeding with his transfer in any event.

Conclusions

70. Mr S has complained that the Trustee did not conduct adequate due diligence checks before agreeing to transfer his benefits to the Receiving Scheme.

Statutory right to a transfer

71. I will first start by considering whether or not Mr S, at the time of the transfer, held a statutory right to a transfer.
72. At the time of the transfer, Mr S was no longer accruing benefits within the Scheme, he was not in receipt of his Scheme benefits, nor was he within a year of his normal retirement age. So, Mr S met the criteria for a statutory right to a transfer. However,

sections 93 to 96 of the 1993 Act make further provisions as to how a statutory transfer right can be exercised.

73. To exercise a statutory transfer right for a transfer to an occupational pension scheme, Mr S needed the Trustee to be able to use his CETV to acquire “transfer credits” for him under the Receiving Scheme. The 1993 Act defines transfer credits as “rights allowed to an earner under the rules of an occupational pension scheme...”. The meaning of “earner” or “earnings” are given the same meaning as under section 3 of the SSCB Act. This states that earnings “includes any remuneration or profit derived from an employment”, and that “earner” “shall be construed accordingly”.
74. The requirement for an “earner” in the definition of “transfer credits” was clarified by the High Court ruling in the case of *Hughes*. This provided that to be an earner members did not need to be in receipt of earnings from the sponsoring employer of the scheme to which they wished to transfer. Earnings from another source were sufficient. However, in this case Mr S’ only source of income at the time of the transfer was ESA.
75. I do not consider that Mr S was in receipt of “earnings”, so he was not an “earner” on 21 April 2015, when the final approval for the transfer was given. Consequently, on the basis of the interpretation accepted in *Hughes*, Mr S would not be eligible to acquire transfer credits in the Receiving Scheme and so could not exercise his statutory transfer right by requiring the Trustee to make a transfer to that scheme. I will come back to the decision in *Hughes* and the requirements for the acquisition of “transfer credits”.
76. A further issue with the transfer as an exercise of Mr S’ statutory transfer right is that the transfer discharge forms were returned outside of the three-month guarantee period which the Trustee should have been aware of. However, this would not necessarily invalidate the transfer as a statutory transfer. Insofar as the Trustee accepted the transfer discharge forms and acted on them despite being out of time, the Trustee may be held to have waived its right to refuse to treat them as valid, since the limit of the three-month guarantee period reasonably appears to be for the protection of the Trustee and the Scheme rather than the member and is therefore a provision that can be waived by the Trustee (see *Hamar v French* [1998] PLR 321). This is subject however to the terms of the form and the alternative treatment of the transfer as a non-statutory transfer under the Scheme Rules.
77. In summary, and subject to further considerations below:
 - 77.1. I find that Mr S was not an “earner” at the time of the transfer and if, as assumed in *Hughes*, he was required to be an “earner” to acquire “transfer credits” under section 95 of the 1993 Act, the Trustee could not have used his CETV to acquire “transfer credits” for him;

- 77.2. I find that the Trustee could waive the statutory requirement for Mr S to request a transfer within the three-month guarantee period and its conduct in accepting the transfer request and paying the transfer could amount to a waiver.

Discretionary Transfer

78. The Scheme Rules provide the Trustee with the discretion to allow for the payment of a non-statutory transfer when requested in writing by a deferred member. Clause 18(c) provides, subject to certain provisos that are not material here, that:

“If a Member leaves Service, or remains in Service but ceases to be in Pensionable Service, at any time in circumstances where he has accrued rights to benefit under the Scheme but does not acquire or exercise a statutory right to a cash equivalent, the Trustees may, at the written request of the Deferred Member, apply an amount equal to the amount that would have been applied if the Deferred Member had been entitled to a cash equivalent (but so that that the particular circumstances of the Deferred Member will not be deemed to be altered for the purposes of calculating the amount) or any other amount that the Trustees decide, after consulting the Actuary, in whichever of the ways described in sub-clause (b) of this Clause that the Deferred Member chooses.”

The ways described in sub-clause (b) of Clause 18 are the ways specified by section 95 of the 1993 Act. In other words, if Mr S could not exercise his statutory right to a CETV by requesting the Trustee use it to acquire “transfer credits” within the meaning of section 95 of the 1993 Act for him in the Receiving Scheme because he was not an “earner” and, as accepted in *Hughes*, only an “earner” can acquire “transfer credits”, then the Trustee could not effect a discretionary transfer to the Receiving Scheme for him under Clause 18(c) either.

79. The question has also been raised as to whether Mr S’ transfer was required to have an earnings link, in order for the transfer to comply with the preservation requirements under section 73 of the 1993 Act.
80. Section 73(2) of the 1993 Act allows for the payment of a transfer in lieu of a short service benefit. Section 73(2)(a)(i) states: “to be transferring to another occupational pension scheme with a view to acquiring transfer credits for the member under the other scheme...”. “Transfer credits” has the same meaning in section 73 as in section 95 of the 1993 Act and as such, on the interpretation accepted in *Hughes*, if Mr S was not an “earner” at the time of the transfer, any transfer to the Receiving Scheme would not meet the requirements of section 73(2)(a)(i) of the 1993 Act.

As such, if “transfer credits” is interpreted as accepted in *Hughes*, a discretionary transfer to the Receiving Scheme would not be a permitted alternative to providing Mr S with his short service benefits from the resources of the Scheme for the purpose of section 73 of the 1993 Act (irrespective of whether it was permitted under the Scheme Rules.)

81. Considering this matter further, if “transfer credits” is interpreted as accepted in *Hughes*, schemes would be prevented from undertaking bulk transfers, which rely on such transfers being permitted ways of giving effect to short service benefits for deferred members under section 73(2)(a)(i) of the 1993 Act, if any of the deferred members are not in employment at the time the bulk transfer is implemented. The relevant provisions of section 73(2) including the definition of “transfer credits” as rights allowed to an ‘earner’ under the rules of an occupational pension scheme have been in force since 7 February 1994 and have been relied on for bulk transfers on scheme mergers or transfers to new schemes in the context of corporate transactions, schemes winding-up or distressed schemes, without taking into consideration the individual circumstances of each member and whether they are earners or not at the date of the transfer and entitled to acquire rights as such in a new scheme.
82. The interpretation of the definition of “transfer credits” accepted in *Hughes* may make bulk transfers between occupational pension schemes impossible to complete or result in trustees not being discharged from the obligation to provide short service benefits directly from the resources of the scheme for any deferred members not in current employment. It is, in my view, unlikely that this was the aim of the legislation.

“Employment link” requirement

83. After the decision in *Hughes*, the Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021 (**the 2021 Regulations**) introduced an explicit requirement for an “employment link” between the member and the receiving scheme for the exercise of statutory transfer rights in an attempt to protect individuals from potential scams. However, as also referred to by TPR in its 2021 guidance “Dealing with transfer requests”⁵ and as referred to in the Pension Scams Industry Group (PSIG) – Practitioner Guide⁶ the “employment link” requirement under the 2021 Regulations applies only to statutory transfers and does not apply to discretionary transfers (or indeed bulk transfers), although TPR recommends following its guidance for discretionary transfers. The definition of “transfer credit” as “a right allowed to an earner under the rules of an occupational pension scheme” has not been amended.

The decision in Hughes

84. I acknowledge that the interpretation of the definition of “transfer credits” accepted in *Hughes* is that it is a requirement for Mr S to have “earnings” at the time of the transfer, albeit from any source. I note however that the only point actually determined in the case was whether Mrs Hughes needed to be an “earner” in relation to a scheme employer or whether having “earnings” from any source would be sufficient.

⁵ <https://www.thepensionsregulator.gov.uk/en/document-library/scheme-management-detailed-guidance/administration-detailed-guidance/dealing-with-transfer-requests>

⁶ Section 5.1 - The PSIG – Combating Pension Scams – Practitioner Guide (Interim) – 20 March 2023

85. I carefully considered whether I am bound to follow the interpretation of “transfer credits” accepted in *Hughes* in my recent Determination *Mrs T v Lloyds Banking Group Pensions Trustees Limited* (CAS-78486-R9D8) and for the reasons set out in that decision I do not consider that I am bound to follow the assumed interpretation of *Hughes*.

Meaning of “transfer credits”

86. I therefore need to consider and determine whether the rights acquired for Mr S in the Receiving Scheme by its trustee's acceptance of the payment made by the Trustee further to his signed “transfer to an occupational pension scheme” form were “transfer credits” and whether as such, the transfer was made in accordance with section 95 of the 1993 Act and Clause 18(c) of the Scheme Rules and was a valid alternative to providing Mr S’ short service benefits under section 73 of the 1993 Act.
87. As explained in my Determination *Mrs T v Lloyds Banking Group Pensions Trustees Limited* (CAS- 78486-R9D8) at paragraph 73, I accept Morgan J’s suggestion that the definition of “transfer credits” can be read so that it refers to *“rights which have the character of rights which were allowed to persons who were earners but without requiring the individual applicant for a transfer of the cash equivalent to be himself or herself an earner”*.
88. I find that the definition of “transfer credits” in section 181 of the 1993 Act as used in section 73 and section 95 of the 1993 Act does not require Mr S as the transferring member to be receiving “earnings” of any kind at the time of the transfer and the reference to “an earner” in the definition of “transfer credits” is to be taken to refer to any person who is “an earner” as defined in section 181 of the 1993 Act and not to Mr S as the individual for whom the transfer credits are being acquired. Instead, the definition of “transfer credits” defines the type of rights that may be acquired under the receiving scheme if it is an occupational pension scheme.
89. Save that Mr S was not an “earner” at the time of the transfer, it is not suggested, and I have seen no evidence that his CETV was not used to acquire “transfer credits” for him in the Receiving Scheme, being rights of the type that could be allowed to an earner under rules of the Receiving Scheme. As referred to in paragraph 24, the Trust Deed governing the Receiving Scheme provided for benefits for both employed and unemployed or self-employed members and was a registered pension scheme not allowing members to access benefits till age 55. The rights granted in respect of a transfer were on a defined contribution basis and were consistent with those that could be accrued by “earners” including both earners and self-employed earners under the Trust Deed as a registered pension scheme.

Conclusion on “transfer credits”

90. I therefore find that, notwithstanding that Mr S was not an “earner” at the time of the transfer, the transfer made in respect of Mr S to the Receiving Scheme was used to acquire “transfer credits”, being rights of the type allowed to an “earner” under the rules of the Receiving Scheme, and:

- 90.1. was permitted under section 95 of the 1993 Act;
- 90.2. was permitted under Clause 18(c) of the Scheme Rules as a way of giving effect to his CETV that would have been permitted under section 95 of the 93 Act as referred to in Clause 18(c); and
- 90.3. was also a permitted alternative to providing Mr S' short service benefits directly from the resources of the Scheme for the purposes of section 73 of the 1993 Act.

Discretionary or statutory transfer

- 91. Mr S has challenged the notion that the Trustee can use a discretionary transfer to override Mr S' statutory transfer right and argues that either the Trustee did not genuinely apply its discretion, or if it did, it should have given Mr S formal notification of that it was treating the transfer as a discretionary transfer rather than a statutory transfer. He argues that the failure to provide clear and timely information raises a legitimate concern over whether the discretion was actually exercised or whether the reference to the discretionary transfer is used retrospectively as a defence.
- 92. Having reviewed Clause 18(c) of the Scheme Rules (see above), I note that it permitted the Trustee to pay a transfer, at the written request of a deferred member who does not have or does not exercise a statutory right to cash equivalent, by applying an amount equal to the cash equivalent (or any other amount as they decide having consulted the actuary) in any of the ways permitted for a statutory transfer under section 95 of the 1993 Act as the deferred member chooses. In effect, Clause 18(c) allows the Trustee to pay a transfer of the same amount and on the same basis and to the same receiving schemes as for a statutory transfer, where the member makes a request but does not have or has not exercised a statutory right. The main differences between a statutory transfer and a transfer under Clause 18(c) (unless the Trustee exercises its discretion to pay a different amount), is that a transfer under Clause 18(c) can be made where the member has no statutory right or does not exercise their statutory right and the Trustee has a discretion whether to pay the transfer or not.
- 93. Having reviewed Mr S' signed transfer form, I find that it is drafted on a basis that is broad enough to apply to both situations where the member is exercising a statutory transfer right and where he is exercising the option under Clause 18(c). The section signed by Mr S provides that "*In accordance with the option under the [Scheme Rules] I request the Trustee to pay the transfer value to the above Receiving Scheme for the purpose of securing transfer credits for me under it*". It then also contains language applicable "*in so far as my request relates to my statutory option under section 95(2)(a)*". I find the form is drafted so as to meet all of the requirements for an exercise of a member's statutory transfer right and also the requirements for a request for a transfer under Clause 18(c). In effect, it did not matter whether Mr S was exercising his statutory right or the option under Clause 18(c) and his request was valid both insofar as he had a statutory right that he was exercising and insofar

as he did not but met the conditions under Clause 18(c) (it is not disputed that he did).

94. I consider that the fact that the form was drafted in this manner, signed by Mr S and accepted and acted on by the Trustee is evidence that, at the time, neither party considered that it was material whether Mr S was exercising a statutory right or not. Indeed, it did not matter: the amount would be the same, the receiving scheme would be the same and the requirements for the receiving scheme and the rights that Mr S would receive in respect of the transfer would be the same. The only reason the transfer was not a statutory transfer was that the form was returned in October 2014, outside the three-month period for Mr S to exercise his statutory right which expired on 19 August 2014 (the “three-month guarantee period”).
95. If the form were not drafted to provide for a transfer under the Scheme Rules or if a transfer under Clause 18(c) were not a permitted option, I would consider whether the Trustee, having accepted and acted on the transfer request after the end of the three-month guarantee period, was permitted to waive, and should be treated as having waived, the statutory requirement for the request to be made within the three-month guarantee period⁷. I consider that the three-month guarantee period is for the benefit of the Scheme, principally in protecting the Scheme and remaining members from the financial impacts of the Trustee being required to pay a fixed CETV quotation more than three months after the date of calculation; there could be adverse impacts on the Scheme because of changes in financial markets and because of the need to hold liquid assets in anticipation of a transfer payment.
96. The three-month guarantee period strikes a balance between the needs of the transferring scheme and the needs of the transferring member to have certainty over the amount that will be transferred and sufficient opportunity to exercise his right. The Trustee may allow the transferring member more time (but not less). As such, I consider that, for the reasons given in *Hamar v French*, it would be permissible for the Trustee to waive the limit and accept a transfer request out of time and where it does so, by conduct or otherwise, not only may it be estopped from resiling but the transfer will also be a valid statutory transfer.
97. However, because the written request was drafted as a request by Mr S in exercise of his option under the Scheme Rules and as an exercise of his statutory right, and there was no material difference between a transfer under Clause 18(c) or in exercise of a statutory right other than the Trustee’s discretion not to pay a transfer under Clause 18(c), I find that the better interpretation of the Trustee’s conduct is that it accepted the transfer request as a request under Clause 18(c), rather than waiving its right to refuse to pay a statutory transfer out of time. It would seem unreasonable to interpret its conduct as a waiver of its right to refuse the statutory transfer when its conduct and the documents are compatible with acceptance of the transfer request under the Scheme Rules on a basis that retains its discretion.

⁷ See the decision of the Court of Appeal in *Hamar v French* also dealing with a waiver of requirements under section 95 of the 1993 Act.

98. As such, I find that the request was made and was accepted under Clause 18(c) because it was out of time to be an exercise of Mr S' statutory right. Given that Mr S had signed the form expressing his request as "in accordance with the option [under the Scheme Rules]", I don't see anything inappropriate or retrospective about the Trustee having accepted his request as such. I also do not find that the Trustee needed to notify Mr S that it was accepting the transfer request or making the transfer pursuant to the discretionary option in the Scheme Rules rather than any statutory right. Nothing in Clause 18(c) or the transfer form required this.

Nature of discretion and Trustee's duty

99. Clause 18(c) provides that the Trustee "may" pay a transfer "equal to the amount" of a cash equivalent in accordance with sub-clause (b) and essentially gives the Trustee discretion to decide on whether to permit a member's transfer request. When considering whether, and how to exercise a discretion, aside from acting within the scope of the discretion, trustees must exercise the discretion for the purpose for which it was given, genuinely consider its exercise, act honestly, fairly and without indirect motive, have regard to all relevant considerations and no irrelevant considerations and not act irrationally or perversely. This does not however prevent trustees adopting policies or exercising a discretion on a general basis, particularly given the duty to treat members fairly by being consistent in similar cases.
100. The difficulty is often to determine the purpose of the discretion and, as a related point, what considerations are relevant. A further issue as raised by Mr S is to determine whether the Trustee has in fact exercised its discretion.
101. The effect of Clause 18(c) is to allow non-statutory transfers at the option of the member and on the same basis as a statutory transfer, i.e. to allow transfers to be paid where the member does not meet all conditions to have a statutory right or for the exercise of such right, but to give the Trustee the right to refuse to make such non-statutory transfers. It creates a member option subject to Trustee consent.
102. In that context, the purpose of the Trustee's discretion to accept or refuse the member's request must be to hold the balance between the interests of the requesting member and the general interests of the Scheme including protecting the interests of other members who may be adversely affected by such transfer, for instance for solvency or liquidity reasons if there were a large number of transfer requests or significant market movements or a risk of insolvent winding-up. The Trustee must not refuse a transfer perversely or capriciously, without genuine consideration, on the basis of irrelevant considerations or disregarding relevant considerations or in breach of discrimination law. If it did so, Mr S could complain and if the Trustee were in breach, it may be directed to reconsider its discretion. It would not be for the Pensions Ombudsman to substitute its decision.
103. In this case, the Trustee's discretion under Clause 18(c) was exercised in Mr S' favour. As such, Mr S has no complaint.

104. For completeness, I have already found that the transfer was within the terms of Clause 18(c) and so the transfer was within the scope of the Trustee's power.
105. Mr S has also suggested that the decision to allow the transfer was perverse, i.e. a decision no reasonable trustee would have made and that the Trustee failed to take account relevant considerations. However, as I find that the purpose of the discretion was to allow transfers on the same basis as statutory transfers where the member either had no statutory right or did not exercise it while holding the balance with the interests of the remaining members, I do not find that allowing a transfer pursuant to a member request to a scheme that could have accepted a statutory transfer could be perverse.
106. I also do not see that Mr S can complain that no reasonable trustee would have allowed his request. He is not complaining that this was adverse to the Scheme, but adverse to himself. In effect, his complaint is that in allowing his transfer, the Trustee failed to protect him from his own decision to request a transfer.
107. As in the case of other member options, the purpose of the Trustee's discretion cannot be to ensure the transfer is in the member's own interests. The courts have been clear that trustees have no duty to advise members on their options. I note in particular the decision by Collins J in *Hamar v The Pensions Ombudsman* [1996] PLR1 holding that it was not the duty of the trustees of a pension fund to point a beneficiary in the right direction or to tell him of his errors. Mr S cannot complain that the Trustee failed to prevent his exercise of his transfer option. They were under a duty to pay his benefits and to act fairly in deciding whether to allow his transfer request, but they were under no duty to check his transfer request was in his interests. For the same reason, the question of whether Mr S' was acting in his own best interests and the merits of his transfer request cannot be a relevant consideration for the Trustee in exercising its discretion under Clause 18(c) such that failing to consider it could be a basis for setting aside the Trustee's decision.⁸
108. As such, I find that, in accepting his transfer request, the Trustee had no duty to Mr S, other than not to unreasonably refuse his transfer and to ensure that the transfer value was correctly calculated and duly paid to the Receiving Scheme in accordance with the Scheme Rules and, pursuant to Clause 18(c) and 18(b), in accordance with section 95 of the 1993 Act. It did not have a duty to ensure that the transfer was in his best interests or to exercise its own discretion in his best interests.
109. It is argued that the Trustee did not in fact exercise its discretion at all but that it only now asserts that the transfer proceeded under Clause 18(c) because it was not a valid statutory transfer. Mr S says that the lack of notification at the time about an exercise of discretion in his favour indicates no such discretion was exercised. In

⁸ More broadly I have considered whether the Trustee had an obligation to consider Mr S' best financial interests and note Asplin J' comments in *Merchant Navy Ratings Pension Fund Trustees Ltd v Stena Line Ltd* [2015] EWHC 448 (Ch) at para [228] that the "best interests of beneficiaries" should not be viewed as a paramount standalone duty or separate from the proper purposes principle."

effect, Mr S complains that the transfer was made without a valid decision or exercise of Trustee discretion and should therefore be set aside.

110. I don't agree. The discretion created by the word "may" in Clause 18(c), merely allows the Trustee to either pay or refuse to pay transfers in accordance with that Clause. It does not impose on the Trustee an obligation to consider each transfer individually or to take any particular steps in exercising its discretion. I consider that it would be legitimate for the Trustee to adopt a standing practice of always paying out transfers under Clause 18(c), i.e. to exercise their discretion on a general basis, or to delegate its discretion or authorise its administrator to make transfers on that basis. If the Trustee or its administrator acting within its delegated authority makes a transfer payment that is otherwise in accordance with Clause 18(c), I do not see that the transfer could be treated as unauthorised or paid in breach of trust merely because the Trustee did not take a conscious decision to authorise the individual transfer; more would be required for the transfer to be set aside and Mr S' benefits reinstated, such as clear evidence of a mistake or lack of authority for the person authorising the payment in circumstances making it unjust or unconscionable for it not to be set aside⁹. Such a standing practice appears to be implied by the adoption of the standard request form covering both transfers under the Scheme Rules and statutory transfers and by the fact that the transfer was made. On the evidence, I find that the transfer was made pursuant to a standing practice of allowing transfers under Clause 18(c) in cases not satisfying the conditions for a statutory transfer and it was not unauthorised. Further, Mr S can hardly complain that the transfer payment was made without a proper exercise of discretion because the discretion was exercised in his favour in accordance with his request.

111. Finally, as mentioned above, if I did not consider that the conduct of the Trustee and the wording of the transfer request form were more consistent with authorisation of the transfer as a transfer under Clause 18(c), I would find that the Trustee had waived the requirement for the transfer request to be made within the three-month guarantee period for a statutory transfer by its conduct in paying the transfer.

112. To address Mr S' challenges in response to my Preliminary Decisions, I find that:

112.1. The wording of the transfer request form signed by Mr S expressly provided for the transfer to be made either under the Scheme Rules or pursuant to a statutory right;

112.2. If the transfer proceeded, it made no difference whether the transfer was under the Scheme Rules or a statutory right under the 1993 Act;

112.3. Authorisation of transfers under Clause 18(c) could be made on a general basis;

⁹ See *Pitt v Holt* [2013] UKSC 26

- 112.4. The Trustee did not discriminate against Mr S on the grounds of disability as it actioned his transfer as requested in accordance with the Scheme Rules, that apply for all deferred members;
- 112.5. As considered below in paragraph 130 the Trustee did not have a duty of care to undertake additional due diligence;
- 112.6. The Consumers Right Act 2015 came into force on the 1 October 2015, over five months after Mr S' transfer was completed and does not apply to Mr S' transfer;
- 112.7. The transfer did not fall within the FCA perimeter meaning that any rules in respect of regulated activities, including the Condition of Business Rules 2.1.1 do not apply to Mr S' transfer; and
- 112.8. No formal notification to Mr S of any decision of the Trustee (or its administrator) to affect the transfer under Clause 18(c) pursuant to Mr S' written request was required.
113. Since the discretion to allow the transfer under Clause 18(c) was exercised in his favour, Mr S can have no cause of action against the Trustee in respect of its exercise of discretion, and there is therefore no need for me to make any finding as to whether or how the discretion was exercised.
114. I am satisfied that Clause 18(c) enabled the Trustee to pay Mr S' transfer on a non-statutory basis, in accordance with his clear wishes, taking into account the legislative requirements of the time and the wording of his signed "transfer to an occupational pension scheme" form and that the transfer was therefore paid in accordance with the Scheme Rules.

Due diligence

115. The Pensions Ombudsman has considered the obligations of trustees of occupational pension schemes to carry out due diligence in respect of statutory transfers in the Determination of Mr D v Open Trustees Limited (CAS-81940-Z2S8). Having reviewed the Scorpion Leaflet, the 2013 Action Pack and case-law on duties of care in tort and equity, the Pensions Ombudsman concluded that, in law, no duty of care exists on trustees to carry out the due diligence suggested by the 2013 Action Pack and, if necessary, then warn members of any red flags that might be apparent such that it would allow the member to mount a claim in negligence against the trustee.
116. As set out in Mr D v Open Trustees Limited in relation to a statutory transfer, trustees only have a duty to undertake checks to fulfil the express statutory requirements within section 95 of the 1993 Act and therefore no duty to carry out the due diligence in the 2013 Action Pack. For the same reasons, I find that there would be no duty to carry out the due diligence suggested in the 2014 Action Pack in relation to a statutory transfer. While the recommendations in the 2014 Action Pack were wider in

the sense that it addressed pension scams as well as pension liberation, it was not materially different and, above all, its status as guidance was no different.

117. The same applies to a transfer under the Scheme Rules: the Trustee needed only to confirm that the transfer was in accordance with Clause 18(c). I find that the Trustee fulfilled these requirements, as it went to some length to obtain the appropriate responses from Deuten to confirm the status of the Receiving Scheme and its willingness to accept the transfer (see paragraph 35). In any event, the requirements were met.
118. Mr S has argued that the provision of section 99 of the 1993 Act requiring trustees dealing with a statutory transfer request to do “what is needed to carry out what the member requires” creates a duty to carry out due diligence and the guidance from the Pensions Regulator in the 2013 and 2014 Action Packs (the **Action Packs**) effectively clarifies what is required. But the problem with that is that there’s nothing in the statute or regulations that includes the undertaking of due diligence as part of what the member requires.
119. Mr S’ argument is that section 99 effectively creates a novel freestanding duty on the Trustee that to do due diligence as part of what he as the member required. I don’t consider that section 99 should be construed in this way. It would be contrary to the principle against doubtful penalisation, where a statute will be presumed not to operate to the detriment of a person, including the imposition of civil liability, unless imposed by clear words. It’s also clear from the rest of the CETV legislation what the words “what the member requires” are intended to express: the words are used in section 95(1) which sets out the ways in which the cash equivalent can be taken. In section 97, reference is made to the trustees doing “what is needed to comply with what he requires under section 95” making the link with section 95 explicit. So, the concept of what the member requires is linked to section 95 and I find that the words in section 99 should similarly be read as referring to what the member may require under section 95 and not as creating new obligations to carry out due diligence. I do not consider that section 99 creates a duty to carry out additional due diligence for statutory transfers and equally it does not create a duty to carry out due diligence for a transfer under Clause 18(c).
120. As such, I find that the Trustee had no duty under legislation to carry out due diligence in relation to a statutory transfer or a non-statutory transfer, save to the extent of ensuring applicable requirements of legislation or of the Scheme Rules were met. It also owed no duty of care to Mr S in tort or equity to carry out due diligence to protect him from the risk of financial losses in the Receiving Scheme or consequent on the transfer as it had no duty to check that the transfer was in the best interests of Mr S.
121. As explained in *Mr D v Open Trustees Limited*, the Action Packs are not statutory requirements. They are issued by the Pensions Regulator under its powers to provide information, education and assistance to those administering pension schemes. It is not suggested that trustees should not carry out such due diligence in the interests of

limiting scams and fraud and as suggested in the Action Packs, so as to collect evidence which the Pensions Regulator may consider in exercising its power to allow additional time for the payment of a statutory transfer. However, the Action Packs could not themselves impose on trustees or administrators an obligation to carry out such due diligence or a liability to members for any failure to carry out such due diligence if the trustees or administrators did not have a pre-existing duty to the member to protect them from such risks. As I find that there is no such pre-existing duty under general law or any provision of legislation or of the Scheme Rules, I find that the Trustee had no duty to Mr S to carry out the due diligence suggested by the Action Packs.

122. Further, and for the same reasons, it had no duty in law to provide the Scorpion Leaflet to Mr S. There is disagreement as to whether or not Mr S received a copy of the Scorpion Leaflet. However, Mr S did sign at the time to say he had read it. If material, on balance I am satisfied that it was sent. However, I consider that there was no legal duty to provide it for the same reasons that there was no duty to carry out the due diligence suggested in the 2013 or 2014 Action Packs.

Voluntary Assumption of Duty

123. Recognising that a trustee or manager of a pension scheme has no general duty of care to carry out the due diligence suggested in the 2013 or 2014 Action Packs, before permitting a statutory or non-statutory transfer, it is necessary to consider whether the Trustee nevertheless assumed a duty to Mr S to carry out such due diligence to protect him from the risk of scams or poor investments in the Receiving Scheme.
124. At common law, a party may be held to be liable in tort for economic losses suffered by another where they have voluntarily assumed responsibility to that other party for a statement, service or task (or are to be treated as having done so)¹⁰.
125. In order for a duty of care to arise on the basis of a voluntary assumption of responsibility, it would be necessary to find that:
- 125.1. the Trustee had voluntarily assumed responsibility to Mr S to carry out the relevant due diligence and, in particular, due diligence to identify risks associated with investments that might be made in the Receiving Scheme;
- 125.2. in proceeding with the transfer, Mr S placed reasonable reliance on the Trustee undertaking such due diligence; and

¹⁰ There is considerable case law on voluntary assumption of responsibility and the above is only a summary of the principles as applicable in this case. Recent cases considering the voluntary assumption of responsibility as a basis for liability in tort for pure economic loss include *HMCEC v Barclays Bank* [2006] UKHL 28; *NRAM v Steel* [2018] UKSC 13; *Phelps v Hillingdon LBC* [2001] 2AC 619(HL); *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665, and *Hamble Fisheries Ltd v L Gardner & Sons Ltd (The Rebecca Elaine)* [1999] 2 Lloyd's Rep 1.

125.3. it was reasonably foreseeable to the Trustee that Mr S would be relying on it doing such due diligence in making his decision to transfer.

126. Merely exercising a discretion to pay a transfer does not amount to a voluntary assumption of responsibility to do due diligence in relation to the transfer. It is a decision to allow the transfer and implementing the transfer may require certain actions including due diligence checks necessary to ensure the transfer meets statutory or scheme requirements. But the exercise of discretion is not in itself an assumption of duty to do something not already required by the Scheme Rules, general law and legislation in respect of paying transfers. As set out above in paragraph 125, to establish a voluntary assumption of responsibility a member will need to have been advised by the trustee that it was undertaking additional due diligence so that the member relied on the trustee and that it was known or foreseeable to the trustee that the member was relying on it to undertake such additional due diligence.
127. In principle, where a trustee or administrator informs a member that they have carried out or intend to carry out due diligence, as set out in the 2013 or 2014 Action Pack or otherwise to confirm that there are no red flags or risks associated with the transfer, and that it will make a discretionary decision based on these checks or contact the member about any red flags, the trustee or administrator could be held to have assumed a duty of care to the member in respect of such due diligence. This is in contrast to a scenario where a trustee undertakes due diligence, as set out in the Action Packs or otherwise, but does not communicate this to the member. This is because a key requirement for establishing a duty at common law by voluntary assumption of responsibility is the expectation of the other party's reliance. This generally requires direct or indirect communication that the due diligence is being carried out and reasons to expect reliance. If the fact that the trustee is carrying out or intends to carry out due diligence is not communicated to the member, the trustee may have no reason to expect the member to be reliant on its due diligence.
128. Likewise, if the trustee is aware that the member is being advised by an IFA or some other party, it may be reasonable for them to expect the member to be relying on such other adviser¹¹. Sending out the Scorpion Leaflet and/or asking a member to confirm that they have read it, would also tend to negate any assumption of duty in respect of the Scorpion Leaflet checks.
129. In this case the Trustee has asserted that the Scorpion Leaflet was issued to Mr S' IFA and it is accepted that Mr S signed the transfer forms to acknowledge that he had read and understood the Scorpion Leaflet. The CETV quotation was accompanied by a statement referencing the Scorpion Leaflet. As such, while it is disputed that Mr S ever received the Scorpion Leaflet, I find that the Trustee was expecting Mr S to be appraised of its contents and, at the least, was expecting Mr S to consider the

¹¹ See *NRAM v Steel* [2018] UKSC13 in contrast to *Dean v Allin and Watts* [2001] EWCA Civ 758.

matters referenced in the Scorpion Leaflet. This would tend to negate an assumption of duty in relation to the contents of the Scorpion Leaflet.

130. As to whether the Trustee voluntarily assumed a responsibility to carry out the due diligence in the 2013 or 2014 Action Packs (and then warn Mr S if there were any red flags) I do not consider that the Trustee did assume responsibility to carry out such due diligence. The checks carried out by Aon were principally those necessary to ensure that Mr S' transfer request could be satisfied in accordance with the Scheme Rules. Carrying out due diligence that is necessary to ensure the transfer is in accordance with Scheme Rules does not imply or suggest an assumption of responsibility to carry out other due diligence. In any event, the fact of carrying out some due diligence, to satisfy the regulatory requirements is not sufficient for an assumption of responsibility to carry out the due diligence as recommended in the Action Packs.
131. To establish a voluntary assumption of responsibility the Trustee would need to have taken on some responsibility to Mr S for carrying out the due diligence set out in the Action Packs in circumstances that would make it reasonably foreseeable that Mr S would rely on it to do so in relation to his transfer. Mr S then also needed to rely on the Trustee having done this due diligence in requesting the transfer. The investigations and questions asked by Aon were not of themselves sufficient to communicate an undertaking to carry out the due diligence, set out in the Action Packs, in the expectation of reliance, given that it was legitimate and relevant for Aon to be carrying out such investigations and asking such questions for the benefit of the Trustee and to ensure that the conditions for a transfer under Clause 18 and section 95 of the 1993 Act were met.
132. As evidenced above (see paragraphs 9, 10, 32 and 56 to 61), Mr S' relationships prior to the completion of his transfer were primarily with his IFA and Deuten who provided him with financial advice and assistance in the management of his transfer request. I do not consider that there is any doubt that rather than placing reliance on the Trustee, Mr S relied on the advice provided by his IFA and the assistance of Deuten. The involvement of both the IFA and Deuten, to the knowledge of Aon and the Trustee, also mean that it was reasonable for the Trustee to take the view that Mr S was being professionally advised and that he was not relying on the Trustee to provide him with either advice or further information on whether the transfer was in his best interest. The requirement that Mr S confirm he had read and understood the Scorpion Leaflet further supports the conclusion that the Trustee was not assuming responsibility for risks mentioned in the leaflet but leaving it to Mr S to consider for himself.
133. For these reasons, I find that the Trustee did not assume a duty of care by voluntary assumption of responsibility to carry out due diligence either as suggested in the 2014 Action Pack or otherwise.

Reliance

134. In my Preliminary Decision, I considered the due diligence that had been carried out, that Mr S had confirmed that he had read the Scorpion Leaflet and that he had confidence in his IFA. Based on the evidence available, I concluded that even if further additional due diligence measures were undertaken, and Mr S was directly contacted with more questions, he would more likely than not still have proceeded with the transfer. Mr S' representative (see paragraph 54) has suggested this conclusion was speculative. On reflection and having reviewed The Pensions Ombudsman's decision in *Mr D v Open Trustees Limited*, I consider that I do not need to make a finding on what Mr S might have done had additional due diligence been carried out and had further questions been put to him. The Trustee had no duty to carry out such additional due diligence or issue any warnings or check whether his decision was in his own interests when acceding to his request to transfer under Clause 18(c) and did not assume a duty to do so, and as such the Trustee can have no liability to Mr S in respect of the transfer. I make no finding as to what Mr S would have done had due diligence been undertaken in line with the Action Packs and had the Trustee discovered more and issued warnings to him.

Conclusion

135. For the reasons set out above, I conclude that the Trustee owed no duty to Mr S, to carry out due diligence checks in respect of the Receiving Scheme, in accordance with the 2013 and 2014 Action Packs or otherwise, before transferring his benefits to the Receiving Scheme either under the Scheme Rules including Clause 18(c), the statutory transfer provisions of the 1993 Act, general law or by voluntary assumption of responsibility.

136. While I find that Mr S did not have a statutory right to a transfer because he exercised or purported to exercise his statutory right after the expiry of the three-month guarantee period under section 95 of the 1993 Act, I find that the Trustee was:

136.1. entitled to accept the transfer request as made in respect of Clause 18(c);

136.2. authorised under Clause 18(c) to pay the transfer in accordance with Mr S' request; and

136.3. in paying a transfer under Clause 18(c), the Trustee was not required to consider whether the transfer was in the best interests of Mr S and owed no duty to Mr S not to pay his transfer under Clause 18(c) where the requirements of Clause 18(b) and (c) and section 95 of the 1993 Act were met.

137. I also find that the Trustee:

137.1. did not owe Mr S a general duty of care to investigate or consider whether the transfer was in his interests;

137.2. did not owe and did not voluntarily assume a duty to Mr S to carry out the due diligence suggested in the 2013 and 2014 Action Packs or any due diligence in respect of the Receiving Scheme or the transfer, other than as required to

ensure the transfer met the requirements under Clause 18 of the Scheme Rules and section 95 of the 1993 Act.

138. I also find that the transfer was made in accordance with his request and that it complied with the requirements of Clause 18(c) (including the requirements of Clause 18(b) and section 95 of the 1993 Act insofar as required by Clause 18(b)).

139. I appreciate that this will not be the outcome that Mr S had hoped for.

140. While I sympathise with Mr S' circumstances and the losses he suffered in the Receiving Scheme, I do not uphold his complaint.

Camilla Barry

Deputy Pensions Ombudsman

25 November 2025

Appendix 1

Excerpts from Action pack for the trustees and administrators

Checklist

Answering **yes** to any of these questions individually does not necessarily indicate a pension scam, but if several features are present there may be cause for concern.

The nature/status of the scheme	
Is the scheme to which the member wants to transfer:	How to establish
newly or not registered for tax purposes with HMRC, whether it is an occupational or personal scheme (including SIPPs)?	Check the scheme is registered with HMRC for tax purposes: ask the pension scheme in question for documentary evidence of their registration. You can also write to HMRC for confirmation (see p9)
a personal pension (eg a SIPP) where the scheme operator is not authorised by the Financial Conduct Authority (FCA)?	Check the scheme operator is authorised with the FCA (www.fca.org.uk/register)
a recently set up small self-administered scheme, where the member is a trustee?	Ask the member
- sponsored by a newly registered employer? - sponsored by a dormant employer? - sponsored by an employer that is geographically distant from the member?	- Obtain employer information from scheme in question - Check with Companies House for details of the employer status (www.companieshouse.gov.uk)
sponsored by an employer that doesn't employ the member?	Ask the member
connected to an unregulated investment company?	- Ask the receiving scheme for details of their investment service providers - Check these providers with the FCA (www.fca.org.uk/register)

Description/promotion of the scheme	
Do descriptions, promotional materials or adverts:	How to establish
- include the words 'loan', 'savings advance', 'cash incentive', 'bonus', 'loophole', 'preference shares', 'one-off investment opportunities', 'free pension reviews' or 'government endorsement'? - allude to overseas investments? - hint at unusual, creative or new investment techniques?	- Ask the member for copies of promotional materials, emails or letters about the scheme - Ask the member about the way the receiving scheme has been described to them over email/text/phone

The scheme member	
Has the member:	How to establish
- been contacted by an 'introducer'? - been advised by a non-regulated adviser? - taken no advice? - decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension?	- Ask the member about how he/she became aware of the receiving scheme - Check whether the advisers are approved by the FCA at www.fca.org.uk/register
- pressured the trustees/administrators to carry out the transfer as quickly as possible? - mentioned that your pension scheme has transferred funds to this arrangement before?	Check whether the member has contacted trustees/administrators to hurry along transfer since first submitting request
not received documentation from the new scheme?	Check whether the member has received documents
- been told they can access their pension before age 55? - been misled about the potential tax consequences?	Review promotional material for receiving scheme
been advised that there will be no contributions paid by themselves or the employer?	Ask what the member has been told about contributions

Appendix 2

The Social Security Contributions and Benefits Act 1992

Section 3 - “Earnings” and “earner”

“(1) In this Part of this Act and Parts II to V below—

(a) “earnings” includes any remuneration or profit derived from an employment; and

(b) “earner” shall be construed accordingly.”

Section 4 - Payments treated as remuneration and earnings

“(1) For the purposes of section 3 above there shall be treated as remuneration derived from employed earner’s employment—

(a) any sum paid to or for the benefit of a person in satisfaction (whether in whole or in part) of any entitlement of that person to—

(i) statutory sick pay; or

(ii) statutory maternity pay;

(iii)... statutory paternity pay;

(iv).

(v) statutory adoption pay; ...

(vi) statutory shared parental pay; or

(vii) statutory parental bereavement pay; and

(b) any sickness payment made—

(i) to or for the benefit of the employed earner; and

(ii) in accordance with arrangements under which the person who is the secondary contributor in relation to the employment concerned has made, or remains liable to make, payments towards the provision of that sickness payment.”

Section 112 - Certain sums to be earnings

“(1) The Treasury may by regulations made with the concurrence of the Secretary of State provide—

(a) that any employment protection entitlement shall be deemed for the purposes of Parts I to V of this Act to be earnings payable by and to such persons as are prescribed and to be so payable in respect of such periods as are prescribed; and

(b) that those periods shall, so far as they are not periods of employment, be deemed for those purposes to be periods of employment.

(2) In subsection (1) above “employment protection entitlement” means—

(a) any sum, or a prescribed part of any sum, mentioned in subsection (3) below; and

(b) prescribed amounts which the regulations provide are to be treated as related to any of those sums.

(2A) Regulations under subsection (2) above shall be made by the Treasury with the concurrence of the Secretary of State.

(3) The sums referred to in subsection (2) above are the following—

(a) a sum payable in respect of arrears of pay in pursuance of an order for reinstatement or re-engagement under the Employment Rights Act 1996;

(b) a sum payable by way of pay in pursuance of an order under that Act or the Trade Union and Labour Relations (Consolidation) Act 1992 for the continuation of a contract of employment;

(c) a sum payable by way of remuneration in pursuance of a protective award under the Trade Union and Labour Relations (Consolidation) Act 1992.”

Section 122 – Interpretation of Part I and VI and supplementary provisions

““employment” includes any trade, business, profession, office or vocation and “employed” has a corresponding meaning;..”