CAS-57495-Q9Q1

Ombudsman's Determination

Applicant	Mr A
Scheme	HSBC Bank (UK) Pension Scheme (**the Scheme**)
Respondents	HSBC Bank Pension Trust (UK) Limited (**the Trustee**)
	Willis Towers Watson (**WTW**)

Complaint Summary

1. Mr A's complaint concerns WTW's failure to switch his investments in the Scheme and the subsequent financial loss he has allegedly incurred. Specifically:-

    1.1. WTW did not carry out his instructions to switch his investments in the Scheme between the UK Property Fund (**the Property Fund**) and the Emerging Markets Active Fund (**the Emerging Markets Fund**).

    1.2. If he had known that the switch had not taken place, he would have invested $330,000 in emerging market equities from his Interactive Brokers' account (**the brokerage account**), which was separate to the Scheme. This amount is the equivalent US Dollar value of the units he held in the Property Fund in March 2020.

    1.3. On numerous occasions, WTW misinformed him that the switch had taken place and delayed responding to his emails.

Summary of the Ombudsman's Determination and reasons

2. The complaint is upheld against the Trustee and WTW because:-

    2.1. Although it would not have been possible for WTW to carry out Mr A's instructions to switch his investments from the Property Fund, WTW, which was acting on behalf of the Trustee, misinformed him on numerous occasions over a period of several months that the switch had been carried out. As a direct consequence of these failings, Mr A was deprived of the opportunity to mitigate his financial position.

    2.2. The maladministration on the part of WTW has caused Mr A financial loss and serious distress and inconvenience.

Detailed Determination

Material facts

3. Mr A held a senior role at HSBC Global Markets.

4. On 17 March 2020, Mr A deposited $410,000 in the brokerage account. This was for the purpose of investing in emerging markets, after the initial market downturn resulting from the Coronavirus pandemic.

5. On 25 March 2020, Mr A decided to obtain exposure to emerging markets by switching his investments in the Scheme and contacted WTW. During his telephone call with WTW, he was asked to email his instructions and was informed that the switch should take place within a couple of days.

6. On the same day, Mr A emailed WTW to authorise the switch of 100% of his holding in the Property Fund, which was then valued at approximately £263,000, to the Emerging Markets Fund (**the Switch**).

7. Sometime later, on 17 April 2020, Mr A received an email from WTW notifying him that the Property Fund had been frozen, and the units could no longer be traded.

8. On the same day, having seen that email from WTW, Mr A emailed WTW to check that the Switch had been carried out, as he had requested it some weeks earlier.

9. On 29 April 2020, Mr A received an email from WTW confirming that the Switch had taken place with effect from 20 April 2020. WTW apologised for not confirming this sooner.

10. On 10 May 2020, Mr A sent an email to WTW and queried why his Scheme web account (**the Web Account**) still showed that he was invested in the Property Fund. However, he did not receive a response, so he sent a further email to WTW on 13 May 2020.

11. When WTW failed to respond, Mr A telephoned WTW on 15 May 2020, and was assured that the final status of the Switch would be confirmed in writing by 20 May 2020.

12. On 20 May 2020, Mr A received an email from WTW reaffirming that he was invested in the Emerging Markets Fund with effect from 20 April 2020. He was asked to email a screenshot of the Web Account if it still showed that his investments were held in the Property Fund.

13. Mr A responded the same day with the screenshot. When WTW failed to respond, he sent a follow up email on 28 May 2020.

14. On 11 June 2020, Mr A emailed WTW again and requested a copy of its complaint procedure. On the same day, Mr A telephoned WTW and expressed his concerns about the impact of market volatility on his investments and raised a formal complaint.

15. On 14 June 2020, WTW apologised for the level of service Mr A had received. WTW advised that the Property Fund had closed on 20 March 2020. As this was before the date Mr A had requested the Switch, he was still invested in the Property Fund.

16. Information that was subsequently obtained from Fidelity, the Scheme's investment platform provider, shows that the Trustee instructed Fidelity to cease trading units in the Property Fund with effect from 08:00 am on 24 March 2020, the day before Mr A emailed WTW his request for the Switch. Fidelity communicated this to WTW by email at 02:10 pm on 24 March 2020.

17. On 18 June 2020, WTW provided Mr A with details of its complaint process, and it acknowledged there had been service issues.

18. The following day, Mr A made a formal complaint to WTW. He claimed that if he had known at the time that the switch had not taken place, he would have invested $330,000 in a similar fund outside of the Scheme via the brokerage account.

19. Mr A provided evidence that he had deposited $410,000 in the brokerage account and claimed that he had missed out on investment returns of £118,000 up to the date of his complaint. Mr A then contacted WTW on 28 June 2020 and 1 July 2020 for a response.

20. On 6 July 2020, WTW offered Mr A £100 in full and final settlement of his complaint, which Mr A rejected on the same day. He asked for transcripts of the telephone calls he made to WTW concerning the Switch.

21. On 16 July 2020, Mr A contacted WTW when it failed to respond to his request. In the period that followed, Mr A had further exchanges with WTW concerning the Scheme's Internal Dispute Resolution Procedure (**IDRP**).

22. In subsequent correspondence with The Pensions Ombudsman (**TPO**), Mr A suggested that his alleged financial loss could be calculated over two separate periods: from 25 March 2020 to 14 June 2020 (**Period A**); and from 15 June 2020 to the date of the Ombudsman's Determination of his complaint (**Period B**).

Summary of Mr A's position

23. Mr A maintains that he would have invested in emerging markets equities through the brokerage account if WTW had provided him with the correct information. Mr A submits:-

    23.1. He wanted to take exposure in emerging markets equities. This has been demonstrated by the fact that he submitted the Switch instruction to WTW. He has changed his fund choice in the Scheme only once in the last 14 years.

23.2. He had the technical understanding of investing in emerging markets equities, as he had worked at HSBC Global Markets for 14 years. He led a team that structured derivative deals across a range of asset classes. He worked with sovereign nations, institutional clients, hedge funds and corporate clients in Hong Kong, London, and Dubai. His role included being interviewed by the financial media, for example, Bloomberg.

23.3. He already had the brokerage account and would have invested in the Amundi MSCI Emerging Markets UCITS ETF – ticker: AUEG (**the ETF**) to obtain exposure to emerging markets equities. The ETF was an index-tracking fund that had the same investment objective as the Emerging Markets Fund. It was also the most commonly traded emerging markets equities fund on Interactive Brokers' trading platform.

23.4. The cumulative performances of the ETF and the Emerging Markets Fund were similar during the period 25 March 2020 to 25 March 2021. He has provided a chart which confirms this.

23.5. When he submitted the Switch instruction to WTW on 25 March 2020, he already had sufficient cash in the brokerage account to make the $330,000 investment in the ETF. This was available for investing straight away.

24. Mr A subsequently invested the equivalent of £263,000 from the brokerage account between 25 March 2020 and 14 June 2020. During the investigation, TPO asked Mr A for information on these transactions. Mr A advised that:-

24.1. It was difficult for him to split out the transactions. Between 17 March 2020 and 15 June 2020, he deposited a further $426,000 in the brokerage account. He held $1.14 million in his brokerage account on 14 June 2020.

24.2. During the same period, he made hundreds of transactions in equities, futures, and options. He has provided evidence of this in a report that runs to over 50 pages.

24.3. He did not make any investments in emerging markets equities during the period in question as he assumed he had sufficient exposure via the Scheme. The Net Asset Value of the brokerage account between 25 March 2020 and 12 June 2020, as measured on a Time Weighted Rate of Return, fell by 17.9%[1]. This is evidence that he lost money during this period.

24.4. When he discovered on 14 June 2020, that he was still invested in the Property Fund he did not invest the brokerage account in emerging markets equities straight away. This was because he was confident that his complaint to TPO would be successful and that he would receive an award in due course. As he did not know what period the award would cover, he did not want to risk increasing his exposure to emerging markets.

[1] Source – Interactive Brokers – Activity Statement 26 March 2020-12 June 2020.

24.5. Since 14 June 2020, he has deposited a further $1.49 million in the brokerage account. Over the last two years, he has invested in emerging markets from the brokerage account. On 3 October 2022, the total value of the brokerage account was $5.34 million. On 29 November 2022, his investments in emerging markets were valued at approximately $440,000.

24.6. When the Property Fund re-opened to trading in June 2022, he switched 100% of his holding in the Scheme to the Cash Fund.

24.7. During the period 25 March 2020 to 14 June 2020, the value of the Emerging Markets Fund increased by 12.6%. If the Switch had been completed on 25 March 2020, the value of his investment would have increased by around £33,000 to £296,000 by 14 June 2020. The value of his holding in the Property Fund fell by 2% over this period.

24.8. He does not consider that there would have been any tax implications if he had invested in emerging markets from the brokerage account as he did not expect to return to the UK within the next five years. He was not resident in the UK for tax purposes and had been living in Dubai for 12 years.

25. Mr A maintained his view that he should be awarded financial loss for both Periods A and B. For Period B, he submitted:-

25.1. There was no way for him to manage risk during this period as the risk level was dependent on the outcome of the Ombudsman’s decision. If he had invested in the ETF on 15 June 2020 and the Ombudsman had decided that he should be awarded financial loss for Period B, then he would have been invested with twice the level of risk in emerging markets, which would not have been desirable.

25.2. WTW’s error was the cause of him not being able to manage the risk.

25.3. It was much more likely that he would have retained the investment in the Emerging Markets Fund in the Scheme after 14 June 2020.

25.4. WTW had behaved in poor faith and had been reckless with the truth in its responses to TPO. For example, WTW had told TPO that Mr A did not submit an appeal to the Trustee’s Stage One IDRP decision, when he had.

Summary of the Trustee’s position

26. The Director and Chair of the Appeals, Discretions & Operations Committee of the Trustee (**the Committee**) provided Mr A with its Stage Two IDRP response on 22 June 2021.

27. The Committee apologised for the error made by WTW and acknowledged that Mr A was entitled to rely on the information. The information WTW provided on the Property Fund should have been accurate.

28. The Trustee's decision to suspend the Property Fund was taken in the best interests of the members generally. The Committee recognised that this prevented Mr A from being able to switch his funds. It was regrettable that WTW did not make Mr A aware of the position in its subsequent correspondence. The Committee acknowledged that Mr A was not informed of the error until several months later.

29. However, the Committee said that it was not clear that Mr A had relied on the incorrect information and made decisions he would not otherwise have taken, or that WTW had caused him a financial loss. Mr A did not provide any evidence to support the financial loss he claimed to have incurred, or the course of action he would otherwise have adopted.

30. At Stage One of the IDRP, Mr A was offered £1,000 for the distress and inconvenience he had suffered. The Committee agreed that the offer was appropriate in view of the poor service he had received from WTW.

Conclusions

31. Mr A was entitled to receive information that he could rely on when making decisions regarding his investments. I note the Trustee has accepted this. I am satisfied on reviewing the evidence that Mr A's reliance on the information provided by WTW concerning the Switch was reasonable in the circumstances.

32. It was reasonably foreseeable that Mr A would rely on the information. It subsequently transpired that the information was incorrect. Given the repeated reassurances from WTW, Mr A would have had no reason to suspect that the Switch had not gone ahead. Consequently, he was initially denied the opportunity to mitigate his financial position by making alternative investments outside the Scheme.

33. While the Trustee accepts that WTW had a duty of care to provide Mr A with correct information, it has questioned whether Mr A relied on the information to his financial detriment.

34. In the case of Tenconi v James Hay Partnership [2019] EWHC 2285 (Ch), the applicant missed out on an investment opportunity due to a delayed pension transfer resulting from maladministration. This case raised an issue that is referred to as the counter-factual scenario. The counter-factual was the difference between what the applicant would have done with the transfer if there had been no delay, and what the applicant actually did when it eventually arrived.

35. This means that in order to determine whether Mr A has suffered a financial loss as a direct consequence of his reliance on the information, it is necessary for me to consider what action Mr A would have taken at the time, had he been given the correct information.

36. Mr A has submitted that he would have invested the value of his investment in the Property Fund on 25 March 2020, in emerging market equities from the brokerage account. Mr A has explained that his request to switch his investments from the Property Fund to the Emerging Markets Fund was made after careful consideration. He has also explained that the purpose of making the transaction was so that he could obtain better returns on his investments.

37. I am conscious that the scenario that has been presented is with the benefit of hindsight. The case of *North Star Shipping v Sphere Drake Insurance* [2005] 2 Lloyd's Rep. 76 is relevant here. The Court held that:

> "….such [hypothetical] evidence has to be rigorously tested by reference to logical self-consistency, and to such independent evidence as may be available."

38. Mr A has provided TPO with information concerning his financial experience, including the senior roles he held at HSBC. He has also provided evidence showing his trading activity over the period in question, together with evidence that he has invested in emerging markets assets from the brokerage account over the last two years.

39. This detailed evidence supports the view that Mr A is an avid investor and has a good understanding of finance and investment markets. Mr A has explained to TPO that he only made one previous request to switch his investments in the Scheme in 14 years. The sum that Mr A was looking to switch was not an insignificant amount; the fact that he sought confirmation from WTW that the Switch had been completed shows his commitment to making this particular investment. I am satisfied that any financial loss Mr A has incurred in respect of Period A, is a direct consequence of his reasonable reliance on the information provided by WTW regarding the Switch.

40. I accept that Mr A requested the Switch because he was seeking higher returns on his investments. On reviewing the evidence, I am satisfied that if Mr A had been advised that the Switch could not be completed, he would have made a similar investment using another route. I find that his reasons for justifying why he would have made an equivalent investment in emerging markets from the brokerage account, if he had been given the correct information, are both persuasive and logical.

41. I accept that it is impossible to establish with certainty exactly what action Mr A would have taken if he had been advised on 25 March 2020, that the Property Fund was closed to transactions. However, taking into consideration all of the evidence that I have reviewed, I find on the balance of probabilities that Mr A would have invested an equivalent sum of money in an emerging markets fund from the brokerage account.

42. Due to the specific request Mr A made to WTW, and the limited time period over which the incorrect information impacted on his decision making, it is relatively straightforward to identify whether he has incurred any financial loss in respect of Period A.

43. I acknowledge Mr A's comment that he did not know what the outcome of his complaint to TPO would be and consequently decided not to invest in emerging markets from the brokerage account when he was told about WTW's error on 14 June 2020. However, once he was in possession of the correct information, namely that the Property Fund had not been switched for the Emerging Markets Fund, Mr A had an obligation to mitigate his financial position. Given his experience in handling his own financial affairs, I consider it reasonable that from 15 June 2020, he would have used reasonable endeavours to manage his risk exposure. Consequently, I find that the Trustee is not liable for any financial loss he has incurred in respect of Period B.

44. Based on the evidence available to TPO, Mr A would have benefited from investment growth of 10.4%[2] by the end of Period A, if he had invested £263,000 in the ETF on 25 March 2020. This equates to an increase of £27,352 on the investment in monetary terms. Consequently, this is the amount Mr A should be compensated for.

45. I have considered whether Mr A should be compensated for the financial loss he incurred in respect of the brokerage account over Period A. Mr A has provided evidence that he held cash in the brokerage account, and I have concluded that he would have invested this in the ETF. However, having purchased units in the ETF, any losses that Mr A may have incurred in respect of other funds within his brokerage account cannot be directly attributable to his reliance on the information provided by WTW and could not have been foreseeable.

46. There is no automatic right to interest on any amount that I direct to be paid, although I may direct interest to be calculated and added to that amount. I will generally direct interest to be paid where the claimant has been without an amount of money for a period of time and was unable to invest it and obtain a return.

47. Given that Mr A has not had the opportunity to invest the sum of £27,352, he would otherwise have earned if he had made an equivalent investment in the ETF, I consider it appropriate to direct that interest be paid on that amount from the 14 June 2020 to the date of the actual payment. I also consider it appropriate for the court's judgment rate of 8% per annum (**the Judgment Rate of Interest**) to be applied.

48. WTW's actions have caused Mr A serious distress and inconvenience. However, I do not consider that it made serious administrative errors over a long period of time or prevented Mr A from making critical decisions in respect of his retirement planning. For these reasons, I consider that the offer of £1,000 made by WTW is sufficient in recognition of the non-financial injustice Mr A has sustained.

[2] Source – Financial Times - AUEG:LSE:GBX – 25 March 2020–12 June 2020, close of business prices

49. I note that Mr A’s complaint is against both the Trustee and WTW. While WTW failed to carry out its administrative duties on behalf of the Trustee, the Trustee is ultimately responsible for the running of the Scheme and dealt with Mr A’s complaint during the IDRP process. Consequently, the directions I make in this case are made in respect of the Trustee.

50. I uphold Mr A’s complaint and make the appropriate directions in paragraph 51 below.

Directions

51. Within 28 days of the date of this Determination, the Trustee shall:

    51.1. pay the sum of £27,352 into Mr A’s brokerage account, plus interest in respect of the period 14 June 2020 to the date of actual payment. The interest referred to above shall be calculated at the Judgment Rate of Interest; and

    51.2. pay Mr A an overall award of £1,000, in respect of the non-financial injustice he has suffered in connection with this matter.

Dominic Harris

Pensions Ombudsman
28 November 2023