PO-11134

Ombudsman's Determination

Applicant	Mr S
Scheme	Armed Forces Pension Scheme (**AFPS**)
Respondents	Ministry of Defence (**MoD**)

Complaint Summary

1. Mr S has complained that MoD allowed him to transfer his benefits out of AFPS into a receiving scheme which he believes to be a fraudulent arrangement. Mr S transferred his benefits to the Capita Oak Pension Scheme (**the Capita Oak Scheme**), which was operated by Imperial Trustee Services Limited (**Imperial**). Imperial has since been forced into compulsory liquidation and Mr S believes his benefits have been lost.

Oral Hearing

2. I held an oral hearing on 27 May 2021 (**the Oral Hearing**), as part of my investigation. I considered it necessary to do so to hear the evidence of the parties regarding the sequence of events leading up to the transfer of Mr S' pension benefits.

3. The Oral Hearing was attended by Mr S and his legal representatives. MoD was represented by a Manager from the Defence Business Services unit of Veterans UK, the AFPS, and its legal representatives.

Summary of the Ombudsman's Determination and reasons

4. Having fully considered the evidence and submissions presented to me in writing, and those provided at the Oral Hearing, I uphold the complaint.

5. Mr S' complaint is upheld on the basis that Mr S did not have a statutory right to a transfer as he was not an "earner" for the purpose of acquiring transfer credits. The AFPS did not have a separate discretionary transfer right (and in any event one was not purported to be used) so the transfer was invalid, constituted maladministration and has not discharged MoD's liability/responsibilities under the relevant transfer legislation.

6. I also find that there was maladministration by MoD in executing the transfer process by failing to assess the transfer request in accordance with the Pensions Regulator's guidance which operated at that time and failing to warn Mr S of the concerns MoD should have had as a result. However, on the balance of probabilities, I do not find these failures would have affected his transfer decision, had the transfer been legally valid. I direct MoD to pay Mr S £2,000 for the severe distress and inconvenience caused to him.

Detailed Determination

The statutory right to a transfer value

7. Section 94 of the Pension Schemes Act 1993 (**PSA 1993**), provides that a member of an occupational or personal pension scheme has a right to a "cash equivalent transfer value" of any benefits which have accrued under the transferring arrangement.

8. Section 95 (1) of PSA 1993, states that a cash equivalent transfer value can be taken by making an application in writing to the managers of the transferring arrangement requiring them to use the cash equivalent in one of several ways as set out in subsequent paragraphs. In summary, and so far, as relevant, they are:

    - for acquiring "transfer credits" in an occupational pension scheme or
    - for acquiring rights under a personal pension scheme

    which satisfies prescribed requirements in each case and where the trustees or managers of the scheme are able and willing to accept the transfer.

General obligations and duties

9. This Office has previously considered a number of pension liberation cases and issued Determinations setting out the Ombudsman's approach with respect to the duties on the ceding provider. For example, a previous Determination (reference PO-6375) concerned a transfer to the Capita Oak Scheme in 2013.

10. In that case, the then Ombudsman noted that The Pensions Regulator (**the Regulator**) issued guidance to providers on 14 February 2013, regarding pension liberation and the danger of pension scams. The Ombudsman therefore felt that this could be regarded as a point of change, in good industry practice, regarding the due diligence expected.

11. That is not to say that pension liberation was not on the radar before then, it was addressed in the Pensions Act 2004. However, where scheme members have a statutory right to a transfer, the extent to which providers could delay or refuse a transfer is limited where the receiving scheme has met the necessary legislative requirements.

12. The judgment in Hughes v Royal London [2016] EWHC 391 Ch (**Hughes),** highlighted that prior to the changes that have since been brought in under the Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021, there was little providers could do to stop a transfer unilaterally, where a statutory right existed, even when they had serious concerns about the destination of the money, the investments, or the nature of the receiving scheme. However, the potential inability to refuse a transfer did not, and should not, have prevented a provider from carrying out due diligence and doing all that it could to ensure the member and the scheme administrator had access to the full facts before deciding whether to proceed with his or her transfer. In doing so, this due diligence might have uncovered evidence that the statutory transfer right to transfer to the requested scheme did not actually exist, for example, because that scheme was not a valid recipient scheme, or the transfer would not have provided transfer credits as required under the legislation.

Material facts

13. Mr S was an active member of AFPS from 3 November 1988 to 12 February 2001. After this date, he became a deferred member, and his accrued benefits were to be preserved until he reached age 60 in 2024.

14. At the Oral Hearing, Mr S explained how he was cold-called, then put in touch with a representative of the Capita Oak Scheme and persuaded to transfer his benefits to it. He said he had not considered transferring his AFPS benefits before this time and had not been aware that he could. He was told his investments would perform much better in the Capita Oak Scheme and he would receive a higher return upon his retirement. He stated that this was particularly important to him, as he intended his retirement fund to be for his children.

15. When I questioned Mr S on whether he had considered the risks involved, based on his view that the investment return quoted appeared unrealistic, he commented that the initial approach to him had been made in such a strong, positive, and professional manner, that he was convinced that the individual he had spoken to knew what they were doing.

16. Mr S informed me that he was aware of scams in general, however, he did not consider that there were specific pension-based scams at the time he was cold called and when he had had a conversation with the representative from the Capita Oak Scheme. Mr S considered the Capita Oak representative to be impressive and convincing, although, he did comment that it was not always easy to contact the Capita Oak office and that it could take a week or two before his calls were returned.

17. On the 28 December 2012, MoD received a fax from Carrington Mitchell Limited with a letter of authority from Mr S. The cover page requested that MoD provide Carrington Mitchell with, among other things, a Full Transfer Value for Mr S, the pension information form also listed Mr S' pension account details with Royal London and Friends Provident.

18. On being questioned about the timeline Mr S was unable to recollect any information about Carrington Mitchell Limited, or the information he gave to them, although he accepted that he must have provided the policy details for each pension. Mr S did not hear from Royal London or Friends Provident in respect of a proposed transfer out of these policies and he confirmed that Capita Oak were not interested in these smaller pensions.

19. In January 2013, MoD received a request from Mr S to transfer his benefits to the Capita Oak Scheme. Mr S has advised me that he does not recollect signing the one letter that he has seen, though he accepts it is his signature and that he did not see many of the documents relating to the transfer.

20. In a letter to Mr S dated 22 January 2013, MoD provided him with a notional transfer value and near the end of the letter it stated:

    "the Pensions Office is a non-advisory body and does not highlight the advantages and disadvantages of different schemes. For advice, you should consult an Independent Financial Adviser. If a transfer is made, it will include your entitlement to any terminal grant (lump sum) and will mean you relinquish all rights to any preserved pension award you may be entitled (*sic*) from the Ministry of Defence."

21. On the 21 February 2013, MoD received a letter from the Capita Oak Scheme with transfer discharge documentation papers signed by Mr S on the 4 February 2013.

22. On the 28 February 2013, MoD sent Mr S a further letter advising him that it had received an application from the Capita Oak Scheme requesting the transfer of his AFPS pension to it. The letter contained various documents and requested that once completed the "Annex(es)" should be returned to MoD via the Capita Oak Scheme. The letter contained a further paragraph that stated:

    "It should be noted that SPVA is not an advisory body and cannot highlight the advantages and disadvantages of different scheme. For advice, you should consult an Independent Financial Adviser."

23. Over the following few months, MoD has shown that it checked that the Capita Oak Scheme was registered with HMRC. In particular, the information it has provided showed that the Capita Oak Scheme was registered with HMRC on 23 July 2012 as an occupational pension scheme established in Cyprus.

24. MoD has also stated that it received a letter from the Capita Oak Scheme stating it was a legitimate scheme and that it was willing to receive Mr S' pension benefits. Capita Oak advised the AFPS that the scheme was a Defined Contribution Occupational Pension Scheme registered with HMRC under PSTR 00785484RM. A representative of the Capita Oak Scheme confirmed that "The scheme is willing and able to accept the full transfer of the clients pension benefits."

25. There was a delay to completing the transfer as the MoD had not received sufficient proof of identification from Mr S. As part of the documents provided to MoD to meet

the identification requirements, Mr S provided evidence in a letter to MoD dated 16 August 2013, that he was in receipt of a Jobseekers Allowance. MoD was therefore in possession, during the transfer process, of key information affecting and relevant to Mr S' transfer rights under the legislation, that he was not in employment.

26. On 3 September 2013, after completing all identification checks, MoD gave final approval for the transfer and Mr S' benefits were transferred out of AFPS shortly thereafter.

27. MoD has said that it put additional due diligence checks in place in November 2013, in relation to pension liberation scams. In particular, at this time, it says it began to provide the Pensions Regulator pensions liberation leaflet (the **Scorpion Leaflet**), concerning pension liberation scams, to any scheme members who expressed an intent to transfer their benefits out of the AFPS (see extract in the Appendix).

28. MoD has said Mr S did not receive the Scorpion Leaflet as his transfer was completed in September 2013. However, it believes it exercised due diligence when allowing his transfer because it received confirmation that the Capita Oak Scheme was a registered scheme with HMRC, and it had advised Mr S to seek independent financial advice.

29. Around the time of the AFPS transfer application, it appears that Mr S also initiated the transfer process of pension benefits held with Royal London and Friends Provident. However, ultimately, these benefits were not transferred and remain with those providers.

30. Neither Royal London nor Friends Provident have a record of why Mr S' transfer requests with them were not completed. Mr S himself cannot clearly remember, but believes it is likely he did not pursue those transfer requests, as the accrued benefits in question were relatively small and therefore not worth the effort and interest of Capita Oak.

31. On 2 October 2018, I issued a preliminary decision (the **Preliminary Decision**) upholding Mr S' complaint on the basis of a failure to carry out sufficient due diligence on the transfer and warn Mr S appropriately, which would have stopped the transfer. Both Mr S and MoD provided their comments and further information for my consideration prior to attending the Oral Hearing.

Summary of Mr S' position

32. MoD did not exercise sufficient due diligence when allowing Mr S to transfer his benefits, it simply checked that the Capita Oak Scheme was registered with HMRC and did little else. It received a letter stating that the Capita Oak Scheme was a legitimate scheme, but as this was sent by Capita Oak MoD ought not to have applied much weight to it.

33. Mr S confirmed at the Oral Hearing that he did not recall seeing MoD's notice for him to seek independent financial advice and in hindsight he should have done so,

although he did expect that MoD should have given him advice and point out the risks by undertaking sufficient due diligence. Mr S commented that he had no real contact with MoD since 2001 when he left the army, and that there was no direct contact by phone, both prior to and following the transfer.

34. When questioned at the Oral Hearing on whether any leaflets provided to him would have made any difference to his decision, Mr S replied that it would have made all the difference, had MoD warned him of the risk. He said that if he had been warned he would not have gone ahead with the transfer.

35. It would have been reasonable for MoD to have put in place additional due diligence processes relating to pension liberation scams much earlier than November 2013. The Regulator issued its pension liberation scams guidance in February 2013, and MoD ought to have been aware of this guidance when it was issued.

36. The Capital Oak Scheme did not meet a necessary requirement to be an occupational pension scheme as there was no employment relationship with Mr S, and MoD would have established this had it carried out the necessary checks.

37. While Mr S' transfer application was made around the time that the Regulator issued its guidance, his transfer was not completed until many months later. In the meantime, MoD remained as manager of the AFPS and subject to the usual responsibilities in respect of managing risks, ensuring compliance with the AFPS rules and legislation. The substantive transfer did not take place until September 2013. There was therefore sufficient time for MoD to have applied the new due diligence processes. If it had done so, Mr S would have been made aware that there were a number of reasons to be concerned about his transfer and he would have cancelled it. In particular, the Capital Oak Scheme had only recently been registered in 2012, and it was based in Cyprus. These two facts raised "red flags".

38. MoD, as manager of the AFPS, owed Mr S a higher duty of care, by virtue of its knowledge and profession, than the care the ordinary prudent man of business would take in managing his affairs. The Regulator's guidance should have been applied to Mr S' transfer as a whole, not just specific elements of the process.

39. Mr S' other pension benefits remain in place with other providers and have not been transferred.

40. Mr S has provided evidence to confirm that he was in receipt of Jobseeker's Allowance between 26 June 2013 until 13 September 2013 and during the Oral Hearing it was established that he had been looking for work at that time.

Summary of MoD's position

41. MoD argued that it was not aware of the Regulator's announcement in February 2013. It highlighted that it was not informed directly by the Regulator of the announcement at the time, and the announcement was not mentioned at a committee

attended regularly by its representatives. At the Oral Hearing MoD stated that it did not get any specific instructions following the issue of the Scorpion Leaflet.

42. MoD also argued that Mr S had already applied for his transfer when the Regulator made its announcement, and it was not able to cancel the transfer without his authorisation. The substantive transfer process took place in February-March 2013 and not September 2013. Mr S requested his transfer value before the Regulator issued its guidance on 14 February 2013 and he applied for a transfer within a week of the guidance being issued. Moreover, MoD had completed the formal processes for due diligence in March 2013, reflecting the law and regulatory guidance as reasonably known to itself at the time. The delay to September 2013 was simply due to the provision of incorrect ID information.

43. During the Oral Hearing, the MoD representative advised that while he was not personally involved with the transfer, he confirmed that Mr S had a statutory right to a transfer and that having taken the necessary due diligence measures required at that time MoD had no legal reason to stop the transfer.

44. MoD was of the view that Mr S would have continued with the transfer regardless of the additional measures contained in the Regulator's guidance. MoD had no duty to "advise" Mr S of the advantages and disadvantages of proceeding with his transfer request. In its response to the Preliminary Decision MoD submitted that Mr S commenced the transfer of benefits from the two other schemes and that this had not been investigated by the Pensions Ombudsman. It disputed, and considered that it had not been determined, whether MoD's actions had any effect on Mr S' decision to transfer his benefits and requested that this question should be addressed at an oral hearing.

45. This is a case of maladministration, so the Pensions Ombudsman erred in law in its First Preliminary Decision by concluding that MoD acted negligently. The Pensions Ombudsman must apply the standards of good administration as they stood at the period in question, not subsequently or with the benefit of hindsight. The case also turned on the principles of trust law and any statutory or common law duty of care owed to Mr S, in addition to MoD's duties under PSA 1993. In any event, the finding of maladministration, that MoD did not update its guidance until November 2013, relates to a period after the completion of Mr S' transfer and was not relevant.

46. The Pensions Ombudsman has held MoD to an unrealistically high standard and applied the benefit of hindsight in assessing MoD's actions. The complaint should be decided on the basis of established legal principles, not on grounds of what is fair and reasonable. The Pensions Ombudsman has not identified the standard of due diligence MoD fell below, and which represents what a reasonable pension scheme would have done.

47. MoD accepted that the duty to act prudently and in the best financial interests of beneficiaries, includes a duty to undertake due diligence in processing a transfer request under S95 PSA 1993. This can mean the need to adopt processes with

regard to established principles of industry-wide good practice. However, MoD did comply with its legal duties at the time the transfer request was received; the release of new regulatory guidance does not itself establish the point at which a new industry-wide benchmark of good practice is set; a "breach" of the guidance does not constitute a breach of the duty of care and skill; the Scorpion Leaflet said nothing on how to treat pending or processed transfer requests; and it is a matter of fact and degree as to what constitutes a reasonable time for responding to regulatory changes.

48. MoD said that "What appears to be at issue here are the common law duties of a trustee to act prudently and act in the best financial interests of the scheme beneficiaries." In its letter to my office dated 14 November 2018, MoD went on to comment "this is a duty to take such care as an ordinary prudent man of business would take in managing his own affairs, and under a moral obligation to provide for others." However, while it meant to act in the beneficiaries' best financial interests overall, it did not override the MoD's duty to authorise a transfer where a statutory right to transfer had been established.

49. The Pensions Ombudsman has decided in previous cases that scheme managers would be entitled to some time for procedures to be updated (PO-6375 refers). MoD is not aware of any benchmark which demonstrates that a period of six months is sufficient for a public sector occupational scheme to have been aware and to reasonably comply with the guidance. The Pensions Ombudsman has not justified, by reference to an industry-standard, any guidance and/or evidence of what other reasonable providers did and was incumbent on MoD to also follow. No industry code of practice was put in place until March 2015.

50. Under S94-99 PSA 1993, MoD was obliged to comply with Mr S' transfer application as he had acquired a statutory right to transfer. There was an occupational pension scheme "able and willing" to accept a payment and the scheme met the prescribed requirements. Accordingly, MoD has "done what is needed to carry out what the member requires" in accordance with the requirements of PSA 1993. The MoD referred to Hughes.

51. The Pensions Ombudsman cannot direct MoD to restore Mr S to the AFPS, where it is outside the rules that govern the scheme, or to set up a bespoke scheme for him. Mr S cannot re-join the AFPS 1975 as it is closed to new members and there is no power to re-admit ex-members, and he does not qualify to join AFPS 2015. MoD is not able to set up a bespoke scheme for Mr S, but even if it were possible to do so, Mr S would also be put in a more favourable position than taking the matter to court and result in a significant cost and administrative burden to the AFPS and the public purse. It would also be difficult to monitor recovery of any funds from the Capital Oak Scheme by Mr S, much less enforce any agreement to recover it from him.

Conclusions

52. I have looked at the status of the Capita Oak Scheme and consider that for the purpose of the proposed transfer it was reasonable for MoD to consider it an Occupational Pension Scheme. I note that the Pensions Regulator has subsequently appointed an Independent Trustee on the basis that it is an Occupational Pension Scheme.

53. Other than check that the Capita Oak Scheme was registered with HMRC and Mr S' proof of identity, there is no evidence to show that MoD undertook any other investigation to confirm whether Mr S had a statutory right to a transfer.

Statutory right to transfer

54. In completing a declaration of intent on behalf of Mr S, a Capita Oak representative signed to confirm that, "if the AFPS fulfils the requirements of section 95(2) to the PSA 1993, and its scheme rules, it will be discharged from any obligation to provide benefits to which the transfer value relate." This is the standard wording contained in the AFPS transfer discharge documentation. The declaration was signed and dated 27 March 2013, by a Capita Oak representative, with Mr S also signing and dating Annex C, on 19 March 2013, confirming his wish to transfer.

55. By way of confirmation of his address, Mr S sent the AFPS a document confirming that he received jobseeker's allowance and a P60 for the tax year 6 April 2012 to 5 April 2013, which showed that Mr S received £5,854.20 of income for the previous tax year.

56. I do not know what income Mr S was in receipt of in January 2013, at the time he made his transfer request, however, I have seen evidence that between the 26 June 2013 and 13 September 2013, Mr S was in receipt of Jobseekers Allowance at a rate of £71.70 per week.

57. To obtain transfer credits under the rules of the Capita Oak Scheme it was necessary for Mr S to be an "earner", the definition of which is set out in section 3 of the Social Security and Benefits Act 1992 (the 1992 Act). The definition of "earnings" in the 1992 Act refers to an "employment" that is further defined as including any trade, business, profession, office or vocation. I consider that the ordinary meaning of earnings and earner imply that an individual is in employment, and this is confirmed in section 3 of the 1992 Act. Mr S was in receipt of Jobseekers Allowance that was paid by the state, not by an employer.

58. Sections 4 and 122 of the 1992 Act (see appendix below), extend the definition of earnings to include certain benefit payments and certain employment protection entitlements. However, as Jobseekers Allowance is not included as a benefit to be treated as "earnings" in these exceptions, I do not consider that Mr S was in receipt of "earnings", so he was not an "earner" on the 3 September 2013, when the final approval for the transfer was given. Mr S did not have a statutory right to a transfer.

59. The case of Hughes provides clarity on the interpretation of the PSA 1993, and the requirement for Mr S to be in receipt of "earnings", although not necessarily from the scheme-sponsoring employer; and the Mrs H v Hampshire County Council (PO-21489) Determination emphasises the need for the transferring authority to consider whether a member has a statutory right to a transfer. In the latter case, I held that Mrs H did not have a statutory right to transfer as she was in receipt of benefits not earnings.

60. In its submissions, and in a letter to TPO dated 14 November 2018, MoD relies on sections 94 to 99 of the PSA 1993, stating that it was "under a duty to comply with a written application for a transfer of the cash equivalent of any benefits under the scheme."

    MoD said that Mr S acquired "a statutory right by virtue of there being: (i) another occupational pension scheme the trustees of which were "able and willing" to accept a payment; and (ii) the scheme satisfying the prescribed requirements: s 95(2)(a)(i) and (ii). The requirements of both provisions were satisfied." This letter shows that MoD's focus was placed on the status of the receiving scheme and that it had not considered whether Mr S had a statutory right to transfer as an "earner".

61. MoD misdirected itself in respect of the PSA 1993, by focusing on the status of the receiving scheme in isolation and it did not take into consideration Mr S' employment status. If Mr S' employment status meant he was unable to obtain transfer credits under the legislation, as I have found, then his transfer request did not establish a statutory right to transfer. In relation to the discharge form referred to at para 54 above, the AFPS did not fulfil the requirements of S95(2) PSA 93, and therefore has not been discharged from its obligation. The AFPS does not have a discretionary transfer provision and in any event, MoD has not claimed to have exercised one. MoD has argued its case on the basis that it had no option but to comply with Mr S' exercise of his statutory right to transfer but, in fact, he did not have such a right at that time and the transfer was invalid.

<u>Transfer process/due diligence</u>

62. I have upheld Mr S's complaint because MoD should not have processed his transfer since he had no statutory right to it (and the AFPS has no discretionary right provision, nor was one purported to be used). However, it is appropriate to also deal (as I did in my first Preliminary Decision) with the due diligence/lack of warnings aspect for the purpose of considering the effect of what actually happened, and whether there was maladministration and a resulting non-financial injustice.

63. MoD said that it did not become aware of the Regulator's guidance until 29 October 2013. I do not believe it is tenable for a reasonably competent pension provider to argue it was not aware of the Regulator's announcement before September 2013, and therefore unable to put the guidance into practice, until November 2013. It should be remembered that the Regulator published a press release and factsheet in

February 2012, warning about pension liberation. February 2013 was therefore not the first time that the Regulator had drawn attention to this issue.

64. I would not expect MoD to have been directly informed by the Regulator of its regulatory guidance in order for MoD to be aware of it. While it is not for me to say exactly how MoD ought to have kept up to date with pensions standards and guidance, it was its responsibility to do so. I believe it ought to have had processes in place to achieve this so as to avoid non-compliance, and the provision of less protection to its pension members than other schemes. The pensions industry was generally aware of pension scams prior to the Regulator's Scorpion campaign and the issue of its guidance and Scorpion Leaflet in February 2013.

65. I note that Mr S applied for his transfer value shortly before the Regulator's announcement was made, and that MoD sent its transfer pack two weeks after the announcement. However, despite the initial checks made in February-March 2013, the transfer was not completed until September 2013. From April to August 2013, MoD was trying to obtain acceptable ID for Mr S. In August 2013, following receipt of acceptable ID, MoD noted that further checks on the Capital Oak Scheme registration were carried out by the Quality & Assurance team. In September 2013, the Officer in Charge of Armed Forces Pensions informed the Finance Team that all the paperwork and payment details had been checked and final approval was granted for the transfer and payment to proceed. This clearly indicates that the substantive decision regarding the transfer was only taken in September 2013, following the receipt of all the transfer requirements and further checks. The alternative is that MoD agreed to the transfer before confirming Mr S' identity, which would be unacceptable.

66. In fact, the identity aspect and subsequent delay provided MoD with a perfect opportunity to reassess the application and ensure it met its obligations under s95(2) PSA 93, as it was provided with clear evidence that Mr S was not in employment, however, it failed to take this up. I assume this was due to a failure to appreciate the significance of this by those staff dealing with the transfer process.

67. MoD has pointed out that, in previous cases, I have allowed a period of time for scheme administrators to become aware of, and act on the Regulator's guidance. Generally, I have allowed around 1 month for providers to amend their transfer processes (see, most recently PO-24554, which summarised the related cases and confirmed my general view), although each case will be assessed on its own merits. MoD referred to PO-6375, where a similar complaint was not upheld, but in that case the transfer was completed in March 2013, a few weeks after the Regulator issued its guidance.

68. When MoD made its final decision on Mr S' transfer application, in September 2013, it had been at least six months after the Regulator's guidance had been issued. Bearing in mind that this guidance was issued in response to increased awareness of pension scams, it is reasonable to say that, by September 2013, MoD should have been aware of the heightened due diligence necessary in respect transfer applications.

69. MoD said that it put additional due diligence measures in place in November 2013, and MoD argued that there was no timescale within the Regulator's announcement for the guidance to be put into effect. While that may be so, the guidance issued by the Regulator should have put prudent administrators on notice of the standards expected when considering future transfers. I have seen, over many TPO cases, those standards adopted with alacrity within the pension provider space confirming good industry practice. The fact that MoD increased its due diligence in November 2013, once the guidance had been flagged internally in late October 2013, is a recognition of the necessary measures that needed to be in place.

70. I am of the view that, following the issue of the February 2013 guidance, there was sufficient time for MoD to put further due diligence checks in place and to provide Mr S with a copy of the Scorpion Leaflet, in accordance with the Regulator's announcement, before Mr S' AFPS benefits were transferred in September 2013.

71. The Regulator's guidance, included an action pack for pension professionals which stated:

> "Looking out for pension liberation fraud
>
> When processing a transfer request, trustees and administrators may be in a position to identify the warning signs that suggest that pension liberation fraud is occurring.
>
> If you are a trustee or administrator, and any of the following criteria apply to a transfer request you have received, then you may be about to transfer a member's pension to a scheme designed to liberate their funds. Here are some of the things to look out for:-
>
> - Receiving scheme not registered, or only newly registered, with HM Revenue & Customs;
> - Member is attempting to access their pension before age 55;
> - Member has pressured trustees/administrators to carry out transfer quickly;
> - Member was approached unsolicited;
> - Member informed that there is a legal loophole;
> - Receiving scheme was previously unknown to you, but now involved in more than one transfer request.
>
> If any of these statements apply, then you can use the check list on the next page to find out more about the receiving scheme and how the member came to make the request."

72. The guidance also advised that a transferring scheme ought to ask how a member found out about the receiving scheme and review the promotional material provided by it. It also included the Scorpion Leaflet to be given to potential transferees.

73. In previous Determinations such as Jerrard PO-3809, we set out the type of due diligence expected of the transferring scheme. If MoD had followed the action pack, cited in paragraph 71 above, when processing Mr S' transfer, the fact that the Capita Oak Scheme was registered with HMRC in July 2012, just a matter of months before Mr S' transfer request, would have been seen as a red flag warning. It would have then been reasonable for MoD to have carried out a further investigation to see whether there were any other reasons to be concerned about the transfer.

74. In particular, the check list included the following questions:

- Is the scheme to which the member wants to…sponsored by an employer that is geographically distant from the member?
- Has the member…decided to transfer after receiving cold calls, unsolicited?

75. It is apparent that MoD did not request a copy of the promotional material, or trust deed and rules for the Capita Oak Scheme, so it was unable to review any further details concerning the arrangement.

76. The Capita Oak Scheme was established by a written instrument dated 23 July 2012, entered into between the sponsoring employer and Imperial. The sponsoring employer was based in Cyprus, and so it was geographically distant from the member. Furthermore, Mr S had only become aware of the Capita Oak Scheme following an unsolicited phone call. These were both warning flags set out in the Regulator's action pack.

77. When questioned at the Oral Hearing about any potential "red flags" associated with the transfer, MoD said that the Capital Oak Scheme was relatively young and based abroad but that was common at the time. MoD also confirmed that it had not checked Mr S' employment status when challenged on whether the geographic disparity between the respective parties raised any concerns.

78. There were multiple factors regarding Mr S' transfer which were a cause for concern. It was reasonable for MoD to have discovered and advised Mr S of these and suggested that he reconsider his transfer request in light of them. I do not consider that this would amount to the provision of financial advice as stated by MoD. I find that it was maladministration on MoD's part that they did not act on the Regulator's pensions liberation guidance before authorising the transfer, six months after the guidance was issued. I find that in this case MoD's actions fell well below the standard expected of a reasonable pension scheme manager, and what is expected of them by the Regulator.

79. MoD has raised the issue of causation and questioned whether Mr S would have carried on with the transfer regardless of any warnings from MoD. I cannot say, with absolute certainty, what would have happened had MoD put in place further due diligence checks; given Mr S the Scorpion Leaflet; and discussed the potential of a pension liberation scam with him, before he transferred his AFPS benefits.

80. I have taken into consideration Mr S' comments at the Oral Hearing relating to the level of professionalism shown by the Capita Oak representative and the fact that he found him very convincing. I am also conscious that Mr S appears to have paid little attention to the documents that he signed prior to the transfer, and I struggle with the comments made in respect of Carrington Mitchell Limited. I find it particularly compelling that Mr S relied on MoD to cover any risk, despite the fact that it had written to him explaining that he should take Independent Financial Advice.

81. I am of the view, on the balance of probabilities, that had Mr S been provided with the Scorpion Leaflet, informed that the sponsoring employer for the Capita Oak Scheme was based overseas; and the scheme was recently registered, he would still have continued with the transfer.

82. MoD raised the point that Mr S was considering transferring two other pensions and this may have a bearing on whether a warning by just one provider (MoD) would have been sufficient to dissuade Mr S from continuing with the transfer. As Mr S did not proceed with the other two pension transfers, I cannot speculate on what might have happened. I also cannot consider a hypothetical complaint against those providers in these circumstances and use that as a basis in assessing this complaint. Each complaint is fairly considered on its own facts and merits. Regardless of what the other providers may have done, it was for MoD to have carried out its duties to the best of its ability.

Transfer discharge

83. MoD refers to PSA 1993, in carrying out what was needed to effect Mr S' transfer request. Mr S was transferring from one occupational pension scheme to another occupational pension scheme and under s95(2) of the PSA 93, Mr S could only take a cash equivalent transfer value from an occupational pension scheme to acquire "transfer credits" in the new arrangement. Transfer credits are defined in s181 of the PSA 93, as rights allowed to an "earner". Following Hughes, the earnings required did not need to come from the principal employer of the scheme, but there needed to be some earnings from employment. I find that MoD did not make any checks, in respect of Mr S' employment status and, despite receiving evidence that he was on Jobseekers Allowance, failed to note that he was not in receipt of earnings, and this affected his statutory transfer rights at the time it processed the transfer in September 2013. For this reason, Mr S did not have a statutory right to transfer his pension into the Capita Oak Scheme.

84. MoD confirmed that it was unaware of the February 2013 guidance at the time and that it had no legal basis to stop the transfer. As stated in paragraph 83 above, this is

incorrect. Moreover, I do not see how this demonstrates that it took proper consideration of the law, available regulatory guidance or any risks associated with the transfer. It certainly did not bring any of the apparent risks to Mr S' attention, though I am not convinced that this would have changed his mind (see paragraphs 79-81 above). So, if the transfer had been valid, I would have found maladministration in the process but that this had not caused any loss.

85. I uphold Mr S' complaint, because MoD erroneously concluded that it had to make the transfer from the AFPS to the Capita Oak Scheme, when it should not have done so. It failed to establish whether Mr S had a statutory transfer right.

86. MoD has argued that it cannot reinstate Mr S' benefits into AFPS, as the relevant section is closed to new members. However, Mr S is not a new member, but a previous member whose membership ought never to have ceased. He should therefore not be considered as re-joining the AFPS, but rather as having continuing membership as a deferred member. Moreover, as Mr S' transfer was invalid at law, it reverts back to the originator/the Scheme.

87. Notwithstanding the cost to the public purse, the purpose of the proposed redress is to place Mr S in the position he would have been but for MoD's maladministration. If MoD maintains that it is unable to reinstate Mr S' benefits into AFPS then it should make arrangements to provide Mr S with the equivalent benefits he would have received had he remained in AFPS. I do not see that setting up such a scheme puts Mr S in a more favourable position than the courts would provide. How MoD provides the equivalent benefits is a matter for MoD.

Non-financial injustice

88. Had MoD carried out the level of due diligence of a reasonably competent pension provider during the relevant transfer period, it would have established that Mr S did not have a statutory right to transfer, would have refused the transfer request and Mr S would not have lost his pension funds and suffered the related distress and worry. Further, upon carrying out such appropriate due diligence a number of red flags concerning the transfer ought to have been apparent which should have been notified to Mr S. While these might not (as I have found) have changed his mind regarding his wish to transfer, they would at least have made him better informed of the risk to this or any other transfers he was considering.

89. I find that MoD's maladministration has caused Mr S severe distress and inconvenience over a long period of time. It is right that this should be recognised by an award for non-financial injustice.

Directions

90. Within 42 days of the date of the Determination MoD shall:

    (i) reinstate Mr S' accrued benefits in the AFPS, as though he had not transferred out. If MoD is unable to reinstate Mr S' accrued benefits, then it shall provide

him with the equivalent benefits by means of another pension arrangement; and

(ii) pay Mr S £2,000 for the severe distress and inconvenience caused to him by its maladministration in the handling of his transfer application.

91. If Mr S subsequently receives any financial recompense from the Capita Oak Scheme and MoD is provided with satisfactory evidence of this, MoD will be entitled to recover that amount from Mr S. I recommend that the parties enter into an agreement to that effect when my Directions at para 90 above are complied with.

Anthony Arter

Pensions Ombudsman
7 December 2021

Appendix

Legislation

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;

(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 Parts I to VI and supplementary provisions

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

The Pension Schemes Act 1993 Section 94.—

(1) Subject to the following provisions of this Chapter—

(a) a member of an occupational pension scheme other than a salary related scheme acquires a right, when his pensionable service terminates (whether before or after 1st January 1986), to the cash equivalent at the relevant date of any benefits which have accrued to or in respect of him under the applicable rules; and

(aa) a member of a salary related occupational pension scheme who has received a statement of entitlement and has made a relevant application within three months beginning with the guarantee date in respect of that statement acquires a right to his guaranteed cash equivalent;

(b) a member of a personal pension scheme acquires a right to the cash equivalent at the relevant date of any benefits which have accrued to or in respect of him under the rules of the scheme.

Section 95

(1) A member of an occupational pension scheme or a personal pension scheme who acquires a right to a cash equivalent under paragraph (a), (aa) or (b) of section 94(1) may only take it by making an application in writing to the trustees or managers of the scheme requiring them to use the cash equivalent to which he has acquired a right in whichever of the ways specified in subsection (2) or, as the case may be, subsection (3) he chooses.

(2) In the case of a member of an occupational pension scheme, the ways referred to in subsection (1) are—

(a) for acquiring transfer credits allowed under the rules of another occupational pension scheme—

(i) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights, and

(ii) which satisfies prescribed requirements;

(b) for acquiring rights allowed under the rules of a personal pension scheme—

(i) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights, and

(ii) which satisfies prescribed requirements;

(c) for purchasing from one or more insurers such as are mentioned in section 19(4)(a), chosen by the member and willing to accept payment on account of the member from the trustees or managers, one or more annuities which satisfy prescribed requirements;

(d) for subscribing to other pension arrangements which satisfy prescribed requirements.

Section 181 _ General Interpretation

“employed earner” and “self-employed earner” have the meanings given by section 2 of the Social Security Contributions and Benefits Act 1992;

“rights, in relation to accrued rights (within the meaning of section 73, 136 or 179) or transfer credits, includes rights to benefit and also options to have benefits paid in a particular form or at a particular time;

The Armed Forces Pension Scheme Literature

Copy of warning contained in leaflet issued November 2013:

“Transferring your Pension – Pension Liberation

When you consider transferring your pension, you should be aware that saving for your pension attracts certain tax advantages; this is to encourage people to save for their retirement. One of the conditions of this is that the pension benefit is not, paid before age 55.

At present, there are a number of pension liberation frauds around and they are on the increase in the UK. Because of the rare circumstances in, which you can access your personal or company pension before age 55, any company offering to do so is likely to be bogus. Any payments made are likely to be looked upon by HMRC as an unauthorised payment. Unauthorised payments will lead to a substantial tax charge. The Armed Forces Pension

Scheme (AFPS) informs Her Majesty's Revenue and Customs (HMRC) whenever a transfer takes place.

The restrictions on taking your pension early can amount to a significant tax charge to you of 55% of the total cash equivalent transfer value (CETV).

Ensure that you take appropriate financial advice before using such company's websites and be aware of the potential for charges being imposed by HMRC. Also, consider taking advice from an independent financial adviser (IFA) ensuring you take that advice from someone who is not associated with the proposal you have received.

What to look for in Pension Liberation Scams:

- Access to pension before age 55 and offers of legal loopholes,
- Cash bonus, cash back, loans from Scheme to Members,
- Tax information and the potential consequences,
- Unsolicited correspondence,
- Transfers Overseas,
- Poor pension documentation,
- Pressure to transfer as quickly as possible.

For further information on pension liberation go to:

www.thepensionsregulator.gov.uk **Pension-liberation-fraud**

www.fsa.gov.uk **Pension Liberation Schemes**

www.hmrc.gov.uk **Pension Liberation**