

Ombudsman's Determination

Applicant	Mr T
Scheme	LPH Executive Pension Scheme (the Scheme)
Respondent	Mr David Alan Howard

Outcome

1. Mr T's complaint is upheld and to put matters right Mr Howard shall sign the relevant change of address, share indemnity and investment transfer documents that are required to facilitate Mr T's transfer from the Scheme into his self-invested personal pension (**SIPP**).
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr T has complained that Mr Howard has breached his duties as Trustee by repeatedly refusing to sign documents which would allow him to transfer his share of the Scheme to a SIPP.
4. In bringing his complaint to this Office, Mr T is being represented by Barnett Waddingham.

Background information, including submissions from the parties

5. The Scheme is a small self-administered scheme (**SSAS**) which was established on 31 August 1983. The SSAS has three member Trustees; Mr Howard, the Respondent; Mr T, the Applicant and Mr R who is not party to the complaint. There is also a professional Trustee, Pensioneer Trustees (London) Limited, which is wholly owned by Barnett Waddingham.
6. The Scheme is a defined contribution scheme with individually earmarked assets for each member. Mr T's assets, which comprise a portfolio of shares, unit trusts, bonds and open ended investment companies (**OEICs**), are registered in the names of the four Trustees, rather than being held by a nominee or fund manager.

7. There are around 40 individual holdings in Mr T's share of the scheme.
8. In February 2009, Mr T requested to transfer his share of the Scheme into a SIPP. A dispute between Trustees prevented that from proceeding smoothly and on 16 March 2012 he applied for a cash equivalent transfer value. On 24 October 2012 Mr Howard agreed to the transfer.
9. However, the share certificates for some holdings have been misplaced, so share indemnity certificates are required. Further, the address details for some of the Trustees need updating with the share registrars before the indemnity certificates can be issued.
10. Mr T and Barnett Waddingham have, over a number of years, made repeated and sustained attempts to have Mr Howard sign documents which have been sent to him in order to effect the transfer. These efforts included letters from Barnett Waddingham's solicitor and a referral to the Pensions Regulator about Mr Howard's conduct.
11. To date, Mr Howard has not signed the documents sent to him.
12. Mr Howard has also disputed receiving a bundle of documents Barnett Waddingham sent by recorded delivery in October 2013. This included stock transfer forms and original share certificates relating to the holdings. Barnett Waddingham has provided evidence that the documents were signed for but Mr Howard maintains he never received them.
13. On 15 September 2015 Barnett Waddingham sent paperwork necessary to start the process of obtaining the indemnities necessary to deal with the stocks in the absence of the original certificates. Mr Howard returned them over a year later. They maintain that additional forms remain outstanding.
14. Barnett Waddingham has pointed out that the process which will be required to achieve the transfer is lengthy. It has expressed concern that, without an enforceable Determination, Mr Howard may continue to obstruct matters.
15. As well as requiring Mr Howard to cooperate, Mr T is seeking compensation for any financial loss arising from the delay including the indemnity fees for replacing the share and investment documentation. Mr T also seeks compensation for his professional and legal fees, including his fees on Barnett Waddingham's account as a result of this matter.
16. No reason has been provided by Mr Howard for refusing to allow Mr T to transfer.
17. Mr Howard did highlight some issues with loans the Scheme had made, which were subsequently written off. However, these loans relate to Mr Howard's share of the Scheme assets.

18. Mr Howard has informed my Adjudicator that he is willing to cooperate by signing the relevant paperwork and that he has already returned to Barnett Waddingham any share certificates, indemnities or transfer forms he has in relation to the Scheme.

Adjudicator's Opinion

19. Mr T's complaint was considered by one of our Adjudicators who concluded further action was required by Mr Howard. The Adjudicator's findings are summarised briefly below:-
- As a Trustee, Mr Howard has a fiduciary duty, that is to say a legal duty to act in the best interests of all members, this duty extends to Mr T as a member Trustee.
 - Mr Howard has suggested that he has concerns about the loan arrangements the Scheme made. However these relate to Mr Howard's share of the Scheme and not to Mr T's share, so there is no clear reason why Mr Howard has so far refused to allow Mr T to transfer from the Scheme when the other Trustees have all agreed.
 - Mr Howard has been chased by Barnett Waddingham on numerous occasions, but he has not completed the necessary forms that were sent to him by courier, and signed for, on 31 October 2013.
 - By refusing to sign the relevant forms Mr Howard has acted in maladministration. The injustice Mr T has suffered is that he has been denied the opportunity to transfer without good reason.
20. Neither party disputed the substance of the Adjudicator's Opinion. However, Barnett Waddingham, acting on behalf of Mr T, asked for this matter to be referred to me, so that a legally binding Determination can be issued. It also asked me to reconsider the matter of unnecessary costs which they say have fallen to Mr T's side of the scheme, including:
- the costs to replace share and investment documentation
 - administration costs including their time invoiced to Mr T
 - legal fees.
21. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Barnett Waddingham, for completeness.

Ombudsman's decision

22. I am satisfied that Mr Howard failed to respond to the requests made by Mr T, over a prolonged period of time. This constitutes maladministration, which has caused Mr T significant distress and inconvenience
23. Mr Howard has expressed concerns about loans the Scheme made. These relate to Mr Howard's share of the Scheme assets, and so do not prevent Mr T exercising his right to transfer.
24. As Trustee, Mr Howard is obliged to act in the best interests of all members, including Mr T. As a consequence of Mr Howard's maladministration, Mr T has been deprived of a statutory right to transfer under Section 94 of the Pension Schemes Act 1993.
25. I am not prepared to make an award of compensation for direct financial loss for the following reasons. The costs and fees claimed did not form part of the original complaint and have not been fully investigated. I have seen no evidence which proves the extent of the costs and fees which flow directly from Mr Howard's conduct in delaying the transfer. There were other disputes between the trustees which do not form part of this complaint which have nevertheless become bound up in it. The matter has a long history and I am told that accounts for fees remain outstanding from all three members of the scheme. I consider it would be inappropriate to attempt to apportion costs flowing directly from Mr Howard's actions in isolation from that broader picture which is beyond the scope of this complaint. I am also conscious that Mr Howard has the benefit of an indemnity under the Scheme rules except to the extent attributable to acts or omissions knowingly and deliberately committed in bad faith. I find that Mr Howard's behaviour has been uncooperative for no relevant reason, but I have seen no evidence from which I can conclude that he knowingly and deliberately failed to return the original share certificates because there is no evidence that they ever came directly into his possession. In those circumstances I consider that any direction I might make is likely to be the cause of further dispute between the trustees rather than providing an effective remedy.
26. Therefore, I uphold Mr T's complaint and make a direction aimed at remedying the injustice of his remaining unable to transfer.
27. The directions that follow will, if necessary, be enforceable by Mr T in the County Court as if they were a County Court Order (section 151(5) of the Pension Schemes Act 1993 and regulations thereunder).

Directions

28. Barnett Waddingham shall send Mr Howard, by special delivery or courier, the relevant forms needed to effect the transfer. These include, but are not limited to, change of address instructions, indemnity forms and transfer request applications.
29. Mr Howard shall sign and return the forms to Barnett Waddingham within 14 days of receiving them.

Karen Johnston

Deputy Pensions Ombudsman
22 March 2017