

Ombudsman's Determination

Applicant	Mr H
Scheme	The Finlays Pension Fund (now the FPF Section of the John Swire & Sons Pension Fund) (the Fund)
Respondents	The Trustees of the Fund (the Trustees) James Finlay Limited (James Finlay) Hymans Robertson LLP (Hymans Robertson)

Outcome

1. I do not uphold Mr H's complaint and no further action is required by the Trustees, James Finlay, or Hymans Robertson.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr H essentially complains that the Trustees, James Finlay, and Hymans Robertson failed to adequately inform him of the actions which he had to take within prescribed timescales to transfer the benefits available to him from the Fund to a new pension arrangement before they were lost.

Background information, including submissions from the parties

4. In accordance with current statutory requirements, since 6 April 2006, members of occupational pension schemes with between three months and two years' pensionable service are entitled to take either a cash transfer value of their pension rights or a refund of their own contributions (if applicable less tax).
5. The Pensions Regulator (**the Regulator**), as required by the Pensions Act 2004, has issued "Code of Practice No 4: Early Leavers Reasonable Periods" (**the Code**) which covers the periods during which early leavers should be notified of their pension rights.
6. The Code states that the administrator of an occupational pension scheme, on behalf of the trustees, should provide the affected members with written notice of:
 - their rights under the legislation;
 - the amount of the cash transfer sum or refund; and

- how to exercise their rights
7. This should be done as soon as reasonably possible after the member leaves pensionable service. The Regulator expects this normally to be within three months of the member leaving pensionable service (although the time period is not set out specifically in the legislation).
 8. The member should then be given a reasonable period to reply, which the Regulator normally expects to be at least three months. The deadline should be confirmed in the options letter issued by the scheme administrator and is designed to enable the member to obtain financial advice before responding. The member is able to request further information, or ask for an extension to the deadline, but the Code states that the trustees are not obliged to grant an extension.
 9. Once the reply date has passed, the member may be provided with a refund under the default procedure. There is no requirement to chase members for a response before the three-month period has expired but the Regulator would expect the trustees to allow a period of one month after the reply date before issuing the refund to the member.
 10. James Finlay is the principal employer of the Fund. Mr H joined Finlay Beverages Ltd (**Finlay Beverages**), an associated employer, in June 2007 and became a member of the Fund in February 2008.
 11. Mr H did not have to pay any contributions into the Fund. Finlay Beverages paid employer's contributions into it on his behalf.
 12. James Finlay changed the nature and structure of its pension arrangements due to funding concerns. It closed the Fund to future entrants and established a new money purchase pension scheme for employees joining the company from 1 December 2009. Existing members were required to contribute 5% of their pensionable salaries in future if they wished to remain in the Fund. It was open, however, to such members to opt out of the Fund and join the new pension scheme if they were unwilling to pay this employees' contribution and effectively take a pay cut.
 13. The Respondents say that:
 - to comply with the Pensions Act 2004 consultation requirements, James Finlay explained the above changes to all members of the Fund including Mr F at staff presentations and in the documentation provided during the statutory consultation period;
 - the consultation was carried out in an open and transparent manner by James Finlay and the changes to its pension arrangements were made only after obtaining the agreement of a majority of those affected;
 - because of the consultation exercise, James Finlay introduced enhanced terms for members wishing to opt out of the Fund and join the new defined contribution arrangement; and

- during the consultation, James Finlay informed all members of the Fund that they would receive deferred benefit statements if they chose to opt out of the Fund and explained the consequences of doing so in an “Question and Answer” document (**the Q & A Document**), which described “in-depth” the proposed changes to be made to the Fund.

14. The Q & A document showed that:

“If you opt out of the Fund your benefits will depend on how long you were a member of the Fund...

It is important to remember that if you decide to opt out of the Fund, you and your Dependant(s) will be giving up some very valuable benefits. You should get advice from an Independent Financial Adviser (**IFA**) before making a decision...

If you leave the Company, you would receive information about the options you have for your pension and a statement from the Fund administrator setting out your pension benefits. It is normal practice for schemes to send this information to leavers. Normally if you have completed less than two year’s Pensionable Service when you leave, you can either:

- take a refund of the contributions you have paid to the Fund (if any) less deductions or
- transfer the value of your benefits to a new arrangement...

The Company and the Trustees are not allowed to give you advice. However, if you think you need advice you can contact an IFA...

...the information...is intended to be a guide. It is not exhaustive...if there are any discrepancies between this announcement and the Trust Deed and Rules* (**the Rules**), the Rules will take precedence.”

*The relevant clauses from the Rules have been reproduced in the Appendix.

15. Mr H decided to opt out of the Fund and joined the new money purchase arrangement. He became a deferred pensioner in the Fund on 31 January 2010, having accrued pensionable service a few weeks short of two years.
16. On 24 August 2010, Hymans Robertson, the Fund administrator, sent Mr H a letter which said that as he had been a member of the Fund for less than two years and did not pay any employee contributions, the only option available to him was a transfer of his pension rights to another suitable pension arrangement in accordance with the Rules. It also said that:
- he had three months from the date of the letter to confirm that he intended to transfer his benefits;

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- if he did not elect to transfer by the specified deadline date, the value of his pension rights would be returned to the Fund; and
- to ensure that he did not lose this benefit entitlement, he should therefore pass these details to his new pension provider as soon as possible

A deferred benefit statement was enclosed with the letter showing that the current transfer value available to Mr H was £16,769.64 (all employer contributions).

17. On 29 November 2010, Hymans Robertson sent Mr H another letter to inform him that as it had not received a reply to its previous letter, the value of his benefits had been returned to the Fund. The Respondents contend that if Mr H had replied to the November 2010 letter in good time, the Trustees would have authorised payment of the transfer value available to him despite his failure to inform them of his decision before the deadline passed.
18. In June 2015, Mr H asked Hymans Robertson for details of the pension benefits available to him from the Fund. Hymans Robertson replied that as Mr H had not confirmed that that he wished to transfer by the specified deadline, he was no longer entitled to any benefits in the Fund.
19. Hymans Robertson referred the matter to the Trustees who informed Mr H, in December 2015, that after seeking legal advice, they had decided not to pay the transfer value previously available to him on a discretionary basis because Finlay Beverages could not afford to pay the necessary contribution into the Fund for them to do so. The Trustees explained that without this contribution, they could not agree to the transfer payment because it would adversely affect the funding position of the Fund for the remaining members.

Mr H's Position

20. He did not receive the two letters which Hymans Robertson sent him in the post during August and November 2010.
21. If he had, he would have responded within the prescribed timescales to transfer the benefits available to him from the Fund before losing them.
22. The Respondents did not inform him until it was too late that, as he had less than two years' pensionable service in the Fund, there was a specified deadline which he had to meet notifying his decision to transfer.
23. At no time whilst he continued to work for Finlay Beverages after opting out of the Fund on 31 January 2010, did the Respondents tell him that he had forfeited his benefits in the Fund and it was only in June 2015, after contacting Hymans Robertson, that he first became aware of this.
24. He says that:

“Did James Finlay act correctly during the compulsory closure of the final salary pension scheme by relying on Hymans Robertson writing to me on one

single occasion, advising that I needed to act within a given time to secure the monies within that pension scheme?

One letter, that was never received, has led to the loss of a considerable of accrued pension. The pension was part of my contracted package.”

The Respondents' Position

25. At the time of joining the Fund, Mr H completed an application form stating that his membership was subject to the Rules which were available for inspection on request.
26. Hymans Robertson sent the two letters by first class post to the address at which Mr H was living at the time and they were not returned marked “not known at this address” by the Post Office.
27. It was most unlikely that both letters had been lost in transit in the post and therefore reasonable to assume that Mr H had received at least one of them.
28. They concede that during the consultation, James Finlay did not explicitly inform members who had between three months and two years of pensionable service, such as Mr H, that they had to transfer their benefits within prescribed timescales before they were lost.
29. They are satisfied that Mr H was made sufficiently aware of the prescribed timescales in the letters sent to him by Hymans Robertson.
30. From the Q & A document, Mr H ought reasonably to have known that he would receive a deferred benefit statement shortly after opting out of the Fund.
31. If he had not received this statement after waiting for a reasonable period, he should then have contacted Hymans Robertson to find out why.
32. If Mr H had sought independent financial advice, as recommended, they would expect his IFA to have found out about the prescribed timescales for Mr H to transfer before advising him whether opting out of the Fund would be in his best financial interests.

Adjudicator's Opinion

33. Mr H's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Trustees, James Finlay and Hymans Robertson. The Adjudicator's findings are summarised below:-
 - One of the main duties of the Trustees is to act in accordance with the Rules and within the framework of the law. The operation of overriding pension law created by Parliament means that the new measures must be applied even if the Rules make no equivalent measure.
 - The Regulator has statutory objectives to protect the benefits of members of work-based pension schemes. It is required to publish codes of practice giving

guidance on implementing certain parts of the legislation and indicating the expected conduct. Although the codes are not “law”, they are material to my decision as to whether the Respondents have acted properly.

- The Trustees have devised a policy (**the Policy**) for leavers who have between three months and two years of pensionable service in the Fund, which is both compliant with the Rules, statutory requirements and the Code.
- It was therefore appropriate and equitable for the Trustees and Hymans Robertson to have used the Policy to determine the benefits available to Mr H on leaving the Fund.
- It is clear from the evidence that the Trustees, through Hymans Robertson, adhered to the prescribed timescales in the Code and the Policy to notify Mr H of his pension rights in the Fund on leaving service. When Mr H did not respond within three months of the letter of 24 August 2010, the Trustees, through Hymans Robertson, informed him on 29 November 2010, that they had to apply the default procedure and as he had not paid any voluntary contributions, he was not entitled to any benefits from the Fund.
- It would have been better if during the consultation James Finlay had made it perfectly clear in advance, at the staff presentations and its documentation, such as the Q & A document, of the Policy applying to members who had accrued between three months and two years of pensionable service in the Fund at their date of leaving.
- By doing so, the Trustees and Hymans Robertson would not then have had to rely heavily on the letter dated 24 August 2010, safely reaching Mr H in the post to inform him of the Policy, if he had not sought independent financial advice before deciding whether to opt out or remain in the Fund.
- Furthermore, given the importance of ensuring Mr H received this letter in the post, in the Adjudicator’s view, Hymans Robertson should have sent it, and its subsequent letter of 29 November 2010, to Mr H by recorded delivery so that it had proof of receipt. By using only standard (first class) post to send these letters, there was unfortunately little evidence to confirm or deny Mr H’s assertion that he did not receive them.
- On the balance of probabilities, it was highly unlikely that both letters would have been lost during transit in the postal system. The Respondents say that the letters were sent to the correct home address for Mr H and they were not returned. It was consequently reasonable for the Trustees and Hymans Robertson to have believed that Mr H could be found at the home address held on their records.
- Mr H should have known from the Q & A document, which he had received, that a deferred benefit statement would be sent to him after opting out of the Fund, and if he had not received it after waiting for a reasonable period, it is logical to expect that he would have contacted Hymans Robertson to find out why.
- Mr H had therefore received sufficient information during the consultation stage to find out about the Policy, which was, in any event, made plain to him in the letters sent to him by Hymans Robertson during August and November 2010.

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- Three months was sufficient time to enable Mr H to reach a decision. As Mr H did not respond within the required timescale, he lost his right to a cash transfer sum and was only entitled to a refund of his contributions, which was nil as the Fund was non-contributory.

34. Mr H did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr H provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr H for completeness.

Ombudsman's decision

35. Mr H contends that the Respondents failed to adequately inform him of what he had to do within prescribed timescales in order to transfer the benefits available to him from the Fund before they were lost.
36. Having carefully considered the available evidence, although I fully sympathise with Mr H's unfortunate circumstances, I agree with the Adjudicator's view that Mr H had received sufficient information during the consultation stage to find out about the Policy (had he taken the advice to engage an IFA), if as he says, he did not receive the letters sent to him by Hymans Robertson during August and November 2010.
37. Furthermore, I consider that Mr H should have been reasonably aware that he would receive a leaving service benefit statement from Hymans Robertson shortly after opting out of the Fund, and it had therefore been open to him to contact Hymans Robertson to enquire why he had not received it after waiting for a reasonable period.
38. I do not consider that there has been maladministration on the part of the Respondents.
39. I do not therefore uphold Mr H's complaint.

Anthony Arter

Pensions Ombudsman
29 March 2019

Appendix

Rule 7.2 of Part 9 of the Fund Trust Deed and Rules (FBSF Members with less than two years Qualifying Service)

“If a FBSF Member ceases to be in Pensionable Service before Pensionable Age having completed less than two years Qualifying service (and if no transfer of rights under a personal pension scheme has been made to the Scheme) he shall be entitled to receive either:

7.2.1...

7.2.2 where the FBSF member has completed at least three months Qualifying Service, a transfer value calculated in accordance with Rule 2 of Part 15 if the Member so decides within the timescale notified to him...