

## Ombudsman's Determination

Applicant	Mr I
Scheme	The O Executive Pension Scheme
Respondents	James Hay Partnership ( <b>James Hay</b> )

## Outcome

1. Mr I's complaint is upheld and to put matters right, James Hay Partnership shall pay Mr I £2,000 in recognition of the significant distress and inconvenience caused.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr I's complaint is that James Hay caused an undue and avoidable delay in the transfer of his pension to a new provider. As a result, Mr I lost the opportunity to invest in the stock market immediately following the Brexit referendum in June 2016.

## Background information, including submissions from the parties

4. This case has a long background. While I have noted all the information and evidence provided by both parties, I have only referred to the material facts which have led to my conclusions.
5. Mr I had cash and stocks with Barclays Stockbrokers (**BSB**) in a small self-administered scheme (**SSAS**). He also had cash with James Hay of approximately £220,000. Following receipt of a notice from BSB that it would be closing its pension trader accounts from 30 June 2016, Mr I emailed James Hay on 24 March 2016, to initiate the process of transferring the SSAS.
6. On 11 July 2016, James Hay received the cash element of Mr I's BSB portfolio.
7. On 11 August 2016, Mr I emailed James Hay and complained about the length of time the transfer was taking. Among other things, Mr I said he had "made it clear at various times that it was of great importance that the transfer be completed before Brexit". Mr I said his intention was to position in the FTSE 100 Index immediately after the referendum, if the result was an exit vote which resulted in a fall. Mr I pointed out

that the FTSE 100 dropped to approximately 5,700 following the vote, and had now recovered to 6,800.

8. Mr I said it was completely unacceptable that absolutely nothing was done from March until some time in June/July, despite the number of calls he made and the assurances he received from various staff members. Mr I said there had been no sense of urgency and weeks passed when it was unclear what was being done. In addition, he said James Hay's inability to produce accurate documentation caused further delays.
9. On 19 August 2016, in accordance with Mr I's wishes, £250,000 in cash was transferred from James Hay to Mr I's new SIPP with Hargreaves Lansdown. On 26 August 2016, six out of seven lines of stock were transferred in-specie to the new provider. The final line of stock transferred in-specie on 3 October 2016.
10. James Hay issued its response to Mr I's complaint on 20 January 2017. It said it was not aware of Mr I's intentions until his email of 6 May 2016, where he said he wanted to transfer cash and stock – in-specie – from BSB to the new provider. James Hay said BSB's notice of the closure of pension trader account warned that a transfer can take up to eight weeks but this timescale was optimistic given the various parties involved. James Hay said it carried out its duties in a satisfactory manner and within acceptable timescales with two exceptions. Firstly, its email of 15 April 2016 overlooked Mr I's email of 24 March 2016, and he did not receive a response until 21 April 2016. Secondly, its email of 6 June 2016 should have been aware of Mr I's intentions to take a part transfer. James Hay said the first reference Mr I made to the referendum vote was in his email of 23 June 2016, on the same day of the vote. Further, while it may have been his intention to speculate on the outcome of the vote through his new SIPP, Mr I still had the option of using the Saxo Capital Markets trading facility which he had used in the past. James Hay did not uphold Mr I's complaint in respect of the transfer delays. However, it did accept that there were two instances of maladministration on its part, and it offered £100 to Mr I in recognition of this.
11. On 25 January 2017, Mr I responded to James Hay. He did not accept its findings as he found them inadequate and inaccurate. Mr I said he was insulted by James Hay's suggestion that he could have used the Saxo Capital Markets trading account. Firstly, he was not informed of this at the time. Secondly and more importantly, the effect of the delays were that he did not know at what point the cash would be transferred from BSB to James Hay, or at what point after 16 May 2016, James Hay would transfer the cash to the new provider. Mr I said this "was a fairly intolerable position which effectively neutralised [his] ability to invest during this important period of market volatility." Mr I asserted that once James Hay received the transfer request from his new SIPP provider on 16 May 2016, the cash element of the transfer should have been concluded. While the in-specie transfer could have taken slightly longer, Mr I believed he would have been in a position to invest prior to 23 June 2016, had the delays not occurred.

12. James Hay replied to Mr I on 2 February 2017. It provided contemporaneous evidence which it said Mr I appeared to have overlooked. James Hay said it did correspond with Mr I between 24 March and June 2016, contrary to his assertions. It said Mr I was informed on numerous occasions about BSB's requirements for a letter of instruction from Mr I, in order to transfer funds from the account. It said that once the necessary paperwork had been completed, James Hay received the cash element of Mr I's BSB portfolio in 12 working days.
13. Mr I responded to James Hay on 3 February 2017. He said it did not address the point of why the whole process took so long. Mr I said there were only two things to do in relation to the cash transfer, the first was to bring it back to James Hay, and the second was to send it to Hargreaves Lansdown. As James Hay's response had failed to address the main point from his 25 January 2017 letter, Mr I informed James Hay that he would refer his complaint to The Pensions Ombudsman. James Hay acknowledged Mr I's letter a short while later.
14. Mr I would like James Hay to compensate him for his profit opportunity losses in the market, which he believes arose directly from its failure to get the cash back from BSB, and transfer it Hargreaves Lansdown by 23 June 2016. He maintains that the timescale to do so was adequate and reasonable, and James Hay knew it was his intention to conduct post-Brexit trade as he informed it on a number of occasions.

## **Adjudicator's Opinion**

15. Mr I's complaint was considered by one of our Adjudicators who concluded that further action was required by James Hay. The Adjudicator's findings are summarised briefly below:-
  - After considering the timeline of events, the Adjudicator concluded that there had been maladministration by James Hay and that Mr I's complaint should be upheld.
  - Despite being aware that action needed to be taken by 30 June 2016, prior to receiving the cash from BSB on 11 July 2016, there were a total of 46 working days where there is no evidence that James Hay actively sought to progress matters and effect the transfer. The Adjudicator concluded that this amounts to maladministration. From the moment James Hay became aware of Mr I's intentions, as the experts, it should have asked the relevant questions from all parties, and processed the transfers efficiently. This did not happen. Mr I had to chase James Hay on a number of occasions to request updates and check that matters were progressing.
  - After receiving the cash from BSB on 11 July 2016, it took 29 working days for it to be transferred to Hargreaves Lansdown. Although it is my view that this was too long for a transfer of this type, in these circumstances, using the same timeframe, had James Hay acted sooner, the transfer should have been completed before 23 June 2016, and certainly before 30 June 2016.

- The first mention that Mr I made of completing the transfer by the Brexit referendum vote was during two separate conversations with James Hay on 10 June 2016. In the first call, he said he was “desperately keen to be back in the market before Brexit” and he talked about being in limbo and needing the cash back with James Hay so he could get back in the market again. Although the James Hay staff member sympathised with Mr I, no assurances were provided during this call. In the second call, the James Hay staff member said he appreciated that the deadline for the closure of the BSB account was 30 June 2016. However, Mr I said, "My target really is before the 23rd, that's key to me really that this cash gets transferred over to [Hargreaves Lansdown]'s platform". He said this was so he could take the opportunity that a fall in the market will bring to "get some really good purchases in". James Hay did not give any assurances about this date but the staff member said his colleagues would progress the transfer while he was on leave. This did not happen.
  - Given the available time that there was before the referendum vote, the Adjudicator considered that it was not unreasonable for Mr I to expect that the cash transfer would be completed before then. Although he was not given any assurances about a likely completion date, James Hay did not inform Mr I of any difficulties it was facing with the transfers. The Adjudicator did not consider that there were any difficulties or that the documentation requirements from BSB were particularly onerous or difficult. From the available evidence, Mr I made it clear from the beginning that he wanted the transfers completed expeditiously.
  - In its capacity as administrator, the Adjudicator was not satisfied that James Hay acted promptly in order to ensure that the transfers were completed by 30 June 2016. Had it done so, it is likely that on balance, the cash transfer would have completed even before the referendum vote on 23 June 2016.
  - James Hay's actions caused significant distress and inconvenience to Mr I. A higher award is warranted in the circumstances because the loss of opportunity was substantial in those unique circumstances. In recognition of this, James Hay should pay Mr I £2,000.
16. Although Mr I accepted the findings of the Adjudicator, he did not accept the Adjudicator's opinion on the loss he had suffered, and the complaint was passed to me to consider. Mr I 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 I for completeness.

## **Ombudsman's decision**

17. As Mr I did not go on to invest in the stock market when the cash transfer eventually completed in August 2016, Mr I does not agree that this resulted in only a loss of expectation. He asserts that his subsequent actions can only be relevant to mitigation of any loss. Mr I asserts that the correct test for when a loss may be reclaimed, is one

that is directly caused by the fault of the defaulting party and within the contemplation of the parties. Mr I believes that both these tests were fully satisfied by the findings of the Adjudicator in the Opinion. On this point, Mr I said further:

“...the market fell to a level of 5700 (on the FTSE 100 index) in the immediate aftermath of the Brexit vote. The fact that it fell was fully foreseeable. I intended to buy that index on any fall occurring as a result of a Brexit vote and as you have found as a fact, [James Hay] was aware of this. The index had recovered to around 6800 by the time (19/8) the cash was finally transferred to the scheme at Hargreaves Lansdown, which had the required dealing platform. I lost a 20% uplift during that period. I would not expect to claim a loss all the way up to current levels of 7600 as I could have been invested from the 6800 level when the cash was received. In fact the reason why I did not invest, once I had received the cash as I explained previously, was because I felt at levels near 7000 the market was overvalued. It seems therefore to be perverse and unfair to say that I did not suffer a loss because I did not invest and then lose money or make less money. I was actually trying to mitigate any loss by not investing at 6800 as I felt it too high on fundamentals and in my view could have collapsed again. I therefore suggest that the difference between 5700 and 6800 is a perfectly sound calculation of the quantum of loss i.e. 20% of the value to be invested being £50,000.

What I think makes matters worse, regardless of the BSB issues is that throughout this sorry episode James Hay held cash of approx. £220,000... and once they had received the transfer request from HL [on 16 May 2016]...could have transferred cash at any time, which would at least have made substantial sums available to invest on the 23rd June 2016. [The Adjudicator] also found as a matter of fact in [the] opinion that [James Hay was] aware of my intention to invest on a market fall if the vote was in favour of Brexit well before 23rd June. I agree that if that had not been the case, it could be suggested that I was inventing this intention after the event, but [the Adjudicator] found that [James Hay] knew the transfer was market sensitive. The fact that [James Hay] apparently ignored that fact requires them to make good the loss as they caused it by their maladministration and it was foreseeable and in the contemplation of the parties.

In these circumstances I do not think that it is correct in law or equitable to find that I did not suffer a loss. Nor do I think there is any difficulty in calculating the quantum of the loss as set out above.

[The Adjudicator] found the following in [the] Opinion:

- i) [James Hay] knew I wanted to invest on the 23rd June if the market fell
- ii) [James Hay] should have been able to transfer cash to [Hargreaves Lansdown] before the 23rd June so that it was available for that purpose.

Therefore the loss was directly caused by [James Hay]'s maladministration and that loss was directly in their contemplation and foreseeable by them as they were on notice of my intention and knew that the transaction was market sensitive.”

18. Mr I is correct in principle about the applicable tests for assessing damages when loss has occurred. However, I do not agree that on the facts, the relevant tests can be satisfied.
19. In not completing the cash transfer sooner, and within a reasonable time, I accept that this maladministration by James Hay effectively caused Mr I to miss the opportunity to invest in the stock market, either before or immediately following the Brexit referendum and I do understand Mr I's frustration. However, unfortunately, the loss that Mr I is claiming, is neither measurable nor the exact nature of his investment within the reasonable contemplation of the parties.
20. While in principle, losses of this nature may be recoverable, I have not seen anything to suggest that Mr I informed James Hay of the specific shares he intended to purchase in the immediate aftermath of the vote, that he would have been able to purchase those shares in the amount he would have wished to, what price would have been achieved, and that these specific shares were then negatively affected by the outcome of the vote, before then recovering afterwards. The lack of certainty and the presence of so many variables means I cannot conclude what actual loss Mr I has suffered (if any) or that it was reasonably foreseeable to James Hay that Mr I would suffer the losses he is now claiming.
21. As Mr I was not going to invest in all the FTSE 100 companies, his suggestion that his loss be based on the difference between the low and high points of the index on the relevant dates cannot work.
22. Around the time of the Brexit referendum vote, many astute investors such as Mr I would also have had the same idea of using the potential significant fall in the market to bring “some good purchases in”. Nevertheless, this would all have been speculative in nature since the most affected shares, the numbers available for purchase and the exact low points of any of the companies was not known until the actual event had occurred. If the chosen shares were then available to buy, the price would most likely have impacted the quantities that would have been purchased.
23. Also, given that the predominant feeling prior to the vote was that we would remain in the Economic Union, and if the vote had gone that way the market may easily have risen, many sophisticated investors would have hedged their bets and invested some of their liquid assets prior to the vote. There is no proof that Mr I might not have decided to do this.
24. I agree that had Mr I gone on to make purchases following the completion of the transfer in August 2016, it would have confirmed his intention to invest. However, I accept Mr I's assertion that he sought to mitigate his losses by not buying at the high

levels. The fact that he did not do so at that point does not mean that he suffered no loss but it does mean there is simply no evidence of the shares he had in mind to buy and the specific foreseeability of the claimed losses here.

25. Mr I has also asserted that James Hay had approximately £220,000 which it could have transferred to Hargreaves Lansdown from 16 May 2016. From the evidence available to me, Mr I requested a specific amount of £250,000 to be transferred in cash, following receipt of the cash held by BSB. He did not expressly instruct James Hay that it could carry out two cash transfers to his new SIPP. This is an argument borne out of hindsight in my view and on this point, I do not find that maladministration occurred.
26. Ultimately, I agree with the Adjudicator's finding that Mr I's claim can only be redressed, and James Hay liable, in respect of non-financial loss due to the lost opportunity. I also agree that in recognition of the significant impact of James Hay's maladministration in this case, a higher award is warranted.
27. Therefore, I uphold Mr I's complaint to the extent that he has suffered a loss of expectation.

## **Directions**

28. Within 28 days of this Determination, James Hay shall pay Mr I £2,000 in recognition of the very significant distress and inconvenience caused by its maladministration.

**Anthony Arter**

Pensions Ombudsman

15 June 2018