

**PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE PENSIONS OMBUDSMAN**

Applicant	Mrs Diane Kenyon
Scheme	Zurich Personal Pension (no. IA) Plan (the Plan)
Respondent	Zurich Assurance Ltd (Zurich)

Subject

Mrs Kenyon complains that Zurich refused to act on her request to transfer her benefits from the Plan to the Axiom UPT Scheme.

Summary of the Ombudsman's determination and reasons

The complaint is not upheld. Mrs Kenyon does not have a right to transfer, primarily because the Axiom UPT Scheme is not an occupational pension scheme as defined in the relevant legislation.

Background

Pension liberation

1. This case is connected to what is known as “pension liberation”, or “pension scams”. Currently the issue has a high profile in the UK pensions industry so this and other decisions concerned with the same matter will be of wide interest.
2. To begin with the basics: present tax legislation is designed to prevent access to pension funds before the age of 55 (other than in ill-health or as benefits following death) as part of the policy that encourages pension saving by giving tax advantages, with penalties if the advantages are abused by using funds other than for authorised purposes. There was also, at the material time, a limit on the amount that could be taken as cash at any age.
3. The practice of pension liberation involves a transfer away from a genuine pension scheme intended to allow access to a scheme member’s pension savings before the age of 55, or to more cash than would normally be allowed. It is recognised as being contrary to the broad policy of encouraging pension savings and is of concern to the regulatory and tax authorities and those responsible for national pension policy. The businesses active in persuading people to indulge in such arrangements are likely to be doing so with their own financial gain put before the long term interests of the people with whom they deal. Charges made by businesses for making such arrangements are high and significant tax penalties that a member is likely to suffer may not have been explained. Some transfers have been fraudulently diverted to the advantage of the persons advertising the schemes and there is a suggestion of the involvement of organised crime in some pension liberation schemes.
4. Pension liberation is recognised in statute in sections 18 to 21 of the Pensions Act 2004, under which pension money is defined as having been liberated where a transfer value is paid from a pension scheme on the understanding that it would be secured to be used in an authorised way by the recipient, but it has not been. The Pensions Regulator is given power to make restraining and repatriation orders and the courts are given powers to order restitution. These provisions have no direct relevance to the matter I have to consider, however.

The statutory right to a transfer value

5. Section 94 of the Pension Schemes Act 1993 (**PSA93**) 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.
6. Section 95(1) of PSA93 says 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 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.
7. The definition of “occupational pension scheme” for this purpose is in section 1(1) of PSA93:

““occupational pension scheme” means a pension scheme -

 - (a) that -
 - (i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or
 - (ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people,

is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force, and
 - (b) that has its main administration in the United Kingdom or outside the EEA states,

or a pension scheme that is prescribed or is of a prescribed description;”
8. Subsection (2), referred to in the definition above as describing persons who can establish an occupational pension scheme, limits them to, in fairly complex terms that I do not need to reproduce here, employers of people who are in an employment of the description referred to in paragraph (a)(i), or persons who are themselves in an employment of that description, or persons representing the interest of either. Subsection (3) says that where a person in an employment is an office holder, their employer will be taken to be the person responsible for paying them.

9. Transfer credits are defined in section 181(1) as follows:

““transfer credits” means rights allowed to an earner under the rules of an occupational pension scheme by reference to a transfer to that scheme of his accrued rights from another scheme (including any transfer credits allowed by that scheme)”

10. That in turn leads to the definition of “rights” in the same section, being:

““rights”, in relation to ... transfer credits, includes rights to benefit and also options to have benefits paid in a particular form or at a particular time;”

Where “benefit” and “benefits” are undefined.

11. The definition of “earner” cross refers to section 3 of the Social Security Contributions and Benefits Act 1992.

“(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.”

12. The prescribed requirements under section 95(1) in relation to transfers from occupational pension schemes are set out in Regulation 12 of the Occupational Pension Schemes (Transfer Values) Regulations 1996 (**the Occupational Schemes Transfer Regulations**). The requirements for transfers from personal pensions are in the Personal Pension Schemes (Transfer Values) Regulations 1987 (**The Personal Pension Transfer Regulations**). The relevant requirement is the same in each, being that where the transferring scheme is registered under section 153 of the Finance Act 2004 (**FA04**) the receiving scheme should also be registered under that section.
13. Section 99 of PSA93 requires the trustees or managers to carry out the member’s requirements within a specified period – basically within six months of application, or, in the case of salary related occupational pension schemes, six months of the date of guarantee of the amount of the cash equivalent. It also provides:
- that the Pensions Regulator can extend the six month period in specified circumstances;
 - for notification to the Pensions Regulator where payment is not made; and

- in the case of occupational pension schemes, for civil penalties to be imposed by the Pensions Regulator on trustees or managers who have not taken reasonable steps to comply.
14. In relation to transfers from occupational pension schemes, Regulation 13 of the Occupational Schemes Transfer Regulations specifies the circumstances in which the Pensions Regulator may grant an extension to the period for compliance with the member's request. In particular the Pensions Regulator may do so where the member has not taken all the steps that the trustees or managers may reasonably expect in order to satisfy them of any matter needing to be established, or has not provided the information that the trustees or managers reasonably need. There are no equivalent regulations relating to transfers from personal pension schemes, so there are no circumstances in which the Pensions Regulator or any other regulator can extend the six month period.

Tax legislation

15. Section 153 of the Finance Act 2004 (**FA04**) provides for the registration of schemes by the Inland Revenue. One condition of registration is that the instruments or agreements of the scheme do not entitle a person to "unauthorised payments".
16. Section 164 of FA04 lists types of payments that are regarded as "authorised member payments", which include "recognised transfers" under section 169. Section 169 says that a recognised transfer is a transfer of sums or assets to another recognised scheme (or a qualifying recognised overseas scheme).
- "A "recognised transfer" is a transfer of sums or assets held for the purposes of, or representing accrued rights under, a registered pension scheme so as to become held for the purposes of, or to represent rights under-
- (a) another registered pension scheme, or
 - (b) a qualifying recognised overseas pension scheme,
- in connection with a member of that pension scheme."
17. "Member" is defined in section 151 of FA04 as follows:
- “(1) In this Part “member” in relation to a pension scheme, means any active member, pensioner member, deferred member or pension credit member of the pension scheme.
 - (2) For the purposes of this Part a person is an active member of a pension scheme if there are presently arrangements made under the pension scheme for the accrual of benefits to or in respect of the person.

- (3) For the purposes of this Part a person is a pensioner member of a pension scheme if the person is entitled to the present payment of benefits under the pension scheme and is not an active member.
 - (4) A person is a deferred member of a pension scheme if the person has accrued rights under the pension scheme and is neither an active member nor a pensioner member.”
18. Sections 208 and 209 of FA04 provide that, where an unauthorised member payment is made, an unauthorised payment charge, and potentially an unauthorised payment surcharge, will be levied on the member (where living).
 19. Section 239 of FA04 provides for a “scheme sanction charge” to be paid by the person identified as the administrator of the scheme. A scheme sanction charge could (subject to some conditions not relevant) be payable if an unauthorised member payment was made. It would be at 40% of the payment subject to a deduction where an unauthorised payment charge has been paid.
 20. Also relevant are sections 157 and 158 of FA04 which provide that a scheme that makes ‘unauthorised payments’ that exceed a permitted threshold could face de-registration. If registration is withdrawn the trustees or managers become liable to pay a de-registration charge, assessed at a rate of 40% of the assets held by the arrangement immediately before registration was withdrawn.

General obligations

21. Regulation of pension schemes is divided between the Financial Conduct Authority (**FCA**) and the Pensions Regulator under different statutory regimes. Before the FCA came into existence, the Financial Services Authority (**FSA**) had the same responsibilities and there are no material differences between the regulatory regimes of the FSA and the FCA. (For convenience in this document I use “FCA” where I might otherwise have said “the FCA and the FSA before them”.)
22. The FCA’s jurisdiction broadly includes providers of all pension schemes other than occupational pension schemes (activities concerning which are excluded from being a “regulated activity” in the relevant legislation). The FCA expects all firms within its jurisdiction to act in accordance with certain principles, which include acting with integrity, due skill, care and diligence, and treating customers fairly. More specifically, in relation to retail investment business (which includes pensions) the FCA expects firms to “act honestly, fairly and professionally in accordance with the best interests of its client”.

23. Trustees and managers of occupational pension schemes have general obligations in law, which there is no need to rehearse here in depth, to act in the best interests of beneficiaries, with due care, etc. However, since, as stated above, managing an occupational pension scheme is not a regulated activity, businesses and persons managing such schemes are not required to be authorised by the FCA.

Regulation

24. In February 2012 the Pensions Regulator published a press release directed to the public headed “Warning against early release pension offers”. The Pensions Regulator noted that it had published details of investigations in two cases, which had resulted in the appointment of an independent trustee, and including advice to pension scheme members about pension liberation schemes, including comments from HM Revenue and Customs (**HMRC**) and the FSA. At the same time, the Pensions Regulator published a factsheet “Pension Liberation Fraud” giving information for scheme members and the FSA published its own material directed to consumers.
25. A year later, in February 2013, the Pensions Regulator published “Pension liberation fraud. An action pack for pension professionals” in conjunction with a number of bodies including HMRC and the FSA, directed to trustees, administrators and providers. It says:

“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”

26. The action pack goes on to set out check lists that could be used if any of the above applied.

The nature/status of the scheme	
Is the scheme to which the member wants to transfer:	How to establish
<ul style="list-style-type: none"> • newly registered with HMRC? • if the scheme is a self-invested personal pension (SIPP), not registered with the Financial Conduct Authority (FCA)? 	<ul style="list-style-type: none"> • Ask the pension scheme in question for documentary evidence
<ul style="list-style-type: none"> • sponsored by a newly registered employer? • sponsored by a dormant employer? • sponsored by an employer that is geographically distant from the member? 	<ul style="list-style-type: none"> • Obtain employer information from scheme in question • Check with Companies House for details of the employer status (www.companieshouse.gov.uk)
<ul style="list-style-type: none"> • sponsored by an employer that doesn't employ the member? 	<ul style="list-style-type: none"> • Ask the member
<ul style="list-style-type: none"> • connected to an unregulated investment company? 	<ul style="list-style-type: none"> • Ask the receiving scheme for details of their investment service providers • Check these providers with the FCA (www.fca.org.uk/register)

Description/promotion of the scheme	
Do descriptions, promotional materials or adverts:	How to establish
<ul style="list-style-type: none"> • include the words 'loan', 'savings advance', 'cash incentive', 'bonus', 'loophole' or 'preference shares'? • allude to overseas investments? • hint at unusual, creative or new investment techniques? 	<ul style="list-style-type: none"> • Ask the member for copies of promotional materials, emails or letters about the scheme • Ask the member about the way the receiving scheme has been described to them over email/text/phone

The scheme member	
Has the member:	How to establish
<ul style="list-style-type: none"> • been advised by an 'introducer'? • been advised by a non-regulated adviser? • taken no advice • decided to transfer after receiving cold calls, unsolicited emails or text messages about their pension? 	<ul style="list-style-type: none"> • Ask the member about how he/she became aware of the receiving scheme • Check whether advisers are registered with the FCA at www.fca.org.uk/register
<ul style="list-style-type: none"> • pressured the trustees/administrators to carry out the transfer as quickly as possible? • mentioned that your pension scheme has transferred funds to this arrangement before? 	<ul style="list-style-type: none"> • Check whether member has contacted trustees/administrators to hurry along transfer since first submitting request
<ul style="list-style-type: none"> • not received documentation from the new scheme? 	<ul style="list-style-type: none"> • Check whether member has received documents
<ul style="list-style-type: none"> • been told they can access their pension before age 55? • been misled about the potential tax consequences? 	<ul style="list-style-type: none"> • Review promotional material for receiving scheme

27. The pack continues:

“Answering 'yes' to any of these questions individually does not necessarily indicate a dangerous pension liberation arrangement, but if several features are present there may be cause for concern.

...

Next steps if you have concerns

Contact the member to establish their understanding of, for example, the type of scheme they'll be transferring to. You may also want to direct the member to the Pensions Advisory Service (TPAS), who can help them understand the potential tax consequences of the transfer if any part of the arrangement is deemed as unauthorised. ...

Communicating with the member may also allow you to establish answers to more of the questions above, where you've been unable to answer them with the information you have available. If your concerns remain then you should alert the relevant authority ...

Delaying a transfer when you have concerns over liberation

Should you have concerns regarding a transfer request you may wish to seek your own legal advice. Trustees have a duty to carry out a member's transfer request where the legislative requirements are met. This includes a member having made a valid application requesting the transfer.

If, for example, a member requests a transfer to obtain transfer credits in an occupational pension scheme, but the trustees of the transferring scheme have reason to believe that the receiving arrangement is not a legitimate occupational pension scheme they should consider carefully whether the application is validly made, and if not whether they have any duty to process the transfer.

For example, in certain circumstances where a scheme describing itself as an occupational pension scheme is sponsored by a dormant company, which has never actually traded, the trustees may conclude that it does not have the necessary characteristics of an occupational pension scheme.

We can't predetermine any future regulatory action we may take on any particular case. However, where the transferring trustees or administrators have reason to believe that member funds may be liberated and can evidence their concerns, then this would be a relevant factor to the regulator when deciding whether it would be appropriate to take action in respect to a non-payment of a transfer.

For example, where a trustee has obtained evidence that subsequent to a member's transfer then monies would be passed back to the member before their normal minimum pension age, this factor would be given significant weight by the regulator in assessing whether it would be appropriate to pursue any action in relation to a non-payment of a transfer.

The Pensions Regulator would expect trustees/managers to be able to demonstrate that they have taken steps to establish the legitimacy of an arrangement where they have delayed making a transfer for that reason."

28. The Pensions Regulator's guidance was updated in July 2014. It is not significantly different and, of course, any changes significantly postdate the events to which this Determination relates.

The issue

29. The issue that arises in this case can be straightforwardly expressed and is typical of one presenting itself across the pensions industry in relation to pension liberation. Put simply, it concerns where the balance lies for those responsible for the management of a scheme when a transfer request is thought possibly to be for the purpose of pension liberation. On the one hand, the member has statutory transfer rights and, usually, transfer rights under the transferring scheme. On the other, the trustee, manager or provider has regulatory and other general responsibilities to act in the member's interests and with due care – and it must act consistently with the tax legislation or risk financial penalty.
30. I understand that there has been a range of approaches across the industry, with some schemes and providers taking a protective attitude towards their members, building (and sharing) databases to help them to identify transfer requests that are likely to be for pension liberation, and others adopting a more permissive stance. .

Also, schemes and providers may have modified their respective approaches over time as experience has grown.

31. No doubt in some cases in which a scheme or provider contacts the member offering information and/or asking questions, as advocated by the Pensions Regulator, the member will simply drop the application – whether because they realise from the information that the transfer is not in their interests or they retain their original impulse but give up in the face of an obstacle.
32. In those cases, the scheme or provider will not need to look beyond the *prima facie* evidence that the transfer was for the purpose of pension liberation. But where the member persists, the trustee, manager or provider will need to make a judgment about what evidence is needed and how much further to look for it before concluding whether or not the member has a right to transfer.

Basis of my decision

33. I have jurisdiction to decide complaints of injustice due to maladministration and disputes of fact or law. The two often overlap. There will not have been maladministration by a body that makes a reasonable decision in an honest belief that it is acting correctly. However, where I am determining legal rights, I must do so in accordance with legal principles – in substance reaching a decision equivalent to the decision that a court could have reached, and I must provide the same legal remedy as a court would in the same circumstances. The position is helpfully summarised in *Arjo Wiggins Limited v Henry Thomas Ralph* [2009] EWHC 3198(Ch), paragraphs 13 to 15.

Mrs Kenyon’s case: Material Facts

Zurich Personal Pension (no. 1A) Plan

34. Zurich, whose relevant activities are regulated by the FCA (and previously by the FSA), is the Plan’s administrator.
35. The material rules of the Plan are set out below.

“6.10 Power to make authorised payment

Notwithstanding the provisions of these Rules, the Scheme Administrator may, with the agreement of the relevant Member (or other beneficiary of the Scheme entitled to receive such a benefit) pay a benefit in a form or amount that differs from those otherwise set out within these Rules provided that is not an Unauthorised Payment.”

“7.1 Transfers out

7.1.1 A Member may request the Scheme Administrator to transfer a cash sum equivalent to the Member’s Personal Account (including any Drawdown Pension Fund) to one or more arrangements selected by the Member. Any such transfer requires the consent of the Scheme Administrator except where the member has a right to a transfer under Part IV of the Pension Schemes Act 1993.”

“7.1.3 The transfer may be made to any scheme or arrangement which is capable of accepting a recognised transfer under Section 169 of the Finance Act (Recognised transfers) and is willing to accept that transfer.”

“7.2.5 Following the application of the Member’s Personal Account in accordance with Rule 7.1 (Transfers Out) the Scheme shall be discharged of all liability to which the transfer relates.”

The receiving scheme

36. The arrangement to which Mrs Kenyon wished to transfer is known as the Axiom Umbrella Pension Trust (the **Axiom UPT**). By a trust deed dated 8 August 2012, a trust was established by Satori Limited, a company based in Belize, described as “the Founder”, and Bitterne International Trust Consultants Limited also based in Belize described as the “Original Trustees”. Recital 2 says that the trust will be known as the Axiom Umbrella Pension Trust. The trust is said to be governed by the laws of England. An amendment power provides for changes to be made by the Trustees with the consent of “The Protector”, a person defined and given powers under the deed, but not identified there as any particular person.
37. On 24 September 2012 HMRC wrote to Business Law Ltd (**Business Law**) a company registered in the UK with an address in Cheadle to say that the Axiom UPT had been registered with a Pension Scheme Tax Reference (**PSTR**) of 00786869RD.
38. On the same day an amending deed was entered into between Legal Protector Limited, also of Belize and described as “the Protector” (although there is no document that I have seen appointing them as such) and Bitterne International Trust Consultants Limited. There were two schemes referred to in the definition of “Pension Schemes” in the amending deed, one of which was the Axiom UPT, which was described as “established and administered by” Business Law. The definition referred to Axiom UPT’s PSTR of 00786869RD, so the deed was apparently entered into almost immediately after HMRC had registered the scheme.

39. The content of the original deed was completely and retrospectively replaced, although in many respects it appears to be the same as the original. Attached to it is a set of rules.
40. The declaration of trust and the rules of the Axiom UPT separately define “Member” as “...any member of the pension scheme” and “Employer” as “...any company of whom the Member is an employee or director from time to time”. There is no definition of “employee”.
41. Rule 2.1 says “The Scheme shall be operated as a “money purchase occupational pension scheme” as set out in the [Pension Schemes Act 1993]”.
42. Rule 6 provides that the Trustees may admit as a member “any employee of an Employer” and “any other person whose admission is in the opinion of the Trustees consistent with the Scheme’s status as a *registered pension scheme*”. The rules go on to provide for participating employers and others to contribute, and for funds held for their benefit to be applied in ways that are consistent with the benefit rules of FA04.
43. The rules are silent as to the benefits to be paid in any particular case. Rules 2.2 and 2.4 purport to give the Trustees wide discretion to apply the income and capital in such shares as they see fit to or for the benefit of all or any of the Beneficiaries. “Beneficiaries” is defined as any widow, widower or dependant of a Member. There does not appear to be any express power to pay benefits to members as defined.
44. There is no longer any current information about Business Law, Axiom or the Axiom UPT on the internet. However, a brochure for the Axiom UPT, found on a web page belonging to an adviser not connected with this complaint, refers to the Pensions Regulator’s February 2012 statement and distances the Axiom UPT from the type of arrangement that the Pensions Regulator was referring to. Then, amongst other things, it says:

“The Axiom UPT brings flexibility by allowing access to pension cash before retirement.”

“The Axiom UPT is a solution for individuals who may find their financial circumstances require an injection of cash. In addition to this the scheme provides 100% control over how the pension is managed going forward.”

“Trust Law is still evolving, which is why the Axiom UPT includes a facility that enables further trust protection either retrospectively or prospectively as matters arise. This means that, were the law to

change and potentially affect the Axiom UPT, then our lawyers would simply amend the trust to nullify the effect of the new law.”

45. The brochure goes on to explain that participants join the scheme as employees and that they may choose to have their funds managed either by an offshore company which participates in the scheme as an employer or by their own personal management company, ultimately with the option of taking a loan from the offshore company or personal management company. Fees are at least 15%, plus an agreed figure or percentage to an introducer, plus £1,000.

The transfer application

46. Mrs Kenyon was born on 23 January 1970 and so was 42 when these events were set in motion. She was a member of Zurich’s personal pension scheme and at the time her policy had a value of some £31,000.
47. On 25 October 2012 Mrs Kenyon rang Zurich about transferring the proceeds of the Plan. The following are extracts from a transcript of Mrs Kenyon’s call with Zurich:

”Yes I’d like to have a transfer value fund and discharge form please”

“All to be sent to you, yes? OK, and is it just for your records at the moment or are you actually looking to transfer the plan?”

“No, I’m looking to transfer it in to my new work pension.”

“OK, and is there a reason why you want to move this over?”

“Oh, I’ve just been, I’ve taken advice and basically it would be better for me to have it all in one place.”

“Oh right, OK, is that your advisers Elite Financial or is it a different adviser?”

“Oh I don’t know, it’s one of my, through my husband’s work.”

“Right OK, the only reason I ask is because if it’s an adviser who’s not got authorisation on the plan they might not have full details on the policy which would mean they might not know if it is fully ideal if you are to transfer or not...”

“Well the person we’ve been speaking with is a reputable financial adviser so I’m just following his advice...”

48. Business Law wrote to Zurich on 13 November 2012. They said that Mrs Kenyon had applied to join the Axiom UPT and enclosed a completed form headed “Document 4: Scheme membership letter – sign and return” signed by Mrs Kenyon agreeing “as from the above date, to be a member of the above named scheme in accordance with the trust deed of the scheme”. The form appears to be completed in Mrs Kenyon’s handwriting, apart from the date, which was 12 November 2012.

Also enclosed was “Document 5: Transfer Value Request – sign and return” saying that Mrs Kenyon “wished to transfer all benefits, to the Axiom UPT with immediate effect.” It was signed by Mrs Kenyon and again dated 12 November 2012 in a different hand. A further enclosure was Zurich’s own “transfer claim form” requiring the cheque to be payable to Business Law.

49. Zurich responded to Mrs Kenyon’s request by writing to her on 28 November 2012 referring to the press release described in paragraph 24. The letter, which included links to the websites of the Pensions Regulator and the FSA, said:

“The warning urges consumers not to be taken in by website promotions, adverts or cold callers encouraging them to transfer their existing pension fund to a new arrangement in exchange for a loan or cash payment. As a result we are taking extra precautions when dealing with all transfer requests and this has increased our work load and the number of days required for us to review each transfer. We have added these measures to protect our customers as any transfer made to any scheme which is not recognised will incur significant tax charges, 55% of the fund value transferred.

If you have been offered a cash incentive you may wish to reconsider your transfer request...

After reviewing this information please would you be able to confirm in writing if you have been offered a cash incentive and if you still wish to proceed with the transfer...”

50. Mrs Kenyon responded to Zurich on 14 December 2012 and said “Please accept this letter as my confirmation and request to transfer my pension fund for the above policy to Axiom without further delay.”
51. Mrs Kenyon wrote to Zurich again on 28 December 2012 and said “Please accept this letter as my confirmation and request to transfer my pension fund for the above policy to Axiom without further delay. Thank you. PLEASE NOTE I HAVE NOT RECEIVED A CASH INCENTIVE.”
52. On 31 December 2012 Zurich wrote to Mrs Kenyon and said they were currently unable to proceed with her transfer request as they were unable to satisfy themselves that the transfer would be treated as a recognised transfer under Section 169 of the Finance Act 2004 but that they would continue to consider her request and advise her if their position changed.
53. Mrs Kenyon contacted Zurich on 3 January 2013 expressing concern that her transfer request was being delayed.

54. Zurich wrote again to Mrs Kenyon on 17 January 2013 and said they were still considering her request.
55. On 21 January 2013 Mrs Kenyon wrote to Zurich expressing her dissatisfaction that the Plan had not been transferred to the Axiom UPT.
56. On 28 January 2013 Zurich wrote again to Mrs Kenyon as follows:

“We have a responsibility as the Pension Scheme Administrator to ensure that any transfers that we make would be treated as a “recognised transfer” in accordance with Section 169 of the Finance Act 2004. If we were to allow a transfer which subsequently turned out not to be recognised, this would result in you personally incurring unauthorised payment tax charges from HMRC, which currently total 55% of the value of the fund you transferred. In addition, we as the transferring administrator could be liable to a charge of up to 40%.

We are currently not able to satisfy ourselves that HMRC would accept the transfer of benefits to the new scheme as a ‘recognised transfer’...

...we will be happy to consider any additional information that comes to light and will advise you should our position change. Alternatively, if you wish to transfer to another scheme then upon receipt of the relevant documentation we will be more than happy to consider your request.

In the meantime though, I confirm that your funds will remain invested in your plan and I can confirm that the current value of your plan is £31,009.04 although should you wish to transfer your fund, the current transfer value is £31,006.13, as a transfer charge is currently applied to your Plan...”

57. That letter was Zurich’s “final response” and they told Mrs Kenyon that she could complain to the Financial Ombudsman Service. She did so, and under the Memorandum of Understanding between my office and the Financial Ombudsman Service the complaint was transferred to my office.
58. Zurich tell me that at the time they refused Mrs Kenyon’s transfer request they did not have a copy of the Axiom UPT’s rules. (They obtained one later on, in connection with a different transfer, and subsequently provided it to my office.)
59. Recently Mrs Kenyon has not actively engaged with my office’s work. However, it is the public interest that her complaint be determined.

Summary of Mrs Kenyon’s position

60. Mrs Kenyon’s core complaint is that she first requested a transfer in November 2012 and has told Zurich that she has not been offered a cash incentive but they have denied her request. To that she has added that:

- She has spent a lot of time considering various companies to transfer to and has thoroughly looked into transferring her pension away from Zurich.
- She is fully aware that there are companies that do not adhere to strict pension rules. Axiom is not one of them.
- She has chosen Axiom because they offer flexibility and many choices in the investments they provide and she can amend her investment choices if necessary. Transferring would give her a more viable pension on retirement having chosen to put all her pensions into one pot.
- She has already transferred three pensions to the Axiom UPT with no trouble at all and her husband has transferred his work pension to Axiom also. She has provided documents that show that.

Summary of Zurich's position

61. Having considered Mrs Kenyon's application Zurich concluded they were unable to proceed with the transfer because they did not believe a transfer would be treated by HMRC as a recognised transfer in accordance with SI 69 of the FA 2004.
62. The Plan's rules do not permit Zurich to make an unauthorised payment.
63. Zurich's decision took account of these factors:
 - The Axiom UPT was only registered by HMRC on 24 September 2012 and is administered from the same registered office address as the company organising the transfer.
 - Mrs Kenyon was aged 43 and so Zurich was concerned that she may have wished to transfer because she required cash.
 - The Axiom UPT was previously unknown to Zurich but they received five transfer requests from the same scheme and administrator between 14 November and 14 December despite it having only been in existence for a very short time.
 - Business Law Limited is not, and never has been, registered with the FSA/FCA.
 - Zurich reviewed Axiom UPT's website and key benefits being actively promoted include:

“*Pension can be accessed at any age, you do not have to be retirement age * Averts income drawdown/No compulsory annuity purchase *Complete freedom of investment, including loans to companies and purchase of residential property anywhere in the world *Funds are protected from litigation, creditors and divorce *Avoids any lifetime allowance 55% overfunding tax penalties being charged *You can use our strategies to get 100% of your funds out of your pension at any time, pre or post retirement *You will not have to pay the tax you would when you reach retirement on your pension.....UPT Criteria 1 Do you want access to pension cash before retirement? 2 Do you want a scheme that is not constrained by UK Pension Law?”

- HMRC had asked Zurich to provide information about all transfer requests they received to the Axiom UPT.
- Mrs Kenyon said that she wanted to transfer the proceeds of the Plan into her “new work pension plan”, but it seemed clear that the Axiom UPT was not linked to or provided by her employer.
- During the telephone conversation on 25 February 2012 Mrs Kenyon was unclear about her financial advisers and the advice she had received.

64. Zurich drew my office’s attention to negative press reports about the Scheme. There were press articles about “dodgy offers to unlock your pension early and tax-free”, reporting that pensions could be transferred to a Belize company called Axiom, which would return it as a “non-repayable loan” claiming no tax implications. It was reported that Axiom was taking a huge fee when effecting a transfer.
65. Zurich says that HMRC flagged the Scheme as one in which it required to know all transfer requests received.

Conclusions

66. As I note in paragraph 33, I must determine the matter in accordance with the law. So the primary question is whether Mrs Kenyon had a legal right to transfer. My approach is first to look at her rights under the Plan and under statute. Also relevant are the tax and regulatory questions, but, in particular, she could not be deprived of a statutory right by regulatory or other guidance (and there is no suggestion otherwise from the Pensions Regulator).

The Plan’s rules

67. The Plan does not give Mrs Kenyon a freestanding right to a transfer. Rule 7.1.1 (set out in paragraph 35) makes a transfer subject to Zurich’s consent, unless there is a

statutory right. And Rule 7.1.3 restricts a transfer (whether in exercise of the statutory right or not) to being a recognised transfer.

68. So looking narrowly at the rules, Zurich:
- (a) had to pay the transfer if there was a statutory right
 - (b) had to withhold the transfer if it was not a recognised transfer;
 - (c) in other circumstances had discretion to consent to the transfer.
69. The rules could not of course deal with the possibility of a conflict between (a) and (b), which would be technically possible if the two sets of legislation were not a perfect fit for each other. (See also paragraph 86.)

The statutory right to a transfer value

70. I now consider whether Mrs Kenyon’s application met the statutory requirements for a request for a cash equivalent transfer value.
71. First, the receiving scheme needed to be an occupational or personal pension scheme. The Axiom UPT purported to be an occupational pension scheme (see paragraph 41). The tests for an occupational pension scheme were considered in some detail by Morgan J in *Pi Consulting v The Pensions Regulator* [2013] EWHC 3181 (Ch). That case related to nine schemes to which the Pensions Regulator had appointed a trustee on the grounds that the schemes were devised for the purpose of pension liberation. The judge considered two tests to arise under the definition in PSA93 (see paragraph 7), the “purpose” test corresponding to (a)(i) and (ii) of the definition and the “founder” test corresponding to the rest of paragraph (a). (I do not need to set out Morgan J’s judgment in any detail here.)
72. In that case, the judge assumed that the schemes were not mere shams. I take the same starting position here.
73. The minimum requirement for the Axiom UPT to pass the purpose test is that it should be “for the purpose of providing benefits to, or in respect of, people with service in employments of a description”.
74. The only references to employment in the Axiom UPT’s documents are to define “Employer” as any company of whom the member is an employee or director. A member is merely defined as a member of the scheme. I find that to be so unspecific and general as to fail to meet the test that it provides benefits to people with service in “employments of a description”. There is no description of employments at all –

and any description that can be inferred would include any form of employment with any employer. The scheme therefore failed the purpose test and was not an occupational pension scheme.

75. Whether it meets the founder test is less clear, though in view of the finding above, it is academic. To look at matters at their simplest, the schemes in *Pi Consulting* passed the founder test because in each case the founder had a director when the scheme was established and the director was in an employment (because the company that remunerated the director was to be regarded as the employer) of the description concerned.
76. The founder of the Axiom UPT was a Belize limited company. I know nothing about its directors, let alone their terms of office. PA93 does not limit employment to Great Britain (there is separate equivalent Northern Ireland legislation) so the fact that the company is not based in Great Britain would not have disqualified a director from being in a relevant employment. However, I can do no more than speculate as to the likelihood that the Axiom UPT met the founder test.
77. I find, for the reasons above, that the Axiom UPT was not an occupational pension scheme. In addition, I have considered whether it was a scheme at all. In *The Pensions Regulator v A Admin Ltd and others* [2014] EWHC 1378 (Ch), Mrs Justice Rose considered whether a scheme that was in some ways similar to the Axiom UPT was established under a trust that was in fact void for uncertainty. She referred to the principle that “the donor must make his intentions sufficiently plain as to the objects of his trust and that the court, which acts in default of trustees, must know with sufficient certainty the objects of the beneficence of the donor so as to execute the trust”.
78. In the case of the Axiom UPT the only relevant powers to apply the trust assets appear to be the wide discretion to distribute among the beneficiaries, which, as described in paragraph 43, do not include members. Whilst it seems unlikely that it was the intention that the assets should only find their way to widows, widowers and dependents, I do not find that there is insufficient certainty for the execution of the trust to be possible. The trust was not void, even if it was not as intended.
79. In view of my finding that the Axiom UPT was not an occupational pension scheme, I do not strictly need to consider Mrs Kenyon’s rights further, nor the tax and regulatory issues. However, in view of the considerable public interest in this and other cases, I shall go on to do so.

80. Had the Axiom UPT been an occupational pension scheme, the next test would be whether Mrs Kenyon's application required Zurich to use the cash equivalent transfer value for securing transfer credits, being rights allowed to her as an earner (a person with remuneration or profit from an employment) under the rules of the Axiom UPT.
81. That question is to some extent bound in with my previous finding. Under the definition of "Employer" in the Axiom UPT rules, any employer would do. That was, as I have said, not apt to an occupational pension scheme. Had the Axiom UPT met the definition, employments would have been "of a description". In her initial telephone conversation with Zurich, Mrs Kenyon referred to her "new work pension". Apart from that oblique reference, Mrs Kenyon has not claimed that her employment might have been "of a description" in relation to the Axiom UPT. I find it improbable that she has received any remuneration from any employer (including a personal management company) that is connected to the Axiom UPT.
82. However, had the Axiom UPT been "for the purpose of providing benefits to, or in respect of, people with service in employments of a description", Mrs Kenyon would not have needed to be such a person. That is because the Axiom UPT could, if its terms said so, also have provided benefits "to, or in respect of, other people". Merely being a member would not, though, have meant that a transfer met the test of securing transfer credits. For that she had to be an earner. There is nothing in the legislation that expressly states that her status as an earner had to be in relation to a scheme employer, but I find that it did. It would be a very strange result if people not in "employments of a description" who were earners in some other context (with earnings, however small or irregular, from some completely unconnected enterprise) could require a transfer value to be paid to the scheme, when other people not in "employments of a description" could not. It would give the reference to "earner" arbitrary consequences if it just means a person with any earnings from any source.
83. So I find that Mrs Kenyon would have needed to have been an earner in the context of an "employment of a description". There were no such employments, and she had no relevant earnings.
84. Finally, I have remarked earlier on the fact that the Axiom UPT seems not to give the Trustees power to pay benefits to members at all. So only on the broadest possible reading would a transfer to the Axiom UPT have secured rights to benefit in relation

to her - being in the form of benefits payable to her husband on her death or to dependants.

85. For the reasons given above I find that Mrs Kenyon's request for a cash equivalent transfer value was not for securing transfer credits - and therefore she would have had no statutory right, even if the Axiom UPT had been an occupational pension scheme.

The tax legislation

86. It is a condition of registration under section 153 of FA04 that scheme rules do not entitle a person to unauthorised payments. It follows that, in relation to transfers, authorised payments must have been defined at least sufficiently broadly to cover transfers to which there is a right under PSA93. Otherwise a PSA93 right that amounted to an unauthorised payment would be in conflict with the requirement (though it could not be withheld).
87. The relevant requirements for Mrs Kenyon's intended transfer to be a "recognised transfer" were that was to be held for the purposes of another registered pension scheme or to represent rights under it, in connection with Mrs Kenyon as a member of that scheme.
88. I should begin by saying that I have little doubt that the attraction to Mrs Kenyon of the Axiom UPT was that it purportedly could provide cash before she would have been able to receive it from a normally constituted personal or occupational pension scheme. Mrs Kenyon was asked by Zurich whether she had been offered an incentive payment, which was the wrong question in the circumstances, since she was able to honestly say that she had not received such a payment. She was not asked, and did not say, whether she expected to receive a cash sum at a later stage. The providers of the Axiom UPT would no doubt have argued at the time (with what degree of conviction I do not know) that the scheme used a device which would not mean that she received an unauthorised payment.
89. There is no question that the Axiom UPT was at the time a registered pension scheme, so the only remaining reasons for doubting the transfer's status as an authorised payment would have been if the payment was not to be held for the purposes of the Axiom UPT or to represent rights under it - or that Mrs Kenyon's membership of the scheme was in doubt.

90. To take the second question first, as set out in paragraph 17 “member” is defined in FA04 as being one of an active member, a deferred member, a pensioner member (and a pension credit member, which is not relevant). The only possible category of membership would be an active member (she could not have joined as a deferred member), for which there would have had to have been “presently arrangements made under the pension scheme for the accrual of benefits to or in respect of” her. She was not presently accruing benefits, but (leaving to one side the peculiar consequences of the Axiom UPT not being an occupational pension scheme and any unorthodox arrangements for benefit payments) to the extent that the Axiom UPT would have been able to accept a transfer in respect of her, there were presently arrangements made for the accrual of benefits – even if actual accrual was contingent on a transfer¹.
91. It is much less clear that the payment was to be held for the purposes of the Axiom UPT or to represent rights under it. Leaving to one side (again) that the purposes of the Axiom UPT were not consistent with it being an occupational pension scheme, and also setting aside that there was no express power to pay any benefits to a member, then some at least of the payment was presumably for those purposes (and probably would have represented rights in respect of Mrs Kenyon). However, if, as the evidence very strongly suggests, a significant part of the transfer would have gone to the introducer and others in fees, then that much at least was not for the purposes of the Axiom UPT or to represent rights in respect of Mrs Kenyon. I find that on the balance of probabilities a significant proportion of the transfer would have been used for a purpose inconsistent with it being a recognised transfer. I also find that the requirement that the transfer was to be used for the purposes of the Axiom UPT or to represent rights in respect of Mrs Kenyon applied to the whole transfer and since a significant part of it was not to be so used, it would not have been a recognised transfer.

Regulatory matters

92. As I observed earlier, had a regulator’s guidance or rules been inconsistent with statutory rights, then clearly those rights would have taken precedence.

¹ Transfers to arrangements such as “section 32” policies and deferred annuities are presently permitted by HMRC and my reading of the definition is consistent with that. If the definition was read narrowly, so as to only include as members those who were actually accruing benefits, then such transfers would not be recognised transfers. (An alternative reading would be that on acceptance of the transfer value they become a deferred member – but it is not necessary for me to decide that point.)

93. The application to transfer was made before the action pack of February 2013 referred to in paragraph 25. However had the guidance in the action pack been applicable at the time, the references to the Pensions Regulator not taking action where transfers were delayed would not have been relevant since there are no penalties that the Pensions Regulator can levy in relation to a personal pension scheme. (And it is my understanding that the FSA/FCA would be unlikely to penalise a firm in relation to a single delayed transfer). Strictly the Pensions Regulator's statements about trustees are not relevant to Zurich as an FSA/FCA regulated provider. But the guidance was endorsed by the FSA, so it is understandable that Zurich had regard to it after the event – as well as to the earlier guidance for members issued by both the Pensions Regulator and the FSA.
94. Properly, though, the only directly relevant regulatory and general legal obligations would have been for Zurich to act with integrity, honestly and fairly, in the best interests of Mrs Kenyon and consistently with the duty of care that they owed her. Mrs Kenyon was adamant that she wanted to transfer. Zurich did not give acting in her best interests as the reason for refusing the transfer, instead relying on the tax legislation (though I do not find the explanation was entirely satisfactory, as I explain below).

The approach that Zurich took

95. In the foregoing paragraphs I have subjected the Axiom UPT and Mrs Kenyon's position in relation to it to detailed analysis in order to establish whether it was a proper destination for a transfer to which Mrs Kenyon had a legal right. It fails the test on a number of grounds.
96. Although I have approached the matter on the assumption that the scheme was not a sham, its inaccurate and untidy documentation (including only a power to give benefits to dependents, amongst other deficiencies) is strong evidence that it was in fact a sham. I have no doubt that it was a scheme designed to get Mrs Kenyon early access to her pension assets. Whether one views it as an attempt at making that access both possible and free of tax penalty, or as a sham scheme intended to make the transfer look plausible, makes little difference.
97. As to Zurich's approach, in practice they reached a conclusion that the transfer should not go ahead because they believed it was for pension liberation purposes without subjecting it to the analysis that I have subjected it to above. Apart from anything else, at the time they did not have a copy of the Axiom UPT documents.

98. Zurich said to Mrs Kenyon that they were not able to satisfy themselves that the transfer to the Axiom UPT would be a recognised transfer. It makes no difference to the outcome of this complaint, but if that was their actual justification then I find that it does not adequately acknowledge their responsibilities. In substance Mrs Kenyon was attempting to exercise a statutory right and Zurich were declining to comply with her wishes. Zurich did not ever tell her that they did not think she had a statutory right. It may be that they thought that went hand in hand with the transfer not being a recognised transfer – see also paragraph 101. But I cannot see why the burden lay with Mrs Kenyon to prove that the transfer was recognised and/or that she did have a statutory right. In my view, reflecting the different balance of power between the parties, Zurich needed to satisfy themselves that she did *not* have a right to the transfer.
99. Notwithstanding that, there was no such right and I find in Zurich’s favour.

General closing observations

100. Pension providers, trustees, managers and administrators find themselves in a highly unenviable position. They must decide between complying with what might have initially seemed a legitimate transfer request, and delaying the transfer, making further investigations and, potentially refusing it. If they comply with the transfer request, they are at risk of having made an unauthorised payment, with potential tax consequences. If they delay or refuse they are at risk of the member seeking to enforce the statutory right and succeeding, possibly claiming a financial loss. The strength of their reputation as an effective guardian of their customer’s money is also at risk.
101. That a regulator, or other source of intelligence, indicates that a transfer may be for pension liberation purposes (perhaps because the receiving scheme and/or those connected with it have a history) may be good reason for delaying the transfer and asking relevant questions during the statutory period allowed for the transfer. As I noted in paragraph 31, those questions may result in the application being withdrawn – and where they do, that may be the “right” outcome, as long as the scheme member has not been misled or unfairly pressurised.
102. But there is no direct link between a transfer being for pension liberation purposes and (a) its not being a recognised transfer or (b) there being no statutory right to the transfer. It may be probable in any individual case that all three go together. But providers, trustees, managers and administrators will want to keep in mind that

strictly they can only refuse to make the transfer beyond the end of the statutory period if there is no statutory right to it. They should satisfy themselves of the position, on the balance of probabilities and a correct interpretation of the law, based on such evidence as they can obtain from the member or receiving scheme or other sources - and reaching a decision may include drawing inferences from a failure to provide evidence. Where they find that there is no right to transfer they should be expected to be able to justify that to the person asserting the right.

Tony King
Pensions Ombudsman

8 January 2015