

Ombudsman's Determination

Applicant	Mr E
Scheme	VRSEB Retirement Plan (the Plan)
Respondents	Fast Pensions Limited (FP), FP Scheme Trustees Limited (the Trustee)

Outcome

1. Mr E's complaint is upheld, and to put matters right the Trustee shall comply promptly with any valid statutory transfer request that Mr E makes, and offer him a transfer in cash or in specie or a mixture of both, whichever the Trustee considers most appropriate bearing in mind the Plan's current assets and the amount of the transfer payment net of any early exit penalty that is applicable to him at that time, as set out in the agreement that Mr E signed in 2013. If Mr E's new pension provider then notifies the Trustee that it is willing to accept the transfer in the form offered by the Trustee, the Trustee shall make payment to the new pension provider within 28 working days, and inform Mr E within 7 working days of making payment. FP shall pay Mr E £2,000 for the significant distress and inconvenience that its conduct in this matter has caused him.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr E's complaint is that FP and the Trustee have refused his request to access his pension funds in the Plan or to transfer from the Plan to another pension provider.

Background information, including submissions from the parties

4. Following advice received from an independent financial adviser, Mr E decided to join the Plan in 2013.
5. Mr E's application form to join the Plan was dated 20 April 2013. It included the following statements:

"I acknowledge that I have had notice of and agree to be bound by the rules of the Scheme...I agree and understand the terms and conditions of the investment [and] wish to proceed based on the above terms and conditions".

6. These terms and conditions included the following paragraphs:

“The Trustees will invest with a view to targeting a minimum return of 4.5% p.a. net of any charges over a 6 year period plus additional growth as appropriate without undue risk to the underlying target growth.

In order to comply with the requested strategy the Trustees will invest in underlying assets with a 6 year term that are best suited in the Trustees opinion to deliver the minimum targeted return.

Due to the underlying structure of these investments an early redemption penalty of 42% of capital applies in the first year. This penalty reduces by 7% of capital each year i.e. a penalty of 35% applies in the second year, 28% applies in the third year and so on. After 6 years there are no redemption penalties.

Member initial pension scheme fee £1,000. Member annual administration fee NIL.

The Trustees will provide the members with an annual valuation of the portfolio which is then available on an annual statement.”

7. With Mr E’s consent, over £10,000 was transferred from his Scottish Widows pension arrangement to the Plan on 29 August 2013.
8. In 2016 Mr E reached the minimum pension age of 55. The following year, as he was unhappy with the administration of the Plan he informed FP that he would like to draw his pension benefits as a lump sum or transfer to another pension provider. FP said that this was not possible at that time.
9. In response to Mr E’s email dated 21 July 2017, to query the position, Sara Moat (the sole director of FP) told him that he could not draw his benefits at that time because:
- “you signed for a 7 year investment. The penalties apply in the event the trustee permits early withdrawal or transfer...The trustee makes investment decisions based on your funds and other members funds being available for 7 years. This is then invested in an investment for approx. 7 years to get the required return targeted on the plan. If they have to disinvest this, it not only affects your pension fund however affects all other members in the scheme.”
10. Mr E pointed out that his contract did not make clear that withdrawal from the Plan would be subject to the Trustee’s discretion; it just stated that an early exit penalty would apply, which he was willing to pay.

On 22 July 2017 Sara Moat emailed Mr E a copy of the Plan rules, and referred him to Rule 20.6 (see Appendix hereto). She said: “I am sorry that we cannot transfer out at the moment however the Trustee Company needs to ensure that all members are protected based on the terms signed.”

11. On 22 August 2017 Mr E appealed under the Plan's internal dispute resolution procedure (**IDRP**) that he should be allowed to cash in his pension fund or transfer out subject to the 21% early redemption penalty that applied after four years' membership. His appeal was unsuccessful.
12. At stage 1 of the IDRP Sara Moat responded that under the contract there was a six year investment term: as Mr E's existing pension funds were not transferred to the Plan until 29 August 2013 he would be able to request a transfer without penalties from 30 August 2019; the Plan rules provided for retirement benefits to be taken at age 65: they could apply to the Trustee in August 2019 for retirement benefits to be taken early, but that would be at the Trustee's discretion.
13. At stage 2 of the IDRP Mr E also complained that he had not seen the Plan rules until recently, and they had not been attached to the contract that he signed in 2013.
14. Sara Moat replied on behalf of the Trustee that:

"The original introducer that dealt with you, should have furnished you with a copy of these and also we sent a copy to you with the original welcome pack at the start of the process."
15. Mr E then complained to us.

Adjudicator's Opinion

16. Mr E's complaint was considered by one of our Adjudicators who concluded that further action was required by Fast Pensions. The Adjudicator's findings are summarised briefly below:-
 - Mr E wanted to access his pension fund before the age of 65, or transfer out. Unfortunately, there were several difficulties in him doing so.
 - Firstly, the Plan rules referred to a normal retirement age of 65. Many pension schemes allowed retirement pensions to be paid early, subject to an appropriate reduction for early payment. However, under Rule 10.1 (see Appendix hereto) an early retirement pension was payable subject to the consent of FP, as the Principal Employer of the Plan. Therefore, Mr E could not draw an early retirement pension from the Plan unless he made an application to FP, and FP exercised its discretion to agree to that request.
 - Secondly, as the rules of the Plan dated from 2012, they did not include the flexible access provisions that later legislation allowed. It was not compulsory for existing pension schemes to be amended to allow for flexible access, although it was helpful for members if they did. If the Plan rules were amended by FP and the Trustee to allow flexible access, Mr E would then be able to request it.

- Thirdly, Mr E had a statutory right to transfer under s.94 of the Pension Schemes Act 1993 (the Act). He was entitled to ask the Trustee to quote a cash equivalent transfer value (**CETV**). When this had been quoted and accepted, it would be up to the Trustee whether it would offer a transfer in cash or a transfer in specie (transferring scheme assets instead of paying cash), or a mixture of both. There was no statutory obligation to offer a cash transfer, for example where investment was made in an asset for which its cash value was not easily realised. In practice, this meant that Mr E could not transfer out of the Plan if the Trustee was only willing to pay an in specie transfer, unless Mr E had a new pension provider which was willing and able to accept such a transfer. This might prevent a transfer being made in practice.
- The Adjudicator took the view that a member's valid statutory right to a transfer out could not be defeated by the wording on consent forms he signed. That was consistent with the legal principle that, unless legislation specifically permitted, a member could not contract out of rights that had been conferred on him by statute.
- With regard to the amount of the CETV, Mr E signed an agreement in 2013 that an early exit penalty would apply in the first six years (not seven years as FP told him on 21 July 2017) because of the fixed term investment policy. Therefore, the appropriate percentage reduction would apply to any CETV for Mr E that was paid before August 2019.
- The correspondence that we received from Sara Moat was on behalf of both FP and the Trustee. They had relied on the wording of Rule 20.6 of the rules of the Plan to prevent a transfer out. It was unclear whether the rules were made available to Mr E before July 2017, when FP emailed a copy to him. Mr E said that they were not, whereas FP said that they would have been given to him in 2013. However, we are aware from other cases that FP's welcome packs usually said that a member should apply to the Scheme Secretary for a copy of the trust deed and rules, so that implied that a copy was not automatically given to Plan members. This led the Adjudicator to conclude that Mr E probably did not see the rules of the Plan in 2013.
- Rule 20.6 was worded less formally than the remainder of Rule 20, and said that the Trustee might agree to an early transfer if it believed there were exceptional circumstances. There was, therefore, a strong inference that a transfer would not normally be permitted by the Trustee. This was at odds with Rule 20.1, which provided for a CETV to be paid if the Plan member had a right to a CETV. Rule 20.1 reflected the statutory requirements. Rule 20.6 did not cross-refer to Rule 20.1 or explain how the two sub-rules should interact. In the Adjudicator's view Rule 20.6 was drafted in an attempt to water down members' statutory rights, which had

already been acknowledged. However, the Adjudicator considered that to be unsuccessful and that therefore Rule 20.1 should prevail.

- FP told Mr E, on 21 July 2017, that the disinvestment of Plan assets would weaken the security for other members of the Plan. However, the Adjudicator's view was that most members would conclude that the significant early exit penalties, set out in the terms and conditions that they signed up to when joining the Plan (e.g. 42% reduction within the first year), were specifically designed to mitigate the potential losses for other members. Furthermore, the Trustee should have made some allowance for the risk of early withdrawals arising for various reasons (e.g. transfers, death benefits, income drawdown, commutation), when setting its investment strategy for the Plan. It was unrealistic for the Trustee to assume that in practice there would be no withdrawals within the fixed investment term.
- Mr E and FP had disputed the date on which he first became aware of relevant Plan information. We have experienced similar disputes in other cases involving FP and the Trustee. The individual members are at arm's length from each other and are not aware of the complaints that other members are making, but there are similarities in many of their accounts. That is unlikely to be a mere coincidence. On balance, the Adjudicator took the view that the comments concerning FP and the Trustee, that had been received from individual members, should be given considerable weight.
- The Adjudicator therefore concluded that FP did not inform Mr E until 2017, of its position that transfers within the lock-in period would be made only at the discretion of the Trustee. That restriction should have been disclosed to Mr E in 2016, and the delay amounted to maladministration. However, that delay was not critical because in the Adjudicator's view there was no discretion for the Trustee to exercise, as Mr E had a right to transfer under the Act, and that statutory right could not be fettered.
- This meant that, although Mr E might not be able to draw an early retirement pension or access income drawdown, he should be able to transfer out of the Plan if he could find another pension provider willing and able to accept the transfer value (whether in cash, or in specie, or a mixture of both, whichever the Trustee offered) and subject to the early exit penalty set out in the agreement that Mr E signed in 2013. However, the new pension provider would not be obliged to accept a transfer.
- The disclosed correspondence showed that FP had not communicated with Mr E as clearly and accurately as it should have done, and had interpreted Rule 20 incorrectly. The Adjudicator therefore considered that I would uphold the complaint and make an award of £1,000 to Mr E for his distress and inconvenience.

17. FP and the Trustee did not accept all of the Adjudicator's Opinion. They said:

"We agree that compensation should be offered however do not agree that the client is able to transfer his pension whilst in contract and we have differing legal opinions on this position which no doubt will have to be settled in the courts. The clients entered into the agreement with the full knowledge on the term, penalties and lock in periods."

18. The complaint was then passed to me to consider. I agree with the Adjudicator's Opinion, except in respect of the level of award for the considerable distress and inconvenience which Mr E has suffered. My decision in response to the key points made by FP is set out below.

Ombudsman's decision

19. FP and the Trustee do not agree with the Adjudicator that Mr E can transfer during the six year fixed investment term. However, I consider that the view expressed by the Adjudicator is correct. In my view the restrictive wording of Rule 20.6 does not override a statutory right to a transfer out. Therefore Mr E should be able to transfer out of the Plan if he has a statutory right to a CETV and can find another pension provider that is willing to accept his CETV (whether payable in cash or in specie or a mixture of both, whichever the Trustee prefers); the Act does not prescribe that a transfer must be offered only in cash. The calculation and payment of the CETV will be subject to any early exit penalty arising as set out in the agreement that Mr E signed in 2013.

20. In the recent cases that I have upheld against FP and the Trustee, as respondents, I have awarded each of the applicants £2,000 for their significant distress and inconvenience. I consider that a similar award for Mr E is appropriate in this case.

21. Therefore, I uphold Mr E's complaint.

Directions

22. First, I direct that the Trustee shall comply forthwith with any CETV request that Mr E sends to it, and the Trustee shall offer him a transfer in cash, or in specie, or a mixture of both, whichever the Trustee considers most appropriate bearing in mind the Plan's current assets and the amount of the CETV, net of any early exit penalty, that is applicable to Mr E at that time, as set out in the agreement that Mr E signed in 2013. If Mr E's new pension provider then notifies the Trustee that it is willing to accept the transfer, in the form offered by the Trustee, the Trustee shall make payment to the new pension provider within 28 working days, and inform Mr E within 7 working days of making the payment.

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23. Second, I direct that within 28 days of the date of this Determination, FP shall pay Mr E £2,000 for the significant distress and inconvenience that its conduct in this matter has caused him.

Anthony Arter

Pensions Ombudsman
16 March 2018

Appendix

Extracts from the Rules of the Plan

“10.1 Benefits payable on early retirement

If a Member retires from Pensionable Service for any reason after reaching Minimum Pension Age, or at any time on the grounds of Incapacity, the Member may, subject to the consent of the Principal Employer, as an alternative to any benefit payable under Rule 8 (normal retirement) elect to receive an immediate monthly pension payable during his lifetime...

20.1 Statutory right to a transfer

(a) A Member who acquires the right to a Cash Equivalent in accordance with Chapter IV of Part IV of the Pension Schemes Act shall be entitled to a Cash Equivalent transfer value which shall be calculated and paid in accordance with Part IV of that Act. In particular reference to Chapter 4 section 93

(b) If a Member requests a Cash Equivalent transfer, the Trustees will pay to the Receiving Scheme the Cash Equivalent for the Member. The transfer will be made in accordance with the relevant requirements of the Pension Schemes Act. The Cash Equivalent will be calculated and verified in a manner approved by the Trustees in accordance with the requirements of the legislation relating to transfer values

...

20.6 Transferring out early from the scheme.

This investment is for a period [of] 6 years. In the event that you want to transfer or withdraw funds from your pension scheme, an application needs to be sent to the Trustees to seek their approval. In the event that the Trustee believes that there are exceptional circumstances, they may authorise and agree to an early transfer out of the scheme. In the event that a transfer is approved under these conditions, exit penalties will apply. An illustration of the terms and penalties are shown in the original application made to enter the scheme.”