

Ombudsman's Determination

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| Applicant | Mrs H |
| Scheme | Local Government Pension Scheme – Hampshire Pension Fund (the Fund) |
| Respondent | Hampshire County Council (the Council) |

Complaint Summary

1. Mrs H has complained that the Council failed to carry out proper due diligence before it transferred her benefits from the Fund to The Focusplay Retirement Benefits Scheme (**the Scheme**). Mrs H is concerned that her entire pension fund may have been lost or misappropriated.

Summary of the Ombudsman's Determination and reasons

2. The complaint shall be upheld against the Council because it failed:
 - to consider correctly whether or not Mrs H had a statutory right to a transfer; and
 - to engage directly with Mrs H regarding the concerns it should have had with her transfer request, had the Council properly assessed it.
3. Having considered all the available evidence, I am satisfied, on the balance of probabilities, that but for the Council's maladministration Mrs H would not have proceeded with this transfer and suffered a loss.
4. To put matters right, the Council shall reinstate Mrs H's accrued benefits in the Fund, or provide equivalent benefits, adjusting for any revaluation that has arisen since the transfer and allowing for any lump sum that Mrs H has already received from the Scheme. To avoid "double counting", the Council will be entitled to recover from Mrs H the amount of her pension fund that in future the trustees of the Scheme are able to retrieve for her, if any.
5. Also, the Council shall pay Mrs H £500 to reflect the significant distress and inconvenience that Mrs H has suffered as a result of the Council not undertaking proper due diligence before it made the transfer payment.

Detailed Determination

Material facts

6. Mrs H began working for Portsmouth City Council's housing department in April 1989. At that time she opted out of membership of the Fund, a defined benefit arrangement. In April 2002 she elected to join the Fund for future service benefits. Mrs H became a deferred member of the Fund in November 2007, when her local government employment ended.
7. In 2013 Mrs H received a cold call from Pension Matters Associates Limited (PMA). Mrs H agreed that PMA could review her pension arrangements. In August 2013 PMA contacted the Council to ask for information about Mrs H's accrued benefits under the Scheme, including her current transfer value. PMA's letterhead did not specify that it was a regulated financial adviser.
8. On 6 September 2013 the Council sent PMA a transfer value statement, transfer request form, scheme discharge form and information summary. On the same day the Council informed Mrs H, and sent her a copy of the Pensions Regulator's action pack (dated February 2013) headed "Pension liberation fraud – The predators stalking pension transfers" (**the Scorpion warning**).
9. Mrs H completed and signed the transfer request form on 26 September 2013. The signed declaration section said:

"I have read the leaflet from the Pensions Advisory Service entitled "Predators stalk your pension"...I understand that...It is my responsibility to ensure the benefits the transfer value buys in the new scheme are suitable for me and my family and that no responsibility for this rests with the [Fund], the LGPS administering authority or my former employer...On payment of the transfer value I will have no further benefits from the [Fund] in respect of the rights to which the transfer value relates. Neither I nor my dependants will have any further claim in any circumstances or in any form on the [Fund], the LGPS administering authority or my former employer for any rights to which the transfer value relates."
10. On 13 November 2013 the scheme discharge form was completed and signed by Roger Bessent, then managing director of the Scheme trustee company, Gleeson Bessent Trustees Services Limited (GBTS), and was returned to the Council with several documents regarding the Scheme. These showed that the Scheme's sponsoring employer was Focusplay Limited, a company incorporated in 1999. Its principal activity was stated to be a steel stockholder in Warrington. Mr Bessent's covering letter said that the Scheme was registered with HM Revenue & Customs (**HMRC**) for tax relief purposes, and was a contracted-in defined contribution occupational pension scheme. A copy of the HMRC letter was enclosed.
11. When it checked the completed transfer documentation, the Council's pensions department noted:

“Receiving scheme was only set up on 2 May 2013. Member is over age 55 so risk of Pensions Liberation is reduced. The large amount of additional documentation sent by Focusplay would indicate that they realise that they arouse suspicions. However, they have been very clear in indicating that they are a contracted in defined contribution arrangement and the member will lose the right to a minimum benefit in respect of their section 9(2B) rights. There is no evidence of actual illegal activity and the member has declared on the discharge form that they have read the “Predators stalk your pension” leaflet, so on this basis the transfer must proceed.”

12. Later in November 2013 Mrs H’s benefits were transferred from the Fund to the Scheme. The transfer payment was £26,234. At her request Mrs H received a tax-free lump sum of £6,393 from the Scheme.
13. In late 2015 Mrs H became concerned about her remaining pension funds. She approached a claims management company, Whitehall Randall and Associates (**WRA**), for assistance. Mrs H told WRA that she had intended to use the tax-free lump sum provided by the Scheme to buy a funeral plan, as she did not want to burden her children with that future expense.
14. In a letter dated 15 January 2016, WRA told the Council that Mrs H may have been the victim of negligence caused by a financial adviser, and asked the Council for relevant documentation.
15. In its reply on 4 February 2016 the Council said that it had given Mrs H information on pension fraud/scams when quoting her transfer value.
16. In April 2017 the Financial Times reported that GBTS and a related company had been closed down by the High Court “in the public interest” following an investigation by the Insolvency Service.
17. In a letter dated 14 September 2017, WRA made a formal complaint to the Council that it had been negligent in making the transfer from the Fund to the Scheme. WRA said that the Council should have identified the Scheme as a possible scam, and should have prevented the transfer. The letter also said:

“The fact that PMA weren’t authorised was a clear and obvious red light that a scam was going on...why on earth a 59 year old lady, who lives in Portsmouth, would be cashing up a gold plated scheme and joining the money purchase occupational pension scheme of a “steel stockholder” based in Warrington? Did you enquire as to what “employment” she was taking up with them?”
18. In its reply dated 26 September 2017, the Council defended its position and said that:

“At the time of Mrs [H’s] transfer the scheme was legal and registered and the transfer was therefore processed in line with the scheme rules as well as in

accordance with [Mrs H's] formal request and her legal right and entitlement to a transfer out of her benefits.”

19. Mrs H then invoked the Fund's internal dispute resolution procedure (IDRP). In its stage 1 response on 27 November 2017, the Council's Head of Finance rejected Mrs H's complaint. He said that pension administrators could not refuse the request to transfer if the receiving scheme was properly registered, even if they had significant concerns about pensions liberation. In support, he cited the High Court judgment in the case of *Hughes v Royal London Mutual Insurance Society Limited* (2016) (**Hughes**).
20. He also pointed out that Mrs H's transfer had taken place in the fairly early days of pension scams. He would recommend that in future cases, where a pension liberation scheme was suspected, a final letter should be sent to the Fund member to outline the Council's concerns, referring again to the pension scam action pack and recommending that the member sought independent financial advice before transferring.
21. WRA did not accept the Council's decision. WRA said that the Hughes judgment hinged on the definitions of “earnings” and “earner” in relevant legislation and concerned a transfer from a personal pension plan to an occupational pension scheme, whereas Mrs H had transferred from one occupational pension scheme to another occupational pension scheme. WRA also said that the Council had made no enquiries about whether Mrs H was an “earner”; in fact she had no earnings as she lived on State benefits and looked after her elderly, sick mother.
22. The IDRP stage 2 decision letter was issued by the Council's Head of Legal Services on 5 March 2018. He rejected Mrs H's complaint, saying that the Hughes case was “authority for the proposition that a Pension Fund cannot refuse an appropriate request for transfer.” He also said that it was not relevant whether Mrs H was an “earner”. He added that, as Fund administrator, the Council was required “to accede to the legitimate request of a deferred pension[er] of full capacity and competence in circumstances where there was no lawful basis upon which it could refuse the request to transfer.”
23. WRA then contacted us on behalf of Mrs H.
24. The Pensions Regulator announced on 11 December 2018 that Mr Bessent had been charged with fraud by abuse of position and with making prohibited employer-related investments. At Preston Crown Court on 27 February 2019 Mr Bessent pleaded guilty to seven offences, for which he was later sentenced to 40 months' imprisonment.

Summary of Mrs H 's position

25. She was not financially aware, as shown by the fact that she did not join the Fund, a defined benefit arrangement, until several years after she first became eligible.

26. Until she was contacted by PMA in 2013 she had not thought about transferring her deferred pension benefits.
27. When PMA contacted the Council, it should have noted that PMA was not authorised to give Mrs H financial advice.
28. The PO determination in 2018, in favour of Mr N against Northumbria Police Authority (PO-12763), supports her case, as in that case The Pensions Ombudsman asked “whether the Authority only had to send the Scorpion warning to Mr N, or should have done more” and the Pensions Ombudsman concluded that “it should have done more...Put simply, there should have been some direct engagement from the Authority before it finalised Mr N’s life-changing request. This has been expected by the Pensions Regulator since February 2013. In practice, the Authority did not engage with Mr N about his transfer request at all.”
29. Mrs H was never asked by the Council whether she had got a new job in Warrington, or warned by the Council that the Scheme might be a scam. If the Council had contacted her, she would have changed her mind about making the transfer.
30. Mrs H’s transfer could be distinguished from the Hughes case because Mrs H was transferring from one occupational pension scheme to another occupational pension scheme.

Summary of the Council’s position

31. Mr N’s case can be distinguished, because the Council had sent the Scorpion warning to Mrs H before her transfer, so she should have been aware of possible scams. She also signed a discharge form, implying she had read it.
32. The Council made the necessary checks when it received the completed transfer documentation, and it could not refuse to process a statutory transfer request.
33. The Hughes case supported the Council’s position; it did not require the relevant member to have current earnings, and such a requirement would infringe age discrimination legislation because Mrs H was an older deferred pensioner.
34. At the time of the proposed transfer in 2013 there was no reason for the Council to suspect any illegality.
35. There was no requirement at that time for Mrs H to obtain advice from a FCA registered financial adviser.
36. The Council acted in accordance with transfer guidance given by the Local Government Association and said, “the only thing that we could have done that we did not do was to refuse the request to transfer the funds”.
37. With regard to Mrs H’s distress and inconvenience, this stemmed from the fraudulent misappropriation of her pension funds in the Scheme, not any action or omission by the Council, so the Council should not be required to pay her £500.

38. In recent correspondence, the Council provided evidence that through a different financial adviser Mrs H had made a request for her cash equivalent transfer value in 2010. Therefore WRA was incorrect in stating that until she was contacted by PMA Mrs H had never thought about a transfer out.
39. The Council also said that if any remedy were to be awarded to Mrs H, it should take account of any benefits she had already received from the Scheme.

Conclusions

40. I note that the Scorpion warning was issued by the Council to Mrs H, and that Mrs H signed a scheme discharge form. Mrs H's transfer documentation was received by the Council in November 2013 and the transfer was completed in the same month. This was nine months after the Pensions Regulator's pension liberation fraud guidance of February 2013 was issued. However, the pensions industry was aware of possible pension scams before the Scorpion warning was published.
41. The Council has agreed, in hindsight, that it transferred Mrs H's pension benefits under the Fund to a scam pension arrangement, and it seems highly likely that she has lost all or most of her pension benefits as a consequence, so there is no dispute that Mrs H has been financially disadvantaged as a result. This has clearly been a very distressing matter for her.
42. In a number of our previous determinations, (see for example Jerrard PO-3809 and Stobie PO-3105) we have said that February 2013 marked a point of considerable change in the level of due diligence expected of scheme trustees, managers and administrators when considering transfer requests. In complaints we have seen relating to events since that date, we have noted the increased levels of enquiry and due diligence that have been employed throughout the industry. Indeed, many of those complaints alleged that providers were delaying too long in making a legitimate transfer due to the obligations they had to fulfil.
43. Although that could amount to a valid maladministration complaint for undue delay, the overriding consideration for a scheme trustee or administrator must be to evaluate the transfer application carefully in order that a valid statutory transfer right is complied with and an invalid transfer application is legitimately withheld.
44. I accept the Council's point that in 2013 it was not compulsory for Mrs H to obtain advice from a financial adviser who was registered with the FCA.
45. However, the other points raised by the Council in its defence are based on the premise that the Council could not refuse to implement the transfer because Mrs H had a statutory right to transfer under the Act. That is incorrect. Mrs H was transferring from one occupational pension scheme to another occupational pension scheme. Under s.95(2) of the Pension Schemes Act 1993 (**the Act**), Mrs H could only take a cash equivalent transfer value from an occupational pension scheme to acquire "transfer credits" in the new arrangement.

46. Transfer credits are defined in s.181 of the Act, as rights allowed to an “earner”. Following Hughes, the earnings required do not need to come from the principal employer of the Scheme (Focusplay Limited), but there do need to be some earnings from employment. However, when the transfer was made Mrs H had no employment earnings as she was living off State benefits. This meant that she was unable to obtain transfer credits in the Scheme. Therefore, she was not an “earner” as defined.
47. The Council expressed the view that the Hughes judgment did not require the transferring member to have current earnings in order to qualify as an earner. However, as is clear from the judgment (and confirmed by a representative of my Office who was present throughout the hearing) there was a discussion in court about former employees of a scheme employer who had retired, but that was not Mrs Hughes’ situation and in the absence of full argument or clarity on how that point should be dealt with, the judge and the parties proceeded on the basis that in order to obtain transfer credits the applicant had to be a current earner from an employment of some sort. Paragraph 32 of the Hughes judgment reads “As it is agreed that Ms Hughes was an earner by reason of her earnings from another source or sources, it follows that she was entitled to require Royal London to transfer the cash equivalent...”. In contrast, Mrs H did not have any earnings. She lived off State benefits.
48. Therefore, Mrs H had no statutory right to transfer to the Scheme. Instead, the Council had a discretion whether or not to allow a requested transfer. The Council’s note on the completed transfer forms that “the transfer must proceed” strongly implies that the Council was unaware of the correct legal position and suspected a scam.
49. It is possible that a future case or a change in legislation may provide further clarity on the situation for those on benefits or others not in receipt of ‘earnings’ within the meaning of the Social Security Contributions and Benefits Act 1992. However, at this time, Mrs H’s statutory right to transfer had not been made out.
50. In the absence of a statutory right to transfer, the Council had a discretion whether or not to implement the requested transfer. As Mrs H was already a deferred pensioner, having left employment (unlike Mr N), and was age 59, it should have been clear to the Council that there might be an earnings problem. Therefore, in view of its suspicions, the Council should have made enquiries of Mrs H before deciding whether to allow the transfer, but it failed to do so.
51. The Council’s failure to recognise the correct legal position and, as a consequence, its failure to conduct further due diligence before making the transfer amounts to maladministration.
52. The type of analysis contained in our previous determinations and expected by the Pensions Regulator, and subsequently seen in practice in the pensions industry, is not present in the Council’s actions in this case.
53. If the Council’s pensions team had realised that it had a discretion whether or not to make the transfer, it seems likely that based on the Scorpion warning it would have

noticed several “red flags”: Mrs H was approaching her normal retirement age and was living on the South coast, but the employer running the Scheme was a steel stockholding company and was based several hundred miles away. Also, the Scheme was recently established. In that situation, one would have expected the Council to make an attempt, by phone or email, to explain its concerns to Mrs H and to point out the possibility that the Scheme could be a scam. Unfortunately, it failed to contact her at all and quickly processed the transfer request as though it had no choice in the matter.

54. For example, the Council did not ask Mrs H whether she had an employment connection with Focusplay, or why she wanted to transfer from the Fund to a new occupational pension arrangement established by a steel stockholder company located several hundred miles away.
55. As I determined in the case of Mr N, the respondent in the present case “should have done more”. I do not agree that the only thing that the Council did not do but could have done was to refuse the request; it could have asked questions.
56. I cannot be certain in hindsight how Mrs H would have reacted if she had received cautionary information from the Council in 2013. She may have gone ahead with the transfer in any event. On the other hand, she may have withdrawn her transfer request. In my view, having carefully evaluated the circumstances, it seems more likely than not, on the balance of probability, that she would have changed her mind and withdrawn her transfer request in those circumstances.
57. I say that for the following reasons:
 - Firstly, as the Council was aware, Mrs H had opted not to join the Fund in 1989, even though it was a generous defined benefit arrangement providing pension and life assurance benefits. It was not until April 2002 that she elected to join the Fund. This meant that when she left the Fund in 2007 her accrued benefits were much smaller than they would otherwise have been. This strongly suggests that she was not financially aware, and was susceptible to being taken advantage of.
 - Secondly, Mrs H told her representative that she intended to use the tax-free lump sum provided by the Scheme to buy a funeral plan, as she did not want to burden her children with that expense. This suggests that Mrs H was not seeking financial gain for herself, did not benefit herself from the transfer, and did not appreciate that a significant lump sum would have been payable by the Fund on her death, which could have paid for her funeral. Again, this demonstrates that she was not financially aware.
58. In my view, had the Council made contact with Mrs H when she submitted the transfer request, to explain the risks of leaving her existing scheme with its various protections; that the circumstances of her transfer request were unusual; and that the new scheme was unknown to the Council but would not have the same protections, she would in all likelihood have changed her mind.

59. Bearing these points in mind, it is my view that the Council's failure to contact Mrs H, express the risks and its concerns, and enquire into the matter further were crucial. The Council's actions constitute maladministration, falling below the standard required of a prudent pension provider, and have led to Mrs H losing all or most of her pension benefits. I consider that accordingly, Mrs H should be compensated by the Council.
60. Therefore, I uphold Mrs H's complaint, because the Council erroneously concluded that it had to make the transfer from the Fund to the Scheme, instead of making further enquiries and then considering how to exercise its discretion whether or not to permit the transfer.
61. I accept the point made by the Council that any remedy to be awarded to Mrs H should take into account any benefits that Mrs H has already received from the Scheme. Otherwise there would be double counting.
62. In addition, in my view there is a sufficiently strong link between the Council's maladministration and the distress caused to Mrs H to justify the award of a lump sum for her significant distress and inconvenience.

Directions

63. To put matters right, within 28 days of the date of this Determination, the Council shall:
 - (1) reinstate Mrs H's accrued benefits in the Fund, adjusting for any revaluation that has arisen since her transfer from the Fund to the Scheme in 2013, and allowing for the lump sum that Mrs H has received from the Scheme; and
 - (2) pay Mrs H £500 for the significant distress and inconvenience she has suffered as a result of the Council not undertaking more due diligence before it made the transfer payment.
64. If in future the trustees of the Scheme manage to retrieve some or all of Mrs H's pension fund for her benefit and provide the Council with satisfactory evidence that has happened, the Council shall be entitled to recover that amount from Mrs H.

Anthony Arter

Pensions Ombudsman
28 August 2019