

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

Applicant	Mr Mark Harrison
Scheme	Prudential Personal Pension Scheme (the Scheme)
Respondent	Prudential Assurance Company Limited (Prudential)

Subject

Mr Harrison complains that Prudential refused to act on his request to transfer his benefits from the Scheme to the Cheshire Food Services Pension Scheme.

Background

Pension liberation

1. This case is connected to what is known as “pension liberation”. 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 is also, at present, a limit of the amount that can 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. Principle 11 requires a firm to "deal with its regulators in an open and cooperative way".
23. 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" (FCA handbook, COBS 2.2.1).
24. 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, business and persons managing such schemes are not required to be authorised by the FCA.

Regulation

25. 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.
26. 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”

27. 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

28. 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."

29. The Pensions Regulator's guidance has since been updated (without major revision) but, of course, any changes significantly postdate the events to which this Determination relates.

The issue

30. 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.

31. I understand that there is 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.
32. 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.
33. 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

34. 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.

Mr Harrison's case - Material Facts

The transferring scheme

35. The Scheme was established by a Deed Poll dated 31 March 1988 by Prudential. Prudential is the scheme administrator of the Scheme and its activities are regulated by the FSA/FCA. The current rules of the Scheme were adopted by a deed of variation dated 9 May 2012.

36. The material rules of the Scheme are set out below.

“5.1 Transfers out of the Scheme

- (a) The Member may direct the Scheme Administrator to transfer the Member’s Fund to another Registered Pension Scheme or to a Qualifying Recognised Overseas Pension Scheme...
- (e) The transfer must be made by a direct payment between the Scheme Administrator and the scheme administrator or trustee of the other scheme...”

The receiving scheme

37. The Cheshire Food Services Pension (**the Cheshire FSP**) was established by a trust deed, dated 2 April 2013, between Cheshire Food Services Limited (**the Principal Employer**) and Michael Hart (**the Trustee**), a director of the Principal Employer.
38. The Rules were adopted by a Declaration of Adoption signed on 2 April 2013 by the Principal Employer. The Rules say:

“Part I – Scheme Structure and Operation

I Interpretation

...

“Adopting Deed” means the deed by which the Rules were adopted.

“Member” means:

- (i) a person admitted as a Member in accordance with Rule 16; ...

“Participating Employer” means the Principal Employer or any other employer which has been admitted to participation in the Scheme in accordance with Rule 11.2”

2 Constitution of Scheme and Fund

2.1 The Scheme is governed by the trusts, powers and provisions contained in the Rules....

2.3 The Rules shall in all respects be governed by and interpreted according to the laws of England...

- 4** 4.1 The persons specified for this purpose in the Adopting Deed may at any time by deed and subject only to any restrictions imposed by the Adopting Deed:

...4.1.2 appoint one or more persons to be new or additional trustees of the Scheme...

9 Scheme Administrator

- 9.1 The Trustees may from time to time appoint in writing one or more persons resident in the United Kingdom to act as Scheme Administrator. Where no such

appointment has been made, the Scheme Administrator shall be:

- 9.1.1 if the Rules took effect on the establishment of the Scheme, such of the General Trustees as are resident in the United Kingdom...

11 Employers

- 11.2 The Trustees may at any time by deed admit any other employer to participate in the Scheme as a Participating Employer provided that employer enters into a covenant with the Trustees in such form as the Trustees may require...

Part 2 – Membership and Benefits

16 Admission to Membership

- 16.1 The Trustees may at their absolute discretion admit as a Member:
 - 16.1.1 any employee of a Participating Employer
 - 16.1.2 any other person whose admission is in the opinion of the Trustees consistent with the Scheme's status as a registered pension scheme.

- 39. The rules relevant to benefits provide (in summary) that the fund attributable to the member (being the amount of contributions by or in respect of them, transfer payments, pension credits, and income and capital gains from those amounts) should be used to provide pension (and cash if required, within the permitted maximum) on or after age 55 other than in incapacity.
- 40. According to the records held at Companies House, the Principal Employer is an active UK based company incorporated on 29 September 2003.
- 41. Active SSAS Admin Limited (**Active SSAS**) was appointed as the Scheme Administrator by a deed, dated 2 April 2013, between the Trustee and Active SSAS. According to the records held at Companies House Active SSAS is an active UK based company incorporated on 3 April 2012.
- 42. The Cheshire FSP was registered with HMRC as a registered pension scheme on 2 April 2013. The registration was submitted by Active SSAS.
- 43. Mr Harrison was appointed as a trustee of the Cheshire FSP by a deed dated 20 May 2013 between the Principal Employer and Mr Harrison. The deed does not however appear to have been witnessed.

The transfer application

44. Mr Harrison was born on 29 June 1967 and was 45 when these events were set in motion. He was a contributing member of the Scheme from 1 April 1989 until 1 August 2002.
45. On 20 May 2013 Mr Harrison wrote to Prudential and said that he wanted to transfer the proceeds of the Scheme. His letter provided authority for Prudential to deal with Active SSAS as the administrator of the Cheshire FSP.
46. On 4 June 2013 Mr Harrison completed a transfer out authority form requesting a transfer of the funds from the Scheme to the Cheshire FSP. Active SSAS sent the transfer request to Prudential on 5 June 2013.
47. Prudential responded to Mr Harrison's request on 18 June 2013 and said that in order to proceed with the transfer they would require copies of the Trust Deed and Rules for the Cheshire FSP, a copy of the "View Current Scheme Details page from the Pensions Schemes Online", confirmation of registration with the Pensions Regulator and confirmation that the Trustee would be registering as a data controller with the Information Commissioners Office.
48. On 5 July 2013 Active SSAS sent Prudential copies of the Trust Deed and Rules of the Cheshire FSP and a print-out of the current scheme details from the HMRC website. The letter said:

"The scheme is registered with the Pensions Regulator and again we enclose a print out of the first page of the registered details. Unfortunately the Pensions Regulator logo did not print but the PSR number is shown.

Since the administration functions are performed by us as appointed Administrator it is not our opinion that the scheme or the Trustees need to register with the ICO. We have a pending application with ICO for entry on the Data Protection Register."
49. On 14 August 2013 Mr Harrison telephoned Prudential because he had not heard further from them. Prudential responded on 16 August 2013, having treated his call as a complaint, and acknowledged that they had received the information they had asked for on 10 July and offered compensation for the delay in responding to him. On the transfer itself, they said:

"After further investigation we decided that we would not be proceeding with the transfer. At this point we should have contacted you to let you know of our decision and to give you the reasons why.

Before making this decision we have undertaken appropriate checks as outlined by the pensions regulator, which have highlighted some concerns with regard to the proposed transfer, and indicate that the pension fund may be intended to be accessed prior to the permitted age (usually age 55). This is commonly known as 'Pension Liberation', which can be a serious matter for a customer and is often associated with potentially fraudulent activity.

Our concerns in your case are as follows:

- You are under age 55.
- Active SSAS Admin Ltd was only recently registered as a company.
- The pension scheme was only recently registered with HMRC..."

50. Mr Harrison responded to Prudential on 22 August 2013 and said:

"You have failed to provide any valid reason for your failure to transfer my benefits to my chosen scheme..."

If you believe I do not intend to invest my benefits within the range of permitted investments for the purpose of providing appropriate retirement benefits then please state so clearly and supply actual evidence in support rather than conjecture.

I have had the opportunity of discussing your letter with the Chair of the Trustees of the receiving scheme and would comment as follows:

1. The Cheshire Food Services Pension was established as a defined contribution scheme by one of the Directors of Cheshire Food Services Ltd who serves as Chair of the trustees.
2. Cheshire Food Services Ltd was registered in 2003 and has traded ever since.
3. The pension scheme was registered with HMRC on 2 April 2013 and was subsequently registered with the Pensions Regulator when it became required to be registered.
4. The scheme appointed an independent administrator who has been registered with HMRC as such since April 2012. The administrator is merely that and has made clear that they do not advise on investment and act on instruction from the Trustees subject to any investments being within the range of permitted investments.
5. The scheme now has multiple members and has had funds under investment since May 2013...

I appreciate there are rogue operators within the pensions industry. As far as I am aware and indeed you confirmed as much by telephone, there is nothing to suggest any[thing] inappropriate on behalf of the receiving scheme. I have not been induced to transfer my benefits in any way. I merely wish to take advantage of investment choices that will provide superior returns for my pension as is my right..."

51. Prudential responded on 5 November 2013 and said that they were not going to proceed with the transfer. The letter gave seven possible areas of concern which appear to have been derived from the Pensions Regulator's guidance "some or all of which may be specific to your own circumstances". They explained about the press releases warning against early release pension offers and included links to the TPR, HMRC and FSA websites.

Summary of Mr Harrison's position

52. Prudential's insinuation about pension liberation is entirely unsubstantiated. Prudential have not provided any evidence in support primarily because there is none.
53. He had not been coerced, cold called or in any way induced to seek the transfer. The Cheshire FSP was set up by a friend primarily for his own benefit. Mr Harrison was offered the opportunity to become a member to allow flexibility over his retirement investments and to transfer from an underperforming scheme. It is an occupational scheme, and whilst he is not an employee the scheme allows non-employees to become members, which is allowable.
54. Active SSAS has made clear to him that they will not allow him or the scheme in general to invest in anything other than an allowable investment.
55. When the Cheshire FSP was set up a deed was executed to appoint Active SSAS as the administrator. He was appointed as a trustee by a deed dated 20 May 2013.

Summary of Prudential's position

56. In their original statement to the Pensions Ombudsman's office Prudential said that their areas of concern were that Mr Harrison was under age 55, Active SSAS was only registered as a company on 3 April 2012 and the Cheshire FSP was only registered with HMRC on 2 April 2013. Further reasons were given during the investigation of the complaint.
57. Prudential told my office that they accepted that the Cheshire FSP was an occupational pension scheme. They say they will comply with valid instructions received to transfer to a scheme that is appropriately registered with HMRC but they are also required to follow regulatory guidance. In more recent correspondence, they accepted that their Trust Rules permit members to direct a transfer, provided it would not be an unauthorised payment.

58. Prudential say they had not received any information confirming that Mr Harrison is an employee of Cheshire Food Services Limited. He is not identified as one of its directors. If he is not an employee or a Director then they do not understand why he would be invited to join the pension scheme. They are aware of the tax rules, but consider non-employees should only be invited to join an occupational pension scheme in unusual circumstances. A typical feature of many of the schemes causing concern to the regulators is their willingness to accommodate transfer values for non-employees.
59. They say that the trustee of the Cheshire Food FSP is not registered with the Information Commissioners Office as a data controller and so they are concerned about the possible Data Protection implications if Prudential were to make the transfer. Prudential believe the trustee is unable to rely on an exemption provided to sole traders because it is clear that there is an intention there should be other members of the scheme.
60. Prudential say that before the transfer request they had no experience of Active SSAS as an administrator and they had not been able to find out any further information about them to establish their credentials and provide Prudential with reassurance. For example at the time the request was made they Active SSAS did not have a website. There is no mention of them on professional pension industry related websites and they are not members of the Association of Member Directed Pension Schemes that represents SSAS practitioners.
61. In correspondence with the Pensions Ombudsman's office, before they had seen the Deed referred to in paragraph 41, Prudential added that there was no evidence to substantiate that Active SSAS were appointed as Administrator for the Cheshire FSP. They said that Active SSAS were not mentioned in the Trust Deed and Rules for the Cheshire FSP and that if there was no other documentation appointing Active SSAS as Administrator then in accordance with Rule 9 of the Rules the Trustee was the Administrator.
62. Leading on from that they said that if the Trustee was the Administrator then it was not possible for Active SSAS to register the Scheme with HMRC and provide the declarations required during the registration process. They gave a reason for not transferring as being that they were therefore not certain that Cheshire FSP could be regarded as a registered pension scheme, and so if they were to make a payment it would be regarded by HMRC as an unauthorised payment.

63. Cheshire FSP is intended to be a small self-administered scheme with no more than 10 members. As such all its members should be trustees and able to direct how their pension monies are invested. The Trust Deed only appoints Michael Hart as trustee. There is no documentation appointing Mr Harrison as a trustee.
64. Cheshire FSP is regulated by the Pensions Regulator so the Pensions Regulator's guidance was relevant in that context. Also the FCA has been supportive of the Pensions Regulator's guidance.
65. The FCA requirement to cooperate with regulators includes the Pensions Regulator. There are also requirements in relation to maintaining systems and controls to prevent financial crime, and crime can be associated with pensions liberation.

Conclusions

66. As I note in paragraph 34, I must determine the matter in accordance with the law. So the primary question is whether Mr Harrison had a legal right to transfer. My approach is first to look at his rights under the Scheme and under statute. Also relevant are the tax and regulatory questions, but, in particular, he could not be deprived of a statutory right by regulatory or other guidance (and there is no suggestion otherwise from the Pensions Regulator).

The Scheme

67. Rule 5 of the Scheme makes a transfer to a registered pension scheme (or qualifying recognised overseas pension scheme) mandatory on request: it says "The Member may direct the Scheme Administrator to transfer the Member's Fund to another Registered Pension Scheme or to a Qualifying Recognised Overseas Pension Scheme".
68. That immediately places Prudential on the back foot in this case. On the face of it Mr Harrison had a contractual right to a transfer as a member of the Scheme..
69. Prudential said at one point that there was uncertainty that the Cheshire FSP could be regarded as a registered pension scheme on the ground that Active SSAS had not been properly appointed administrator and so the registration was suspect. I comment below on Prudential's general approach, but in fact Active SSAS had been appointed so the objection has no substance. The Cheshire FSP was a registered pension scheme and there was no reason to reject the request on the ground that it was not.

70. Having established that Mr Harrison has a contractual right to a cash equivalent, subject to it not being an unauthorised payment, I next consider his statutory rights and whether Prudential should have permitted a transfer to the receiving scheme, the Cheshire FSP, bearing in mind s18 PA 2004.
71. So is the Cheshire FSP an occupational pension scheme under s1 of PSA 1993? The tests for an occupational pension scheme were considered in some detail by Morgan J in *Pi Consulting (Trustee Services) Ltd v The Pensions Regulator and others* [2013] EWHC 3181(Ch). That case was decided in October 2013, after the initial events to which Mr Harrison's complaint relates but before Prudential's final refusal to him. It concerned 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. Mr Justice Morgan considered two tests 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 repeat 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 Cheshire FSP 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 Rules of the Cheshire FSP say that a "Participating Employer" means the Principal Employer or any other employer which has been admitted to participation in the Scheme in accordance with Rule 11.2" Rule 16 refers to admission to membership of "any employee of a Participating 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 Cheshire FSP therefore met the minimum requirement of the purpose test as it was "for the purpose of providing benefits to, or in respect of, people with service in employments of a description" in this case, employees and officers of Cheshire Food Services Limited or any other participating employers.
75. The Cheshire FSP also met the founder test. The founder of the Cheshire FSP was an active UK limited company and had directors who were presumably remunerated by Cheshire Food Services Limited when the Cheshire FSP was established. So the Cheshire FSP was, as it appeared to be, an occupational pension scheme. The next test is whether Mr Harrison's application required Prudential to use the cash

equivalent transfer value for securing transfer credits, being rights allowed to him as an earner (a person with remuneration or profit from an employment) under the rules of the Cheshire FSP.

76. That question is to some extent bound in with my previous finding. Under the definition of “Participating Employer” in the Cheshire FSP rules, any employer would do. Mr Harrison is not claiming to be in an employment “of a description” in relation to the Cheshire FSP. In fact in his submissions Mr Harrison says he is not an employee but that the scheme was set up by a friend primarily for his own benefit and that he was offered the opportunity to join the Cheshire FSP to take advantage of more flexible investment opportunities. I find therefore that Mr Harrison has not received any remuneration from any employer that is connected to the Cheshire FSP.
77. Although there is nothing in the legislation that expressly states that his status as an earner had to be in relation to a scheme employer, 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.
78. So I find that Mr Harrison would have needed to have been an earner in the context of an “employment of a description”. There were no such employments, and he had no relevant earnings.
79. For the reasons given above I find that Mr Harrison’s request for a cash equivalent transfer value was not for securing transfer credits - and therefore he would have had no statutory right to take a cash equivalent transfer value.

The Tax legislation

80. 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).

81. The relevant requirements for Mr Harrison's intended transfer to be a "recognised transfer" were that it was to be held for the purposes of another registered pension scheme or to represent rights under it, in connection with Mr Harrison as a member of that scheme.
82. The Cheshire FSP 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 Cheshire FSP or to represent rights under it – or that Mr Harrison's membership of the Cheshire FSP was in doubt.
83. As to the first matter Active SSAS asked for the transfer to be made direct to the Cheshire FSP bank account, provided the appropriate details and said that the payment was to be invested for Mr Harrison's benefit. There is no evidence that there would then have been an unauthorised payment out of the receiving scheme and Mr Harrison insists the opposite.
84. Turning to the second, 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, 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" Mr Harrison. He was not presently accruing benefits, but to the extent that the Cheshire FSP would have been able to accept a transfer in respect of him, there were presently arrangements made for the accrual of benefits – even if actual accrual was contingent on a transfer¹.
85. But anyway, it would have required very little effort for Mr Harrison to accrue benefits quite independently of the transfer. A modest contribution to the Cheshire FSP was all that might have been required.
86. There was no reason to object to the transfer as being itself an unauthorised payment, therefore.

¹ Transfers to arrangements such as "section 32" policies and deferred annuities are presently permitted by HMRC and this reading of the definition is consistent with that. If the definition was read so as to only include as members those who were actually accruing benefits, then such transfers would not be authorised payments.

Regulatory matters

87. As I observed earlier, had a regulator's guidance or rules been inconsistent with statutory rights, then clearly those rights would have taken precedence.
88. The application to transfer was made after the action pack of February 2013 referred to in paragraph 26. The references in the action pack 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 at all. But the guidance was endorsed by the FSA, so it is understandable that Prudential, in managing the Plan, would have had regard to it – as well as to the earlier guidance for members issued by both the Pensions Regulator and the FSA. (I do not think that the fact that receiving scheme would have been regulated by the Pensions Regulator, as Prudential point out, adds anything to their obligations, nor does a broad obligation to cooperate with regulators generally.)
89. The only directly relevant regulatory and general legal obligations would have been for Prudential to act with integrity, honestly and fairly, in the best interests of Mr Harrison (see paragraph 23) and consistently with the duty of care that they owed him. Mr Harrison was adamant that he wanted to transfer. Prudential did not give acting in his best interests as the reason for refusing the transfer, instead relying on the regulatory guidance and tax legislation (though I do not find the explanation satisfactory, as I explain below).

Overall conclusions

90. In the foregoing paragraphs I have subjected the Cheshire FSP and Mr Harrison's position in relation to it to detailed analysis in order to establish whether it was a proper destination for a transfer to which Mr Harrison had a legal right. It fails the statutory test on a number of grounds.
91. However, Mr Harrison had a separate contractual right under Prudential's Scheme Rules. The transfer request he made would not have constituted an unauthorised payment. So, Prudential should have acceded to it, once they completed their review of the receiving scheme's documentation.

92. Prudential 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. They initially failed to tell Mr Harrison that they had decided not to make the transfer – leaving it to him to enquire.
93. Then, in August 2013 they told him that they would not uphold a complaint that they had withheld the transfer. This was the first time that they had mentioned any concern about pension liberation, Mr Harrison had had no opportunity to argue his case, and Prudential gave no specific reasons. They mentioned three generic concerns, without saying why they were particularly relevant to his case. After Mr Harrison had objected, they again only gave generic reasons.
94. In submissions to the Pensions Ombudsman Service, Prudential said they had seen no evidence that Mr Harrison was employed by Cheshire Food Services Ltd or that he was a trustee, nor had they seen any evidence that Active SSAS had been appointed as administrator. But they had not asked about any of those matters. If they had, they would have discovered that their concerns in relation to the last matter at least were unwarranted.
95. Even if there had been a genuine concern about Active SSAS' status, I do not think that Prudential should have automatically regarded the Cheshire FSP's registration as invalid. It might have been suspect. Perhaps Prudential could have brought the matter to HMRC's attention, but unless it was withdrawn, the Cheshire FSP was a registered pension scheme.
96. Prudential said to Mr Harrison that they were not able to satisfy themselves that the transfer to the Cheshire FSP would be a recognised transfer. If that was their actual justification then I find that it does not adequately acknowledge their responsibilities. In substance Mr Harrison was attempting to exercise a statutory and contractual right and Prudential were declining to comply with his wishes. Prudential did not ever tell him that they did not think he had a statutory or contractual right. It may be that they thought that went hand in hand with the transfer not being a recognised transfer – see also paragraph 97. But I cannot see why the burden lay with Mr Harrison to prove that the transfer was recognised and/or that he did have a statutory or contractual right. In my view, reflecting the different balance of power between the parties, Prudential needed to satisfy themselves that he did *not* have a right to the transfer.

97. If Prudential had followed the correct approach, I consider that they should, by 31 July 2013, have reached the decision that Mr Harrison was entitled to exercise his contractual right to transfer to the Cheshire FSP. I shall therefore direct that Prudential provide Mr Harrison with a cash equivalent transfer value within the timescale specified below and upon receipt of all the relevant requirements they are to pay, to an arrangement which satisfies the prescribed requirements, the higher of a transfer value backdated to 31 July 2013 with interest and the current transfer value.

Directions

98. I direct that within 14 days of Mr Harrison requesting a current value to transfer to the Cheshire FSP, if received within 56 days of this Determination, Prudential are to pay the transfer value to the Cheshire FSP. It shall be the higher of:
- the transfer value as at 31 July 2013, plus simple interest at the average rate for the time being payable by the reference banks from that date to the date of payment,
 - and the transfer value at the date of payment.



Tony King
Pensions Ombudsman

17 April 2015