

Ombudsman's Determination

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| Applicant | Mr X |
| Scheme | Capita Oak Pension Scheme |
| Respondent | Imperial Trustee Services Ltd (ITSL) |

Subject

Mr X complains that ITSL has refused to act on his request to transfer his benefits out of the Capita Oak Pension Scheme (the **Capita Oak Scheme**).

Background

Pension liberation

1. This case is connected to what is known as “pension liberation” or “pension scams”. Currently the issue has a high profile in the UK pensions industry and media so this and other decisions concerned with the same matter will be of wide interest.
2. To begin with the basics: present tax legislation is designed to prevent access to pension funds before the age of 55 (other than in ill-health or as benefits following death) as part of the policy that encourages pension saving by giving tax advantages, with penalties if the advantages are abused by using funds other than for authorised purposes. There was also, at the material time, a limit on the amount that could be taken as cash at any age.
3. The practice of pension liberation involves a transfer away from a genuine pension scheme intended to allow access to a scheme member’s pension savings before the age of 55, or to more cash than would normally be allowed. It is recognised as being contrary to the broad policy of encouraging pension savings and is of concern to the regulatory and tax authorities and those responsible for national pension policy. The businesses active in persuading people to indulge in such arrangements are likely to be doing so with their own financial gain put before the long term interests of the people with whom they deal. Charges made by businesses for making such arrangements are high and significant tax penalties that a member is

likely to suffer may not have been explained. Some transfers have been fraudulently diverted to the advantage of the persons advertising the schemes and there is a suggestion of the involvement of organised crime in some pension liberation schemes.

4. Pension liberation is recognised in statute in sections 18 to 21 of the Pensions Act 2004, under which pension money is defined as having been liberated where a transfer value is paid from a pension scheme on the understanding that it would be secured to be used in an authorised way by the recipient, but it has not been. The Pensions Regulator is given power to make restraining and repatriation orders and the courts are given powers to order restitution.

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. 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.

8. An application, for the purpose of the time limit above, is one that requires the trustees or managers of the scheme to use the cash equivalent transfer value to acquire credits in an occupational or personal pension scheme which meets prescribed requirements under legislation and the trustees or managers of which are able and willing to accept payment.

Mr X's case - material facts

9. Mr X has transferred from the National Health Service Superannuation Scheme (Scotland) to the Capita Oak Scheme. The Capita Oak Scheme, the advice given in connection with it and the investments under it have recently been the subject of media coverage. I am aware of that coverage, but I deal here purely with the facts in Mr X's case.

Mr X's transfer from the National Health Service Superannuation Scheme (Scotland)

10. Mr X's complaint is not about the decision to transfer to the Capita Oak Scheme, but what happened gives context to his later attempt to transfer away from the Capita Oak Scheme, about which he has complained.
11. Mr X was an active member of the National Health Service Superannuation Scheme (Scotland) (the NHS Scheme).
12. In April 2012 Mr X authorised "thepensionspecialist.com" to act on his behalf in obtaining information about his NHS Scheme benefits. The authorisation form describes thepensionspecialist.com as being a trading name of Douglas Baillie Ltd, a firm authorised by the then Financial Services Authority. The Scottish Public Pension Agency (SPPA) who administer the NHS Scheme received the form under a covering letter which purported to be from The Pension Specialist LLP, an appointed representative of Douglas Baillie Limited. (I see from the Financial Conduct Authority's register, however, that The Pension Specialist LLP ceased to be registered as an appointed representative on 25 May 2011.)
13. I mention the regulatory matters for background only. Nothing turns on them because the giving of advice in relation to occupational pension schemes, such as the NHS Scheme and (apparently) the Capita Oak Scheme is not a regulated activity.
14. The SPPA gave thepensionspecialist.com an estimate of the transfer value on 26 June 2012. In response to a request for discharge forms they explained that Mr X was still an active member of the NHS Scheme and that he would need to opt out before he could transfer.

15. SPPA's notes say that a financial adviser (not identified, but presumably thepensionspecialist.com) called in August 2012 asking if they had received an opt-out form (they had, but it had not been signed by his payroll). They also say that Mr X called in December saying he had opted out and wanted to transfer and the note records that he knew that the request had to come from the receiving pension provider.
16. Mr X has provided copies of information and forms that relate to the Capita Oak Scheme. I have not seen the signed and dated copies of all of the forms, but they will have been completed at around the same time. On 5 December 2012 Mr X signed a declaration on "Capita Oak Pension Scheme" headed paper saying that he had decided to transfer to the Capita Oak Scheme and asking the recipient to deal with the Capita Oak Scheme as necessary to process that instruction. The declaration was at the foot of a letter from the Capita Oak Scheme which was received by SPPA on 4 February 2013 and which requested forms and information for the transfer value to be facilitated.
17. There is also a form giving ITSL authority to act on Mr X's behalf. An application form for the Scheme authorises deduction of a 5% fee from his member account on joining the Capita Oak Scheme, and various other deductions.
18. On 20 February SPPA told the Capita Oak Scheme that the estimated transfer value was £367,601.81 and provided forms, including a declaration to be signed by Mr X that he had "been made aware of the implications of transferring to a UK non contracted out Defined Contribution scheme" as well as a "Pension Liberation Factsheet".
19. The signed forms were returned and on 14 March SPPA wrote to the Capita Oak Scheme saying that a BACS payment would be made of £367,601.81.
20. Mr X says that he was told that his investment in the Capita Oak Scheme would be in Storefirst Limited, a large self-storage firm in the north of England. Storefirst Limited was offering an 8 to 12% return on investments and therefore it seemed a good investment. He also says that he received a "non-repayable loan" of £17,500.
21. The opening unit statement issued by ITSL shows that a 5% initial charge of £18,380.09 was deducted from the transfer value.

22. Around the same time ITSL sent an undated letter to Mr X saying:

“The Principal Sponsor of the Scheme is RP Redplant Limited. Other companies or bodies can become Participating Bodies under the Scheme.

The Scheme is an occupational pension scheme. The Scheme is a Registered Pension Scheme...

The Scheme is managed by Imperial Trustee Services Limited (“ITSL”). ITSL is also the Administrator of the Scheme...

Copies of the governing documents of the Scheme are available to Members...

Admission to membership is at the discretion of the Principal Sponsor and is subject to terms and conditions. Members can terminate membership by giving one months’ notice in writing addressed to ITSL...

For members who leave the Scheme before taking benefits, applications may be made for a transfer of the value of the Member’s account. You should do this by writing to the ITSL...”

Mr X’s attempt to transfer from the Capita Oak Scheme

23. On 29 July 2013 Mr X wrote to ITSL and said “I am writing in order to facilitate a transfer value of the above fund...”. He did not say where he wanted the transfer to go, but said that he intended to appoint an independent financial adviser to help.
24. Mr X sent a follow up letter on 23 August 2013 chasing a response to his letter of 29 July 2013. He said that his adviser (a Mr Creevy of Financial Advisers Scotland) had also contacted them without success.
25. Mr X attempted to contact ITSL by phone and in writing on several further occasions but has not received a response.

ITSL

26. ITSL has been invited to respond to the allegations brought against them but has failed to respond directly to the Pensions Ombudsman Service.

27. Towards the end of the investigation we were contacted by Downs & Co, a firm of Chartered Accountants in Bromley, Kent who say they have been requested by a Mr Payne, who they say is the sole director of ITSL, to investigate the financial affairs of the Capita Oak Scheme. Their submission to us about the transfer only says that “9.8 million was invested in storage pods with a company called Store First Limited...As the entire scheme was invested in these pods it is impossible at this moment of time for any transfer to be made on behalf of Mr X.”

Conclusions

28. Mr X has opted out of, and transferred away from, a secure and generous public sector scheme. There is little doubt that it was against his best interests to do so. He transferred to the Capita Oak Scheme, which is of a type that is designed to avoid regulatory obligations that would otherwise limit scope for abuse and/or bad advice. He apparently did so in search of high investment returns and with the inducement of a cash sum. I do not know what has happened to the assets he transferred. They may or may not be secure, though he is very rightly concerned that they are not.
29. However, I am not dealing with advice to transfer to the Capita Oak Scheme. The matter Mr X has brought to me is his inability to get the money out of the Capita Oak Scheme now.
30. The primary question is whether Mr X had a legal right to transfer out of the Capita Oak Scheme. My usual approach would be to look at his rights first under the Capita Oak Scheme and then under statute. Mr X has told us that he has never seen the Capita Oak Scheme’s governing documents. No response to my investigator’s enquiries has been forthcoming from ITSL and I am not therefore able to reach any sort of conclusion as to whether Mr X has a freestanding right under the Capita Oak Scheme to a transfer or whether there might be an element of discretion involved. But in any event whatever the transfer provisions of the Capita Oak Scheme are Mr X cannot be deprived of a statutory right to a transfer, if he has one.
31. So I move on to whether Mr X’s application met the statutory requirements for a request for a cash equivalent transfer value.
32. Section 94 of 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. 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 and 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 in this case.

33. In the information provided to Mr X the Capita Oak Scheme is referred to as an occupational defined contribution scheme. The letter is addressed to Mr X as a member of the scheme. So on ITSL's own account, Mr X was a member of an occupational scheme.
34. He wrote to the trustees of that occupational scheme and asked for a cash equivalent transfer value. However to qualify as an application for the purpose of the six month time limit for payment it needed to require ITSL to use the transfer value to acquire credits in an occupational or personal pension scheme the trustees or managers of which were able and willing to accept payment. Strictly Mr X's request did not meet the test.
35. But it was unquestionably maladministration not to respond – and it is the lack of response that stopped the process in its tracks. I have absolutely no doubt that Mr X would have made a full transfer request, and acquired a statutory right to payment, had he not been ignored.
36. Mr X initially wrote on 29 July 2013. I find that if he had had a response he would have made a full request within a month. If he had, then although there was not an express obligation for ITSL to pay it before the six months was up, an unwarranted delay could amount to maladministration. There were no particular features of the transfer request that might have caused ITSL to have requested further information or have felt the need to take advice of any sort and therefore I see no reason why the transfer could not have been paid by the end of September 2013.
37. I shall therefore direct that ITSL provide Mr X 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 30 September 2013 with interest and the current transfer value.
38. I make that direction without any great confidence that it will be complied with immediately. If ITSL do not comply, Mr X may attempt to enforce the direction through the courts, but sadly even if ITSL respond he may find that some or all of the money is no longer there.

Directions

39. Within 14 days of Mr X requesting a transfer value to a named scheme that is prepared to accept it, ITSL are to pay the transfer value to that arrangement. The transfer value shall be the higher of:
- the cash equivalent transfer value as at 30 September 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 correctly calculated cash equivalent transfer value at the date of payment.

Tony King
Pensions Ombudsman

15 December 2014