

Ombudsman's Determination

Applicant	Ms Lynda Berry
Scheme	Portigon UK Pension Plan (the Plan)
Respondent(s)	Trustees of the Portigon UK Pension Plan (the Trustees)

Complaint summary

Ms Berry has complained that the Trustees of the Plan refused to transfer her brother's funds to his SIPP even though they knew his life expectancy was less than 12 months.

Ms Berry wants the Trustee's to pay her the difference between what she has received following Mr Berry's death and what would have been paid as a transfer.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld:

- the Trustees exercised their discretion not to accept Mr Berry's transfer request;
- their decision to offer immediate retirement to Mr Berry was not perversely reached;
- following Mr Berry's death, lump sum benefits were paid to Ms Berry in a timely manner.

Detailed Determination

The Plan's Rules

Rule 11.1 ('Right to transfer or buy-out') says:

"A Member who leaves Service with a preserved pension at least a year before Normal Pension Date can require the Trustees to use the cash equivalent of his or her benefits (including death benefits) ...to acquire rights under another occupational pension scheme or a personal pension scheme, in accordance with the Transfer Value Laws."

Rule 30.1 ('Commutation because of serious ill-health') says:

"The Trustees may allow a Member who is exceptionally seriously ill (so that life expectancy is very short) when his or her pension starts to give up the whole of the pension (except any GMP) for a lump sum. The Trustees will convert pension to lump sum on a basis agreed between the Principal Employer and the Trustees, and acceptable to the Inland Revenue. The choice will not affect any pensions payable on the Member's death."

Rule 8.3 ('Member dies within 5 years after pension starts') says

"If the Member dies within 5 years after starting to receive a pension, the benefit will be equal to the pension payments which would have been made during the remainder of the 5-year period if the Member had not died, discounted for early payment at a rate decided by the Trustees after considering advice from an actuary."

Material Facts

1. Mr Berry had a preserved pension in the Plan. In 2008, at age 60 (his normal retirement age) the Trustees exercised discretion and consented to his request to defer retirement.
2. In October 2010 the Plan's principal employer, WestLB AG, now called Portigon AG (**the Bank**) wrote to all deferred members offering an enhanced transfer value (to reduce the size of the Plan and potential financial risks for the Bank in sponsoring the Plan). The letter said:
 - the offer was "on a first come, first serve basis" as funds made available by the Bank to cover enhancements were limited;
 - the Bank had selected O&M Financial Services Ltd (**O&M**) to provide financial advice to members for the transfer exercise (the cost being met by the Bank);
 - a comprehensive offer pack would be issued at the beginning of November.
3. Following this communication, it was highlighted by the Plan's actuary that some of the deferred members written to had less than one year to their normal retirement date and therefore did not have a statutory right to a transfer of benefits. The Bank and Trustees

agreed that such members should continue to be included but if a transfer request was made it would be considered individually in conjunction with the financial advice the member had received.

4. In December 2010 a further letter was sent which quoted Mr Berry a standard transfer value (which was reflective of the fact that he was past his normal retirement date) of £173,464. Mr Berry was notified that:
 - if he wanted the Bank to cover the cost of IFA advice he needed to appoint O&M by 14 February 2011;
 - forms to effect the transfer must be returned by 28 February 2011.
5. The letter also said:

“You are able to request a standard transfer value or transfer out of the Plan at any time up until a year prior to your normal retirement date (subject to the consent of the Trustees and Bank if you are within one year of normal pension date)”
6. A third letter was issued on 25 January 2011 after the Bank became aware that some members had not received the second letter.
7. Mr Berry registered his interest with O&M in February 2011. Later that month O&M notified Mr Berry that they could not deal with his case (as he wanted to take immediate benefits and they could not give him retirement advice).
8. On 3 March 2011 Mr Berry wrote to the Trustees:

“...there is no enhanced transfer value but we wish to transfer the current pension scheme with WestLB to another provider.

We signed the relevant forms to your advisor O & M Systems to provide advice and are now being informed that they are unable to inform us further on this matter.

Unfortunately, on 22nd December 2010 we were diagnosed ...as having a non operable malignant pancreatic cancer...

O & M Systems suggest to us that we should raise this issue with [the] Trustees for a lump sum at the [T]rustees discretion in order that we can regulate our pension sums on advance of death. In this respect I enclose the Mercer Transfer Out Member Statement highlighting the sums involved.”
9. Mr Berry additionally enclosed details of two AVCs (respectively with the Prudential and Equitable Life).
10. On 8 March Mercer replied on behalf of the Trustees informing Mr Berry that the Trustees had asked them to provide him with an immediate retirement quotation (which they would shortly issue) and mentioned that if his life expectation was less than 12 months HMRC would allow his Plan benefits to be paid as a cash sum. A form was

enclosed for completion by Mr Berry if this applied to him and he was requested to provide medical confirmation of his condition.

11. Mr Berry wrote to Mercer thanking the Trustees for their comments on HMRC's position and enclosed a copy of his letter to his Consultant requesting confirmation of his medical condition. Mr Berry subsequently submitted a statement from his Consultant to the Trustees on 19 March 2011, which advised that Mr Berry's life expectancy was likely to be not more than 12 months.
12. Two days later Mercer wrote to the Consultant requesting confirmation of Mr Berry's condition and life expectancy.
13. On 30 March Mercer wrote to Mr Berry confirming receipt of the Consultant's medical report and said the Trustees would be considering his case when they were next scheduled to meet on 12 April 2011.
14. At the Meeting the Plan's actuary notified the Trustees:
 - Mr Berry was not entitled to a statutory transfer value as he had passed his normal retirement age;
 - on the current standard transfer value basis his transfer value would be £190,000.00 (plus AVC funds of approximately £80,000.00);
 - the Trustees had three options:
 - first, exercise discretion and allow Mr Berry to transfer his benefits as he had requested;
 - second, commute his pension on grounds of serious ill health (providing an estimated lump sum of £160,000 based on normal mortality tables); and
 - third, offer Mr Berry immediate retirement (providing an estimated tax free cash of £40,000 and residual pension of £6,000 based on normal health guaranteed for 5 years);
 - in making their decision the Trustees should take into account the rights and interests of all the members;
 - allowing commutation of benefits based on normal health knowing that a member was seriously ill would adversely affect the security of other members' benefits and set a precedent whereby any deferred pensioner over NRA who fell seriously ill could potentially ask to be treated on the same basis;
 - Mr Berry's pension, taking into account his shortened life expectancy, was approximately £8,000.

15. The Trustees decided that as Mr Berry had passed NRA he should be offered the third option.
16. On 27 April 2011 Mercer wrote to Mr Berry informing him of the Trustees decision. Among other things they said:
 - the transfer value he had been offered was initiated and supported by the Bank for a limited time period, which had now expired;
 - the Trustees were required to act in accordance with the Trust Deed and Rules, any overriding legislation and in the interests of the Plan's members;
 - after taking into account advice from the Plan's Actuary and the actuarial assumptions on which the Bank paid contributions to the Plan the Trustees had decided not to exercise their discretion to allow a transfer of his benefits;
 - that payment of his pension benefits could commence at any time;
 - in the event of his death before commencing his pension it would be assumed that he had retired the day before and spouse's benefits (including payment in respect of the 5 year guarantee) would be payable;
 - his AVC funds would be paid as a cash lump sum.
17. The letter enclosed a retirement quotation based on Mr Berry's pension commencing on 1 May 2011 and notified him of what was required if he wished to proceed with taking his benefits.
18. Mr Berry disputed the Trustees decision in a letter of 6 May. The Trustees say Mercer told them that they did not receive Mr Berry's letter until Mr Berry's accountants wrote to Mercer on 27 May enclosing a copy it.
19. The next day Mr Berry died. He was not married and had no children.
20. In July 2011 Mercer:
 - notified Ms Berry (the executor of her late brother's estate and sole beneficiary in Mr Berry's Will) that the Trustees had decided to pay her a discretionary lump sum of £40,529.32 (representing the value of Mr Berry's five year pension guarantee, on the basis he had retired the day before he died, less actuarial discount for future investment returns), plus the return of his AVC funds estimated to be £16,658 (from Equitable Life) and £66,969 (from Prudential);
 - asked Ms Berry to forward her original birth certificate and enclosed a bank mandate for her to complete if she wanted the payment to be made direct to her bank account;

- notified the Solicitors instructed by Ms Berry in the administration of Mr Berry's estate that the discretionary benefits payable from the Plan did not form part of the estate and therefore were not subject to inheritance tax;
21. Ms Berry asked AON to look further into the reasons why Mr Berry's pension was not transferred prior to his death. Mercer recapped what had occurred to AON.
 22. On 13 October 2011 Mercer notified AON that they would wait to hear from them or Ms Berry before settling the death benefits.
 23. Later that month Mercer asked AON to confirm Ms Berry's position. AON replied that she was considering the information that they had provided her with and asked Mercer to bear with it for the time being. Mercer next chased AON on 2 December 2011.
 24. On 23 January 2012 Ms Berry notified Mercer that she had a number of unanswered questions (including why the transfer offer of £173,464 that Mr Berry had accepted did not proceed and why did it take so long to refer to the Trustees when it was known that her brother was dying) and would be consulting with her colleagues in the press, television and radio, together with her lawyers. She said she would be out of the country until 3 March after which she would be in contact.
 25. On 2 April 2012 Ms Berry wrote to Mercer saying that she was still investigating the matter and would be in touch shortly.
 26. Mercer replied on 12 April enclosing a copy of their letter to Mr Berry of 27 April 2011 to explain why the transfer had not proceeded and confirmed that after receiving medical evidence on 24 March 2011 the Trustees had considered Mr Berry's case at their next meeting on 12 April 2011. Mercer again informed Ms Berry that they would arrange payment once they received her original birth certificate.
 27. On 28 May 2012 Mercer asked Ms Berry if she required any further information in order to settle the benefits in respect of Mr Berry.
 28. The same month Ms Berry authorised financial adviser Towry Ltd to obtain information about the Plan. Towry Ltd duly wrote to Mercer on 31 July 2012 requesting among other things a copy of the Plan's Booklet and the last benefit statement issued to Mr Berry.
 29. Mercer replied on 9 August enclosing a copy of the Booklet, confirmed Mr Berry's preserved pension, the discretionary lump sum that the Trustees had decided to pay Ms Berry, the AVC fund values payable and that they still awaited sight of Ms Berry's birth certificate and confirmation of her bank details to arrange the payment.
 30. On 16 October Mercer wrote to Towry Ltd asking whether any progress had been made to enable settlement of the discretionary lump sum to Ms Berry.

31. Mercer wrote to Ms Berry on 22 November notifying her that if the discretionary payment was not made to her within 2 years of her brother's death then it would be subject to tax as an unauthorised payment. Mercer notified Ms Berry that if she did not return the bank mandate by 11 February 2013 a cheque payment would be arranged.
32. Ms Berry emailed Mercer on 30 November that no cheque should be issued in February, she was finalising her research and asked for the person to write to make a formal complaint and a spokesman for a potential interview on radio and television.
33. At the end of January 2013 Mercer replied providing contact details for their press officer, TPAS' contact details and informed her that the Plan Trustees were fully aware of the position. Mercer again informed her of the death benefit payable and that tax charges would apply "to both you and to the Plan" if the payment was not made within two years of Mr Berry's death.
34. On 5 March Ms Berry requested confirmation of the possible tax charges, which Mercer advised on 8 March and said that they were making arrangements to pay the total death benefit to her before the two year deadline elapsed. Ms Berry said no payment should be made and that she would be in touch very soon.
35. On 11 March Ms Berry requested the Plan's particulars. Mercer provided her with a copy of the Trust Deed and Rules.
36. Later that month a financial journalist emailed the Bank's Executive Director that unless they provided a full explanation of their actions towards Mr Berry or paid into Mr Berry's estate the transfer value that he was offered they intended to go to print about the matter. About the same time Ms Berry contacted TPAS.
37. On 25 March the Plan Trustees emailed Ms Berry to suggest a meeting to address any outstanding questions she had and to communicate in full their decision on the payment of benefits due to her. A meeting was arranged for 8 April 2013.
38. On 2 April TPAS wrote to the Plan Trustees requesting various information including any correspondence with Mr Berry during 2011, the Trustees reasons for declining his transfer request and details of the process they undertook in making their discretionary decision.
39. At the 8 April meeting the Trustees explained their position, including:
 - the correspondence issued to Mr Berry relating to a transfer was made by the Bank not the Trustees and had only recently been seen by the Trustees;
 - they were not aware of the seriousness of Mr Berry's illness until early March 2011;
 - they had dealt with the matter reasonably in all the circumstances.

40. The Trustees offered to prepare a cheque to be signed after the meeting to settle the AVC funds as their sum was not disputed. Ms Berry declined the offer.
41. The next day the Trustees emailed Ms Berry. Among other things, they restated that they were prepared to settle the AVC cash sums immediately and asked Ms Berry what she considered to be the next steps to progress discussions to finalise the settlement (of the total death benefits payable).
42. On 11 April, having discussed with TPAS that acceptance of the AVCs would not jeopardise her case, Ms Berry notified the Trustees that she would appreciate a cheque for the AVC funds and would provide her bank details separately.
43. After receiving her bank details on 23 April the Plan Trustees arranged for the AVC funds to be settled. £85,926.33 was credited to the bank account on 24 April 2013.
44. On 29 April the Chairman of the Trustees wrote to TPAS summarising the events thus far and saying that they were awaiting feedback from Ms Berry on how to proceed in this matter and continued to highlight that the Trustees remained willing to settle the death benefits payable.
45. As the dispute was ongoing, the Chairman of Trustees wrote to Ms Berry on 7 May 2013 suggesting that she accept the death benefits payable to avoid an unauthorised payment tax charge and that any further actions could be decided once feedback had been received from TPAS.
46. £41,782.80 (Mr Berry's pension for 5 years, undiscounted) was paid on 9 May 2013. Ms Berry reduced the mortgage on her late brother's property by £200,000 on 13 May 2013.
47. On the issue of their decision to offer Mr Berry a retirement pension, the Trustees notified TPAS that a transfer was not offered because "the risks borne by the remaining members of the Plan would be inequitable, if the transfer value was not reduced in light of the medical evidence, due to the fact that the Plan was materially underfunded on both an ongoing and solvency basis". Similarly a serious ill health lump sum was not offered since it was clear that "any calculation of a cash commutation sum taking into account of all the relevant evidence provided in the meeting of 12 April 2011 would severely reduce the total sum payable. Taking account of the above the Trustees felt it was appropriate for Mr Berry to be offered all of the protections afforded by the Plan by drawing his pension."
48. With the assistance of TPAS Ms Berry invoked the Plan's internal dispute resolution (IDR) procedures. It was agreed that the consideration should go straight to IDR stage two.
49. At IDR stage two the Trustees reconsidered their original decision (reached at the 12 April 2011 meeting with Mercer) and concluded:

- in view of his age and deferred retirement status Mr Berry did not have a statutory right to request a transfer of his pension benefits;
- it would not have been appropriate for the Trustees to exercise discretion and allow a transfer value assuming normal mortality (as the Scheme was materially underfunded);
- clause 30.1 of the Plan's Rules did not give the Trustees discretion to offer cash commutation until such time as the member had started his or her pension;
- cash commutation based on normal life expectancy was not appropriate in the case of serious ill health;
- if cash commutation based on reduced life expectancy had been offered it would have been reasonable to limit the sum to the 5 years pension guarantee (which applied if Mr Berry's pension had been put into payment);
- while the Trustees could have limited the amount to reflect Mr Berry's life expectancy (of less than 12 months) they recognise that the Plan would have paid a lump sum based on the 5 years pension guarantee;
- the option given to Mr Berry (to commence the payment of his pension) was therefore the correct decision, albeit the letter issued to Mr Berry could have explained more fully the reasons for the Trustees decision;
- the chronology of events following Mr Berry's letter of 3 March 2011 shows a timely response. Once the Consultant's opinion had been received the Trustees considered Mr Berry's request at the next scheduled meeting on 12 April 2011. A meeting could not be held before then as the Chairman of the Trustees was on jury service from 14 to 25 March and the Plan actuary was on holiday from 30 March to 10 April.

50. In response to Ms Berry's claim that her complaint was not addressed for nearly 2 years after her brother's death the Trustees said:

- throughout this period Ms Berry and various advisors sent a number of requests for information which Mercer provided;
- following an escalation of the matter the Trustees had a face to face meeting with Ms Berry, but no specific complaint was set out until the IDR stage 1 application;
- however, it was noted that Mercer failed to adequately respond to Ms Berry's request of 30 November 2012 to be directed to the correct person to make a serious formal complaint and did not provide a copy of the Plan's IDR procedures;

- the Trustees have now strengthened procedures with Mercer in terms of escalation and reporting of non-routine member issues.

51. TPAS then complained on behalf of Ms Berry about the time taken to pay out the AVC funds and 5 years' worth of pension. TPAS explained that Ms Berry was paying the mortgage on Mr Berry's house and on receipt of both payments had reduced the mortgage shortly afterwards by £200,000 (on 30 May 2013). Her claimed loss was therefore a proportion of the mortgage payments which she made between her brother's death and the date the lump sum was paid out.

52. The Trustees rejected the claim on the grounds that many attempts had been made (by both Mercer and the Trustees) to make the payments to Ms Berry beforehand, but on each occasion Ms Berry had refused to accept the monies.

Summary of Ms Berry's position

53. Ms Berry says:

- her brother tried to transfer his pension benefits to his SIPP so that the debt on his mortgage would be covered;
- despite being encouraged to transfer his request was refused so that he could not sort out his affairs;
- she has been paying the mortgage and has had to find funds to pay a debt which would have been covered by funds in her brother's SIPP if a transfer had been allowed.

Conclusions

54. I do not think Ms Berry is right in saying that the Trustees (or the Bank) encouraged Mr Berry to transfer. The offer was made to all deferred members. Also it was clear from the first letter that the encouragement of an enhancement might not be available in any individual case (because it was "first come, first served").

55. As Mr Berry was past his normal retirement date (he was the only deferred member in that position) he did not have an automatic right under the Plan's Rules or a statutory right to a transfer value.

56. In making their decision, following Mr Berry's request to transfer, the Trustees were required to act impartially and entitled to weigh the interests of the individual against the need to protect the security of the beneficiaries as a whole. They were also able to take into account that the Scheme was materially underfunded. They took, and had regard to, actuarial advice. In those circumstances, I cannot find that they exercised discretion unreasonably not to pay a transfer value.

57. The Trustees decision not to offer a lump sum payment on grounds of serious ill health again was at their discretion. (Rule 30.1 says the Trustees “may allow...”). Similarly their decision followed advice from the Plan’s actuary. More importantly the Trustees have confirmed that if it had been offered the amount would not have exceeded the 5 years pension guarantee lump sum that was subsequently paid to Ms Berry.
58. I therefore consider the Trustees decision to offer immediate retirement to Mr Berry was not perversely reached.
59. On the time taken to pay the benefits to Ms Berry, Mercer first offered to make the payments in early July 2011 and sent regular reminders from then until the actual payment was made. The Trustees also offered to arrange payment of the AVC funds (the amount for which was not in dispute) while Ms Berry’s complaint was ongoing, which Ms Berry initially declined to accept.
60. The AVC funds were paid out shortly after Ms Berry agreed to accept the payment and had provided her bank details. The subsequent payment of the 5 years pension lump sum was similarly timely made.
61. I therefore do not find that the Trustees delayed payment.
62. I do not uphold the complaint.

Tony King

Pensions Ombudsman
31 March 2015