

Ombudsman's Determination

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

Outcome

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

Complaint summary

3. Mr R's complaint about FP and the Trustee is that they failed to send him relevant information about the Plan and did not allow him to transfer to another pension provider.

Background information, including submissions from the parties

4. Mr R joined the Plan in 2013, after being approached by a representative of AC Management and Administration Limited who told him that it would be advantageous for him to combine his two existing pension funds in a new pension arrangement. Mr R signed an application form to join the Plan on 8 March 2013 that said:

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

5. These terms and conditions included the following paragraphs:

“The trustees will invest with a view to targeting a minimum return of 5% p.a. net of any charges over a 6 year period plus additional growth as appropriate without undue risk to the underlying target growth.

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

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

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

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

6. In August 2013 Mr R’s two existing pension funds, totalling £66,940.72, net of fees payable to FP, were transferred into the Plan.
7. In 2014, Mr R complained to FP that he had transferred his existing pension funds to the Plan in the expectation that, as he was over the age of 55, he would be able to receive income drawdown from the Plan, but FP had refused to allow this.
8. On 10 November 2014, Miss Wright, the then trustee of the Plan, wrote back to Mr R, saying:
- “There is new regulatory information that has been proposed by the government which will allow you to access the full value of your Pension from April 2015, but this is still being reviewed and all pension providers will be notified when this is authorised legislation. Once this has been done this legislation will be reviewed by the Trustees of the scheme, and we will relay this information to our members detailing any impact this will have on your pension and what options have become available to you.”
9. In March 2015, Mr R tried to contact FP by email, as he understood that the flexible access legislation was now in force, but he received no response, despite sending further emails to FP. This caused him concern about the security of his pension funds.
10. On 14 May 2015, FP wrote to Mr R to reject his request for a flexible drawdown payment from the Plan. FP’s letter explained:

“When you joined the Leaffield Retirement Plan your advisor will have explained both the nature of the Leaffield Retirement Plan’s investment principles and the Scheme rules in relation to benefits available. The Leaffield Retirement Plan has a targeted rate of return of 5% per annum and it is able to achieve this level of growth by investing in fixed term investments. The nature of these investments means that the Scheme is unable to disinvest funds within that fixed term to allow members to take a Flexible Pension Payment.

The scheme rules allow for all benefits to be accessed on Retirement Age, and once you reach age 65 you will be able to apply for your pension through Flexible Drawdown.”

11. Mr R then contacted the Pensions Advisory Service (**TPAS**), who wrote to FP on 22 September 2015, and received FP’s formal response in a letter dated 12 November 2015. FP said that it had responded to Mr R’s earlier emails and had tried to telephone him. FP enclosed a copy of its letter of 14 May 2015, in case Mr R had not received it.
12. TPAS explained to Mr R, on 16 November 2015, that he would not be able to take flexible drawdown under the Plan because pension scheme trustees could choose whether or not to provide that option, and in this case the Trustee had decided not to offer the option because it conflicted with the Plan’s fixed term investment/target return policy. TPAS added that Mr R could probably transfer from the Plan to another pension arrangement that did allow flexible drawdown, if that would be in his best financial interests.
13. Mr R then asked FP about his transfer options. In January 2016, FP informed Mr R that there would be a 28% reduction in his transfer value if he made a transfer out of the Plan before April 2019, consistent with the terms and conditions that he had signed up to. Because of this reduction Mr R decided not to pursue a transfer out of the Plan.
14. Later in 2016 Mr R asked FP to send his annual benefit statement, but FP’s web-based online facility was not working properly and the emails he sent to FP were returned as being undeliverable.
15. As Mr R became more worried about the security of his pension funds he requested a cash equivalent transfer value (**CETV**) quotation, which FP sent to him on 31 January 2017 with his annual benefit statement for 2016. FP quoted a CETV of £61,753.22 after allowing for an early exit penalty of £15,719.63. Mr R requested a transfer on that basis on 13 February 2017.
16. On 24 March 2017, FP informed Mr R that an “in specie” (scheme asset) transfer out would be possible, subject to the approval of the Trustee, but not a cash transfer. However, in May 2017 FP told Mr R that an “in specie” transfer out might not be acceptable to the Trustee. The pension provider to which Mr R proposed to transfer told him that because the Plan assets apparently consisted of corporate loan notes it

would need to hold a first charge over the relevant assets. FP said this was not feasible.

17. On 27 May 2017, Mr R invoked the Plan's internal dispute resolution procedure (**IDRP**), as he was unhappy that his transfer request had not been actioned as expected. FP's IDRP form said that the Trustee would aim to resolve the dispute within four weeks and make a formal decision within two months.
18. Mr Porter, FP's scheme administrator at that time, told Mr R on 29 June 2017 it was his understanding that, because Mr R had signed up to a six year investment contract, he would not be able to transfer until that period had expired. Mr R replied on 3 July 2017 that he had a statutory right to a transfer under s.94 of the Pension Schemes Act 1993 (**the Act**), and complained that FP had adopted delaying tactics.
19. Sara Moat, the sole director of FP, provided FP's formal response to Mr R on 31 July 2017. FP apologised for the period of poor service provided in 2016 and accepted that its communications had been unsatisfactory. FP offered Mr R compensation of £250 for this. FP said that a transfer within the agreed fixed term would be possible only if the Trustee considered that there were "exceptional circumstances". If the Trustee consented to a transfer out there would be an early exit penalty, as described in Mr R's application form.
20. Mr R responded that he could not be deprived of his statutory right to transfer out under s.94 of the Act, and complained that the "exceptional circumstances" requirement had not been mentioned in FP's earlier correspondence. He asked for his transfer payment to be made in cash.
21. FP pointed out to Mr R that he had signed up to a six year fixed investment term, and rule 20.6 of the Plan rules (see Appendix hereto), which was referred to in his application form, made clear that an early transfer would be subject to the consent of the Trustee and, if the transfer was approved by the Trustee, early exit penalties would apply. FP explained that its practice was to check the contract terms when a transfer value was accepted, not when a transfer value was first quoted.
22. In subsequent correspondence, Mr R told us that it had taken FP several weeks to conclude that an "in specie" transfer subject to a first charge over assets was not practicable because "this would weaken the security for all the other pension holders". His main concern was to make a transfer under s.94 of the Act to a pension provider that he could trust more, even if he had to pay an early exit penalty; he said that he had less interest in the level of compensation that FP had offered.
23. Mr R admitted that he did not fully read the FP application form that he was asked to sign in 2013. He also said that he received an introductory letter from FP but not the welcome pack that he should have received; he did not see the Plan rules until our office received a copy from FP and forwarded them to him in September 2017.

Adjudicator's Opinion

24. Mr R's complaint was considered by one of our Adjudicators who concluded that further action was required by FP and the Trustee. The Adjudicator's findings are summarised briefly below:-

- As a Plan member, Mr R had a statutory right to transfer. He was entitled to ask the Trustee to quote a CETV. When this had been quoted and accepted, it would be up to the Trustee whether it would offer a transfer in cash or in specie (transferring scheme assets instead of paying cash), or a mixture of both. There was no statutory obligation to offer a cash transfer, for example where investment was made in an asset for which its cash value was not easily realised. In practice, this meant that Mr R could not transfer out of the Plan if the Trustee was only willing to pay an in specie transfer, unless Mr R's new pension provider was willing and able to accept such a transfer. This might prevent a transfer being made in practice.
- In the Adjudicator's view the valid statutory right to a transfer out could not be defeated by the wording on consent forms that Mr R signed. That was consistent with the legal principle that, unless legislation specifically permits, a member cannot contract out of rights conferred on him by statute.
- With regard to the amount of the CETV, Mr R signed an agreement in 2013 that an early exit penalty would apply in the first six years, so the appropriate percentage reduction should apply.
- The correspondence that we received from Sara Moat was on behalf of both FP and the Trustee. They had relied on the wording of Rule 20.6 of the rules of the Plan to prevent a transfer out. It was unclear whether the rules were made available to Mr R before September 2017, when we emailed a copy to him. Mr R said that they were not, whereas FP said that they would have been shown to him when he joined in March 2013. However, we were aware from other cases that FP's welcome packs usually said that a member should apply to the Scheme Secretary for a copy of the Trust Deed and Rules, so that implied that a copy was not automatically given to Plan members. This led the Adjudicator to conclude that Mr R probably did not see the Rules in 2013.
- Rule 20.6 was worded less formally than the rest of Rule 20, and said that the Trustee may agree to an early transfer if it believed there were exceptional circumstances. There was therefore a strong inference that a transfer would not normally be permitted by the Trustee. This was at odds with Rule 20.1, which provided for a CETV to be paid if the Plan member had a right to a CETV. Rule 20.1 reflected the statutory requirements. Rule 20.6 did not cross-refer to Rule 20.1 or explain how the two sub-rules should interact. In the Adjudicator's view Rule 20.6 was drafted in an attempt to water down members' statutory rights, which had already been acknowledged. However, he considered that to be unsuccessful and therefore that Rule 20.1 should prevail.
- FP said that the disinvestment of Plan assets would weaken the security for other members of the Plan. However, the Adjudicator's view was that most members would conclude that the significant early exit penalties, set out in the terms and

conditions, that they signed up to when joining the Plan (e.g. 42% reduction within the first year), were specifically designed to mitigate the potential losses for other members. Furthermore, the Trustee should have made some allowance for the risk of early withdrawals arising for various reasons (e.g. transfers, death benefits, income drawdown, commutation) when setting its investment strategy for the Plan. It was unrealistic for the Trustee to assume that in practice there would be no withdrawals within the fixed investment term.

- Mr R and FP had disputed the date on which he firstly became aware of relevant Plan information. We had experienced similar disputes in other cases involving FP and the Trustee. The individual members were at arm's length from each other and were not aware of the complaints that other members were making, but there were similarities in many of their accounts. That was unlikely to be a mere coincidence. On balance, the Adjudicator took the view that the comments about FP and the Trustee that had been received from individual members should be given considerable weight.
- He therefore concluded that FP did not inform Mr R until 2017 of its position that transfers within the lock-in period would be made only at the discretion of the Trustee. That restriction should have been disclosed to Mr R in January 2016 when he firstly requested a transfer value, and in subsequent correspondence. However, that delay was not critical because in the Adjudicator's view there was no discretion for the Trustee to exercise, as Mr R had a right to transfer under the Act, and that statutory right could not be fettered.
- This meant that Mr R should be able to transfer out of the Plan if he could find another pension provider willing and able to accept the transfer value (whether in cash or in specie or a mixture of both, whichever FP offered) and subject to the early exit penalty set out in the agreement that Mr R signed in 2013.
- However, the new pension provider would not be obliged to accept a transfer. If the new pension provider insisted on having a legal charge over scheme assets it would be up to the Trustee whether or not to agree to that request. In the absence of agreement no transfer could be made.
- FP had offered Mr R a compensation payment of £250. That was only 50% of the minimum amount that the Pensions Ombudsman awarded nowadays in those cases where he considered that maladministration had caused non-financial injustice. In view of the delays that Mr R had suffered and FP's unwillingness to give him full details of the transfer terms available the Adjudicator considered that the compensation sum should be increased, as it had in other cases involving FP which we had investigated in recent months.
- For the reasons given, the Adjudicator considered that Mr R's complaint should be upheld against FP and the Trustee: to put matters right, assuming that at the relevant date Mr R still had a statutory right to a transfer, the Trustee should comply promptly with any CETV request that Mr R made, and offer a transfer in cash or in specie or a mixture of both, whichever the Trustee considered appropriate bearing in mind the Plan's current assets and the amount of the CETV net of any early exit penalty applicable; if Mr R's new pension provider then notified the Trustee that it

was willing to accept the transfer in the form offered by the Trustee, the Trustee should promptly make payment to the new pension provider and inform Mr R accordingly; FP should pay Mr R £1,000 for the significant distress and inconvenience that its conduct had caused him.

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

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

26. The complaint was then passed to me to consider. I largely agree with the Adjudicator's Opinion, and I will therefore only respond to the key points made by FP and the Trustee for completeness.

Ombudsman's decision

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

28. I consider that the award for Mr R's significant distress and inconvenience should be £2,000, because of the extreme difficulties that Mr R has had in attempting to exercise his statutory right and exacerbated by the delays in responding to Mr R.

29. Therefore, I uphold Mr R's complaint.

Directions

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

PO-5072

31. Secondly, I direct that within 28 days of the date of this determination FP shall pay Mr R £2,000 for the significant distress and inconvenience that its conduct in this matter has caused him.

Anthony Arter
Pensions Ombudsman

26 February 2018

Appendix

Extract from Rule 20 of the Rules of the Plan

“20.1 Statutory right to a transfer

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

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

...

20.6 Transferring out early from the scheme.

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