

Ombudsman's Determination

Applicant	Mr Andrew Johnston
Scheme	Prudential Personal Pension Plan
Respondent(s)	Prudential

Complaint Summary

Mr Johnston complains that, following his application, Prudential transferred his pension to the Capita Oak Pension Scheme without sufficient checks on the receiving scheme and he is now unable to locate his pension fund.

Background

Pension liberation

1. 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.
2. 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.
3. 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

4. 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.
5. 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 schemewhich satisfies prescribed requirements in each case and where the trustees or managers of the scheme are able and willing to accept the transfer.
6. In this case, the rules of the Scheme (5.1(a)) also granted a contractual right to a transfer to a registered pension scheme or qualifying recognised overseas pension scheme, provided it would not be an unauthorised payment (7.2).

General obligations

7. 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.
8. 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. 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”.
9. 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 accordance with scheme rules and 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.

Mr Johnston's case - Material Facts

10. On 24 August 2012, Barncroft Associates contacted Prudential, with a letter of authority signed by Mr Johnston a day earlier, requesting transfer documentation for his pension policy.
11. Prudential sent the requested details to Barncroft Associates on 4 September 2012.
12. The Capita Oak Pension Scheme then wrote to Prudential on 3 October 2012, with the completed transfer discharge documentation. Mr Johnston's signature is dated 22 September 2012. The paperwork included an HMRC registration number for the Capita Oak Scheme, which was said to be a defined contribution occupational pension scheme (which would mean that operating it and advising in connection with it would not be activities regulated by the FSA, now FCA). Payment of the transfer value was requested by electronic transfer to the administrator's account (Imperial Trustee Services Limited).
13. Prudential processed the transfer on 10 October 2012, by bank transfer, writing to Barncroft Associates the same day to confirm their actions. The amount transferred was £18,643.00. Before doing so, Prudential checked the HMRC register which confirmed that the Capita Oak Scheme was registered as an occupational pension scheme on 23 July 2012.
14. Imperial Trustee Services Limited wrote to Mr Johnston on 5 November 2012, to confirm that his application to join the Capita Oak Pension Scheme had been processed and accepted. The letter included some basic information about the Capita Oak Scheme.
15. On 26 January 2013, a company called Designed 4 Life contacted Prudential by fax with a signed authority from Mr Johnston. He had instructed that company to investigate his pension options and various information was requested, including a current transfer value. Naturally, Prudential replied that the policy had already been transferred out.
16. On 19 February 2013, Capita Oak (no department or other status in the header) sent Mr Johnston an 'Investment Choice Letter' to be signed and returned. An opening statement followed on 28 April 2013.
17. Mr Johnston has since been unable to obtain further information about his pension fund from Capita Oak, Imperial Trustee Services Limited, or Barncroft Associates. He complained to Prudential that they had not carried out a proper procedure in making the transfer and to take responsibility for reimbursing him the missing money. He does not dispute that he authorised the transfer or instructed the above parties.
18. Prudential replied to the complaint in full on 11 June 2014. They said that they had acted in good faith under Mr Johnston's specific instruction. They obtained and reviewed the relevant paperwork, checked it was in order and that the receiving

scheme was registered with HMRC, and were satisfied that they had followed the correct process required at that time.

Conclusions

19. Mr Johnston has transferred out of a reputable established scheme and there is little doubt that it was against his best interests to do so. He transferred to the Capita Oak Pension Scheme, which is of a type that is designed to avoid regulatory obligations that would limit scope for abuse and/or bad advice. I imagine that he did so in search of high investment returns and possibly the inducement of a cash sum. I do not know what has happened to the remainder of the assets he transferred. They may or may not be secure, though he is very rightly concerned that they are not. We have issued a previous determination on a complaint by Mr X (available on our website www.pensions-ombudsman.org.uk) about his inability to transfer out of the Capita Oak Scheme.
20. However, I am not dealing with a complaint about the Capita Oak Scheme or about any advice given to transfer to it. I do not know what, if any, advice Mr Johnston took in this regard but it is not suggested that Prudential provided advice. If Capita Oak or an associated business advised him, that advice was unregulated. I understand that Mr Johnston complained to the Financial Ombudsman Service about Barncroft Associates. The question for me in relation to Mr Johnston's complaint against Prudential is whether it was maladministration to make the transfer. In considering whether there was maladministration I have to consider Prudential's legal obligations to Mr Johnston, and whether they acted consistently with good industry practice.
21. Mr Johnston's transfer request was made in October 2012. In paragraphs 4 and 5 above I describe the requirements for a statutory right to transfer. The transfer application appeared to comply with those requirements. The Capita Oak Pension Scheme was registered with HMRC on 23 July 2012. It purported to be an occupational pension scheme so FSA regulation was not relevant. The Capita Oak Scheme confirmed it was willing to accept the transfer and that it would be applied to provide benefits consistent with the scheme registration with HMRC.
22. The Pensions Regulator did not issue guidance to providers about pension liberation and the danger of pension scams until February 2013. That could be regarded as a point of change in what might be regarded as good industry practice.
23. Given the current publicity both concerning pension liberation generally and certain schemes in particular, it is natural that Mr Johnston feels upset about what has happened in his case. But I cannot apply current levels of knowledge and understanding of pension liberation/scams or present standards of practice to a past situation.
24. Prudential were faced with a member who apparently wished to exercise his legal rights, and a receiving scheme that was properly registered with HMRC which had provided the appropriate declarations and information. And Mr Johnston could not be

deprived of a statutory right by regulatory or other guidance (and there is no suggestion otherwise from the Pensions Regulator). To the extent that Prudential had a duty of care to Mr Johnston, it would have been overridden by a statutory obligation to make the transfer and simply met by doing as he apparently wished. The same is true of their regulatory and contractual responsibilities to him.

25. Even if Mr Johnston was right that Prudential should have carried out greater due diligence (though I do not find that he is) that would not necessarily lead to the reinstatement of his benefits with Prudential. It is possible, though I have not needed to consider the point, that even if he had been warned further that transferring was an unusual and/or risky step, he would have persisted at that time.
26. I have great sympathy for the position Mr Johnston now finds himself in, but I do not consider that there was an administrative failure by Prudential in complying with his transfer request. I therefore do not uphold his complaint.

Anthony Arter

Pensions Ombudsman
30 June 2015