

Ombudsman's Determination

Applicant	Mr Anthony Hughes
Scheme	AVIVA Personal Pension Plan
Respondent	Aviva UK Life

Complaint Summary

Mr Hughes complains that, following his application, Aviva 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. This case is indirectly 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 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.

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 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.

Mr Hughes' case - Material Facts

10. Mr Hughes contacted Aviva on 11 January 2013 to request to transfer his pension to the Capita Oak Pension Scheme. Aviva's records indicate that Mr Hughes said he had spoken to an adviser about doing so. Aviva sent the transfer paperwork that day, including the transfer value and a warning that Aviva strongly recommended Mr Hughes sought financial advice before making any decisions. Mr Hughes has not told me how he was introduced to the Capita Oak Pension Scheme but it is not material to my determination.
11. Aviva received Mr Hughes' completed discharge form on 1 March 2014 together with an HMRC registration form for the Capita Oak Pension 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). A separate sheet detailed the bank account to be used, which was in the name of Imperial Trustee Services Limited (the administrators of the Capita Oak Pension Scheme).
12. Aviva processed the transfer on 19 March 2013, writing to Mr Hughes the following day to confirm its actions. The amount transferred was £37,893.24.
13. I understand that Mr Hughes made similar contact with Countrywide Assured in connection with a transfer of a further pension policy to the Capita Oak Pension Scheme. They wrote to him on 4 March 2013, confirming receipt of the transfer paperwork. However, they were unable to proceed without sight of the original policy schedule.
14. Since Mr Hughes' complaint is not against Countrywide Assured, I do not have further details of developments in that transfer application, except that some months later – on 11 July 2013 – Countrywide Assured wrote to Mr Hughes enclosing a leaflet from the Pension Regulator explaining pension liberation fraud; asking him to complete a member's declaration form regarding the background circumstances; and advising that they had contacted the Capita Oak Pension Scheme for further clarification of the Scheme arrangements.
15. I understand that the transfer from Countrywide Assured to the Capita Oak Pension Scheme did not proceed, although I do not know whether that was because a formal refusal to transfer decision was taken (I have not been provided with a letter to that effect) or Mr Hughes became concerned at the risks and decided not to proceed. He seeks to compare the approach taken by Aviva and Countrywide Assured. He says that had Aviva done more to protect his money and check the credentials of the Capita Oak Pension Scheme, he would not have transferred his pension and lost £37,893.24.

16. Mr Hughes wrote to Aviva with a formal complaint on 8 August 2014. He wants Aviva to reimburse him the amount they transferred, plus the additional funds which would have accrued had his pension remained invested with Aviva.
17. Aviva replied to the complaint in full on 22 September 2014. They said that they were sorry to learn of the difficulties Mr Hughes was experiencing but they did not consider they were responsible. They had acted in good faith under his specific instruction. Whilst the primary responsibility for any losses suffered as a result of pension scams lay with the perpetrators, Aviva considered that plan holders must also take some responsibility for their own decisions.
18. In subsequent correspondence with this office, Aviva have commented on Mr Hughes' comparison between the approaches taken by Aviva and Countrywide Assured. They point out that the Pensions Regulator issued its guidance in February 2013. They say that as soon as possible thereafter, they enclosed the 'Scorpion' leaflet in response to all transfer requests but Mr Hughes' application was already being processed and his funds were transferred before their processes changed. They also commented that Countrywide Assurance's letter to Mr Hughes of 4 March 2013 did not contain the leaflet or possible pension liberation warnings.

Conclusions

19. Mr Hughes has transferred away from 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 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.
20. However, I am not dealing with advice to transfer to the Scheme. I do not know what, if any, advice Mr Hughes took in this regard but it is not suggested that Aviva provided advice. If Capita Oak or an associated business advised him, that advice was unregulated. The question for me in relation to Mr Hughes' complaint against Aviva then is whether it was maladministration to make the transfer. And in considering whether there was maladministration I have to consider Aviva's legal obligations to Mr Hughes, and whether they acted consistently with good industry practice.
21. The approach taken by Countrywide Assured is not strictly relevant to this case, other than as an example of how another provider dealt with a similar application at the same time. There may be slightly different circumstances (such as there appears to have been here in regards to the original policy schedule affecting the timing of Countrywide's review) and the actions of any one individual provider might not necessarily be representative of good industry practice.

22. Mr Hughes' transfer request was made in January 2013 and was completed on 19 March 2013. In paragraphs 5 to 8 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.
23. 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. .
24. It would be reasonable to expect some time would be required for procedures to be updated and new literature prepared to reflect the guidance. This would seem to have been the case with both Aviva and Countrywide Assured (because the latter enclosed the Scorpion leaflet in July 2013 but not in March 2013).
25. Mr Hughes' transfer request had already been received before the guidance was issued and a warning that he should seek financial advice before making any decisions had been provided in the letter in response from Aviva. The final paperwork then arrived on 1 March 2013, shortly after the guidance came out. Upon issuing the guidance, the Pension Regulator said that it was asking administrators to include the leaflet with transfer packs issued to members. Mr Hughes' transfer pack, of course, had already been sent out on 11 January 2013. But in any event I do not consider the fact that Aviva had not yet amended its procedures (such as to include the 'Scorpion leaflet') to constitute maladministration.
26. Given the current publicity both about pension liberation generally and certain schemes in particular, it is natural that Mr Hughes 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.
27. Aviva were faced with a member who apparently wished to exercise legal rights, and a receiving Scheme that was properly registered with HMRC and had provided the appropriate declarations and information. And Mr Hughes 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 Aviva had a duty of care to Mr Hughes, 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 responsibilities to him.

28. Even if Mr Hughes was right that Aviva 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 Aviva. 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.
29. I have great sympathy for the position Mr Hughes now finds himself in, but I do not consider that there was an administrative failure by Aviva in complying with his transfer request. I therefore do not uphold his complaint.

Tony King

Pensions Ombudsman
18 May 2015