PO-6388

Ombudsman's Determination

Applicant	Mr Ronald Powell
Scheme	Prudential Personal Pension Plan
Respondent(s)	Prudential

Complaint Summary

Mr Powell complains that, following his application, Prudential transferred his pension to the Dataspec 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 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.

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 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 Powell's case - Material Facts

10. UK Pension Transfers Ltd, whose contact address was a PO Box in Poole, contacted Prudential on 8 June 2012, with a letter of authority signed by Mr Powell, requesting "all relevant information" relating to Mr Powell's pension policy. Mr Powell telephoned Prudential on 26 June 2012, and confirmed that he required transfer paperwork, which was sent out the following day. It appears that Mr Powell completed the paperwork but it may have gone astray in the post because he made several telephone calls to chase up the transfer and the paperwork had to be re-issued.

11. Prudential received Mr Powell's completed transfer claim form on 24 August 2012, together with an HMRC registration form for the Dataspec Pension Scheme, which was said to be a money purchase 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). The Registration Certificate gave a registration date of 26 July 2012, and the appropriate pension scheme HMRC tax reference. The paperwork was submitted by Target Consultants, as administrators for the Dataspec Pension Scheme. Payment of the transfer value was requested by cheque in favour of the Dataspec Pension Scheme or bank transfer to an account in that name with Investec Bank.

12. Prudential processed the transfer on 31 August 2012, by bank transfer, writing to Mr Powell the same day to confirm their actions. The amount transferred was £54,503.00. During the interim period, Mr Powell contacted Prudential directly several times by telephone to clarify when the transfer would take place.

13. Mr Powell contacted Prudential by telephone on 11 August 2014, just under two years later, to make a formal complaint regarding the loss of part of his pension fund. In his subsequent complaint to this office, he said that he received £27,000 from the transfer but the remaining balance had disappeared. Target Consultants had not responded to him. He wanted Prudential to admit that they had not carried out a proper procedure in making the transfer and to take responsibility for reimbursing him the missing money.

14. Prudential replied to the complaint in full on 23 August 2014. They said that they had acted in good faith under Mr Powell's specific instruction. They obtained and reviewed the relevant paperwork, the receiving scheme was registered with HMRC and they had listened to the telephone call recordings to ensure they had acted in accordance with Mr Powell's wishes at that time.

15. Within the papers forwarded by Mr Powell to this office with his complaint, but seemingly not to Prudential with the transfer application, were a number of other documents which provide further background facts:

- A letter to Mr Powell dated 31 May 2012, from Pension Marketplace, Poole (said to be a trading name of UK Pension Transfers Ltd), asking him to contact his pension provider for a full pension illustration and to complete and return a letter of authority. Handwritten at the top of the letter is “£25,000 back. No cost.”

- A letter dated 16 August 2012, signed by Mr Powell and addressed to the Dataspec Pension Scheme Administrator, requesting to invest 100% of his funds in Hawkhurst Capital PLC. The letter indicated that he understood this request was being made on an execution-only basis, he had received no advice on the investment from the Administrator, had taken as much professional advice as he felt necessary, and understood it to be a long-term investment carrying significant risk with no guarantee of return.

- A Loan Agreement dated 5 September 2012, between Mr Powell and The Regent Group Ltd (whose registered office was in the Seychelles) in the amount of £27,251.50. Interest of 6% per annum was to be charged but there was no requirement on Mr Powell to make repayments before the Lock-In date, defined separately as 31 December 2026. The agreement makes reference to the Hawkhurst Capital PLC investment and the Dataspec Pension Scheme.

- A Deed of Indemnity also dated 5 September 2012, which states that Mr Powell had requested the Trustees of the Dataspec Pension Scheme invest his pension monies in Hawkhurst Capital PLC. In consideration of the Trustees, Dataspec, and Target Consultants, facilitating this investment, Mr Powell was to indemnify all 3 parties for all or any costs or liability in connection with the transaction.

- An undated letter from Mr Powell to The Regent Group in the Seychelles asking for his loan funds of £27,251.50 to be paid to his bank account and referring to the loan agreement he signed on 5 September 2012.

Conclusions

16. Mr Powell has transferred from a reputable established scheme and there is little doubt that it was against his best interests to do so. He transferred to the Dataspec 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 he clearly received 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.

17. However, I am not dealing in this complaint with advice to transfer to the Scheme. I do not know what, if any, advice Mr Powell took in this regard but it is not suggested that Prudential provided advice. If Dataspec or an associated business advised him,

that advice was unregulated (though I note that he appears to have signed an indemnity saying that the parties involved in the investment had not advised him and were not responsible for any liability that might accrue). I understand that Mr Powell is pursuing a separate complaint in that respect. The question for me in relation to Mr Powell's complaint against Prudential then is whether it was maladministration to make the transfer. And, in considering whether there was maladministration I have to consider Prudential's legal obligations to Mr Powell, and whether they acted consistently with good industry practice.

18. Mr Powell's transfer request was made in June 2012 and was completed on 31 August 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 Dataspec Pension Scheme was registered with HMRC on 26 July 2012. It purported to be an occupational pension scheme so FSA regulation was not relevant. The Dataspec Pension 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.

19. 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.

20. Given the current publicity both about pension liberation generally and certain schemes in particular, it is natural that Mr Powell 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.

21. Prudential 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 Powell 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 Powell, 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.

22. Even if Mr Powell 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, particularly given the large inducement he received.

23. I have great sympathy for the position Mr Powell now finds himself in, particularly given his state of health, 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
23 June 2015