

Ombudsman's Determination

Applicant	Mrs N
Scheme	Admiral Pension Management Ltd Retirement Benefits Scheme (the Scheme)
Respondent	Mr Y, in his capacity as Trustee of the Scheme (the Trustee)

Complaint Summary

1. Mrs N has complained that Mr Y is obstructing access to her pension by refusing to agree calculations to implement the Pension Sharing Order (**PSO**) made after their divorce in 2006.

Summary of the Ombudsman's Determination and reasons

2. The complaint should be upheld against Mr Y because he has unreasonably failed to agree the calculations in his capacity as the Trustee.

Detailed Determination

Material facts

3. Mr Y and Mrs N are the only members of a Small Self-Administered Scheme (**SSAS**), set up for Admiral Pest Management Ltd (**APM**), the Scheme's Principal Employer. Mr Y and Mrs N (together, **the Managing Trustees**) are the scheme administrators (see rule 12.2 of the Scheme Rules), and Friends Life act as Special Trustee. In 2006, Mr Y and Mrs N were both Directors of APM but Mrs N resigned her directorship in 2007, having been made redundant from APM.
4. Mr Y and Mrs N divorced in 2006. Under the PSO made by Chelmsford County Court, effective 27 March 2006, Mrs N became entitled to a pension credit of 37% of Mr Y's benefits under the Scheme.
5. The PSO annex stated that the order should be implemented by the person responsible for the Scheme within a period of four months beginning with the latter of:
"the day on which this order takes effect; or

the first day on which you are in receipt of ...the pension sharing order including this annex...”

6. Friends Life received a copy of the PSO from Mrs N's solicitors on 4 April 2006. On 8 June 2006, Mrs N confirmed she wished to retain her benefits in the Scheme.
7. In terms of the Scheme's assets in 2006, both Mr Y and Mrs N had policies with Friends Life. Additionally, there were self-invested funds, namely a 5-year loan to APM, the repayments from which funded CoFunds investments. The loan was funded by the surrender of £14,513.68 units from Mr Y's Friends Life policy; £14,513.67 units from Mrs N's Friends Life policy; and £5,972.65 from unallocated units.
8. The unallocated fund was not subject to the PSO (as it was unallocated on 27 March 2006) and was dealt with by agreement between Mr Y and Mrs N, namely 53%/47% in Mr Y's favour in September 2010.
9. Following receipt of the PSO on 4 April 2006, Friends Life requested values of the self-invested assets from the Managing Trustees in order to implement the Order. They also wrote to Mrs N with a request for information on the same day.
10. Mrs N later informed Friends Life that she had not received that request, so it was resent on 19 June 2006. On 7 August 2006, Mrs N told Friends Life that she had written to the Scheme Accountant and Mr Y on 17 July 2006, to ask for the information requested, but she received no response. Friends Life wrote to Mr Y on 16 August 2006 to request the same information. This letter referred to the legal requirement on the Scheme Administrators to implement the PSO. In this case, the Managing Trustees (see Scheme rule 12.2).
11. Friends Life then wrote to the Scheme's financial adviser (**the IFA**) on several occasions: 15 November 2006; 26 September 2008; 29 December 2008; 14 September 2009; and 19 January 2010. The IFA provided the necessary information on 1 March 2010 by way of an 'A-Day Fund & Tax-Free Cash Protection Questionnaire'.
12. Discharge notices were sent to the Managing Trustees on 13 July 2010. The pension credit was calculated to be £18,311.10, equating to £5,959.76 from the loan and £12,351.34 from Mr Y's Friends Life policy.
13. Friends Life provided detailed calculations to Mr Y and Mrs N on 9 May 2011. A letter from the IFA on 12 May 2011, refers to the 9 May 2011 calculations and states: "We can confirm that we are happy with the figures that you have produced therefore please arrange for the appropriate discharge documentation to be issued".
14. On 12 July 2014, the IFA wrote to Mrs N to say: "I have no issues with the FL calculations / fund split and [Mr Y] knows this." A similar point is made by the IFA on other occasions, including as far back as 1 November 2011.

15. Subsequently, on 10 June 2011, the IFA wrote to Friends Life with some queries and Friends Life responded on 21 June 2011. The IFA also wrote to Friends Life on 22, 23 and 24 August 2011; all letters were responded to on 31 August 2011.
16. Further detail was provided by Friends Life on 8 September 2011, in response to an email from the IFA on 2 September 2011. On 24 November 2011 Mr Y contacted Friends Life by telephone to request further details of the calculations. Friends Life responded by letter on 2 December 2011. Mr Y again queried the calculations on 1 August 2012 and a response was sent on 7 August 2012. Mr Y also wrote on 24 June 2013, to which Friends Life replied on 5 July 2013. Mr Y made further queries on 15 July 2013 and a reply was sent on 19 July 2013. Mr Y sent some additional queries on 9 September 2013, which were replied to on 13 September 2013.
17. On 1 August 2012, Mr Y emailed Friends Life to confirm he was unhappy with the calculations provided in September 2011. Mr Y's 24 June 2013 email includes the following: "despite raising complaints and forwarding legal and independent financial advice no complaint procedure has ever been implemented". On 20 December 2013 Mr Y sent an email which confirmed his intention to refer matters to (what is now agreed was intended to be) the Pensions Ombudsman.
18. Friends Life provided updated calculations on 9 May 2011, 20 July 2011 and 25 January 2013. The 25 January 2013 calculations show the funds as at 5 November 2012, and the pension pot split was as follows: Mr Y - £59,671.06; and Mrs N - £70,420.82.
19. Ultimately, Mr Y did not agree to the calculations provided and the PSO has not yet been implemented.
20. By or before 21 June 2011, Mrs N had confirmed that she wanted to transfer her pension. As the calculations were not agreed, this did not occur.
21. In May 2010, the Scheme had entered a winding up procedure. The Friends Life policies were surrendered and the monies were paid into a low-interest bearing bank account (**the Co-op account**). Friends Life requested more information to enable the wind up of the Scheme, but it was never received and so has not been completed.
22. At this stage, the parties disagree as to what happened. I have seen a signed mandate of October 2010 adding SunTrust Ltd (part of the Friends Life group) and Mrs N as co-signatories to the Co-op account. It is not clear whether that was ever done, but both parties agree that neither SunTrust Ltd nor Mrs N are currently co-signatories of the Co-op account.
23. Mrs N says that the Scheme's monies are solely represented by the cash held in the Co-op account, whereas Mr Y says that some funds may continue to be held by Friends Life. This disagreement formed part of a complaint by Mr Y to this office as he was still being invoiced for management fees. It is sufficient to record here that, in

the course of reviewing that complaint, I concluded that Friends Life did not retain any funds.

24. Mr Y provided my office with a photograph of a recent bank statement for the Co-op account, but as Mr Y would not consent to me sharing this with the other parties, I have been unable to take it into account in reaching my decision.

Summary of Mrs N's position

25. Mrs N says that Mr Y is obstructing access to her pension. She says that his refusal to agree to the Friends Life calculations, and therefore the release of her funds, is unreasonable. Mrs N says the figures provided by Friends Life should be accepted.
26. Mrs N says that Mr Y has ignored her and Friends Life's repeated requests for bank statements for the Co-op account, and he has refused to include Mrs N or Friends Life as co-signatories. Mrs N says that she has never received notice of removal as a trustee. She has, however, been informed by the Co-operative Bank that she is not a signatory to the Co-op account.
27. In order to resolve these issues, Mrs N wishes to transfer her pension to a personal pension arrangement. She says she should be awarded interest on her pension fund value because if it had been transferred in 2011, it would have seen significant growth to date. Further, Mrs N says that she should not be liable for any additional fees incurred as a result of Mr Y's unreasonable refusal to agree the calculations.
28. Mrs N would like to be compensated for the distress that this has caused to her, and the effect on her health. Mrs N had to take anti-depressants as a result, and she cannot personally open post from Mr Y and requires her husband to do so on her behalf. Having to pursue this matter for a number of years, and ultimately bringing her complaint to this office, has re-opened old wounds.

Summary of Mr Y's position

29. Mr Y says that Friends Life did not contact the IFA until 2010 and it did not contact him personally to implement the PSO. He says that even if Friends Life did contact the IFA before 2010, that was insufficient and Friends Life was required to contact Mr Y personally. Mr Y says that failure to contact him prohibited him from fulfilling his obligations as the Trustee, and meant the PSO was implemented outside of the time limit.
30. Mr Y says that, via the IFA, he provided the information sought as soon as it was requested in 2010. There was no further progress on implementing the PSO because the calculations were incorrect.
31. Mr Y objects to Friends Life's calculations for three reasons:-
- 31.1. First, he does not accept that Mrs N could elect to have her 37% share "in specie", that is to say Mrs N remaining in the Scheme and re-assigning her

share of Mr Y's policy and loan to her pot. It was his choice, as the Principal Employer, how Mrs N took the pension credit. He would have chosen to transfer the sum due from his Friends Life policy and not transfer any of the loan. Had the PSO been implemented in time, Mr Y says this option would have been open to him as he had sufficient units in his own personal Friends Life policy to transfer out the cash equivalent transfer value (**CETV**).

31.2. Secondly, the sum Mrs N was entitled to was 37% of the whole pension fund, not her pot plus 37% of Mr Y's pot.

31.3. Thirdly, that the PSO is not a correct reflection of the agreement he and Mrs N reached at mediation, which was for a specific figure, not a percentage. He says it was that agreement which was intended to be reflected in the PSO and it is that agreement which should be followed now.

32. As to the Co-op account, Mr Y says it was not possible for Mrs N to be a co-signatory because it is a company bank account and it holds monies other than the pension funds. Mr Y also said that he believed Mrs N was not a trustee of the Scheme.

Conclusions

33. In order to reach a conclusion on Mrs Y's complaint, I need to consider who was responsible for implementing the PSO and decide at which point it should have been implemented. In addition, I need to consider whether the delay and failure to implement it caused any injustice.

34. I note that Mr Y brought an application to me against Friends Life for failing to implement the PSO correctly or in-time, and for failing to respond to his own complaints. Although, Mr Y's application is the subject of a separate complaint, I will address it to the extent that it is relevant to the determination of Mrs N's complaint.

35. The member's benefits to be included in the calculation of a CETV are specified in section 29 of the Welfare Reform and Pensions Act 1999 (**the Act**) (see Appendix) as follows: 'Where the [pension scheme member] is in pensionable service under the scheme on the transfer day, the relevant benefits ... are the benefits or future benefits to which he would be entitled under the scheme by virtue of his shareable rights under it had his pensionable service terminated immediately before that day. Otherwise, the relevant benefits ... are the benefits or future benefits to which, immediately before the transfer day, the [member] is entitled...'

36. The Act does not say that pension scheme assets must be realised, but it does require the Trustee to use the asset values to calculate a CETV, which will be the basis of the pension credit. This means that their accrued entitlement under the Scheme must be calculated and valued, and assets equal to that monetary value must be made available for transfer whether internally or externally. That is what is meant by the CETV. The CETV does not require that a cash lump sum is paid or that assets are realised.

37. The Managing Trustees supplied values of the various funds to Friends Life, not from the day before the PSO was issued, but as at 5 April 2006. It is not clear why the Trustee could not have obtained values as at the date stipulated by the Act, but for the sake for concluding this matter without further delay, the April 2006 values will suffice, as I consider that it is sufficiently close to the relevant date.
38. Mrs N is a member of the Scheme. It was open to her to transfer her pension credit to another pension arrangement, but it was equally open to her to not do so. Mrs N chose to take her benefits in specie and remain in the Scheme. Mr Y's objection to that action is that it would have been easier or more convenient for him to transfer Mrs N's CETV from his Friends Life policy, rather than in specie. However, it was not his decision. The Act does not require the transfer of benefits to another scheme; it is permissible to discharge liability of a pension credit by conferring appropriate rights under that scheme with the consent of the person entitled to the credit: Schedule 5, para 1(2)(a) of the Act. The Scheme Rules provide for assignment in this scenario: rule 13.6 and the addendum, part 3, rule 2.
39. Mr Y's argument is that the PSO is unsound as it provided for a 37% share of the entire fund in the Scheme for Mrs N. The Trustee needed to allocate 37% of Mr Y's share of the Scheme to Mrs N. That is the normal course of events with a PSO and what the PSO itself states: "the specified percentage of the member's CETV to be transferred: 37%".
40. Mr Y also contends that the PSO fails to accurately reflect the mediation agreement reached between Mr Y and Mrs N. Mr Y has provided documentation which he says demonstrates that the split in fact agreed was for specific sums. I do not need to decide whether the mediation document does show what Mr Y suggests, because the PSO overrides it. The PSO should be implemented as it stands unless, and until, it is successfully challenged. The PSO has not been challenged to date.
41. Although it is now Mr Y's position that Mrs N should not have been given a share of his loan, and that Mrs N is entitled to 37% of the entire fund rather than 37% of Mr Y's fund, that was not his position at the time the PSO was agreed. On 16 February 2006, Bawtree & Sons (Mrs N's solicitor) wrote to Holmes & Hills Solicitors (Mr Y's solicitor), to advise that they had amended the draft consent order as it had not previously included the loan, but only the Friends Life policy, so Mrs N's share would have been unduly limited. As a result, Mr Y's policy number was deleted from the consent order and the Scheme reference inserted, to ensure both the policy and the loan was included in the split. It said: "*It will also be necessary to make it clear to [Friends Life] when the Annex is re-submitted that the application relates to all your client's assets under the Scheme, including his self-invested assets.*" The PSO provides the policy reference number and states "all assets under the Scheme including [Mr Y's] self invested assets".
42. In short, there was no good reason for the failure to agree the calculations. As explained in the jurisdiction decision by this office, we are only able to investigate the

three years immediately prior to bringing the complaint to this office, that is from 21 January 2012 to date. I find that the reason for the lack of implementation since that date was Mr Y's failure to agree the calculations. I find that the failure to implement the PSO was unreasonable and amounts to maladministration. By 21 January 2012 Mr Y had received two comprehensive explanations from Friends Life and, I find on the balance of probabilities, he also had advice from the IFA that the calculations were acceptable (see the email of 1 November 2011). Although Mr Y was correct to challenge figures of which he was unsure, it was unreasonable to maintain that position in those circumstances. Mr Y's concerns are unsound and are dispelled by the Act; it is reasonable to expect Mr Y to have investigated this.

43. The Trustee failed to implement the PSO within a period of four months, as was required by law. I consider that the Trustee's failure to do this amounts to maladministration, which has, undoubtedly, caused Mrs N significant distress and inconvenience and I shall make an award in recognition of this.
44. Under section 33 of the Act (see Appendix), scheme trustees can apply to the Pensions Regulator to extend the four-month period on specified grounds, such as where the financial interests of scheme members generally will be prejudiced if the trustees do what is needed to discharge their liability for the pension credit within the implementation period. However, the Trustee did not do this, so he has no defence in his failure to implement the PSO.
45. I find that the delay has prevented Mrs N from investing her pension share and it has no doubt caused her significant distress. In upholding her complaint, I will therefore include an award for Mrs N's distress and inconvenience, which has been further exacerbated by the considerable delay, over many years, in implementing the PSO. I note that APM indemnifies the Trustee: rule 12.10 of the Scheme Rules.
46. It is unclear how much is deposited in the Co-op account, and how much of that sum is attributable to the Scheme funds. Although a mandate was signed to add Mrs N and SunTrust Ltd as co-signatories in October 2010, I have seen no evidence that it was put into action. I have seen letters from the IFA of 6 September 2010, which state Mr Y was taking action to update the co-signatories. Mr Y's position to this office was that Mrs N was not a trustee and that the account was a company account, not a scheme account.
47. The Scheme Rules require that all scheme assets shall be held in the names of the Managing Trustees (and the Special Trustee on their request): rule 3.4. I find that Mrs N is a Managing Trustee, as there is no evidence that she was removed from this role. Although a trustee can be removed with four weeks' notice by Deed (rule 12.4), I have not seen any evidence that such a Deed exists. Further, the Scheme Rules require two or more Managing Trustees at all times (rule 12.3) and it is not suggested that any other person was a Managing Trustee. It is therefore a breach of the Scheme Rules to hold funds in an account which Mrs N cannot access.

48. I am also concerned that the Co-op account is said to be used for both the Scheme and other company monies, the Trust monies should be held in a separate account to those used for the purposes of the company.
49. My role is to put Mrs N back into the position she would have been in had there not been maladministration by the Trustee. In this instance, this means receiving her pension share within four months from the date that the PSO was issued. On 5 November 2012, Mrs N's pension fund amounted to £70,420.82. One can reasonably expect that amount to have grown subsequently with interest.
50. Regulation 18 of The Pension Sharing (Implementation and Discharge of Liability) Regulations 2000 (SI 2000/1053) (see Appendix), provides for the pension credit to be increased to the greater amount applicable (if any) if the valuation day were the actual date of payment by the Trustees, or by adding interest from the actual valuation day calculated as 1% above base rate. Unfortunately, the Trustee has not prepared accounts for several years, so it is not feasible to substitute a contemporary valuation date.
51. I have found that by the date of 21 January 2012, Mr Y ought to have accepted the calculations. I will therefore direct that £70,420.82 must be transferred by the Trustee to Mrs N's new pension arrangement.
52. As it is not feasible to substitute a contemporary valuation date of 21 January 2012, the pension credit calculated as at 5 November 2012, £70,420.82, will be the figure used, with the interest to be added, calculated as from 21 January 2012, to the date of the transfer, at 1% above the base rate from time to time quoted by the reference banks.
53. I also conclude that the fees, from 21 January 2012 to date, have been incurred as a result of Mr Y's unreasonable refusal to accept the PSO calculations. Friends Life made an offer that if the Scheme was wound up by 28 June 2018, they would be willing to accept £2,000 in full and final settlement of their fees. I consider that the fees should, therefore, be paid as follows:
- 53.1. If the Scheme was wound up by 28 June 2018, Mrs N and Mr Y will each pay £1,000 to Friends Life, deducted from their respective funds.
- 53.2. If the Scheme was not wound up by 28 June 2018, Mrs N will pay £1,000 to Friends Life and Mr Y will pay the remainder of any fees charged.

Directions

54. I make the following directions:
- Mrs N shall, within 14 days of the date of this determination provide the Trustee with details of a qualifying arrangement to which she wishes to transfer out her fund;
 - the Trustee shall arrange for the sum of £70,420.82 to be transferred to the selected qualifying arrangement, with interest added, calculated from 21 January

2012 to the date of transfer at 1% above the base rate from time to time, as quoted by the reference banks, less £1,000 for Mrs N's portion of Friends Life's fees, within 28 days of Mrs N's indication above; and

- the Trustee shall, within 28 days of the date of this determination, pay Mrs N £2,500 in respect of the significant distress and inconvenience she has suffered in failing to implement the PSO in a timely manner.

Anthony Arter

Pensions Ombudsman
19 July 2018

Appendix - Relevant legislation

Welfare Reform and Pensions Act 1999

Section 29 Creation of pension credits and debits

“(1) On the application of this section

(a) the transferor's shareable rights under the relevant arrangement become subject to a debit of the appropriate amount, and (b) the transferee becomes entitled to a credit of that amount as against the person responsible for that arrangement.

(2) Where the relevant order or provision specifies a percentage value to be transferred, the appropriate amount for the purposes of subsection (1) is the specified percentage of the cash equivalent of the relevant benefits on the valuation day.

(3) Where the relevant order or provision specifies an amount to be transferred, the appropriate amount for the purposes of subsection (1) is the lesser of (a) the specified amount, and (b) the cash equivalent of the relevant benefits on the valuation day.

(4) Where the relevant arrangement is an occupational pension scheme and the transferor is in pensionable service under the scheme on the transfer day, the relevant benefits for the purposes of subsections (2) and (3) are the benefits or future benefits to which he would be entitled under the scheme by virtue of his shareable rights under it had his pensionable service terminated immediately before that day.

(5) Otherwise, the relevant benefits for the purposes of subsections (2) and (3) are the benefits or future benefits to which, immediately before the transfer day, the transferor is entitled under the terms of the relevant arrangement by virtue of his shareable rights under it.

(6) The Secretary of State may by regulations provide for any description of benefit to be disregarded for the purposes of subsection (4) or (5).

(7) For the purposes of this section, the valuation day is such day within the implementation period for the credit under subsection (1)(b) as the person responsible for the relevant arrangement may specify by notice in writing to the transferor and transferee.

(8) In this section

"relevant arrangement" means the arrangement to which the relevant order or provision relates;

"relevant order or provision" means the order or provision by virtue of which this section applies;

"transfer day" means the day on which the relevant order or provision takes effect;
"transferor" means the person to whose rights the relevant order or provision relates;

"transferee" means the person for whose benefit the relevant order or provision is made"

Section 33 Time for discharge of liability

(1) A person subject to liability in respect of a pension credit shall discharge his liability before the end of the implementation period for the credit.

(2) Where the trustees or managers of an occupational pension scheme have not done what is required to discharge their liability in respect of a pension credit before the end of the implementation period for the credit

(a) they shall, except in such cases as the Secretary of State may prescribe by regulations, notify the Regulatory Authority of that fact within such period as the Secretary of State may so prescribe, and

(b) section 10 of the Pensions Act 1995 (power of the Regulatory Authority to impose civil penalties) shall apply to any trustee or manager who has failed to take all such steps as are reasonable to ensure that liability in respect of the credit was discharged before the end of the implementation period for it.

(3) If trustees or managers to whom subsection (2)(a) applies fail to perform the obligation imposed by that provision, section 10 of the Pensions Act 1995 shall apply to any trustee or manager who has failed to take all reasonable steps to ensure that the obligation was performed.

(4) On the application of the trustees or managers of an occupational pension scheme who are subject to liability in respect of a pension credit, the Regulatory Authority may extend the implementation period for the credit for the purposes of this section if it is satisfied that the application is made in such circumstances as the Secretary of State may prescribe by regulations.

(5) In this section "the Regulatory Authority" means the Pensions Regulator.

Section 34 Implementation period

(1) For the purposes of this Chapter, the implementation period for a pension credit is the period of 4 months beginning with the later of

(a) the day on which the relevant order or provision takes effect, and

(b) the first day on which the person responsible for the pension arrangement to which the relevant order or provision relates is in receipt of

(i) the relevant documents, and (ii) such information relating to the transferor and transferee as the Secretary of State may prescribe by regulations.

Schedule 5 Pension credits: mode of discharge

1 (1) This paragraph applies to a pension credit which derives from—

- (a) a funded occupational pension scheme, or
- (b) a personal pension scheme.

(2) The trustees or managers of the scheme from which a pension credit to which this paragraph applies derives may discharge their liability in respect of the credit by conferring appropriate rights under that scheme on the person entitled to the credit—

- (a) with his consent, or
- (b) in accordance with regulations made by the Secretary of State.

(3) The trustees or managers of the scheme from which a pension credit to which this paragraph applies derives may discharge their liability in respect of the credit by paying the amount of the credit to the person responsible for a qualifying arrangement with a view to acquiring rights under that arrangement for the person entitled to the credit if—

- (a) the qualifying arrangement is not disqualified as a destination for the credit,
- (b) the person responsible for that arrangement is able and willing to accept payment in respect of the credit, and
- (c) payment is made with the consent of the person entitled to the credit, or in accordance with regulations made by the Secretary of State.

(4) For the purposes of sub-paragraph (2), no account is to be taken of consent of the person entitled to the pension credit unless—

- (a) it is given after receipt of notice in writing of an offer to discharge liability in respect of the credit by making a payment under sub-paragraph (3), or
- (b) it is not withdrawn within 7 days of receipt of such notice.

The Pension Sharing (Implementation and Discharge of Liability) Regulations 2000 SI 2000/1053

Regulation 18 Adjustments to the amount of the pension credit - increasing the amount of the pension credit

(1) For the purposes of paragraph 10 of Schedule 5 to the 1999 Act (adjustments to amount of pension credit) the trustees or managers of an occupational pension scheme to which paragraph 1(3) or 3(3) of Schedule 5 to the 1999 Act applies shall increase the amount of the pension credit by

(a) the amount, if any, by which the amount of that pension credit falls short of what it would have been if the valuation day had been the day on which the trustees or managers make the payment; or

(b) if it is greater, interest on the amount of that pension credit calculated on a daily basis over the period from the valuation day to the day on which the trustees or managers make the payment, at an annual rate of one per cent above the base rate.