

Ombudsman's Determination

Applicant	Mr T
Scheme	FP1 Retirement Plan (the Plan)
Respondents	Fast Pensions Limited (FP), FP Scheme Trustees Limited (the Trustee)

Outcome

1. Mr T's complaint is upheld, and to put matters right the Trustee shall comply promptly with any CETV request that Mr T 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 T signed in 2012. If Mr T's new pension provider 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 T within 7 working days of making payment. FP shall pay Mr T £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 T's complaint is that he has been trying to transfer his pension fund out of the Plan since 2015, and it was only in 2017 that FP informed him that his pension fund was locked in for ten years, and until that period has expired he cannot transfer out of the Plan.

Background information, including submissions from the parties

4. The Plan commenced on 27 July 2012 and is administered by FP.
5. In August 2012, a company called Blu Funding telephoned Mr T to offer him a loan of £11,650. At the same time Mr T was asked about his pension arrangements, and it was recommended that he should transfer one of his pension funds to the Plan.
6. On 24 November 2012, Mr T signed a form to accept the Plan's terms and conditions. These said that, amongst other matters:

“The trustees have directed the manager to invest with a view to targeting a minimum return of 5% p.a.net of any charges over a 10 year period plus additional growth as appropriate without undue risk to the underlying target growth.

In order to comply with the requested strategy the discretionary fund manager will invest in underlying assets with a 10 year term that are best suited in the [manager’s] opinion to deliver the minimum targeted return.

Due to the underlying structure of these investments an early redemption penalty of 40% of capital applies in the first year. This penalty reduces by 4% of capital each year, i.e. a penalty of 36% applies in the second year, 32% applies in the third year and so on. After 10 years there are no redemption penalties.”

Apart from these penalties, the acceptance form did not refer to any prohibition on transfers out.

7. FP sent Mr T a welcome pack which said “If you would like a copy of the Trust Deed and Rules please contact: The Scheme Secretary”.
8. Mr T’s transfer to the Plan was completed on 21 December 2012. A fee of £1,000 for FP was deducted, as agreed, from the transfer value of £48,185.57.
9. On 18 January 2013, Ms Wright, FP’s pension processor at that time, sent Mr T a letter setting out its management principles and purporting to include a Plan booklet. Mr T told us recently that the booklet was not enclosed with the letter, but he did not chase FP for a copy.
10. Mr T’s loan was provided in February 2013, with monthly repayments of £264.90 due over seven years.
11. On 12 July 2014, the Trustee was appointed as sole trustee of the Plan in place of the existing individual trustees, who included Mrs Moat. Ms Wright is the sole director of the Trustee.
12. In November 2014, as he was approaching his 55th birthday, Mr T instructed FP that he would like to take 25% of his pension fund as a lump sum. Mr T received the lump sum on 24 December 2014.
13. At this time Mr T discovered that Blu Funding no longer existed, and he became concerned that he might have been a victim of a pensions liberation scam. He reported the matter to Action Fraud. However, in April 2015, Action Fraud concluded that no evidence of a fraud had been found.
14. On 16 June 2015, Mr T asked FP for information on transferring out of the Plan. FP replied on 24 June 2015 that there would be a time-related early exit charge of £12,707 applied to Mr T’s cash equivalent transfer value (**CETV**), so his net CETV

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would be £27,007.34. FP asked him to consider whether he still wished to complete the transfer.

15. Mr T confirmed that he still wished to proceed, and signed FP's forms requesting a transfer of his funds to Standard Life. The completed forms were sent back to FP on 13 July 2015, but were not actioned.
16. Mr T subsequently made various attempts to contact FP and pursue his transfer request to completion. However, FP did not respond to his phone calls or emails and his posted letters were returned to sender.
17. Mr T's initial complaint to us was considered by one of our Adjudicators, who concluded that further action was required by FP. The Adjudicator's findings are summarised briefly below.
 - FP failed to respond to Mr T over a prolonged period of time, mainly regarding his requested transfer to Standard Life, but also in regard to the status and security of the Plan. This constituted maladministration, and lost him the opportunity to vest his funds with his preferred provider. It also caused him significant distress and inconvenience.
 - A formal request from Mr T to transfer from the Plan had been made, and Mr T could not be deprived of a statutory right to transfer under Section 94 of the Pension Schemes Act 1993.
 - Therefore Mr T's complaint should be upheld, because FP had failed to (1) complete his transfer to Standard Life, (2) provide any valid reason why he would not have a statutory right to the transfer, and (3) respond to his subsequent enquiries about this process.
18. Mr D accepted the Adjudicator's Opinion and agreed for the matter to be referred to the Pensions Ombudsman for a binding determination to be issued.
19. FP failed to respond to the initial complaint, and the copy of the Adjudicator's Opinion that was sent to its registered address in London was returned to sender.
20. The initial complaint was then passed to me to determine, and I upheld the complaint on 11 November 2016 [PO-12025]. My determination (**the 2016 Determination**) directed that within 14 days of the date of the Determination FP should:
 - contact Mr T, and if he still wished to do so, assist him in exercising his statutory transfer rights; and
 - pay Mr T £1,000 (**the Compensation Award**) to reflect the significant distress and inconvenience caused to him by its maladministration.

However, FP did not comply with this deadline.

21. On 27 January 2017, FP re-established contact with Mr T, sending him and his financial adviser the annual benefit statement as at 31 December 2016.

22. On 30 March 2017, Mr T's financial adviser told Mr T that Mr Porter, FP's scheme administrator at that time, had recently explained that there was a ten year lock-in period for Mr T's investments in the Plan. Mr T complained that this restriction had not been brought to his attention (or his financial adviser's) when FP quoted Mr T's CETV and provided discharge forms for him to sign in 2015.
23. In July 2017, Mrs Moat, the sole director of FP, confirmed to Mr T that the Trustee would not disinvest his funds within the ten year lock-in period.
24. On 1 August 2017, FP emailed Mr T to acknowledge its poor administration during the previous year. FP also told Mr T that it was not in a position to make a transfer out as it did not have access to the Trustee's bank accounts, so he would have to complain to the Trustee about his transfer request. FP emailed to Mr T a copy of the Plan Rules. Rule 20 refers to individual transfers out (see Appendix hereto). Mr T said that he had not seen the Rules before. FP also sent Mr T the forms to be completed for making a complaint under the Plan's internal dispute resolution procedure (**IDRP**).
25. Mr T then submitted his IDRP complaint to FP and the Trustee. Mrs Moat replied on behalf of both FP and the Trustee. She said that FP was happy to pay the Compensation Award, as the Pensions Ombudsman had determined, once Mr T had supplied his bank details. She also said that the other part of the Pensions Ombudsman's determination regarding Mr T's proposed transfer would not be enforceable in court against FP as it was not in control of the invested funds; that was a matter for the Trustee. Mrs Moat also said that a final review of the transfer request by the Trustee would have highlighted that Mr T was locked in for ten years, saying to him:

“We take decisions to disinvest very seriously as all the investments made by the trustees are in line with the investment contracts that have been signed by clients. Some of these investments are pooled investments and in order to disinvest them we would have to take losses on the whole investment that not only affects your investment however would affect all other members in that pooled investment. The investments are geared to mature in time for your discharge at the end of your investment contract. In some circumstances the Trustee will allow early release however not if it is going to affect other members of the scheme. In the event that the Trustee allows the discharge from the contract early then the penalties will apply to the transfer out depending on what you signed in the original contract.”
26. The Compensation Award was paid by FP to Mr T on 13 September 2017.
27. Mr T then submitted a new complaint to us that, despite the correspondence between 2015 and 2017, regarding his transfer out request, he had not been informed by FP or the Trustee until March 2017, that he was effectively locked into the Plan and could not transfer out for a period of ten years. Mr T said that he had signed several letters of authority for FP to make a transfer on the understanding that the only restriction would be an early redemption charge, which he accepted was a contractual term.

Adjudicator's Opinion

28. Mr T's new 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 FP had resumed correspondence with Mr T in 2017, and had eventually paid him the Compensation Award, the complaint now to be investigated related to the information given to Mr T about restrictions on transfers.
- As a Plan member, Mr T had a statutory right to transfer. He was entitled to request 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. In practice, this meant that Mr T could not transfer out of the Plan if the Trustee was only willing to pay an in specie transfer, unless Mr T's new pension provider was willing and able to accept it. Although Mr T had a preferred pension provider, it was not clear whether it was currently willing to accept an in specie transfer from the Plan. This might prevent a transfer being made in practice.
- In the Adjudicator's view, the statutory right to a transfer out could not be defeated by any wording on consent forms signed by Mr T. That was consistent with the legal principle that, unless legislation specifically permits, a member cannot contract out of rights that have been conferred on him by statute.
- With regard to the amount of the CETV, Mr T had signed an agreement in 2012 that an early exit penalty would apply in the first ten years, so the appropriate percentage deduction should apply.
- In correspondence, FP and the Trustee had relied upon the restrictions in the Plan rules to prevent a transfer out. It was unclear whether the rules were made available to Mr T before August 2017, when FP emailed a copy to him. Mr T said that they were not, whereas FP said that they were given to Mr T when he applied to join the Plan in November 2012. However, FP's welcome pack 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 T probably did not see the rules in 2012.
- Rule 20.6 was worded less formally than the remainder of Rule 20, and said that the Trustee might 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 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, the Adjudicator considered that to be unsuccessful and therefore that Rule 20.1 should prevail.

- FP made the point that the disinvestment of pooled investments at the wrong time could prejudice 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. 40% 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 T and FP had disputed the date on which he firstly became aware of important Plan information. We have 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. This was unlikely to be a mere coincidence. On balance, the Adjudicator took the view that the comments concerning FP and the Trustee, that had been received from individual members, should be given considerable weight.
- The Adjudicator concluded that FP did not inform Mr T until 2017, of its position that transfers within the lock-in period would be made only at the discretion of the Trustee. That information should have been disclosed to Mr T in 2015 when he requested a transfer, and in subsequent correspondence. However, this delay was not critical because in the Adjudicator's view there was no discretion for the Trustee to exercise, as Mr T had a right to transfer under the Pension Schemes Act 1993, and that statutory right could not be fettered.
- The Adjudicator accepted FP's comments that making transfers was a Trustee responsibility and the 2016 Determination did not make a finding against the Trustee. Therefore the current complaint was made against FP and the Trustee, so both parties were respondents. Mrs Moat had replied to our enquiries on behalf of both parties.
- For the reasons set out above, the Adjudicator considered that Mr T's complaint should be upheld against FP and the Trustee: to put matters right, assuming that at the relevant date Mr T still had a statutory right to a transfer, the Trustee should comply promptly with any CETV request that he sent to it, 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 T's new pension provider 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 T accordingly; FP should pay Mr T £1,000 for the significant distress and inconvenience that its conduct had caused him.

29. 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."

30. Mr T said that although he accepted the Adjudicator's Opinion, he was concerned that it allowed for the Trustee to transfer either in cash or in specie (or a mixture of both); he thought an in specie transfer would be offered, and that would not be acceptable to a new pension provider.

31. The complaint was then passed to me to consider. I agree with the Adjudicator's Opinion except in respect of the level of award for the considerable distress and inconvenience which Mr T continues to suffer. My decision in response to the key points made by Mr T, FP and the Trustee, is set out below.

Ombudsman's decision

32. FP and the Trustee do not agree with the Adjudicator that Mr T can transfer during the fixed investment term. 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 T 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 considers most appropriate in the circumstances). The calculation and payment of the CETV will be subject to any early exit penalty arising as set out in the agreement that Mr T signed in 2012.

33. Mr T was concerned that only an in specie transfer would be offered by the Trustee, and that his new pension provider would not be willing to accept it. However, although the Act provides for a statutory right to a transfer, it does not stipulate that a transfer must be offered only in cash. Therefore the Trustee cannot be compelled to offer Mr T a cash transfer.

34. In the recent cases that I have upheld against FP and the Trustee, as respondents, I have awarded each of the applicants £2,000 for their significant distress and inconvenience. Mr T has already received a £1,000 compensation award in respect his initial attempts to obtain a statutory transfer to which he is entitled. However, Mr T has had to make a further complaint and given the considerable obfuscation; the extremely poor administration, and what appears to be deliberate delays on the part of FP, which has inevitably caused Mr T considerable further distress and inconvenience, I consider that a further award of £2,000 is appropriate in this case.

35. Therefore, I uphold Mr T's complaint.

Directions

36. First, I direct that the Trustee shall comply forthwith with any CETV request that Mr T sends to it, and the Trustee shall 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 Mr T at that time, as set out in the agreement that Mr T signed in 2012. If Mr T'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 T within 7 working days of making the payment.
37. Second, I direct that within 28 days of the date of this Determination, FP shall pay Mr T £2,000 for the further significant distress and inconvenience that its conduct in this matter has caused him since the 2016 Determination.

Anthony Arter

Pensions Ombudsman
8 March 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 10 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.”