

## Ombudsman's Determination

<b>Applicant</b>	Mr A
<b>Scheme</b>	Rettig UK Pension Scheme ( <b>the Scheme</b> )
<b>Respondent</b>	KPMG LLP ( <b>KPMG</b> )

### Complaint Summary

1. Mr A has complained that when a pension sharing order on divorce was made against him, KPMG transferred too much money from the Scheme to the pension arrangement of Mrs A, his ex-wife.

### Summary of the Ombudsman's Determination and reasons

2. The complaint should be upheld against KPMG because it transferred too much money from the Scheme to Mrs A's pension arrangement, causing Mr A financial loss. In addition, he incurred legal costs that would not otherwise have been incurred, and should be compensated for those costs. Lastly, an award should be made to Mr A for the significant distress and inconvenience that KPMG has caused him.

### Detailed Determination

#### Material facts

3. The Rettig UK Pension Scheme (**the Scheme**) is an occupational pension scheme that contains two sections: a defined benefit (**DB**) section for pensionable service up to 30 June 2005, administered by KPMG on behalf of the trustees of the Scheme (**the Trustees**), and a defined contribution/money purchase (**DC**) section for pensionable service from 1 July 2005, administered by Standard Life on behalf of the Trustees. As a long serving member of the Scheme, Mr A had benefits in both sections.
4. On 14 June 2013, at Sunderland County Court, District Judge Jackson issued a draft Pension Sharing Order (**PSO**) on divorce. This had been drafted by the lawyer acting for Mrs A, and ordered that:

"There shall be a pension sharing order of the husband's pension with Rettig no. H93849 as to 54% in favour of the wife".

5. The reference number H93849 referred to the DC section of the Scheme. The Pension Sharing Annex (**PSA**) that was attached named the transferring arrangement as the Rettig UK Pension Scheme and referred to Mr A and his National Insurance number. Nothing was typed in the box headed "If appropriate, such other details to enable the pension arrangement to be identified" (**Box (iv)**).
6. The draft order was approved by the lawyer acting for Mr A on 18 June 2013.
7. In a letter to KPMG dated 19 June 2013, the lawyer acting for Mrs A enclosed a copy of the draft PSO and draft PSA and asked: "We would be most grateful if you could kindly confirm to us as soon as ever possible whether or not you would be able to implement the attached Order and Annex as prepared."
8. On 19 July 2013 KPMG replied: "I can confirm that we are able to implement a Pension Sharing Order, if made in line with the Annex you have provided." KPMG enclosed a schedule of implementation charges.
9. The PSO and PSA were signed and sealed on 1 October 2013, in the same form as the drafts.
10. In a letter dated 18 October 2013 Mrs A's lawyer asked KPMG to implement the PSO and PSA, enclosing sealed copies.
11. In letters, dated 29 October 2013, KPMG asked Mr A and Mrs A's lawyer to supply further documents and pay the appropriate implementation charges. They complied with these requests in November 2013.
12. In January 2014 KPMG identified an inconsistency in the PSO and the PSA. On 27 January 2014 KPMG asked Mrs A's lawyer to confirm "whether the pension sharing order is to apply to both [Mr A's] Defined Benefit pension, and his Money Purchase pension." KPMG also said that the implementation period had started on 24 January 2014 and would end on 24 May 2014.
13. In February 2014 the firm of lawyers that had represented Mr A in the divorce proceedings ceased trading.
14. On 18 February 2014 KPMG sent a reminder to Mrs A's lawyer.
15. In a letter to KPMG dated 26 February 2014 Mrs A's lawyer replied that:

"...the Court Order for the Pension Sharing Order applies to the *whole* of the Pension holding that [Mr A] holds in the Rettig UK Pension Scheme. We do hope this is of assistance to you."
16. Mr A moved house on 14 April 2014, informing Mrs C (his HR Manager and one of the Trustees of the Scheme).
17. On 20 May 2014 KPMG transferred 54% of Mr A's DB pension and 54% of his DC pension fund from the Scheme to Mrs A's pension plan.

18. On 20 June 2014 KPMG sent a “notice of discharge of liability” to Mr A, confirming that the Trustees had completed the implementation of the PSO. The letter set out a pension debit of £147,052 in respect of the DB pension and a pension debit of £32,173 in respect of the DC pension fund (the amounts that had been transferred to Mrs A’s pension plan) and set out the value of Mr A’s residual benefits in the Scheme. Unfortunately, KPMG posted the letter to Mr A’s old address, and it was not forwarded to him.
19. Mr A said that in April 2016 he became aware that the transfer from the Scheme to Mrs A’s pension plan was larger than he had expected. On 28 April 2016 his lawyer contacted Mrs A’s lawyer and pointed out that the PSO had referred to pension fund reference H93849, not the whole of the Scheme, and there was no intention to share all of Mr A’s benefits under the Scheme. Mr A’s lawyer asked for the matter to be put right, with Mr A’s costs to be reimbursed.
20. Mrs A’s lawyer replied on 3 May 2016 that if there was any valid claim it should be made against (1) KPMG, who had not raised any issues on the wording before it was implemented; his letter of 26 February 2014 gave KPMG no wider authority than that set out in the PSO draft, or (2) Mr A’s lawyer, who had agreed the drafting with Mrs A’s lawyer.
21. Mr A then instructed another law firm, which asked KPMG whether it had acted in accordance with the authority provided to it, or had been misled by the letter of 26 February 2014.
22. On 30 June 2016 KPMG explained that the DB section and the DC section formed two parts of the same Scheme; there was no specific reference number for the DB section, and it was not uncommon for advisers to quote the Standard Life reference number for the DC section (H93849) when identifying individual Scheme members; the PSO did not state that only 54% of the DC fund should be transferred; the letter of 26 February 2014 had confirmed that the whole pension under the Scheme should be shared. Therefore, KPMG had acted correctly; if it had known earlier that the PSO was to be applicable to only one section of the Scheme it would have suggested different wording. KPMG added that Mr A had stated that the DC pension fund should not be shared, which contradicted the statement that only the DC pension fund should be shared.
23. On 21 July 2016 Mr A’s lawyer complained to Mrs A’s lawyer that the latter had not completed the PSA clearly and did not complete Box (iv); the PSO wording provided for a transfer in respect of the DC pension fund as it included Standard Life’s reference number, whereas transfers had been made in respect of both the DB and the DC sections; Mrs A should therefore transfer back the DB element, plus costs.
24. On 11 August 2016 Mrs A’s lawyer told Mr A’s lawyer that he had understood that only the DB part should have been shared with Mrs A, so any transfer back to the Scheme should relate to the DC pension fund; he denied making any representation

to KPMG; he said that he was not currently instructed to act for her. He noted that Mr A should have been aware of the position when he received KPMG's letter of 20 June 2014, but he did not raise the issue until nearly two years later.

25. Mr A's lawyer then contacted Mrs A directly, by email and letter, asking her to confirm that she would transfer back the DB share plus costs. Mrs A emailed back that she would return the letter unopened, saying she assumed that it related to mistakes made by professional parties, and complained of harassment. She was upset that Mr A's lawyer had found her current address.
26. In November 2016 Mr A applied to the family court, to enforce the 2013 consent order against Mrs A and recover the DC transfer.
27. A note of the hearing by District Judge Jackson (the same judge as in 2013) was produced. The judge retrieved the file for the divorce hearing and retraced the arithmetical calculations he had made previously. He was clear that there had been no intention for Mr A to share the Standard Life DC account; as drafted the PSA did not authorise the Trustees (or their agent KPMG) to transfer a share of that account. The judge also said that he did not have power to order recovery from Mrs A, and it was for Standard Life (or KPMG as its agent) to recover the sum from Mrs A.
28. The judge made an order (**the 2017 Court Order**) as follows:

“Upon the Court declaring that the court neither ordered nor intended to order any pension sharing of the Applicant's Standard Life Retirement Account Plan Member Number 236 IT IS ORDERED THAT

Application dated 7<sup>th</sup> November 2016 be dismissed.

No order for costs.”
29. Mr A sent a copy to Mrs C and told the Trustees that KPMG should not have transferred any money until the PSO and PSA had been properly completed. He wanted KPMG to reinstate his DC pension fund and reimburse his legal fees. He also wanted compensation for the stress he had been caused over 18 months.
30. Mr A made a formal complaint to the Trustees on 18 October 2017, saying that the 2017 Court Order made clear that the DC pension fund should not have been shared; the party that had implemented the PSO incorrectly was KPMG.
31. The Trustees discussed the matter at their next meeting on 28 November 2017. They told Mr A that KPMG would discuss the matter with Mrs A.
32. On 13 December 2017 KPMG wrote to Mrs A, referring to the 2017 Court Order and asking her to repay to Standard Life the DC element that had been transferred to her pension plan (£32,173). Mrs A declined to do so on 5 January 2018, saying that she was not at fault and had relied on the professionals involved.
33. Mr A complained to us in January 2018.

### **Summary of Mr A's position**

34. The PSO and PSA had not been drafted correctly by the lawyers involved, as they did not make clear that only the DB benefits should be shared, so those documents were not in a form suitable for implementation.
35. KPMG had incorrectly transferred a share of his DC pension fund to Mrs A's pension arrangement. He was unaware of the error until April 2016. That was because he had informed Mrs C of his new address in 2014, but KPMG's letter of 20 June 2014 was sent to his old address, and was not forwarded to him.
36. KPMG should reinstate his DC pension fund in the Scheme plus interest, to put him in the position he should have been in.
37. He had to incur legal expenses to obtain the 2017 Court Order because KPMG persistently denied that it had made an error and refused to rectify the position; therefore, KPMG should reimburse him for those costs.
38. KPMG had still not complied properly with the terms of the PSO and PSA, and had incorrectly implied that he had not been open, honest and truthful.
39. The matter had caused him much distress over eighteen months, and KPMG should also compensate him for that.

### **Summary of KPMG's position**

40. Mr A should have been aware from KPMG's letter in June 2014 of the transfer amounts that had been made, and should not have delayed raising the matter until 2016.
41. KPMG should not be held responsible for the error that had been made in sharing Mr A's pension benefits, as KPMG had not been party to the divorce negotiations and legal proceedings, and it could only act on the instructions provided, which had been agreed between Mr A and Mrs A (or their lawyers).
42. When KPMG queried the scope of the proposed PSO in February 2014, it was told by Mrs A's lawyer that the PSO applied to all of Mr A's pension funds in the Scheme. KPMG had no reason to question the veracity of that information, so it was reasonable for KPMG to proceed on that basis.
43. A number of parties had contributed to the situation that had arisen, and KPMG was the least culpable.
44. If Mrs A's pension arrangement had received too much money, the clear and equitable solution would be for that money to be repaid to the Scheme, but that was not KPMG's responsibility.
45. KPMG had never intended to imply that Mr A had not been open, honest or truthful.

## Conclusions

46. Mr A has brought his complaint against KPMG, so I cannot make a finding against any of the other parties that have been involved in this matter.
47. KPMG has admitted that it transferred more money to Mrs A than Mr A had intended, as the transfer related to a share of both his DB and DC benefits but the intention was to transfer only a share of DB benefits, leaving all the DC pension fund in the Scheme. Therefore, Mr A has suffered a financial loss, so there is no dispute that a problem has occurred and that Mr A has been disadvantaged as a result.
48. I accept that KPMG was not party to the divorce discussions, and did not draft the PSO and PSA. However, as Scheme administrator, it was the responsibility of KPMG under the relevant legislation to comply with the terms of the PSO and PSA as worded.
49. In my view, the wording adopted in the PSO and PSA was highly unsatisfactory because the PSO quoted the reference number for the DC pension fund (implying a DC transfer should be made) whereas the PSA referred to the Scheme name and Box (iv) was not completed (implying both DB and DC transfers should be made). Box (iv) could have been filled in to say, "DB section only" or similar words, to clarify what was intended.
50. KPMG noticed that the proposed wording was unclear and made a point of seeking clarification from the lawyers involved in the divorce proceedings. When KPMG was told by Mrs A's lawyer that the pension share applied "to the whole of the Pension holding that [Mr A] holds in the...Scheme", KPMG relied on that statement and made a transfer on that basis. Unfortunately, as later became clear, Mr A had been intending to share only the DB part of the Scheme. In my view KPMG was seriously misled by Mrs A's lawyer in February 2014, and as a direct consequence KPMG transferred more money than was intended.
51. KPMG did not take legal advice from its own lawyer, as it should have done. Alternatively, KPMG should have referred the matter back to the Trustees to consider and take advice on. In practice KPMG relied only on the advice of a lawyer that it had not instructed, who was acting for Mrs A. I consider that KPMG's failure to take proper advice on this matter when it identified that the wording was ambiguous amounted to maladministration.
52. When Mr A obtained the 2017 Court Order it made clear that the parties had no intention to require Mr A to share with Mrs A any part of his DC pension fund, and that "the court neither ordered nor intended" that to happen.
53. I am of the view that the position needs to be rectified, and that in the circumstances it is KPMG's responsibility to do that. KPMG made the incorrect transfer so KPMG should put that right.

54. To remedy the position, KPMG should liaise with such other parties as are appropriate to reinstate Mr A's DC pension fund in the Scheme in full, adjusted to reflect the investment return that would have arisen in the Scheme had the DC transfer not been made in 2014.
55. Mr A sought to recover his legal costs. I do not normally make an award that an applicant's legal costs should be reimbursed. That is because applications can be made to The Pensions Advisory Service and this office without firstly instructing lawyers. However, Mr A would not have had to go back to court to obtain the 2017 Court Order if KPMG had taken independent legal advice and not transferred an incorrect amount in 2014. In my view, there is a sufficient causal link between KPMG's errors and Mr A's legal expenses to justify me finding that KPMG should reimburse Mr A for those costs.
56. In addition, Mr A has suffered non-financial injustice since this issue came to light in 2016. I consider that KPMG should make a payment to Mr A for the significant distress and inconvenience that he has unnecessarily been caused. However, I am satisfied that KPMG did not intend to imply that Mr A was not open, honest or truthful.
57. It may be that KPMG will have a counter-claim against other parties involved in this matter, but that is not an issue for me to determine.
58. I therefore uphold the complaint against KPMG because it transferred monies from the Scheme to Mrs A's pension arrangement which it had no authority to do.

### **Directions**

59.

- Within 56 days of the date of this Determination, KPMG shall liaise with such other parties as are appropriate to reinstate Mr A's DC pension fund in the Scheme in full, adjusted to reflect the investment return that it would have attracted up to the date of this Determination, and confirm promptly to Mr A, in writing that has been done;
- Within 28 days of the date of this Determination, KPMG shall reimburse Mr A for his legal expenses of £4,775, and
- Within 28 days of the date of this Determination, KPMG shall pay Mr A £500 for his significant distress and inconvenience.

**Anthony Arter**

Pensions Ombudsman  
23 November 2018