

## Ombudsman's Determination

Applicant	Mr N
Scheme	Netwindfall Executive Pension Plan ( <b>the Plan</b> )
Respondents	Clerical Medical

## Outcome

1. I do not uphold Mr N's complaint and no further action is required by Clerical Medical.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr N has complained that Clerical Medical has refused to transfer the value of his Plan to the Marchar Ltd Retirement Benefits Scheme (**the Marchar Scheme**) and he has lost out on a large financial gain he would otherwise have attained.

## Background information, including submissions from the parties

4. Mr N says that he contacted Clerical Medical in October 2013 and requested a transfer to the Marchar Scheme. He had an opportunity to invest in Eligere Investments plc (**Eligere**) and to purchase shares at a price of £0.001 per share. The value of the shares increased to between £0.58 and £0.61 per share in February 2014. Mr N says he would have wanted to sell the shares at this time and would have expected to receive a discount to the bid price for a large amount of shares but would have expected to make in excess of £1 million on the transaction.
5. Clerical Medical say that they can only process a transfer if it falls under the definition of a "recognised transfer" as set out under section 169 of the Finance Act 2004. If after carrying out due diligence checks, on all parties to a transfer, they are not confident that funds will be held within a specified destination scheme or will represent rights under that scheme, or that they believe the trustees may not fulfil their fiduciary duties then they class the proposal as being outside the definition of a recognised transfer.

6. Clerical Medical have also questioned the validity of what Mr N says is his prospective financial loss due to the delay in transferring to the Marchar Scheme. Mr N says that the share price increased from £0.001 to £0.61 between November 2013 and February 2014, an increase of 6100 times the original price in just three months. Clerical Medical say that this level of increase is inconceivable. Mr N's funds are approximately £18,000 and if he had invested all in Eligere, his pension pot would be worth £10,980,000.

## **Adjudicator's Opinion**

7. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by Clerical Medical. The Adjudicator's findings are summarised briefly below:-
  - Clerical Medical as Plan administrator is required by the Pensions Regulator to carry out due diligence checks to establish the probity of a transfer in order to prevent pension liberation activity and potential pension scams. If, as a result of these due diligence checks, the administrator has concerns about the transfer then he can delay the transfer and in some cases prevent it proceeding (for example, if it would not provide transfer credits in the receiving scheme).
  - The issue for administrators, around the time that Mr N was applying for a transfer, was that there was little guidance as to what features of a transfer, particularly one with unusual features, gave sufficient grounds to prevent a transfer proceeding. The pensions industry looked to the courts, or the Pensions Ombudsman to provide guidance through cases brought before them.
  - There were a number of complaints brought to this office concerning similar cases to Mr N's where the Scheme employer did not trade and did not pay any earnings to the member.
  - One of the first cases that the Pensions Ombudsman determined, in relation to reasons to prevent a transfer, was the case of Jerrard in January 2015. In this determination the former Ombudsman set out his view that a transferring member had to be in receipt of earnings from a scheme employer of the receiving scheme in order to obtain transfer credits and establish a statutory right to transfer under the Pension Schemes Act 1993. The current Ombudsman made a similar finding in his subsequent determination of 30 June 2015, in the case of Hughes (PO-7126).
  - As Marchar Limited appears to have been set up purely to facilitate the transfer from Clerical Medical and Mr N has no earnings from it, then had either of the Ombudsmen issued a determination at the time, the Ombudsmen would not have upheld Mr N's complaint, in relation to transfer rights.

- In July 2015, the Ombudsman's determination in Hughes was appealed to the Chancery Court and all similar cases (including Mr N's case) were placed on hold. The main ground of appeal related to the Ombudsman's analysis of the meaning of 'earners' in legislation.
- The appeal judgment, Hughes v Royal London [2016] EWHC 319 (Ch), on 19 February 2016, held that earnings from any capacity, not just from a scheme employer, would suffice. Therefore, the Ombudsmen's finding on the need for a transferring member to have earnings in the new scheme was overturned. This means that Mr N may, if he receives earnings from another source, now meet that legal test and have a statutory right to transfer.
- Although the Hughes judgment did not specifically deal with the issue of Directors, it has previously been held, in Pi Consulting (Trustee Services Limited) and Dalriada Trustee Services Ltd v The Pensions Regulator and others [2013] EWHC 3181 (Ch), that an unremunerated director can be a member of an occupational pension scheme by way of their directorship rather than remuneration. This was in the context of considering whether that scheme was a valid occupational scheme, rather than the earners issue, so it remains unclear whether an unremunerated director could be said to obtain transfer credits in that scheme by transferring in from another (i.e. has a statutory right to transfer) without having any other earnings. However, bearing in mind that in Hughes the key finding that earnings (albeit any earnings) was necessary for the purpose of receiving transfer credits, then a directorship of itself is unlikely to be sufficient.
- It was not maladministration for Clerical Medical to have declined to transfer before then, since that was in line with both the Ombudsmen's views before February 2016. Case law is clear that incorrect interpretation of the law does not necessarily constitute maladministration. Without such a finding, consideration of Mr N's claim for financial loss becomes unnecessary.
- Mr N has provided a letter from Bracher Rawlins solicitors to show that he had an Investment Facility Agreement with Eligere whereby he agreed to make available a facility of up to £90,000 of zero coupon convertible unsecured loan notes (**Convertible Loan Notes**). These Convertible Loan Notes could be converted into Eligere ordinary shares at an exercise price of £0.001. Thus if Mr N had been able to invest his £18,000 into Eligere shares he would have been able to acquire some 18 million shares.
- Eligere and its trading subsidiary CNI (UK) Limited were engaged in marketing carbon credits. The shares were quoted on the GXG Market, which has now ceased trading. However, a large trade of 18 million shares would only be possible if there was a buyer willing to acquire such a large parcel of shares. The market in carbon credits has received a lot of negative press comment and although Mr N may say that he would have exited at close to a high point in the share price of Eligere, this may be more of an expectation than what would have happened in

practice. Therefore the perceived financial loss is more one of expectation than an actual loss.

- Furthermore the transfer of funds to the Marchar Scheme was always subject to Clerical Medical agreeing to the transfer and it was not unreasonable for them at the time to take the position they did.

8. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr N for completeness.

### **Ombudsman's decision**

9. Mr N says that when Clerical Medical first contacted him about the transfer to the Marchar Scheme they sent him a list of questions which he answered. These included questions regarding his reasons for transferring and what, if any, advice he received.
10. Mr N says he has worked in the investment industry for over 40 years and was active as a market maker and understands the market better than most people. A sell order will often generate a lot more turnover as the supply of shares usually increases liquidity allowing people to trade. He believes that that this would have been the case with Eligere and a £1million profit would have been realised if the shares had been traded at one tenth of the price they actually traded at in February 2014.
11. I do not doubt that Mr N has considerable investment experience and one possible outcome is that a sell order will generate additional turnover in the shares. However, on the balance of probabilities, I think it more likely than not that the shares would not have realised the profit that Mr N says could have been realised and thus his perceived loss is more one of expectation than an actual loss.
12. I also find that it does not change the view that it was reasonable for Clerical Medical to withhold the transfer due to their concerns over the Marchar Scheme. Mr N had set up Marchar Limited purely to facilitate the transfer and Mr N had no earnings from it. These concerns were sufficient within Clerical Medical to raise alarm bells and was in line with the thinking of both this office and other pension professionals at the time.
13. The position was clarified by the Hughes judgment and it would be inequitable to find against Clerical Medical for an incorrect interpretation of the law prior to that judgment. As the Adjudicator has said Case law is clear that an incorrect interpretation of the law does not necessarily constitute maladministration.
14. Clerical Medical should now review their position and decide if a transfer can proceed if Mr N still wishes to transfer.

**PO-5395**

15. Therefore, I do not uphold Mr N's complaint.

**Anthony Arter**

Pensions Ombudsman

1 February 2017