

As another year begins, which will no doubt see many changes to the pensions landscape, it seems timely to take a look back and consider a few Determinations from the Pensions Ombudsman in the last few months and what these may mean for Trustees, pension schemes and providers.

### Pension Scams and the Statutory Right to Transfer

Pension scams have been the bane of many pension administrators' lives for many years now. It remains to be seen just how effective the new restrictions on a member's statutory right to transfer will be, however there was a useful [Determination](#) published in December 2021 which acts as a helpful reminder of the position before the new restrictions came into force.

The case here concerned a transfer from the Armed Forces Pension Scheme to an occupational pension scheme called the Capita Oak Pension Scheme, which had been established in 2012 in Cyprus. (We are sure that, for many of you, serious alarm bells will already be ringing!)

The timeline for this case is interesting, in that the member's request to take the transfer was received by the transferring scheme in January 2013, just before the Pensions Regulator issued its so called 'Scorpion leaflet' on 14 February 2013. The transfer out was not actually completed until September 2013.

As noted in the Determination, this 14 February 2013 date is taken by the Ombudsman as marking a point of change in the level of due diligence

expected from transferring pension schemes. Previous Determinations have indicated that the Ombudsman considered it reasonable for schemes to have a period of time (traditionally considered to be three months, but more recently reduced to one month) to adjust to the new due diligence expectations.

One of the worrying aspects of this case is that the transferring scheme claimed that it did not become aware of the Regulator's Scorpion leaflet and the new due diligence expectations until 29 October 2013 and then put in place additional due diligence processes from November 2013. As the Ombudsman commented, it is for all schemes to keep up to date with changes to pension standards and guidance. In addition, the Ombudsman concluded that there was sufficient time between the issue of the Scorpion leaflet (February 2013) and the completion of the transfer (September 2013) for the transferring scheme to put in place additional due diligence measures and provide the member with a copy of the Scorpion leaflet, which it did not do.

The Determination here also considers the circumstances in which a member had a statutory right to transfer under Section 95 of the Pension Schemes Act 1993 and, in particular, the requirement that a transfer to an occupational scheme must be used by the receiving scheme to provide 'transfer credits' under that scheme in respect of an 'earner'. Many readers here will remember the case of *Donna-Marie Hughes v Royal London Mutual Insurance Society Ltd* where the High Court concluded that the reference to an 'earner' here simply means someone in receipt of

earnings from any source, not necessarily from a sponsoring employer of the receiving scheme. (Incidentally, this is one of the issues that the recent *The Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021* [[SI 2021/1237](#)] are intended to address.)

In this particular case, the transferring scheme argued that the member had a statutory right to transfer under the Pension Schemes Act 1993. As the Ombudsman stated, however, in August 2013, as a method of providing proof of his identity, the member provided the transferring scheme with evidence that he was in receipt of Jobseeker's Allowance (a benefit that is only payable to individuals who are not working). In addition, the Ombudsman had seen evidence that, between 26 June 2013 and 13 September 2013, the member was in receipt of this benefit. Importantly, these dates span the 3 September 2013 date on which the transfer was actually approved by the transferring scheme.

As such, the Ombudsman concluded that, on the date that the transfer out was approved, the member was not an 'earner' and so had no statutory right to take a transfer out. As a result, the transferring scheme is not entitled to benefit from the statutory discharge of their liabilities in respect of the transferred benefits.

The Ombudsman directed the transferring scheme to reinstate the member's benefits in that scheme, or if it is unable to do so, provide the member with equivalent benefits under another pension arrangement and also to pay the member £2,000 in respect of severe distress and inconvenience.

### **Aries Comment**

This Determination provides a very helpful review of the development of the due diligence expectations on transferring schemes. It is also a useful reminder that, notwithstanding the *Hughes* case, a member who is not an 'earner' does not have a statutory right to transfer to an occupational scheme.

It is surprising to us that the transferring scheme claimed to have been unaware of the Scorpion leaflet until over eight months after it was published. One would hope that the scheme will not take so long to become aware of the recent *The Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021* [[SI 2021/1237](#)].

### **A Hot Potato**

In October 2021, the Ombudsman issued a [Determination](#) concerning a member of the Old British Steel Pension Scheme. Readers may be aware of the British Steel Pension Scheme, which entered into a PPF Assessment Period on 29 March 2018 and, at the same time, changed its name to the Old British Steel Pension Scheme (OBSPS).

In the run up to this, members of the British Steel Pension Scheme were given the opportunity to transfer their benefits into a new scheme, called the New British Steel Pension Scheme (NBSPS). The member in this case decided that he wished to transfer to the NBSPS but also requested a CETV statement on 13 October 2017.

This statement was provided to the member on 24 November 2017, quoting a CETV of £323,733.36. The statement also included:

- a notice that the member would be required to take appropriate independent advice before the transfer could proceed and that the Money Advice Service and Unbiased could provide details of Independent Financial Advisers;
- a notice that, if the member's application to transfer was not processed by 28 March 2018 even if the member had requested to transfer within the guaranteed period, the member might not get the CETV that was quoted or be able to transfer out at all. In terms of the deadlines here, the notice also stated that the member's new pension arrangement would need to complete and return all the necessary forms and transfer documentation to the OBSPS by 16 February 2018 at the latest; and
- a warning that the member's transfer value in the new scheme (the NBSPS) is likely to be lower than their transfer value in the current scheme (the OBSPS), to reflect the fact that the overall benefits, including possible future increases, could be lower in the new scheme.

Readers may well be aware of concerns that have been raised about [advice](#) given to members of the OBSPS in connection with transfers out from that scheme. This was certainly evident in this case, as:

- On 30 November 2017, the member contacted an IFA, who said that it had concerns over the Financial Conduct Authority's investigation into other IFAs who had previously advised members of the OBSPS and that, as a result, it would not

provide any advice in connection with that scheme.

- On the same day, the member contacted a second IFA, who responded by providing the member with details of another IFA that was based closer to the member. (In our experience, it is quite rare for an IFA to decline business and refer a potential client to another IFA – perhaps this second IFA also considered the OBSPS to be too much of a hot potato.) That third IFA, however, then contacted the member to confirm that he would not take on any work connected with the OBSPS.
- On 5 January 2018, the member contacted a fourth IFA, who arranged a meeting with the member on 19 January 2018. On 24 January 2018, however, that IFA contacted the member to say that there were inherent risks carried by advising members of the OBSPS, so it would not be providing any advice.

Eventually the member found an IFA that would help him and on 7 February 2018, that IFA contacted the OBSPS to request a CETV statement and additional information to enable the IFA to produce a report for the member.

The OBSPS responded on 9 February 2018 to confirm that the member was already in possession of a valid CETV statement and that, in light of the imminent changes to the scheme, further information would not be available until later in the year.

On 16 February 2018, the deadline for making an application to transfer out of the OBSPS expired and, on 28 March 2018, the member joined the

NBSPS, in accordance with the 'option form' that the member had provided to the OBSPS.

The member then requested a CETV statement from the NBSPS, which was provided on 31 May 2018 confirming a CETV of £230,569.78. It was at this point that things started to kick off. The member's IFA contacted the NBSPS to ask why the new CETV was significantly lower than the previous CETV, to which the scheme replied, saying:

... "the 'new' Scheme introduced from 29 March 2018 uses different actuarial factors and assumptions than those previously used under the 'old' Scheme. These reflect the cost of providing the member's benefits as prescribed under the 'new' Scheme's Trust Deed and Rules. As you will be aware from previous correspondence issued, this includes the changes to the future pension increases applied. It is not therefore possible to accurately compare transfer values provided under the different arrangements."

The member complained to the Ombudsman on three grounds:

- He had wasted a significant amount of time because of problems he faced when searching for an IFA.
- He said that the OBSPS's hotline was always engaged, so he could not get any help in sourcing an IFA.
- He has not received a satisfactory answer as to why his CETV had reduced by such an amount.

The Adjudicator who reviewed the complaint concluded that:

- the November 2017 CETV statement clearly stated the 16 February 2018 deadline for submitting transfer applications and that this deadline was given sufficient prominence, so that the member would have been aware of its importance.
- the requirement to take appropriate independent advice is not a condition imposed by the OBSPS but is instead a statutory requirement where the CETV exceeds £30,000. Whilst the member clearly faced difficulties in finding an IFA who would provide advice, this could not be attributed to any maladministration on the part of the Trustees of the OBSPS.
- whilst the member may have had difficulties in contacting the OBSPS's hotline (which the member asserted caused delays in sourcing an IFA), recommending an IFA would have been beyond the remit of the hotline and, as the scheme had already signposted the Money Advice Service and Unbiased as places where the member could obtain details of IFAs, the Trustees had provided sufficient information on this aspect.
- the November 2017 CETV statement had warned the member that, if he transferred to the NBSPS, their transfer value in the new scheme would be likely to be lower than that in the old scheme and that the reasons for this had indeed been made clear to the member.

As such, the Adjudicator rejected the complaint. The member did not accept this, so the case was referred to the Ombudsman, who upheld the Adjudicator's decision.

#### **Aries Comment**

Whilst the circumstances of the OBSPS are somewhat unusual, with many IFAs clearly treating this as a hot potato that they simply will not provide any advice on, the difficulty in obtaining appropriate independent advice is a growing concern for many members seeking to transfer 'safeguarded benefits'. Whilst we fully support the requirement for affected members to take appropriate independent advice before they can take a transfer, this clearly cannot work in practice if there are no IFAs who are willing to provide such advice.

Schemes can, however, take comfort from this Determination in terms of the fact that schemes are not required to assist members in finding an IFA that is willing to provide advice.

#### **Taking a guaranteed CETV**

The final [Determination](#) we will look at here concerned a member who had requested a guaranteed statement of her CETV in August 2018. This was provided by the scheme on 24 August 2018, with the CETV of £423,154.16 being guaranteed until 24 November 2018.

The letter accompanying the statement included the following note:

"We must be in receipt of all completed forms by 24 November 2018 to secure the guaranteed

transfer value. If we receive the 'transfer agreement' or 'Confirmation of Appropriate Independent Advice' form after 24 November 2018, the transfer value will be recalculated and it may be higher or lower than the value shown on the enclosed statement. If your revised guaranteed transfer value is higher, or within 10% of the amount shown on the statement of entitlement, we will go ahead and pay the revised transfer value."

On 23 November 2018, one day before the guarantee period expired, the member's IFA e-mailed the transferring scheme to provide the completed member's portion of the 'transfer agreement'. It was not, however, until 26 November 2018 that the IFA provided the scheme with the required confirmation of appropriate independent advice having been taken and only on 28 November 2018 did the receiving scheme provide their completed portion of the 'transfer agreement'.

On 2 January 2019, the receiving scheme confirmed to the member that a transfer of £409,877.29 had been made to her chosen receiving scheme. This led to a complaint by the member's IFA that the e-mail of 23 November 2018 was sufficient to hold the guaranteed CETV of £423,154.16.

The transferring scheme rejected this argument, stating that, to hold the guaranteed CETV, it needed to receive not only confirmation of the member's intention to take the transfer (the member's portion of the 'transfer agreement') but also confirmation that the receiving scheme was willing and able to accept the transfer payment and that it met certain prescribed conditions (this

confirmation being contained in the receiving scheme's portion of the 'transfer agreement').

The IFA disagreed, asserting that insisting that the receiving scheme documentation etc must be received within the guarantee period for the guarantee to stand, was incorrect.

The complaint was then considered by the transferring scheme's IDR process, where the Trustees rejected the complaint on the basis that they had not received all of the necessary forms to complete the transfer within the guarantee period.

The complaint was then raised with the Ombudsman, with all parties setting out their respective positions, including arguments from the member's position that:

- the Pensions Regulator's guidance on the appropriate independent advice requirements includes a [timeline](#) indicating that the member has a ten day window after the expiry of the guarantee period within which confirmation of appropriate independent advice could be provided and that there was no reason why the transferring scheme could not apply the same approach for the receiving scheme's portion of the 'transfer agreement'.
- the member's portion of the 'transfer agreement' stated that the receiving scheme was a Personal Pension Plan (although it appears that it did not name the actual receiving scheme) and included a declaration from the member that the receiving scheme has agreed to accept the transfer.

- other pension administrators had been willing to accept that receipt of the completed member's portion of a 'transfer agreement' within the guarantee period was sufficient to hold the guaranteed CETV.

The complaint was considered by an Adjudicator, who rejected it. In particular, the Adjudicator commented that:

- The Trustees of the transferring scheme would not have known if the member's application satisfied the 'ways' referred to in subsection 95(1) of the Pension Schemes Act 1993 (the permitted ways of taking a right to a cash equivalent) unless it had the receiving scheme's details and was able to check that it met either subsection (a), (b), (c) or (d) of subsection 95(2) of that Act. The Adjudicator was of the opinion that the member's application could not have been treated as complete unless all of this information was provided within the guarantee period as set out in subsection 95(1A) of the Act.
- In terms of the Pension Regulator's guidance, this also states that "Members must also be informed that the authorised independent adviser's confirmation that appropriate independent advice has been obtained by the member must be in the required form and be provided to the trustees within three months of the day on which the statement of entitlement was provided to the member".
- Whilst the Regulator's guidance includes the statement that "Trustees have discretion to honour a transfer in the event member confirmation (in respect of the appropriate independent advice requirement) is received

after the three-month period, for example, if there has been a delay in obtaining appropriate independent advice", the Regulator was not suggesting the ten-day extension should be allowed in every case. In the Adjudicator's view, it was for the Trustees of the transferring scheme to decide if they should exercise their discretion to allow further time. However, they did not have to do so and this discretion did not extend to the receipt of any other information.

- In its letter of 24 August 2018, the transferring scheme was clear in relation to its requirements for the CETV that had been quoted to be paid. It stated that it must receive all completed forms by 24 November 2018 to secure the guaranteed transfer value. It went on to say that, if it received the transfer agreement or the confirmation of appropriate independent advice form after 24 November 2018, then the transfer value would be recalculated.

The member disagreed with the Adjudicator's decision and so the case was referred to the Ombudsman, who upheld the Adjudicator's findings. In particular, the Ombudsman commented that:

- Under subsection 95(2) of the Pension Schemes Act 1993, confirmation is required from the Trustees or managers of the receiving scheme that they are willing and able to accept the transfer in. It was reasonable for the transferring scheme to insist that it must receive the receiving scheme's portion of the 'transfer agreement' by 24 November 2018. The member's application to transfer was not valid

until all of the required information had been provided.

- Whilst the member's IFA asserts that other providers are willing to accept some of the documentation after the guarantee expiry date, the transferring scheme here is not obliged to follow administration procedures used by other schemes. What matters is the administration procedures agreed between the transferring scheme's Trustees and its administrators.

#### **Aries Comment**

This is a welcome Determination in that it confirms that transferring schemes are entitled to insist that all of the required information etc must be received within the guarantee period of a CETV for that guarantee to hold good. It is not possible for a member or their IFA to argue that, provided some of the information is provided within that period, the guarantee must then stand.

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