

Ombudsman's Determination

Applicant	Mr T
Scheme	Phoenix Life Personal Pension (the Plan)
Respondents	Phoenix Life Limited (Phoenix)

Outcome

1. I do not uphold Mr T's complaint and no further action is required by Phoenix.

Complaint summary

2. Mr T has complained that Phoenix wrongly permitted a transfer of his benefits under the Plan to the Optimum Retirement Benefit Plan (**the Optimum Scheme**). Mr T is concerned that, as a consequence, all his pension funds have been lost. He would like to be put back into the position he would have been in had Phoenix not allowed the transfer.

Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
4. On 30 June 2015, the Optimum Scheme was established by trust deed and registered with HM Revenue & Customs as an occupational pension scheme. It was administered by Optimum Financial Solutions Limited (**Optimum**), a company regulated by the Financial Conduct Authority (**the FCA**).
5. Mr T says that, in 2016, he received an unsolicited contact from his cousin who was associated with a firm called Pension Analysis. He trusted his cousin as he understood him to be a financial adviser. He says his cousin told him that he would receive better investment returns if he transferred his pension from the Plan to the Optimum Scheme. He says that his cousin spoke to all relevant parties on his behalf thereafter and that the pension companies did not contact him directly. It was only later that he realised his cousin was not a regulated financial adviser.
6. On 1 November 2016, an administrator, on behalf of the Optimum Scheme, wrote to Phoenix enclosing a letter of authority (**LOA**), signed by Mr T. The LOA asked Phoenix to provide information regarding the Plan to Optimum.

7. On 28 November 2016, Phoenix issued a transfer value quote to Mr T. In the covering letter (**the letter**), under the heading 'Advice', it said:

“Deciding what to do about your pension is a very important decision and we recommend that you speak to your financial adviser directly. If you do not have a financial adviser, the important information sheet enclosed with this letter contains details of how you can find one.”

The information sheet gave details of how to find a local financial adviser by visiting www.unbiased.co.uk.

8. A footnote to the letter said “Enclosures: SCAMPROOF YOUR SAVINGS LEAFLET”
9. A copy of the transfer value pack was issued to Optimum on 29 November 2016.
10. On 20 December 2016, Optimum wrote to Phoenix to confirm that the Optimum Scheme was a registered Occupational pension scheme. It enclosed Mr T's instruction to transfer, dated 7 December 2016, and a copy of the Optimum Scheme's HM Revenue & Customs registration certificate.
11. On 3 January 2017, Phoenix wrote to Mr T to confirm that he had recently instructed it to transfer his pension to the Optimum Scheme and that £17,944.38 had been paid on that date.
12. In February 2018, Optimum was wound up following confidential investigations carried out by the Insolvency Service. Further investigations by the Official Receiver established that Optimum had failed to keep adequate records, did not provide information to the tax authorities and was derelict in its duty to provide Optimum Scheme members with up to date information, such as personal statements.
13. The sole director of Optimum claimed that he was not personally involved in the promotion of the Optimum Scheme. However, the Pensions Regulator (**TPR**) published a report in June 2018 that proved Optimum did play a role. Furthermore, despite being regulated to deal with insurances and mortgages, the director confirmed that neither he nor anyone else at Optimum had permission to talk to potential clients about pension schemes.
14. TPR's report also highlighted that the Optimum Scheme was not being run in an appropriate manner and there were serious concerns over the status of members' funds. On 13 February 2018, TPR exercised its statutory powers to appoint Dalriada as trustee of the Optimum Scheme. It appeared that the previous trustee had used the assets to make several high-risk investments that were now worthless.
15. On 30 July 2019, Mr T complained to Phoenix through a solicitor. The solicitor said that Phoenix had failed to conduct any due diligence in respect of the Optimum Scheme, not even obtaining basic details about it. Furthermore, Phoenix did not engage directly with Mr T to explain the risks of pension liberation and 'scams'.

16. Specifically, the solicitor argued that Phoenix should have obtained basic information about the Optimum Scheme, such as:
 - type and legal status of the scheme;
 - date scheme was established
 - location of the scheme and any administrators;
 - details of any employment link between the Optimum Scheme and Mr T;
 - marketing methods used;
 - details of any cash payment being offered;
 - investment choice;
 - provenance of the Optimum Scheme; and
 - details of who provided advice to transfer.
17. The solicitor said that had Mr T received a warning from Phoenix he would not have transferred his pension.
18. Phoenix responded on 28 August 2019, rejecting Mr T's complaint. It said that at the time of processing the transfer it carried out the required checks prior to releasing the funds.

Adjudicator's Opinion

19. Mr T's complaint was considered by one of our Adjudicators who concluded that no further action was required by Phoenix. The Adjudicator's findings are summarised in paragraphs 20 to 34 below.
20. TPR has the power to appoint an independent trustee under Section 7 of the Pensions Act 1995 where it is reasonable to do so. TPR had appointed Dalriada in this capacity, so there could be little doubt that there were serious issues with the Optimum Scheme.
21. The underlying investments of the Optimum Scheme appeared to have been inappropriate for a pension arrangement and Dalriada was in negotiations to recover as much of the assets as possible. Furthermore, Optimum was in liquidation and it was clear that there were serious irregularities with the way in which it had administered the Optimum Scheme.
22. However, this all took place some 15 months after Mr T had transferred his benefits and Phoenix would not have been aware of any of this at the time.

23. Mr T had a statutory right to a cash equivalent transfer of his benefits under the Plan and he had exercised his right by requesting that Phoenix make a transfer payment to the Optimum Scheme.
24. In previous Determinations the Pensions Ombudsman had referred to the Scorpion guidance, issued by TPR in February 2013, as being a point of change as to what might be regarded as good industry practice with regard to the level of due diligence required when making a transfer.
25. As part of this guidance, TPR recommended that transferring scheme managers issued warnings to customers about the dangers of pension liberation fraud, or 'scams'. The most common way of doing this was to include the Scorpion leaflet with the transfer pack.
26. In this instance, while the evidence fell sort of showing that the Scorpion leaflet was included in the transfer pack that was addressed to Mr T, there was a clear indication from the footnote to the letter that something similar was included with the letter.
27. Mr T had said that he could not recall receiving the Scorpion leaflet and it was possible that the transfer pack, although addressed to Mr T, was issued via Optimum as a copy of the transfer pack was sent to it the day after the letter to Mr T. If this was indeed the case, while it could not be said for certain that Optimum forwarded the leaflet to Mr T, it was evident that other documents in the transfer pack were forwarded to him as he had signed and dated them. The reference to the scams warning was prominent so if it were not enclosed, it would be reasonable to have expected Mr T to have questioned why not.
28. Furthermore, it was reasonable for Phoenix to have expected Optimum, as an FCA authorised firm, to have forwarded the entire transfer pack, including the warning leaflet, to Mr T.
29. There was no evidence to show that Phoenix would have been aware that Mr T had been cold called. Its dealings were with Optimum and Mr T alone. Further, Mr T had said that he was not aware that his cousin was not a regulated adviser until later and also that he left everything to his cousin to deal with, not checking any of the details personally, and yet there was no mention of his cousin in any of the correspondence.
30. Page 8 of the Scorpion guidance issued to providers says:

“Looking out for pension liberation fraud

When processing a transfer request, trustees and administrators may be in a position to identify the warning signs that suggest that pension liberation fraud is occurring. If you are a trustee or administrator, and any of the following criteria apply to a transfer request you have received, then you may be about to transfer a member's pension to a scheme designed to liberate their funds.

Here are some of the things to look out for:

- Receiving scheme not registered, or only newly registered, with HM Revenue & Customs;
- Member is attempting to access their pension before age 55;
- Member has pressured trustees/administrators to carry out transfer quickly;
- Member was approached unsolicited;
- Member informed that there is a legal loophole;
- Receiving scheme was previously unknown to you, but now involved in more than one transfer request.

If any of these statements apply, then you can use the check list on the next page to find out more about the receiving scheme and how the member came to make the request.”

31. While the list was not intended to be exhaustive, in the Adjudicator’s view in Mr T’s case there was nothing to raise any concerns:-
- The Optimum Scheme had been registered in June 2015, some 15 months before the transfer took place.
 - The transfer followed the normal course expected with no undue pressure being placed on Phoenix to complete the transfer quickly.
 - There was nothing to indicate to Phoenix that Mr T had received an unsolicited approach from an unregulated individual.
 - There was no evidence to suggest that Mr T was attempting to access his pension before age 55.
32. At the time of the transfer, the Pensions Scams Industry Group’s 2015 publication ‘Combating Pensions Scams – a Code of Good Practice’ was also in force. This recommended a two-stage due diligence process. The first stage was to check whether there were any factors that would indicate a pension liberation or scam risk. It was only if this initial analysis threw up some concerns that further checks were recommended, otherwise the transferor could consider proceeding to payment.
33. With regard to there having been no employment link between Mr T and the Optimum Scheme, the transfer had taken place after the High Court ruling in the case of Hughes v Royal London on 19 February 2016. This had provided instruction to trustees and administrators that, assuming the other requirements for a statutory transfer right were made out, members did not need to be in receipt of earnings from an employer sponsoring the occupational pension scheme to which they wished to transfer their pension. Earnings from another source were sufficient. Therefore, in the Adjudicator’s opinion this was not relevant to Mr T’s complaint.

34. In summary, Mr T had a statutory right to transfer his benefits from the Plan. Phoenix was not able to advise Mr T and he appeared to be dealing with an FCA regulated firm of some years' standing. All Phoenix was expected to do was consider the information as presented to it and decide if there was a legitimate reason to refuse the transfer. There was nothing which was apparent to Phoenix at the time that could reasonably be expected to have led it to raise any questions.
35. Mr T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr T provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the following additional points raised by Mr T.
36. Mr T repeats that he does not recall receiving the Scorpion warning and did not expect Phoenix to transfer his pension into a scam.
37. He says the evidence falls short of showing that the Scorpion leaflet was included in the transfer pack which was addressed to him. He argues that any inference should be drawn in his favour and it is certainly not sufficient for Phoenix to rely upon a footnote in a letter to put him on enquiry nor is it sufficient, when one considers TPR's guidance available at that time, for Phoenix to rely on an expectation that Optimum would issue the warning him.
38. He argues there were several features that should have flagged a potential scam, including:-
 - He was an unsophisticated investor who was financially stable and had no pressing need to transfer his pension.
 - There was no link between the receiving scheme and his employment.
39. The complaint should be upheld therefore, on the basis that Phoenix:-
 - Failed to send the Scorpion warning leaflet to Mr T notwithstanding TPR's guidance which had been around since 2013.
 - Failed to engage directly with Mr T as to the concerns it should have had with the transfer request.
40. In the case of Hughes v Royal London, Ms Hughes was self-employed, so joining a small, self-administered pension scheme with her own company as sponsor would not necessarily be of concern. In contrast, Mr T's proposed transfer was to another occupational pension scheme based over one hundred miles away.

Ombudsman's decision

41. I acknowledge that Mr T says he cannot recall having received the Scorpion leaflet, or a similar alternative. The events he is complaining about took place some years previously and there would have been a number of documents issued to him as part of the transfer pack, so it may be that he has forgotten this particular leaflet. Furthermore, he has said that he left all the paperwork to his cousin to deal with so I accept it is possible that he was not shown this document.
42. But I cannot hold Phoenix to account for how Mr T chose to manage his own affairs. I can only consider what is more likely than not to have happened based on the evidence available. In this instance, the footnote to the letter clearly indicates that a Scorpion leaflet, or its equivalent, was provided as part of the pack issued to Mr T and if this was withheld from him that is not something for which Phoenix can be held responsible. Further, as the Adjudicator has pointed out, it would have appeared to Phoenix at the time that Mr T was being advised by an FCA regulated firm of some years' standing so that Phoenix would have reasonably expected such a firm to ensure that it dealt with its clients in an appropriate manner, regardless of its specific permissions.
43. I note the distinction made between the circumstances of the Hughes v Royal London case and those applicable here, but that distinction is to miss the point. The effect of the Hughes case is that it effectively did away with the link between the applicant's earnings and the sponsoring employer of the receiving scheme, regardless of the type of scheme involved.
44. I sympathise with Mr T and the position he now finds himself in, but I have to consider the situation as it was presented to Phoenix at the time. Mr T had a statutory right to transfer his benefits from the Plan and he appeared to be dealing with an FCA regulated firm. Phoenix was expected to consider the information and decide if there was a legitimate reason to refuse the transfer. It did so and concluded there was nothing to indicate anything untoward. This was a reasonable conclusion in the circumstances. I cannot apply the benefit of hindsight to the situation.
45. I do not uphold Mr T's complaint.

Anthony Arter CBE

Deputy Pensions Ombudsman
16 August 2023