

## Ombudsman's Determination

Applicant	Mr S
Scheme	City and County of Swansea Pension Fund ( <b>the Fund</b> )
Respondent	Swansea City and County Council ( <b>the Council</b> )

## Outcome

1. Mr S' complaint against the Council is partly upheld, and the Council shall pay Mr S £500 in respect of the significant distress and inconvenience he has experienced as a result of its maladministration.

## Complaint summary

2. Mr S has complained that the Council allowed the transfer of his pension benefits in the Fund to The Focusplay Retirement Benefits Scheme (**the Focusplay Scheme**), without carrying out sufficient due diligence.

## Background information, including submissions from the parties

3. On 18 July 2012, Mr S requested a transfer value quotation in respect of his deferred benefits in the Fund.
4. On 9 August 2012, the Fund emailed Mr S requesting details of where the pension transfer was to be made. On the same day, Mr S replied that he might use a company called IPI.
5. On 21 August 2012 Mr S completed the Fund's 'Transfer of Pensions Rights' form. A 'Letter of Authority'<sup>1</sup> was also completed by Mr S in favour of Clearmond Wealth Management (**Clearmond**).
6. On 28 August 2012, the Fund emailed Mr S confirming it had received his transfer out option form and requested that he call regarding the matter.

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<sup>1</sup> The footnote to the Letter of Authority states: "The financial advisers trading under Clearmond Wealth Management are members of Nexus Global (IFA Network). Nexus Global is a division of Blackwater Financial Management (International) Limited (BFMI). All approved individual members of Nexus Global are Appointed Representatives of BFMI. BFMI is licensed and regulated by the Gibraltar Financial Services Commission (FSC) and bound by the rules under license number FSC00805B."

7. In October 2012, the Fund emailed Mr S for an update on his transfer. Mr S notified the Fund that IPI was “going through the process of deciding which company to go with.”
8. On 14 November 2012, the Fund notified Mr S that the three-month guarantee period had expired. It explained that if Mr S wanted to proceed with the transfer the estimated transfer value may be different. Mr S replied that he had been informed that the independent financial adviser (**IFA**) was allocating a new company to use. Mr S said he hoped this could be completed in the coming weeks.
9. On 13 December 2012:-
  - Mr S emailed the Fund. He said he was no longer going to transfer his pension to “IPI (clearmond)” as he was not happy with the scheme and was considering another scheme. He said he needed a further transfer document.
  - In a secondary email, Mr S requested an estimate of his deferred pension at age 60 and the conversion figure.
  - The Fund wrote to Mr S providing an estimate of his pension benefits.
10. The next day, Mr S emailed the Fund that he had spoken with his financial advisor and needed relevant documents to transfer to another occupational pension scheme. He said he also required a current transfer value, which he said he was willing to pay for.
11. On 17 December 2012, Mr S emailed the Fund and said:

“Cancel my last e-mail. Having spoken to IPI they have told me frankly that the new company I was going to go with are very dubious so I have decided to stay with IPI.”
12. Hearing no more from Mr S, it appears the Fund closed its file on Mr S’ transfer request on 12 February 2013<sup>2</sup>.

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<sup>2</sup> An undated note, submitted by the Council to The Pensions Ombudsman (**TPO**), as part of its response to Mr S’ complaint to TPO, states:

“TV OUT CASE CLOSED 12/02/2013. AFTER SEVERAL ATTEMPTS TO GET [Mr S] TO DECIDE IF HE IS GOING TO TRANSFER AND ALSO TO PROVIDE US DETAILS OF THE COMPANY HE IS GOING TO TRANSFER TO, AS OF 12/02/2013 NO RESPONSE SO FILE NOW CLOSED AND BACKSCANNED. IF HE GETS IN CONTACT AGAIN TRANSFER OUT PROCEDURE TO BE STARTED AGAIN.

18TH APRIL TRANSFER PROCEDURE STARTED AGAIN TO CLEARMOND WEALTH MANAGEMENT AT [Mr S’] INSTRUCTION.”

13. The same month, The Pensions Regulator (**TPR**) launched a “fraud action pack”<sup>3</sup> for pension professionals advising pension schemes how to assist in tackling pensions liberation (**the February 2013 Guidance**). It mentioned the following warning signs:
- Unsolicited text messages.
  - Transfers overseas.
  - Access to pension before age 55.
  - No member copy of documentation.
  - Member encouraged to speed up transfer.
14. Additionally, Schemes were advised to look out for the following six specific signs. If any of these were present, further due diligence checks should be undertaken:-
- (i) Receiving scheme not registered, or only newly registered, with HM Revenue & Customs.
  - (ii) Member is attempting to access their pension before age 55.
  - (iii) Member has pressured trustees/administrators to carry out transfer quickly.
  - (iv) Member was approached unsolicited.
  - (v) Member informed that there is a legal loophole.
  - (vi) Receiving scheme was previously unknown to the scheme but has been involved in more than one transfer request.
15. In April 2013, the transfer procedure appears to have restarted (see reference 1 above). On 18 April 2013, the Fund wrote to Clearmond enclosing a transfer value illustration for Mr S and transfer forms. It also informed Mr S that it had issued the transfer pack to Clearmond.
16. In early May 2013, Mr S appears to have notified the Fund of a change of address for Clearmond (from London to Belfast). The call note says: “send copies to new address in Ireland”, “done” and is dated “3.05.13”.
17. On 25 June 2013, the Fund emailed Mr S that before it could send the disclaimer form (see paragraph 19 below), he needed to find out the name of the company that the transfer was going to be paid to.
18. On 27 June 2013, Gleeson Bessent Trustee Services (**GBTS**) wrote to the Fund enclosing a completed transfer form in favour of the Focusplay Scheme which had been signed by Mr S on 8 May 2013. GBTS said:-
- The Focusplay Scheme was a contracted-in defined contribution occupational pension scheme and provided the Pension Scheme Tax Reference number.
  - It was willing and able to accept the full transfer of Mr S’ pension benefits.

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<sup>3</sup> ‘Pension Liberation Fraud  
The predators stalking pension transfers’.

- If the pension benefits contained Section 9 2(B) rights or Guaranteed Minimum Pension benefits the Fund would need to notify HMRC that Mr S intended to transfer to a non-contracted out pension scheme.
- It requested that the funds be transferred electronically and provided bank account details.

19. On 4 July 2013, the Fund wrote to Mr S. It said for the transfer to proceed it required Mr S to sign and return an enclosed disclaimer form. The disclaimer form said:

“1. Having considered all the options available to me I confirm it is my wish that City & County of Swansea Council, the Administering Authority of City and County of Swansea Pension Fund (the “Fund”) pay the whole of my cash equivalent transfer value (the “transfer payment”) under the Local Government Pension Scheme to The Focusplay Retirement Benefit Scheme (the “Trust”) and that following payment of the transfer value to the Trust I will have no further claim upon the Fund, my former Employing Authority or the Administering Authority for any pension benefits in any circumstances or in any form.

...

3. I understand that future benefits payable under the Trust may be in a different form or a different amount to (and potentially significantly less than) those that I would otherwise have become entitled to from the Fund. I further understand that if my future benefits are to derive from a money purchase scheme they may differ from the benefits specified in any quotation or illustration because the assumptions made in preparing such a quotation or illustration may prove to be incorrect.

...

5. I confirm that I have been made aware by the Administering Authority of the Fund of the risks associated with transferring benefits into a scheme which provides a method of early release of benefits and / or pension liberation vehicles and have reviewed the joint announcement dated 25 February 2012, on such schemes issued by the Pension Regulator, the Financial Services Authority and HMRC.

6. I confirm that I have taken independent appropriate financial advice from the adviser named below whom I confirm is regulated by the Financial Services Authority, in respect of the proposed transfer and the risks associated with transferring benefits into a scheme which provides a method of early release of benefits and / or pension liberation vehicles. I confirm that the Administering Authority has my permission to contact this adviser.

...

8. In relation to the transfer payment, I confirm that I will not accept any cash payments or loans or any unauthorised payment (within the meaning of section 160 of the Finance Act 2004) from the trust or my sponsoring employer before I reach the age of 55.

...

11. In consideration of the payment of the full cash equivalent transfer value from the Fund to the Trust by the Administering Authority I hereby waive any and all claims for any person claiming through me may have against the Administering Authority in respect of my benefits under the Fund or in the Trust, and discharge the Administering Authority from all liability to and in respect of me or any person claiming under me whatsoever and hereby on my own behalf and that of my estate I undertake to indemnify and keep indemnified and hold harmless the Administering Authority against all claims and liabilities whatsoever made by me or any such person in respect of my period of membership of the Fund or the Trust.”

20. Mr S signed and returned the disclaimer form.
21. On 17 July 2013, the Fund wrote to GBST and enclosed details of the transfer value which would be paid via BACS. The Fund also wrote to Mr S on the same day and said all liabilities for his pension benefits had been discharged.
22. At the time of the transfer, Mr S was age 45.
23. On 16 May 2019, Mr S' then representative, the Byrne Practice, wrote to the Fund asking for details of the transfer including details of the IFA providing transfer and investment advice.
24. The Fund replied on 20 May 2019, enclosing documentation relating to the transfer.
25. In December 2019, a new representative for Mr S, Money Redress Limited (**Money Redress**) complained to the Fund that the Council had failed to comply with its duty to Mr S as set out in TPR's February 2013 Guidance. The Council rejected the complaint.
26. In June 2020, Mr S referred his complaint to TPO via Money Redress. In his application to TPO Mr S said:

“I wanted to find out if I could gain access to my pension funds...because at the time I was struggling financially as I had recently been diagnosed with a brain tumour; resulting in reduced working hours. I searched for advice online, which led to a telephone calls with an advising firm. I was told that I could not directly obtain funds from my pension, but if I agreed to transfer my pension to an alternate scheme, I would be able to acquire vouchers worth £3,500 for High Street shops.

During this time I was working as a sales representative ... earning a very limited income and was residing in rented accommodation. I did not hold any other pensions or forms of savings.

I had a nil to very low tolerance to investment risk and I had no previous investment experience. I required some financial support, which I believed I could obtain from [the Fund].

I did not receive any risk warnings to make me aware that the recommended Focusplay Scheme was unsuitable for me...I was sent a declaration form in July 2023 which I completed ...and returned to [the Fund].

If [the Fund] had contacted me to discuss the details surrounding the transfer, they would have informed me of the issues. I therefore, would have heeded such warnings and decided against the transfer.”

### **Money Redress’ submissions on behalf of Mr S**

#### 27. Money Redress submits:-

- The transfer was requested across the point when TPR published its February 2013 Guidance, yet it should have been known to a well-established pension administrator that, in 2012, there were a high number of pension transfer cases, which fell to pension liberation scams. Publications were jointly made by TPR, FSA and HMRC from early 2012 in relation to pension scams.
- The Fund alleges that a Scorpion leaflet was issued to Mr S but has not provided any evidence or reference as to when. There is no evidence that the Fund checked that Mr S received and understood the document. Mr S has previously confirmed that he was not supplied with any such warnings.
- The transfer request was made for a transfer to a purported occupational scheme. The form prepared by the Fund which contained a number of declarations, also included a number of entries for completion. One such entry requested the nature of the employment relationship. This was left blank along with adviser details, date of leaving the Fund and the name of the receiving pension scheme.
- From Clearmond’s Letter of Authority, the Fund knew, or ought to have been aware, that Clearmond was not a firm registered within the UK but was ultimately under the regulation of a firm in Gibraltar<sup>4</sup>.
- The further response from the Fund re-emphasised that it was not registered with the FCA and authorised to provide any form of financial advice to Mr S, but it should have known and relayed to Mr S that Clearmond was neither registered with the FSA (later the FCA) nor authorised to provide financial advice.
- The Fund has neither provided details nor evidence of how it followed the February 2013 Guidance. The question asked by TPO in relation to this matter appears to have been avoided or misinterpreted by the Fund only referencing the Code of Good Practice for Combating Pension Scams (which was not in existence at the time of the transfer request).

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<sup>4</sup> The Gibraltar Financial Services Commission.

- Had the Fund contacted Mr S before the transfer, which it should have done, it would have found that the transfer of his funds was orchestrated by unregulated introducers in return for cash/vouchers to high street shops.
- At the time of the transfer Mr S was almost 46 years of age. He was working as a self-employed agent and living in rented accommodation. Mr S is now unemployed for reasons of ill-health. He is not a high net worth individual, was not sophisticated in terms of investments, and had no experience in pensions or investments.
- Mr S would like to be put back in the position he would have been in had he not transferred to the Focusplay Scheme.

### **The Council's position**

28. The Council submits:-

- Before proceeding with the request from GBST to transfer Mr S' accrued benefits to the Focusplay Scheme, it sought evidence of company registration with TPR, HMRC and Companies House. Its enquiries confirmed that GBST was appropriately registered, and the Focusplay Scheme had been registered with HMRC.
- At the time Mr S' benefits were transferred, the due diligence checks were not as stringent as they are now. The actions it took were in accordance with the then requirements and it complied with all the appropriate checks that were warranted at the time of the request.
- Mr S was issued with a copy of TPR's leaflet 'Predators stalk your pension'.
- It is not registered or authorised to provide any form of financial advice to Fund members. In emails from Mr S, prior to the transfer date, Mr S referenced discussions with an IFA.

### **Adjudicator's Opinion**

29. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by the Council. The Adjudicator's findings are summarised below:-

- Mr S' complaint concerned the level of due diligence that he believed the Council should have carried out prior to transferring his pension benefits to the Focusplay Scheme.
- The transfer process originally started in July 2012 when Mr S requested a transfer quotation from the Fund. There was some correspondence between the Fund and Mr S concerning the pension arrangement to which the transfer was to be made. Mr S decided to not use a scheme originally proposed by Clearmond

but decided to use another scheme also put forward by Clearmond. This meant that the transfer process extended beyond the time that TPR brought in the new practice for pension schemes in February 2013.

- From the information provided it appeared that the Fund did not treat Mr S' second transfer request as a new transfer application but rather as a continuation of the original transfer request from July 2012. If it had done so and followed TPR's guidance more carefully it would have recognised that the Focusplay Scheme opened to new members on 23 April 2013, HMRC approval was obtained on 2 May 2013 and that the trustees name was changed on 19 April 2013. All of these were warning signs and based on these facts the Fund could have contacted Mr S to obtain more details.
- The Fund said it carried out the necessary checks at the time but had simply referred to checks with TPR, HMRC and Companies House.
- Mr S said he did not receive any warnings or the Scorpion leaflet. The Fund said it provided a copy of the Scorpion leaflet and it was included in the copies of correspondence provided to TPO.
- The Adjudicator's view, on the balance of probabilities, was that Mr S did receive the Scorpion leaflet. However, Mr S may not have registered its importance or taken note of its content. Mr S admitted, at the time he was struggling financially and was on a limited income because of his illness. The Adjudicator's view was that due to these circumstances the offer of vouchers to the value £3,500 would have been attractive to Mr S, and, even if he had read the Scorpion leaflet, he would have gone ahead with the transfer.
- Mr S did complete the Fund's disclaimer form in which he declared in Section 5 that he was aware of the risks associated with transferring funds into a scheme which provided a method of early release or pension liberation vehicles. Also, in Section 11, Mr S undertook "to indemnify and keep indemnified and hold harmless the Administering Authority against all claims and liabilities whatsoever made by me or any such person in respect of my period of membership of the Fund or the Trust."

30. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Money Redress, has provided further comments on behalf of Mr S which do not change the outcome. I agree with the Adjudicator's Opinion in the most part (save in one respect) and note the additional points raised by Money Redress.

### **Money Redress' further submissions**

31. Money Redress' further submits:-

- 31.1. No documents have been provided by the Fund for the period 18 December 2012 to 17 April 2013. Given the extent of correspondence before and after this period, it is unlikely there was no correspondence at all. As this period

may contain events / correspondence that is relevant to Mr S' complaint, it asks that TPO request a complete set of documents from the Fund and that it be given an opportunity to comment on them.

- 31.2. With his application, Mr S provided TPO with a screenshot of an email he received from the Fund on 25 June 2013<sup>5</sup>. This was not amongst the papers previously provided by the Fund following a subject access request sent on Mr S' behalf in 2019. So, there may be other communications between the Fund and Mr S during the crucial transfer period which the Fund has not disclosed. It requests that all communications covering this period are disclosed by the Fund and made available to it for comment.
- 31.3. It was clear from the letterhead on Clearmond's Letter of Authority that Clearmond was not FCA regulated or regulated in any other way.
- 31.4. TPR's February 2013 Guidance did not limit ceding schemes to looking out for six specific signs. Mr S' case should be assessed using an interpretation of the guidance which is consistent with Determinations by previous Ombudsman, specifically PO-21489, PO-3809 and PO-3105.
- 31.5. The Adjudicator's Opinion noted four bullet points of information contained in the transfer pack received from GBTS (see paragraph 18 above). But It was also directly identifiable from the pack that:-
  - 31.5.1. The Focusplay Scheme was newly registered with HMRC (on 2 May 2013).
  - 31.5.2. The sponsoring employer for the scheme (Focusplay Limited) was located in Warrington, a significant distance from where Mr S lived in Swansea.
  - 31.5.3. There was no reference to Mr S having received any FCA regulated advice.
- 31.6. The signature box in the disclaimer form, which Mr S signed, asked for the "Name and address of your Independent Financial Adviser (including the firm's Financial Services Authority's registered number" and to "Please explain the nature of your employment relationship with details of your role and the hours you work and how you will be eligible to be a member of the Trust". These were important due diligence questions, but were left unanswered when the form was returned, and the Fund did not take this up with Mr S.
- 31.7. The Adjudicator was not accurate in saying Mr S' April 2013 transfer

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<sup>5</sup> See paragraph 18 above.

application was a continuation of the July 2012 transfer request. While Mr S asked for transfer values and was looking at the possibility of transferring, he made no actual request to transfer in 2012. The first point at which an application was made was in April 2013 – two months after the publication of TPR's February 2013 Guidance.

31.8. The Adjudicator noted three warnings which the Fund could have picked up if it had followed the 2013 guidance more carefully. Namely:-

31.8.1. The Focusplay Scheme opened to new members on 23 April 2013.

31.8.2. HMRC approval was obtained on 2 May 2013.

31.8.3. The Trustees' name was changed on 19 April 2013.

But there were additional warning signs noted in TPR's February 2013 guidance. In addition to those mentioned in paragraphs 31.3 and 31.5 above:-

31.8.4. Mr S was under the age of 55 at the time of requesting the transfer. There was certainly a possibility, therefore, that there may be an element of early release pension liberation involved in the transfer.

31.8.5. There was no employment link between Mr S and the sponsoring employer of the Focusplay Scheme. Mr S' failure to answer this question on the disclaimer form ought either to have been treated as confirmation of the lack of employment link or justified a check with Mr S.

31.8.6. If the Fund had contacted Mr S, it would have disclosed that:-

- Mr S had been offered a significant amount of high street vouchers if he agreed to transfer. This was a clear financial inducement.
- The early stages of the contact with the unregulated adviser and/or Gleeson Bessent had involved the offer of a free pension review.
- Mr S had been told that he would achieve very high investment returns through the Focusplay Scheme.

31.9. It accepts that the short form 'Scorpion' warning leaflet may have been sent to Mr S.

- 31.10. It disagrees with the Adjudicator's conclusion that Mr S would have gone ahead with the transfer even if he had read the Scorpion leaflet, because at the time he was struggling financially, was on a limited income and the offer of vouchers to the value of £3,500 would have been attractive to him.
- 31.11. The Adjudicator's view on what Mr S would have done assumes the only obligation on the Fund was to send the Scorpion warning. This is inconsistent with previous Determinations by the Ombudsman. In Determination PO-12763 (*Mr N v Northumbria Police Authority*), the Ombudsman said in paragraph 76: "This type of dialogue should have enabled an open discussion about the nature of the transfer request and an opportunity for the Authority to provide information on the risks of transferring, or benefits of remaining in the Scheme. The Authority is not expected to give advice on the proposed transfer request, but it is entitled, if it has concerns, to delay it, to seek further information, and warn the member of any issues that it may have".
- 31.12. The correct question to consider on causation is what Mr S would have done if this type of communication had occurred with him, following the Fund carrying out a due diligence exercise that had identified all or most of the pension liberation/scam warning signs listed above. The evidence does not confirm that Mr S would have gone ahead with the transfer, rather that he would have pulled out. Whilst Mr S was in a difficult financial position and the offer of high street vouchers was attractive to him, the available evidence shows that he had attempted to make a careful decision whether to transfer and where to. Correspondence was ongoing from July 2012 and Mr S' emails in December 2012 confirm that he was prepared to pull out of a potential transfer where he thought or had been advised that he "was not happy with it" or it was "dubious". It would have made no sense for him to risk a pension he knew was valued at £45,000 on transfer, to receive £3,500 of vouchers. The evidence does not support a finding either that he was so reckless as to ignore warnings or so financially desperate to do so.
- 31.13. Given that the Fund did not comply with the due diligence and communication requirements contained in TPR's February 2013 guidance it is neither fair nor reasonable for the Fund to rely on the disclaimer form which Mr S signed to escape liability.

### **Ombudsman's decision**

32. Firstly, Money Redress has suggested that there may be documents that have yet to be submitted by the Council (specifically for the periods 18 December 2012 to 17 April 2013 and covering the transfer), which may contain events/correspondence

relevant to Mr S' complaint. Money Redress asks that TPO request a complete set of documents from the Fund.

33. I am satisfied that the evidence submitted by the parties is sufficient to make my decision.
34. Money Redress says Mr S' case should be assessed using an interpretation of TPR's February 2013 guidance which is consistent with Determinations by previous Ombudsman.
35. Nonetheless, I am not bound by previous decisions. My decision is based on the facts and merits of Mr S' case.
36. It appears the Fund closed its file on Mr S' initial transfer request in February 2013 and the transfer procedure restarted in mid-April 2013, when the Fund sent a new transfer illustration and transfer forms to Clearmond and informed Mr S. The Fund received the transfer request from GBST in late June / early July 2013 and the transfer was completed in July 2013.
37. As noted by the Adjudicator and Money Redress, there is evidence that the Council did not undertake all of the necessary due diligence in accordance with TPR's February 2013 Guidance (specifically in relation to identifying that the receiving scheme was only newly registered with HMRC). I agree with the Adjudicator that this amounts to maladministration (and, in contrast to the Adjudicator's view, view that maladministration to be sufficiently serious to warrant an award for distress and inconvenience). However, for me to uphold the substance of the complaint, it is not simply the case that I must identify maladministration; I must also be satisfied that the individual has, as a result, sustained injustice.
38. Mr S says if the Council had contacted him to discuss the details surrounding the transfer, it would have informed him of the issues, and he would have heeded such warnings and decided against the transfer. However, the Council did, in my view, take steps to warn Mr S of the risks – and yet Mr S chose to continue with the transfer in any event. For example, the detailed disclaimer form, referred to in paragraph 19 above, which contained specific warnings<sup>6</sup> and the Scorpion leaflet, which I find on the balance of probabilities was sent to Mr S.
39. Money Redress says it would have made no sense for Mr S to risk a pension he knew was valued at £45,000 on transfer, to receive £3,500 of high street vouchers and that the evidence does not support a finding that Mr S was so reckless as to ignore warnings or so financially desperate to do so.
40. The fact that Mr S aborted a previous transfer request and a potential transfer suggests an element of caution on his part.

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<sup>6</sup> Although, for the avoidance of doubt, I am concentrating on the specific warnings provided to Mr S in the disclaimer form and, as I do not need to do so, am not making a finding on the efficacy or enforceability of the purported waiver of future claims against the Council, that is also contained in the disclaimer.

41. However, I note that Mr S says that around the time of the transfer he was “struggling financially” and Money Redress concede that the offer of high street vouchers was “attractive” to Mr S. Money Redress also says that the transfer was “orchestrated”.
42. Clearmond were involved in both July 2012 and April 2013. I consider that the involvement of Clearmond is significant as it would have built a relationship with Mr S and probably an element of trust.
43. Taking this into account, combined with the warning provided to Mr S, the fact that Mr S was “struggling financially” and the attraction of £3,500 in high street vouchers, it is my view, on the balance of probabilities, that Mr S would have proceeded with the transfer even if the Council had contacted him before allowing the transfer.
44. While I very much sympathise with Mr S, who has been a victim of pension liberation fraud, I do not uphold the substance of his complaint. However, although it did not in my view result in the unfortunate transfer of Mr S’ benefit from the Fund, the due diligence failings by the Council did amount to maladministration that warrants an award of £500 for the significant distress and inconvenience it caused, and so the complaint is partly upheld.

**Dominic Harris**

Pensions Ombudsman

8 July 2024