

## Ombudsman's Determination

Applicant	Mr S
Scheme	Scottish & Newcastle Pension Plan ( <b>the Plan</b> )
Respondent	Mercer Ltd ( <b>Mercer</b> )

## Outcome

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

## Complaint summary

3. Mr S has complained that Mercer should have undertaken more due diligence on the pension scheme he proposed to transfer to, the Pennines RBS Pension Scheme (**the Pennines Scheme**). It has since been established that the Pennines Scheme is linked to pension liberation and it appears Mr S has lost his pension.

## Background information, including submissions from the parties

4. On 12 July 2011, Mercer issued a Cash Equivalent Transfer Value (**CETV**) to Mr S, at his request, in respect of the defined benefits he held in the Plan. The Plan's discharge paperwork was enclosed with the CETV, to be completed by Mr S and his chosen receiving scheme, in order to facilitate a transfer.
5. On 25 October 2011, Mr S wrote to Mercer requesting to transfer his pension to the Pennines Scheme.
6. On 7 November 2011, T12 Administration Limited, the Pennines Scheme administrator, wrote to Mercer requesting payment of the CETV to the Pennines Scheme. This letter included the Pennines Schemes' Pension Scheme Tax Reference number (**PSTR**), Employer's Contracting-Out Number (**ECON**) and Scheme Contracted-out Number (**SCON**), and the HMRC registration certificate. The Plan's discharge paperwork, also enclosed, was signed and dated 27 October 2011 by Mr S.
7. On 16 November 2011, having received the transfer request, Mercer completed the transfer as instructed and paid £83,000.01 to the Pennines Scheme.

8. Mr S received a payment from his benefits in the Pennines Scheme. HMRC classed this as an unauthorised payment as benefits were taken before age 55 and Mr S received a tax charge. He has taken a complaint, against his financial advisors' firm, to the Financial Ombudsman Service and received redress in respect of fees charged, the tax charge and the distress and inconvenience he suffered. This redress does not address his loss of pension.
9. In 2012 Dalriada, appointed as Trustee by the Pensions Regulator (**TPR**), informed all of the members of the Pennines Scheme of the change of Trustee. The members were told that the Pennines Scheme they had transferred into was essentially a pension liberation scheme, and that transfers should not have occurred.
10. Mr S has said that Dalriada has told him that, at the time of the transfer, Mercer was required to check if he had been cold called and that he was employed by, and receiving earnings from, the receiving schemes employer, but that Mercer did not do this.

## **Adjudicator's Opinion**

11. Mr S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Mercer. The Adjudicator's findings are summarised briefly below:-
  - It appears that Mr S has been the victim of pension liberation, an issue that over recent years has become more high profile within the UK pensions industry. In essence it involves a transfer from a genuine pension scheme, with the eventual intention of allowing access to pension funds before the statutory minimum age of 55. This usually results in a punitive tax charge levied by HMRC against the member and the pension scheme as the payment is classified as unauthorised. In some instances the individual receives pension funds from the new scheme, as appears to be the case here, but in addition to this, the individual often loses all control of their pension fund and the pension fund is misappropriated by the scheme operators. It is noted that the Pennines Scheme is now being operated by a new trustee.
  - Often pension liberation will have been instigated by a cold call, "free pension review" or adverts placed on the internet. In Mr S' case it appears that he was contacted by a company, and persuaded to go ahead with the transfer. The Adjudicator did not look at the company's involvement, she limited her investigation to considering whether Mercer committed any maladministration when proceeding with the transfer. The company's actions have already been considered by the Financial Ombudsman Service and redress directed.
  - It is relevant that, under Sections 94 and 95 of the Pension Schemes Act 1993, a member of an occupational pension scheme has a statutory right to a transfer value. On receipt of a valid transfer instruction from Mr S to transfer to an HMRC-

registered scheme, Mercer was required to act on it. The recent court judgment in *Hughes v Royal London* [2016] EWHC 319 (Ch), confirmed that there was no requirement for the transfer to be to a scheme with which the member had an employment link. The current position under case law is that, regardless of any concerns the transferring scheme might have with the receiving scheme, it is required to proceed with the transfer in a timely manner in line with the member's instruction. In that context Mercer could not have unilaterally denied Mr S his right to transfer. In any event, there is no indication that Mercer had, or should reasonably have had, any concerns over the transferring scheme at that time. Only with the benefit of hindsight have details about the Pennines Scheme come to light.

- However, since Mr S' transfer, the general understanding of pension liberation and the warning signs associated with it have increased significantly. The key date in evolution of that understanding is February 2013. At that time TPR issued an announcement to the pension industry highlighting the rise and risks of, pension liberation to members and genuine schemes. The stance of the Pension Ombudsman is that following that announcement and guidance, transferring schemes, in this case Mercer, should have had robust processes in place to help identify potential instances of pension liberation and make the transferring member aware of the risks. This is not to say that the scheme had to stop the transfer, since it remained bound by the legislation regarding members' transfer rights, only that it should do more to investigate potential identifiable concerns and inform the member of the potential risks. In this way, the member can still choose to transfer, or alternatively to rescind his instructions, based on a more informed level of understanding. This approach, and the timing of the change in industry good practice is set out in the Pension Ombudsman's determination PO-5930.
- That being said, Mr S' transfer happened before the change in industry good practice, at a time when the Pension Ombudsman accepts that standard practice in relation to transfers was less rigorous.
- In this instance Mr S had instructed a transfer into a scheme which was able to demonstrate to Mercer that it had a PSTR, that it was registered with HMRC and provided assurances that it would provide benefits in line with the relevant legislation. These are the details that, at the time, a transferring scheme would be expected to establish before making a transfer and there was no requirement or expectation under pension legislation or regulations for Mercer to have done anything more. The Adjudicator had not seen any evidence to show that Dalriada informed Mr S differently, and could not comment on why it might have done so, in the light of how the duties on transferring schemes have evolved over time.
- Had Mr S' transfer been made following the 2013 change in good practice the Adjudicator said a different approach to the complaint would have been taken, although in any such case, whether the provision of a warning about the risks of pension liberation would have altered the transfer decision taken by the member

would still have needed to be considered. The benefit of hindsight cannot be applied to the case and a view must be reached in the context of the then regulatory environment. Mr S had submitted a transfer instruction, as was his statutory right, and the Pennines Scheme appeared to meet the requirements of a properly registered pension scheme. As such Mercer had an obligation under statute to act on the instruction, it had no choice in the matter.

- There was no requirement on Mercer at that time to undertake any additional checks on the Pennines Scheme, issue any further warnings to Mr S, or delay the transfer. It was obliged to make the transfer and it did. As such the Adjudicator could not make a finding of maladministration.
12. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments summarised below, which do not change the outcome:-
- He believes there were guidelines in place before TPR's guidance in February 2013,
  - The Adjudicator based her decision on a previous case that is not the same, and
  - The Adjudicator has not done enough work in investigating his complaint.
13. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr S for completeness.

### **Ombudsman's decision**

14. There were no guidelines in place with regard to pension scams, imposing additional requirements on transferring providers, prior to February 2013, nor has Mr S provided any evidence to support his belief that there were. The legislation and guidance available at the point of his transfer, in November 2011, required the transferring Scheme to check that the receiving Scheme had a PSTR and was properly registered with HMRC. Mercer requested information from the Pennines Scheme to satisfy itself that these criteria were met and the Pennines Scheme supplied it. Mercer was required to make the transfer, as is Mr S' statutory right, and it did so. I cannot find maladministration here.
15. The Adjudicator, during the course of her investigation, supplied Mr S with Determination PO-5930, made by my predecessor, and the court judgment *Hughes v Royal London*. Mr S says that the Adjudicator's decision was guided by these previous cases. It is not for me to comment on this. My role is to review the facts before me. My Determination takes into account the facts of Mr S' case individually on its own merits, nonetheless I must consider the legislation applicable at the time the issue being complained about occurred, and current case law. This is what I have done in this instance, so whilst the Adjudicator may have supplied previous cases, I

would like to assure Mr S that this Determination is based on the facts of his complaint.

16. I would add that, if issues have previously been raised and determined, there is no reason why they cannot be applied to similar cases. In the Determination, PO-5930 which Mr S received from the Adjudicator, the issue of guidance and legislation available prior to, and post, February 2013 are discussed, as is the statutory right to transfer. These issues are applicable to Mr S' case. Mr S had the opportunity to provide evidence to demonstrate why a different conclusion should be reached in his case but, in my view, has not been able to do so.
17. Similarly, Mr S has said that there was a requirement for Mercer to check that he was employed by the receiving Schemes' sponsoring employer. The court judgment in *Hughes v Royal London* found that members do not need to be in receipt of earnings from an employer sponsoring the occupational pension scheme to which they wish to transfer their pension. While the claim made by Miss Hughes was the opposite to that made by Mr S', in that Mr S' transfer had been processed and Miss Hughes' transfer had been refused, the key principles and findings can be applied to Mr S' case.
18. I understand that Mr S has previously raised with the Casework Director, the way in which the Adjudicator investigated the matter, therefore I will not comment on this point. However, I have seen sufficient information to be satisfied that I can confidently conclude the matter.
19. Therefore, I do not uphold Mr S' complaint.

**Anthony Arter**

Pensions Ombudsman  
5 October 2017