

Ombudsman's Determination

Applicant	Mr L
Scheme	Co-op Pension Scheme
Respondent(s)	Mr Mohammed Hanif Mirza (trading as One Stop) Blacksey Limited

Complaint Summary

Mr L has complained that Mr Mirza and/or Blacksey Limited failed to set up a pension scheme following his transfer of employment to them under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI2006/246) (**TUPE 2006**).

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against Mr Mirza and Blacksey Limited because they were required to make appropriate arrangements under the Transfer of Employment (Pension Protection) Regulations 2005 and failed to do so.

Detailed Determination

Material facts

1. Mr L was employed by the Co-operative Group. In April 2015, he was notified that the Co-operative Group had agreed to transfer his store to Mr Mirza. In a letter to Mr L, dated 7 April 2015, the Co-operative Group said Mr Mirza acknowledged that this constituted a TUPE transfer. The letter went on to state:

“If you are a member of the Co-operative Group Pension Scheme, you will also be eligible for protection under the new Transfer of Employment (Pension Protection) Regulations 2005, whereby the buyer must provide a scheme with a matching contribution of up to 6% of actual gross pay.”
2. Mr L was a member of the defined contribution section of the Co-operative Pension Scheme (**PACE**). He joined PACE in January 2013. Mr L was required to pay 1% of his earnings into PACE. The Co-operative Group was required to pay 2%. From 1 October 2017, the contribution rates were due to rise to 2% and 3% respectively. The Co-operative Group paid contributions of £1,343.67 in the period January 2013 to April 2015. Mr L’s employment with the Co-operative Group ceased on 15 April 2015.
3. In December 2016, Blacksey Limited registered for VAT following a Transfer of Going Concern from Mr Mirza. Mr L’s employment with Blacksey Limited ceased in February 2018.
4. Neither Mr Mirza nor Blacksey Limited provided a response to Mr L’s complaint when asked to do so by this office.
5. On 27 March 2018, Blacksey Limited was dissolved by way of compulsory strike-off by the Registrar of Companies under section 1000(3) of the Companies Act 2006. The first notice of the Registrar’s intention to strike-off Blacksey Limited was published in the Gazette on 9 January 2018. The Registrar may take action to strike-off a company if he has good reason to believe that the company is not carrying on business or is not operational. This may be because he has not received documents which are required to be submitted to him. On 27 March 2018, Mr L notified The Pensions Ombudsman (**TPO**) that Blacksey Limited had been dissolved.
6. Following receipt of a preliminary decision, Mr D Gulzar contacted TPO. Mr Gulzar had been the sole director for Blacksey Limited. He informed TPO that Blacksey Limited had been dissolved and there were no company assets.

Conclusions

7. The transfer of Mr L’s employment from the Co-operative Group to Mr Mirza is covered by TUPE 2006. It is also subject to the Pensions Act 2004, and the Transfer of Employment (Pension Protection) Regulations 2005 (SI2005/649) (as amended) (the **Pension Protection Regulations**). Extracts from the relevant legislation are provided in an appendix.

8. Under section 257 of the Pensions Act 2004 and the Pension Protection Regulations, since 6 April 2005 transferee employers have been obliged to provide pension benefits for transferring employees where all the following conditions are satisfied:-
 - There is a TUPE transfer.
 - By virtue of the transfer the employee ceases to be employed by the transferor and becomes employed by the transferee.
 - Immediately before the transfer there is an occupational pension scheme in relation to which the transferor is the employer and the employee is:-
 - an active member of the scheme; or
 - eligible to be such a member; or
 - in a probationary period to become eligible to be a member.
9. In these circumstances, if any of the benefits that may be provided under the transferor's scheme are money purchase benefits, the transferring employee qualifies for protection only if the transferor was required to make employer contributions or, if there was no such requirement, at least one such contribution was actually made by the former employer.
10. Where an employee qualifies for protection, it becomes a term of their contract with the new employer that the employee will be offered access to a money purchase scheme which meets the prescribed standard.
11. Mr L was an active member of PACE prior to the TUPE transfer to Mr Mirza. He paid contributions of 1%. Following the TUPE transfer, Mr Mirza was obliged to provide an occupational pension scheme which Mr L could join from the date his employment transferred; 16 April 2015. He was also obliged to pay contributions which matched those paid by the Co-operative Group to PACE. For the period April 2015 to December 2016, this amounts to 2% of Mr L's earnings. Mr Mirza's failure to establish an appropriate pension arrangement or to pay the required contributions amounts to maladministration on his part. Mr L has suffered injustice as a consequence because he was not provided with the required pension accrual for that period. I uphold Mr L's complaint against Mr Mirza.
12. With effect from 4 December 2016, it appears Mr Mirza transferred the business which employed Mr L to Blacksey Limited. This is evidenced by correspondence from HMRC in relation to VAT. I find that this transfer was also a TUPE transfer.
13. For TUPE to apply, there has to be a relevant transfer. A "relevant transfer" is defined as:-
 - A transfer of a business, undertaking or part of a business or undertaking where there is a transfer of an economic entity that retains its identity (a "business transfer") (regulation 3(1)(a), TUPE 2006).

- A client engaging a contractor to do work on its behalf, reassigning such a contract or bringing the work “in-house” (a “service provision change”) (regulation 3(1)(b), TUPE 2006).
14. The Transfer of Going Concern to Blacksey Limited meets the “business transfer” definition. Mr L’s employment transferred to Blacksey Limited which then became responsible for providing an appropriate pension arrangement. Blacksey Limited was also obliged to pay contributions of 2% for the period December 2016 to September 2017 and 3% for the period October 2017 to February 2018. Its failure to do so amounts to maladministration on its part. Mr L suffered injustice because he was not provided with the appropriate pension accrual for that period. I uphold his complaint against Blacksey Limited.
 15. The fact that Blacksey Limited has been dissolved means that any directions I give against that entity cannot have effect unless and until action is taken to restore that company. This is not action which I can take but it may be something which Mr L wishes to consider. It is for this reason that I am making directions against Blacksey Limited notwithstanding its dissolution.
 16. I also take into account that neither Mr Mirza or Blacksey Limited have provided a response to us, including my Provisional Determination, concerning their failure to abide by the Pensions Act 2004 and the various applicable Regulations. This has undoubtedly caused Mr L further considerable distress and inconvenience which I have taken into account in increasing my award in respect of the severe distress and inconvenience which Mr L has suffered. I can fully understand why Mr L feels that this is a highly unsatisfactory situation and that he has been “let down by the system”.

Directions

17. Within 21 days of the date of this determination, Mr Mirza shall pay 2% of Mr L’s earnings for the period 15 April 2015 to 3 December 2016, into a pension arrangement of his choice, together with simple interest at the rate quoted for the time being by the reference banks. He shall also pay Mr L £2,500 for the very significant distress and inconvenience arising out of his complete failure to comply with his obligations under the Pensions Act 2004 and the Pension Protection Regulations.

18. Within 21 days of the date of this determination, Blacksey Limited shall pay 2% of Mr L's earnings for the period 4 December 2016 to 30 September 2017 into a pension arrangement of his choice, together with simple interest at the rate quoted for the time being by the reference banks. It shall pay 3% of his earnings for the period 1 October 2017 to 28 February 2018 into the same arrangement, together with the same rate of interest. It shall also pay Mr L £2,500 for the very significant distress and inconvenience arising out of its failure to comply with its obligations under the Pensions Act 2004 and the Pension Protection Regulations.

Anthony Arter

Pensions Ombudsman

30 April 2018

Appendix

The Pensions Act 2004

“Pension protection on transfer of employment

257 Conditions for pension protection

- (1) This section applies in relation to a person (“the employee”) where -
 - (a) there is a relevant transfer within the meaning of the TUPE regulations,
 - (b) by virtue of the transfer the employee ceases to be employed by the transferor and becomes employed by the transferee, and
 - (c) at the time immediately before the employee becomes employed by the transferee -
 - (i) there is an occupational pension scheme (“the scheme”) in relation to which the transferor is the employer, and
 - (ii) one of subsections (2), (3) and (4) applies.
- (2) This subsection applies where -
 - (a) the employee is an active member of the scheme, and
 - (b) if any of the benefits that may be provided under the scheme are money purchase benefits -
 - (i) the transferor is required to make contributions to the scheme in respect of the employee, or
 - (ii) the transferor is not so required but has made one or more such contributions.
- ...
- (5) For the purposes of this section, the condition in subsection (1)(c) is to be regarded as satisfied in any case where it would have been satisfied but for any action taken by the transferor by reason of the transfer.
- (8) In this section -

the “TUPE Regulations” means the Transfer of Undertakings (Protection of Employment) Regulations 2006 ...”

“258 Form of protection

- (1) In a case where section 257 applies, it is a condition of the employee's contract of employment with the transferee that the requirements in subsection (2) or the requirement in subsection (3) are complied with.
- (2) The requirements in this subsection are that -
 - (a) the transferee secures that, as from the relevant time, the employee is, or is eligible to be, an active member of an occupational pension scheme in relation to which the transferee is the employer, and
 - (b) in a case where the scheme is a money purchase scheme, as from the relevant time -
 - (i) the transferee makes relevant contributions to the scheme in respect of the employee, or
 - (ii) if the employee is not an active member of the scheme but is eligible to be such a member, the transferee would be required to make such contributions if the employee were an active member, and
 - (c) ...
- (3) The requirement in this subsection is that, as from the relevant time, the transferee makes relevant contributions to a stakeholder pension scheme of which the employee is a member.
- (4) The requirement in subsection (3) is for the purposes of this section to be regarded as complied with by the transferee during any period in relation to which the condition in subsection (5) is satisfied.
- (5) The condition in this subsection is that the transferee has offered to make relevant contributions to a stakeholder pension scheme of which the employee is eligible to be a member (and the transferee has not withdrawn the offer).
- (6) Subsection (1) does not apply in relation to a contract if or to the extent that the employee and the transferee so agree at any time after the time when the employee becomes employed by the transferee.
- (7) In this section—

“the relevant time” means -

(a) in a case where section 257 applies by virtue of the application of subsection (2) or (3) of that section, the time when the employee becomes employed by the transferee;

(b) ...

“relevant contributions” means such contributions in respect of such period or periods as may be prescribed;

“stakeholder pension scheme” means a pension scheme which is registered under section 2 of the Welfare Reform and Pensions Act 1999 (c. 30).”

The Transfer of Employment (Pension Protection) Regulations 2005 (SI2005/649) (as amended)

19. As at the date Mr L’s employment transferred, regulations 2 and 3 provided:

“(2) This paragraph is satisfied if the amount contributed by the transferee in respect of each remuneration period is -

- (a) where the employee's contributions are less than 6 per cent. of the employee's remuneration, an amount not less than the contributions made by the employee;
- (b) where the employee's contributions equal or exceed 6 per cent. of the employee's remuneration, an amount not less than 6 per cent. of that remuneration.

(3) This paragraph is satisfied if -

- (a) in respect of the remuneration period immediately before the relevant time -
 - (i) the transferor had been required to make contributions; and
 - (ii) those contributions had been solely for the purpose of producing money purchase benefits for the employee; and
- (b) the amount contributed by the transferee is not less than the amount the transferor had been required to contribute.”