

Ombudsman's Determination

Applicant	Mr E
Scheme	Optimum International Pension Plan (the Scheme)
Respondent	Optimum Capital Ltd (Optimum)

Outcome

1. Mr E's complaint is upheld and to put matters right, Optimum shall pay him £2,000 for the exceptional distress and inconvenience caused.

Complaint summary

2. Mr E has complained that Optimum has failed to act on his transfer request.

Background information, including submissions from the parties

3. On 30 May 2007, the Scheme was established by Trust Deed. Optimum was the Provider and the Trustee. Tudor Capital Management Limited (**Tudor Capital**) was the Scheme's administrator.
4. The Scheme Rules are set out in a document entitled "2006 Model Rules for the Optimum International Pension Plan" (**the Rules**). Rule 9, in relation to transfers, states:

"9.1 Members Right To A Recognised Transfer

A member has a right to request that the "cash equivalent" of all the accumulated funds, assets and other rights held within any or all arrangements under the scheme should be transferred in accordance with section 169 of the 2004 Act to:

- Another registered pension scheme; or
- A qualifying recognised overseas pension scheme.

The transfer must be made by a direct payment between the scheme administrator and the administrator of the other scheme."

5. On 25 February 2008, Mr E was issued with a certificate confirming his membership of the Scheme. The associated paperwork describes the Scheme as an occupational pension trust.
6. On 28 November 2017, Optimum acknowledged a request from Mr E to transfer saying, in summary:-
 - Under Rule 9 of the Scheme, only the administrator has the power to effect a transfer.
 - The administrator had been Tudor Capital, but that firm had been suspended from acting as a trustee of the Scheme and the Directors had been jailed for pension scheme tax fraud in relation to a different scheme.
 - Optimum was in dispute with Tudor Capital about the way in which the Scheme had been administered.
 - Optimum's legal adviser was in discussion with HMRC and the Pensions Regulator in order to appoint a new administrator and trustee.
 - Optimum was prepared to action the request unilaterally, without the involvement of Tudor Capital, but its success was dependent on the Scheme's bank account provider's accepting the transfer instruction.
 - However, this action could amount to breach of trust, duty, or maladministration by Optimum, and so it asked Mr E to sign an indemnity (set out in the Appendix below).
7. On 13 April 2018, Mr E signed the transfer declaration and indemnity.
8. On 18 April 2018, Mr E's preferred pension provider wrote to Optimum enclosing the necessary documents for the transfer to proceed.
9. On 25 April 2018, Optimum acknowledged the documentation and confirmed it was being considered by its legal advisers.
10. Over the following months, there was no apparent progress, despite Mr E's attempts to hasten the situation, so he referred the matter to The Pensions Ombudsman (TPO).
11. On 17 October 2018, Optimum resigned as the Scheme's trustee and a professional trustee was appointed to the Scheme, by Supplemental Deed, becoming the sole Trustee.
12. On 6 November 2018, Optimum issued a formal response to TPO, saying:

"As we had no scheme administrator since the suspension of Tudor Capital Management Limited ("TCML") and [sic] we worked hard with our pension lawyer to appoint a new trustee.

Optimum Capital Ltd is simply provider of the scheme and I have strictly no competence, skills and professional qualifications in the field of pension funds.”

13. On 20 March 2019, in the course of our investigation, Mr E was contacted by the Director of Optimum to discuss the complaint. Mr E described the call as follows:

“Yesterday Mr Tanguy Lestang gave me a call to discuss and complain about the investigation. He told me that:

- 1) when I asked to transfer the pension assets I did sign a letter that stated that I will not launch any litigation against Optimum in relation to the transfer. Indeed I signed this letter after asking my new pension advisor SwissRock who confirmed that it was common to request such letter.
- 2) Tanguy will go to court with the letter in case I continue with the investigation, claiming that thanks to this letter he should "win" the case.
- 3) Tanguy has stopped charging me pension management fees since he received my request to transfer the assets, and if I continue with the case he will charge back the fees which are due and resume the fees from now on.
- 4) he explained something that I did not understand fully, but apparently PAN did put the review of my pension transfer on hold because PAN are concerned about being liable for any litigation in relation to the past.”

Adjudicator’s Opinion

14. Mr E’s complaint was considered by one of our Adjudicators who concluded that further action was required by Optimum. The Adjudicator’s findings are summarised below:-

- Mr E’s claim was limited to recognition of the distress and inconvenience caused.
- Optimum had highlighted the indemnity clause signed by Mr E as a defence to his complaint. The indemnity was intended to protect Optimum from the possible risks if it transferred on an execution only basis, and Mr E had signed and accepted it. The indemnity covered a wide range of risks, “In consideration for OCL [Optimum] attempting to action the transfer...”.
- That opening sentence was significant because the indemnity was, in the Adjudicator’s opinion, limited to Optimum’s attempt to carry out the transfer. However, on the evidence provided to the Adjudicator, no attempt had been made. As a result, the Adjudicator did not believe that the indemnity could protect Optimum from our investigation of the matter.
- The Scheme was significantly impacted by the involvement of Tudor Capital. However, the Scheme has had no appropriate administrator since at least 2015, when a very similar complaint was determined by TPO (PO-3658). The

Adjudicator took the view that this impediment to the effective operation of the Scheme should have been resolved much sooner, and the fact that it had not been was Optimum's responsibility. In these circumstances, the delay to Mr E's transfer could not be attributed to the issues with the former administrator.

- Between April and October 2018, there was no evidence of any genuine attempt to transfer Mr E's pension. The delay was effectively the full statutory timeframe allowed. At the end of that timeframe, a new trustee and administrator were appointed, but they should have been in place much sooner.
 - The six months between April and October 2018 was a delay without mitigation or extenuating circumstances. Optimum was criticised by the Ombudsman for the same issues under PO-3785 back in 2015. The fact that the same issue remained unresolved several years later was a significant breach of Optimum's fiduciary duty.
 - Had Optimum acted appropriately, and appointed a new administrator in a reasonable timeframe, the transfer could have proceeded much sooner. So, Optimum's inaction had caused Mr E significant distress and inconvenience, and a payment of £500 was warranted.
15. Optimum did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Despite being given the opportunity, Optimum provided no further comments.

Ombudsman's decision

16. I agree with the Adjudicator's Opinion except in respect of the level of distress and inconvenience. It is unacceptable that such a fundamental flaw in the Scheme has been allowed to continue for so many years. Without an effective administrator, the members are prevented from making important decisions in relation to their pension, and that has been borne out in Mr E's case.
17. As the Adjudicator has highlighted, in 2015 I held Optimum accountable for a similar breach of its fiduciary duty (see paragraph 14 above), but Optimum has continued to seriously breach its fiduciary duties with a total disregard of responsibility to its members. I find it particularly concerning that in Optimum's formal response to this Office on 6 November 2018, the representative said, "I have strictly no competence, skills and professional qualifications in the field of pension funds." Without the necessary skills Optimum should not have offered its services as a scheme provider and trustee and I will refer TPO's findings to The Pensions Regulator.
18. I find that the resulting delay in effecting Mr E's transfer request has caused Mr E exceptional distress and inconvenience.
19. Therefore, I uphold Mr E's complaint.

PO-23185

Directions

20. Within 21 days of the date of this determination, Optimum shall pay Mr E £2,000 for the exceptional distress and inconvenience that he has suffered.

Anthony Arter

Pensions Ombudsman
29 July 2019