PO-4774

Ombudsman's Determination

Applicant	Ms Lynda Berry
Scheme	Hilton UK Pension Plan (**the Plan**)
Respondent(s)	Hymans Robertson LLP (**Hymans Robertson**)
	Trustees of the Hilton UK Pension Plan (**the Trustees**)

Complaint summary

Ms Berry has complained that her brother was denied the opportunity to transfer his Plan benefits to his SIPP before he died.

Ms Berry wants to be paid the difference between what she has received following Mr Berry's death and what would have been paid as a transfer value.

Summary of the Ombudsman's determination and reasons

The complaint should not be upheld against Hymans Robertson because;

- the request received from Mr Berry's financial adviser was for a serious ill health lump sum – it did not amount to a transfer request;

- while Hymans Robertson response was delayed there is insufficient evidence to say, more likely than not, that Mr Berry wanted to transfer his benefits in the Plan to his SIPP.

The complaint against the Trustees should not be upheld because:

- they exercised discretion and paid Ms Berry the serious ill health lump sum that they would have paid Mr Berry;

- they reimbursed her the interest she had incurred on her late brother's mortgage as a consequence of the payment of two lump sums, thereby putting her in the position she would have been in if the first payment had been for the right amount; and

- they paid her £250 for distress and inconvenience, which was reasonable in all the circumstances.

Detailed Determination

Plan's Rules

1. Rule 6.5 'Member dies with a preserved pension that has not started' says:

> "If the Member dies with a preserved pension that has not started, the benefit will be equal to the total contributions paid by the Member of the Plan in accordance with Rule 3.2 (basic contributions by Members), with interest to the date of death at a yearly rate decided by the Trustees (including nil rate)."

Rule17.1 'Commutation because of serious ill-health' says:

> "The Trustees may allow a Member who is exceptionally seriously ill (so that life expectancy is very short) when his or her pension starts to give up the whole of the pension (except any GMP) for a lump sum. The Trustees will convert pension to lump sum on a basis certified as reasonable by the Advising Actuary and acceptable to HM Revenue and Customs. This choice will not affect any pensions payable on the Member's death."

Material Facts

2. Mr Berry was born in 1948. His normal retirement age under the Plan was 65. He was a preserved member.

3. In December 2008 he was provided with a requested transfer value (for £76,209) but did not proceed further with it.

4. In July 2010 he took out a SIPP, transferring-in benefits from another pension arrangement with Phoenix Life.

5. In December 2010 he was diagnosed with cancer. He approached his financial adviser (ISIS Financial Associates Ltd – **ISIS**).

6. On 4 January 2011, Mr Berry emailed ISIS about a transfer offer made in respect of another of his pension arrangements. Under the same subject, on 13 January 2011, he notified ISIS that he had unknown months to live he needed to get his affairs in order …"Thus all pensions need to be looked at…"

7. On 23 March Mr Berry wrote to ISIS:

> "You will recall my letters earlier in the year regarding my pension funds and the fact that I now have terminal cancer.
>
> We have received information from the Trustees of the [redacted] Fund that in view of the circumstances HMRC are not seeking to levy the normal taxation on these amounts
>
> I attach a copy of the letter received from them.

> Therefore we had our Consultant, Professor Cunningham, address letters 'To Whom it may concern' which should be forwarded to Hilton (UK) Pension Plan, [redacted] and [redacted] to enable you to identify at an early stage whether this will apply to their funds.
>
> In view of the amounts of monies involved I would be grateful if you could revert as soon as possible."

8. On 8 April Hymans Robertson (the Plan's Administrator) received a letter from ISIS advising that Mr Berry had terminal cancer (enclosed was a letter from his treating Consultant confirming Mr Berry's condition and that his life expectancy was "likely to be not more than 12 months") and that he "would like the trustees to release the pension prior to his death in order for him to sort out his affairs". The letter included bank details (in the name of Mr Berry) and requested payment of the proceeds of his fund into it.

9. On 27 May Hymans Robertson wrote to ISIS with a statement of options on grounds of serious ill health:

    1. a lump sum of £39,802 retaining dependants benefits within the Plan ;
    2. a transfer value to another pension arrangement – to be calculated on request;
    3. take no action with benefits on death amounting to a refund of contributions plus interest and a spouse's pension of around £2,900 a year (subject to recalculation).

    They advised:

    - before payment they would require site of Mr Berry's original birth and marriage certificates with his spouse's original birth certificate;
    - if he chose option 1 he should complete the enclosed Declaration form (to check whether the payment would exceed his lifetime allowance);
    - if he wanted option 2 to contact them for additional forms.

10. Mr Berry died the next day (28 May 2011).

11. Ms Berry (the executor and sole beneficiary in Mr Berry's Will) asked AON to piece together the various pension assets of Mr Berry.

12. In August Hymans Robertson received notification of Mr Berry's death and a copy of his Will from AON. AON confirmed that Mr Berry was not married at the time of his death and asked the amount of lump sum benefits payable and for any documentation required.

13. The next month Hymans Robertson advised AON that a return of Mr Berry's contributions was payable at the discretion of the Trustees and asked for written confirmation that there were no financial dependents on Mr Berry and for details of any potential beneficiaries apart from Ms Berry.

14. In November Ms Berry confirmed that she was the only beneficiary and on 13 December 2011Hymans Robertson wrote to her that they had received agreement from the Trustees to pay a lump sum of £2,755 to her representing the return of Mr Berry's contributions. Enclosed with the letter was a mandate form which Ms Berry was asked to complete and return so that the amount could be paid into her bank account.

15. In January 2012 Ms Berry replied that the offer was unacceptable "£75,000 REDUCED TO £2,755 – HAS TO BE SERIOUSLY QUESTIONED". She advised that she was consulting with colleagues in the media and her lawyers about the matter, but would be out of the country until early March, and would be in contact after then.

16. In March Hymans Robertson wrote to Ms Berry to clarify why the transfer value quoted in December 2008 was not payable on Mr Berry's death.

17. Over the next twelve months Hyman's Robertson sent regular chasers to Ms Berry for the completion and return of the mandate form so that the refund of contributions could be paid to her.

18. At the end of July Towry Ltd (appointed by Ms Berry to obtain information about the Plan) wrote to Hymans Robertson requesting among other things a copy of the Plan's Booklet and the last benefit statement issued to Mr Berry. The requested information was supplied in early August.

19. In March 2013 Hymans Robertson were contacted by a financial journalist about the matter. Ms Berry also contacted the Pensions Advisory Service (**TPAS**). On 2 April TPAS wrote to the Plan Trustee (via Hymans Robertson) requesting various information.

20. Hymans Robertson acknowledged TPAS' letter two days later. The next day Hymans Robertson emailed Ms Berry a letter from the Chairman of the Trustees dated 4 April 2013. The letter informed Ms Berry that while the refund of contributions was the benefit strictly payable under the Plan's Rules "due to the particular circumstances here" the Trustees in consultation with the Company (Hilton Worldwide) had agreed to exercise discretion and pay her the ill-health commutation lump sum of £39,802 (quoted in May 2011) plus interest at 2.5 per cent per year. The letter asked Ms Berry for her bank details.

21. Ms Berry consulted with TPAS and on her behalf TPAS wrote to Hymans Robertson:

    - Mr Berry had previously received a transfer quote of around £75,000;
    - Ms Berry was of the opinion that had Hymans Robertson promptly provided Mr Berry's options he would have opted for a transfer which could have been completed before his death.

22. TPAS requested the immediate payment of the Trustee's offer and that they consider Ms Berry's claim for the difference between this amount and the transfer value that was quoted to Mr Berry.

23. Hymans Robertson replied:

    - strictly the benefit payable under the Plan's Rules was a refund of contributions;
    - however, Hilton Worldwide and the Trustees had agreed to make a discretionary payment based on full commutation serious ill health;
    - the transfer value quoted in 2008 (of £76,209) was guaranteed for 3 months;
    - Mr Berry chose not to take it and made no subsequent request to transfer;
    - in the absence of such a request the Trustees could only conclude that Mr Berry did not wish to pursue that option;
    - the payment the Trustees would make was £39,802 plus interest.

24. Mr Berry's financial adviser then notified TPAS that it had been Mr Berry's intention to transfer his Plan benefits into his SIPP before his death to provide Ms Berry with a lump sum, but due to the speed of his illness and the delays in receiving the necessary paperwork they were unable to fulfil his wishes.

25. The financial adviser later added that Mr Berry had misunderstood about his pensions that a death in service benefit might be payable and had advised him to transfer to his SIPP but communications were difficult because of his condition. Ms Berry commenting on that notified TPAS that from January until mid-February her brother had been very ill in hospital and unable to deal with things and as he improved he started chemotherapy which made it impossible for him to focus on affairs.

26. The Plan's internal dispute resolution (**IDR**) procedure was invoked and it was agreed to go straight to IDR stage two (rather than use the usual two stages) as the matter would go straight to the Trustees.

27. Prior to the Trustees decision it was agreed that Ms Berry should be paid £39,802 plus interest. The sum of £41,596.88 was paid to her on 21 May 2013.

28. The Trustees decision was that there was insufficient evidence available of Mr Berry's intention to take a transfer value for the Trustees to pay Ms Berry a lump sum equal to that amount. The Trustees reasons were:

    - ISIS' letter of 5 April 2011 requested the payment of Mr Berry's pension proceeds into his bank account (amounted to a request for the payment of a serious ill health lump sum);
    - the letter did not request or refer to the possibility of a transfer value and did not mention the amount Mr Berry expected to receive as a serious ill health lump sum;
    - the transfer value issued in 2008 was guaranteed for three months and no subsequent request was received from Mr Berry or his financial adviser;
    - while the financial adviser had said his advice to Mr Berry was to take a transfer value he had provided no evidence to support this;
    - Mr Berry's letter of 23 March 2011 did not refer to the possibility of a transfer from the Plan and while they had not been provided with copies of Mr Berry's

email correspondence with his financial adviser they understood that it equally made no such reference;

- Mr Berry's reference to an amount of £51,000 (in his letter to ISIS of 27 March 2011) is unexplained and at the time he was unaware of the amount payable as a serious ill health lump sum. But if his concern was the potential difference between this amount and a transfer value it would have been reasonable to have expected Mr Berry to have requested an updated transfer value.

29. However, it was identified that the serious ill health lump sum quoted to Mr Berry of £39,802 (and subsequently paid to Ms Berry with interest) was incorrect and should have been £58,778. The Trustees and Hilton Worldwide agreed to pay the difference to Ms Berry (£18,976 plus yearly interest at 2.5 per cent).

30. The additional sum of £19,939.32 was paid into Ms Berry's bank account on 8 August.

31. TPAS subsequently calculated that the delayed payment of the lump sums cost Ms Berry £2,909.16 in interest charged (at 2.77 per cent) on Mr Berry's mortgage, the payment for which she had inherited. The Trustees duly paid Ms Berry a further £150.96 (that is the difference between £2906.16 and the interest they had paid her to date, £2758.20) plus £250 for distress and inconvenience.

Conclusions

32. My view is that Hymans Robertson fairly interpreted the letter they received from Mr Berry's financial adviser on 8 April 2011 (which enclosed the Consultant's letter confirming Mr Berry's condition and that his life expectancy was likely to be less than 12 months) as a request for a serious ill health lump sum payment.

33. The letter did not request a transfer value and any forms to complete (nor did it include transfer forms from the SIPP provider for completion). Further it requested payment directly into Mr Berry's bank account yet for a transfer payment it would have had to be paid directly to the SIPP's bank account.

34. Following the request ISIS do not appear to have chased the matter and there is no mention that Mr Berry wanted to transfer (until after his death).

35. It took until 27 May 2011 (7.5 weeks) for Hymans Robertson to issue Mr Berry's options to ISIS, including a transfer. My view is that it should have been issued before then, say within two weeks of their receipt of the financial adviser's letter (albeit the Consultant's letter did not say that Mr Berry's life expectancy was a matter of weeks). While the extra time they took amounts to maladministration Ms Berry incurred no financial or non-financial loss as a consequence.

36. Ms Berry claims that Mr Berry would have transferred his benefits to his SIPP if Hymans Robertson had replied to ISIS before when they did. But that is speculation.

37. While Mr Berry did request a transfer from another pension arrangement he had that is not sufficient to say, more likely than not, that he would have opted to transfer from the Plan as well.

38. Following Mr Berry's death the Trustees (in agreement with Hilton Worldwide) exercised discretion and paid Ms Berry the serious ill health lump sum quoted to Mr Berry in May 2011 plus interest. While strictly they could have limited the payment to a return of Mr Berry's contributions (with or without interest), which was originally intended, the decision was revised. My view is that neither the original decision to refund contributions nor the later decision to pay a higher sum was perverse.

39. An additional sum with interest was paid later, when it was realised that the amount quoted to Mr Berry had been understated and a further amount was paid when TPAS advised that the interest that Ms Berry had paid on her late brother's mortgage over the period that it took Hymans Robertson to pay the two lump sums exceeded the interest that the Trustees had paid to her. As a consequence Ms Berry was put in the position she would have been in if the original payment to her had been for the correct amount and she had not incurred the mortgage interest.

40. The Trustees also paid Ms Berry £250 for distress and inconvenience caused. In all the circumstances I consider that was reasonable.

41. Therefore, for these reasons, I do not uphold Ms Berry's complaint.

Jane Irvine

Deputy Pensions Ombudsman
31st March 2015