

Pensions liberation – the Ombudsman speaks at last...

The Pensions Ombudsman has finally published the first three in a series of determinations dealing with complaints relating to pensions liberation. Eagerly awaited by the pensions industry, these determinations contain useful guidance for trustees on how to deal with transfer requests where they suspect a pensions liberation purpose.

Comment

The Ombudsman upheld the providers' decisions to refuse the transfer requests on the grounds that the members had no legal transfer entitlement. His careful analysis of the tests for whether a scheme is an occupational pension scheme, and whether transfer credits will be provided, will be welcomed by the pensions industry and in particular by trustees considering transfer requests that raise pensions liberation concerns.

However, there is a note of caution to be observed in the determinations. In all three cases, although the Ombudsman rejected (or, in the third case, partially rejected) the members' complaints, he commented that the providers had failed to reach their decisions to refuse the transfer requests on the correct grounds. The providers had not considered whether the members had a transfer right and instead focussed on the suspicion that the receiving schemes were liberation vehicles.

While the Ombudsman acknowledges that suspicions as to the purpose of the transfer may justify schemes in "delaying the transfer and asking relevant questions during the statutory period allowed for the transfer ... there is no direct link between a transfer being for pensions liberation purposes and ... there being no statutory right to the transfer". He states clearly in all three determinations that it was for the providers to satisfy themselves that the members did not have a transfer right, rather than for the members to satisfy the providers that they did have a transfer right.

Trustees will therefore need to be careful to ensure that, should they decide to reject a transfer request, they are doing so because they have analysed whether the member has a transfer right and have decided that he or she does not. They should also make it clear when communicating the refusal to the member that this is why the request has been rejected. Trustees of schemes who have discretion to make a non-statutory transfer should ensure that – as with any discretion – they at least *consider* whether to exercise this discretion and that they communicate their decision to the member.

Where a member has a transfer right, it seems that trustees who refuse to make the transfer because they suspect (or even know) that the member is engaged in pensions liberation will receive no support from the Ombudsman.

Background

Industry interest in the problem of pensions liberation has soared over the last couple of years as liberation schemes have become more widespread and more sophisticated. Industry regulators have also taken an increased interest in the issue, with the Pensions Regulator, the FCA and HMRC (among others) working together to produce guidance and an action pack for schemes and advisers to combat the problem. The Regulator has also taken action against suspected liberation vehicles, appointing independent trustees to a number of schemes, and recently announcing that it has shut down five connected liberation schemes.

The increased number of transfer requests to possible liberation vehicles has led many schemes to delay making transfer payments and, in some cases, to refuse transfer requests. As of late October 2014, the Ombudsman had received over 140 complaints relating to pensions liberation. Almost 90% of those complaints were from members whose scheme had refused a transfer request because the scheme believed that its purpose was pension liberation (known as "blocked transfers").

TRANSFER RIGHTS

Under legislation, a deferred member of an occupational or personal pension scheme has a right to transfer the cash equivalent of his or her pension benefits to another occupational or personal pension scheme. This right generally lapses once the member is less than 12 months from normal pension age¹. Legislation sets out how the cash equivalent of the member's benefits is to be calculated. Schemes have six months following receipt of a statutory transfer request to make the transfer payment. Failure to comply with a statutory transfer request or delaying the making of a statutory transfer payment beyond the six month deadline without reasonable excuse can result in civil penalties for the scheme trustees/provider.

Some schemes will also have a rule giving deferred members a non-statutory right to transfer their benefits. The extent of this right will depend on the wording of the rule.

The Ombudsman's determinations in detail

All three complaints related to blocked transfers from personal pension schemes. All three receiving schemes were registered pension schemes and, in their governing documentation, purported to be occupational pension schemes².

In two of the three cases, the Ombudsman decided that the members did not have a statutory transfer right as the receiving schemes were not occupational pension schemes. In order for a scheme to be an occupational pension scheme, it must be established "for the purpose of providing benefits to, or in respect of, people with service in employments of a description". The Ombudsman considered that this provision meant that it must be possible to identify "a closed list of classes of employment to which the scheme relates". He decided that, in these two cases, the provisions governing membership of the scheme were either so wide or so unclear that it was impossible to identify the necessary classes of employment.

In the third case, it was possible to identify a closed list of classes of employment and the Ombudsman therefore decided that the receiving scheme was an occupational pension scheme. However, he went on to decide that, nonetheless, the member did not have a statutory transfer right as the transfer payment would not be used to secure "transfer credits" in the receiving scheme. This was because transfer credits are rights allowed to an "earner" under the receiving scheme. The Ombudsman decided that, although the legislation does not expressly say so, the member's status as an earner must be in relation to an employer in the receiving scheme. The member in the third case was not employed by one of the receiving scheme's employers and therefore was not an earner for the purposes of acquiring transfer credits.

However, in the third case, the scheme had discretion to make a non-statutory transfer and the Ombudsman decided that the scheme provider had failed to consider whether it should exercise this discretion. The Ombudsman therefore directed the provider to reconsider the member's transfer request on these grounds.

If you have any questions about this update, please get in touch with your usual Mayer Brown contact or:

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¹ From April 2015, this age limit is likely to be extended for transfers of money purchase or cash balance rights.

² Although a statutory transfer payment can be made to either an occupational or a personal pension scheme, pensions liberation vehicles are usually established as occupational pension schemes as providers of personal pension schemes must be authorised by the FCA.

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