

THE OMBUDSMAN SETS OUT HIS POSITION ON PENSION TRANSFERS

British Steel Pension Scheme CAS-81940-Z2S8

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Overview and summary

In an important recent determination, *British Steel Pension Scheme CAS-81940-Z2S8*, the Pensions Ombudsman has decided that, for transfers out pre-dating the Transfer Regulations 2021, trustees of the transferor occupational pension scheme do not generally owe the transferring member a duty to carry out due diligence on the receiving scheme where the member exercises his statutory right to take a transfer.

In *British Steel*, the applicant, Mr D, complained that the trustee of the transferor scheme had failed to carry out sufficient due diligence when it transferred Mr D's pension fund to a Small Self-Administered Pension Scheme (SSAS) administered by a non-FCA regulated firm. The transfer of some £41,000 was made in August 2014. Mr D alleged that he was the victim of a "scam", with the SSAS's assets then being invested in a speculative overseas investment (a fractional share in a hotel resort) and lost to him. Mr D alleged that the transferor trustee had failed to act on numerous "red flags" which cast doubt on the bona fides of the receiving arrangement.

Rejecting the complaint, the Ombudsman held that there was no obligation on the transferor trustee to carry out the due diligence that Mr D argued should have taken place. While the Pensions Regulator’s “scorpion” action pack envisaged due diligence checks being carried out, the Ombudsman concluded that there was no general obligation, whether under legislation or common law or equitable duties of care, on the trustee of a transferor occupational pension scheme to carry out such due diligence in the context of a statutory transfer. Such a duty would, the Ombudsman said, inhibit the trustees from performing their statutory transfer out duties under the Pension Schemes Act 1993.

The Ombudsman noted that a different result might obtain where such a transfer was made from a *personal* pension scheme in the FCA-regulated sphere, or if there was a voluntary assumption of responsibility by the trustee, or if it was a non-statutory transfer. But for the generality of *statutory* transfers from *occupational* pension schemes pre-dating the Transfer Regulations 2021, the Ombudsman would appear to take the view that, absent special facts, there will usually be no duty of due diligence.

Since November 2021, the law has been changed by the Transfer Regulations 2021,¹ which do impose duties of due diligence in relation to the transfers to which those Regulations apply. The Transfer Regulations 2021 did not apply in the present case. Similarly the case fell outside the “appropriate independent advice” requirement under s 48 of the Pension Schemes Act 2015 for transfers of “safeguarded benefits” exceeding £30,000 with a view to acquiring a right to flexible benefits. The upshot was that Mr D’s complaint failed.

The determination in more detail

The case follows a depressingly familiar “pension scam” fact-pattern. Mr D said that in 2014 he received an unsolicited approach from a non-FCA regulated firm called First

¹ The Occupational and Personal Pension Schemes (Conditions for Transfer) Regulations 2021, SI 2021/1237.

Review, who persuaded him to transfer his deferred British Steel pension to a SSAS administered by another unregulated firm, to take advantage of offshore investment opportunities. Mr D exercised his right to take a transfer under the Pension Schemes Act 1993. He signed various forms confirming to the transferor trustee that he had read the Pensions Regulator's "scorpion" leaflet and that he had not been offered any cash or other incentive to take the transfer. The transferor trustee was sent a copy of the scorpion leaflet signed as having been read by Mr D.

But, in his subsequent complaint to the Ombudsman, Mr D alleged that there were various suspicious signs that the transferor trustee should have detected through due diligence and by contacting Mr D directly. The nub of the complaint was that under the guidance in place at the time of the transfer, the transferor trustee should have carried out due diligence to check for scam warning signs, and communicated the presence of such signs to Mr D in order to put him in an informed position so that he could decide himself whether or not to proceed (see determination at [71]).

The short answer to the complaint, as the Ombudsman found, was that Mr D would have made the transfer even if he had been told of the warning signs, so that the alleged failure to investigate did not cause Mr D's losses (determination at [93]).

However, the Ombudsman did not want to leave matters to rest there and he went to considerable lengths to examine the more fundamental question of whether the transferor trustee was under the alleged duty to carry out due diligence at all.

The Ombudsman took the view that there was no such duty. His reasoning can be summarised as follows:

- The Ombudsman's function is to decide disputes in accordance with established legal principles, not more general considerations of what he considers to be fair and reasonable: *Arjo Wiggins v Ralph* [2009] EWHC 3198 (Ch).
- The issue was therefore what are the legal obligations on a transferor trustee when asked to make a transfer by one of its members.
- There is no one answer to that question, because it depends on the facts of each case and the legislation/regulatory regime in place at the time (determination at [94]-[99]). The answer might differ according to (for example) whether the member has a statutory or discretionary right to transfer and whether the trustee is an FCA-regulated personal pension provider or an occupational pension scheme trustee. The Ombudsman's analysis in the *British Steel* case focused on the position of an occupational pension trustee dealing with a statutory transfer, not subject to the Transfer Regulations 2021 or the "appropriate independent advice" requirement for "safeguarded benefits".
- The transfer in the present case fell within the CETV provisions of the Pension Schemes Act 1993, which set out the trustee's obligations to issue a statement of entitlement and to make the transfer to the SSAS, resulting in a statutory discharge for the trustee (determination at [102]-[109]). Although the Pensions Regulator's "scorpion" action pack envisaged that due diligence checks might be made by the trustee, it was clear to the Ombudsman that there was no legislative or regulatory obligation at the time to carry out due diligence (determination at [130]-[135]). Such checks were not required by the Pensions Schemes Act 1993 or any applicable Regulations, and the "scorpion" action pack did not mandate checks or have the force of law.
- Nor was there a duty of care:

- There was no tortious duty at common law, applying the test for a duty of care in *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4. A duty of care will generally not arise where it would hinder the performance of a statutory duty (*Desmond v Chief Constable of Nottingham Police* [2011] EWCA Civ 3), and the Ombudsman took the view that imposing a duty to carry out due diligence would inhibit transferor trustees from meeting their statutory obligations under the Pension Schemes Act 1993. Such checks might cause the trustees to miss the transfer deadlines under the 1993 Act. Recognition of a duty of care would also undermine the utility of the statutory discharge under the 1993 Act. It also militated against the recognition of a duty of care that the obligation to make the transfer was *imposed* on the transferor trustees by law rather than being something which they had decided to do (cf. *HMCE v Barclays Bank* [2006] UKHL 28).
- In the Ombudsman's view, the High Court's decision in *Hughes v Royal London* [2016] EWHC 319 (Ch) (a suspected "pension liberation" case where it was held that a personal pension provider was required to make the transfer as the requirements under the 1993 Act were satisfied) confirmed that no duty of care arose. *Hughes* showed that if the statutory requirements for transfer were met, there was nothing to justify a refusal to transfer.
- Further, a variety of pensions cases confirmed that there was no general duty of care (whether framed as a tortious duty or as part of a trustee's equitable duty of care) on a pension scheme trustee to advise members of their rights or how to exercise them or as to the appropriateness of a transfer (e.g. *Hamar v Pensions Ombudsman* [1996] Pens LR 1).
(Determination at [142]-[158], [174]).

- The Ombudsman accepted that a duty of care might arise under the *Hedley Byrne* principle if there was a voluntary assumption of responsibility by the transferor trustee to carry out due diligence. But that would only arise on special facts, such as an express or implied representation by the trustee to the member that due diligence would be carried out. In the Ombudsman's view, such a duty would not arise where the member was unaware that a trustee had attempted to carry out due diligence as suggested in the "scorpion" action pack, and it did not arise in the present case (determination at [159]-[172]).

For these reasons, the Ombudsman concluded that the transferor trustee was under no duty to carry out due diligence on the receiving arrangement. However, he stressed that different factual situations could result in a different outcome, for example (1) if there was a voluntary undertaking to carry out due diligence which was communicated to the member, (2) if the transfer was by an FCA-regulated personal pension provider subject to the additional requirements of the FCA Handbook, or (3) if the transfer was non-statutory and required the consent of the scheme's trustee or manager (determination at [175]-[176]).

Ultimately, the Ombudsman considered that an obligation to perform due diligence of the sort advocated by Mr D was a matter for legislative intervention (determination at [178]-[179]). Such intervention only came about with the Transfer Regulations 2021, too late for Mr D.

Discussion

This is an important determination which may have wide-ranging implications for complaints relating to transfers out not governed by the Transfer Regulations 2021. This article does not seek to consider all the many interesting points and issues which may arise from the determination, but here are some initial thoughts.

The first is the potential for inconsistency of outcome for equivalent transfers from FCA-regulated personal pension schemes. The Ombudsman had this potential inconsistency well in mind, and explained (entirely correctly) that any such inconsistency would be attributable to the different FCA regulatory regime applicable to personal pensions operated by FCA-approved providers, and to the much broader test applied by the Financial Ombudsman Service when resolving complaints (“fair and reasonable in all the circumstances of the case”). This may be a sound distinction as a matter of legal analysis, but it might be questioned whether as a matter of policy it is sensible for government/regulatory bodies to impose such different standards for personal and occupational pensions.

The second observation is that many of the “scam” transfer cases proceed on the agreed basis that the receiving arrangement was a proper “occupational pension scheme” within the meaning of the Pension Schemes Act 1993, as did the present case. This is not particularly surprising, as it is often in the interests of both the transferor trustee and the transferring member to assert that the receiving scheme was an “occupational pension scheme”, otherwise the transfer would have been an unauthorised breach of trust and unwelcome tax consequences would ensue. However:

- As a matter of trust law (and putting adverse tax consequences to one side), it might be much easier for a member to be “reinstated” into the transferor scheme if he were to allege that the scam nature of the receiving scheme meant it was not a true occupational or pension scheme at all, e.g. because it was a sham, so that the member never ceased to be a beneficiary of the transferor scheme: see the discussion of this issue in *Dalriada v Pension Protection Fund* [2020] EWHC 2960 (Ch) at [188]ff. In practice, though, it may be hard for a transferring member to assert that the receiving scheme was a sham, given his/her complicity in the arrangement.
- Once it is accepted that the receiving arrangement was a genuine pension scheme, the member is faced with Mr D’s problem – namely that, in the case of a statutory transfer,

the transferor trustee was under a legal obligation to make the transfer irrespective of any concerns about its appropriateness. That opens wide the door to the argument that, given the trustee's largely passive role under the legislation, the trustee was not under any obligation to carry out due diligence or warn the member, as held by the Ombudsman in the present case and as appears to be implicit in *Hughes v Royal London* [2016] EWHC 319 (Ch).

A related issue is whether it is correct to say that due diligence would impede the performance of a transferor trustee's transfer duties under the Pension Schemes Act 1993. As just explained, it is essential for the validity of the transfer that the receiving scheme should be a genuine pension scheme (of one of the types listed in ss 73(2) or 95 Pension Schemes Act 1993 and falling within s 169 Finance Act 2004). A transferor trustee will therefore need to carry out checks to ensure that the receiving arrangement qualifies as such. It could therefore be said to be inherent within the statutory scheme that a transferor trustee *ought* to carry out at least some form of due diligence in relation to the receiving scheme, which might arguably cast doubt on the Ombudsman's view that the recognition of a duty of care would inhibit performance of the trustee's statutory duties. Indeed, the Pensions Regulator's "scorpion" action pack does not appear to have regarded the possibility of due diligence as being contrary to such duties. The Ombudsman's own Factsheet on "Pension scams" (dated February 2022 and still published on the Ombudsman's website) says "Trustees are obliged to carry out due diligence before making any transfer."

The Ombudsman suggested that the analysis might be different in the case of a non-statutory transfer out, where the trustee has to exercise a discretion as to whether to permit the transfer. It is correct to say that there is a difference of substance between the two types of transfer, as illustrated in the *Lloyds GMP* equalisation case on topping-up transfers out, where a very different approach applies depending on whether the transfer was statutory or not ([2020] EWHC 3135 (Ch)). However, it might be open to question whether it is really part of a trustee's function when exercising a discretion to make a non-statutory transfer to

examine the wisdom of the transfer from the member's point of view, as this is arguably tantamount to "advising the member" which according to established case-law is not part of a pension trustee's duties. On the other hand, case-law on bulk transfers suggests that it is very much part of a transferor trustee's duty to consider the security of benefits under the receiving scheme (*Pollock v Reed* [2015] EWHC 3685 (Ch) at [87]), and if that is so, then one can see how it could be said that it is also the duty of the transferor trustee, when exercising a discretion to make a transfer, to check on the appropriateness of the receiving arrangement as a whole.

Finally (for now), it is worth considering what impact the present determination might have on the Ombudsman's previously established approach to pension scam transfer cases:

- As noted above, the Ombudsman's Factsheet reflects the Ombudsman's then view that a degree of due diligence was required for a transfer. This was reflected in a number of important Ombudsman determinations, such as *Northumbria Police Authority*, PO-12763, 11 July 2018, where the then Ombudsman held that it was maladministration for the transferor trustee to have failed to provide a copy of the Pensions Regulator's "scorpion" leaflet directly to the transferring member and to have failed to carry out due diligence given the number of potential "red flags", such that the statutory discharge did not apply. In *Northumbria*, the then Ombudsman said that the publication of the "scorpion" leaflet and action pack in February 2013 "marked a point of considerable change in the level of due diligence expected of trustees"; he said that the transferor scheme was "not expected to give advice on the proposed transfer, but it is entitled, if it has concerns, to delay it, to seek further information, and warn the member of any issues that it may have". Although framed in *Northumbria* as an "entitlement", the then Ombudsman appears to have treated this as the foundation of a duty to carry out due diligence, breach of which amounted to maladministration.

- It is open to question whether the reasoning in *Northumbria* and similar cases can stand with the conclusion in *British Steel* that, for statutory transfers from occupational pension schemes, there is ordinarily no duty of due diligence. The two cases might potentially be reconciled on the basis that the fundamental failure in *Northumbria* was to provide the member with the “scorpion” leaflet, but if the reasoning in *British Steel* is correct, it might be said that even the provision of the leaflet amounts to giving advice and is not a regulatory requirement, and hence was not something the transferor trustee was under a duty to do.

Conclusion

The determination may significantly reduce the scope for victims of pension transfer scams to attack the transferor trustee. While Ombudsman decisions do not create legally binding precedent, it is clear that the current Ombudsman regards this as an important determination setting out his “general view” (see [176]) which will guide his approach in other cases. It will be interesting to see whether there will be an appeal by Mr D to the High Court on a point of law. It is also notable that the Ombudsman alluded in the decision to other forthcoming determinations which will address equivalent issues under personal pension schemes and the requirements for a statutory transfer (see determination at [95] and [105](b)), so it will be important to look out for those decisions to understand the Ombudsman’s developing approach to cases of this nature.

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