PENSION TRANSFER CLAIMS: THE SAGA CONTINUES

Mrs T v HBOS Final Salary Pension Scheme, CAS-78486-R9D8

by Edward Sawyer, Barrister, Wilberforce Chambers

Overview and summary

This article looks at the Deputy Pensions Ombudsman's recent determination of Mrs T's complaint against the HBOS Final Salary Pension Scheme, CAS-78486-R9D8. In the determination, the DPO rejected Mrs T's complaint that the Trustee of the transferor HBOS Scheme had failed to carry out sufficient due diligence when Mrs T transferred from the HBOS Scheme to a small self-administered scheme (**SSAS**). The SSAS turned out to be an alleged scam pension liberation scheme in which Mrs T's pension fund was lost.

This article is the sequel to my article on the Pensions Ombudsman's important recent determination in the case of *British Steel Pension Scheme*, CAS-81940-Z2S8, in which the PO decided that, for transfers out pre-dating the Transfer Regulations 2021, trustees of a 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 their statutory right to take a transfer. It appears that both the *HBOS* determination and the *British Steel* determination were concerned with the same, or a connected, alleged scam.

In the *HBOS* determination, the DPO followed and applied the PO's *British Steel* guidance, concluding that the transferor Trustee owed no duty of care to protect Mrs T from or advise her or warn her about potential fraud or scams by third parties.

The *HBOS* determination thus illustrates, as one might expect, that the PO's *British Steel* guidance is now likely to be followed in future cases of this nature before the PO and DPO – subject to any appeal to the High Court against the PO / DPO's new approach.

The *HBOS* determination is also of interest for the DPO's departure from aspects of the High Court case of *Hughes v Royal London*[1] concerning the requirements for a valid cash equivalent transfer under the Pension Schemes Act 1993 (**PSA 1993**).

The determination in more detail

The due diligence issue

Mrs T was a member of the HBOS Scheme. She was persuaded to transfer her cash equivalent to a SSAS by an unsolicited call from an unregulated adviser (apparently the same adviser as featured in the *British Steel* case, which had also involved a transfer to a SSAS with the same administrator as in the *HBOS* case). Mrs T's transfer was completed in February 2015. The SSAS invested some £81,000 of Mrs T's pension fund in a Cape Verde Islands resort (apparently the same investment as in the *British Steel* case).

Mrs T's complaint to the DPO was that it was later found that the SSAS was a pension liberation scheme, exposing her to the loss of her pension fund. Although Mrs T had received a copy of the Pensions Regulator's "scorpion" leaflet at the time, she argued that the transferor Trustee had failed to follow the Regulator's "scorpion" guidance and that the Trustee should have spotted the warning signs of a scam and alerted her.

[1] [2016] EWHC 319 (Ch).

The DPO held that the Trustee owed no legal duty to Mrs T to investigate Mrs T's circumstances or intentions or the advice she had received from third parties or to issue or highlight warnings or telephone Mrs T, notwithstanding the Regulator's guidance in the 2013 and 2014 versions of the "scorpion" documentation (determination at [82]). The DPO considered that the Trustee had a duty under s 95 of the PSA 1993 to make the transfer to the SSAS to give effect to Mrs T's statutory right to take a cash equivalent, and that at the time of the transfer there was no requirement under law for the Trustee to investigate any warning signs. In the DPO's view, the Regulator's "scorpion" documentation was simply non-statutory guidance, and there was no general legal duty on the Trustee to protect her from or advise her about potential fraud, nor any duty of care to do anything not provided for by the HBOS Scheme or legislation (determination at [77]).

In so holding, the DPO noted that her reasoning was consistent with the PO's *British Steel* determination, and she adopted the reasons given in *British Steel* as to why there was no relevant duty of care on the Trustee (determination at [78]-[79]).

The DPO emphasised the case of *Philipp v Barclays Bank*[2] – also referred to by the PO in the *British Steel* determination – in which it had been held that there was no duty of care on a bank to investigate a potential fraud before making payment, because the law could not coherently treat compliance with an authorised instruction as a breach of duty (determination at [80]). This underscores an important aspect of the reasoning in both *British Steel* and *HBOS*, namely that, because the transferor Trustee was under a statutory obligation to make the transfer as directed by the member, it would be inconsistent with that obligation to impose a duty of care on the Trustee to give warnings.

[2] [2024] 1 All ER Comm 1.

Hughes v Royal London

This strand of the DPO's reasoning put into sharp focus an alternative line of argument advanced by Mrs T. She argued that the Trustee was not under a statutory obligation to make the transfer, because she did not have a right to transfer under the PSA 1993.

Mrs T's contention was that because she was not in employment at the time of the transfer, she was not an "earner" for the purposes of the statutory definition, and therefore she was not entitled to "transfer credits" under the receiving SSAS, with the result (so Mrs T argued) that the transferor Trustee was not obliged to make the transfer to the SSAS under s 95 PSA 1993.

At the material time, s 95(1) PSA 1993 permitted a statutory cash equivalent to be used "for acquiring transfer credits allowed under the rules of another occupational pension scheme".[3] "Transfer credits" were defined in s 181(1) PSA 1993 as "rights allowed to an earner under the rules of an occupational pension scheme by reference to a transfer to that scheme of his accrued rights from another scheme …". "Earner" was defined elsewhere in the pensions legislation as a person receiving "earnings", being any remuneration or profit derived from employment.

In *HBOS*, the DPO noted that a similar issue had been considered in *Hughes v Royal London*,[4] another case involving a statutory transfer to a suspected pension liberation scheme. The DPO observed that in *Hughes* Morgan J was asked to determine whether the employment income required to be an "earner" needed to be in respect of employment with a scheme employer or whether employment income from any source was sufficient. Morgan J held in *Hughes* that employment income from any source was sufficient.

[3] See also s 73 PSA 1993.
[4] Supra.

However, in *Hughes* it was common ground between the parties that the word "earner" in the definition of "transfer credits" required the transferring member to be an "earner". And it was on the basis of this common ground that Morgan J had decided that, assuming the transferring member needed to be an "earner" to qualify for the grant of "transfer credits" in the receiving scheme, their earnings could come from any source.

The DPO rejected the correctness of the common ground in *Hughes*. She preferred the obiter observation made by Morgan J in the *Hughes* judgment that the phrase "rights allowed to an earner under the rules of an occupational pension scheme" in the definition of "transfer credits", was apposite to describing the type of rights that could be "transfer credits", rather than importing a requirement that the transferring member be an earner (determination at [63]). In the DPO's view, this obiter observation was the correct interpretation of the legislation, because it was the natural meaning of the phrase and it appropriately limited the type of rights that could be acquired on a transfer, without arbitrarily restricting the class of persons who could enjoy statutory transfer rights (determination at [72]-[74]). She considered that, because the point had been common ground in *Hughes*, it was not a binding precedent on the point and she was free to form her own view of the meaning of "transfer credits" (determination at [65]-[71]).

Applying her interpretation of "transfer credits", the DPO concluded that Mrs T was entitled to "transfer credits" under the receiving SSAS, and accordingly she had had a statutory right to make the transfer (determination at [75]-[76]).

Conclusions

Like the PO's *British Steel* determination, the *HBOS* determination illustrates the PO's and DPO's general approach to cases of this nature, rejecting the existence of a duty of care to perform due diligence in the ordinary case.

However, this general approach will be subject to the exceptions identified in the *British Steel* determination (i.e. (a) the possibility of a bespoke duty arising on special facts, on the basis of a *Hedley Byrne* assumption of responsibility, (b) different requirements applying in the FCA-regulated sphere, and (c) potentially a different analysis in the case of non-statutory transfers made in the exercise of a trustee's discretion).

It is also important to bear in mind that there have been statutory interventions in this area where advice and due diligence requirements will arise (see the "appropriate independent advice" requirement under s 48 of the Pension Schemes Act 2015, and importantly the Occupational and Personal Pension Schemes (Conditions for Transfer) Regulations 2021, SI 2021/1237). That legislation did not apply to Mrs T's transfer in 2015.

It is beyond the scope of this article to consider the correctness of the PO's and DPO's rejection of a general duty of due diligence in this area. It might be questioned whether the recognition of a duty to warn is inconsistent with an absolute duty to make a transfer (e.g. a solicitor might have a duty to follow their client's instructions to carry out a transaction but might nevertheless have a duty to warn the client that it is legally a bad idea), particularly given that (as the DPO recognised in *Hughes* at [77.2]) at least some due diligence is required when making a statutory transfer because the transferor trustee needs to be satisfied that the receiving scheme falls within s 95 PSA 1993. However, that is a topic for another day.

What is clear, however, is that the current PO and DPO are not afraid to depart from previous PO practice and decisions where they do not consider them to be legally correct, and they will not be regarded as binding precedent.

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