



**Pensions Ombudsman Update**  
December 2020

# Contents

Mr N (PO-25899): Historic transfer-in disregarded on subsequent member transfer ..... 1

Mr S (PO-28262): Conflicting medical reports on an ill-health retirement.....2

Mr S (PO-27485): Pension liberation: current trustees not liable for historic pension scam.....3

Ms N (PO-40022): Death benefit distributions: exercise of discretion held to be proper .....4



## Mr N (PO-25899): Historic transfer-in disregarded on subsequent member transfer

The Deputy Pensions Ombudsman (the **Deputy Ombudsman**) has ruled that the failure to account for a previous transfer when calculating a member's cash equivalent transfer value (**CETV**) was maladministration.

### Facts

Mr N was employed by Clydesdale bank from 1975 to 1986, and had a deferred pension with the Yorkshire & Clydesdale Bank Final Salary Scheme (the **Clydesdale Scheme**). The Clydesdale Scheme was a contracted-out final salary scheme and therefore was required to provide its members with a guaranteed minimum pension (**GMP**).

Mr N was subsequently employed by Bradford & Bingley, and later HSBC, where he was a member of those firms' pension schemes (the **Bradford & Bingley Scheme** and the **HSBC Scheme**).

In April 2017 Mr N contacted Capita, the administrators of the Clydesdale Scheme, in relation to his deferred pension. Capita initially informed Mr N that they had no record of his membership in the Clydesdale Scheme, and that Mr N's data had been deleted in accordance with data protection laws.

Capita was carrying out a GMP reconciliation exercise for the Clydesdale Scheme at the time of Mr N's enquiry. After accessing the scheme's GMP records held by HMRC using the online GMP Checker, Capita informed Mr N that the Clydesdale Scheme did not hold any GMP liability in respect of his membership, and that he had most likely therefore transferred all his pension rights to another scheme, likely to be the Bradford & Bingley Scheme.

Mr N unsuccessfully raised a complaint with the Clydesdale Scheme's internal dispute resolution procedure, and subsequently complained to the Ombudsman in relation to the Clydesdale Scheme and the Bradford & Bingley Scheme.

### Decision

The Deputy Ombudsman upheld Mr N's complaint against the Bradford & Bingley Scheme.

During the Deputy Ombudsman's investigation of Mr N's complaint, HMRC confirmed that Mr N's GMP liability had in fact been transferred to the Bradford & Bingley Scheme in 1986, and subsequently to the HSBC Scheme.

An Adjudicator reviewed Mr N's complaint and found that it was more likely than not that Mr N's deferred pension rights were transferred to the Bradford & Bingley Scheme. The Adjudicator found that the trustees of the Bradford & Bingley Scheme had failed to consider these benefits when calculating Mr N's CETV paid to the HSBC Scheme. This constituted maladministration.

The Deputy Ombudsman agreed with the Adjudicator, and directed that the trustees of the Bradford & Bingley Scheme should recalculate Mr N's deferred pension in the Bradford & Bingley Scheme including the transfer from the Clydesdale Scheme. If Mr N chose to receive a backdated pension and lump sum, then the trustees of the Bradford & Bingley Scheme should also pay interest on the amounts due.

### Impact

This is an example of issues which can arise concerning historical CETV transfers. The Deputy Ombudsman was clear that the Clydesdale Scheme had acted properly in disposing of its records of the transfer. However, in not accounting for the probable transfer from the Clydesdale Scheme, the Bradford & Bingley Scheme had caused detriment to Mr N. The determination – and the investigation process, involving reconciling records with HMRC – provided a pragmatic solution for Mr N.

Though made in May 2020, this determination is of increased relevance following the **recent ruling** in the Lloyds Bank GMP equalisation litigation. We now know that where a CETV was transferred out containing an unequalised GMP, trustees of that scheme can be compelled to make a top-up payment to the receiving scheme.

It highlights the practical difficulties trustees and administrators are likely to face in topping-up such CETVs. In this case, HMRC's GMP records served as a trail allowing administrators and the Deputy Ombudsman to reach pragmatic conclusions. Trustees and employers should note the assistance that tools such as the GMP online checker can provide when past transfer information is missing/incomplete.

## Mr S (PO-28262): Conflicting medical reports on an ill-health

The Pensions Ombudsman (the **Ombudsman**) has recently ruled that the failure to ask for further information relating to expert medical evidence that denied a member an ill-health pension was maladministration.

### Facts

Mr S was a pilot with British Airways plc (the **Company**) until August 2017, and a member of the New Airways Pension Scheme (the **Scheme**). He stopped flying in April 2016 due to ill-health. British Airways Health Services (**BAHS**) set the criteria used to determine whether a pilot was eligible for an ill-health pension under the Scheme's rules. Amongst certain other criteria, a pilot will be eligible if, due to an incapacity, the individual is unlikely to return to flying within two years of the termination of their employment.

In April 2017 BAHS referred Mr S to a consultant psychiatrist, Dr Arkell, who diagnosed Mr S with generalised anxiety disorder.

In April and July 2017, Mr S also met with a BAHS doctor, Dr Popplestone, who concluded that Mr S was unfit to return to work, and would likely remain so until October 2017. In July 2017 the Company notified Mr S that it was terminating his employment, and after waiving his notice period Mr S's employment terminated in August 2017. That month, the Company authorised the Scheme administrators to pay Mr S an ill-health pension.

In August 2017 Mr S met with a second BAHS doctor, Dr Caddis, who wrote to Dr Arkell and said that Mr S may be experiencing a degree of trauma stress reaction, or a mild form of PTSD and asked Dr Arkell whether an alternative treatment might be advisable. Dr Arkell agreed with the possibility of trauma distress but considered

unwise to push Mr S to follow a different therapeutic process. In October 2017 Dr Caddis informed Mr S that he did not meet the criteria for an ill-health pension as Mr S may return to flying within two years. Mr S provided Dr Caddis with contrary opinions from Dr Arkell and his GP, Dr Chapman, but these did not change Dr Caddis' view.

The Company informed the Scheme administrator that the authorisation to pay Mr S an ill-health pension was made in error, and Mr S's pension payments ceased in November 2017.

Mr S's case was referred to another doctor, Dr Emslie, who agreed with BAHS's decision. Mr S unsuccessfully appealed BAHS's decision under the Scheme's internal dispute resolution procedure, and then escalated his complaint to the Ombudsman.

### Decision

The Ombudsman upheld Mr S's complaint.

The Ombudsman noted that Dr Caddis made the initial decision that Mr S did not satisfy the criteria for an ill-health pension, which was at odds with the opinions of Dr Arkell and Dr Chapman. The difference of opinion between Dr Caddis and Dr Arkell was particularly concerning, as Dr Arkell was a specialist in Mr S's condition. Given this, the Ombudsman would have expected Dr Caddis to provide a clear explanation of why his opinion differed, which he did not do. However, Dr Emslie provided even less of an explanation.

The Ombudsman found that the reports of Dr Caddis and Dr Emslie were both confusing and contradictory. He held that for BAHS to proceed with a decision based upon these reports without requesting further clarification amounted to maladministration.

BAHS was ordered to obtain additional evidence from Dr Arkell and Dr Chapman and, in the absence of a formal diagnosis of PTSD, to confine its consideration to Dr Arkell's diagnosis. BAHS was also ordered to pay Mr S £500 for the significant distress and inconvenience caused by its maladministration.

### Impact

Eligibility for ill-health pensions is a common topic of complaints to the Ombudsman.

Employers and trustees should ensure that they are familiar with the provisions set out in their scheme's rules, and apply them correctly. Where it is unclear how the rules may be applied to particular case, a legal opinion should be sought. Further, where there are material differences between expert opinions received, trustees should seek clarification on why those opinions differ. Employers and trustees should also make sure there is a solid decision-making procedure in place and should keep full records of their reasoning for reaching their decision.

## Mr S (PO-27485): Pension liberation: current trustees not liable for historic pension scam

The Ombudsman has held that the current trustee and administrator of a pension scheme were not liable for a historic pension liberation scam, as they were not involved with the scheme at the relevant date of the transfer.

### Facts

In 2013 Mr S was approached by the administrator of the Eleven Property Pension Scheme (the **Scheme**), which offered to pay him 25% of his deferred pension with Friends Life if he transferred the pension's balance to the Scheme. This would be invested in storage units. Promotional material for the storage units claimed Mr S could receive a return of up to 8% a year over five years and then sell the units for a profit.

Mr S effected the transfer. Friends Life made a transfer payment of £22,639 to the Scheme's administrator in April 2013, which the Scheme received later that month.

Mr S then signed a 'member directed investment form' to invest £19,525 of his transfer payment in leases of three storage units. The balance was set aside for Scheme's administration fees. The leases were then transferred to the trustee of the Scheme, Mr K, and in May 2013 Mr S was paid £3,815 by the Scheme's administrator's solicitors.

In June 2014, Brambles Administration Limited (**Brambles**) was appointed as the Scheme's administrator. The letter informing Mr S of this referred to the investment of £19,525, a deduction of £3,000 administration fees, but not to any income from the storage units.

In 2016, Eleven Property Limited (**EPL**) was appointed as trustee of the Scheme in place of Mr K. One month later Mr K replaced Mr M as EPL's director.

In January 2018, HMRC informed Mr S that he was liable to pay a tax charge for the unauthorised payment he had received in 2013.

Mr S contacted Brambles multiple times regarding drawing his pension benefits and was told that, as his fund was invested in the storage units, an interested buyer must be found. Mr S complained using the Scheme's internal dispute resolution procedure, and subsequently complained to the Ombudsman regarding Brambles and EPL.

### Decision

The Ombudsman partially upheld Mr S's complaint.

The Ombudsman found that Mr S had been the victim of a pension liberation scam in 2013. However, Brambles and EPL were not involved in the 2013 transfer arrangements, and neither company could be held liable for any losses arising from the transfer. That Brambles and EPL were corporate entities, legally distinct from the individuals involved, was significant.

The Ombudsman determined that Brambles had been slow to answer Mr S's enquiries and had given him misleading information. Brambles' actions and omissions amounted to maladministration and it was directed to pay Mr S £500. The Ombudsman determined that EPL had failed to communicate with Mr S and "effectively chosen to hide behind Brambles". EPL's inaction amounted to administration and it was directed to pay Mr S £1,500.

### Impact

This determination may provide some comfort to current trustees/administrators that they may not be held liable for historic acts of maladministration and/or breaches of duty in relation to pension scams.

Although the liberation event in this case went back to 2013, the lessons drawn from this complaint remain relevant given the continued targeting by scammers of potentially vulnerable members. Trustees and employers should make sure they (and their members) are properly trained to spot the signs of scams. The Pensions Regulator's guidance is particularly informative, as is the recently published "pension scam" module in the Trustee Toolkit which allows the trustees to:

- identify the most common warning signs of a pension scam;
- define expectations around communicating regular scams warnings, both ongoing and when triggered by an event (e.g. a transfer request);
- identify the questions that they can ask scheme members in order to help protect them from scammers; and
- understand what constitutes appropriate due diligence on scheme transfers.

## Ms N (PO-40022): Death benefit distributions: exercise of discretion held to be proper

The Ombudsman has recently dismissed a complaint, stating that the administrator was not unreasonable in disregarding evidence of a member's wishes which were provided after his death.

### Facts

Mr N was a member of the Hudson Global Resources Limited GPP (the **Scheme**). Mr N died in July 2018.

In September 2018, Mr N's independent financial adviser (the **IFA**) informed Aegon, the Scheme Administrator, of Mr N's wish that his death benefits should pass solely to his partner, Ms N, so that she could pay off their mortgage. The IFA also informed Aegon that Mr N's death in service lump sum of £164,000 had been paid to Ms HN, Mr N's daughter.

In October 2018, Aegon informed the IFA that, after considering the information provided, it had decided to split Mr N's death benefits between Ms N and Ms HN. Aegon also informed the IFA that Ms N did not automatically meet the criteria of being a dependent under the Scheme rules, but had classed her as a beneficiary using its discretion as she and Mr N were financially interdependent.

The IFA raised a complaint on behalf of Ms N. Ms N complained that the death benefit should have been awarded solely to her, as Mr N's partner, as Ms HN had been provided for by the death in service lump sum. The IFA also sent Aegon an email from Mr N setting out his last wishes, which said "Pension will pay off mortgage".

Aegon responded that it had done nothing wrong as it has applied its discretion according to the Scheme rules and Ms N complained to the Ombudsman.

### Decision

The Ombudsman did not uphold Ms N's complaint.

The Ombudsman stated that his role was to consider whether the Scheme rules were correctly interpreted and whether Aegon reached its decision in a proper manner, taking into account all relevant matters and disregarding all irrelevant matters, to reach a decision that was not perverse.

The Ombudsman found that Aegon took account of all potential beneficiaries and considered how the lump sum should be distributed according to the Scheme rules. As Mr N's child and under 23, Ms HN was a dependent under the scheme rules. As Ms N proved financial interdependency with Mr N, Aegon agreed that she would also be classed as a dependent.

Ms N argued that Aegon had wrongly disregarded Mr N's email expressing his last wishes. The Ombudsman found that Aegon had not behaved unreasonably in its consideration of the email, as it had not had sight of the email prior to Mr N's death, nor had Mr N provided a valid expression of wishes form.

Aegon's decision fell within the bounds of what was reasonable; the fact that Ms N was dissatisfied with the decision did not make it perverse.

### Impact

Under typical scheme rules, a death benefit nomination must be submitted to the scheme trustees or administrators before the member's death, if it is to be valid. However, in most cases such nominations will not be binding on the decision makers, who may instead exercise their discretion in providing the death benefit to any such beneficiary or beneficiaries as permitted under the scheme's rules.

This complaint serves as a helpful reminder to decision makers that acting in accordance with their scheme rules and following a proper process are the most effective shields they have against future complaints and challenges. As such, if any of those rules are not understood, decision makers should seek advice in interpreting them. When considering complaints from dissatisfied individuals, the Ombudsman will pay close attention to the process followed in reaching the final outcome. Decision makers therefore need to ensure clear records are taken and maintained of the process followed to reach their decision, making sure they note the relevant factors they considered as well as any irrelevant factors which were not taken into account.

# TLT's Pension Dispute Resolution Team

Pensions disputes have become a key issue for many employers and trustees. TLT's Pensions Dispute Resolution team are first and foremost pensions lawyers.

We understand the issues facing companies and trustees, and provide clear and realistic solutions based on commercial and practical realities to help clients, whether employers or trustees, achieve the right result.

The team is experienced in dealing with complaints to the Pensions Ombudsman, acting on behalf of individuals as well as employers and trustees.

Disputes involving members and disputes between trustees and employers require careful handling and a pro-active approach.

Most disputes the team have been involved in have not become public knowledge as we pride ourselves on pro-active case management to resolve matters at an early stage, avoiding wherever possible the unwelcome cost exposure involved in full blown litigation.

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“They are the best pensions lawyers I have ever dealt with: they are responsive and practical,” says an impressed source.

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