DRN-3677820

The complaint

Mr A has complained about the actions of HSBC UK Bank Plc ("HSBC") when it transferred his personal pension to a Qualifying Recognised Overseas Pension Scheme ("QROPS") in 2013. He says he can no longer get a valuation for his QROPS and all benefits have been lost.

Mr A says HSBC failed in its responsibilities when dealing with his transfer request. He says HSBC should have done more to warn him of the potential dangers of transferring, and undertaken greater due diligence on the transfer, in line with the guidance he says was required of transferring schemes at the time. Mr A says he wouldn't have transferred, and wouldn't have suffered financial losses, if HSBC had acted as it should have done.

What happened

On 4 June 2013, HSBC wrote to a firm called Mount Rock Capital with its requirements to allow a transfer of Mr A's HSBC pension to an overseas scheme. This included paperwork for the receiving scheme, and Mr A, to complete. HSBC's letter was in response to an earlier enquiry from Mount Rock Capital. HSBC also wrote to Mr A confirming that it had written to Mount Rock Capital with its requirements for a transfer.

The transfer paperwork was completed and returned to HSBC. The paperwork indicated Mr A's intention to transfer to a QROPS based in Malta – the Momentum Malta Retirement Trust (the "Momentum Scheme"). Included in the paperwork was a letter from HMRC which said it had accepted the Momentum Scheme as a QROPS and confirmation from the Malta Financial Services Authority ("MFSA") that the Momentum Scheme was registered and authorised to operate as a retirement scheme.

On 10 July, HSBC wrote to Mr A and the Momentum Scheme to confirm the transfer had gone through. The transfer value was a little over £3,500. Mr A had just turned 56. He was living overseas but not in Malta where the QROPS was domiciled.

In December 2020, Mr A (with the help of a claims management company) complained to HSBC. He said "the investment" had failed, he could no longer get a valuation for his pension and all benefits had been lost. He said HSBC failed to do adequate due diligence on the transfer and failed to contact him ahead of the transfer in order to warn him about the risks he was taking. He said HSBC shouldn't have allowed the transfer.

HSBC didn't think it had done anything wrong. It said, in brief, that it had conducted adequate due diligence into the receiving scheme's status and hadn't found any reason to prevent Mr A exercising his right to transfer.

Mr A referred his complaint to us. Our investigator didn't uphold the complaint. Mr A asked for an ombudsman to make a final decision.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

The relevant rules and guidance

Personal pension providers are regulated by the Financial Conduct Authority (FCA). Prior to that they were regulated by the FCA's predecessor, the Financial Services Authority (FSA). As such HSBC was subject to the FSA/FCA Handbook, and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS).

There have never been any specific FSA/FCA rules governing pension transfer requests, but the following have particular relevance here:

- Principle 2 – A firm must conduct its business with due skill, care and diligence;
- Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly;
- Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading; and
- COBS 2.1.1R (the client's best interests rule), which states that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.

Also relevant here is that an overseas pension scheme is defined in HMRC regulations as being one which is subject to specified regulatory and taxation restrictions in the country of establishment. To become a QROPS it must also be:

- Recognised, meaning in short that it meets specified tests applied by HMRC, including on minimum retirement age and the application of tax relief.
- Qualifying, meaning it must notify HMRC that it is a recognised overseas pension scheme; provide appropriate evidence of this; undertake to adhere to HMRC's requirements; and not be otherwise excluded by HMRC from being a QROPS.

Overseas schemes that have notified HMRC that they qualify to be a QROPS are included in a published list on HMRC's website.

The Pensions Schemes Act 1993 gives a member of a personal pension scheme the right to transfer the cash equivalent value of their accrued benefits to another personal or occupational pension scheme, which is either registered with HMRC for tax purposes or is a QROPS. Someone may also have a right to transfer under the terms of their pension.

The right to transfer came to be exploited, with people encouraged to transfer to fraudulent schemes in the expectation of receiving payments from their pension that they weren't entitled to – for instance, because they were below minimum retirement age. This came to be known as pension liberation. At various points, regulators issued bulletins warning of the dangers of taking such action. But it was only from 14 February 2013 that transferring schemes had guidance to follow that was aimed at tackling pension liberation – the "Scorpion" guidance.

The Scorpion guidance was launched by The Pensions Regulator (TPR). It was described as a cross-government initiative by Action Fraud, The City of London Police, HMRC, the Pensions Advisory Service (TPAS), TPR, the SFO, and the FSA/FCA, all of which endorsed the guidance, allowing their names and logos to appear in Scorpion materials. The guidance comprised the following:

- An insert to be included in transfer packs (the “Scorpion insert”). The insert warns readers about the dangers of agreeing to cash in a pension early and identifies a number of warning signs to look out for.

- A longer booklet issued by TPAS which gives more information, including example scenarios, about pension liberation. Guidance provided by TPR on its website at the time said this longer leaflet was intended to be sent to members who had queries about pension liberation fraud.

- An “action pack” for scheme administrators that highlighted the warning signs present in a number of transfer examples. It suggested transferring schemes should “look out for” various warning signs of liberation. If any of the warning signs applied, the action pack provided a check list that schemes could use to help find out more about the receiving scheme and how the member came to make the transfer request. Where transferring schemes still had concerns, they were encouraged to write to members to warn them of the potential tax consequences of their actions; to consider delaying the transfer; to seek legal advice; and to direct the member to TPAS, TPR or Action Fraud.

TPR issued the guidance under the powers at s.12 of the Pension Act 2004. Thus, for the bodies regulated by TPR, the status of the guidance was that it provided them with information, education and/or assistance, as opposed to creating any new binding rule or legal duty. Correspondingly, the communications about the launch of the guidance were predominantly expressed in terms that made its non-obligatory status clear. So, the tenor of the guidance is essentially a set of prompts and suggestions, not requirements.

The FSA’s endorsement of the Scorpion guidance was relatively informal: it didn’t take the form of Handbook Guidance, because it was not issued under s.139A of the Financial Services and Markets Act (FSMA), which enabled the FSA to issue guidance provided it underwent a consultation process first. Nor did it constitute “confirmed industry guidance”, as can be seen by consulting the list of all such FSA/FCA guidance on its website.

I take from the above that the contents of the Scorpion guidance was essentially informational and advisory in nature and that deviating from it doesn’t necessarily mean a firm has broken the Principles or COBS rules. Firms were able to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member’s legal rights.

That said, the launch of the Scorpion guidance was an important moment in so far as it provided, for the first time, guidance for personal pension providers dealing with transfer requests – guidance that prompted providers to take a more active role in assessing those requests. The guidance was launched in response to widespread abuses that were causing pension scheme members to suffer significant losses. And the guidance’s specific purpose was to inform and help ceding firms when they dealt with transfer requests in order to prevent these abuses and save their customers from falling victim to them.

In those circumstances, I consider firms which received pension transfer requests needed to pay regard to the contents of the Scorpion guidance as a matter of good industry practice. It means February 2013 marks an inflection point in terms of what was expected of personal pension providers dealing with transfer requests as a matter of fulfilling their duties under the regulator’s Principles and COBS 2.1.1R.

<u>What did personal pension providers need to do?</u>

For the reasons given above, I don’t think personal pension providers necessarily had to follow all aspects of the Scorpion guidance in every transfer request. However, I do think they should have paid heed to the information it contained. And where the recommendations in the guidance applied, absent a good reason to the contrary, it would normally have been reasonable, and in my view good industry practice, for pension providers at least to follow the substance of those recommendations. With that in mind, I take the view that personal pension providers dealing with transfer requests needed to heed the following:

1. When TPR launched the Scorpion guidance in February 2013, its press release said the Scorpion insert should be provided in the information sent to members requesting a transfer. It said on its website that it wanted the inclusion of the Scorpion insert in transfer packs to "become best practice". The Scorpion insert provided an important safeguard for transferring members, allowing them to consider *for themselves* the liberation threat they were facing. Sending it to customers asking to transfer their pensions was also a simple and inexpensive step for pension firms to take and one that wouldn't have got in the way of efficiently dealing with transfer requests. So, all things considered, I think the Scorpion insert should have been sent as a matter of good industry practice with transfer packs and direct to the transferring member when the request for the transfer pack had come from a different party.

2. I also think it would be fair and reasonable for personal pension providers – operating with the regulator's Principles and COBS 2.1.1R in mind – to ensure the warnings contained in the Scorpion insert were provided in some form to a member before a transfer even if the transfer process *didn't* involve the sending of transfer packs.

3. The Scorpion guidance asked firms to look out for the tell-tale signs of pension liberation scams and undertake further due diligence and take appropriate action where it was apparent their client might be at risk. The action pack points to the warning signs transferring schemes should have been looking out for and provides a framework for any due diligence and follow-up actions. Therefore, whilst using the action pack wasn't an inflexible requirement, it did represent a reasonable benchmark for the level of care expected of transferring schemes and identified steps that would be appropriate for them to take, if the circumstances demanded.

4. The considerations of regulated firms didn't start and end with the Scorpion guidance. If a personal pension provider had good reason to think the transferring member was being scammed – even if the suspected scam didn't involve anything specifically referred to in the Scorpion guidance – then its general duties to its customer as an authorised financial services provider would come into play and it would have needed to act. Ignoring clear signs of a scam, if they came to a firm's attention, or should have done so, would almost certainly breach the regulator's Principles and COBS 2.1.1R.

These were additional requirements over and above what a ceding scheme would always have needed to do when processing a QROPS transfer. Those requirements included checking whether the QROPS was on HMRC's published list, and ensuring the necessary HMRC forms were completed.

<u>The circumstances surrounding the transfer: what does the evidence suggest happened?</u>

Mr A said a representative from the Momentum Scheme visited him in his office (which was overseas, but not where the QROPS was based). He says he became interested in transferring in order to start drawing income from his pension and earn interest on his remaining funds. Mr A hasn't elaborated on how he thought his pension would be invested. He says he wasn't offered a cash incentive but was "more or less coerced" into transferring.

Mr A's recollections aren't especially detailed. But it doesn't look like he was attempting to liberate his pension. He was over 55 and wasn't offered a cash incentive. He hasn't mentioned anything about "legal loopholes". And he hasn't mentioned receiving a tax penalty from HMRC. So it appears as though he transferred in order to start drawing his pension and for the interest he was promised on his residual funds. Neither of these required Mr A to transfer to a QROPS. But neither would have indicated Mr A was, or appeared to be, liberating his pension.

Mr A hasn't provided much detail or evidence on what happened to his pension – how it ended up being invested, what happened to those investments, what income (if any) he drew from the pension and so on. All he has said is that "the investment" failed, all benefits have been lost and he can no longer get a valuation for it from the Momentum Scheme.

<u>What did HSBC do and was it enough?</u>

Due diligence:

The paperwork HSBC received as part of Mr A's transfer request showed HMRC had accepted the Momentum Scheme as a QROPS, the scheme was registered with the MFSA and it was authorised by the MFSA to operate as a retirement scheme. HSBC has also provided an "overseas transfers checksheet" which shows it checked the credentials of the Momentum Scheme, including whether it was on HMRC's published list – which it was (and continued to be long after Mr A's transfer). These steps ensured that the transfer payment both qualified as an authorised payment for tax purposes and also satisfied Mr A's statutory right, and potentially other legal rights, to transfer.

For the reasons given above, firms also needed to be aware of the Scorpion guidance and follow the action pack's check list (or take similar steps) if there appeared to be a material risk of pension liberation. That risk *wasn't* apparent in Mr A's transfer. I say this because none of the "triggers" for further due diligence outlined in the Scorpion action pack were present. The action pack highlighted the following as being prompts for further due diligence:

- receiving scheme not registered, or only newly registered, with HMRC;
- member is attempting to access their pension before age 55;
- member has pressured trustees/administrators to carry out transfer quickly;
- member was approached unsolicited;
- member informed that there is a legal loophole; and
- receiving scheme was previously unknown to ceding scheme, but now involved in more than one transfer request.

It's not clear whether the transfer followed an unsolicited approach. But even if it had, that wouldn't have been apparent from the transfer paperwork. Mr A was above the age of 55. He didn't pressure HSBC into transferring. And he hasn't said anything about being informed of a legal loophole – and there's nothing in the transfer paperwork that would have indicated that anyway.

Importantly, the Momentum Scheme was long-established – it had been showing on HMRC's published QROPS list without issue since at least 2012 (and most likely since 2011 when HMRC had confirmed it as a QROPS). So it wasn't a likely vehicle for early release pension liberation, otherwise it would likely have been removed from the QROPS list by the time of Mr A's transfer request.

With all this in mind, and taking into account the legitimacy of the Momentum Scheme, I'm satisfied there wouldn't have been sufficient reason for HSBC to have conducted further due diligence along the lines of the action pack's check list – there was no prompt for it to do so.

In coming to that conclusion, I've considered the action pack's case studies, one of which included an individual who transferred to a pension scheme which, after paying the individual a cash incentive, invested the rest overseas. One of the warning signs highlighted in that case study was a "transfers overseas", which was elaborated on as follows:

"One technique that pension fraudsters use is to send a large portion of the pension transfer overseas. This makes the funds harder to trace and retrieve when the arrangement is closed down."

Mr A was transferring his pension overseas, which would have been apparent to HSBC. Whilst overseas transfers weren't included as one of the "triggers" for further due diligence listed in the bullet points above, firms should nevertheless have considered things in the round, including the case studies in the action pack, to decide if a transfer presented a material risk of pension liberation. So I've considered whether the fact that Mr A was transferring to an overseas scheme was, in itself, reason enough to have conducted more detailed due diligence.

But it strikes me that the action pack, and the press release that accompanied it, weren't drawing attention to transfers to overseas *schemes* because those transfers would have involved the whole pension being transferred overseas direct from the ceding scheme rather than a "portion" being transferred overseas via a recipient scheme. Instead, attention is being directed to overseas *investments* and only then in the context of early release pension liberation. The action pack, and press release, presented overseas investments as being a possible feature of scams involving the early access of pension funds – and it is the early access of pension funds that is presented as the threat ceding schemes are told to be guarding against.

So, in my view, QROPS weren't evidently the focus of TPR's concerns at the time the 2013 Scorpion guidance was issued. The purpose of the guidance at that time was to direct efforts on preventing early release pension liberation rather than anything else.

It was only in 2014 that the emphasis changed and schemes were directed towards members wanting to transfer because they had become interested in inappropriate, high-risk, investments. This appears to be what Mr A is essentially complaining about given his references to his investment failing. But this wasn't the issue HSBC was being asked to look out for at that time. To repeat: the guidance in place at the time of Mr A's transfer directed HSBC to the threat posed by early release pension liberation. As there wouldn't have been anything to indicate that was likely, I'm satisfied with HSBC's actions here.

The Scorpion insert:

For the reasons given above, my view is that personal pension providers should, as a matter of course, have sent transferring members the Scorpion insert or given them substantially the same information. I've seen nothing to suggest HSBC did send Mr A the Scorpion insert so, on this front, HSBC fell short of what I'd expect.

However, I'm satisfied the Scorpion insert wouldn't have made a difference to Mr A's decision to transfer. I say this because the focus of the insert – like the action pack – was early release pension liberation. Its opening message is as follows:

"'Pension loans' or cash incentives are being used alongside misleading information to

entice savers as the number of pension scams increases. This activity is known as 'pension liberation fraud' and it's on the increase in the UK.

In rare cases – such as terminal illness – it is possible to access funds before age 55 from your current pension scheme. But for the majority, promises of early cash will be bogus and are likely to result in serious tax consequences."

It goes on to list four things for people to watch out for:

- *Being approached out of the blue over the phone or via text message*
- *Pushy advisers or 'introducers' who offer upfront cash incentives*
- *Companies that offer a 'loan', 'saving advance' or 'cash back' from your pension*
- *Not being informed about the potential tax consequences*

Some of the things to "watch out for" had parallels with Mr A's situation. He said he was "more or less coerced" into transferring and he may well have been contacted out of the blue. But he has said he wasn't offered a loan, advance or cash incentive and he evidently wasn't trying to access his pension before the age of 55 because he had already reached that age. So I'm satisfied Mr A wouldn't have considered his transfer was the type of transfer the insert was warning about. Therefore, I think the most likely scenario is that Mr A would have carried on with the transfer, even if he had been sent the Scorpion insert by HSBC. It follows that I don't uphold Mr A's complaint.

My final decision

For the reasons given above, my final decision is to not uphold Mr A's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 30 January 2025.

Christian Wood
Ombudsman