TPO clarification on transfer regulations

Matthew Swynnerton discusses the recent Pensions Ombudsman determination tackling the confusion with transfer regulations

Pension scams are a serious problem, both for victims and for the wider industry. Recent reports estimate that financial fraudsters in the UK have just a one in 3,000 chance of being convicted. It is understandable therefore that legislators introduced the Occupational and Personal Pension Schemes (Conditions for Transfers) Regulations 2021 (the transfer regulations).

However, under the transfer regulations, if any overseas investments are included in the receiving scheme or if any offer of an incentive for making the transfer is made, trustees are required to raise amber and red flags, respectively. This is despite the fact that many well-diversified pension funds include overseas investments and that incentives are commonly used as a legitimate way to encourage members to transfer their pension scheme.

Nonetheless, under the transfer regulations, these triggers can halt the transfer or refer the member to MoneyHelper for advice. Where an innocent transfer is flagged and the member is referred for a safeguarding appointment they feel they do not need, the member may feel frustrated, especially when they suffer a perceived loss if their transfer value drops in the time it takes to seek the advice.

This was the scenario which led to a recent pensions ombudsman (PO) determination, which goes some way to tackling the key points of confusion for those grappling with the transfer regulations. Mr W complained firstly that the trustee did not correctly interpret the transfer regulations, and secondly that his transfer request was unnecessarily delayed as the trustee required him to seek a MoneyHelper safeguarding appointment following an amber flag (the overseas investments flag). As a result, Mr W felt he should be financially compensated for the fall in his transfer value, as well as for resulting stress and inconvenience.

Rather fittingly, the PO noted that the approach of the pensions industry on how to implement the transfer regulations has been fragmented from the outset, with little consistency in practice, and different approaches on the level of risk tolerated by trustees. The PO held that the complaint should not be upheld against the trustee because it did not act unreasonably in determining that an amber flag was present in Mr W's transfer request and referring him to MoneyHelper for a safeguarding appointment. The PO noted that the trustee's literal interpretation of the Transfer Regulations was not unreasonable, especially since the trustee took legal advice.

The determination supports a more cautious approach by trustees when it comes to the presence of overseas investments. However, the language used could be interpreted as the PO saying implicitly that the TPR guidance on overseas investments cannot override a strict reading of the regulations.

In the absence of any other PO commentary, it is harder to adopt the alternative view that non-opaque overseas investments can be ignored, at least until either the transfer regulations are changed or there is a determination in relation to a statutory transfer complaint where there were overseas investments and no referral to MoneyHelper was made.

The PO's careful language in concluding that the trustee made decisions that were "not unreasonable" potentially leaves the door open for him to conclude in a future complaint in that scenario that a decision to transfer without guidance could also be "not unreasonable", if the decision were based on proper procedure having been followed, including taking legal advice.

Many trustees are concerned when advising on a strict interpretation of the transfer regulations that the risk of a delay-related complaint is higher than the risk of a claims management company-orchestrated scam complaint. What is now clear is that the PO would not uphold a delay complaint where proper procedure has been followed and the member has been referred for guidance to MoneyHelper, so this case can set at ease the minds of trustees following the letter of the transfer regulations to some extent.

Whilst it does not provide the clarity required, which can perhaps only come from the DWP and tweaks to the transfer regulations, this PO determination does provide some crucial guidance for trustees and administrators when faced with the overseas investments amber flag.

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