



<b><u>Decision Ref:</u></b>	2021-0124
<b><u>Sector:</u></b>	Investment
<b><u>Product / Service:</u></b>	Personal Retirement Savings Accounts (PRSA)
<b><u>Conduct(s) complained of:</u></b>	Failure to process instructions Failure to process instructions in a timely manner
<b><u>Outcome:</u></b>	Upheld

**LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

**Background**

This complaint relates to a pension fund.

**The Complainant's Case**

The Complainant states that he wished to transfer his pension fund in December 2018 from the Provider, against which this complaint is made, and that he contacted a new Provider to take over the management of his fund. The Complainant asserts that the new Provider issued a "willing and able" letter to the Provider on 7 January 2019 to progress the transfer of the Complainant's fund.

The Complainant asserts that the Provider stated that it would require a "cert of discharge" to be completed by the Complainant before it could release his funds to the new Provider. Having considered this request, the Complainant declined to complete this cert of discharge because he felt it was not relevant or legally required in order for the Provider to transfer his funds to the new Provider.

The Complainant states that he did sign the bottom of the cert of discharge providing his consent to the transfer of his funds but that he did not tick the boxes to acknowledge his acceptance of the contents of the declaration statements. The Complainant also states that he has investigated the legitimacy of this cert of discharge with the Pensions Authority and has established that completion of this document is unnecessary in order to proceed with the transfer and in light of the Pension Authorities guidance, he informed the Provider on

11 February 2019 that is was the Pension Authority's understanding, as well as the new Provider's, that the Provider's cert of discharge was not a legal requirement under the Pensions Act in order for the transfer to take place.

The complaint is that the Provider has wrongfully, unreasonably or through a mistake of law, refused to transfer the Complainant's pension as requested.

The Complainant wants the Provider to transfer his pension as per his original request, to refund any financial loss resulting from fluctuations in the value of the fund due to the time lapse between the dates that the request to transfer the fund was received by the Provider from the Complainant and the date that the Provider agrees to proceed with the transfer.

### **The Provider's Case**

The Provider asserts that the cert of discharge allows it to deal with various responsibilities in relation to its role as the Complainant's Provider and that it is important to the Provider's management of potential liabilities arising from a transfer of benefits.

The Provider submits that it never exercised a prohibition on the Complainant's transfer and that according to its records, shortly after the transfer request was lodged, the certificate of discharge which would give effect to the transfer was forwarded to the Complainant. The Provider explains that its conduct is audited annually by a PRSA actuary who reports to the Pensions Authority and every year the actuary certifies that the Provider's business is conducted in accordance with part X of the Pensions Act.

The Provider also makes the point that it is not relying on any terms of its agreement with the Complainant or any regulations and it did not decline the transfer and that the paperwork required by it to effect the transfer was not completed by the Complainant. The Provider denies that it has provided poor customer service and makes the points that if the Complainant has completed the necessary paperwork, the transfer to the new Provider would have taken place within a matter of days. The Provider states that it became clear that the Complainant did not wish to complete the paperwork and as a sign of goodwill, it was explained to the Complainant the reasoning why the paperwork was required.

### **Decision**

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 7 January 2021, outlining my preliminary determination in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the parties made the following submissions:

1. E-mail, together with attachments, from the Complainant to this Office dated 12 January 2021.
2. Letter, together with attachments, from the Provider to this Office dated 25 January 2021.
3. E-mail from the Complainant to this Office dated 5 February 2021.

Copies of these submissions were exchanged between the parties.

The Provider advised this Office under cover of its e-mail dated 12 February 2021 that it had no further submission to make.

Having considered these additional submissions and all submissions and evidence furnished by both parties to this Office, I set out below my final determination.

The Complainant held a PRSA (Personal Retirement Savings Account) with the Provider.

The Complainant sought to transfer to another Provider in or around January 2019. Shortly after this, the Provider sent the Complainant a certificate of discharge. The certificate of discharge contained a number of questions which were required to be answered. The Complainant signed the certificate but did not tick the boxes in response to the questions.

On 8 February 2019, the Provider emailed the Complainant stating that his transfer out request had been reviewed by management and it was noted that the questions on the first page of the certificate of discharge were required to be answered.

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On 11 February 2019, the Complainant responded by email stating that the Pensions Authority had confirmed with him that the questions on the certificate of discharge are not required by the Pensions Act and that the "willing and able" letter is all that was legally required to make the transfer of funds. He requested that the funds be transferred to the new Provider as per the new Provider's "willing and able" request.

The Provider emailed the Complainant to explain that it was a policy of the Provider to ensure that the transfer of pensions assets is a bona fide transfer and that the Provider seeks confirmation on a number of items from each client that wishes to transfer their scheme to an alternative Provider to ensure the trustees have completed their duties correctly. The email went on to state that the Provider would not be in a position to complete the transfer without the certificate of discharge being completed.

The Provider in its response to this office suggests that the Provider's PRSAs were wound up in or around 25 October 2019 and that the assets were then transferred to the new or alternative Provider.

As regards asserted losses on the part of the Complainant, the Provider explains that its product is "self-administered" which means that all investments and investment decisions are matter for the Complainant in conjunction with his financial advisor and that this is clearly stated in the provided terms of business. The Provider asserts that if there was a particular fund with the new Provider which the Complainant wished to invest in, it would have been available on its platform during the period when he and his financial advisor decided whether or when to complete the transfer documentation.

A copy of the Provider's terms of business in reference to this office on the relevance and material sections are as follows:

**1G. Investment Advice**

*1G.1 We will not advise you about the merits of a particular transaction.*

*1G.2 You must be aware that investments can fall as well as rise in value.*

*1G.3 In conjunction with your financial advisor, you must at all times ensure that your funds are properly invested. We will provide administrative assistance to facilitate your investment decisions but it is your and your financial advisor's responsibility to supervise all investment transactions and to ensure that they are completed to your satisfaction. We will not be held responsible for the proper application of your investments.*

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*1G.4 The operating scheme account which accepts contributions, transfers from external Providers and proceeds/dividends of investments, is established for record keeping purposes.*

*We do not make representations as to the suitability or the level of return to be obtained from the operating scheme account. It is your and your financial advisor's responsibility to ensure the most suitable return from your cash deposits.*

In my Preliminary Decision I had quoted the below section from the Provider's terms of business:

**2C. Transfers**

*2C.1 We will accept transfers of benefits from other occupational pension schemes, buy-out bonds and PRSAs to the ITC SSAS. We cannot accept transfers by way of our appointment as trustee of an existing pension scheme.*

*2C.2 Transfers from an [named] SSAS are subject to the Provider of the recipient pension scheme providing us with evidence that it is willing and able to receive the benefit. We will not give effect to transfers by way of appointment of new trustees of an [named] SSAS.*

The Provider has stated in its post Preliminary Decision submission, "Part 2" of the Provider's terms of business "expressly refers to the provision of Small Self-Administered Schemes "[named] SSAS", not the [named] PRSA for which specific additional terms are included under Part 4".

However, while I note that "Part 4" of the Provider's terms of business specifically deals with "[named] PRSA" product, this section of the terms of business does not appear to list a specific section regarding transfers as "Part 2C" does for the "[named] SSAS" product. From my reading of "Part 4", I was unable to find any similar or comparable information, as contained in "Part 2C", regarding how a Complainant may conduct a transfer to a recipient pension scheme provider.

The only mention of the term "transfer" in "Part 4" is found at "4A.4" under the heading "Our core services" and "4H.2" under the heading "Termination", which set out:

*"4A.4 If you transfer an existing portfolio to us, we will accept all assets outlined above, subject to completion of the paperwork and transfer of agency. All transfer documents must be signed for us to provide our core services to you".*

*"4H.2 In addition to the annual management fee, fund charges and expenses may have to be paid. We can only transfer investment funds to other providers where all fees and expenses are paid up until the date where the new provider takes custody".*

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It is also worth noting that the Provider's "[named] PRSA brochure" at page 12 section "3.8.1" details under the sub heading "transfer of your policy" that:

*"You may transfer your accumulated PRSA portfolio to another PRSA provider.*

*You also have the choice of transferring your portfolio to another exempt approved scheme, such as an occupational pension scheme, of which you are a member. The scheme provider must be able to receive a transfer value and all parties involved must agree to it".*

Section 108 of the Pensions Act (as amended) provides:

*(1) Any provision of a PRSA contract purporting to prohibit a contributor from entering into another PRSA contract and transferring his PRSA assets to the PRSA provider with whom he has entered into the other such contract shall be void.*

*(2) Any provision of a PRSA contract purporting to require a payment by a contributor in respect of a transfer of the kind referred to in subsection (1) shall be void.*

*(3) A provider of a Standard PRSA which is nominated by an employer and which facilitates access by the employees of the employer by means of payroll deductions shall accept transfers of any PRSA assets that may be held by those employees.*

The Provider in this case did not execute the requested transfer on the basis that the Complainant did not furnish the Provider with a completed certificate of discharge to the satisfaction of the Provider.

I believe it is not unreasonable for the Provider to ask that clients complete a certificate of discharge and it is clear that it was the company policy, and that this policy was adopted in order to adhere to standards of governance and practice.

It is not entirely clear what the Complainant's objection was in completing the certificate of discharge other than there was no legal requirement for him to do so.

The Complainant is correct that there was no requirement either by law or under the terms of business with the Provider that meant that a transfer of his benefits to another provider could not proceed in the absence of a fully completed certificate of discharge.

In my Preliminary Decision, I had stated that the terms of business expressly stated that transfers to another provider are subject only to the new provider furnishing the Provider with evidence that it is "*willing and able*" to receive the benefits.

While I acknowledge that the "*willing and able letter*" was mentioned specifically at "*Part 2C*" regarding the "[named] SSAS" product, I accept that where the Provider's terms of business, and "[named] PRSA Brochure" do not detail the exact requirements for

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transferring a complainant's "[named] PRSA", it was reasonable of the Complainant to rely on the requirements set out in Section 108 of the Pensions Act, as detailed above.

The willing and able letter was furnished to the Provider but notwithstanding that, the Provider withheld the transfer because it had not received a certificate of discharge completed to its satisfaction. It was not entitled to withhold the transfer on that basis in circumstances where it was not a legal or contractual precondition to a transfer.

The Provider submits that it "did not decline the transfer" but rather the paperwork required by it to effect to the transfer was not completed by the Complainant. In reality, the transfer was withheld and the net effect between the transfer being withheld and being declined was that the Provider refused to give effect to the transfer until it appears sometime after the winding up of the PRSA.

In my Preliminary Decision I had stated that based on the foregoing, I believed it was not unreasonable for the Provider to adopt its own policy requiring that a certificate of discharge be fully completed before a transfer could take effect. However, I went on to state:

*"If the Provider intends to rely on such a policy, I believe this should form part of the terms of business between the parties at the outset and it should be expressly explained and set out in the terms of business. In addition, any such term could not operate to interfere with Section 108 (1) of the Pensions Act (as amended). It is not sufficient to seek to unilaterally impose this company policy with the net effect of withholding a transfer because the policy wasn't adhered to when in fact the Provider was required by law and in compliance with the terms of business to give effect to the transfer".*

The Provider has, in its post Preliminary Decision submission, stated:

*"The [Provider's] Terms of Business [...] do in fact, in Part 1 – General Terms, set out that additional paperwork may be needed in order to give effect to a transaction:*

*"1A.3 You must provide us with complete and accurate requests, information and documentation and disclose all facts that may be relevant to the engagement or that we may otherwise request.*

*These terms formed part of the PRSA contract, [the Complainant] confirmed this at set-up, and the terms are available on the [Provider's] website".*

While I note the Provider's submission that the above general statement should be construed as allowing them to require the 'certificate of discharge' prior to actioning the Complainant's request to transfer, it is my view that such a broad general statement is not

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sufficient to require further documentation than what is specified in Section 108 of the Pensions Act.

I am satisfied that the Provider was unreasonable and incorrect in withholding the transfer in the manner it did and therefore I indicated my intention in my Preliminary Decision to uphold the complaint.

The Provider has, in its post Preliminary Decision submission, detailed that:

*“the Preliminary Decision is based on the assumption that [the Provider] required [the Complainant] to complete a Certificate of Discharge in order to transfer out the benefits. That is not correct”.*

This was not my assumption. It was based on the statement by the Provider in its Final Response issued to the Complainant on **11 March 2019**.

In the Provider’s Final Response letter, it details to the Complainant:

*“It seems that there is very little to do to get the transfer done. The Only item delaying the transfer is your completion of our Certificate of Discharge. The Certificate allows us to deal with various responsibilities”.*

Following an explanation of why the Provider requested the completion of the Certificate of Discharge, the Provider states that:

*“upon your completion and return of the form, we will immediately transfer the PRSA funds to [named entity], as per your request”.*

The evidence clearly demonstrates that the Complainant’s request to transfer his PRSA was delayed by the Provider based on its requirement of the Complainant to complete a Certificate of Discharge. The Provider’s assertions in its post Preliminary Decision submissions do not appear to accord with its communications with the Complainant.

The Complainant, in his post Preliminary Decision submission, submits that he has suffered a large financial loss as a result of the Provider’s conduct.

The Complainant submits that he:

*“did not provide a letter that [the Complainant] had received from [named financial provider] confirming these figures as neither [FSPO staff] nor [the Provider] had asked for same and was under the impression that should it be required for making the decision process in my case it would have been requested. I now wish to submit this letter for further consideration in this matter”.*

I would point out that it is a matter for the Complainant to submit any evidence in support of his complaint that he wants this Office to consider in the investigation of the complaint.

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In support of his assertion that he suffered a loss, the Complainant submitted a single page letter with his post Preliminary Decision submission. This communication is from the financial provider to which the PRSA was transferred. It contains no detailed breakdown or calculation. It includes statements as to what the value of the relevant investments would have been, had certain amounts been invested at a particular time.

I cannot accept this as definitive evidence of a loss suffered by the Complainant as a direct result of the conduct of the Provider.

In my Preliminary Decision I stated that I was not satisfied that the Provider was entitled, under the terms of business or by law, to withhold the transfer in the manner that it did. I indicated my intention to uphold the complaint and direct that the Provider pay a sum of €2,000 in compensation to the Complainant.

In response, the Provider submitted in its post Preliminary Decision submission that I:

*“further erred in law by seeking to apply Section 60 of the Financial Services and Pensions Ombudsman Act 2017 and proposing to make a direction to [the Provider] thereunder.*

*As this complaint relates to a scheme as defined by the Act and [the Provider] as a pension provider as defined by the Act, the correct section of the Act to be applied in the making of the Ombudsman’s decision and of any directions to parties is Section 61.*

*Under Section 61(3)(a) the Ombudsman has no jurisdiction to make directions to [the Provider] in relation to the conditions of a scheme.*

*Furthermore, Section 61 (5) of the Act curtails the authority of the Ombudsman to order financial redress by limiting the compensation to “any actual loss of benefit under the scheme concerned.” The Ombudsman has jurisdiction to award compensation, but only to the extent that it replaces the loss sustained as a result of maladministration.*

*In this case it is acknowledged by all parties, to include the Ombudsman, that no loss was sustained.*

*Accordingly, the decision to award [the Complainant] €2,000 of financial redress lacks foundation in law.*

*For the reasons set out above, we do not consider that the Ombudsman’s Preliminary Decision is correct in fact, or that the Ombudsman has jurisdiction to issue a Legally Binding Decision on the same terms”.*

The Complainant, in his post Preliminary Decision submission, responded as follows:

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*“[the Provider] seems to be under the impression that [the Complainant’s] complaint relates to the pension scheme provided to [him] by [the Provider] but that is not the case. [The Complainant’s] complaint is about the delay in the transfer of [his] funds to another provider and the loss [the Complainant] suffered because of that delay.*

*[...]*

*[The Complainant’s] complaint was not about the pension scheme but the unreasonable actions of [the Provider] which [the Complainant] think[s] is covered under Section 60 as they are a financial service provider. [The Provider] delayed the transfer of [the Complainant’s] funds to [his] desired pension provider and [he] suffered a loss.*

*On [the Provider’s] suggestion [the Complainant] went to the Ombudsman. This was to complain about the service or lack thereof from [the Provider].*

*[...] The complaint is about [the Provider’s] unwillingness to transfer the funds in a timely manner and thus [the Complainant] suffered losses from this delay.*

*Had they moved [the Complainant’s] pension when [he] requested [he] would have had a pension worth more than the amount that was transferred (sic) This is where [the Complainant] has suffered a loss and feel[s] this is because of the lack of service by [the Provider] which would be covered under Section 60.*

*[The Complainant] [is] complaining about [the Provider] as a financial service provider and not the performance of the pension that was held with [the Provider]”.*

The Provider is incorrect in its assertion that I have considered this complaint and its conduct under the incorrect provision of the **Financial Services and Pensions Ombudsman Act 2017**. As the Complainant has pointed out, his complaint is not about the pension scheme. Rather his complaint relates to the service the Provider proffered as a regulated financial service provider. It would therefore not be appropriate, as suggested by the Provider, to consider its conduct as it relates to the Complainant and this complaint under Section 61 of the Act. I remain satisfied that this complaint concerns the conduct of the Provider as a regulated financial service provider and is appropriately dealt with under Section 60 of the Act.

I remain of the view that the Provider was not entitled, under the terms of business or by law, to withhold the transfer in the manner that it did and that to do so was unreasonable. Therefore, I uphold this complaint and direct that the Provider pay a sum of €2,000 in compensation to the Complainant.

## **Conclusion**

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My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is upheld, on the grounds prescribed in **Section 60(2) (a) and (b)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €2,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

**The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.**



**GER DEERING  
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

5 May 2021

Pursuant to **Section 62** of the **Financial Services and Pensions Ombudsman Act 2017**, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

**(a) ensures that—**

- (i) a complainant shall not be identified by name, address or otherwise,**
- (ii) a provider shall not be identified by name or address,**

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and

**(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.**

