

Before the Arbiter for Financial Services

Case No. 165/2018

EH ('the Complainant')

vs

**Harbour Pensions Limited (C 59316)
('Harbour Pensions') as substituted by
STM Malta Pension Services Limited
(C 51028)**

Sitting of the 15 December 2020

The Arbiter,

PRELIMINARY

The Office of the Arbiter for Financial Services ('OAFS') notes that, in 2018, STM Malta Trust and Company Management Limited took over the administration of the retirement schemes which were previously administered by Harbour Pensions Limited, the latter being no longer in operation.¹

The Arbiter is further aware that STM Malta Trust and Company Management Ltd changed its name to STM Malta Pension Services Limited in June 2020 as reflected in the records filed with the Malta Business Registry relating to the change in name effective from 22 June 2020.²

¹ A fol. 109 and email dated 28 September 2018 received by the OAFS from STM Malta Trust and Company Management Limited.

² As per the documents filed on 22 June 2020 with the Malta Business Registry - https://registry.mbr.mt/ROC/index.jsp#/ROC/downloadDocument.do?companyId=C+51028&filename=C+51028%2FC_51028_D50_0.pdf&archiveid=3738958&anonEmailAddress=&anonConfirmEmailAddress=

For all intents and purposes the records of this case have been updated accordingly to reflect the said developments.

The Case in question

The Complaint relates to the Complainant not being able to withdraw, at the age of fifty, benefits under his personal retirement scheme, the Harbour Retirement Scheme ('the Retirement Scheme' or 'Scheme').

The Complainant submitted that after accepting the original terms of his personal retirement scheme there was a change in the age at which the benefits could be taken where such change occurred without his knowledge.³

The Complainant explained that he was accepted into the Retirement Scheme on the 28 January 2014, after transferring his UK pension fund into the Scheme. It was noted that he was already living and working in Malta at the time.

The Complainant claimed that when he applied for membership into the Retirement Scheme, he was able, in terms of the pension legislation in Malta, to undertake a drawdown of 30% tax free lump sum at the age of fifty. It was further claimed that this was a major priority for the Complainant as he intended to buy a property in Malta when reaching the age of 50.

The Complainant pointed out that he had indicated, in Harbour Pension's Application Form for membership into the Scheme, that he would like to take a tax-free lump sum pension benefit at the age of 50. The Complainant submitted that the Service Provider accepted him as a member of the Scheme on that basis, knowing that he wanted to drawdown the benefits from age 50.

The Complainant stated that he will be fifty in June 2019 and explained that when his financial adviser requested Harbour Pensions to commence the drawdown process he was notified that, in accordance with updated legislation, he could not take any benefit until age 55.

The Complainant stressed that Harbour Pensions, as his Retirement Scheme Administrator, did not at any stage inform him that the earliest age that benefit could be taken had increased from age 50 to 55. It was submitted that this had

³ A fol. 4

completely ruined his plans with regards to his property purchase in Malta and it was also affecting his health.

The Complainant requested the Service Provider to agree to the original terms of the Scheme and pay him the benefit at the age of fifty so that he can settle in Malta.

In its reply, the Service Provider essentially submitted the following:⁴

1. That the Complainant's intention was to transfer his UK pension, the Strathclyde Pension Fund, to the Harbour Retirement Scheme in Malta, and to this effect the Complainant signed the Scheme's Application Form on 5 November 2013. The Scheme's Instrument of Adherence was subsequently signed by all parties on the 8 November 2013.
2. That the Scheme's Application Form clearly states in section 7 that *'Benefits can be taken at any time between the age of 50 (55 for transfers from the UK) & 70 unless otherwise agreed'*.⁵
3. That furthermore, the Instrument of Adherence entered into in respect of the Scheme state in the fifth paragraph on the second page that *'The normal retirement date that will apply to the Member will be the last day of the calendar month in which the Member turns [] or such other date no earlier than age 50 (or 55 in the case of a UK transfer Member in the period from 6 April 2010), not greater than an age established by the Retirement Scheme Laws or by the Authority as shall be agreed between the Retirement Scheme Administrator and each Member'*. A copy of the Instrument of Adherence was attached to the Service Provider's reply.
4. That given the Complainant's pension consisted of a UK transfer received into the Scheme in January 2014, and all documentation signed by the Complainant stated that in case of a UK transfer the minimum retirement age is 55, it was inconceivable how the Complainant could, in such circumstances, have joined the Scheme with the intention to take his tax-free lump sum at age 50.

⁴ A fol. 69-70

⁵ A fol. 69

5. The Service Provider admitted that at the time the Complainant joined the Scheme, individuals who were not transferring benefits from a UK scheme could have joined the Scheme and expected to receive benefits under the Malta rules at age 50. It was noted that these rules were changed in 2016 and that under SB 4.6.8 of the Pension Rules for Personal Retirement Schemes, the regulator had clarified that QROPS benefits are paid in line with UK HMRC rules. The Service Provider submitted that the HMRC rules require a minimum retirement age of 55 years, except on grounds of ill health.
6. It was pointed out that both the Scheme and its administrator are licensed and regulated by the Malta Financial Services Authority, and therefore subject to the rules and regulations laid out by the Authority.

The Service Provider remarked that the Scheme has also additional responsibilities in view that it qualifies as a recognised overseas pension scheme and is therefore subject to the rules of the HMRC in the UK. It was further noted that as a condition of being a QROPS, the Scheme has undertaken not to pay benefits before the age of 55.

7. The Service Provider noted that the Complainant makes reference to section 7 of the Application Form where a box was ticked to indicate that benefits would commence between 50 and 70 with a written note specifying '*TBA at 50+*'.⁶ It was submitted that the Service Provider cannot agree that this note is a clear indication of the Complainant's intention to commence benefits by drawing the initial lump sum at age 50.
8. The Service Provider submitted that the Complainant cannot demand the Scheme's administrator to contravene the regulations in order to meet his expectations, more so when his expectations contradict the paperwork he signed and the terms and conditions he accepted.
9. The Service Provider claimed that its review of the paperwork does not indicate that Harbour Pensions gave any indication that benefits would be paid at 50 and so cannot agree that the change to the Malta regulations in 2016 gave rise to any change in the terms of the benefits payable to the

⁶ A fol. 70

Complainant. The Service Provider refuted that there was any failure on its part to notify the Complainant of a change in the terms of benefits.

10. The Service Provider submitted that the Complainant's claim is incorrect and that as a member of the Scheme his benefits must be paid in accordance with the Scheme's rules and the Malta Regulations. It was further submitted that unless the Complainant is able to show that he is unable to work on grounds of ill health, the regulations require his benefits not to commence until age 55.

Having heard the parties,

Having seen all the documents and submissions made,

Further Considers:

The Merits of the Case

The Arbitrator will decide the complaint by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.⁷

The Product in respect of which the Complaint is being made

The Harbour Retirement Scheme is a Defined Contribution, Personal Pension Plan, set up in the form of a trust domiciled in Malta, authorised by the Malta Financial Services Authority ('MFSA'). The Scheme has the status of a Qualifying Recognised Overseas Pension Scheme (QROPS).⁸

The Scheme was initially registered with MFSA under the Special Funds (Regulation) Act (Chapter 450 of the Laws of Malta), and originally administered by Harbour Pensions Limited which acted as its Retirement Scheme Administrator.⁹

⁷ Cap. 555, Art. 19(3)(b)

⁸ A fol. 103 & 122

⁹ A fol. 122

In 2018, Harbour Pensions Limited ceased its operations as a Retirement Scheme Administrator, and STM Malta Trust and Company Management Limited became the new Retirement Scheme Administrator of the Scheme. The Scheme subsequently changed its name and is now known as STM Harbour Retirement Scheme.¹⁰

The Service Provider

Harbour Pensions Limited was an entity incorporated in Malta in February 2013 and licensed by the MFSA as a Retirement Scheme Administrator. Harbour Pensions surrendered its licence with effect from 5 October 2018,¹¹ and the said entity was dissolved and struck off from the records held with the Malta Business Registry with effect from 31 January 2020.¹²

As indicated above, the new Retirement Scheme Administrator of the Scheme is STM Malta and, as outlined in the note received by the OAFS on 20 February 2019, STM Malta is now defending this Complaint in relation to the Scheme.¹³

The Complainant

The Complainant was born on 24 June 1969. His occupation was indicated as an '*Accounts Officer*' in the Scheme's Application Form for Membership signed and dated 5 November 2013.¹⁴

As indicated in his Application Form for Membership dated 5 November 2013, the Complainant applied for the transfer into the Scheme of his then existing pension scheme, the Strathclyde Pension Fund in Scotland, which had an approximate value of GBP118,000 at the time.¹⁵

Investment adviser

Lawsons Equity Limited was the appointed professional adviser of the Complainant in respect of the Scheme as outlined in the Scheme's Application

¹⁰ <https://www.mfsa.mt/financial-services-register/result/?id=4843>

¹¹ A fol. 102 & 109

¹² <https://registry.mbr.mt/ROC/index.jsp#/ROC/companiesReport.do?action=companyDetails&fKey=e28217a1-645c-4073-b525-45e89a90a604>

¹³ A fol. 102

¹⁴ A fol. 74 - 88

¹⁵ A fol. 77

Form for Membership.¹⁶ Lawsons Equity Limited is an entity incorporated in Malta and licensed by the MFSA.¹⁷

The Regulatory Framework

The Retirement Scheme and its Retirement Scheme Administrator are subject to specific financial services legislation and regulations issued in Malta, including conditions or pension rules issued by the MFSA in terms of the regulatory framework applicable for personal retirement schemes.

The Special Funds (Regulation) Act, 2002 ('SFA') was the first legislative framework which applied to the Scheme and the Service Provider. The SFA was repealed and replaced by the Retirement Pensions Act (Chapter 514 of the Laws of Malta). The Retirement Pensions Act ('RPA') was published in August 2011 and came into force on the 1 January 2015.¹⁸

There were transitional provisions in respect of those persons who, upon the coming into force of the RPA, were registered under the SFA. The Retirement Pensions (Transitional Provisions) Regulations, 2015 provided that retirement schemes or any person registered under the SFA had one year from the coming into force of the RPA to apply for authorisation under the RPA.

In terms of Regulation 3 of the said Transitional Provisions Regulations, such schemes or persons continued to be governed by the provisions of the SFA until such time that these were granted authorisation by the MFSA under the RPA.

Personal retirement schemes subject to the SFA regime, were subject to applicable conditions outlined under the '*Directives for Occupational Retirement Schemes, Retirement Funds and Related Parties under the Special Funds (Regulation) Act, 2002*' ('the Directives'). Subsequent to the coming into force of the RPA, the MFSA issued, in January 2015, the Pension Rules for Personal Retirement Schemes in terms of the Retirement Pensions Act, 2011 ('the Pension Rules').

¹⁶ A fol. 83

¹⁷ <https://www.mfsa.mt/financial-services-register/result/?id=1950>
<https://www.mfsa.mt/financial-services-register/result/?id=5198>

¹⁸ Retirement Pensions Act, Cap. 514/Circular letter issued by the MFSA -
<https://www.mfsa.com.mt/firms/regulation/pensions/pension-rules-applicable-as-from-1-january-2015/>

With respect to withdrawals and payments of retirement benefits, the Directives under the SFA stipulated various conditions, such as those outlined in Part B.1.7 of the Directives, which explained the manner in which retirement benefits were to be paid other than in case of death or permanent invalidity of a member.

Albeit the said section did not mention any age at which benefits can be taken but rather stipulated how the retirement benefits can be distributed, it is noted that condition 1.7.6 of Part B.1.7 of the Directives stipulated at the time that:

'1.7.6 The above shall be without prejudice to any other limitations on withdrawal of retirement assets as specified by any other pensions or taxation legislation to which a retiree is subject to.'

With respect to the pension rules issued under the RPA, reference to the age of the member of a personal retirement scheme is made in condition 1.1.2 of Part A and condition 1.2.5 of Part B.1 of the Pension Rules.

Standard Licence Condition 1.1.2 of Part A of the said Pension Rules stipulates that:

'1.1.2 Moreover, a scheme or arrangement does not constitute a Personal Retirement Scheme under the Act, if it provides for:

(a) the payment of Retirement Benefits to five or fewer Members; or

(b) the commencement of payment of Retirement Benefits to a Member on a date that is earlier than that on which such Member has attained the age of fifty, or later than that specified in Pension Rules for Personal Retirement Schemes, except in those cases where the retirement scheme or arrangement provides that the payment is made by reason of the disability or death of a Member.'

In turn, Standard Licence Condition 1.2.5, of Part B.1 of the Pension Rules provides that:

'1.2.5 The commencement of payment of Retirement Benefits to a Member of the Scheme may not be made on a date that is earlier than that on which such Member has attained the age of fifty, or not later than that on which the Member attains the age of seventy-five.'

It is also noted that Part 4.6 of the Pensions Rules stipulates rules relating to lump sum payments, withdrawals and annuity payments. An equivalent

condition to that found in condition 1.7.6 of Part B.1.7 of the Directives referred to above, also features as condition 4.6.6 of the Pension Rules.¹⁹

In addition, it is pertinent to note that condition 4.6.8 of the same section of the Pension Rules and which is particularly relevant to the case in question, specifically provides that:

'4.6.8 The rules referred to under Part B.4.6 relating to Retirement Benefits for a Defined Contribution Retirement Scheme shall not apply to pension funds transferred directly or indirectly from Pension Schemes registered in the United Kingdom ("UK Transfer Funds") or UK Tax Relieved Funds as defined by Her Majesty's Revenue and Customs ("UK HMRC") to Retirement Schemes licensed under the Act, which qualify as Qualifying Recognised Overseas Pension Schemes as determined by UK HMRC. In respect of such UK Transfer Funds or UK Tax Relieved Funds, Members shall take benefits in a manner consistent with those provided for under UK Rules provided for under UK Authorised Member payments for pension income under UK legislation.'

Other Observations and Conclusions

In its submissions, the Service Provider referred to the HMRC Pensions Tax Manual and to the section titled '*Pension Age Test*' in the said manual.²⁰

The HMRC's Pensions Tax Manual specifies *inter alia* that:

'The 'Pension Age Test' sets a limit for the earliest age from which benefits can be paid to the member and the scheme retain the ability to meet the requirements to be a ROPS'.²¹

The said test applied from 6 April 2015, as also specified in the said manual.

The Service Provider noted that the:

'... HMRC Manual clearly provides that save for certain exceptions applicable with respect to serious ill-health, short service refund lump sum, refund of excess contributions and wind-up sums (none of which exceptions the Claimant has claimed to qualify under), a payment may only be made to a member aged under 55 if they are retiring due to ill-health. Furthermore, the rule provides that if a

¹⁹ Condition 4.6. of the Pension Rules issued under the SFA provides that *'The above shall be without prejudice to any other limitations on withdrawal of retirement assets as specified by any other pensions or taxation legislation to which a retiree is subject to.'*

²⁰ A fol. 104 & 114-118

²¹ <https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm112300#PensionAgeTest>

member aged under 55 who is not retiring due to ill-health, is entitled to a payment under the scheme, the scheme cannot satisfy the pension age test'.²²

The conditions outlined in the HMRC's Manual are essential as condition 4.6.8 of the Pension Rules outlined above indeed requires members to take benefits *'in a manner consistent with those provided for under UK Rules ...'*.

Withdrawing benefits prematurely and not in conformity with the applicable rules could trigger material tax implications on the respective member and even materially affect the status of a retirement scheme as a QROPS.

A QROP is indeed required to meet prescribed requirements, including the 'Pension Age Test' to maintain its status as indicated in the HMRC's Pensions Tax Manual.²³

One needs to accordingly exercise great care on such matters, where professional tax advice should be sought given the material implications involved. The exact HMRC conditions in terms of which one can claim that pension benefits can be taken before the normal minimum pension age ultimately need to be specified and their applicability explained accordingly.

The Arbiter understands the Complainant's position that he genuinely believed, at the time of joining the Scheme, that he could receive the retirement benefits at the age of fifty and the disappointment that has materialised when this has transpired not to be the case.

The Arbiter is also cognisant of past debates on similar tax issues.²⁴ However, a member needs to ultimately follow and be guided by the applicable requirements that evolve over time.

No specific HMRC conditions have ultimately been indicated by the Complainant on which basis he is deemed able to take the benefits under his Scheme at the age of fifty. It has not been indicated, for example, that the Complainant was eligible for a protected pension age at the age of fifty,²⁵ or

²² A fol. 104

²³ <https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm112300>

²⁴ <https://www.qrops.net/clarity-needed-qrops-income-pre-55-years-old/>

²⁵ <https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm062205>

was retiring due to ill health or was eligible for receipt of the pension benefits before age fifty-five in terms of any applicable HMRC conditions relevant to the Scheme.²⁶

It has also not been either sufficiently proven that the Retirement Scheme Administrator has itself provided wrongful advice or itself misled the Complainant on this aspect taking into consideration also the disclosures made in its documentation, particularly Section 7, titled '*Pension Benefit Request*' including the warning in bold in the same section, and clause 5 of the Scheme's Instrument of Adherence.

Whilst during the hearing of 25 February 2019, the Complainant referred to an email from '*Mr David Mason of Harbour Pensions to Mr Peter Hardy, his advisor, dated 11 October 2013, which states that if a member wants to take benefits at 50 years of age they need to have been non-UK tax residents for 5 complete tax years*',²⁷ such an email cannot reasonably serve on its own as a sufficient and justifiable basis on which one can request the Retirement Scheme Administrator to pay the benefits at the age of fifty.

Conclusion

The Arbiter considers that the arguments put forward by the Service Provider, that the Scheme is not permitted in terms of the applicable HMRC requirements to make payments to the Complainant at the age of fifty in his particular circumstances, and that should such payment be undertaken at this stage it would have adverse implications on the Scheme with respect to its status as a QROPS, are indeed valid and relevant ones.

The Arbiter is therefore accepting the position taken by the Service Provider in the particular circumstances of this case.

Moreover, taking into consideration the disclosures in the Scheme's documentation as already mentioned, the nature of the contributions made into the Retirement Scheme which involved a transfer from an existing UK scheme and, ultimately, the applicable MFSA rules and those of the HMRC as

²⁶ <https://www.pensionwise.gov.uk/en/your-pension-before-55>

<https://www.gov.uk/hmrc-internal-manuals/pensions-tax-manual/ptm112300#PensionAgeTest>

²⁷ A fol. 120

outlined in this decision, the Arbiter does not find sufficient and justifiable basis on which it can attribute shortfalls on the part of the Service Provider as alleged by the Complainant in his Complaint Form.

For the reasons explained, the Arbiter cannot accede to the Complainant's request to direct the Service Provider to pay out his retirement benefits at the age of fifty.

The Arbiter accordingly rejects the request and claims made by the Complainant in his complaint.

Because of the uniqueness of this case, each party is to bear its own legal costs of these proceedings.

**Dr Reno Borg
Arbiter for Financial Services**