

Ombudsman's Determination

Applicant	Mr D
Scheme	Aegon Section 32 buy-out Plan (the Second Plan)
Respondents	Trustees of the Marley Plan Retirement and Death Benefits Scheme Limited (the Trustee) Aegon

Outcome

1. Mr D's complaint against Aegon is partly upheld. To put matters right, Aegon shall make a payment of £500 to Mr D, in respect of the significant non-financial injustice he has experienced. This is inclusive of the £300 that it has already offered him.
2. No further action is required by the Trustee.

Complaint summary

3. Mr D's complaint concerns an annual charge of 11.21% that has been applied to his investments in the Second Plan since 2005. He says that the charge does not appear on his annual statements, and he was unaware of it until May 2019.
4. Mr D wants his entitlement from the Second Plan to be recalculated as if the charge had never been applied, and any difference in the value of his retirement benefits paid to him.

Background information, including submissions from the parties and timeline of events

5. The sequence of events is not in dispute, so I have only set out the salient points. I acknowledge there were other exchanges of information between all the parties.
6. Mr D was employed by Marley Davenport Limited (**the Employer**).
7. On 1 January 1997, Scottish Equitable plc set up a plan (**the First Plan**) for the benefit of Mr D under the Marley Davenport Limited Retirement Benefit Scheme (**the Scheme**). The Scheme was an occupational pension arrangement set up under trust and managed by individual trustees (**the Individual Trustees**).

8. The First Plan was set up through Anthony Reed Limited (**Anthony Reed**), an independent financial adviser.
9. Scottish Equitable plc is now trading as Aegon. For ease of reference in the paragraphs that follow, Scottish Equitable plc is referred to as “Aegon” before and after the date it changed its trading name.
10. Mr D’s nominated retirement date (**NRD**) under the First Plan was his 65th birthday in June 2019. Monthly pension contributions were paid to the First Plan by both Mr D and the Employer.
11. In May 1998, Mr D left the Employer’s service. Consequently, pension contributions to the First Plan ceased and his benefits became paid-up.
12. Aegon did not have a copy of the terms and conditions for the First Plan. It maintained that these would have been made available to the Individual Trustees and/or the financial adviser of the Scheme.
13. Aegon explained that the First Plan was subject to an additional Specific Member Charge (**SMC**) because the pension contributions had ceased. However, it allowed a period of grace (**the Grace Period**) before applying the SMC. The SMC was also known as a paid-up charge.
14. Following the end of the Grace Period in January 2001, Aegon said that it should have applied the SMC to Mr D’s investments in the First Plan. It would have been based on the surrender value of the First Plan and the term remaining as at the date the contributions ceased. However, due to an administrative error, Aegon did not apply the SMC at the time.
15. On 11 November 2005:-
 - The Individual Trustees established the Second Plan, a Section 32 buy-out policy, with Aegon. Mr D’s benefits in the First Plan were transferred to the Second Plan, at the request of the Individual Trustees. Mercer Jelf Financial Planning (**Mercer Jelf**), an independent financial adviser, provided advice in connection with the transfer.
 - An endorsement to the terms and conditions in respect of the Second Plan came into effect. This allowed for the application of the SMC. An extract from the endorsement can be found in the Appendix.
16. Aegon retrospectively applied the SMC, that it said should have been applied under the First Plan, to Mr D’s investments in the Second Plan. The value of Mr D’s investments in the First Plan was £2,005.84 on the date of the transfer.
17. In December 2005, Aegon sent Anthony Reed a copy of the Policy Conditions Booklet (**the Booklet**) in respect of the Second Plan together with a copy of the policy schedule (**the Policy Schedule**). Regarding fees that apply to the Second Plan, the Policy Schedule stated:

“Standard Member Charge:

Fund-related Charge: This Charge applies and the rate is as follows:

Percentage: 0.00%.”

18. On 6 March 2006, Aegon sent Mr D a statement of estimated retirement benefits which provided a projection of his benefits in the Second Plan at his NRD. It showed that the current value of his investments amounted to £2,164.82.
19. In 2010, the Employer was acquired by SPX Technologies (**SPX**). The due diligence exercise, which was undertaken in connection with the acquisition, did not identify any information on the First or Second Plan or the Individual Trustees.
20. On 18 August 2012, Aegon sent Mr D an annual benefit statement for the year to 15 August 2012 (**the 2012 Statement**). It showed a current value of £1,276.99 and a projected value of £710.19. It also showed that his entire pension pot was invested in the “BAL PASSIVE LFESTYLE fund”; the total number of units amounted to 864.290. The 2012 Statement said:

“Please see the policy conditions document we sent you when you set up your policy for details of all charges. If you would like a full breakdown of your yearly charges, please contact us.

Your yearly charge is made up of the plan’s annual management charge plus any additional fund management expenses.”
21. On 17 August 2013, Aegon sent Mr D an annual benefit statement for the year to 14 August 2013 (**the 2013 Statement**). It showed a current value of £1,274.66 and a projected value of £783.48. It also showed that his entire pension pot was invested in the “SE BAL PAS LSTL 2019 fund” (**the SE 2019 Fund**); the total number of units amounted to 1,139.210. The 2013 Statement said:

“Please note the policy conditions document we sent you when you set up your policy for details of all charges. If you would like a full breakdown of your yearly charges, please contact us.

Single contributions

Yearly charge 1.00%

Your yearly charge is made up of the plan’s annual management charge plus any additional fund management expenses.”
22. On 15 August 2014, Aegon sent Mr D an annual benefit statement for the year to 13 August 2014 (**the 2014 Statement**). It showed a current value of £1,182.75 and a projected value of £733.70. It also showed that his entire pension pot was invested in the SE 2019 Fund; the total number of units amounted to 1,011.500. It repeated the wording that was contained in the 2013 Statement regarding the policy conditions document.

23. On 13 August 2016, Aegon sent Mr D an annual benefit statement for the year to 10 August 2016 (**the 2016 Statement**). It showed a current value of £1,560.44 and a projected value of £1,212.79. It also showed that his entire pension pot was invested in the SE 2019 Fund; the total number of units amounted to 1,011.500. It repeated the wording that was contained in the 2013 Statement regarding the policy conditions document.
24. On 3 April 2019, Aegon wrote to Mr D as he was approaching his NRD. It stated that the value of his investments in the Second Plan was £1,623.66, which he could take as a lump sum.
25. On 25 April 2019, Aegon wrote to Mr D to confirm that the value of his investments in the Second Plan was £1,583.60, which he could take as a lump sum.
26. On 31 May 2019, Aegon wrote to Mr D following a telephone call he had with it on 23 May 2019 concerning his investments (**the May Letter**). It said:-
 - It enclosed a summary of the investment transactions in the Second Plan since its inception together with a factsheet. The factsheet mentioned a total charge of 1% but included the following caveat:

“This includes a standard 1% product charge, a fixed management fee and expenses that vary with the day to day costs of running the fund. You may pay a different product charge.”
 - As the Second Plan was proposed by the Individual Trustees, there was no annual policy fee. A fund management charge of 1%, also known as the annual management charge, is deducted from the unit price of each fund. In addition, the SMC of 11.21% of the amount transferred to the Second Plan is deducted annually.
 - Mr D was not being charged for transferring his benefits in the First Plan to the Second Plan. The SMC would also apply to the First Plan. This charge came into force when the regular contributions that were being made to the First Plan ceased.
27. On 5 June 2019, Mr D telephoned Aegon. He asked for an explanation of the charges. The next day, Aegon contacted Mr D and discussed the charges with him. Mr D said he raised a complaint about the SMC during the telephone call. However, Aegon was unable to find a record of the complaint.
28. On 9 August 2019, Mr D's retirement benefits were settled. The final value of his investments in the Second Plan was £1,583.60.
29. On 30 August 2019, Mr D telephoned Aegon. He requested a copy of the documentation in respect of the Second Plan that included information on the SMC. Aegon advised that the charges had been agreed with the Individual Trustees and could not be reviewed.

30. On 9 September 2019, Aegon sent Mr D a copy of the Booklet.
31. On 7 May 2020, Aegon emailed Mr D in response to a complaint he had raised on 20 April 2020. It did not uphold his complaint. It repeated some of the information it had provided in the May Letter but also said:-
 - Other than the Policy Schedule, which was sent to Mr D's financial adviser, it held no documents dating back to when the First Plan was set up in 1997 or when the transfer to the Second Plan took place in 2005.
 - The Policy Schedule did not show the SMC because this was carried over from the First Plan.
32. In 2020, SPX became aware of at least one historic pension arrangement that was associated with Marley. By this time, the individual Trustees had all retired.
33. In November 2020, SPX set up a trustee '**Trustee**'.
34. Mr D made the following submissions:-
 - He assumed at the time that the decrease in the value of the Second Plan was due to poor investment performance.
 - He did not have a financial adviser and could only assume that the financial advisers were appointed by the Employer or the Individual Trustees. He did not recall receiving any communications from Mercer Jelf in 2005.
 - The first time he saw the Booklet was in September 2019; it did not mention the SMC.
35. Aegon made the following submissions:-
 - The charging structure of the First Plan was agreed on the basis that contributions would continue for the full term. The terms of the Second Plan, including the charges, substantially matched those of the First Plan.
 - As the First and Second Plan were set up through financial advisers, it would have been their responsibility to make sure that Mr D was aware of the charges involved. It has no record of which party the financial advisers were providing advice to.
 - The charges were reasonable. While they were not explained in the annual benefit statements that it sent to Mr D, this was not a regulatory requirement.
 - The annual statements showed a reduction in the value of Mr D's pension pot from year to year, with a corresponding reduction in the number of units. As no contributions were being paid to the Second Plan, and there were no withdrawals, this should have indicated to Mr D that deductions were being made. He could have contacted Aegon to request more information.

- Mr D's complaint was out of time as more than six years elapsed since he would have reasonably known about the deductions.
- The SMC should have resulted in an additional annual charge of 4.63% from January 2001 to June 2014, in respect of the period of five years prior to Mr D's NRD. Allowing for the yearly SMC of 1.15%, this gave a total charge of 5.78%.
- It did a comparison between what Mr D should have been charged, had the SMC commenced in January 2001, and what he has actually been charged from 2005. This showed he had been charged an additional £471.88 in error. This was due to the fact that the SMC that was calculated in 2005, was based on a higher surrender value and did not allow for the Grace Period.
- Mr D would not have known that the charges were higher than they should have been. It would refund the amount of £471.88 and was willing to offer him £300, for any distress and inconvenience he suffered.

36. The Trustee made the following submissions:-

- It could not say with any certainty whether the First and Second Plans came under its remit. Its name referred to the "Marley Plan Retirement and Death Benefits Scheme" rather than "Marley Davenport". However, it was willing to assist The Pensions Ombudsman (TPO) with its investigation.
- It did not hold any historic documentation concerning the First or Second Plans, and has only been able to obtain limited information from Aegon. Nor did it hold any information on Mr D, or a record of the information that would have been provided to members of the First and Second Plans at the time.
- SPX checked the files held by its human resources department, dating back over a period of seven years. No information was found on Mr D.
- It wrote to Aegon to obtain additional information in connection with this matter. However, due to Aegon's data retention policy, it did not hold any further information on either the First or Second Plans.
- While it was no longer in contact with Anthony Reed, it had an ongoing relationship with Mercer Jelf. However, this did not relate to pension matters. Mercer Jelf confirmed that it held no historic information of relevance to Mr D's case and that any records were likely to have been destroyed.
- It located the contact details for one of the Individual Trustees, Mr Y.

37. During the investigation, TPO attempted to contact Anthony Reed by email to obtain additional information. However, the email was returned undelivered. Further investigation identified that Anthony Reed had its Financial Conduct Authority authorisation revoked on 5 May 2004; it went into liquidation on that same date.

38. Mr Y provided the following information to TPO:-

- He joined the Employer in September 1998, as the Finance Director.
- While he recognised the name Mercer Jelf, his recollection was that it was Clark Roxburgh that assisted with the setting up of the Second Plan. He assumed that Clark Roxburgh was taken over shortly afterwards and became Jelf Clark Roxburgh and more latterly Marsh Insurance.
- Communications were issued to members at the time the Second Plan was put in place. He recalled the location where the relevant paperwork was held at the time he left the Employer. However, he suspected that the paperwork may not have been retained.
- The aim of a section 32 policy was to put pension benefits in the name of the member and to remove direct company involvement. Once this has been achieved, he assumed the trustee body was dissolved.

39. Following further investigation:-

- TPO contacted Marsh Insurance. However, it advised that, due to several changes in ownership, it was unable to locate any records that may have been held by Clark Roxburgh.
- SPX confirmed that it held no relevant paperwork in the location Mr Y had indicated.

Adjudicator's Opinion

40. Mr D's complaint was considered by one of our Adjudicators who concluded that further action was required by Aegon because there was maladministration on its part. The Adjudicator's findings are summarised in paragraphs 41 to 54 below.
41. The Adjudicator acknowledged that there was uncertainty over whether the Trustee had any responsibility in relation to the First and Second Plans. Despite TPO's enquiries, it did not prove possible to obtain information relevant to Mr D's complaint from the parties that were likely to have been involved at the time. The information provided by Aegon did not provide a full picture. So, the Adjudicator said that it was necessary for him to reach a view, based on the limited information available.
42. When the Second Plan was set up in November 2005, Aegon issued an endorsement recording the changes made to the original policy terms and conditions. Those changes allowed for the application of the SMC. So, in the Adjudicator's opinion, Aegon was permitted to apply the SMC to Mr D's investments in the Second Plan.
43. It was not uncommon for pension arrangements of this type to apply additional charges in the event of contributions ceasing early, which was what had happened in the case of Mr D.

44. Due to the passage of time, it was not possible to obtain details of any communications that may have been issued to Mr D by the Individual Trustees, Aegon, the Employer or the financial advisers concerning the First or Second Plan. In particular, it was not clear what information, if any, Mr D would have received in relation to the SMC. In cases such as these, where evidence was limited, it was necessary to form a view as to what was most likely to have happened.
45. It was not clear what role Anthony Reed, Mercer Jelf and Clark Roxburgh, had in connection with this matter. The Adjudicator noted that Mr D had confirmed that he did not have a financial adviser at the time. So, on the balance of probabilities, it seemed likely that the financial advisers were appointed by the Individual Trustees, and/or the Employer, to assist with setting up the First Plan and the subsequent transfer to the Second Plan.
46. While it may have been the case that some of the responsibility for communicating with members affected by the introduction of the First Plan, and the transfer to the Second Plan, was delegated to the financial advisers, it was the Adjudicator's view that the Individual Trustees would have been ultimately responsible for this.
47. On the balance of probabilities, the Adjudicator took the view that Mr D was notified about the SMC under circumstances he can no longer recall, or in correspondence sent to him which, for whatever reason, he did not receive. The Adjudicator said this because the provision of information on fees was an important consideration for providers of arrangements of this type. It seemed likely that the Individual Trustees and/or the Employer obtained financial advice from Anthony Reed, Mercer Jelf and/or Clark Roxburgh; agreeing an appropriate communication strategy may well have been part of that advice.
48. Aegon said that Mr D should have been aware of the position from the gradual reduction in the number of units shown in his annual benefit statements. The Adjudicator acknowledged that there was sufficient information in the annual statements to identify a decrease in units in some years, but this was not always the case; the 2014 Statement and the 2016 Statement displayed the same number of units. It was not unreasonable to take the view that Mr D would have focused on the value of his investments and, as a layperson, may not have identified the decrease in units. While each annual benefit statement showed both the current and previous value of Mr D's investments, to identify a decrease in the number of units he would have needed to compare this against the previous year's annual benefit statement.
49. Mr D said that he was not aware of the SMC until Aegon responded in writing following the telephone call in May 2019. For the reasons stated in paragraph 47 above, the Adjudicator took a different view on this point. Even if the Adjudicator were to accept that this was the case, he did not think that it would change the outcome in the circumstances.

50. Having reviewed the evidence, it was the Adjudicator's opinion that Mr D had suffered a loss of expectation rather than a financial loss, as Aegon was permitted to apply the SMC.
51. Even if the evidence supported the view that Mr D was not notified about the SMC at the time, on the balance of probabilities, Mr D would not have done anything differently if he had been made aware of the SMC before May 2019. The annual benefit statements, which were sent to Mr D, provided information on how he could obtain details of the charges that applied to the Second Plan; there was no evidence that Mr D requested this information until 2019.
52. Aegon said that the terms and conditions in respect of the First and Second Plans were agreed with the Individual Trustees. While no documentary evidence was provided to support this, on the balance of probabilities the Adjudicator's view was that this was likely the case. So, with regard to Aegon's application of the SMC, the Adjudicator's opinion was that it was carrying out instructions that were agreed with the Individual Trustees. In the circumstances, the Adjudicator was not persuaded that this amounted to maladministration. The Adjudicator appreciated that his view on this point would provide Mr D with little comfort, but he had to reach a view based on the evidence available. Based on the evidence, the Adjudicator was not persuaded that the Pensions Ombudsman would reach a different conclusion and award redress for the financial loss Mr D was claiming.
53. However, the Adjudicator noted that there was no evidence that Aegon informed Mr D, or the Individual Trustees, that it would adjust the SMC under the Second Plan to recover the SMC that it had omitted to apply to the First Plan. The Adjudicator's opinion was that Aegon had a responsibility to notify Mr D of the adjustments it was making in this respect. The Adjudicator's view was that, on the balance of probabilities, no communication was sent to Mr D.
54. The failure on the part of Aegon to notify Mr D of the adjustments amounted to maladministration. It should make an award to Mr D in respect of the significant non-financial injustice it caused him.
55. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D provided his further comments in response to the Opinion. These are summarised below:-
 - The SMC of 11.21%, which Aegon previously referred to as a transfer charge in the May Letter, was never clearly shown on annual benefit statements. The annual benefit statements stated the yearly charge of 1% was "made up of the plans annual management charge PLUS any additional fund management expenses". They also stated that: "The administration and management cost incurred in running the fund, and the yearly fund management charge made by us, will be paid from the fund". To the layman, this referred to the overall group fund, and not to an individual's specific fund. Otherwise, why not state the value of the SMC, other than deception.

- He disagreed with the Adjudicator's comment that: "on the balance of probabilities Mr D would not have done anything differently if he had been made aware of the SMC before May 2019." He also provided a copy of a statement of benefits dated 15 December 1998 which showed the fund value as being £2,256.88. He said that any thought of transferring at that point to another arrangement was not in his interest as the transfer value quoted was only £871.39.
- With regard to paragraph 12 above, although Aegon did not provide a copy of the terms and condition for the First Plan, in paragraph 52, the Adjudicator seemed to have accepted paragraph 13 without any evidence. In fact, Aegon did not apply the SMC to the First Plan which supports that the SMC was not clearly notified even to those in charge, if notified at all.
- Regarding Aegon's comment that he should have been aware of extra charges because the value of his investments was going down, he was always told there was a possibility with defined contribution pensions, that this could occur due to the volatility of investments.

56. I have considered the additional points raised by Mr D; however, they do not change the outcome, I agree with the Adjudicator's Opinion.

Ombudsman's decision

57. Mr D's complaint concerns the SMC that Aegon applied to his investments in the Second Plan.

58. I acknowledge the difficulties in coming to a conclusion in relation to Mr D's complaint given the lack of evidence and the fact that many of the parties involved, including the Individual Trustees, either no longer exist or no longer hold records of the events that occurred. However, I have to make my findings and, where adequate evidence is not available, I will do this on a 'balance of probabilities' basis.

59. I agree with the Adjudicator's assessment in paragraph 42 above that Aegon was permitted to apply the SMC to Mr D's investments in the Second Plan and I find that, based on the wording of the endorsement, a SMC existed under the First Plan.

60. While there is no documentation from the time that the First and Second Plans were set up stating the amount of the SMC, I have seen no evidence to suggest that the figures provided by Aegon were not correct. So, on the balance of probabilities, I find that, apart from Aegon making adjustments for the late application of the SMC, it applied the SMC at the correct rate.

61. Mr D has referred to the fee information that was provided on the annual benefit statements he received and the fact that the level of the SMC was never shown. I agree that it would have been good practice for Aegon to have included details of the SMC on these statements. However, I also agree with the Adjudicator's assessment in paragraphs 44 to 47 above that, on the balance of probabilities, Mr D had been

sent a notification in relation to the application of the SMC, including details of its level, when the Plans were put in place.

62. I note Mr D's comment in relation to the statement of benefits dated 15 December 1998, that taking a transfer out of the First Plan would not have been in his best interests at that time given the large difference between the transfer value of £871.39 and the fund value of £2,256.88.
63. Mr D has referred to Aegon being unable to provide a copy of the terms and conditions for the First Plan and the Adjudicator's acceptance of the existence of the SMC without any evidence. Mr D also suggested that the fact that the SMC was not applied to the First Plan was evidence that the management team at Aegon were not clearly notified of it. As explained in paragraph 58 above, due to the lack of evidence available, some conclusions have to be made on a 'balance of probabilities' basis. Furthermore, on the balance of probabilities, I consider that the fact that the SMC was not applied to the First Plan was an administrative oversight and not an indication that it should not have been applied.
64. Mr D referred to Aegon's comment that he should have been aware of extra charges because the value of his investments was going down. I acknowledge Mr D's response that, due to the volatility of the underlying investments, there was a possibility of his investments decreasing in value. I agree with the Adjudicator's view that Mr D could only have reasonably been aware that the decrease in the value of his investments was not due to their volatility if he had recognised that the number of units held was decreasing. This would only have been possible if he had compared an annual statement with an earlier one.
65. While I find that Mr D did not suffer a financial loss, I do consider that he suffered non-financial injustice as a result of Aegon's actions. In particular, I have seen no evidence that Aegon notified Mr D that, having failed to correctly apply the SMC under the First Plan, it would apply it at a higher rate under the Second Plan. I consider Aegon's lack of communication in this respect to be maladministration.
66. I uphold Mr D's complaint in part.

Directions

67. Within 28 days of the date of this Determination, Aegon shall pay Mr D an overall award of £500, for the significant distress and inconvenience it caused him. This award is inclusive of the ex-gratia payment of £300 that Aegon has already offered Mr D.

Anthony Arter CBE

Deputy Pensions Ombudsman
6 September 2024

Appendix

Extract from the endorsement made to condition eight of the Second Plan's terms and conditions which came into effect from 11 November 2005

"Specific Member Charge

- (a) There will be a Specific Member Charge. It will be payable as follows:
- (b) In good faith, Scottish Equitable shall calculate the part of the Transfer Value which relates to accumulation units of regular premiums under the Transfer Contract – the 'Regular Premium Part'. The amount of Specific Member Charge for the Regular Premium Part is the percentage per annum which applied under the Transfer Contract immediately before the payment of the Transfer Value to this Policy, of the Bid Value of the Units derived from the Regular Premium Part.
- (c) The amount of Specific Member Charge for the Regular Premium Part will be payable on the day before each anniversary of the Date of Commencement up to the Transfer Pension Date or, if earlier:
 - (i) the Member's date of death; or
 - (ii) the Pension Commencement Date for non-Reserved Units; or
 - (iii) an earlier date in terms of the Transfer Contract.
- (d) The amount of each instalment of Specific Member Charge is collected by cancelling Units derived from the Regular Premium Part at Bid Price."