

Ombudsman's Determination

Applicant	Mr Y
Scheme	Elements Pension Scheme (the Scheme)
Respondents	20- 20 Trustees Services Ltd (20-20) Aegon

Outcome

1. I do not uphold Mr Y's complaint and no further action is required by 20- 20 and Aegon
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr Y's complaint against 20-20 (then known as Alexander Forbes Trustee Services Limited) is about the deductions for legal fees from the Scheme's residual funds.
4. Mr Y's complaint against Aegon is for applying a discontinuance charge to the Scheme, and also against 20-20 for deducting it from the Scheme's residual funds.

Background information, including submissions from the parties

5. The defined contribution Scheme was established in 1988 with Aegon, on a defined contribution basis. It was established to collect contracted out benefits, principally the Guaranteed Minimum Pension (**GMP**). The Scheme had an unallocated account, which was used to meet any shortfall in members' GMP. In the event, that all GMP entitlements had been secured, the remainder within the unallocated account would become a surplusin (**residual funds**).
6. The sole trustee of the Scheme was the principal employer, Lyledale Limited (**the Company**) – of which Mr Y was one of two directors, the other being his wife. Besides from the Company there was no other Trustee. In the event where there were residual funds, Aegon allowed the Company to decide how they were paid. The Company initially agreed that the residual funds would be paid to the directors.
7. Mr Y and his wife resigned as directors of the Company in March 1995. In 1998 the Company, was sold to Regent Communications (UK) Limited (**Regent**), together with

the Scheme. In September 1998, transfer payments were made to Mr Y and his wife in respect of their full entitlement from the Scheme. From this point, they ceased to have any entitlement as members within the Scheme.

8. Once Mr Y and his wife had transferred their benefits, there were insufficient funds left in the Scheme to pay the remaining GMPs. State scheme premiums were therefore paid instead. This meant the members' entitlement in the State Earnings Related Pension Scheme was restored, in lieu of them ever receiving their GMPs.
9. In October 2002, Regent was dissolved and, as Regent was the sole Trustee, there was no legal entity to whom the residual funds could be paid. Therefore, when Mr Y asked Aegon to pay the residual funds to him in 2008, Aegon referred the matter to the Pensions Regulator.
10. In January 2011 the Pensions Regulator appointed 20-20 under section 7 of the Pensions Act 1995 (single appointment), to act as the trustee and complete the wind-up of the Scheme. Section 4 of the Order (**the Order**) under which 20-20 were appointed states:

“The fees and expenses of [20-20] so appointed as trustee shall be paid out of [the Scheme's] resources pursuant to section 7(5)(b) of the Pensions Act 1995 and section 8(1)(b) of the Pensions Act 1995 as amended by section 35 of the Pensions Act 2004”.
11. 20-20 sought legal advice from Pinsent Masons as to what to do with the residual funds of approximately £35,000 remaining within the Scheme. Ultimately it paid the balance to the Court, so that qualifying members could apply to the Court for it to be released. Mr Y made an application to the Court for the residual funds, and he was granted them in February 2014. However, once he received the funds he realised 20-20 had deducted a sum to cover legal costs incurred by engaging Pinsent Masons and a discontinuance charge on behalf of itself and Aegon respectively.
12. In relation to the legal fees, 20-20 has said legal advice was necessary as there were potentially competing interests in respect of the residual funds. In particular, it has said there was uncertainty over whether any other previous members of the Scheme may have had a claim to the residual funds in relation to the GMPs that were never paid.
13. 20-20 has stated that Pinsent Masons is one of the firms it has worked with previously and as such it is a trusted firm. It states that Pinsent Masons is particularly experienced in the relevant field and, whilst they do not charge the lowest rates, they also do not charge the highest. 20-20 therefore feels it acted appropriately in engaging Pinsent Masons for its legal services.
14. On 28 November 2016, 20-20 provided this office with a breakdown of the legal fees charged, and a copy was forwarded to Mr Y. 20-20 felt this was evidence that there

was a significant amount of legal work carried out by Pinsent Masons, thereby justifying the legal fee.

15. 20-20 has said that it approached Aegon in relation to whether the discontinuance charge should be applied, and Aegon made it clear that its position would not change. In other words, Aegon confirmed the charge was applicable.
16. With the above in mind, 20-20 said its intent was then to avoid risking additional Scheme assets. It believes it took a pragmatic view and decided not to pursue this matter further with Aegon to prevent the Scheme assets being used to seek legal advice.
17. Aegon has referred to section 14 of the Nexus Group Money Purchase Technical Specification Rules (**the Nexus Rules**), which were the rules that underpinned the Scheme. This section states that:

“If a NEXUS scheme is discontinued then the individual withdrawal benefits, as calculated in Section 12, will be further reduced by 50% of the highest contribution paid to each member’s account in any 12-month period.”
18. Aegon has highlighted that 50% of the highest recorded premium in this case would have been £10,273.46. However, for administrative ease, it normally calculates the discontinuance figure by simply calculating 8% of the transfer value. In this case, this meant it had deducted approximately £3,000 from the residual funds.
19. Mr Y believes it was clear from the outset that the residual funds ought to be paid to the previous directors of the company – namely, him and his wife. As such, he feels 20-20 did not need to employ Pinsent Masons. He feels the question which was put to Pinsent Masons – namely, who was entitled to the residual funds - was a very simple one. Therefore, he does not feel the fee is justified.
20. Mr Y believes Section 14 does not apply in this case because it refers to Section 12, which does not cover unallocated funds. In particular, Mr Y says that Section 8 (vii) covers unallocated accounts, and this section only says Section 12 may apply. In particular, Section 8 (vii) states:

“[The unallocated account] is treated as being a single, additional member account...Any transfer out of the unallocated account will normally be treated as a withdrawal and may be subject to the charges specified in section 12”.
21. Mr Y emphasises the use of the word “may” in this section and that if Section 12 does not apply then Section 14 does not either.

22. Aegon has responded and said that Section 12 covers early retirement or transfers. As winding up a scheme necessitates a transfer of funds, Section 12 is applicable. It has also confirmed that a residual fund settlement is classed as an individual withdrawal and therefore Section 14 applies.
23. Mr Y has evidenced that he recently received correspondence from Aegon confirming that whether the discontinuance charge is applicable depends on how much commission has been paid – which contradicts the Nexus Rules. Finally, he feels the discontinuance charge penalises the last member to receive payment under the Scheme.

Adjudicator's Opinion

24. Mr Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by 20-20 and Aegon. The Adjudicator's findings are summarised briefly below.
- 20-20 has provided a reasonable explanation for its decision to engage Pinsent Masons. In particular, that there may be other parties who could have a claim to the residual funds, and so it was necessary to seek expertise on the matter.
 - 20-20 has obtained evidence that the legal costs are justified and reasonable. They therefore showed a duty of care towards the Scheme before deducting the fees.
 - Aegon acted in accordance with the Scheme rules when applying the discontinuance charge.
 - The discontinuance charge has been taken out of residual funds, so it is not reasonable to say the last Scheme member was penalised.
 - The evidence shows that a representative of Aegon gave inconsistent information on when the charge should be applied, but this did not happen until the complaint had already been raised. Also, it does not mean that the Scheme rules no longer apply. Noticeably, Aegon has charged significantly less than it was entitled to for the discontinuance charge. As such, any confusion or stress caused by inconsistent information is outweighed by the lower fee that has been charged.
25. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider.
26. Mr Y has provided his further comments which do not change the outcome. He has not provided any new evidence, but he has emphasised a number of points which he does not feel were fully addressed.

27. In particular, Mr Y says that Pinsent Masons were engaged unnecessarily. He says it then took them 18 months to answer the simple question of who was entitled to the residual funds, when it was clear they should be paid to him and his wife. He also does not feel that the breakdown of legal costs provided sufficient detail to justify their fee.
28. Mr Y has emphasised that the residual funds were approved for transfer years ago, and a discontinuance charge was never mentioned at that time.
29. Finally, Mr Y also says that, by applying the discontinuance charge now, the cost cannot be spread across all members. He says the intent of the fee cannot be to penalise the last member, and so he does not feel it is fair for the full amount to be taken from the residual funds.
30. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr Y for completeness.

Ombudsman's decision

31. I believe 20-20's reasons for engaging Pinsent Masons are reasonable. Furthermore, Mr Y believes the legal question put to Pinsent Masons was straight-forward, but I do not agree. The fact that the residual funds were ultimately paid to Mr Y does not mean his entitlement was obvious.
32. The breakdown for legal costs provided to 20-20 by Pinsent Masons gives full detail of the tasks undertaken and the time spent to complete them. Nothing in the breakdown appears to me to be unnecessary or unreasonable.
33. I agree with the Adjudicator that Aegon has interpreted and applied the Scheme rules reasonably. Whilst Mr Y says that the cost of the discontinuance charge has not been spread across the members, there was no reason for this to happen, as there was a residual fund. Unless all the former members had an entitlement to the residual fund, there was no need to spread the cost across the members. Mr Y was the only beneficiary of the residual fund following his successful Court application, so I see no reason why 20-20 should have spread the cost to other members, when he was the only person entitled to the residual fund.
34. I appreciate Mr Y's frustration that, before 20-20 was appointed as trustee, he had agreed a figure with Aegon to be paid to him. However, even if Mr Y had received a quote which did not mention the discontinuance charge, I do not feel this would be enough for me to say that Aegon is wrong to apply it. Whilst Aegon could have been clearer on occasion in relation to this matter, I agree with the Adjudicator that this has been addressed by Aegon charging significantly less than it was entitled to do under the terms of the Scheme rules.

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35. Therefore, I do not uphold Mr Y's complaint.

Anthony Arter

Pensions Ombudsman
20 January 2017