Ombudsman's Determination

Applicant	Mrs S
Scheme	The Stanley Black & Decker UK Pension Plan (**the Plan**)
Respondents	Stanley Black & Decker Europe (**Stanley Black & Decker**)
	The Trustee of the Stanley Black & Decker UK Pension Plan (**the Trustee**)

Outcome

1. I do not uphold Mrs S' complaint and no further action is required by Stanley Black & Decker or the Trustee.

Complaint Summary

2. Mrs S has complained that her employer, Stanley Black & Decker, should have had a procedure to allow her to apply for Fixed Protection 2016 (**FP 2016**).

3. She has said that the actions of Stanley Black & Decker and the Trustee jeopardised her opportunity to apply for FP 2016. In addition, she feels both respondents have been negligent in updating members of the way the Plan operates, which has meant that she was unable to take advantage of her carried forward Annual Allowance (**AA**).

Background information, including submissions from the parties

4. On 24 January 2013, Stanley Black & Decker sent Mrs S the Introducing Pension Max booklet (**the Booklet**). Pension Max is a salary sacrifice arrangement, which meant that the "majority of members of the Plan will see an increase in their take home pay." As a result of Pension Max, all contributions would be classed as employer's contributions. In the accompanying covering letter, Stanley Black & Decker said that it, "has put in place a number of safeguards to ensure that those who may be adversely affected are not included in Pension Max."

5. In December 2015, Mrs S approached Stanley Black & Decker to ask whether, if a member applied for FP 2016, and therefore left the Plan, it would pay the net company savings as a taxable cash allowance to the individual.

6. In January 2016, Mrs S contacted Mercer, the Plan administrator, to ask for information on applying for FP 2016.

7. In February 2016, the Trustee sent members its annual ONPLAN Pension Newsletter. This said that: -

   “the pension input period – which is the period used to measure pension savings for the purpose of the AA – will be moved to be in line with the tax year end the AA for 2015/2016 will be £80,000. (Please note: this includes a maximum of £40,000 for the period from 9 July 2015 to 5 April 2016).”

8. In February 2016, Stanley Black & Decker’s response confirmed that it would not provide a taxable cash allowance in lieu of its employer pension contributions.

9. In the same month, Mrs S has told us that her Independent Financial Advisor (**IFA**), advised her to make an Additional Voluntary Contribution (**AVC**) to maximise her pension pot prior to applying to FP 2016.

10. Some time in March 2016, Mercer replied to Mrs S’ request for FP 2016 information by supplying a copy of the Pension Plan Booklet.

11. On 8 March 2016, Mrs S emailed Stanley Black & Decker’s payroll department. She explained that she wished to make an AVC to the Plan. Mrs S said that the maximum she was able to put into her pension, including employer contributions, was £54,570. Mrs S said that she had discussed this with Stanley Black & Decker’s Human Resources Department prior to this date.

12. On 15 March 2016, following an exchange of emails, the payroll department confirmed that Mrs S’ March 2016 payroll contained an AVC of £47,517.

13. On 23 March 2016, Mrs S wrote to Stanley Black & Decker and said that she wanted to stop paying contributions into her pension. Mrs S confirmed that she was unsure whether she would be applying for FP 2016, as she was waiting for some information from HM Revenue and Customs (**HMRC**). However, she wished to keep the option of FP 2016 open by stopping any further contributions.

14. On 31 March 2016, Mrs S, Stanley Black & Decker and the Trustee signed a form to say that, from 1 April 2016, Mrs S wished to cease contributing to the Plan and for all employer contributions to cease. The letter explained that, “this may be a temporary request until such times as the Inland Revenue confirms it will benefit her from continuing to pay into her pension.”

15. On 1 April 2016, Mrs S wrote to Stanley Black & Decker. She was concerned that her March contributions had not yet been added to her valuation. She said that she was worried that if they are not included in her valuation by 5 April 2016, they will fall into the next tax year, which will stop her being able to apply for FP 2016.

16. On 4 April 2016, Stanley Black & Decker contacted Mercer. It highlighted Mrs S’ concerns and said that it would send through the March 2016 information. On the

same day, Mercer responded and said that no further contributions should be paid across for Mrs S due to her potential application for FP 2016. However, it said that it understood that the March 2016 contributions had already been paid, so the deadline had not been breached. It said that it would check with the accounts team to ensure the March 2016 contributions have been received.

17. On 5 April 2016, Mrs S wrote, jointly, to Stanley Black & Decker and Mercer. She explained that she had spoken to HMRC who told her that if her contributions had been deducted from payslips relating to the 2015/2016 tax year, then a delay of a couple of days should not be an issue. However, HMRC said that if the Trustee's normal procedure was to include any monies received after 5 April 2016, regardless of when it was deducted from salary, as money received in the new tax year, then this would mean it's a 2016/2017 contribution. Mrs S said that her previous year's contributions came out of her March 2015 payroll and were paid after the 5 April 2015 cut-off. However, this contribution was still classed as falling in the 2014/2015 tax year, so she thought that her March 2016 payroll would fall into the 2015/2016 tax year.

18. On 6 April 2016, Mercer wrote to Stanley Black & Decker and confirmed that the contributions for March 2016 were not paid into the plan by 5 April 2016. It explained that contributions paid via salary sacrifice are treated as employer contributions. Employer contributions are classed as deducted on the date that they are paid into the Plan; so, if the AVC was paid, Mrs S would not be able to apply for FP 2016. As a result, Mrs S' AVC would be held outside of the Plan until Mercer received confirmation of what Mrs S wanted to do.

19. As part of its explanation, Mercer sent a copy of an email regarding a similar case from 2014. In this email, Mercer "strongly recommended" that the Trustee should look into altering its processes to stop this problem occurring again, it said:

> "Although HMRC are aware of this problem, we do not expect them to update their guidance. The same issue arose in April 2012 with the introduction of Fixed Protection 2012 and HMRC took no remedial action then. Hence we strongly recommend that you start to manage this potential issue sooner rather than later, for example by looking to change your processes for the March 2014 contributions (as a minimum for those who are electing for Fixed Protection 2014) or communicating to members so that they opt out of the scheme to avoid any contributions being paid in April. Clearly, depending on the Pension Input Period, you will need to bear in mind any impact on savings versus AA if there is change in when contributions are paid."

20. On 6 April 2016, Mrs S called the Trustee who was unaware that March 2016 contributions wouldn't be included in the 2015/2016 tax year. She said that the Trustee was also unaware of the importance of the date that the contributions are received.

21. On 8 April 2016, Mrs S spoke to the Trustee again. The Trustee now said that it had told Stanley Black & Decker of the importance of when contributions are received.

22. On 4 May 2016, Stanley Black & Decker spoke to Mrs S and confirmed that it had been in discussions with HMRC who said that there was no alternative but to return the contributions to Mrs S or she would be unable to apply for FP 2016.

23. Shortly after, Mrs S received an email from Stanley Black & Decker who informed Mrs S that, “the company has not made a decision as to whether they would make a payment in lieu of contributions for individuals if they decided to take fixed protection”. As a result, Mrs S instructed her IFA to re-assess whether she should apply for FP 2016.

24. On 24 May 2016, Mrs S wrote to Stanley Black & Decker and said that because it is not offering to pay a taxable cash allowance in lieu of employer contributions, her decision regarding an application for FP 2016 was marginal. Therefore, Mrs S wanted to know whether Stanley Black & Decker would backdate its pension contributions if she decided against applying for FP 2016.

25. On 26 May 2016, Stanley Black & Decker emailed Mrs S and said that it was still deciding whether it would make payments in lieu of contributions for members who elected to take FP 2016. It also confirmed that if Mrs S decided to remain a member of the Plan, it would backdate employer contributions back to April 2016.

26. On 29 July 2016, following advice from her IFA, Mrs S confirmed that she had decided against applying for FP 2016. As a result, she wanted part of the funds being held to be paid into the Plan. She said that £23,040 should be paid into the Plan and the rest should be returned to her.

27. On 22 August 2016, Mrs S paid an AVC of £23,040. The remainder of the money being held was returned to her.

28. On 31 October 2016, Stanley Black & Decker and the Trustee responded to Mrs S’ complaint. The response confirmed that the payment of Mrs S’ AVC was made by Stanley Black & Decker within the statutory deadlines, but not received by the Trustee before 5 April 2016, the end of the 2015/2016 tax year. Because it was made within the statutory deadlines, Stanley Black & Decker believed it had met its responsibility to pay contributions. The Trustee said that it was not aware, prior to 6 April 2016, that Mrs S wanted to make an AVC or apply for FP 2016. Once it was aware that Mrs S was considering applying for FP 2016, it did not accept the AVC as this would have caused issues in relation to any potential application for FP 2016. The Trustee noted that Mrs S has since decided to continue being a member of the Plan and has made an AVC of £23,040. It noted that this AVC could have been made at the beginning of the tax year, so offered to add units to her fund of the value of £2,609. However, the Trustee did say that, “It is not the Trustee’s role to advise members (and they are not authorised to do so) nor assist them in minimising their personal tax liability.”

29. On 9 November 2016, Mrs S responded. She said that the Trustee could not say that it was unaware that she was intending to apply for FP 2016 as it had agreed to stop making contributions into the Plan until Inland Revenue confirmed its position. Mrs S also said that neither the Trustee or Stanley Black & Decker had been clear as to how fixed protection affected members. She said that the Plan Administrators, Mercer, had been told that contributions paid through salary sacrifice would only be deemed to be paid on the date the contributions were received. Therefore, it should have known that March 2016 contributions would have been counted as the following tax year and so members should have been informed.

30. On 24 November 2016, the Trustee responded to Mrs S. It said, "the agreement made by the letter of 31 March 2016 did not impute an obligation on the Trustee to facilitate the payment by the employer of additional contributions in respect of you [sic] before the end of the tax year. In fact, you had agreed to terminate your contributions with effect from 1 April 2016." It went on to say that it did not accept that it provided any incorrect information or had a duty to provide Mrs S with further information to assist Mrs S in minimising her tax liability.

31. On 21 March 2018, Stanley Black & Decker sent a response to Mrs S' grievance. It reiterated its position that it had provided accurate information in line with legislative requirements. It also said that it had paid the funds within the legally required timescales. Stanley Black & Decker did not uphold the grievance, but reiterated its offer to compensate Mrs S with a number of units equivalent to £2,609.

32. On 18 May 2018, Mrs S raised a further grievance with Stanley Black & Decker. This grievance was related to Stanley Black & Decker's refusal to allow Mrs S to receive a taxable cash allowance instead of employer contributions to the Plan. Furthermore, Mrs S has complained that other members of staff had been allowed this, so she was being treated unfairly.

33. On 24 September 2018, Stanley Black & Decker responded. It said that there was no formal policy to allow for employees to receive taxable salary in lieu of employer's pension contributions. In addition, it said that Mrs S approached the wrong people when she elected to receive taxable salary. However, it confirmed that Mrs S could apply to its Senior Benefits and Pension Manager UK if she still wished to request a taxable cash allowance in place of employer pension contributions.

34. On 1 December 2018, following a successful application, Mrs S began receiving a taxable salary in lieu of employer's pension contributions.

Adjudicator's Opinion

35. Mrs S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Stanley Black & Decker or the Trustee. The Adjudicator's findings are summarised briefly below:-

- Mrs S wanted to ensure that she was eligible for FP 2016. On 31 March 2016, Mrs S, Stanley Black & Decker and the Trustee completed a form to say that all of Mrs S' pension contributions should cease from 1 April 2016. This shows that Mrs S' priority was to ensure that she was eligible for FP 2016, and both Respondents ensured this option was available to her.

- The Adjudicator was of the opinion that the Ombudsman would not be able to investigate Mrs S' complaint that she would have taken FP 2016, had she been offered a taxable cash allowance instead of employer contributions to the Plan. The Adjudicator said that there was no statutory requirement for employers to offer taxable cash in lieu of pension contributions, nor was there any provision for this within the Plan. As the provision of taxable cash benefit is not related to the management of the Plan, the Adjudicator felt it fell outside of the Ombudsman's jurisdiction.

- The Adjudicator also felt that the Ombudsman would not be able to look at the complaint that Mrs S' colleagues were allowed to take a taxable cash allowance in lieu of employer contributions prior to the FP 2016 deadline. The Adjudicator was of the opinion that this issue did not relate to the management of the Plan, so it was an employment issue.

- In relation to Mrs S' complaint that the respondents should have done more to ensure that Mrs S' AVCs should have been paid in the 2015/2016 tax year, the Adjudicator did not agree. Under Pension Max, all contributions are classed as employer's contributions; so, all contributions are dated by the date the Plan receives the money. The Adjudicator said that it was not until March 2016 that Mrs S wrote to her employer asking to make an AVC and even when she did the instruction did not say that she wanted the AVC to be paid in the 2015/2016 tax year.

- Stanley Black & Decker paid contributions to the Trustee within the statutory timescales; so, the Adjudicator did not think the complaint could be upheld on this point. The Trustee did not receive the funds until after the deadline of the 2015/2016 tax year. As a result, it could not be held responsible for missing the deadline.

- Mrs S has complained that she should have been told of the effect moving to Pension Max had on how contributions were made. She says that she should have been notified that all contributions became classed as employer contributions, which meant they were treated as being made the date the funds were paid into the Plan. She argued that the Booklet says that it "has identified the employees it expects may not benefit from joining Pension Max and has written to them individually to inform them that they will not be enrolled." Her argument is that this shows that Stanley Black & Decker was making a judgment on how Pension Max would impact certain members' personal finances, so it should have told her of the impact it would have when AVCs are considered as paid by HMRC.

- The Adjudicator did not accept this argument, he said that the Introducing Pension Max documentation was an overview of the changes made by the introduction of Pension Max and did not purport to be a detailed document. In addition, the section that Mrs S is seeking to rely on relates to the members who earn less than the Primary Earnings Threshold for National Insurance, so it was imperative that they were told that the potential National Insurance savings were not applicable to them.

- The Adjudicator believed Mrs S' circumstances were of an individual nature, relating to her personal tax liability, so he did not expect Stanley Black & Decker to have outlined any issues relating to FP 2016 or AA.

- In response to Mrs S' argument that the Trustee should have done more to manage the timing of pension contributions, the Adjudicator felt that the respondents did enough to manage the issue. He pointed to its handling of FP 2014, where the respondents combined to ensure that members were able to make AVCs and apply for FP before the end of the tax year. He said that he was of the opinion that Mrs S did not provide enough notice to ensure that her case was dealt with effectively.

36. Mrs S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider.

37. Mrs S provided her further comments which do not change the outcome. Mrs S has argued that:-

- She has now been allowed to take a taxable cash allowance in lieu of pension contributions, so it is reasonable to infer that, had Stanley Black & Decker had a full procedure in place, it would have allowed this back in 2016.

- Stanley Black & Decker did not have a procedure for applying for FP 2016. Therefore, she was unable to make the contributions that would have made the most of her carried forward AA.

- She had approached Stanley Black & Decker prior to March 2016 to confirm what the process would be for stopping her pension contributions and including an AVC in the March payroll. This approach was in person due to her proximity to Stanley Black & Decker's compensation and benefits officer. Mrs S was not told that she needed to make the AVC prior to the March payroll.

- The only communication Mrs S received from Stanley Black & Decker relating to Pension Max was the Booklet. Amongst other things, the Booklet said, "Pension Max will not affect your tax position", "…if you have any questions, you may find the answers in the following section of the booklet. If not, please contact a member of the HR team," and "Pension Max is designed so that most members will benefit from taking part". Mrs S has argued that this correspondence was not thorough enough. She also said that it should have told her of the effect of Pension Max on the change from employer contributions to employee contributions.

- Mrs S has said that she contacted the Mercer helpline in January 2016 asking for information on applying for FP 2016. Mercer did not reply until March 2016 and even then, it only provided a copy of the Pension Plan Booklet, which did not reference FP 2016. Mrs S said that this shows a lack of communication for members who were considering applying for FP 2016.

- Mrs S has argued that she approached the appropriate people at the appropriate times to allow the company to decide whether it would allow a taxable salary in lieu of employer contributions. She said that it should have had time to put this process in place before the FP 2016 deadlines. She believes that a lack of procedures put in place by Stanley Black & Decker restricted her from achieving her preferred outcome.

38. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Ms R for completeness.

Ombudsman's decision

39. I turn first to Mrs S' complaint that Stanley Black & Decker should have provided her with a payment in lieu of pension contributions. She said that had she been given this option at the time, she would have applied for FP 2016. Mrs S contends that there was no procedure in 2016 to allow staff to apply for a payment in lieu of pension contributions, she says that she has since taken this option which shows that the only thing stopping her was a lack of application process.

40. This Office cannot investigate this element of Mrs S' complaint. There is no statutory requirement for employers to offer taxable cash in lieu of pension contributions. Furthermore, there is no provision within the Plan which says that Stanley Black & Decker may provide taxable cash in lieu of pension contributions. This Office can only investigate issues relating to the management/administration of the Plan, so I find this issue falls outside of my jurisdiction.

41. Mrs S has also argued that the respondents did not act quickly enough in arranging payment of her AVCs into the Plan. She said that she originally contacted Mercer's helpline in January 2016 asking for "information on applying for FP 2016". Furthermore, Mrs S has said that she emailed Stanley Black & Decker on 8 March 2016 saying that she would like to make an AVC. However, she did not confirm the importance of making the contribution prior to the end of the tax year. Mrs S has said that she did speak to the Compensation and Benefits Officer at Stanley Black & Decker prior to the email she sent on the 8 March 2016 but was not told of the importance of making AVCs prior to the March payroll.

42. I do not find Mrs S' argument persuasive. It is clear that she was considering applying for FP 2016 and, in February 2016, had been told by her IFA that she should make an Additional Voluntary Contribution (**AVC**) to maximise her pension prior to applying to FP 2016. Given her IFAs involvement I would have expected Mrs S to realise that she could not make any contributions after 5 April 2016, so she should have known of

the importance of the timing of her AVCs. Although Mrs S has said that she relied on the verbal information given to her by Stanley Black & Decker, there is insufficient evidence to show that her employer was aware of her intention to make her AVC prior to the end of the tax year. The earliest evidence of the request was from 8 March 2016 and, by this time, it was already too late. Both respondents did enough to ensure that Mrs S was able to apply for FP 2016, if she required, but without the AVC and the promise of tax-free cash, Mrs S decided not to apply.

43. Mrs S has maintained that Stanley Black & Decker did not communicate the true effects of Pension Max to members. She has argued that the Booklet clearly said that, "it will not affect your tax position" and that, "most members will benefit". Having reviewed the Booklet, I cannot agree with Mrs S' position. It is clear that the Booklet was not designed to detail how changes would affect members personal circumstances. Mrs S was receiving financial advice regarding FP 2016 and whether it would be beneficial to her. As part of her planning she should have been told of the importance of the timings of her AVCs and any potential impact this would have on her ability to take advantage of any carried forward AA. I do not find Stanley Black & Decker responsible for this missed opportunity.

44. Mrs S has also complained that the respondents had not accepted advice from Mercer in 2014, where it said that the respondents should take steps to manage the payment of AVCs to ensure that contributions were made in time to allow a fixed protection application. I have considered this argument but I do not consider that the delay in making payment of an AVC was due to any lack of response to Mercer's advice. The respondents have demonstrated that two members who wished to apply for FP 2014 were able to make AVCs before the end of the tax year and, therefore, were accepted onto FP 2014. The difference between their cases and Mrs S' was that the two members provided enough notice to ensure that their case was processed on time.

45. For the reasons outlined above, I do not uphold the complaint.

Karen Johnston

Deputy Pensions Ombudsman
27 November 2019