

## Ombudsman's Determination

Applicant	Mr N
Scheme	Aegon Section 32 Buyout Policy ( <b>the Policy</b> )
Respondent	Aegon

## Outcome

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

## Complaint summary

3. Mr N's complaint is brought by his financial advisor (**the IFA**) on his behalf. The complaint concerns Mr N being unable to transfer the Policy as there are insufficient reserved and non-reserved units to fund the required cost of providing his guaranteed minimum pension (**GMP**) at retirement age. The IFA says that Aegon's Policy conditions are ambiguous on the matter of transferring non-reserved units away from the Policy, and therefore the "contra proferentem" rule should apply meaning that Aegon should allow Mr N to transfer the Policy's non-reserved units.

## Background

4. In May 1999 Mr N transferred his pension benefits in the Pershke Price Service Organisation Occupational Pension Scheme to a Section 32 buyout plan with Scottish Equitable PLC, now Aegon. The underlying premise of Section 32 policies, such as Mr N's, was that the transfer value would be invested and at retirement the total fund would be used to provide a pension. The pension provided would, however, not be less than the GMP that the policyholder would have received from the transferring scheme.
5. In 2017 the IFA asked Aegon whether the Policy could be transferred to another provider. In its response, Aegon explained that the Policy was invested in reserved and non-reserved units, and had a GMP element which it was obligated to pay. The reserved units of the Policy would be set aside to fund the cost of providing the required GMP. However, as Aegon had calculated the Policy's transfer value was lower than the cash equivalent value of the GMP, it could use the Policy's reserved

non-reserved units to supplement the shortfall in providing Mr N's GMP. Aegon refused Mr N's transfer request on this basis.

6. In February 2017, the IFA complained to Aegon on Mr N's behalf, arguing that the reserved units only should be used to provide Mr N's GMP, and it was unfair to utilise the non-reserved units to supplement the cost of providing Mr N's GMP. Mr N's IFA asked to see the Policy Conditions which set out that Aegon could use non-reserved units, and said:

"In English law there is the concept of "contra proferentem". This means, that when there is confusion in a contract, then it goes against the one putting forward the contract i.e. Aegon. Therefore I would be grateful if you could investigate this, and confirm [Mr N] is able to transfer away the "non-reserved" units".

7. In March 2017, Aegon provided the IFA with a full copy of the Policy Conditions which were in place when Mr N took out the Policy in 1999. The relevant extracts relating to the use of non-reserved units and transfers are set out below:-

"4B Reserved Units.

(1) Scottish Equitable shall provide the GMP Contracted-out Benefits from the Policy proceeds. Reserved Units will be used in the first instance to provide the GMP Contracted-out Benefits. However, if the proceeds of the Reserved Units are not sufficient to provide the GMP Contracted-out Benefits, then Scottish Equitable shall use non-Reserved Units – all as follows. Non Reserved Units include any Unit in relation to Reference Scheme Benefits.

...

(3) Where the value of the GMP Contracted-out Benefits, set out in (2) above (being either the value calculated by Scottish Equitable or the amount to be paid to another Insurer, as applicable) is greater than the value of the Reserved Units, less any deductions made as set out in the Policy, then the excess shall be raised as follows. Scottish Equitable will cancel non-Reserved Units to realise the value of the excess and shall apply that value to secure the GMP-Contracted out Benefits or, as applicable, as premium to another Insurer.

...

(5) If the member wants to vest only the non-reserved units before the reserved units have been vest then the following applies.

(a) Scottish Equitable shall calculate, in line with actuarial principles, the value it should retain so that the required GMP Contracted-out Benefits can be provided

(b) If the value in (a) is greater than the value of Reserved Units, the Scottish Equitable shall re-allocate non-Reserved Units to be classified as Reserved Units.

(c) If Scottish Equitable determines that there are insufficient non-Reserved Units to meet the value in (a), then the Member has no right under the Policy to demand that vesting of non-Reserved Units before vesting the Reserved Units takes place.”

8. In July 2017, the IFA brought Mr N’s complaint to this office, maintaining that the Policy should be transferred as the contra proferentem rule was applicable, arguing “how are the non-reserved units, not reserved, if they can be used to cover the cost of the GMP?” He also highlighted that Aegon had not provided a copy of the policy document which was in place at the time Mr N took out the Policy.
9. Aegon provided its formal response to this office, and in summary said:-
  - It has provided the IFA with a copy of the 1998 Policy conditions, which were in place at the time Mr N took out the Policy.
  - The Policy conditions clearly state that in the scenario where the value reserved units are insufficient to fund the GMP, non-reserved units will be used.
  - The Policy conditions also state that if non-reserved units are insufficient to fund the value of providing the required GMP, the member has no right to transfer their non-reserved units.
  - Upon receiving Mr N’s request to transfer out his non-reserved units only, Aegon carried out the requisite calculations and found that there were insufficient non-reserved units to meet the required value needed in order to pay Mr N’s GMP. Therefore, it was Aegon’s position that Mr N does not have the right to transfer out his non-reserved units, in accordance with the Policy Conditions.

### **Adjudicator’s Opinion**

10. Mr N’s complaint was considered by one of our Adjudicators who concluded that no further action was required by Aegon. The Adjudicator’s findings are summarised briefly below:-
  - The contra proferentem rule provides that where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording, which in this case would be Aegon.
  - However, the Adjudicator did not agree that this doctrine applies. Section 4B (1) of the Policy Conditions clearly states that in a case, such as Mr N’s, where the reserved units of a policy are insufficient to meet the cost of providing a GMP, non-reserved units will be reclassified as reserved units in order for the cost to be met. Section 4B (5) goes on to state that if non-reserved units are being used to meet the required cost of providing a GMP, a member does not have the right to transfer

these units. The Adjudicator did not believe that these provisions were ambiguous or unclear, and therefore the contra proferentem rule did not apply.

- The Adjudicator also said that in view of the wording of the Policy Conditions, it would be inconsistent for Aegon to allow Mr N's policy to be transferred, and it was not unreasonable for Aegon to turn down Mr N's transfer request.

11. The IFA, on behalf of Mr N, did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The IFA provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by the IFA for completeness; they are set out below:-

- The IFA said the Adjudicator's Opinion meant that there is effectively no distinction between reserved and non-reserved units, if non-reserved units can also be used to provide the required cost of paying Mr N's GMP.
- The IFA submitted a copy of the Policy Schedule which states:

“The Reserved Contributions are reserved for a Guaranteed Minimum Pension of £815.36 revalued to State Pension Age of £3,493.36”.
- The IFA argued that the Policy Schedule is a core document which states that reserved units will be used to pay for Mr N's GMP, but it does not state that non-reserved units will be used to pay for the GMP if the performance of the Policy is poor. Whilst the IFA accepted that this is mentioned in the Policy Conditions, he felt that the Policy Schedule “is a key component of this contract. And one that stands out far more, and has greater prominence”.
- Therefore, the IFA contended that non-reserved should not be named as such if they can be reclassified as reserved units, and that this “confusion is exacerbated by the Policy Schedule highlighting that reserved units will pay for the GMP.”

## **Ombudsman's decision**

12. When Mr N transferred his pension benefits to the Policy with Aegon, the expectation would have been that Aegon provide Mr N's GMP as well as additional pension benefits. However, it has transpired that the value of the transferred pension benefits are not enough to fund the cost of the GMP, which Aegon are under a statutory obligation to pay.
13. As this is the case, Aegon has the ability to use Mr N's non-reserved units to supplement the cost of providing the GMP, as set out in the Policy Conditions. However, the IFA has argued that the contra proferentem rule applies because this is not stated in the Policy Schedule he has provided, which he says has greater precedence over the Policy Conditions.

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14. I do not agree with the IFA's position. The Policy Conditions are the terms Mr N agreed to upon signing up to the Policy, and override the Policy Schedule. I do not find that any ambiguity or confusion arises simply because the Policy Schedule does not mention that non-reserved units can be used to provide the cost of providing Mr N's GMP. I agree with the Adjudicator that the Policy Conditions clearly set out that non-reserved units will be used to fund the cost of Mr N's GMP if reserved units are insufficient, and that non-reserved units cannot be transferred if they are being utilised in such manner.
15. Consequently, I find that the contra proferentem rule cannot be used to allow Mr N to transfer his non-reserved units away from the Policy.
16. Therefore, I do not uphold Mr N's complaint.

**Anthony Arter**

Pensions Ombudsman  
13 February 2018