

PENSION SCHEMES ACT 1993, PART X
DETERMINATION BY THE DEPUTY PENSIONS OMBUDSMAN

Applicant	Mr Michael Nower
Scheme	AEGON Scottish Equitable Personal Pension Plan
Respondent(s)	AEGON

Subject

Mr Nower complains that AEGON failed to act on his faxed instruction to take up the HSBC share rights issue.

The Deputy Pensions Ombudsman's determination and short reasons

The complaint cannot be upheld against AEGON because Mr Nower did not contact Capita to enquire whether they received his fax and he took no further action after he sent the fax until two years later.

DETAILED DETERMINATION

Terms and conditions (as relevant)

9. Miscellaneous

(2) Written Communication

(b) Electronic messages

...

(x) It is the responsibility of the Member to ensure that any electronic communication is actually received by Scottish Equitable and Scottish Equitable shall not be held liable where it cannot be shown reasonably that the message was received at the appropriate electronic address.

(c) Fax

The Member understands and agrees that Scottish Equitable may act on a fax which purports to come from the Member, his agent or employer without Scottish Equitable being required to make any future enquiry to verify the sender of the message or the authority to send it, and Scottish Equitable may act on the message accordingly.

(d) Scottish Equitable may communicate anything concerning, required by, or relating to the Policy, and any scheme or arrangement to which the Policy is related, to the Member or to any beneficiary under the Policy, or by any one or more of the following:

...

(iii) by email or electronic communication (which includes the fax and which includes putting information on a website)

Material Facts

1. Mr Nower has had a self-administered pension plan with AEGON since 15 January 2007, which is called a Flexible Pension plan (**the Plan**). This plan is administered by Capita, whom AEGON refer to as their agents.
2. Mr Nower purchased 298 ordinary shares in HSBC on 17 February 2009. The shares became an asset of the Plan. On 5 March 2009, Capita contacted Mr Nower in writing, in relation to the share rights issue announced by HSBC. The HSBC announcement said:

“We wish to advise that the Company has declared a Rights Issue with the following terms:

5 New Ordinary Shares of USD0.50 for every 12 shares held @ GBP2.54 per new share- Ex date 20/03/2009

The Board has announced a fully underwritten Rights Issue to raise Net proceeds of GBP12.5 Billion. The Rights Issue is subject to Shareholders Approval at the AGM on 19th March 2009.

Please note, no new shares will be taken up on your client's behalf if there are insufficient funds available in their account at the time any take up instruction is received by ourselves. **If you wish to participate in the Rights Call on behalf of your client, kindly let us have your instructions by Fax to 01722 414613 or by post for the attention of the undersigned by noon 30th March 2009 at the latest.** If no reply is received by the aforementioned date, no action will be taken and the Rights will be allowed to lapse.”

3. A Corporate Action Instruction form was attached with the letter. On this form, it said:

“CORPORATE ACTION INSTRUCTION

PLEASE FAX YOUR INSTRUCTION TO 01722 414613

FAO: INV OPS/CA006365/CORP ACTION/CR

INSTRUCTIONS TO BE RECEIVED BY: NOON 30th MARCH 2009”

4. The form had options to either take up the option or not to take up the option. I will not state all the various options on how to take up the options.
5. Mr Nower agreed to take up the nil paid rights in full and used his personal computer to fax across the instruction form on 12 March 2009. Mr Nower says that the fax was moved to the “sent folder” on his computer. Mr Nower’s copy of the fax sent stated on the header the following:

“3/12/2009 1:40PM FROM: 012XX XXX036 [Mr Nower’s number]TO:
01722 414613 PAGE: 001 OF 001”

6. Capita sent Mr Nower’s financial adviser, Heath Lambert Consulting (**Heath Lambert**), a statement on 31 March 2009. This statement listed all of the transactions for the month of March, of which there were four and there was no mention of the HSBC share rights issue taken up by Mr Nower.

7. Mr Nower held a meeting with Heath Lambert on 14 July 2011. Heath Lambert sent Mr Nower a valuation of his total investments, including the Plan. Mr Nower emailed, Heath Lambert on 9 August 2011, asking why the HSBC share rights issue was not taken up. He said:

“On 17 February 2009, I bought 298 shares. Sometime in March 2009 there was a rights issue. I took up the rights by fax...However, the number of shares shown on the valuation is only 298?”

8. Heath Lambert forwarded the email to Capita on 16 August 2011. Capita replied on 22 August 2011, saying:

“The fax from Mr Nower to take up the HSBC rights does not appear to have been received by us. The 124 Rights shares, were therefore lapsed and the client received a remittance of £239.44 dated 16/04/2009 into his Stocktrade broker account.”

9. Heath Lambert replied and said that they did not accept the explanation offered by Capita, as Mr Nower could show that the fax was sent to the correct number. Capita replied on 5 September saying:

“...I can confirm I cannot [sic] find any evidence of a fax received from Mr Nower on 12 March 2009. The number that he has faxed it to is for the Document Services Team which means this would have been uploaded straight to our Workflow system, however this has not been done. This would suggest the fax did not go through, if you can provide confirmation the result of the fax was successful we can look into this further for you, but the evidence suggests the attached instruction was never received.”

10. Heath Lambert chased Capita on 5 January 2012, for a response regarding the HSBC rights issue as nothing had been heard. Capita said they sent an email on 5 September, but nothing was heard further from Heath Lambert. Heath Lambert contacted Mr Nower by email on 17 January 2012, asking for copy of the fax receipt or an acknowledgement that the fax was received.

11. Mr Nower replied to Heath Lambert on the same day saying that the fax confirmation he sent is the only evidence he has. He added that he cannot understand how he can actually prove that Capita received the fax, when he sent it from his computer.

12. Heath Lambert said that they had chased Capita as much as they could, but without proof of receipt, there was little further they could do. Mr Nower remained dissatisfied and Heath Lambert formally complained to Capita.
13. Capita on 21 March 2012 issued their final decision. Capita said:

“I have checked Mr Nower’s records and have been unable to locate that the fax dated 12 March 2009 was received at our office. The fax confirmation does not provide evidence that this was sent or successfully received. The fax number noted on the top of the confirmation is our main fax machine that is located in our post room, all faxes are scanned on our workflow system by the post room.

As we have been unable to locate the fax we have not been able to process the HSBC rights issue.”

Summary of Mr Nower’s position

14. Mr Nower has said that while AEGON say there is an onus on him to check whether the fax has been received, there must also be a duty of care on Capita to ensure that the fax machine was operational.
15. Mr Nower says that he has a fax confirmation, which would only be produced once the fax was sent.
16. He does monitor the share and stock prices generally to see how well his investments are performing. But he does not check the Plan holdings regularly, as he considers it a long term investment.
17. Mr Nower says that Heath Lambert would not have been aware that he agreed to accept the share rights issue, as he did not tell them. Mr Nower did not receive a copy of the March 2009 statement from Heath Lambert, and generally did not receive copies of monthly statements from Heath Lambert. The first statement he received from Heath Lambert, was the one he asked for in July 2012.
18. Mr Nower’s loss is that he does not have the additional 124 shares within HSBC, which he would have done had the fax been processed by Capita. He has lost out on the additional dividends he could have earned from HSBC if he had the additional shares with HSBC. He wants AEGON to add 124 shares in HSBC to the Plan.

19. Mr Nower says that AEGON are relying on one section within the terms and conditions to avoid accepting responsibility for their mismanagement of his investment. AEGON are expecting him to go through the terms and conditions and take note of the section 9(2)(x). Yet AEGON have not produced any evidence that he received the terms and conditions and acknowledged its content.
20. Mr Nower adds that AEGON have not produced any evidence to show that other members who sent electronic messages did contact AEGON to check whether the messages were received.
21. AEGON did not state in their letter of 5 March 2009 that there was a requirement on Mr Nower to check that any electronic messages sent were received by AEGON.
22. Heath Lambert were acting in a non-advisory capacity therefore there was no need to tell them that he decided to take up share right issue. Mr Nower says that even if Heath Lambert were told and they contacted AEGON, he says that AEGON's response would not have been any different.
23. Mr Nower says that while reliance is placed on the fact that he cannot prove that AEGON received the fax likewise AEGON cannot prove that they did not receive the fax, he adds that this contradiction does not deny the existence of a contract between both parties.

Summary of AEGON's position

24. AEGON have said that, it is the responsibility of the sender of the fax, to make sure that AEGON or their representatives have received it. They cite paragraph 9(2)(x) of the terms and conditions , which relates to electronic messages, in which it states that the sender has to make sure that messages are received by AEGON.
25. Further, AEGON say that within the terms and conditions, faxes are defined as electronic communication under paragraph 9(2)(d)(iii), hence paragraph 9(2)(b)(x) is applicable in this instance.
26. AEGON have said that a copy of the terms and conditions was sent to Heath Lambert on 18 January 2007, when the Plan was created. The letter of 18 January stated:

“Thank you for your client’s [Mr Nower] application for a pension plan with us. This has now been accepted so please find enclosed:

- a policy schedule which should be kept along with the policy conditions booklet (see below)
- a policy conditions booklet describing the general contractual provisions of the plan.”

27. AEGON add that if the terms and conditions booklet was not enclosed with the above mentioned letter, they would have expected Heath Lambert or Mr Nower to have contacted them.
28. With regards to the fax sent, AEGON say that Mr Nower should have retained a copy of the transmission sheet after he sent the fax. This would have confirmed that the fax had indeed been sent. Mr Nower has not given any reasons why there was no transmission sheet.
29. AEGON add that they do not have Capita’s incoming fax records from March 2009, as Capita only keep the incoming fax records for a period of six months.
30. AEGON said that according to their records, Capita did not have a reported malfunction with their fax machine on the day Mr Nower says he sent the fax.
31. In addition, AEGON say that Mr Nower should have monitored his plan and noticed much earlier that the share rights issue was not taken up, rather than notice two years after the cut-off date.

Conclusions

32. The crux of Mr Nower’s complaint is that AEGON failed to act on his faxed instruction to take up the HSBC share rights issue in March 2009.
33. Within the terms and conditions, section 9(2)(x) says, “It is the responsibility of the Member to ensure that any electronic communication is actually received by Scottish Equitable and Scottish Equitable shall not be held liable where it cannot be shown reasonably that the message was received at the appropriate electronic address.”

34. Section 9(2)(x) has a two limbed criteria, firstly the member must ensure that any electronic communication is received by AEGON (formerly Scottish Equitable) and secondly AEGON cannot be held liable where it cannot be shown reasonably that the message was received at the electronic address.
35. Mr Nower says that AEGON have not shown that he received the terms and conditions and acknowledged the content, including section 9(2)(x). But AEGON have said that a copy of the terms and condition was sent to Heath Lambert on 18 January 2007. As AEGON had sent it to Heath Lambert, it was for Heath Lambert to share it with Mr Nower and for Mr Nower to then familiarise himself with the contents of the terms and conditions.

Did Mr Nower ensure that the electronic communication was received?

36. The key words within this clause are “electronic communication”. The terms and conditions says that AEGON consider faxes as electronic communication as defined within section 9(d)iii. So as faxes are electronic communications, it follows that Mr Nower held a responsibility to ensure that Capita received the fax he sent on 12 March 2009.
37. Mr Nower says he has proof that a fax was sent and therefore his responsibility ends with the copy of the fax confirmation from his “Sent” folder on his personal computer. While this confirmation shows a fax was sent to the correct number, it does not confirm whether the fax was successfully transmitted. Mr Nower has not produced any further evidence that can show the fax was transmitted successfully. The confirmation sheet, which Mr Nower has, does not satisfy me as to whether the fax was received by Capita. This is why it was essential for Mr Nower to have contacted Capita to check whether it was actually received by Capita.
38. It is not necessary for AEGON to provide evidence of how many members contacted them after sending electronic messages. As it was still Mr Nower’s responsibility to check with Capita over the phone to ask them whether the fax had been received rather than assume it had been received. As Mr Nower was intending to buy the share rights issue, it was in his interests to do so. Had he done so, he would have been told by Capita that the fax was not received and therefore he would have had an opportunity to send it again.

Can Mr Nower show that the fax was received?

39. It follows from the first limb of section 9(2)(x), that as Mr Nower cannot reasonably show that the fax was transmitted successfully, therefore AEGON cannot be held responsible for the share rights issue not been taken up. Mr Nower may have held the expectation that the fax was received and acted on, but there is no evidence to say that Mr Nower did anything further to ensure that the fax was received.
40. Further Mr Nower did not inform Heath Lambert that he had taken up the HSBC share rights issue. The March 2009 statement sent by Capita to Heath Lambert made no mention of any share rights taken up. I do not agree with Mr Nower's assertion that had Heath Lambert known, AEGON's position would have remained unchanged. Had he told Heath Lambert, they could have monitored the March 2009 statement to see whether the HSBC share rights issues had been taken and if it had not then chased Capita much sooner or contacted Mr Nower for further instructions.
41. It is my view that Mr Nower has not done enough to satisfy me that he ensured that Capita received the fax for him to take up the share rights issue in accordance with the terms and conditions.

Subsequent events

42. Mr Nower only enquired about the share rights issue in August 2011, over two years after he sent the fax. I do not consider this to be reasonable length of time. Capita did not state in the acceptance form that Mr Nower should contact them to check that the form was received. But had Mr Nower been monitoring his plan on a regular basis, he would have known much sooner that the share right issue had not been taken up. This would have allowed him to then take the matter up with Capita whilst they still had the incoming fax records for March 2009.
43. As Mr Nower did not maintain an active interest in the Plan, it follows that he cannot two years later say that he has lost the opportunity to buy the share rights issue, when he within the terms and conditions held a responsibility to enquire whether the fax was received when he sent it on 12 March 2009.

44. Finally, Mr Nower wants AEGON to buy the number of shares he could have received in March 2009. He adds that because he agreed to take up the share rights issue and sent a fax, he and AEGON have entered into a contract. The contract to take up the share rights issue would only have been effective, if it could be shown that Capita had received the fax. As I have said above Mr Nower cannot show that Capita received the fax, hence it was imperative for Mr Nower to have contacted Capita after he sent the fax in order to establish a contract between he and AEGON. Therefore in the absence of any confirmation that Capita received the fax, there was no contract between Mr Nower and AEGON to take up the share rights issue.
45. For the reasons above I do not uphold the complaint.

Jane Irvine
Deputy Pensions Ombudsman

10 February 2015