

## Ombudsman's Determination

|             |  |
|-------------|--|
| Applicant   | Ms S   |
| Scheme      | Scottish Widows Personal Pension Plan          |
| Respondents | Scottish Widows plc ( <b>Scottish Widows</b> ) |

### Outcome

1. I do not uphold Ms S' complaint and no further action is required by Scottish Widows.
2. My reasons for reaching this decision are explained in more detail below.

### Complaint summary

3. Ms S' substantive complaint against Scottish Widows is that the cash equivalent value (**CEV**) of her ex-husband's annuity, resulting from the pension sharing order (**PSO**), is 7% lower due to Scottish Widows misinterpreting that both parts of her ex-husband's policy were subject to the Gender Directive. Also, she has complained about an administrative error informing her that the CEV was almost £100,000 less than the correct value.

### Background information, including submissions from the parties

4. Ms S' ex-husband took out a personal pension with Scottish Widows in April 1987. There were two elements to his policy (ZYP319822.1 and ZYP319822.2 – hereinafter referred to as parts 1 and 2); one for non-Protected Rights and the other for Protected Rights.
5. In or around May 2006 Ms S' ex-husband retired. He used his policy's proceeds to buy an annuity.
6. Ms S was subsequently divorced. The Divorce Decree Absolute was dated 8 April 2011.
7. The Finalised Court Order (**the Order**), dated 2 October 2012, was issued following the earlier Financial Dispute Resolution hearing on 11 January 2011. The Order acknowledged that the parties had signed Heads of Agreement at court on

11 January 2011. It also included a reference to a Pension Sharing Order (**PSO**) at Recital M, and said:

“AND UPON the parties acknowledging that they instructed Bradshaw Dixon to prepare a report on the pension sharing order necessary to provide the parties with equal incomes in retirement, the parties having each paid one half of the costs of that report and shall be equally responsible for the costs of implementation of the pension sharing order.”

8. The provisions of the PSO were set out in annexes to the Order, and said the specified percentages of the member's CEV to be transferred were 66% and 100% for parts 1 and 2 respectively.
9. On 17 December 2012, Scottish Widows quoted a total CEV of £187,202 (split £164,851 for part 1 and £22,351 for part 2). Both the member's benefits and reversionary spouse's benefits were valued, and had been based on gender rates when valuing the annuities. Ms S' share was £131,152.66 (i.e. £108,801.66 and £22,351 respectively).
10. In a judgment delivered on 1 March 2011 (known as the Test-Achats ruling), the European Court of Justice (**ECJ**) declared Article 5(2) invalid with effect from 21 December 2012.
11. On 22 December 2011, the European Union Commission issued guidelines on the application of Council Directive 2004/113/EC to insurance, in light of the judgment of the Court of Justice of the European Union in Case C-236/09 (Test-Achats ruling). Extracts are shown in the attached Appendix.
12. Scottish Widows says it had four months to implement the PSO (as per section 29 of Welfare Reform Pensions Act 1999) – the four months running from either the date on which the Order takes effect, or the first day on which it is in receipt of all the relevant information and documents it requires in order to allow it to implement the PSO.
13. Ms S' application for a Personal Pension (Retirement Account) was received by Scottish Widows on 24 April 2013.
14. Scottish Widows calculated a total CEV of £175,697 (split £153,333 for part 1 and £22,364 for part 2) as at 24 April 2013. These CEVs were quoted on unisex rates. Ms S' share was £123,563.78 (i.e. £101,199.78 and £22,364 respectively).
15. These values (i.e. £101,199.78 and £22,364) were transferred to a new policy in Ms S' name on 7 May 2013.
16. On 8 May 2013, Scottish Widows wrote to Ms S telling her that the PSO had been implemented, but unfortunately said the sums of £10,199.78 and £22,364 (i.e. £32,563.78) had been transferred. Scottish Widows accepts there was a typing mistake in its letter and a digit was missed. It should have said £101,199.78.

17. Internal email correspondence within Scottish Widows, dated 13 May 2013, shows that Ms S' IFA telephoned them to query the error, and questioned the calculations as the decrease was 8%.
18. Scottish Widows emailed Ms S' IFA on 14 May 2013, explaining that the 7% decrease (between £164,851 and £153,333 on part 1 of her ex-husband's policy) was mainly due to (i) the change in basis to comply with new gender-neutral legislation and (ii) future interest rate assumptions related to current market conditions. Initially, there was no mention about part 2 of his policy, but in response to a further query about why its value had not changed, an explanation was given later that same day (see below). Ms S' IFA was also asked if he was content for Scottish Widows to write to Ms S with its apology and amended letter.
19. An administrator at Scottish Widows says she remembers writing to Ms S (and believes the IFA too) to apologise for its error. Scottish Widows cannot produce these letters, however.
20. On 15 May 2013, Ms S' IFA started corresponding with Scottish Widows about the European Commission's Guidelines on the Gender Directive, and further correspondence ensued.
21. On 22 May 2013, policy documentation for Ms S' new policy was issued by Scottish Widows for the transferred amount of £123,563.78.
22. Scottish Widows wrote to Ms S' IFA on 12 June 2013. It accepted its letter of 8 May 2013 contained an error, and sincerely apologised for that error. Whilst it accepted errors had been made, it considered it had acted appropriately in checking that the calculation was correct. It said it used the rates applicable on the valuation day – 24 April 2013 – to work out the cash equivalent transfer value, and if this date was after gender neutral pricing came into force then Scottish Widows' view was that gender neutral rates should apply.
23. Scottish Widows has provided the following additional information during our investigation:

Part 1 of Ms S' ex-husband's policy

CEV for transfer on gender basis = £164,851 as at 17-12-2012.

CEV for transfer on unisex basis = £161,112 as at 17-12-2012 (unisex basis also allows for improvement in mortality). A reduction of 2.27%.

CEV for transfer on unisex basis = £160,738 as at 24-04-2013 (allowing for changes such as age, four months' less annuity payment etc but NOT allowing for changes in market conditions (e.g. interest rates). A reduction of 0.23%.

CEV for transfer on unisex basis = £153,333 as at 24-04-2013 also allowing for the effect of market condition / interest rates change (3.21% at December 2012 and 3.59% at April 2013). A reduction of 4.60% due to market conditions.

**Part 2 of Ms S' ex-husband's policy**

Originally an annuity of £1,182.48 per year was valued at December 2012, when giving a CEV of £22,351. Whilst this has been subject to the same reduction due to factor changes, it was found in January 2013, that the correct annuity should have been £1,272 per year (i.e. 7.57% higher). As a result, the CEV on part 2 at April 2013 was £22,364 – it changed slightly as the 7.57% increase in annuity offset the reduction caused by the change in underlying factors.

24. Ms S' position is that Scottish Widows has misinterpreted that her former husband's policy was subject to the Gender Directive. Ms S believes Guideline 10 is relevant, and believes the amounts to be transferred to her should not be subject to the Gender Directive because her former husband's policy was not a new contract. She is seeking £300 compensation for the distress and inconvenience for this error, and £500 compensation for the stress surrounding the notification that the amount to be transferred was much less than it really was.
25. As the date of calculation was after 21 December 2012 (i.e. 24 April 2013), and pension benefits were moving from one scheme to another scheme, Scottish Widows believes unisex rates should apply.

**Adjudicator's Opinion**

26. Ms S' complaint was considered by one of our Adjudicators who concluded that no further action was required by Scottish Widows plc. The Adjudicator's findings are summarised briefly below:
  - part of the reduction in the CEV between 17 December 2012 and 24 April 2013, is due to factors other than unisex rates;
  - Scottish Widows has interpreted the European Commission's guidelines on the Gender Directive correctly, and it is appropriate to use unisex rates when determining the sum to be transferred to Ms S' new policy;
  - whilst the typographic error made when telling Ms S of the amount transferred to her was maladministration, the correct amount was transferred to Ms S' new policy, and a phone call by Ms S to Scottish Widows could have quickly put her mind immediately at rest.
27. Ms S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The further comments from Ms S' representative are mainly twofold; the opinion did not recognise that the values of the pensions to be transferred to Ms S were derived from her former husband's existing pensions. Also, the Gender Directive was clear; it applied to new policies only. I agree with the Adjudicator's Opinion, summarised above, and I will, therefore, only respond to the key points made by Ms S for completeness.

## Ombudsman's decision

28. Ms S' main argument is that the Gender Directive only applies to new policies. I think focusing on when a policy came into effect is too simplistic.
29. Guideline 5 from the EU Commission says the unisex rule contained in Article 5(1) must be applied without any possible exception in relation to the calculation of individuals' premiums and benefits in new contracts. I would highlight 'contracts' as opposed to 'policies'.
30. Ms S' new policy was a new contract and so there should be no doubt that any annuity secured from any CEV under her new policy will be subject to unisex rates. But that is only half the story, and not relevant to her complaint.
31. Ms S' contends that when valuing her former husband's existing annuity it should be assessed on gender rates rather than unisex rates, thereby increasing the value of her former husband's annuity benefit and ensuring a higher transfer value to Ms S.
32. Despite her former husband's policy beginning before 21 December 2012, the contractual effect of transferring a proportion of his pension annuity to Ms S only happened after 21 December 2012. Guideline 7 says the Test-Achats ruling means that for new contracts (not policies) concluded as from 21 December 2012, this rule has to be applied without any exception.
33. Guideline 9 says that the Directive does not define the concept of a 'new contract', which is unhelpful. Nevertheless, Guideline 10 requires a clear distinction between existing and new contractual agreements. Whilst Ms S' former husband's policy may have started before 21 December 2012, it does not mean that a transfer of his pension rights from him to Ms S does not constitute a new contractual agreement. Indeed, Guideline 11 states that the unisex rule pursuant to Article 5(1) must apply whenever a) a contractual agreement requires the expression of consent by all parties is made, including an amendment to an existing contract and b) the latest expression of consent by a party that is necessary for the conclusion of that agreement occurs as from 21 December 2012.
34. I observe that HMRC's guidance on drawdown policies and amended regulations mean pension providers must use non-gender specific rates when calculating the "annual amount" payable by a notional equivalent annuity. The change applied to reference periods beginning on or after 21 December 2012 and drawdown pension years on or after 21 December 2012. Although, there is a difference in calculating the maximum pension drawdown to calculating a cash equivalent value, it does demonstrate the fact that a drawdown policy which began before 21 December 2012 was still subject to the effect of the ECJ Test-Achats case having effect to contractual changes made after that date.
35. I therefore do not consider there was maladministration by Scottish Widows when calculating the cash equivalent value as at 24 April 2013.

**PO-6789**

36. On Ms S' other complaint, I will not make an award for distress and inconvenience unless it is significant.
37. Ms S would have had awareness from earlier quotations of the likely total CEV, and I am sure Scottish Widows' letter of 8 May 2013, would have come as an initial shock, but any distress should have been relatively short-lived as a phone call to Scottish Widows would have revealed the typing error in its letter.
38. Therefore, I do not uphold Ms S's complaint.

**Anthony Arter**

Pensions Ombudsman  
4 July 2016