

## Ombudsman's Determination

<b>Applicant</b>	Mr Simon Bower
<b>Scheme</b>	Rimmer Brothers Pension Scheme ( <b>the Scheme</b> )
<b>Respondent</b>	Aegon

### Complaint Summary

Mr Bower has complained that Aegon applied a penalty charge to the value of his fund when it was transferred to a new Aegon pension arrangement. He was not told beforehand that a charge would apply and he asserts that the transfer value quoted should be honoured in the new plan.

### Summary of the Ombudsman's Determination and reasons

The complaint should not be upheld. Although there was admitted maladministration in that Mr Bower's benefit statements and transfer valuation contained incorrect information, Aegon have made an adequate offer of compensation, including, reinstatement and a payment for distress and inconvenience.

## Detailed Determination

### Policy Terms and Conditions

1. The terms and conditions that applied to the Scheme are contained in the Policy Booklet and the relevant conditions are set out in the Appendix to this decision.

### Material facts

2. Mr Bower is employed by Rimmer Brothers (the **Company**) and was a member of the Scheme from May 1994. It is a Group Personal Pension Plan (the **Plan**) and was taken out with Scottish Equitable (now known as Aegon, which is a brand name of Scottish Equitable).
3. Mr Bower received annual statements which provided information about the value of his fund in the Plan, possible retirement benefits and a transfer value. As far as Mr Bower can recall, the transfer value and the fund value provided in the annual statements have always been the same.
4. Recent annual statements sent by Aegon included a note next to the transfer value amount which said “this is the amount you could transfer to another plan”. An additional guidance note about the transfer value said:

“Your transfer value takes into account any charges that we’ll deduct if you take your money out of this plan.”
5. In June 2013, a new plan for the Scheme, the Aegon Retirement Choices Plan (the **ARC**) was established by the Company for a number of reasons (including: to reduce the charges to the Scheme; provide greater fund choice and flexibility for members; and make it compliant with the requirements for automatic enrolment).
6. In advance of the transfer, Aegon prepared and pre-populated all the individual transfer forms for all the members of the Scheme. In all instances, the total fund value and the transfer value matched the information that had been quoted in the members’ previous annual benefit statements.
7. At no point was it explicitly clear that the transfer value would be lower than the amount that had been quoted or was printed on the transfer authority forms. Mr Bower (and the other members) accepted the transfer figures and the transfer to the ARC was eventually concluded in May 2014.
8. In June 2014, Mr Bower’s colleague queried his fund value in the ARC with the Company’s independent financial advisor (the **IFA**). After making enquiries, it was established that the transfer value from the Plan to the ARC had been reduced. For Mr Bower, the transfer value quoted was £68,146.13 but the actual transfer value was £66,454.65. (This is a difference of £1,691.48.)

9. An exchange of correspondence followed between Aegon and the IFA. Following an investigation, Aegon accepted that the values on the member statements had been overstated for a considerable time. It said that this was due to an underlying error which showed the 'return of value' which applied on the death of a member, rather than reflecting the true transfer value inclusive of the penalty that applied. Aegon confirmed that a transfer penalty applied to Mr Bower's plan in line with the terms and conditions of the Plan. It said the penalty had been correctly applied and that Mr Bower had received his full entitlement on transfer.
10. Aegon agreed that it had set a false expectation of what the transfer value amount would be and apologised for the disappointment and inconvenience this had caused Mr Bower. Aegon offered to pay Mr Bower £350 compensation. It also said Mr Bower could choose to leave his plan in the ARC, or, if he would have declined to transfer because of the penalty, he could opt to have his former plan reinstated to put him in the position he would have been in had no transfer taken place.

**Summary of Mr Bower's position, as presented by the IFA**

11. At all times, Mr Bower's annual statements had shown that the fund value and the transfer value were at least equal.
12. Prior to the transfer, Aegon had prepared and provided all the figures used on the pre-populated transfer authority forms. Mr Bower's form showed the same transfer value amount without a reduction for penalties.
13. Mr Bower relied on the figures provided by Aegon and accepted them as correct.
14. After receiving the signed transfer authority form, Aegon processed the transfers at a reduced amount without warning Mr Bower or mentioning it to him.
15. The 'Treating Customers Fairly' policy should be applied here as Aegon's dealing with this case has been "nothing short of offhand".
16. If Aegon had provided the correct information regarding the penalty (when the IFA took on the role of adviser to the Scheme in November 2005), remedial action could have been taken long before the ARC was set up. The IFA says that accrual in the Plan could have ceased and contributions could have restarted in a new policy within the Scheme, so that a significant portion of Mr Bower's pension would have been in an un-penalised plan.
17. Although reinstatement to the Plan is an option for Mr Bower, it does not represent the best client outcome. The Plan was subject to high level (government and regulatory) criticism and Mr Bower will not be able to access the new pensions freedoms if he is reinstated. As Aegon has indicated that existing plans will not be altered, it is effectively forcing members to transfer to alternative plans.
18. Condition 6 (a) says the early withdrawal deduction is calculated using formulae for that class of policy which is "applicable from time to time, details of which are

available on request". The IFA says this allows for variance in the Plan and the position in relation to penalising transfers is not absolute. It could be said that Aegon's production of the benefit statements and also the request for a transfer value on the Plan is indicative of whatever may be applied at that time. Condition 6 (b) contains the same sentence. The wording of Condition 6 (c) also confirms the discretionary nature of any penalty that could be applied. The IFA says in light of this, it is reasonable for any member to accept Aegon's provision of a penalty free transfer value as being factually correct and not a 'systems error'.

19. With reference to Condition 6 (d), the IFA highlights the words "if any" which refers to the deduction to be applied. He points out that Aegon did not issue an actuarial certificate to Mr Bower showing a transfer penalty.
20. The IFA says that since the terms and conditions allowed anything from a penalised transfer value to a full value, if a penalty was to apply, it was Aegon's responsibility to confirm this to Mr Bower in writing. This did not happen. The transfer completed on the basis of the full value. This was allowed under the terms and conditions. Mr Bower accepted the value stated on the transfer authority and signed it. This should therefore make the amount contractual.
21. From June 2014, the IFA has spent a considerable amount of time dealing with Aegon in order to resolve the issue. He has also made lengthy submissions to the Financial Ombudsman Service and to this service. The total costs amount to £3,000 plus VAT. Mr Bower says the IFA's professional fees, which were incurred as a direct result of Aegon's maladministration, should be recovered from Aegon.

### **Summary of Aegon's position**

22. Aegon say a transfer penalty applied to Mr Bower's plan in accordance with Condition 16A of the terms and conditions of the Plan. The Plan was set up with assistance from a financial advice company, so it would have been reasonable to expect that the transfer penalty would have been discussed at the selling stage. Aegon maintain it confirmed the penalty when it issued the plan conditions at outset of each plan.
23. The penalty applied to Mr Bower's plan was accurate and he received his full entitlement on transfer. As the penalty was correctly applied, Aegon do not consider it appropriate to waive the transfer penalty because the overstated amount was not money that Mr Bower was entitled to.
24. Aegon say that imposing a penalty on an internal transfer (from one Aegon plan to another) is also in accordance with the terms and conditions of the Plan. Not applying the penalty would amount to a windfall for Mr Bower, and would be unfair to other policy holders.

25. Aegon accept that while the terms and conditions referred to the penalty, because of the errors in the annual statements (which showed that the fund value and the transfer value were the same), it was reasonable for Mr Bower not to know about the penalty. Aegon apologise for the inconvenience this caused Mr Bower.
26. Aegon say that in many situations where there has been misinformation, it is not possible to go back. This is not the case here. It is willing to transfer Mr Bower back into the Plan and remove any loss he may have suffered.
27. Aegon say that it is likely that Mr Bower would have transferred to the ARC despite the penalty. It deduced this from the IFA's comments about the benefits of the ARC. The benefits included broader investment options and the adoption of the new pension legislation. Aegon noted that the IFA said these were "important for member considerations in the future".
28. Aegon say that its offer of settlement amounts to a fair and reasonable resolution of Mr Bower's complaint.

## **Conclusions**

### *Terms and conditions*

29. The starting point for considering the penalties (if any), that are applicable on a transfer out, is the relevant terms and conditions for the plan in question. Condition 16A is the relevant condition that must be considered here.
30. The IFA has said that Condition 6 allows a discretion for when a transfer penalty would be imposed.
31. I disagree. Condition 16A requires a deduction in line with the early withdrawal formula in use at the time '*there shall be deducted* such sums, if any, calculated in accordance with the provisions of Conditions 6 (a), (b) and (c) as if the date of realisation were the Pension Commencement Date..'. Similarly condition 6 says the deduction '*will be calculated*' and '*shall be deducted*'. In my view, the 'if any' wording in condition 16A and 6 (d) recognises that the required calculation may produce a nil figure on the facts. It does not give a discretion whether or not to make a deduction which in fact results from the calculation.
32. Condition 6 (d) states that an actuary's certificate will be treated as conclusive evidence, but in my view does not require a certificate as a prerequisite for the application of a transfer penalty.

### *Benefit statements and the bulk transfer to the ARC*

33. Aegon sent Mr Bower annual statements showing his benefits in the Plan. As far back as he recalls – and certainly from 2009 onwards (as Aegon's own records showed) – the fund value and the transfer value on the statements were the same amount. The guidance notes confirmed that the transfer value amount is what would be paid out if

Mr Bower left the Plan. Another note said the amount had taken any relevant charges into consideration.

34. Aegon have confirmed that these statements were incorrect and said that they were incorrect due to an underlying system error. As a consequence of their error, Aegon misinformed Mr Bower over a prolonged period.
35. Turning now to the events surrounding the bulk transfer to the ARC, I have noted that Aegon provided all the figures relating to the transfer to the IFA prior to the transfer. Aegon also sent the transfer authority forms to the IFA which confirmed the amount that was being transferred from the Plan. This form did not show a reduced figure for the transfer amount.
36. A short while later, Aegon processed the transfer and applied the penalty. It did so without alerting Mr Bower and/or the IFA that incorrect information had previously been provided and that it was being corrected.
37. The IFA asserts that the transfer value was contractual as a result of the transfer authority forms that Aegon produced. I do not agree. The transfer authority form still referred to the amount being transferred as “estimated”. Certainty of terms is required for a contract and I am not satisfied that this form had contractual effect in relation to the exact amount to be transferred. It was a statement, an admitted misstatement, of the pre-existing terms, not an offer of new and different ones.

*Estoppel by representation*

38. Aegon’s provision of the erroneous statements and their subsequent transfer of a different amount without notice is undoubtedly maladministration on its part. My usual approach in cases where maladministration is identified is to try to put the parties, so far as possible, back into the position they would have been in had the maladministration not occurred. However, my approach is subject to there being another remedy available to the applicant.
39. In cases involving misinformation there may be circumstances where it would be unconscionable not to allow a claimant to rely on incorrect information provided to him. Estoppel is an equitable remedy applied by the courts where the particular circumstances would make it unfair (unconscionable) to allow a party to go back on their representation. I do not consider that is so in this case.
40. To succeed with a defence of estoppel by representation, a person needs to establish an unambiguous representation on which he or she relied in good faith to their detriment. These requirements were elaborated in the case of *Steria v Hutchison* [2006] 64 PBLR. In that case Neuberger LJ said as follows:

“When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could also satisfy the three classic requirements. They are (a) a clear representation or promise

made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it.”

41. Aegon made a clear representation to Mr Bower that his transfer out of the Plan would be at the same value as his fund value in the Plan. Aegon repeatedly made this representation to Mr Bower over time (i.e. with each erroneous benefit statement that it sent him). Aegon then confirmed its position at the point when Mr Bower's benefits were being prepared for transfer out to the ARC. To apply the test above, it is necessary to consider the benefit statements and the transfer valuation separately. It was reasonably foreseeable that Mr Bower would act on the erroneous benefit statements, to inform his decisions whether to leave his money invested and whether to make further contributions in future. It was also reasonably foreseeable that he would act on the information in the transfer authority forms when he made the decision to transfer his benefits. In light of this, I find that the first requirement has been satisfied in respect of the benefit statements and the transfer valuation.
42. Going on to whether Mr Bower acted reasonably in reliance upon each of those representations. The IFA makes the reasonable point (para 16) that members would have been better off ceasing contributions into the Plan with exit penalties and in future putting their money into the one without. I have therefore considered whether Mr Bower's conduct relied on the representations contained in the benefit statements to any significant degree prior to the decision to transfer. I can see no evidence that it did. By Spring 2006, the IFA had reviewed the Scheme, had ascertained that new entrants were being offered penalty free exit, and had introduced a batch of new entrants to it. However, existing members like Mr Bower were not advised about their transfer options until much later. There is no suggestion that Mr Bower ever turned his mind to the question of whether his scheme imposed exit penalties until after the transfer had taken place.
43. Mr Bower says he relied on the information provided by Aegon when he signed the transfer authority form to transfer to the ARC. I find that it was reasonable for him to rely upon the representation given in the transfer value quotation when authorising the transfer and that he did so in fact. I am therefore satisfied that the second requirement has been satisfied in respect of the decision to transfer.
44. The final question is whether I am satisfied that Mr Bower will suffer detriment if Aegon is not held to the promise which induced him to transfer, ie to the promise of the higher transfer value. I do not consider that he will. Any irremediable detriment, such as inability to access the better terms of the new plan without paying a penalty, flows from the original terms of the policy rather than the misrepresentation. I agree

that any loss arising from the decision to transfer can be remedied by the offer to reinstate Mr Bower in membership of the original Plan. Aegon's offer to Mr Bower of remaining in the ARC or transferring back to the original Plan still stands. Ultimately, it is for Mr Bower to decide what he wants to do. If he chooses to transfer back, I would expect that Aegon would make good any losses incurred as a consequence of the transfers.

*Distress and inconvenience and costs of representation*

45. Inevitably, this whole matter has caused Mr Bower distress and inconvenience. Aegon's offer of £350 is reasonable compensation in the circumstances. In reaching this conclusion, I have regard to the fact that the complaint predates the Ombudsman's review of its policy on the usual level of awards of this type.
46. It is not normal practice to reimburse costs as it is possible to bring a complaint to our Service (using the assistance of the Pensions Advisory Service, for example) without needing assistance from a professional adviser. There may be occasions where reimbursement is possible, but in directing reimbursement I must be satisfied that the applicant acted reasonably in employing professional assistance. Broadly, the applicant could be said to have acted reasonably in employing professional assistance in circumstances where the complaint was extremely complex or contentious, or involved very significant sums, or the applicant had mitigating personal circumstances. I do not think that any of these factors apply here and, as a consequence, I do not think it is reasonable for Aegon to cover the IFA's costs.
47. For the reasons given above, I do not uphold Mr Bower's complaint.

**Karen Johnston**

Deputy Pensions Ombudsman

14 December 2015



## Appendix

### Reflex Personal Pension Policy Booklet (PP8)

#### **“Condition 6 – Pension commencement date**

- (a) On the Pension Commencement Date selected in accordance with Condition 5A, the Allotted Units comprising the Member’s Fund in respect of the Policy or Policies in question (excluding the Protected Rights Fund) shall be cancelled at Bid Price and, subject as aforementioned, the sum realised shall be applied to provide benefits in accordance with the Rules.

Where the Pension Commencement Date is earlier than the Pension Date, an early withdrawal deduction will be calculated by Scottish Equitable by reference to the early withdrawal formulae for policies of this class applicable from time to time, details of which are available on request.

- (b) On the State Pension Age of the Member (or such other date allowed by the Rules and as may be agreed between the Member and Scottish Equitable preceding the seventy-fifth birthday of the Member) the Allotted Units in the Protected Rights Fund shall be cancelled at Bid Price and, subject as aforementioned, shall be applied in providing or purchasing such annuity or annuities from Scottish Equitable or from any other Insurer as the Member may select all as permitted or required in accordance with the provisions of the Rules. Where the Protected Rights Fund is applied in this way before the Member reaches Pension Date...an early withdrawal deduction will be calculated by Scottish Equitable by reference to the early withdrawal formulae relating to Protected Rights Fund for policies of this class applicable from time to time, details of which are available on request.
- (c) The early withdrawal deduction or deductions calculated pursuant to (a) and (b) above shall be deducted from the sum realised by the cancellation of Units therein respectively contemplated and the sums so deducted shall be retained by Scottish Equitable for its own absolute benefit.

Where deductions from the value of the Member’s Fund fall to be made pursuant to (a) and (b) above at the same time (including where this Condition is applied for the purposes of Condition 16A), the allocation of the aggregate sums to be deducted between the Member’s Fund (excluding the Protected Rights Fund) and the Protected Rights Fund may be varied by the Actuary of Scottish Equitable in any manner he may consider desirable or necessary to accord with the Rules.

- (d) A certificate signed by a duly authorised officer of Scottish Equitable shall be conclusive evidence as to the deductions, if any, to be made pursuant to the foregoing provisions of this Condition.

**“Condition 16A – Transfer from the Policies**

Where a Transfer of funds out of the Scheme is validly requested and required in accordance with the Rules, Allotted Units referable to the Member’s Fund, the Protected Rights Fund comprising part thereof or otherwise affected by the proposed transfer shall be realised by the cancellation of Allotted Units comprising same at Bid Price. From the sum thereby realised, there shall be deducted such sums, if any, calculated in accordance with the provisions of Conditions 6 (a), (b) and (c) as if the date of realisation were the Pension Commencement Date and/or, as the case may be, the date upon which the Protected Rights Fund is to be applied. The resultant sum shall be the transfer payment for the purposes of the Rules...”