

## **The complaint**

The complaint in this case relates to the advice given to Ms W by Hayden Kilkelly Independent Financial Advisors Limited (Hayden Kilkelly) in relation to her pensions, specifically in relation to the order in which benefits should be taken from Ms W's various uncrystallised pension pots to minimise taxation.

Ms W's pension provision was more than the Lifetime Allowance (LTA) and as such Ms W sought advice from Hayden Kilkelly in order to ensure she could realise the maximum possible benefit from her pensions, specifically in relation to one policy held with Scottish Equitable Plc trading as Aegon (Aegon) as this policy had a valuable guaranteed annuity rate (GAR) which Ms W was keen to ensure was fully utilised.

I note here that there is a linked complaint related to Aegon and their role in the below scenario. This has been dealt with separately and will not be commented on further here.

## **What happened**

In September 2020 Hayden Kilkelly contacted Aegon to clarify whose responsibility it was to settle any tax liability for pension benefits crystallised over the LTA.

Aegon gave incorrect information and stated it was the policyholder who bore responsibility to settle any tax due directly with HMRC.

The call note completed at that time stated, *"any tax will be dealt with between [Ms W] and HMRC and Aegon will not be involved as the[y] will be unaware that [Ms W] has exceeded the lifetime allowance and by how much."*

Following receipt of this information Hayden Kilkelly proceeded to advise Ms W on the order in which pension benefits should be crystallised to ensure as much of the Aegon policy could remain intact to benefit from the GAR.

At the time of advice Ms W held three main pension pots with uncrystallised funds.

- Aegon (policy with the GAR) containing around £40,000.
- A self-invested personal pension (SIPP) with uncrystallised funds of around £70,000.
- A money purchase scheme worth around £25,000.

As 96% of Ms W's LTA had already been utilised there remained around £39,000 of headroom available.

Following the confirmation from Aegon it would be Ms W who had to settle the tax bill, Hayden Kilkelly advised around £39,000 of other funds be crystallised, releasing around £9,000 of tax-free cash to Ms W. This crystallisation took place soon after the advice in 2020.

Following this, when the Aegon fund was crystallised the intention was to use as much of the fund as possible to purchase annuity income provided by the GAR, with it then falling to Ms W to settle the LTA tax charge directly with HMRC via self-assessment (possibly using the tax-free cash released in 2020 to pay the bill).

In 2022, after reaching age 70, and having moved into the new tax year, Ms W commenced the process of taking annuity income from the Aegon policy.

Having been informed that rather than the tax charge being payable directly to HMRC by Ms W it would in fact be Aegon who settled the tax liability with HMRC using a proportion of the monies within the policy, a complaint was registered with Aegon about the incorrect information they had provided to Hayden Kilkelly.

In response to the complaint Aegon accepted the information provided to Hayden Kilkelly was incorrect and offered redress to Ms W to cover the distress and inconvenience caused.

Ms W did not agree and noted that as a result of the tax being taken from the Aegon policy value, the actual amount used to purchase an annuity had dropped by around £10,000 (the size of the tax bill) and as such she had lost out on around £1,000 of income each year for the rest of her life.

As Ms W and Aegon could not agree on a resolution, Ms W forwarded her complaint to this service.

Whilst this complaint was being investigated by this service, Ms W also raised a complaint with Hayden Kilkelly about the unsuitable advice received and the resultant loss of annual income.

In their response to the complaint Hayden Kilkelly noted that they had relied on the information provided to them by Aegon and as such did not consider themselves responsible for the losses incurred.

Ms W asked this service to consider the complaint and response from Hayden Kilkelly. Our investigator looked into things and concluded that whilst it was clear the information from Aegon was incorrect, it was the adviser's role to ensure its accuracy and the suitability of their advice. Our investigator noted that content of the pensions tax manual and stated that this should have indicated to Hayden Kilkelly that the information provided by Aegon was incorrect. Given the tax manual was widely available, this information within it would have been available to Hayden Kilkelly and as such our investigator concluded Hayden Kilkelly were responsible for Ms W's losses. A recommended approach for redress was also outlined by our investigator.

Hayden Kilkelly did not agree stating that they had contacted Aegon's intermediary helpline and were of the opinion they were entitled to rely on the information provided. They additionally stated that whilst the tax manual may be widely available, this information would also have been available to Aegon to better inform the information they provided.

It was also stated that given the number of pension providers, and the various different types of policy offered by each provider, it was necessary to ask providers specifics about their own internal processes and be able to rely on the information provided. Finally, Hayden Kilkelly pointed out that Aegon had already accepted that their information was incorrect and as such should be held accountable for the losses incurred by Ms W.

Our investigator was not minded to change their findings and as such the case was passed to me.

I issued a provisional decision which stated:

*"It has already been accepted that the initial information provided by Aegon was incorrect and as such the only thing I have to consider is whether Hayden Kilkelly acted reasonably in relying on this information or whether they ought to have acted differently, checked the information, discovered it was incorrect, and amended their advice accordingly.*

*Within their findings our investigator included the pertinent parts of the pensions tax manual relevant to the questions being asked of Aegon by Hayden Kilkelly.*

*For completeness I have included these here as well. These state:*

*"Liability for paying the lifetime allowance charge varies, depending on whether the charge arises during the member's lifetime, or following the member's death:*

- during the member's lifetime, the scheme administrator and the member are both equally liable to the charge; the liability is 'joint and several' - in practice the scheme administrator is obliged, as a result of its liability, to account to HMRC for the charge due after the BCE."*

*Additionally*

*"Joint and several liability means that both the scheme administrator and the member are equally and separately liable to the whole charge, and that payment by one will discharge the liability of the other(s), to the extent of the amount paid.*

*To meet their obligation, the scheme administrator must pay and account to HMRC for any lifetime allowance charge that arises in respect of any scheme member at a BCE taking place under their scheme..."*

*The above would seem to make it clear that the responsibility of settling any tax liability due to HMRC upon crystallisation of pension monies would fall on the pension administrator – Aegon in this instance.*

*Given the advice being sought by Ms W centred around the taxation of her existing pensions I consider it entirely reasonable that the content of the tax manual would be a key source of reference for Hayden Kilkelly.*

*They, as regulated financial advisers, were being paid by Ms W to ensure her pensions were utilised in a way which allowed the maximisation of the GAR which applied to the Aegon policy.*

*As per Hayden Kilkelly's response to the findings issued by our investigator, given the number of different pension providers, types of pension product available and each providers own internal processes, I consider it entirely reasonable and appropriate for Hayden Kilkelly to approach Aegon and ask the questions they did. However, they should have been aware of the contradiction between the information subsequently provided by Aegon and the tax manual. This should have prompted further questioning and investigation on Hayden Kilkelly's part.*

*Both businesses (Aegon and Hayden Kilkelly) are required to act with skill, care and due diligence in their dealings with their customers, however Hayden Kilkelly are held to a higher standard as they were the business providing advice to Ms W. As the advisers, principle 9 within the FCA handbook applies to Hayden Kilkelly. This states "A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any*

*customer who is entitled to rely upon its judgment.”*

*I have considered the argument put forward by Hayden Kilkelly that it saw no reason to doubt the information provided by Aegon however I disagree. Even considering that another provider had given similar information it is apparent that the information provided by Aegon does not align with the content of the tax manual – content I would expect the adviser to be aware of.*

*Additionally, I have considered the actual content of the information provided by Aegon and believe this itself should have raised concerns about its accuracy.*

*The note completed by Hayden Kilkelly at the time (detailed above) states that it would be Ms W who would settle the tax liability directly with HMRC as Aegon would be unaware of Ms W's previous pension crystallisations and as such they would be unable to calculate any tax liability to be paid to HMRC.*

*However, whilst it is true Aegon would be unaware of Ms W's other pension provision and what had previously been crystallised, this argument could be applied to all other pension providers who would all be unaware of any pension provisions a policyholder may hold elsewhere. If the Aegon statement to Hayden Kilkelly were true, this would result in a scenario whereby no providers were ever in a position to settle LTA tax liabilities with HMRC.*

*The argument is further undermined by common practice amongst the majority if not all pension providers who, when processing a pension crystallisation event for a policyholder, will routinely ask for confirmation from that policyholder (or their adviser) as to what amount of that policyholder's lifetime allowance has already been utilised. This allows the provider to calculate if the lifetime allowance has been breached, if so by how much, and subsequently arrange for the correct amount of tax to be sent directly to HMRC.*

*This is a process I would expect Hayden Kilkelly to have followed numerous times, if not with Ms W, then almost certainly with other clients. As such, the flaw in the information provided by Aegon should have been apparent.*

*Overall, whilst I appreciate that the information from Aegon was incorrect, I do not believe this is the cause of Ms W's losses.*

*As the regulated financial adviser, being paid by Ms W for (predominantly) tax planning advice, Aegon's error should reasonably have been identified by Hayden Kilkelly. Had this been done, and further investigations undertaken, the correct advice could have been given to Ms W with the unnecessary tax charge and subsequent losses avoided.*

*As such I agree with the outcome already communicated by our investigator and am holding Hayden Kilkelly wholly responsible for Ms W's losses.*

*Whilst I have agreed with the outcome reached by our investigator, I have amended the redress instructions as I believe these underestimated Ms W's losses.*

### **Putting things right**

*The aim of any redress instructions I give are intended to put Ms W as close as possible to the position she would most likely now be in but for Hayden Kilkelly's error.*

*In this case, the 2020 benefit crystallisation event should not have been advised.*

*Had correct advice been given, no crystallisation event would have occurred until Ms W chose to commence income from the Aegon plan in 2022. Had this been the case, the previously outstanding headroom of around £39,000 would still have been available.*

*The full value of the Aegon pension would have been utilised to provide income at the GAR rate of 10.8% with the first £39,000 of the plan value incurring no tax, with the amount above the lifetime allowance headroom taxed at 25%.*

*The value of the Aegon policy at the date the annuity was set up was around £42,300, given the headroom detailed above there would have been an LTA tax charge of approximately £825 payable to HMRC from these funds. As such £41,475 would have been available to purchase an annuity using the GAR rate of 10.8% - approximating to annual income of £4,480.*

*The actual income received from the Aegon pension equates to £3,456 each year, meaning Ms W has lost annual income equating to £1,024 (£4,480 - £3,456).*

*The Hayden Kilkelly advice did however result in Ms W receiving £9,000 of tax-free cash that would otherwise have remained in the pension and would have ultimately been taxed as income when withdrawn. Given Ms W is a basic rate taxpayer this would equate to a 20% tax liability on this £9,000 which has not been incurred – a gain of around £1,800 for Ms W.*

*This is £1,800 that Ms W would not otherwise have had and as such needs to be considered within the redress payable. This amount is available to Ms W to purchase income to offset some of the £1,024 annual losses noted above. However, this amount does not benefit from the GAR and as such could only purchase income at the current market annuity rate.*

*Within the findings issued by our investigator a market annuity rate of 6.6% was used for the purposes of illustrating the calculation process and as such I have left this rate unaltered.*

*A 6.6% the current market annuity rate would provide £118 annual income from the £1,800 tax saving. This needs to be deducted from the £1,024 lost GAR income to give Ms W's true annual loss.*

*This equates to £906 per year.*

*As such, Hayden Kilkelly should look to purchase an annuity providing £906 per year for Ms W. This annuity should be set up on the same terms and with the same features as the annuity bought using the Aegon policy (provided by Legal and General).*

*If this cannot be done, Hayden Kilkelly should provide the cost of such an annuity to Ms W by way of compensation. As the annuity income would be taxable this lump sum should include a notional deduction to allow for income tax - presumed to be 20%.*

*In addition, the annuity income provided by the Aegon plan made its first annual payment to Ms W on 15 July 2023. As such Ms W has been deprived of the additional £906 income from 15 July 2023 until the date of settlement. To compensate for this, interest at 8% simple per annum should be applied to the £906 from 15 July 2023 until the date of my final decision. This amount should also be paid to Ms W.*

*Finally, whilst our investigator included an amount to cover the distress and inconvenience caused, I do not believe an additional amount is required for this. The redress above will return Ms W to the correct position with no further amount necessary.*

*It should be noted that the above describes the process that must be followed to as*

*accurately as possible return Ms W to the position she would most likely be in now were it not for Hayden Kilkelly's error. The figures used above are approximations used to illustrate the process which should be followed. To complete an appropriate calculation Hayden Kilkelly should use accurate numbers sourced from their own records, Ms W, Aegon, Legal and General and HMRC as required. In addition, the current market annuity rate of 6.6% used above should be assessed for accuracy and an up-to-date rate used within the calculation.*

*Details of the calculation should be provided to Ms W in a clear and simple format."*

Within the provisional decision I asked both parties to provide any additional commentary or evidence they wanted me to consider before a final decision was issued by 6 October 2023.

### **What I've decided – and why**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Hayden Kilkelly have not provided any response to the provisional decision issued.

Ms W agreed with the outcome reached, the conclusion that her losses were around £906 per year, and that the best solution would be for Hayden Kilkelly to purchase an annuity to provide the lost income.

However, if that was not possible, Ms W did not agree that notional tax of 20% should be deducted from the lump sum payment (equivalent to the cost of the replacement annuity). Ms W noted that if a notional tax deduction was made from a lump sum payment, then she would no longer be able to purchase an annuity covering the £906 per year loss, with any annuity income that was provided also subject to income tax.

I have given careful consideration to the points made by Ms W, however I remain of the opinion that the redress laid out in the provisional decision is fair. I have detailed my reasons for this below.

Any redress instructions I give are intended to place a consumer as close as possible to the position they would otherwise have been in were it not for a business error, however it is not always possible to ensure a consumer is put exactly into the position they may have found themselves in.

In this case I would firstly like to be clear that Hayden Kilkelly should take all reasonable steps to purchase the appropriate annuity on behalf of Ms W. There are no annual or lifetime allowance issues which need to be considered and as such I cannot foresee any significant impediments that would prevent Hayden Kilkelly from purchasing the annuity for Ms W.

As such the provision of a lump sum to Ms W should only be considered the secondary option.

Whilst I appreciate the notional deduction of tax would leave a reduced lump sum for Ms W to purchase an annuity (whose income would then also be taxable), Ms W does not have to use the funds to purchase an annuity. There are in fact no restrictions on how Ms W can use any lump sum once received. The lump sum received could simply be set aside and used to top up annual income and replace the £906 (less tax) each year.

Whilst it may be the case that any returns from a lump sum redress payment may be taxable (annuity income or interest earned would be subject to income tax for example), the lump

sum itself is not subject to tax. Given it is designed to replace a taxable income, the notional deduction of tax is still considered fair and reasonable.

I appreciate that this does mean Ms W would not be able to purchase an appropriate annuity should it transpire Hayden Kilkelly cannot do this on her behalf, however, to remove the notional deduction for income tax could leave Ms W better off than she would otherwise have been as without the notional deduction the lump sum could simply be set aside and used to replace the full £906 each year.

Overall, I have concluded the redress instructions already communicated within the provisional decision remain the fairest way of placing Ms W as close as possible to the position she would otherwise have been in, as such I am not making any changes to them.

### **Putting things right**

The redress methodology outlined in the provisional decision and included above is considered fair and reasonable and as such I am not making any changes to it.

Hayden Kilkelly Independent Financial Advisors Limited should provide Ms W with redress in line with the above.

### **My final decision**

In line with the rationale and commentary above I am upholding this complaint and instruct Hayden Kilkelly Independent Financial Advisors Limited to provide redress to Ms W in line with the methodology detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms W to accept or reject my decision before 13 November 2023.

John Rogowski  
**Ombudsman**