DRN-4713363

The complaint

Mr G has complained that when Scottish Equitable Plc set up an associated policy to his pension to facilitate employer contributions, it paid initial commission to his financial adviser. He doesn't think it should have paid further initial commission as the adviser didn't provide him with any advice.

What happened

I issued my provisional decision on this complaint on 7 March 2024. The background and circumstances to the complaint and the reasons why I was provisionally minded to uphold it were set out in that decision. But in summary, I said I thought the key circumstances were that Mr G had a pension plan with Scottish Equitable originally set up in 1996. I said I'd refer to this as Plan 1. A financial advising firm was linked to the plan and it was paid initial commission and renewal commission.

In February 1998 Mr G wrote to Scottish Equitable and told it that he had a new job and his new employer wanted to make contributions to his pension for a total of £1,050 per month. Mr G wanted to lower his contributions to £350 a month.

Scottish Equitable's systems weren't able to have both employer and personal contributions paid into the same plan. So it set up an associate policy to accept the new stream of payments. I said I'd refer to this as Plan 2.

Mr G referred a complaint about other charges on his pension to this service in October 2020. During the course of that investigation it came to light that Scottish Equitable had paid initial commission to the advising firm on both Plan 1 and Plan 2.

Whilst the commission wasn't taken directly from the fund, it formed part of the Specific Member Charge which was applied to both plans. This was based on the amount of premiums paid into the policy, whether any commission had been paid and the plan's term.

One of our investigators who had considered the complaint hadn't recommend that it should be upheld. He said the decision about whether commission should be paid rested with the adviser rather than Scottish Equitable. He said Mr G had an agreement with his financial adviser and it was reasonable to expect Scottish Equitable to apply the charges and pay commission as agreed. The investigator said commission was applied to the new employer contributions because it was a new set of contributions, and would have been paid even if a new plan hadn't been set up.

Mr G hadn't agreed with the investigator's findings, and it had been passed to me to consider.

I said I thought the logical starting point was to consider the matter in light of the pension's conditions from the time as outlined in the Policy Booklet. Mr G was paying a monthly regular premium of £1,369 into Plan 1 prior to Plan 2 being set up. The employer then paid £1,050 a month into Plan 2. And Mr G reduced his monthly contributions to Plan 1 paying in £350 a month. So the increase in monthly premium paid overall was £31.

The Policy Booklet didn't appear to define 'increment'. But it said that 'Regular Premiums' were the gross amount specified on the schedule, and for some purposes Regular Premiums may be considered as slices. It went onto set out the conditions for a new 'slice' of regular premium. The charges section then said the events that might affect the Specific Member Charge included the slices of regular premiums – each slice could have a different Specific Member Charge.

Scottish Equitable had said as both employee and employer contributions couldn't be administered under one plan - they had separate direct debit mandates which required separate policies - the employer contribution was added as a new premium. And therefore it was an increase to the original premium so was treated as a new slice.

I said I accepted that the premium coming from the employer would have required further administration work to the original plan set up. And that the systems couldn't use one plan to accept the employer premiums. But I thought that was a different matter to in effect treating it as a new slice. I didn't think it met the conditions for a new slice as provided for in the Policy Booklet - which in turn resulted in further initial commission payable to the advising firm which was then reflected in the Specific Member Charge.

When Mr G had contacted Scottish Equitable about the change in premiums/their source in a letter dated 9 February 1998 he said:

I understand that these changes will not affect any loyalty bonuses to which I am entitled under this policy. However, if there is any way that my interests should be adversely affected by these changes, I would appreciate it if you would inform me before these instructions are implemented.

Scottish Equitable said it couldn't find any correspondence that was sent to Mr G in response to his letter. I said Mr G was clearly wary of any adverse impact his planned changes might have had. It wasn't clear to me whether Mr G would have been able to turn off the commission payable to the adviser at that point. However even if that wasn't possible at the time, I thought if he'd been alerted to the further initial commission payable he'd likely have approached the adviser to try to come to some arrangement. And I thought as long as the adviser got the commission it was entitled to for the level of premium/increments it had originally advised on/arranged, it would likely have agreed.

I said I appreciated that the commission wasn't payable directly from Mr G's fund. And that the different charges and their interaction made it difficult to say exactly to what degree Mr G's fund was affected by Scottish Equitable paying a second lot of initial commission.

I said all in all however, whilst I thought it was reasonable for Scottish Equitable to set up an 'associated policy' for the employer contributions for administration purposes, I wasn't persuaded the pension's conditions provided for it to treat the change as a new slice – apart from the extra £31.

I went onto say however, that I didn't think the meaning of the policy conditions was particularly clear about 'slices'. But even if I was wrong in my interpretation of the conditions, I thought Mr G wouldn't have agreed to the additional initial commission being paid to the adviser if he'd been told about it in response to his 9 February 1998 letter. I said I was satisfied Mr G would have been able to prevent that commission being paid. So I thought it was fair and reasonable in all the circumstances for Scottish Equitable to rework the value of Mr G's plan.

I said my provisional decision was to uphold Mr G's complaint. And I intended to order that

Scottish Equitable re-worked Mr G's pension and calculated its value as I'd set out. I also said Scottish Equitable should pay Mr G £250 for the inconvenience that I was satisfied he'd been caused by the matter.

Scottish Equitable didn't agree with my provisional decision. It said, in summary that:

- Mr G had employed his financial adviser to arrange a pension for him. He set up servicing rights on his pension to pay them for the service provided and would likely have been fully aware of the terms he was agreeing to. It said under the terms of the agreement Mr G's financial adviser was entitled to further commission when the new payments were set up. Scottish Equitable was obligated to pay, and it didn't matter that it had to set up a new plan. It said it was the adviser's responsibility to make Mr G aware of the Terms of business and costs etc, and this was an issue he should be raising with the financial adviser.

- Mr G could have cancelled the servicing rights at any time or removed the financial adviser from the plan. However, in doing so, he would have had to have made alternative arrangements to pay his financial adviser for the services it had provided. As Mr G had originally paid this through his pension it didn't see why any arrangements would have been any different a couple of years later in 1998. It confirmed it did claw back commission on the lower personal contribution amount.

- It strongly disagreed that Mr G wouldn't have agreed to the additional initial commission being paid to the adviser if he'd been told about it in response to his 9 February 1998 letter. It said its response to Mr G's letter would have either been yes or no to Mr G's question about the change affecting his bonus. As a pension administrator, it could only respond to direct questions, and wasn't allowed to go off at a tangent in case this further information was construed as giving advice which it wasn't regulated to do. It wouldn't have mentioned commission in any response. So it questioned why I was satisfied Mr G would have prevented the additional commission being paid.

- Although I'd said the definition of a slice wasn't very clear in the terms and conditions these were from 1996, when the plan was set up and the market was totally different now. The conditions included *'The Policy is a policy which is regarded as long-term business. Owing to this long-term nature, it is impossible to foresee all the possible changes and provisions that may occur during the term of the Policy. Where there are changes or new provisions, and these relate to any of the provisions of the Policy, Scottish Equitable may amend, in good faith, the provisions of the Policy to take account of those changes or provisions. The amendment may be made by Scottish Equitable without the consent of any part having a real or contingent right to benefits under the Policy.'*

- When the plan started in 1996, it wasn't envisaged that a plan holder would change the contributor. It was generally employers or employees who made the contributions, on varying levels throughout the life of the plan.

- It asked for clarification on the re-work I'd suggested. I'd said to apply only the Specific Member Charge applied through the lifetime of the plan based on the initial commission only. However I'd accepted that there was an increase in premiums which would constitute another slice. There were then also other increases.

Mr G said he was generally happy with the provisional decision. And also made some further comments: In summary, he said:

- He thought it would be difficult to verify the any re-calculation. Scottish Equitable had argued that Plan 2 was a new product or slice and also had a higher charging structure as it had a shorter life. Given I'd rejected that argument, he said Plan 2 should be assumed to have started at the same time as Plan 1 and attract the same lower charge. Mr G said he accepted that the firm might want to adjust the Specific Member Charge for the later increases.

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.

Mr G changed the contributions in 1998. So it was only two years after the plan had started. However I agree with what Scottish Equitable has said about pensions being long term contracts. Pension legislation changes, and so do the markets they operate in over time. It's not unreasonable that terms might not specifically provide for any set of particular circumstances that might arise.

I said in my provisional decision that in my view the policy conditions didn't provide for the employer contributions to be treated as a new slice – albeit I didn't think they were very clear. And that the creation of a new slice resulted in further initial commission payable to the advising firm. However, having further considered the matter, I think I was wrong about making that link. It didn't necessarily follow that commission would only be payable if a new slice was created.

However, for the reasons I set out in my provisional decision, this doesn't change my opinion on the fair outcome of Mr G's complaint. As I said, I think if Scottish Equitable had responded to Mr G's 9 February 1998 letter, Mr G would have been in a position to take some action to limit, as far as he could, any adverse consequences resulting from the proposed changes to the premiums.

Scottish Equitable has said its response to Mr G's 1998 letter would have merely been a yes or no, as it was a pension administrator and could only respond to direct questions. It had to be careful not to stray into the realms of providing advice, and wouldn't have mentioned commission. However Mr G clearly had the matter on his mind at the time. He'd asked "..*if there is **any way** that my interests should be adversely affected by these changes*" [my emphasis). That was a broad question. And he said he'd appreciate to be informed *"before the instructions were implemented."*

I think even if Scottish Equitable only initially provided a limited response, it's likely that Mr G would have pursued the matter until he had a full understanding of how the changes impacted the charges, and would likely have discovered the commission being paid to the adviser.

Scottish Equitable has said the commission agreement was between Mr G and his adviser, and that it was bound to pay it as part of their agreement. I accept that Mr G would have had an agreement with the advising firm about how it would be remunerated for its services. Scottish Equitable has said the employer contribution was considered as new business. It's not entirely clear to me on what basis 'new business' was decided. However again, I don't think that this is key here because, ultimately, I think if Mr G had been alerted to the potential consequences of the changes he was in a strong negotiating position to limit any impact.

My understanding is that Mr G was able to remove the advising firm as his financial adviser. So if he'd been alerted that it was going to be paid a significant sum in initial commission before the changes were processed, he had that option to remove it available to him.

I accept that he might have had to make alternative arrangements to pay the advising firm for the original advice it had given depending on the terms of his agreement with it. However I think that's probably unlikely given my experience of this type of business and remuneration agreements at the time. But I don't think it's likely it would have come to that in any event.

As I've said above, I don't think the particular circumstances here are specifically provided for in the conditions. And I'm bound to make a decision on the basis of what is, in my opinion, fair and reasonable in all the circumstances of a case.

My understanding is that, on the one hand, by Mr G reducing his own contributions Scottish Equitable clawed back commission from the advising firm. But then on the other, it paid the advising firm further initial commission resulting from the 'new business'.

I accept that the overall position of the claw-back on the one hand and initial further commission paid on the other was unlikely have been financially neutral to the advising firm. But in the particular circumstances, and given it could have lost Mr G as a client, I think as Mr G was effectively replacing the premiums that he'd initially arranged with the firm with premiums from another source (plus £31), it's more likely than not that the advising firm would have agreed to a compromise of some sort so that overall the commission payable to it was broadly equal as to that prior to the changes. I've thought about what's fair in terms of the additional £31 contribution later on below.

I note that the Appendix to the Policy Booklet provided that where commission was given up, the Specific Member Charge would be reduced. And where full commission was given up, the charge would become zero or negative. So there was some flexibility, and advising firms could give up differing amounts of commission that would then be reflected in the Specific Member Charge.

I don't know if it was possible for Scottish Equitable's systems at the time to not have clawed back the commission from the advising firm relating to the reduced regular premium Mr G himself was paying, if the advising firm agreed to give up its initial commission (or at least that equal to the same level of premium it had arranged). But the overall principle behind the compensation is to broadly reflect that position in relation to the premiums that effectively replaced those Mr G was already paying.

Scottish Equitable has asked for clarification on the re-work given I'd accepted that there was an increase in premiums which would constitute another slice. It's said Mr G also made other increases over time.

Given that, as I said in my provisional decision, I accept there was an increase in premium of £31, I think it's fair for Scottish Equitable to reflect that in its calculation, in so far as I think it was reasonable to treat that amount as an increment /new slice/new business. And pay any commission that would have been payable on it – initial or ongoing. The same applies to any other increments that were subsequently added. The rework should only be based on any change in the Specific Member Charge resulting from the initial commission that was paid relating to the same level of premiums that Mr G was already paying.

Mr G has said he thinks Plan 2 should be assumed to have started at the same time as Plan 1, and attract the same lower Specific Member Charge. As I said in my provisional decision, I don't think it was unreasonable for Scottish Equitable to set up the 'associated policy' for the employer contributions. Plan 2 would have required further administration work to the original plan set up. I think it was reasonable for Scottish Equitable to reflect the shorter term to retirement in the Specific Member Charge for Plan 2.

Putting things right

Scottish Equitable should rework the value of Mr G's plan assuming that the Specific Member Charge applied through the lifetime of the plan is based on only the first amount of initial commission being paid (and in full), and assuming the second initial commission wasn't paid (relating to the same level of premium that Mr P was already paying – the £31 can be treated separately as outlined above).

If the value assuming there was only one amount of initial commission paid is higher than the current value, the value should be adjusted to reflect the difference, or such an amount should be paid into Mr G's pension to make up for that difference.

Scottish Equitable should also pay Mr G £250 for the inconvenience that I'm satisfied he's been caused by the matter.

Scottish Equitable should provide a copy of its calculation to Mr G.

My final decision

My final decision is that I uphold Mr G's complaint.

I order Scottish Equitable Plc to calculate if Mr G has made a loss and pay any compensation due to him as I have outlined above under 'Putting things right'".

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 27 April 2024.

David Ashley
Ombudsman