

Before the Arbiter for Financial Services

Case No. 422/2016

ZQ

vs

Harbour Pensions Ltd. (C59316)

Sitting of the 7th November 2017

The Arbiter,

Having seen the complaint whereby the Complainant is contesting certain fees made by the service provider in relation to the Harbour Retirement Scheme, a personal retirement scheme licensed by the MFSA and issued by the Service Provider.

The Complainant considers that the Service Provider is in breach of their contract as they have not advised him of their intention (to apply the disputed fees) in accordance with the notice period stated in the Terms and Conditions of the Retirement Scheme and this in breach of Clause 9.1, 10.1 and 14.2 of the said document.

The Complainant claimed that fees were not appropriately disclosed and that there was a change in the terms and conditions of the Retirement Scheme which terms and conditions included a Fee Schedule.

He states that the fees of GBP750 (Flexi fee) and an exit fee of GBP900, for the total amount of GBP1,650, were taken by the Service Provider from his Pension Scheme without him being advised of the Service Provider's intention in accordance with the provisions outlined in the Terms and Conditions of the Pension Scheme.

Complainant argued that the Service Provider had more than adequate time (over 12 months) to inform him of a major change in the fee schedule within the Terms & Conditions of the Retirement Scheme, and such major change should have not just been included at the bottom of the withdrawal form.

The Complainant is asking for the refund of the fees charged by the Service Provider for the total amount of GBP1,650, comprising of the flexi fee amounting to GBP750, together with the exit fee of GBP900, plus interest.

The service provider is contesting the claim inter alia for the following reasons:

The Service Provider argued that no breach of contract occurred as they were entitled to charge fees for providing the flexi-access facility on the Retirement Scheme and the fees were clearly disclosed to the Complainant on the withdrawal form.

The Service Provider had agreed to discount the fees, had sent the Complainant a flexi-fee agreement to sign; the Complainant signed and the Service Provider then acted on Complainant's instructions.

The Service Provider further argued that they fulfilled their obligations as they had disclosed the fees to the Complainant, they sought his agreement and acted, within their powers, as discretionary trustees of the Retirement Scheme.

Having seen all the documents,

Having heard the parties and considered their submissions, the Arbiter further considers:

Summary of the facts and submissions

The complaint relates to the exit fees taken by the Service Provider in respect of withdrawals (drawdown) from the Harbour Retirement Scheme ('the Retirement Scheme'), this being a personal retirement scheme licensed by the MFSA and issued by the Service Provider. The matter occurred in 2016, with the Complainant becoming first aware of the problem in February 2016, and a complaint made with the Service Provider in May 2016.¹

¹ Complaint Form

A drawdown request form, meaning a form to withdraw some or all of the money out of the Retirement Scheme, was signed by the Complainant on 11th February 2016. This form was countersigned by the Investment Advisor of the Complainant, Gerard Associates Ltd. (an entity based in the UK) on 14th March 2016. In the drawdown request form, instructions were given by the Complainant who chose the one-time flexi-access drawdown facility to withdraw the full amount of the fund.²

Complainant joined the Retirement Scheme on 25th July 2013. The facility to withdraw from the Retirement Scheme, called the Flexi-Access Drawdown, was not available at the time and this facility became available on 1st January 2016, following changes to UK legislation. This facility, which is not offered by all recognised pension schemes, started to be offered by the Service Provider on request as from 1st January 2016. The Complainant had asked to avail himself of this facility and the Service Provider provided the fees to the Complainant who, subsequently, complained about the fees. The Service Provider explained that as a sign of goodwill they waived another applicable flexi payment fee of GBP300 to help with the smooth transfer out of the Retirement Scheme.

The Service Provider explained that on 14th March 2016, they had received the drawdown form signed by client, which form included the fees of GBP900 originally agreed by the Complainant, and the Service Provider proceeded with the withdrawal of the investment. The Complainant received the flexi-access drawdown funds on 29th March 2016. The Complainant sent a formal complaint to the Service Provider on 10th May 2016, complaining about the charges. The Service Provider reiterated that the fees were clearly disclosed to the financial advisors of the Complainant and also, very clearly, disclosed on the withdrawal form signed by the Complainant.³

The clauses of the initial Terms & Conditions which the Complainant claimed were breached were the following:

Clause 9.1 which states that *“Harbour’s most recent scale of fees have been provided to the Client. At least 60 days written notice will be given to the Client*

² Fol 22 et seq. Attachment 3 to the Complaint Form

³ Fol. 35 et seq

of any changes. Where VAT is or becomes payable on any of the Services, it will be added at the applicable rate”.

Clause 10.1 states that *“Harbour have the right to make any amendment to these provisions in order to comply with a change of applicable law or regulation, by giving you 30 days written notice in accordance with Section 14.”*

Clause 14.2 states that *“The Terms and Conditions of this Agreement may be amended by Harbour by giving the Client 30 business days’ written notice. This notice will be sent to the Client’s home address as last advised to Harbour.”*

The Service Provider claimed that Clauses 9.1 and 10.1 did not apply in the context of the new flexi-access drawdown facility introduced after the signing of the Terms and Conditions.

As to Clause 14.2, the Service Provider reiterated that they have provided to the Complainant appropriate documentation as soon as the new facility was requested and the relevant form was signed by the Complainant.⁴

The Complainant also indicated that the Service Provider failed to send the Retirement Scheme Particulars on time, within 1 month of registration, in accordance with the Pension Rules for Personal Retirement Schemes, particularly 2.2.2 which states that *“The Scheme Particulars shall describe the Scheme in sufficient detail for the contributors, members and beneficiaries to make an informed judgement as to the nature of the Scheme.”*

The Service Provider explained that the Key Facts document (which was equivalent to the Scheme Particulars at the time) and Terms & Conditions were provided to the Complainant upon registration with the Scheme.⁵

Complainant also argued that the Service Provider have ignored their own Terms & Conditions in Clause 10.2 which provides that *“These provisions as varied, if appropriate, shall continue until the Individual Member Account have been terminated by the payment of a transfer value to another Retirement Scheme or the provision of annuity/death benefits in the appropriate form”*, as the Service

⁴ Fol. 35 et seq

⁵ Fol. 76.

Provider paid him the whole fund as part of the drawdown facility and this did not involve a transfer or provision of annuity/death benefit.

But the Service Provider indicated that such provisions were not appropriate for the new facility which was ultimately requested by the Complainant.

Final Considerations:

After carefully considering the facts of the case and the submissions made by both parties, the Arbitrator is of the opinion that the Complainant's request for the refund of the fees (with interest) related to the drawdown of his investment is not considered fair, equitable and reasonable in the circumstances of the case on the basis that:

1. There is no sufficient evidence that the fees relating to the new flexi-access drawdown facility (availed of by the Complainant upon his request in March 2016 after the new facility was made available by the Service Provider in January 2016), were not notified to the Complainant adequately and in advance prior to the drawdown request submitted by the Complainant; and for the Complainant not to be in a position to take an informed decision relating to his withdrawal;
2. The fees relating to the new flexi-access drawdown facility are specifically outlined in the drawdown application form signed by the Complainant himself and also by his investment advisor, where the form includes a specific section dealing with the fees which is clearly legible, in an adequate font size and with relevant prominence;
3. In the declaration, section 3 of the duly signed drawdown form, the Complainant is confirming both the fees payable in connection with the drawdown payment and his understanding of such fees. This is, in turn, counter-signed by the Complainant's investment advisor;
4. The Complainant, having himself been an IFA (independent financial advisor) for over 35 years,⁶ and being also assisted by his own independent investment advisor who also countersigned the drawdown form, is considered to have been in an adequate position to understand

⁶ Fol 63. Statement made by the Complainant

and query beforehand as necessary, the applicable fee structure relating to the drawdown and reconsider his position prior to submitting the drawdown request form;

5. The Complainant and his investment advisor were indeed aware that exit fees applied with respect to the drawdown, having also entered into discussions with the Service Provider on the fee structure prior to the actual drawdown being processed.

Reference is *inter alia* made to the sequence of events outlined in the letter submitted by the Service Provider to the OAFS dated 23rd September 2016, wherein it was indicated that after the Complainant had himself asked the Service Provider whether he may avail himself of the flexi-access drawdown facility and the Service Provider providing the fees to the Complainant, he had complained about the fees and the Service Provider had agreed to waive GBP300 flexi payment fee (one of the fees mentioned in the fee section in the drawdown form), with this being reflected in the sequence of events to have occurred prior to the receipt of the drawdown form on 14th March 2016.⁷

This sequence of events was not contested by the Complainant.

DECISION

For the above-stated reasons, the Arbiter **does not** consider the complaint to be fair, equitable and reasonable in the particular circumstances and substantive merits of the case and is rejecting it.

The expenses of the case are to be borne by the Complainant.

Dr Reno Borg
Arbiter for Financial Services

⁷ Point ix of letter dated 23rd September 2016 by the Service Provider/date of signature of the investment advisor on the drawdown form (pg.3).