



<u>Decision Ref:</u>	2019-0077
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Personal Pension Plan
<u>Conduct(s) complained of:</u>	Fees & charges applied
<u>Outcome:</u>	Substantially upheld

**LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

Background

The Complainant commenced a personal pension plan with the Provider in March 2016. The Complainant believes that the plan is not suitable for his needs and that he was not informed of the full level of fees that he would have to pay. He is seeking a refund of all of the contributions that he paid into the plan.

The Complainant is a self-employed contractor and the sole employee of his own company. As such he is both the employer and the employee in the personal pension plan arrangement.

The Complainant's Case

The Complainant took out a pension plan with the Provider in 2016 on the advice of the Provider's representative. The Complainant claims that he made the Provider aware that he wanted a product that was suitable, cost effective and allowed for income that could vary from year to year because he works as a self-employed contractor in the recruitment industry. The Complainant states that the only fee he was informed of was the initial plan fee of €12.85 per month.

When the Complainant obtained a benefit statement in January 2017 he noted that the value of his fund was approximately 50% of the value of the contributions that he had made.

The Complainant states that he was shocked to discover that 50% of his contributions had gone to fees.

The Complainant claims that when he enquired about the level of fees he was informed that, under the terms of his plan, 50% of his contribution would not be allocated to his pension fund for the first two years of the plan. The Provider referred to this as a non-allocation period (NAP).

The Complainant states that this was the first that he had heard of the NAP and that he was not given any explanation of the NAP in the process of his application in February 2016. The Complainant alleges that the charges and costs were not communicated adequately and he states that he immediately stopped contributions when he learned about the NAP. The Complainant claims that he would not have taken out this pension plan if he had known about the NAP.

The Complainant alleges that that the pension product he was sold was not the most suitable for him or in his best interests. He states that the Provider did not give proper consideration to the volatility and inconsistency of his income in assessing the product's suitability for him. The Complainant claims that he was not aware that the Sales Advisor he met with was operating under a contract to sell products from the Provider only.

The Complainant states that he requested a breakdown of his pension in July/August 2016 and that this was only provided to him in December of 2016. The Complainant claims that the financial loss he has suffered is more than it should have been because he didn't receive the information he needed in order to make the decision to cease contributions until several months after he had requested it leading him to make more contributions than he otherwise would have.

The Complainant let his pension plan lapse with effect from 24 March 2017 and seeks from the Provider *"a full refund of the total amount invested"*.

The Provider's Case

The Provider's records indicate that the Complainant started an Executive Pension Plan with the Provider on 24 March 2016. The Complainant let this plan lapse on 24 March 2017 and it was valued at €5,991.40 on 7 April 2017. Under Revenue Commissioner regulations the Complainant is unable to access this fund until he reaches retirement and the fund will fluctuate with market performance and the value of the fund can fall as well as rise.

The Provider notes that one of its Sales Advisors made an appointment to meet with the Complainant on 21 February 2016 to discuss his pension requirements. The Provider claims that prior to this appointment the Sales Advisor emailed the Complainant on 18 February 2016 with some attachments relating to the Executive Pension Plan, including details of all the plan charges.

The Sales Advisor met with the Complainant as planned on 21 February 2016 and the Complainant signed an Application Form, a Personal Financial Review and Oral Explanations to commence an Executive Pension Plan with the Provider at a monthly premium of €1,088. The Provider claims that the Sales Advisor has confirmed to the Provider that the charges, including the NAP charges, were discussed with the Complainant at this time.

The Provider claims that it sent a Policy Pack to the Complainant on 25 February 2016, which included the Membership Certificate, a Statement of Reasonable Projection and an Executive Pension Plan Important Notice. According to the Provider the Important Notice was specific to the Complainant's Executive Pension and included an illustrative table of projected benefits and charges, which confirmed the projected cumulative charges for each of years one to five as well as for years ten, fifteen and years twenty four through to twenty nine. The Policy Pack also contained details of the right of cancellation, confirming that the Complainant could cancel his pension plan within 30 days for any reason and receive a full refund of any contributions paid.

The Provider states that the Complainant contacted the Provider on 10 January 2017 for information on the funds he was invested in and rang again on 16 January 2017 for information on the charges applied to his pension. The Provider claims that the requested information was sent to the Complainant on 6 February 2017. The Provider states that the Complainant then advised the Provider in writing that the pension plan was unsuitable for him and that he would not have gone ahead with it had he been aware of the NAP charge where 50% of the contributions are taken as a charge for 24 months.

The Provider notes that the Complainant's complaint is that he was unaware of all of the charges that would be applied to his Executive Pension Plan. In this regard, the Provider notes that the Sales Advisor emailed the Complainant with information that included all of the Executive Pension charges on 18 February 2016, prior to their appointment on 21 February 2016 and the Complainant has confirmed that he received this email. The Sales Advisor has also advised the Provider that the Executive Pension charges were discussed at the point of sale. Furthermore, the Policy Pack that the Provider sent to the Complainant on 25 February 2016 provided him with a detailed, cumulative breakdown of the charges not only for each of the first five years but also over the life of the pension plan. The cover letter asked the Complainant to read the enclosed documents carefully, which confirmed that if, for any reason, he considered that the pension plan did not now suit his needs, that he could cancel it within 30 days and received a refund of any contributions paid.

As a result, the Provider maintains that it is satisfied that the Complainant was appropriately advised of all of the Executive Pension charges applicable to his plan.

The Complaints for Adjudication

This complaint is primarily about the suitability of the product for the Complainant given the volatile and inconsistent nature of his income. The Complainant claims that the product is not suitable for him because of the NAP charges.

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The Complainant alleges that the Provider did not adequately explain the NAP charges to him and that he would not have taken out the pension plan if he had known about the NAP charges.

The Complainant also alleges that information requested by him from the Provider in July/August 2016 was not given to him until December 2016 resulting in a financial loss because he claims that he was not in a position to make the decision to cease contributing until after he had received the requested information.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties 12 February 2019, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, I set out below my final determination.

The essence of this complaint is that the Provider sold a pension plan to the Complainant that is not suitable for the Complainant. The Complainant asserts that the reason the pension plan is not suitable for him is because of the NAP charges associated with the plan and the volatile and inconsistent nature of his income.

It is necessary therefore to examine the NAP charges in an attempt to establish if this pension plan is a suitable one for the Complainant.

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The NAP charges are described in the Pension Plan Quote documentation that was provided to the Complainant in advance of his meeting with the Provider's Sales Advisor as follows:

"...initial charges are taken during a reduced allocation period. This is a period of time when a portion of the contributions are used to pay administration, setup charges, commissions and medical expenses.

The reduced allocation period will be 24 months and during this period 50% of the contribution is allocated to the fund. This will apply to initial and additional increases in premium. An automatic increase goes through a 9 month non allocation period."

The Pension Plan Quote document also summarises the NAP charges in a table as follows:

Initial Contribution (up to age 45)	Additional Increases (up to age 45)	Automatic Increase in Contribution (Indexation) (up to age 47)
50% allocation for 24 Months 100% thereafter	50% allocation for 24 Months 100% thereafter	0% allocation for 9 months

The Pension Plan Quote assumes that contributions will increase automatically by 2% each year. For the first nine months of each year the 2% increase will be taken by the Provider as a NAP charge.

While the plan provides for increases in the premium outside of the automatic increases such increases are subject to a NAP charge of 50% for 24 months following the increase. In the scenario where the plan member's income can fluctuate, if the income fluctuates upwards and the member increases his premium accordingly then 50% of the increase will be lost to NAP charges for 24 months, by which time the income could have fluctuated downwards necessitating a reduction in premium. If an income fluctuates up and down over short periods such as annually or biennially then all premium increases in response to income increases will be subject to a NAP charge of 50% making this product unsuitable for an individual whose income fluctuates significantly.

The Central Bank's Consumer Protection Code requires financial service providers to ensure that any product offered to a consumer is suitable to that consumer. The Code states that before arranging a product the financial service provider must prepare a written statement setting out why the recommended product is the most suitable product for the consumer taking into account the consumer's needs, objectives, circumstances and financial situation.

In this case the Provider's Statement of Suitability for the Complainant is dated 21 February 2016. It contains the following statements:

"Following our review of your pension planning, I am recommending that your employer take out an executive pension plan for your benefit. The reasons for my recommendation [include]..."

- *An Executive Pension Plan is suitable for long term regular savings for retirement and you are aware that the proceeds of this plan cannot be accessed prior to your retirement."*

"As the pension fund is a long-term investment, your investment needs will change throughout the term. The plan allows you to switch funds during the term of the plan if you wish to change your investment strategy (this option does not apply to capital secure funds). The plan also offers you the flexibility to increase or reduce contributions as your circumstances change."

The Statement of Suitability states that the plan is suitable for long term **regular** savings. Given the volatile and inconsistent nature of the Complainant's expected income it is unlikely that he would have maintained his premium at a regular level over time. While the Statement of Suitability states that the plan offers the flexibility to increase or reduce the contribution as circumstances change, it does not draw attention to the significant NAP charges that apply to increases to the regular premium. An inconsistent and volatile income, such as the Complainant's, can fluctuate upwards as well as downwards and the Complainant is likely to have wanted to increase his premium in those periods when his income fluctuated upwards.

The Statement of Suitability is signed by the Complainant and the Provider's Sales Advisor. It does not contain any details of the NAP charges but it has a statement directing the plan member to read an attached Important Information Documentation which explains the NAP charges amongst the other details regarding the plan.

In its response to the Complainant's allegation that the Executive Pension Plan was unsuitable for him, the Provider refers to the Statement of Suitability and points out that the Complainant signed the statement indicating that he understood that the recommendation was based on the information provided by him.

The Complainant is adamant that he made it clear to the Provider that his income could be volatile and inconsistent. A statement from the Provider's Sales Advisor dated 21 February 2017 confirms that he discussed the volatile and changeable nature of the Complainant's income with him. With regard to the suitability of the product for the Complainant the Sales Advisor states:

"... based on discussions I had with [the Complainant] concerning the previous years performances and the prospects of going forward the premium selected was well within the scope of the company performing less well than envisaged".

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The statement of the Sales Advisor indicates that the advisor took into account the possibility that the Complainant's income could fall, and the statement indicates that the Complainant would still be able to maintain the level of initial premium in that scenario. However, there is nothing in the Sales Advisor's statement to indicate that the Complainant's income could rise and that the Complainant might want to increase the premium in accordance with his increase in income. Such an increase in premium would be subject to the NAP charge making the increase in premium unattractive to the Complainant.

Having examined the evidence in relation to the suitability of the Provider's Executive Pension Plan I am not satisfied that it is a suitable product for the Complainant given the potentially volatile and inconsistent nature of his future income.

The second matter raised by the Complainant is an allegation that he was not adequately informed about the NAP charges when he met with the Provider's Sales Advisor on 21 February 2016. In response to this allegation the Provider states that the Sales Advisor sent the Complainant an email in advance of the meeting that contained an attachment giving details of the NAP charges.

At the meeting on 21 February 2016 the Complainant signed both an Employer Declaration and an Employee Declaration each of which contain a confirmation that he has received a copy of the Executive Pension Important Information Document. The Executive Pension Plan Important Information document is a 10 page document that gives full details of the plan including an explanation of the NAP charges on page 8 and full details of the NAP charges on page 9.

The Provider also states that after he had signed up for the plan he was given a Welcome Pack that included the following documents:

- Policy Schedule
- Membership Certificate
- Statement of Reasonable Projection
- Executive Pension – Important Notice
- Member's Explanatory Booklet

The Welcome Pack was accompanied by a cover letter. The Provider submitted copies of the above documents with its response to the complaint. None of the documents contain an explanation for how the NAP charges will be applied to the plan. However, two of the documents, the Statement of Reasonable Projection and the Important Notice document, contain a projection of the future value of the fund and, in both cases, the projection takes into account the effect the NAP charges will have on the fund although neither document includes a statement about how the NAP charges are calculated. The Statement of Reasonable Projection contains the statement "*The effect of charges on the projected fund is equivalent to a reduction in the investment return of 1% per year*".

Therefore, I accept that the Complainant was emailed details of the NAP charges associated with the Executive Pension Plan before his meeting with the Provider's Sales Advisor in February 2016. At the meeting on 21 April 2016 the Complainant was given documentation that included an explanation and details of the NAP charges.

The Complainant alleges that the Sales Advisor did not adequately explain the NAP charges at the meeting and in response to this allegation the Provider has submitted a signed statement from the Sales Advisor dated 21 February 2017 in which the Advisor states "*The Company charges were discussed in detail including the NAP*" and another signed statement from the Sales Advisor dated 21 September 2018 which states "*I reiterate that all charges were explained to [the Complainant] prior to completion of application form, including the NAP, policy fee, bid-offer spread and management charge*".

The Provider states that the NAP charges were advised to the Complainant in the Welcome Pack that was sent to him after he had signed for the plan. However, the copies of the Welcome Pack documents that were submitted by the Provider in response to the complaint do not contain a specific explanation of the NAP charges.

There is a conflict of evidence about whether the NAP charges were adequately discussed at the meeting between the Complainant and the Provider's Sales Advisor on 21 February 2018. For whatever reason, it appears that the Complainant did not leave the meeting with a full understanding of the NAP charges. Whether this was because the NAP charges were not adequately explained to him or whether it is because he did not properly understand the full explanation given by the Sales Advisor remains unclear.

The Complainant must take some responsibility for his lack of understanding of the NAP charges because he was given details of the charges in documents before and during the meeting. Had he examined these documents that had details of the charges with sufficient care he would have had a better understanding of the charges.

The third matter raised by the Complainant is his claim that he requested details about his plan and the charges applied to it in July/August 2016 but the information he requested was not received by him until December 2016. The Provider claims not to have any record of receiving such a request from the Complainant in July/August 2016. The Provider states that it received a written request for a breakdown of the investment percentage on 9 January 2017 and a fact sheet was issued to the Complainant. A further request for information was received from the Complainant on 16 January 2017 and a response to this was issued on 24 January 2017.

The Provider's Sales Advisor, in his signed statement dated 21 September 2018, states "[The Complainant] *didn't send or verbally request any information for his pension in July/August 2016*".

There is no evidence to support the claim that the Provider delayed in sending the Complainant information about his plan that had been requested by him.

Having examined this complaint and considered all the evidence, I am satisfied that the Executive Pension Plan recommended by the Provider was not suitable for the Complainant given the volatile and inconsistent nature of the Complainant's income.

Therefore, I substantially uphold the complaint and direct that the Provider repay the contributions to the Complainant.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially upheld, on the grounds prescribed in **Section 60(2) (b) and (g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to rectify the conduct complained of by repaying the contributions to the Complainant to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

11 March 2019

Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,
 - (ii) a provider shall not be identified by name or address,
- and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

