CAS-30097-Y7R9

Ombudsman's Determination

Applicant:	Mr Y
Scheme:	Aviva Plan Number F75122/2467 (the **Plan**)
Respondent:	Aviva UK Life (**Aviva**)

Outcome

1. Mr Y's complaint against Aviva is partly upheld. To put matters right, Aviva shall pay Mr Y £500 for the significant distress and inconvenience which he has sustained as a consequence of maladministration on its part.

Complaint summary

2. Mr Y has complained that Aviva is seeking to recover the sum of £23,231.42 which it says has been overpaid to him.

Background information, including submissions from the parties

Background

3. The Plan was originally administered by Friends Life Limited (**Friends Life**). Mr Y contacted Friends Life in 2017 requesting information about his retirement benefits. Friends Life wrote to Mr Y, on 27 June 2017, quoting a pension fund value of £13,617.50.

4. Mr Y opted to take a tax free cash sum and submitted an application form in September 2017. Administration of the Plan had transferred to Aviva. A payment of £26,721.90 was paid to Mr Y's bank account on 28 September 2017.

5. Mr Y complained to Aviva about a delay in providing him with information. It responded, on 10 November 2017, apologising for the time taken and saying it would be sending Mr Y a cheque for £200 in respect of any inconvenience caused.

6. On 17 September 2018, Aviva wrote to Mr Y informing him that there had been an overpayment. It said Mr Y should only have received £3,490.48 based on a policy value of £13,961.91. Aviva asked Mr Y to return £23,231.42 by bank transfer within

14 days. He was given a telephone number and the name of a person to contact if he had any concerns or wished to discuss the matter.

7. Mr Y telephoned Aviva on 18 September 2018. It acknowledged the telephone call in a letter dated 19 September 2018. Aviva said, in order for it to consider a proposal for repayment, it needed Mr Y to provide evidence of how the £23,231.42 had been spent.

8. Aviva wrote to Mr Y again, on 9 October 2018, offering two options: repayment of the £23,231.42; or providing evidence of how the overpayment had been spent.

9. Mr Y responded on 15 October 2018. He said Aviva's error and its correspondence had placed him in an appalling position and had impacted upon his health such that he was now under the care of his GP. Mr Y said he had had no idea that the money was an overpayment and he had proceeded to spend it because this was the reason why he had taken a drawdown option. He asked Aviva to explain why the error had occurred and why it had taken a year to discover it.

10. Mr Y said he was not in a position to repay the money. He said he had spent the money in good faith and, because he did not know he would be asked for information about his expenditure, he did not have any receipts. Mr Y said it was difficult to track how the money had been spent and that he had generally had a better social life and standard of living. He highlighted the following items of expenditure:-

    - A holiday in Portugal in November 2017 costing £2,500.
    - Expenditure of £2,000 for Christmas 2017.
    - £2,500 spent on celebrating his 60th birthday in May 2018.
    - Various weekend breaks during the year amounting to £5,000.
    - £1,500 spent on celebrating his daughter's 40th birthday.
    - A holiday in September 2018 costing £3,000.
    - Regular trips out with his grandchildren costing approximately £100 per week.

    Mr Y said his income was only sufficient to cover day-to-day living costs and he had little in the way of savings.

11. Aviva emailed Mr Y on 7 November 2018. It said:-

    - It wished to apologise for the situation its failings had put Mr Y in.
    - It acknowledged that Mr Y had experienced difficulty obtaining information about his retirement options in 2017.
    - The error had occurred at a time when it had been asked to change the investment funds for a number of members.

- The administrators who were producing Mr Y's retirement quotation were experiencing problems with its system and were unable to view the value of his policy. Mr Y's payment had had to be processed manually.

- It became aware of the overpayment following a reconciliation report which showed that the value of Mr Y's policy at the date his claim was completed was significantly lower than the amount paid to Mr Y.

- When asked if he had noticed that the amount paid was significantly higher than the quotes sent to him previously, Mr Y had said that he had assumed that this was all of his pensions combined. Mr Y had only one policy with Aviva and, therefore, it did not agree that it had given him any indication that he held more than one policy.

- The tax free cash sum quoted in previous illustrations was a quarter of the amount paid to Mr Y and, therefore, the payment was lot higher than he would have anticipated.

- It would like to offer Mr Y £200 compensation to be deducted from the amount it was seeking to recover.

12. On 22 January 2019, Aviva wrote to Mr Y again. It referenced its letters of 17 September and 9 October 2018. Aviva said it had not received repayment of the £23,231.42 or a repayment proposal from Mr Y. It said it would forward the matter to its legal department with a view to obtaining a County Court Judgment (**CCJ**) or to commencing insolvency proceedings if it did not hear from Mr Y within seven days. Aviva also said that the overpayment would be classed as an unauthorised payment and Mr Y would potentially be liable to a tax charge of up to 70% of the value of the overpayment. It said it would be legally obliged to report the unauthorised payment to HM Revenue & Customs (**HMRC**).

13. Following an email from Mr Y, Aviva agreed to allow him until 28 February 2019 to arrange repayment. On 27 February 2019, Mr Y wrote to Aviva saying:-

- He disputed the figures which had been quoted.

- He had not said that he had more than one pension.

- He had been told that the tax free cash sum he should have received was a quarter of what he had been paid. This would mean he should have received £6,680.47. However, the overpayment letter stated that he should only have received £3,490.48.

- Aviva had not considered change of position. He had spent the money in good faith believing the amount paid to be correct.

- If Aviva believed that he should have been aware of the mistake, he queried what evidence it had that he had been advised of the lower sum prior to the wrong amount being paid.

- No amount of compensation could redress the mental damage he had sustained. He was on sick leave and due to see his GP with a view to receiving counselling.

- Aviva should waive the overpayment and recalculate his pension to the amount it would have been if it had not made the catalogue of errors it had.

14. Aviva responded on 1 April 2019. It said:-

- It had been unable to trace Mr Y's telephone call and, therefore, apologised for having said he had referred to pensions being combined.

- The wording used in its previous response was incorrect. The retirement options pack sent to Mr Y in June 2017 had quoted a fund value of £13,617.50. A drawdown quote sent to him in September 2017 had quoted a fund value of £13,655.77 with a tax free cash sum of £3,413.94[1]. Mr Y had called it, on 12 and 19 September 2017, and had referred to estimated plan valuations of "just over £13,000" and "just over £13,777" in the conversations with the call handlers. In a further conversation, on 27 September 2017, he had confirmed the fund value was "around £13,000" and he wished to take the maximum tax free cash sum.

- It was sorry for the position its error had put Mr Y in, but he was only entitled to the amount he should have received and it had a duty to recover the monies it was owed.

- It acknowledged that it had not sent Mr Y a letter confirming payment had been made, but it had sent him a quote providing the fund value and tax free cash sum he wished to take previously.

- It wished to revise its offer of compensation to £300.

15. Mr Y applied to the Pensions Ombudsman on 7 April 2019.

16. On 9 May 2019, Aviva wrote to Mr Y again. It referenced its letters of 17, 18 September and 9 October 2018, and 22 January 2019 and its email of 1 April 2019. Aviva said it had not received repayment of the £23,231.42 or a repayment proposal from Mr Y. It reiterated that it would forward the matter to its legal department with a view to obtaining a CCJ or to commencing insolvency proceedings if it did not hear from Mr Y within seven days. Aviva also reiterated that the overpayment would be classed as an unauthorised payment and Mr Y would potentially be liable to a tax charge of up to 70% of the value of the overpayment. It said it would be legally obliged to report the unauthorised payment to HMRC.

17. The Pensions Ombudsman (**TPO**) received Aviva's response to Mr Y's complaint on 2 July 2019.

[1] Mr Y has said that he did not receive these statements.

Mr Y's position

18. Mr Y submits:-

- He requested a tax free cash sum in June 2017, but he did not receive any information until the beginning of September 2017. He completed an application form and sent this to Friends Life. After numerous telephone calls, he was told there were pages missing from the application form. He resent the form on 20 September 2017 and the lump sum was paid into his account on 28 September 2017.

- He complained to Aviva. On 10 November 2017, he received the response to his complaint and £200 compensation. The letter stated that payment had been made and there did not appear to be anything else outstanding. Almost a year later he was told that he had been overpaid.

- Receipt of the overpayment letter and threats to obtain a CCJ have impacted on his health. He had a month off work due to stress and is taking antidepressants.

- He should not have to repay the money because the overpayment arose solely as a result of a catalogue of errors by Aviva.

- A recent valuation sent to his financial adviser shows that there is still £17,646.34 in the Plan. His financial adviser has been told that Aviva has no record of paying him anything[2].

- He did not receive the drawdown quote or retirement option pack referred to by Aviva. He only received an application form from Friends Life.

Adjudicator's Opinion

19. Mr Y's complaint was considered by one of our Adjudicators who concluded that Mr Y did not have a defence against the recovery of the £23,231.41, but that Aviva should increase its payment for distress and inconvenience. The Adjudicator's findings are summarised below:-

19.1 Mr Y's complaint concerned the overpayment of £23,231.42 which Aviva was seeking to recover from him. The overpayment had arisen because Aviva had paid an incorrect amount into Mr Y's bank account in September 2017. Mr Y had opted to take a tax free cash sum from the Plan. The 'permitted maximum' tax free cash sum in Mr Y's case was 25% of his fund value; £3,490.48, based on a fund value of £13,961.91. As it stood, Mr Y had received more than he was entitled to and, unless he could establish that he had a legal defence against recovery, he would be required to repay the £23,231.42.

[2] Aviva has since written to Mr Y confirming that it had been unable to update its records in 2017 but has since done so.

19.2 The most common defence against recovery of a payment made in error was referred to as “change of position”; that is, the recipient had changed their position such that it would be unjust to require them to repay the monies, either in whole or in part. Change of position was a defence to a claim of unjust enrichment. To make out a change of position defence, certain conditions had to be satisfied. Briefly, the recipient had to be able to show that, on the balance of probabilities:-

- Their circumstances had changed detrimentally;
- The change of circumstances had been caused by receipt of the monies paid in error; and
- They were not disqualified from relying on the defence.

If all of these conditions were satisfied, the Pensions Ombudsman could direct that some or all of the monies paid in error could be kept by the recipient.

19.3 With regard to the last condition, a change of position defence was not available to someone who acted in ‘bad faith’ when changing their position. The Adjudicator said she wished to make it clear that bad faith was not synonymous with dishonesty. It could simply mean that, if the recipient had good reason to think that the payment had been made in error, a change of position defence would not be available to them. This could include cases where someone suspected that something was amiss and could have taken simple steps to ascertain the correct position but did not do so. In other words, the recipient of a payment made in error could not turn a blind eye to any doubts they might have as to whether the payment is correct. Bad faith did not, however, include acting negligently; so, a careless recipient might still be able to invoke a change of position defence. In making a judgment as to whether someone satisfied the requirement to act in good faith, it was not a question of deciding what they should have known; rather, it was a question of deciding, on the balance of probabilities, what they did know.

19.4 Prior to completing his application form requesting payment of a tax free lump sum, Mr Y had been sent a statement by Friends Life. This had indicated that the fund value of the Plan was £13,617.50. The statement was correctly addressed and, therefore, it was likely to have reached Mr Y safely. The Adjudicator acknowledged that Mr Y had said that he did not receive the drawdown quote or retirement option pack referred to by Aviva. He had said that he had only received an application form from Friends Life. This would have meant that Mr Y applied for a tax free cash sum without having any idea of how much the Plan was worth. In the Adjudicator’s view, this seemed an unlikely course of action for someone to take. In addition, there were the telephone conversations between Mr Y and Aviva in which he had referred to a fund value in the region of £13,000.

19.5 The Adjudicator said she was happy to accept that there had been no intention on Mr Y's part to act dishonestly when he received a payment of £26,721.90 on 28 September 2017. However, she was of the opinion that he had been aware that there was a possibility that something was amiss. He might not have been aware that the maximum lump sum he could receive was 25% of his fund value, but he would not have been expecting to receive a payment of nearly twice the fund value. There was no evidence that Mr Y had queried the amount of the payment he had received with Aviva. Accordingly, the good faith requirement was not satisfied and, in the Adjudicator's view, Mr Y did not have a change of position defence to recovery of the £23,231.42. Consequently, she did not consider the expenditure he had identified as having been caused by receipt of the overpayment in any detail.

19.6 There were other defences to the recovery of an overpayment; for example, estoppel and contract. These arose less often in pension cases but would be considered if the circumstances of the case suggested that it was appropriate to do so.

19.7 Estoppel was a legal principle which provided that, if someone made a statement or took some action causing another person to believe that a particular set of facts or circumstances are true, they should not be allowed to draw back from their statement or action if it would be unjust or unconscionable (extremely or shockingly unfair) to do so. The requirements for an estoppel defence to the recovery of an overpayment were similar to those for change of position, including the requirement for good faith. In addition, the recipient of the overpayment had also to be able to demonstrate that they had relied to their detriment either:

- on a clear and unequivocal statement (representation); or
- on a mutual assumption of fact or law (convention).

Where monies had been paid in error, the effect of an estoppel would be that the payer would be held to comply with the incorrect payment. The payer would be estopped from seeking to recover the overpayment. However, the payment itself did not constitute a representation for the purposes of estoppel. There had to be something in addition to the payment, such as a person-to-person promise or a confirmation in response to a specific enquiry.

19.8 Although the Adjudicator was of the view that Mr Y did not satisfy the good faith condition, she did give some consideration to an estoppel defence. However, she explained that she had not been able to identify the kind of representation or assumption of facts required for estoppel in Mr Y's case. The Adjudicator noted his reference to Aviva's statement, in its letter of 10 November 2017, that there did not appear to be anything outstanding at that time. She said she took this to be a reference to there being nothing

outstanding in relation Mr Y's complaint about delay and lack of information. In her view, this statement was not sufficient for an estoppel to arise in relation to the overpayment.

19.9 In any event, succeeding with an estoppel argument presented a considerable hurdle for the recipient of an incorrect payment to surmount. The Courts had spoken of the most important element as being able to show that it would be unconscionable for the payer to go back on the statement or action. It was unlikely that it would be considered unconscionable to ask Mr Y to repay a lump sum to which he was not entitled.

19.10 With regard to there being a contract between Aviva and Mr Y for him to receive the higher lump sum, the Adjudicator explained that she had not been able to identify the elements which were necessary for a contract to exist. For there to be a valid contract, the following had to be present: offer, acceptance, consideration and an intention to enter into legal relations. Contract law was based upon the concept of reciprocity. "Consideration" was something of value, however small, given by one party to the other in return for the promise made under the contract. The Adjudicator said she had not identified any consideration given by Mr Y to Aviva. Nor was there any evidence that Aviva had intended to enter into legal relations outside of Mr Y's entitlement under the Plan. In any event, a contract based upon a mistake of fact was unlikely to be enforceable.

19.11 Aviva had asked Mr Y to repay the overpayment. The Adjudicator said she had, therefore, also considered whether the Limitation Act 1980 (the **Limitation Act**) applied in his case.

19.12 The Limitation Act provided timescales within which an action had to be commenced where there had been a breach of law. Action to recover payments made in error was considered to be a "claim in restitution". Essentially, Aviva was seeking a remedy to an "unjust enrichment" to Mr Y. Such claims were historically based on forms of action found in contract law and the Limitation Act could apply. Section 5 of the Limitation Act required a claim to be brought within six years of the "cause of action". In Mr Y's case, this would be the erroneous payment made on 28 September 2017.

19.13 The Courts had decided that the cut-off date for the purposes of the Limitation Act in cases before the Pensions Ombudsman was the date on which TPO's Office received a response to a complaint. In Mr Y's case, TPO's Office had received Aviva's response to his complaint on 2 July 2019. This was well within the six years allowed for under the Limitation Act. Aviva was not restricted by the Limitation Act in seeking to recover the sum of £23,231.42 from Mr Y.

19.14 Having concluded that Mr Y did not have a defence to the recovery of the sum of £23,231.42, the Adjudicator went on to consider whether there had

been maladministration on the part of Aviva and, if so, whether Mr Y had sustained injustice as a consequence.

19.15 Clearly, the payment of a lump sum far in excess of Mr Y's actual entitlement under the Plan amounted to maladministration on Aviva's part. However, in order to uphold a complaint, the Pensions Ombudsman had to find that the maladministration had resulted in Mr Y sustaining injustice. Mr Y had not sustained a financial loss because he was not entitled to receive the £23,231.42. However, the Pensions Ombudsman could, and did, also consider whether there had been any non-financial injustice; commonly referred to as distress and inconvenience.

19.16 Mr Y was being asked to repay a not inconsiderable sum as a consequence of the maladministration on Aviva's part. The Adjudicator said she had no doubt that this was causing him significant distress and inconvenience. It was, therefore, her opinion that Mr Y's complaint could be upheld to this extent. She suggested that Aviva pay Mr Y £500 in recognition of this.

20. Aviva agreed to pay Mr Y the suggested £500. However, Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y argues that he should not have to repay the monies paid to him error because the error was made by Aviva. He says, in any event, he is not in a position to repay £23,231.42. I acknowledge Mr Y's comments, but, I agree with the Adjudicator's Opinion.

Ombudsman's decision

21. The starting point when money has been paid to someone in error is that the money must be repaid. This is the case even if the party making the payment has been careless or is responsible for the error in some other way. It is only if the recipient of the incorrect payment can show that they have a legal defence against recovery that they may be able to retain some or all of the money they received in error.

22. In Mr Y's case, my Adjudicator went through each of the possible defences against recovery to see if any applied. Those defences are: change of position; estoppel; or contract.

23. For a change of position defence to succeed, Mr Y must have received the payment of £23,231.42 in good faith. I would reiterate my Adjudicator's point that acting in bad faith is not the same as acting dishonestly. It can simply mean that the recipient of an incorrect payment should not ignore any doubts they might have as to whether the payment is correct. If they do have any doubts, they are expected to take reasonable steps to clarify the situation. In other words, the recipient of an incorrect payment should not turn a blind eye to the situation.

24. In coming to a judgment as to whether Mr Y acted in good faith when he accepted the payment of £23,231.42, I need to decide what he knew at the time; not what he should have known. Obviously, only Mr Y can actually say with any certainty exactly

what he knew at the relevant time. I must make my judgment, on the balance of probabilities, by reference to the available evidence.

25. Mr Y has argued that he was assured that everything was correct and he has referred me to Aviva's letter of 10 November 2017. However, this letter was issued in response to Mr Y's complaint that there had been delay in Aviva providing him with information. There is no evidence that Mr Y queried the payment of £26,721.90 made on 28 September 2017.

26. In June 2017, Mr Y had been sent information by Friends Life which quoted a fund value of £13,617.50. He has said that he did not receive any information about the Plan and only received an application form. However, in telephone conversations with Aviva, Mr Y referred to a fund value of around £13,000. This suggests that he had received the information sent to him by Friends Life.

27. On the balance of probabilities, I find that Mr Y knew that the value of the Plan was around £13,000 in September 2017 and, therefore, would have had some doubt about whether the payment of £26,721.90 he received was correct. Mr Y did not query the payment with Aviva and, as a consequence, he cannot now rely on a change of position defence against repaying the £23,231.42 paid in error.

28. I agree with my Adjudicator's analysis of estoppel and contract (see paragraphs 19.7 to 19.10 above) and find that these defences are also not available to Mr Y. With regard to the Limitation Act, I find that Aviva has brought its claim for repayment within the relevant time period and is not prevented from requiring Mr Y to repay any of the £23,231.42 by limitation.

29. Mr Y says that he is not in a position to repay £23,231.42 and that his income currently only covers his day-to-day living costs. I am not unsympathetic to the position Mr Y finds himself in. However, the fact remains that he was not entitled to the money and has been unable to establish a defence against its recovery. I am required to apply the law as it stands. That being said, I would expect Aviva to take Mr Y's circumstances into account when taking steps to recover the amount due. It would be appropriate for Aviva to allow Mr Y to present it with evidence of his financial circumstances and to agree a suitable repayment plan which does not cause him and his family undue financial hardship.

30. Although I have concluded that Mr Y does not have a defence to the recovery of the money paid in error to him and must repay £23,231.42 to Aviva, maladministration by Aviva is a separate matter.

31. I find that the payment of an incorrect lump sum does amount to maladministration on Aviva's part. Mr Y has sustained injustice as a consequence; inasmuch as he has suffered significant distress and inconvenience.

32. Therefore, I uphold Mr Y's complaint to this extent.

Directions

33. Within 28 days of the date of this Determination, Aviva shall pay Mr Y £500 in recognition of the significant distress and inconvenience its error has caused him. It shall give Mr Y the option to have this sum offset against the £23,231.42.

Anthony Arter
Pensions Ombudsman

24 May 2022