

Ombudsman's Determination

Applicant	Mr S
Scheme	Aviva Pension Plan (the Plan)
Respondent	Aviva

Outcome

1. Mr S' complaint against Aviva is partly upheld. To put matters right, Aviva shall pay Mr S £1,000 for the serious distress and inconvenience caused.

Complaint summary

2. Mr S has complained that Aviva has incorrectly interpreted a consent order (**the Order**) between him and his ex-wife (**Mrs C**). In doing so, he considers that it has allocated his ex-wife an incorrect entitlement at his expense.
3. Mr S highlights that this matter has caused him distress and inconvenience, impacted his family and children, and affected his health. He is also dissatisfied with the overall handling of the complaint.

Background information, including submissions from the parties

4. Mr S was the policyholder of the Plan, DD97033, now administered by Aviva. The Plan consisted of two separate elements, 9703321 and 9703390, referring to non-protected rights and protected rights.
5. In 2000, the Order was granted, resolving the financial aspect to the divorce between Mr S and Mrs C. In respect of the Plan, the Order says:

“AND UPON the Respondent undertaking to the Court that he will give the Petitioner 56 days notice in writing of his intention to retire to the Petitioner

AND UPON the Respondent undertaking to the Court not to draw any benefits from his personal pension policy with Axa Equity and Law in such form to frustrate the provisions of the Order below without consent in writing to the Petitioner

AND UPON the Respondent undertaking to the Court that he will not transfer his pension rights from his policy number DD97033 with Axa Equity and Law to any other pension policy or scheme without the consent in writing of the Petitioner such consent not to be unreasonably withheld.

IT IS HEREBY ORDERED:

1. ...
2. ...
3. Upon drawing of a lump sum payable to the Respondent upon his retirement under the terms of his pension with Axa Equity and Law the Respondent will commute 50% of the benefits capable of commutation under the said pension.
4. The Trustees or Managers of the Respondents said pension do pay or cause to be paid to the Petitioner on behalf of the Respondent a sum equal to 50% of the maximum lump sum payable to the Respondent upon his retirement under terms of the said pension.”
6. At the time, a tax free cash lump sum was not available from the protected rights section of the Plan, and an annuity had to be bought with those funds.
7. On 6 April 2004, rules relating to protected rights changed and individuals were able to access tax free cash from protected rights funds.
8. On 6 April 2012, protected rights were abolished and effectively converted into non-protected rights. Aviva considered ring-fencing former protected rights but decided not to and all funds were from then on regarded as non-protected rights.
9. In September 2018, on approaching his 60th birthday, Mr S transferred the Plan into a SIPP, also with Aviva, with a total value of £77,874.87.
10. Subsequently, Mr S crystallised £59,052.80 and took a tax free lump sum of £14,763.20.
11. On 20 December 2019, Mrs C contacted Aviva informing it that the transfer should not have proceeded without her written consent. She later confirmed that she would not have agreed to the transfer and she now required her share of the tax free cash lump sum as per the Order.
12. In early January 2019, Aviva wrote to Mr S explaining that at the point it transferred the Plan into the SIPP it had overlooked the presence of the Order. This meant that it ought to have sought Mrs C’s consent prior to the transfer but did not. Additionally, when the lump sum was paid out, 50% ought to have been paid to Mrs C. Aviva asked that Mr S pay 50% of the lump sum to Mrs C and confirmed that she would be entitled to 50% of the remaining commutable tax free lump sum.
13. Aviva explained that, based on its interpretation of the Order, there was no differentiation between protected and non-protected rights and there was no exclusion of tax free cash from protected rights funds. The change in legislation in 2012 meant that all of the benefits could be commuted for a lump sum and Aviva was

required to follow the legislation now in force. If this was disputed, Mr S would need to return to Court to clarify the wording of the Order.

14. On receipt of the letter, Mr S complained about Aviva's actions. He made the following points, in summary:-

- Over the course of the transfer he had repeatedly advised that Mrs C was entitled to 50% of the main pension. He advised that she was not entitled to the protected rights.
- Protected rights were intended to be for the benefit of the named pension holder only. It could not be assigned or passed to other parties. For this reason, it was kept separate from the main pension. The Order did not need to mention it because there was no need and it would have been referenced if that was the intention. Mrs C was not entitled to any part of the protected rights.
- The amount taken from the SIPP as tax free cash was not 25%, it was only the protected rights element. Aviva had said that this was his only option to keep the protected rights separate, otherwise they would be included in the main pension. There was a second plan, which still included a tax free lump sum entitlement.
- Aviva should have informed him that under the current law it should be treated as one plan. If it had his actions would have been different and he would have discussed it with Mrs C. However, due to Aviva's actions they are no longer on good speaking terms and she does not trust him, causing significant detriment to his family's relationship.
- Aviva has accepted it made mistakes and he considers it negligent. It provided incorrect information and its staff had a lack of knowledge of protected rights.

15. On 28 January 2019, Aviva issued a further letter having received internal guidance. It explained that it considered that at the point of transfer the benefits were transferred as one whole benefit. It also explained that pension law had changed in 2006, 2012 and 2015. Under the current rules, Mr S had a much wider choice as to how to take benefits. Given the changes to the law, Aviva suggested Mr S seek clarity on how the Order should be applied under current pension law and asked that the tax free cash be returned so that the policy could be reinstated to the correct position.

16. On 31 January 2019, Aviva issued its final response letter. It apologised for the error in not requesting Mrs C's consent and failing to apply the Order at the point the tax-free cash was paid. It asked that Mr S return the tax free lump sum and seek a revised court order. Aviva confirmed that feedback had been provided to the relevant teams and acknowledged the distress and inconvenience caused, offering Mr S £250 in respect of this (**the Offer**).

17. On 26 February 2019, Aviva referred the matter back to its legal team for further clarification. In the following months, Aviva considered the matter internally with further legal and technical advice.

18. On 4 June 2019, Aviva wrote to Mr S again. Having reviewed the situation, Aviva said it was satisfied that its interpretation of the Order was correct and requested Mr S repay the tax free lump sum of £7,381.60.
19. Mr S did not accept the Offer. On referral to The Pensions Ombudsman, Mr S added the following points:-
 - Certain individuals at Aviva had made unilateral decisions to inform Mrs C of the situation and in doing so entrenched the situation.
 - Additionally, those individuals effectively investigated their own actions, responding to his formal complaint.
 - If Aviva's interpretation of the divorce agreement is correct, then it is effectively rewriting the divorce agreement. Today's pension law should not be applied to their divorce some 20 years ago.
 - The matter has required several telephone calls, which achieved nothing. In June 2019, his doctor advised him to stop because it was affecting his health.
 - Aviva has since blocked an attempt to withdraw further funds or seek Mrs C's consent to do so. It is only interested in him returning the tax free lump sum.
 - The matter has severely affected his family relationships and his friendship with Mrs C.
20. On 15 November 2019, Mr S spoke with Aviva to request a further drawdown from the SIPP. Aviva explained that it would not provide a drawdown payment until the tax free lump sum was repaid. In response Mr S said that he would not be returning the lump sum as he no longer had the money. He argued that Aviva, having accepted its error, should take the steps necessary to put the matter right by paying Mrs C her share of the tax free lump sum.
21. During the call, Mr S also complained that he had been expecting a telephone call from a senior manager earlier that week but had not been contacted. He considered that other elements of his complaint had not been addressed. Specifically, he had concerns that the complaint was being addressed by an individual who was being complained about.
22. The individual Mr S spoke to confirmed that he would leave call notes on the system and ultimately, after an extended exchange on the matter, agreed to pass on Mr S' request for a call back.
23. Aviva has confirmed that Mr S' request for a drawdown payment from the SIPP was not passed on to the relevant team and that the request for a call back from a manager was not passed on.

Adjudicator's Opinion

24. Mr S' complaint was considered by one of our Adjudicators who concluded that there had been maladministration on the part of Aviva and a distress and inconvenience award should be paid. The Adjudicator's findings are summarised below:-

- The Order made no distinction between non-protected and protected rights, referring only to the joint policy reference. The directions within the Order therefore applied to both parts of the Plan.
- Although at the time the Order was made protected rights could not be commuted, and so it was not foreseen that Mrs C would benefit from it, the wording of the Order is broad. Under the current pension regime, on commuting the former protected rights, the Order requires Mrs C to receive 50% of the lump sum payable.
- The Adjudicator acknowledged Mr S' strength of feeling and the impact that this change might have on the equity of the Order as a whole, but that did not invalidate Aviva's interpretation given the changed pension landscape.
- The Adjudicator was of the opinion that Aviva had correctly interpreted the terms of the Order and was intending to apply them to the Plan as it was required to by the court. In these circumstances it was reasonable for Aviva to seek to recover the overpayment from Mr S. Mr S could challenge this by seeking a variation of the Order from the courts.
- Mr S had received an overpayment of his pension that Aviva was seeking to recover. Where an overpayment has occurred a pension scheme is generally entitled to recover the amount. Mr S had been invited to submit a defence from recovery, for instance change of position or estoppel, but declined on the basis that he believed Aviva had no right to recover the any of the money.
- In respect of Aviva's handling of the situation, the Adjudicator considered there were significant failings. The Order was ignored at the point of transfer and when the lump sum was paid out; this amounted to maladministration, despite Mr S apparently having highlighted the Order prior to the transfer.
- Aviva was entitled to liaise with Mrs C given the terms of the Order and share its interpretation of the Order with her. It was also Aviva's responsibility not Mrs C, to recover the money from Mr S.
- Mr S had noted that the individual that had informed Mrs C of the situation also handled the complaint, investigating their own actions. In the Adjudicator's opinion it was not unreasonable given their understanding of the situation and as point of contact for both Mr S and Mrs C. This was not maladministration and the Adjudicator noted that the matter was later handled by another individual.

- The telephone call of November 2019 was not handled well by Aviva. Although Mr S was correctly referred on to the Ombudsman, as he was dissatisfied by the response to the complaint, it was also reasonable to expect his request for a drawdown of pension to be processed and for his complaint to be escalated to a manager. Despite being told it would be, the matter was not taken forward.
 - Aviva's maladministration had a significant impact of Mr S' family relationships.
 - Had Aviva acted appropriately by following the terms of the Order, that it was aware of, the subsequent issues and overpayment would not have arisen. This had caused Mr S a serious level of distress and inconvenience and the issues remained outstanding and Aviva should pay him £1,000 in respect of this.
25. Mr S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr S provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and note the additional points raised by Mr S.

Ombudsman's decision

26. Mr S has reiterated that at the time the Order was made, by law, Mrs C was not entitled to the protected rights portion of his pension. Therefore, she should not be entitled now. In his view, Aviva has got everything wrong and the Adjudicator has failed to base his Opinion on facts. Additionally, he disputes that his complaint was looked at by an individual at Aviva not previously involved with the process.
27. I understand Mr S' dissatisfaction. His rationale for believing that Mrs C had no entitlement to the protected rights portion of the Plan is reasonable. At the time the Order was made it was not possible for Mrs C to benefit from it. However, while it was not possible at the time, pension law has developed since then and protected rights no longer exist. Under current pensions law, there is nothing to stop protected rights being paid as part of a divorce settlement.
28. The wording of the Order fails to distinguish which part of the pension Mrs C is entitled to benefit from which causes the problem. I accept that the law, as it stood, meant that it did not need to be specific. But Aviva now must follow the wording of the Order. To not do so would be to risk acting in contempt of court. Mr S will have to apply to the Court if he wishes to challenge the application of the Order.
29. Mr S has questioned the Adjudicator's suggestion that a second individual at Aviva had handled his complaint. I note that Aviva's letter dated 4 June 2019 was sent by a separate member of the Customer Care Team.
30. Aviva's failure to take account of the Order in the course of the transfer and in paying Mr S his PCLS is significant maladministration. This was compounded by the failures in the call of 15 November 2019. In the circumstances, I am satisfied that this amounts to a serious level of distress and inconvenience.
31. I uphold Mr S' complaint in part only.

Directions

32. Within 14 days of the date of this Determination Aviva shall pay Mr S £1,000 for the serious distress and inconvenience caused.

Anthony Arter

Pensions Ombudsman
19 April 2021