

Ombudsman's Determination

Applicant	Mr N
Scheme	Aviva Section 32 policy (the Plan)
Respondents	Aviva

Outcome

1. I do not uphold Mr N's complaint and no further action is required by Aviva.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr N has complained that Aviva have refused to honour the contract he has for pension increases at 5% a year to be applied to the pension.

Background information, including submissions from the parties

4. In 1988 Mr N transferred his pension benefits in the Courage Limited Staff Pension Fund to a Section 32 Transfer Plan with Norwich Union (now Aviva). The underlying premise of Section 32 policies such as the one sold to Mr N was that the transfer value would be invested and at retirement the total fund would be used to provide a pension. The pension provided would, however, not be less than the guaranteed minimum pension (**GMP**) that the policyholder would have received from the transferring scheme.
5. Mr N elected to receive pension increases at the rate of 5% a year on the resultant pension. However due to a number of factors the Plan did not perform as well as expected and Aviva advised Mr N that at retirement date the pension payable would only be equivalent to the GMP and that no increases would be payable on this amount.
6. Mr N did not accept Aviva's decision that no pension increases were payable and brought a complaint to this office. The basis of Mr N's complaint is similar to a number of other complaints that have been brought to this office and I have issued a determination for one of those complaints in respect of Mrs R (**PO-13991**) which is attached.

Adjudicator's Opinion

7. Mr N's complaint was considered by one of our Adjudicators who concluded that no further action was required by Aviva. The Adjudicator's findings are summarised briefly below:-
 - As Mr N's complaint was the same as that of Mrs R (PO-13991) the Adjudicator was of the view that an Ombudsman would reach the same conclusion that although Aviva were required to cover the GMP, it was not required to pay increases on the GMP.
8. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N provided his further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr N for completeness.
9. Mr N says that the determination in PO-13991 makes no reference to the Transfer Out Statement he received from Courage Limited which should be considered as part of the "matrix of facts" around the substance of his complaint. This Statement clearly states two provisions (amongst others) as follows:-
 - that the pension is guaranteed for five years from the date payments commence; and
 - that the pension would increase by 5% per annum or the increase in the RPI if lower, and explicitly states that this would be after payments commence. There is no mention that this increase would only apply to that part of the pension that was not the GMP.
10. At the time of taking out the policy, he explicitly chose the guarantee period of five years and also the escalation rate of 5%. Aviva has confirmed to him that Aviva will honour the guaranteed five year period, as stated in Condition 8 of the policy document. There is an actuarial cost to providing such a five year guarantee, which effectively means that the cost of providing the five year guarantee on the pension as defined in condition 7 is already greater than would be required to provide the bare minimum specified as equivalent to the GMP. So effectively, Aviva has chosen to honour one commitment the five year period, but not the commitment to the escalation percentage, neither of which can be met by the existing Capital Fund.
11. When considering the "Matrix of Facts", a very reasonable reading of condition 9 of the policy is that it means exactly what it states, without any explicitly stated qualification, that "Pensions provided under condition 7 shall increase at the Escalation Percentage Rate specified in the Second Schedule." The use of the word shall in normal legal usage implies a duty, not an "optional" duty.
12. The next section of condition 9 explicitly states what happens if an escalation rate has not been specified. Therefore it would not be unreasonable when considering the "matrix of facts" to assume that the clause being used by Aviva to avoid their responsibility to pay the escalation only applies to the situation where no escalation

rate has been chosen. It is, at the very least, ambiguous and could be interpreted either way. Given the ambiguity, then surely the principal of contra proferentem should apply, although PO-13991 comes to a different conclusion.

Ombudsman's decision

13. I do sympathise with the position that Mr N now finds himself in. Mr N had an expectation that the transfer he made to the Section 32 Plan would result in him receiving a larger pension than he had with his previous employer. But there was no guarantee that the Plan pension would be better, the only guarantee provided was that the resultant pension would not be less than the GMP.

Mr N has referred to the fact that Aviva has agreed to honour the five year guarantee period that he chose when taking out the contract. But the five year guarantee is one of the express terms of Condition 8 (Pension Payments) of the policy and Aviva has no choice other than to provide that term of the contract as there is no dispute over this term.

14. The other terms of the contract that Mr N has with Aviva are spelt out in the policy document and these have been examined carefully as part of the determination in PO-13991. The main dispute is over the terms of Condition 9 (Increases in Pension) and whether any increases should be provided on the GMP.
15. The conclusion I reached in PO-13991 was that I was not satisfied that a contractual or other guarantee to provide an escalation over the GMP was made or could be inferred in Condition 9 or otherwise. Clearly, it was hoped that the policy would accrue sufficient value to meet the GMP and also the escalation rate. But neither the confirmation letter nor the policy guaranteed in that case, without exception, that the escalation rate chosen would be met. I do not find that the arguments made by Mr N cause me to change or reconsider that decision.
16. Therefore, I do not uphold Mr N's complaint.

Anthony Arter

Pensions Ombudsman
20 December 2017