

Ombudsman's Determination

Applicant	Mr Y
Scheme	AVIVA Pension Plan (the Plan)
Respondent	Aviva

Outcome

1. I do not uphold Mr Y'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 Y complains that Aviva has requested that he repay an overpayment of pension benefits.

Background information, including submissions from the parties

Background

4. The Plan, which is provided and administered by Aviva, commenced on 1 August 1990. It was set up to receive benefits from a former occupational pension scheme, which was contracted-out of the state earnings related pension scheme (**SERPS**). As such the Plan must provide a Guaranteed Minimum Pension (**GMP**) at state pension age (**SPA**).
5. The Plan had a normal retirement date (**NRD**) of 23 November 2015, coincident with Mr Y's 60th birthday. For the purpose of receiving the GMP from the Plan, Mr Y's SPA is age 65.
6. On 30 October 2015, Mr Y contacted Aviva to request a quote for a lump sum payment and to update his address. On 10 November 2015, Aviva confirmed that Mr Y's address details had been updated.
7. On 14 November 2015, Aviva provided a retirement illustration with the following benefit options:-
 - An annual pension of £4,887.72, increasing at 5% per annum, guaranteed for 5 years with no tax-free cash.

- A reduced annual pension of £4,100.00, increasing at 5% per annum, guaranteed for 5 years with £27,790.55 tax-free cash.
 - A tax-free cash payment of £27,790.55 and a payment of £124,070.54 to be paid to another insurance company, on the open market, to purchase an income.
 - A payment of £151,861.09 to be paid to another insurance company, on the open market, to purchase an income.
8. However, this illustration was incorrect.
 9. Mr Y called Aviva on 23 November 2015. He said that he wanted to take the full value of the Plan as a cash lump sum.
 10. Aviva claims that it informed Mr Y he could not flexibly take benefits from the Plan, therefore a lump sum could not be taken. It agreed to send a further retirement illustration with the available options.
 11. On 24 November 2015, a further retirement illustration was issued. This was also incorrect.
 12. On 26 November 2015, Aviva received Mr Y's completed retirement application. He elected to take the maximum tax-free cash of £27,790.55 with the remainder of the Plan being used to purchase an annuity.
 13. On 3 December 2015, Aviva processed the tax-free cash sum payment of £27,790.53. Mr Y received this on 8 December 2015.
 14. On 10 December 2015, Mr Y made a payment of £24,000 to redeem his mortgage.
 15. Aviva has said that ordinarily the remainder of the Plan value would have been sent to the annuity team in order that the annuity could be set up. However, this did not happen as Aviva suspected there had been an error. So, the matter was referred to the manual calculation team.
 16. The manual calculation team identified that on Aviva's systems, the figure for the pension in excess of the GMP had been incorrectly recorded as £4,887.66 rather than the correct amount of £553.44. The manual calculation team confirmed that the correct value of the Plan was £28,640.82 which should be used to provide an annual annuity of £563.70 with a 5% annual escalation and a spouse's pension of £281.85 also increasing at 5% per annum. From age 65, a GMP step-up of £846.04 would be paid. Further, as the Plan was comprised mainly of GMP, the tax-free cash of £27,790.55 should not have been paid.
 17. On 22 January 2016, Aviva called Mr Y and left him a voicemail message explaining that his benefits had been miscalculated. It asked him to repay the £27,790.55 tax-free cash he had received. This prompted Mr Y to complain.

18. On 5 July 2016, Mr Y's former mortgage provider confirmed that the capital repayment could not be reversed, and the account reopened, since the mortgage provider had redeemed the mortgage in full and removed its legal charge from HM Land Registry.

Summary of Aviva's position

19. Rather than demand repayment of the £27,790.55 paid to Mr Y in error, Aviva is prepared to consider this as, 'a payment in advance' of his GMP. As such payment of the GMP will be withheld until such time as the payments in respect of GMP which Mr Y should have received from SPA exceed £27,790.55, at which point the payment of income will recommence.
20. The payment will be reported to HMRC as an Unauthorised Payment. But, Aviva will refund any Unauthorised Payment Charge levied on Mr Y by HMRC, provided it is presented with evidence of the charge.
21. Aviva is prepared to offer Mr Y £1,000 in recognition of the distress and inconvenience its errors have caused.

Summary of Mr Y's position

22. Mr Y was abruptly informed that he needed to repay £27,790.55. However, it was not possible for him to do this since he had spent the money. Subsequently one of Aviva's employees told him he would not be required to repay the money.
23. He may be subject to an Unauthorised Payment Charge of up to 40% of the overpayment. He does not trust Aviva to honour its commitment to pay any tax he may be liable for.
24. The compensation Aviva has offered is an, "insult" not least because Aviva refuses to confirm whether it will pursue his estate for the remaining overpayment in the event of his death.
25. Mr Y considers that Aviva knew of the error leading to the overpayment as early as 2007. He cited a news article in support of Aviva's awareness that there was a wider issue with some of the pension arrangements it administers.

Adjudicator's Opinion

26. Mr Y'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 below:-
 - Neither the fact that an overpayment has arisen, nor the value of the overpayment has been disputed by either party.

- The recovery of any overpayment is subject to the Limitation Act 1980 (**the Limitation Act**). The usual time limit for seeking recovery of an overpayment is six years from the date of the incorrect payment [Limitation Act, section 5]. Under section 32 of the Limitation Act, there is provision for the six-year period to be extended where the overpayment is the consequence of a mistake. In which case, the time would not start to run until the mistake was discovered or could, "with reasonable diligence" have been discovered.
- In Mr Y's case the provisions of the Limitation Act do not apply to prevent recovery of the overpaid amount. This is because the complaint has been referred to this Office within six years of both the overpayment being made on 3 December 2015, and it being discovered on 22 January 2016.
- The Adjudicator explored whether there were any further defences available to Mr Y in respect of the overpayment. The most common of which is referred to as "change of position." The Adjudicator explained that for a change of position defence to succeed, certain conditions must be satisfied.
- However, in this case Mr Y used the majority of the overpayment to repay his mortgage. So, the Adjudicator was not persuaded that this could be said to be a detrimental change of position. In support of this the Adjudicator relied on the judgment in *Derby v Scottish Equitable Plc [2001] EWCA Civ 369*. In that case, at paragraph 35, the court confirmed that payment of a debt that was required to be paid in due course anyway would not normally amount to a change of position. Thus, and notwithstanding consideration of whether Mr Y was acting in good faith, the Adjudicator was unable to say that Mr Y had a successful change of position defence, since he had not acted to his detriment.
- The Adjudicator also gave consideration to whether Mr Y could rely on an estoppel argument. Central to all estoppel claims is the aim of preventing unconscionable conduct. In *Steria v Hutchinson [2006] EWCA Civ 1551*, Neuberger LJ said there were three specific, "classic requirements" that must all be satisfied in estoppel by representation or promissory estoppel to establish unconscionability. These are:-

"(a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise."
- Of relevance was the third test, (c). To be able to say that it would be unconscionable for Aviva to maintain the position that Mr Y cannot keep the tax-free cash paid to him in error, the Adjudicator would need to be satisfied that he had acted to his detriment, so much so that it would be unconscionable to ask him to repay the overpayment. But, for the same reasons as with the change of

position defence, the Adjudicator did not agree that paying off his mortgage, a debt which would require repayment in any event, was detrimental.

- Thus, Mr Y does not have any defence against Aviva seeking recovery of the overpayment. However, Mr Y has now spent the money he received in error and it is seemingly not possible for him to unwind the redemption of his mortgage in order to repay, in full, the lump sum payment of £27,790.55 Aviva had paid him in error.
 - Consequently, the Adjudicator went on to consider whether the proposal Aviva had made was reasonable.
 - Both reinstating Mr Y's previous mortgage and arranging a new mortgage to assist with the repayment were discounted. The first because the original mortgage provider was unwilling or unable to reinstate the original mortgage, the second because Mr Y's earnings do not support borrowing of the value needed. Consequently, the Adjudicator took the view that Aviva's offer to treat the overpayment as a 'payment in advance' of the GMP was reasonable. This seemed to be a genuine and pragmatic attempt by Aviva to assist Mr Y.
 - Due to pension legislation, Aviva is bound to report the overpayment to HMRC as an Unauthorised Payment. But doing so may subsequently incur an Unauthorised Payment Charge. However, Aviva had offered to refund such a charge on receipt of evidence of the charge. Again, the Adjudicator took the view that this was a reasonable offer. It would ensure Mr Y was in no worse a position as a result of receiving the overpayment.
 - The Adjudicator acknowledged that Mr Y had misgivings about whether Aviva would honour this commitment. But he opined that if Aviva reneged on the offer, Mr Y would have recourse to make a further complaint at that point in time.
 - Aviva accepted that its service had fallen short of the standard Mr Y should expect. It offered Mr Y £1,000 in recognition of his experience. The Adjudicator thought this was appropriate and was in line with the scale of award I would likely direct. As Aviva's offer was made prior to the dispute being referred to this Office, the Adjudicator said the complaint could not be upheld.
27. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y 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 Y for completeness.

Ombudsman's decision

28. Mr Y is concerned that Aviva may seek to recover any outstanding overpayment from his estate in the event of his demise. Aviva has said that in the event of Mr Y's death, it would need to take a decision at that time as to whether to either recover, or write-

off, any outstanding overpayment. For the same reasons as the Adjudicator, I do not find that Mr Y has any defence against recovery of the overpayment. As such the position in law is that Aviva would be entitled to recover any overpayment which remains outstanding in the event of Mr Y's demise. Whether or not Aviva decides to take this course of action is a commercial decision Aviva is entitled to make at its discretion. This is not a decision I would usually interfere with.

29. Mr Y is also concerned that the Plan was affected by a widespread error Aviva identified as early as 2007. I can see that my Adjudicator made enquiries regarding this and that Aviva confirmed that the error leading to the overpayment occurred in 2008/9 when Mr Y's Plan was migrated to a new system and incorrect figures were input.
30. I acknowledge Mr Y's concern that other than Aviva's testimony there is little evidence of this fact. However, I must make a finding based on the balance of probabilities; that is, what is most likely to have happened. In this case I note that the news article Mr Y referenced suggests that the error Aviva identified had led to an underpayment of pension, not an overpayment as in Mr Y's case. So I am not persuaded that the Plan was affected by the error Mr Y refers to.
31. But, in any event, I am not persuaded that Aviva's awareness of when the error occurred has a material effect on the outcome. The time limit for the Limitation Act starts to run from when the 'cause of action' starts to accrue. In this case the cause of action was the erroneous lump sum payment to Mr Y, rather than the error which led to the overpayment. Since Aviva's claim was made within six years of the date of the overpayment being made, I am unable to say that Aviva's date of awareness of the error (which Mr Y alleges was in 2007) interacts with the Limitation Act to mean that recovery of part, or all, of the overpayment is statute barred.
32. Finally, Mr Y expressed concern that Aviva would renege on its commitment to meet any Unauthorised Payment Charge he may be assessed by HMRC as being liable for. As such he requested a final Determination, which is binding on the parties and which can be enforced should the circumstances dictate that this is necessary.
33. Whilst I acknowledge Mr Y's concern, I would be disappointed if Aviva now withdrew its offer of redress. But, I cannot provide a remedy for an eventuality which has not yet occurred. Further, Aviva's offer, which I find to be reasonable, was made before his dispute was referred to this office. Consequently, I cannot properly uphold Mr Y's complaint and make directions against Aviva. As such the correct course of action would be for Mr Y to make a complaint to my office, subject to the normal jurisdictional requirements, if he is subsequently assessed as being liable for an Unauthorised Payment Charge and Aviva refuses to reimburse Mr Y for this liability having been provided with appropriate evidence of the charge.

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34. Therefore, I do not uphold Mr Y's complaint.

Anthony Arter

Pensions Ombudsman
15 November 2018