

Ombudsman's Determination

Applicant	Mr T
Scheme	Phoenix Life Personal Pension (the Plan) Policy No: 2311083J
Respondent	Phoenix Life (Phoenix)

Outcome

1. Mr T's complaint against Phoenix is partly upheld, but there is a part of the complaint I do not agree with. To put matters right (for the part that is upheld) Phoenix shall pay Mr T £2,000 in recognition of the severe distress and inconvenience which he has experienced dealing with this matter.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr T complains that Phoenix provided him with incorrect information about the benefits available to him from the Plan which he relied upon to his financial detriment. He says that in April 2017, shortly before his 70th birthday, he purchased a car, the price of which he believed would be covered in part by the tax free lump sum of around £7,000 that would be available from the Plan on his retirement. It later transpired that his pension rights in the Plan had already been transferred in 1990 to the Kellogg Brown & Root (UK) Ltd Pension Plan, now administered by Mercer, and it was not until October 2017 that Phoenix brought this to Mr T's attention.

Background information, including submissions from the parties

4. Phoenix provided Mr T with details of the benefit options available to him from the Plan in July 2012 shortly after his Normal Retirement Date (**NRD**) on 1 April 2012 but he decided not to retire at that time.
5. In October 2012, Phoenix informed Mr T that he had the option of taking 25% of the Plan fund value of £28,055.93 as tax free cash.
6. During 2013, Mr T considered transferring his pension rights in the Plan to Standard Life and authorised it to contact Phoenix for the relevant details. Phoenix informed Standard Life in April 2013 that the Plan transfer value was £28,095.62. In July

2013, Phoenix sent Standard Life transfer documents showing that the transfer value had increased to £28,243.

7. In November 2013, Standard Life sent Mr T all the information which it had received from Phoenix so that he could decide whether to transfer. Mr T chose not to do so at that time.
8. During late November 2014, Mr T was “looking at three ways to restructure his finances during retirement” with the assistance of Standard Life and decided not to proceed with a transfer of the Plan benefits to Standard Life.
9. In December 2014, Phoenix responded to Standard Life’s enquiry by informing it that the Plan benefits available to Mr T had been transferred out in 1990 and its records had been rectified accordingly. Standard Life says that it did not inform Mr T of this because it was not “looking after Mr T’s personal financial planning”.
10. In September 2016, Mr T asked Standard Life to again investigate the possibility of a transfer. Phoenix incorrectly informed Standard Life in October 2016 that Mr T’s benefits in the Plan had already been transferred to Standard Life in May 2014.
11. Having received conflicting information about Mr T’s pension rights in the Plan, Standard Life sought clarification from Phoenix during 2017 but says that it did not receive a satisfactory reply from Phoenix for some time.
12. In October 2017, Standard Life therefore suggested to Mr T that he should contact Phoenix directly and sent him copies of its correspondence with Phoenix for his information.
13. Phoenix informed Mr T in October 2017 that his pension rights in the Plan had already been transferred. Mr T says that this was the first time that Phoenix had informed him of this.
14. Phoenix apologised to Mr T for its errors and giving him an expectation that he still had benefits in the Plan. It explained that the Plan had been set up in order “to accrue benefits built up from contributions paid by the government.” and after these benefits had been transferred in 1990, it continued to receive contributions in the Plan from HMRC due to an administration error. It was only in November 2011 that this mistake was discovered and it then took until July 2014 for the erroneous payments totalling £24,333.05 to be reimbursed to HMRC. During this time, the Plan had to remain active which regrettably resulted in it providing Mr T with incorrect information.
15. Mercer informed Mr T in 2018 that (a) the Kellogg Brown & Root (UK) Ltd Pension Plan received a transfer value of £5,878.78 from the Plan in September 1990 and (b) this amount was used to purchase an additional pension of £3,090.54 pa which he was already receiving. Both Phoenix and Mercer say that they have not retained any documentary evidence of this transfer in their records.

16. Although Mr T accepts that he no longer has any benefits in the Plan, he says that:
- he clearly made an irreversible decision to his financial detriment and reasonably relied on the incorrect information provided by Phoenix in 2012 and 2013;
 - as his 70th birthday approached, he was satisfied that he could safely spend the tax free lump sum available to him from the Plan of around £7,000 representing 25% of the Plan fund value of approximately £28,000;
 - in April 2017, he consequently purchased a car as a combined retirement and birthday present, the cost of which he had believed would be partly covered by the tax free lump sum of around £7,000.
17. Phoenix has offered Mr T compensation totalling £850 in recognition of the significant distress and inconvenience which he has suffered because of its mistakes and the delay in dealing with his complaint. Mr T does not, however, consider this amount adequately compensates him for the “irrevocable change Phoenix has caused to his financial position”.

Phoenix’s Position

18. Whilst it is sympathetic to Mr T’s circumstances, it is not at fault for the financial commitment he chose to make.

19. It says that:

“We accept that incorrect information had been given historically, however when Standard Life approached us on Mr T’s behalf in December 2014 we made them aware of the situation that the policy had been transferred out. Again, we received further requests from Standard Life in September 2016 and January 2017. Each time they were requesting detailed policy information and values and although incorrect information was provided, we did not say the policy had a value.

Whilst we realise that we had given Standard Life incorrect information, we did advise them that the pension was no longer with us and we never gave the impression that there was any value. Standard Life never came back to query this, nor did Mr T...

...it was not until October 2017 Mr T contacted us and we explained to him that his pension was no longer with us and had been transferred out.”

20. It did not notify Mr T directly that there were no benefits in the Plan because this is not something it would do after receiving a request from a third party. It would expect Standard Life to have passed any information it provided to him. However, if Mr T had contacted it directly at any point prior to making his commitment to purchase his car, it would have informed him accordingly.

Mr T's position

21. Phoenix has not satisfactorily explained why it did not inform him well before Standard Life's involvement of the error and what it was going to do to rectify the mistake.
22. In 2012, he returned to the UK after working in Canada and Phoenix found his new home address using HMRC's tracing service so that it could provide him with details of his retirement benefits available at NRD after he had supplied proof of his identity.
23. He contacted Standard Life many times between December 2016 and October 2017 seeking updates on his proposed transfer of pension rights from the Plan. During this period both he and Standard Life truly believed that he still had benefits in the Plan.

24. He also says that:

"Moreover, just because an organisation provides information to a third party, it should not exonerate that organisation from contacting the person about whom the enquiry was made to correct the information previously supplied, especially if it constitutes such a fundamental change...It was that the previous offer to implement my pension had been withdrawn...Without any correction their statement regarding the existence of my pension remained in place...

I do not believe correction of their errors was a transferable obligation which Phoenix could retrospectively pass onto Standard Life, especially given the contradictory letters which Phoenix had sent to Standard Life...

I had a contractual relationship with Phoenix which they breached. It is not acceptable that Phoenix has attempted to blame Standard Life for Phoenix's failings...they should have accepted it was their responsibility to tell me..."

25. The sequence of events clearly demonstrated that he had every reason to believe that he continued to have pension rights in the Plan until October 2017.
26. The HMRC Guidance document for pension scheme administrators states that administrators must maintain accurate records and they also must inform members. Phoenix breached these obligations when it failed to tell him that there were no longer any benefits in Plan at the earliest opportunity. The fact that Phoenix told Standard Life is therefore irrelevant.
27. Mitigation of financial loss was impossible because if he had sold the car when he found out about the mistake, he would have lost £7,750 which was more than the tax free lump sum of around £7,000 which he was expecting from the Plan.

Adjudicator's Opinion

28. Mr T's complaint was considered by one of our Adjudicators who concluded that further action was required by Phoenix. The Adjudicator's findings are summarised briefly below:

- The origins of the circumstances in which Mr T now finds himself go as far back as 1990 after his benefits in the Plan were transferred into the Kellogg Brown & Root (UK) Ltd Pension Plan and Phoenix's failure to update its records properly at the time. Because of this mistake, Phoenix continued to unknowingly receive tax rebates from HMRC for Mr T into the Plan following the transfer and it was not until November 2011 that the error was discovered and Phoenix could begin rectifying the situation accordingly.
- For the transfer of pension rights from the Plan to have gone ahead, Mr T should have signed a transfer discharge form confirming to Phoenix he accepted that once the transfer had been made, Phoenix would have no further responsibility to pay any benefits from the Plan to him and no further liability to meet any guarantees previously provided by the Plan. It was unfortunate that Phoenix had not retained a copy of this discharge form although not surprising because the transfer took place such a long time ago.
- Despite this, it was reasonable to expect that Phoenix should have notified Mr T directly about the error which it had found in November 2011 as soon as possible. Its failure to do so constituted maladministration on its part. Phoenix then compounded its error by sending Mr T directly details of benefits in the Plan to which he was no longer entitled during 2012 which represents further maladministration.
- During this period Phoenix had been in correspondence with HMRC about the overpaid tax rebates and it was not until July 2014 that it eventually reimbursed them to HMRC. Having identified that it had previously misinformed Mr T about having benefits in the Plan, its failure to take the opportunity to rectify its mistake whilst liaising with HMRC constituted maladministration on its part.
- The provision of incorrect information about Mr T's pension on numerous occasions from April 2013 onwards to Standard Life also constituted maladministration on the part of Phoenix.
- Where mistakes occur, the Pensions Ombudsman's role is, so far as possible, to put Mr T back in the position that he would have been in but for the maladministration.
- This finding, however, by itself, is not enough to enable the Ombudsman to fully uphold Mr T's complaint because he will also need to be satisfied that Mr T incurred an actual financial loss as a direct consequence of that maladministration.

- Although Mr T received incorrect details of the benefits available to him from the Plan, it did not confer on him a right to these benefits quoted by mistake. If he had acted to his financial detriment based on the reasonable belief that the figures were correct, then he may be compensated for the harm.
- Phoenix's responsibility to inform Mr T that he no longer had any benefits in the Plan did not transfer to Standard Life. But the evidence was clear that Phoenix had clearly informed Standard Life in December 2014 that Mr T's benefits in the Plan had been transferred out in 1990 and its records had been amended accordingly. It would have been helpful had Standard Life passed on this response to Mr T but ultimately the responsibility lay with Phoenix.
- Although Mr T was in regular correspondence with Standard Life during 2017 about his proposed transfer of his benefits in the Plan the fact that he no longer had any benefits in the Plan was not mentioned before Mr T decided to purchase a car in April 2017 using the tax free lump sum of around £7,000 which he thought he would be entitled to from the Plan on his retirement to partly cover the cost. Obviously had Mr T been advised he would have been in a position to contact Phoenix directly to check the situation concerning his pension benefits in the Plan before deciding whether to proceed with the car purchase.
- Whilst it might be possible to accept that Mr T relied on receiving the proceeds of the Plan when purchasing the car, the Ombudsman would in any event expect Mr T to have taken steps to mitigate the loss of the pension he expected to receive once he was notified of the error and he cannot therefore claim for a loss that he could have mitigated, whether he in fact did so or not.
- It had been open to Mr T to sell the car once he was notified of the error in October 2017. Mr T said that if he had done so, the selling price would have been more than £7,000 lower than what he paid for the car but did not at time of saying this provide any concrete evidence to corroborate this statement.
- Any financial loss, in the Adjudicator's view, should in any case be proportionately allocated to the whole cost price of the car and not just to the £7,000 which Mr T contends.
- Mr T had consequently not suffered any actual financial loss because of the maladministration identified and attributable to Phoenix.
- There was no dispute that Mr T has suffered severe distress and inconvenience dealing with this situation. Phoenix had made numerous errors and compounded them over a prolonged period and missed opportunities to remedy these mistakes. Phoenix had offered Mr T a compensation payment totalling £850 as a gesture of goodwill in recognition of this. In accordance with the Pensions Ombudsman's current guidelines on redress payments for non-financial injustice, this amount was significantly lower than what he would likely direct Phoenix to pay Mr T in a formal determination of his complaint, i.e. £2,000.

29. Phoenix accepted the Adjudicator's Opinion.
30. Mr T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr T provided his further evidence and comments as follows:
- a bill of sale dated 15 February 2017 showing that he had paid £29,300 for the car; and
 - an e-mail dated 29 March 2018 from the garage where he had bought the car offering to buy it back from him for £21,550, i.e. £7,750 less than the purchase price.
 - the bill of sale showed that Mr T had paid a deposit of £2,000 and the balance of £27,300 would be paid over 12 months as follows: (a) £12,650 "on collect" and (b) £14,650 "12 months".
 - Until March 2018, he truly believed that he was still entitled to benefits in the Plan. It was only when it became clear that Phoenix would not compensate him for the financial loss which he had suffered by its mistakes that he asked the garage to provide a repurchase price for the car.
 - If Phoenix had informed him in good time that he was no longer entitled to any benefits in the Plan, he would only have purchased a car for around £22,000 which he could reasonably afford.
 - If he had sold his car to try mitigating his loss, he would have had to buy a cheaper replacement with the proceeds and incur additional expenses which would "make things worse" financially for him. In his view, the depreciation in the value of his car should not therefore be proportionately allocated to the whole cost price of the car when calculating his financial loss.
 - He does not believe that he should have waited for payment of the tax-free cash lump sum before purchasing the car because this would suggest that reputable "UK pension providers cannot be trusted".

Ombudsman's decision

31. Mr T has suggested that an oral hearing might be required. However, I have been able to decide the matter without the need for an oral hearing since the background and facts of the matter are clear from the papers submitted. Mr T submits that he purchased a car in the belief that he would receive the tax-free cash sum, that he would have bought a cheaper one had he known he would not be able to access that cash sum, and he cannot mitigate his loss by selling the car because it has depreciated. He claims to be entitled to the cash sum promised as a result.
32. There is no dispute that there has been maladministration. However, I can only give Mr T a remedy for the financial loss he claims to have flowed from his decision if a court would provide him a remedy on the same facts. In a court his arguments would amount to a claim for reliance loss based on negligent misrepresentation. I have to decide whether Mr T can prove all the elements of that claim. For the reasons below, I do not consider that he can.

33. I am satisfied that Phoenix made a clear representation to Mr T in 2012 that he had a benefit and it would yield a lump sum of around £7,000. Given Phoenix had already discovered that this was not a true reflection of his entitlement I am satisfied that failing to tell Mr T this was negligent. I do not agree that the conflicting information subsequently given to Standard Life was sufficient to correct the unequivocal statement originally made to Mr T. Phoenix should have foreseen that he would rely on the information it had provided to him and when it received transfer enquiries realised that he was in fact doing so. Given it had approached him proactively in 2012 to tell him he had a benefit, I consider that an equally direct and unequivocal approach was necessary to correct the original statement. That was not done and I consider it was therefore reasonably foreseeable that Mr T would continue to rely on what he had been told.
34. Phoenix have not disputed that Mr T acted in good faith and I accept his evidence that he did so.
35. The issue is whether, or not, Mr T can demonstrate that he reasonably relied on the statement when he bought the car, and whether his reliance caused him the loss he claims. I do not consider that he can prove these elements of his claim for the following reasons.
36. I accept that the amount of cash he had available generally was likely to have influenced the decision he made about how much to spend on a car, but I can see no direct causal link between what he was told about the lump sum available from this particular plan and what he chose to spend.
37. I have to consider what he was likely to have done had he known the correct facts at the point when he was considering what car to buy, without using the benefit of hindsight. Mr T says he would have bought a cheaper model had he known he had less money to spend. It is also apparent that he had funds from other sources which he used to purchase the car and that he had reasons for buying a quality vehicle which would last a long time. I am not persuaded, on the balance of probabilities, that he would have made a different decision had he known he was not going to receive the cash lump sum. It is always difficult for a person to prove what they would have done differently had they believed something different to what they did in fact believe. In a case like this the best evidence would be that someone took steps to put themselves in that other position so far as they could. Mr T says he could not do so because the car had depreciated. I accept that he did not want to buy a cheaper car and carry the cost of the depreciation, but it is equally clear that he could have done so and chose not to. I can see no evidence that his decision would have been any different had he known the correct facts.
38. I accept that the car depreciated before Mr T was made aware of the true facts. He was in possession of it for around six months before he found out that he was not entitled to benefits from Phoenix. He came under a duty to mitigate any losses he might sustain at that point. The maximum financial loss which could be considered to flow from depreciation in the car's value would therefore be the loss he made on

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a sale if he had made it at that point. But the issue about mitigation would only arise if Mr T had in fact sustained loss by re-selling the car. In fact, he did not sustain financial loss in that way because he decided to keep it. Therefore I do not consider it necessary to make any findings about mitigation.

39. It is clear that Mr T has suffered distress and inconvenience as a result of the failure to identify the mistake earlier. Awards for distress and inconvenience are modest and not intended to punish the party directed to pay. In this case, given the long history I consider an award of £2,000 is justified.
40. Therefore, I partly uphold Mr T's complaint to the extent that he has suffered severe distress and inconvenience and make the appropriate directions below to remedy this injustice.

Directions

41. Within 21 days of the date of this Determination, Phoenix shall pay Mr T £2,000 for the severe non-financial injustice which he has suffered dealing with this matter.

Karen Johnston

Deputy Pensions Ombudsman
8 March 2019