

## Ombudsman's Determination

Applicant	Mr N
Scheme	Aviva Personal Pension Plan ( <b>the Plan</b> )
Respondents	Aviva

## Outcome

1. Mr N's complaint against Aviva is partly upheld. To put matters right, in 28 days from the date of this determination, Aviva should pay Mr N £1,990.24 which includes:
  - £1,676.69, representing loss of tax free cash;
  - £13.55 which is the difference between £277.42 (the original calculated loss) and £290.97 (the correct calculated loss); and
  - £300 being the remaining amount to be paid for distress and inconvenience.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr N has complained that he has lost out because he requested to be contracted out of the State Second Pension (**S2P**), but Aviva failed to act upon his instructions. This meant he lost out on flexibility and will need to wait until he reaches state pension age (**SPA**) before he will start receiving the S2P.

## Background information, including submissions from the parties

4. When Mr N established the Plan with Aviva, he requested that he be contracted out of the S2P. This meant he should have received rebates from Her Majesty's Revenue and Customs (**HMRC**) into the Plan enhancing his pension contributions.
5. On 28 October 2013, Aviva wrote to Mr N and advised that since 2001 it had not received any payments from HMRC, which meant he had not been contracted out. Aviva apologised and said it had calculated that Mr N may have suffered a total loss of £424.83. This was calculated as £277.42 (the loss), plus £184.26 (the loss of interest), minus £36.85 (the tax on interest). Aviva said the Plan remained contracted in as the option to contract out was abolished on 6 April 2012.

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6. Aviva did not provide an explanation of how it calculated the potential loss of £277.42, so Mr N requested this and Aviva provided a written explanation on 14 November 2013. Aviva said the basis of its calculations were the annuity rate declared for each applicable tax year, assumed annual growth rate to the rebates of 2% inflation, minus 1% for annual policy management charges. This showed that it was only in tax years 2000/01 and 2001/02 that Mr N had suffered a loss by being contracted in to the S2P. It was not completely transparent on how Aviva had calculated the original compensation amount, but through the Pensions Ombudsman Service's investigation, a further explanation was provided of its calculations. A slight error was discovered and it came to light that Mr N's potential loss should have been calculated at £290.97 not £277.42. This was a difference of £13.55 from Aviva's original calculation.
7. Mr N had requested that Aviva pay the missing contributions into the Plan; however Aviva said it was unable to do this because these contributions had been paid into the S2P. If they did so Mr N would benefit from the S2P when he reached SPA, as well as the rebate contributions in the Plan; this would give him considerably more than he was due.
8. On 6 February 2014, Aviva wrote to Mr N and made a further offer. It said following a review of a previous determination (Ref: PO-221), it considered an offer should be made to cover the loss of tax free cash. This was calculated at £1,676.69, and the calculations were provided to Mr N.
9. Aviva said it recognised that Mr N had suffered a loss of flexibility due to the rebates going into the S2P, as opposed to the Plan and paid Mr N £200 in compensation for the distress and inconvenience this would have caused him.

## Adjudicator's Opinion

10. Mr N's complaint was considered by one of our Adjudicators who concluded that the complaint should be partly upheld against Aviva. The Adjudicator's findings are summarised briefly below:
  - Aviva accepted that it had erred in not following Mr N's instructions to contract him out of the S2P, this amounted to maladministration.
  - It is not possible to put Mr N back in to the position he would have been in had the maladministration not occurred. HMRC cannot accept Mr N's application to retrospectively contract him out as the deadline has been missed.
  - It would be unreasonable to expect Aviva to pay the rebate amount into his Plan, as essentially it would mean he would be receiving the benefit of this money twice.
  - It is fair and reasonable for Aviva to calculate Mr N's loss using generic information and factors that were available at the time.

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- Mr N has lost out on flexibility as he will only receive the benefits of the S2P when he reaches SPA. This would have caused disappointment to Mr N but there has been no financial loss as he will still receive the benefits in due course.
  - Aviva have made an adequate offer to compensate Mr N for losing the opportunity to commute 25% of his fund for a tax free cash lump sum. It has calculated this based on Mr N being a standard tax payer. There is no guarantee that Mr N will remain a high rate tax payer, therefore, it is reasonable for Aviva to base their compensation calculations on this assumption.
  - Compensation cannot be awarded on the basis that there may be future losses; therefore, consideration cannot be given to the possibility that Mr N's selected funds might outperform the assumptions made by Aviva in its calculations, the funds might equally underperform.
  - Mr N has suffered significant distress and inconvenience due to Aviva's errors, and the award for this should be raised from £200 to £500.
11. 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, summarised above, and I will therefore, only respond to the new key points made by Mr N for completeness.

### **Ombudsman's decision**

12. Aviva did not contract Mr N out of the S2P and this error amounts to maladministration, for which Mr N should be compensated.
13. Mr N disagreed with Aviva's calculation for compensation because they are basing it on the retirement age of 65, and his SPA has now increased to age 67; it may also increase further by the time he retires. Aviva have based their calculations on the SPA at the time Mr N made the decision to contract out and I consider this to be reasonable.
14. Mr N has complained that Aviva should provide additional life cover until he reaches SPA, as he currently has a shortfall on his life cover due to the difference in the fund value had the contracting-out rebates been received. I do not consider that Aviva need to do this, as set out in the opinion in the event of Mr N's death it is likely that his dependents will be entitled to additional state benefits.
15. The financial loss suffered by Mr N occurs in the future and as such cannot be determined exactly. I consider Aviva have calculated the level of compensation on a reasonable basis and I do not believe it is necessary for Aviva to take other factors into consideration..

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16. I do however consider this matter would have caused Mr N significant distress and inconvenience and for this reason I believe the award for distress and inconvenience should be increased as set out in my directions to Aviva.
17. Therefore, I partly uphold Mr N's complaint.

**Directions**

18. Mr N's complaint against Aviva is partly upheld. To put matters right, within 28 days from the date of this determination, Aviva will pay Mr N £1,990.24, which is the total of the following sums:
  - £1,676.69, representing loss of tax free cash;
  - £13.55, the difference between £277.42 (original calculated loss) and £290.97 (revised calculated loss); and
  - £300, the additional amount to be paid for distress and inconvenience.

**Anthony Arter**

Pensions Ombudsman  
29 July 2016