PO-7995

Ombudsman's Determination

Applicant	Mr D
Scheme	Data General Ltd Employee Benefits Plan (**the Plan**) - AVC Facility
Respondents	Prudential
	Aon Hewitt (**Aon**)

Outcome

1. Mr D's complaint is upheld against Prudential but not Aon and to put matters right, Prudential should pay Mr D:

   a) the current value of his AVC fund entirely as a tax free lump sum; and
   b) £500 in recognition of the out of pocket expenses and the distress and inconvenience which he has suffered dealing with this matter.

2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr D complains that Prudential and Aon have wrongly refused his request to receive all of his Additional Voluntary Contributions (**AVCs**) into the Plan as a tax free lump sum on retirement.

Background information, including submissions from the parties

4. Mr D was a member of the Plan and contributed AVCs into it. The administrators of the Plan and its AVC Facility were Aon and Prudential respectively.

5. In November 1995, H M Revenue & Customs (**HMRC**) informed Mr D that he was entitled to take his AVC benefits on retirement entirely as a tax free lump sum because he had entered into a contractual obligation before 8 April 1987 (with Nationwide, the administrator of the AVC Facility at the time) despite his first AVC payment not being made until after that date.

6. Mr D subsequently provided Aon with details of what HMRC had told him.

7. In 2002, the Plan commenced winding up and in 2008, sought admission to the Financial Assistance Scheme (**FAS**).

8. FAS were unable to accept defined contribution benefits in the Plan such as Mr D's AVCs. As part of the transfer process, FAS therefore required the Plan Trustees (**the Trustees**) to discharge such defined contribution benefits prior to admission of the Plan.

9. Prudential wrote to Aon on 29 April 2009 to inform them that:

   a) they were finalising procedures to wind up the AVC Facility;
   b) they would prefer to transfer the AVC benefits (excluding any pensions in payment) to Aon after surrendering the members' AVC accounts under their Group AVC Policy (**the Policy**) for the Plan so that all the Plan benefits could "be secured under the same contract";
   c) if the AVC benefits were to remain with Prudential, they would endorse the Policy before the winding up of the AVC Facility had been completed so that the AVC members had direct rights against Prudential under the Policy;
   d) they would need details of where the main Plan benefits were being held; the names and addresses of the Trustees; the members' current addresses; and
   e) they should notify them of the Trustees' decision so that they could take the appropriate action.

10. The Trustees decided that the AVC benefits should remain with Prudential.

11. Aon provided Prudential, in May 2009, with a list of the AVC members who had not yet reached their Normal Retirement Age (**NRA**).

12. Prudential prepared an endorsement to the Policy (**the Endorsement**) which the Trustees signed. Section 5(f) of the Policy stated:

> "Benefits due on the terms of the Policy cannot be assigned. Additionally, such benefits cannot be commuted or surrendered, except in line with requirements of HMRC and regulations 3 & 4 of the Occupational Pension Schemes (Discharge of Liability) Regulations 1997."

13. In their letter dated 29 June 2009, Aon informed Mr D that his AVC benefits had been assigned by the Trustees from the Policy to an individual policy in his own name with Prudential as a consequence of the Plan being wound up. They also said that:

   a) their response to his query about his AVC benefits was that the Plan Rules (**the Rules**) stated that members who commenced payment of AVCs prior to 7 April 1987 were entitled to receive their benefits as a one off cash lump sum;
   b) the Rules also did not allow payment of his AVC benefits before those in the Plan; and

   c) Prudential would confirm the assignment of his AVC benefits to him soon.

14. In March 2014, Mr D sought confirmation from Prudential that he was entitled to receive his AVC benefits entirely as a cash lump sum because he needed the payment to settle a mortgage debt which became due when he attained age 65 in February 2014.

15. Prudential replied that:

    a) as the Trustees had signed the Endorsement, the maximum tax free lump sum available to him from his AVCs would be 25% of the overall AVC fund value; and
    b) if he had further queries about pre April 1987 AVC cash rights, he should contact Aon because Prudential were unaware that he had any such rights.

16. Mr D was dissatisfied with this response and complained to Prudential.

17. Prudential referred the matter to Aon who responded in September 2014, as follows:

    a) as the AVC Facility was purchased by Prudential from Nationwide, they were the existing AVC provider at the date of assignment and should therefore already have had sufficient information to establish whether or not any members had pre April 1987 AVC cash rights;
    b) if this was not the case, Prudential should have requested the necessary information from the Trustees (via Aon);
    c) it was their understanding at the time Mr D's AVC benefits were being assigned that his entitlement to pre April AVC 1987 cash rights would not be affected; and
    d) Prudential's allegation that Aon did not notify them of Mr D's entitlement to pre April 1987 AVC cash rights is consequently unjustified.

18. On 22 September 2014, Prudential sent an e-mail to Aon which said that:

    a) as they only administered the AVC Facility on behalf of the Trustees, they would not have been aware of any members' pre April 1987 AVC cash rights at the point Nationwide transferred the AVC Facility to them or prior to the wind up of the Plan;
    b) condition A of regulation 15 of The Pension Schemes (Transfers, Reorganisation and Winding Up) (Transitional Provisions) Order 2006 states that all the rights of a member must have been extinguished by purchasing one annuity satisfying the requirements prescribed under section 74 (3) (c) of the Pensions Act 1995;
    c) by securing Mr D's AVC benefits with Prudential and his main Plan benefits elsewhere (with FAS), condition A had not been met;
    d) this meant that any right Mr D had to "protected tax free cash" was lost and the maximum tax free lump sum available to him from his AVCs would be 25% of the AVC fund value;

e) the Trustees should have informed the members of what the consequences of the Plan wind up would be on their AVC benefits before signing the Policy; and
f) if the Trustees had done this, the members who did not wish to lose their "protected tax free cash" could then have transferred their AVCs to a more suitable policy or combined them with their main Plan benefits.

19. In November 2014, Prudential informed Mr D that they did not uphold his complaint for essentially the reasons given in the previous paragraph.

20. In their letter dated 20 March 2015, FAS informed Mr D that:

a) he would be entitled to an "assistance payment" of £26,103.85 pa;
b) he should have been paid a total of £158,938.77 for the period 20 February 2009 to 21 March 2015; and
c) his first "assistance payment" would therefore be £161,114.10.

21. FAS also notified Mr D that he was entitled to exchange part of his "assistance payment" for a tax free lump sum in accordance with HMRC and FAS rules.

22. Mr D chose not to accept the option of taking a maximum lump sum of £123,244.91 with a reduced annual "assistance payment" from FAS.

Aon's position

23. It was the Trustees who approved the assignment terms of Mr D's AVCs to Prudential. They only processed the assignment in accordance with the Trustees' instructions and were not actively involved in advising how the Plan members' AVCs should be dealt with prior to the transfer of the Plan into the FAS.

24. Furthermore, they did not advise the Trustees on the precise terms or merits of individual member policies with Prudential. As they were not responsible for approving the assignment terms, they should not be held liable for the consequences on Mr D.

25. They strongly refute Prudential's contention that they had they acted in an advisory capacity to the Trustees with regard to the assignment of the AVC benefits. As administrators of the Plan, they did not have the authorisation (or any responsibility) to advise the Trustees on the basis of discharging AVC liabilities prior to transfer of the Plan into FAS. In any case, Prudential have failed to provide any evidence to corroborate their allegation.

26. Mr D's complaint should be against Prudential and the Trustees who were responsible for acting in his best financial interests. The Trustees, however, were discharged following the Plan's admission into FAS in 2013. It is unfair that Mr D should substitute Aon for the Trustees as one of the Respondents in his complaint.

27. There should have been lengthy discussions between Prudential and the Trustees about removing the right of certain AVC members to take their AVCs entirely as a tax free lump sum before this significant change was made. Furthermore, Prudential should have subsequently brought this matter to the attention of the affected AVC members.

28. They do not know whether or not the Trustees obtained legal advice prior to signing the Endorsement.

29. In response to a request for information from Mr D's IFA, they had replied on 27 October 2008 that, Mr D had "no protected lump sum". They had relied on Prudential's letter of 15 October 2008 which also said this in their reply.

30. After acquiring the AVC portfolio from Nationwide, Prudential should have undertaken due diligence to establish how any assignment terms might impact upon all AVC members and inform the Trustees of the consequences accordingly.

Prudential's position

31. They have acted correctly and in accordance with the rules and regulations governing AVCs.

32. After 6 April 2006 (**A-day**), AVC members could take their entire AVC fund as tax free cash but this option was lost upon the Plan winding up.

33. In order for Mr D to have taken advantage of this option, he would therefore have had to transfer his AVCs out of Prudential before the Plan wound up.

34. Under current legislation, Mr D can now take his entire AVC fund as a lump sum but with only 25% of it being tax free and the remaining 75% taxable.

35. When they took over the administration of the AVC Facility from Nationwide, they only received basic information about the AVC members including their National Insurance numbers, dates of birth, Normal Retirement Dates and their AVC amounts from the Trustees.

36. As administrators of the AVC Facility, their role was simply to invest the AVC funds and to pay out AVC benefits in accordance with the Trustees' instructions. It was the responsibility of Aon, the Trustees' professional advisers, to advise them on the consequences of signing the Endorsement, in particular that members with pre April 1987 cash rights would no longer be permitted to take all their AVC benefits as tax free cash on retirement.

37. They were unaware that Mr D had pre April 1987 cash rights because there was no requirement for them to hold this information in order to fulfil their role as AVC administrator satisfactorily.

38. The Trustees have to act in the best financial interests of the Plan's beneficiaries. Clause 9.2 (b) of the Endorsement stipulates that "the Trustees must notify us how members' accounts are to be dealt". The Trustees should consequently have provided them (via Aon) with a list of members having these rights prior to assignment.

39. They drafted the Endorsement based upon legislation in force at the time. It is commonplace for an (AVC) administrator to also provide documentation services. They are not accountable for explaining how the terms of the Endorsement would affect the AVC members (in particular section 5(f)) because this was the responsibility of the Trustees' professional advisers. In order to fulfil their duties to the Plan beneficiaries, the Trustees should have been fully aware of the consequences before signing the Endorsement.

40. They did not have direct contact with the Trustees. This is further evidence that they did not have an advisory role. The Trustees would not consequently have expected them to have provided adequate and clear information about the implications of signing the Endorsement.

41. They did not have any contractual or common law duty to Mr D. Their relationship with the Trustees was to provide administration services for the AVC Facility. Mr D has not proved how they have breached a contract with (or a duty to) him that caused the financial losses which he is claiming for which, in any case, were not reasonably foreseeable and therefore cannot be recovered.

Mr D's position

42. Either one or both of the Respondents failed to carry out "appropriate due diligence" prior to the assignment which resulted in the loss of his pre April 1987 AVC cash rights.

43. He had earmarked the AVC fund to pay off an interest only mortgage of £30,081 on his property. This mortgage has been due for repayment since March 2014 and the mortgage provider, Lloyds, only reluctantly extended the terms whilst he awaited the outcome of his AVC complaint. He has had to pay interest monthly to Lloyds (at 2.5% pa) on the mortgage amount whilst it remains unsettled.

44. He wanted to receive the maximum annual "assistance payment" available from FAS. Furthermore as his complaint seemed to be a simple one, he had assumed that it would be resolved quickly. He did not therefore take advantage of the tax free lump sum option offered by FAS to pay off his mortgage debt as soon as possible.

45. Prudential are the "purported (AVC) experts" and should have advised the Trustees of the negative impact on the "financial prosperity" of an AVC holder with pre 1987 rights.

46. In order to put matters right, he would like immediate release of his whole AVC fund as a tax free cash lump sum and also to be compensated for:

    a) his out of pocket expenses (which exceeds £100);
    b) the additional costs of extending the mortgage agreement (i.e. the interest payments of £62.50 per month until the mortgage is settled); and
    c) the distress and inconvenience which he has suffered dealing with Lloyds' "aggressive" demands to repay the mortgage.

Adjudicator's Opinion

47. Mr D's complaint was considered by one of our Adjudicators who concluded that further action was required by Prudential. The Adjudicator's findings are summarised briefly below:

    a) Prudential, in their capacity as the administrator of the AVC Facility, failed to supply the Trustees with adequate and clear information about the implications of signing the endorsement to the Group AVC Policy in order to make a proper and informed decision;
    b) Prudential's failure to hold all the relevant information about the members of the AVC Facility, in particular whether any of them had pre April 1987 AVC cash rights meant that they were unable to inform the Trustees that there were members who would be affected by section 5 (f) of the endorsement;
    c) their failure to do so, constitutes maladministration on the part of Prudential which has caused Mr D actual financial loss; and
    d) in the Adjudicator's view, Aon did not play a part in the Trustees' decision to sign and return the endorsement to Prudential and there has not been any maladministration on their part.

48. Prudential did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Prudential provided their further comments many of which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Prudential for completeness.

Ombudsman's decision

49. Prudential had sent the Endorsement to the Trustees so that they could carefully examine it and make sure that they were completely happy with its terms before returning the signed Endorsement.

50. By signing the Endorsement, the Trustees declared to Prudential they understood that the AVC benefits could not "be commuted or surrendered, except in line with the requirements of HMRC and of regulations 3 and 4 of the Occupational Pension Schemes (Discharge of Liability) Regulations 1997".

51. In my view, Prudential should have been more helpful to the Trustees by providing information which explained in plain terms how section 5(f) of the Endorsement would affect the AVC members, in particular that the maximum tax free lump sum available would be restricted to 25% of the AVC fund (even for those members who had previously had pre April 1987 AVC cash rights such as Mr D).

52. The Trustees would have expected Prudential, as the administrator of the AVC Facility to have supplied them with adequate and clear information about the implications of signing the Endorsement on the AVC members in order to make a proper and informed decision.

53. Prudential however were not in a position to do this because they did not hold all the relevant information about the members of the AVC Facility which good administrative practice dictates that they should have, in particular whether any of the members had pre April 1987 AVC cash rights.

54. If as Prudential says, they did not have this information at the time they took over the administration of the AVC Facility from Nationwide, it seems reasonable to me that they would have asked the Trustees (via Aon) for it in order to update their records accordingly and provide a good service to the Trustees. By not having details of the AVC members who held pre April 1987 AVC cash rights at the time of assignment, Prudential were unable to inform the Trustees that there were members who would be affected by section 5 (f) if they signed the Endorsement. Their failure to do so, in my view, constitutes maladministration on the part of Prudential.

55. Aon says that they played no part in the Trustees' decision to sign and return the Endorsement to Prudential. I believe the available evidence corroborates their statement. Aon were only involved in this matter because of Prudential's arrangement with the Trustees, Aon acted as a go-between for any correspondence concerning the AVC Facility between the two parties. Therefore, I consider that there was no maladministration on Aon's part in the assignment process.

56. As a result of the maladministration identified, Mr D has lost the right to take his AVC benefits entirely in the form of a tax free lump sum. Current legislation allows him to only take 25% of his AVC fund with the remaining 75% taxable.

57. In order to put matters right Prudential should compensate Mr D for the tax deductible on 75% of his AVC fund and also pay him a modest compensation sum of £500 in recognition of his out of pocket expenses and the significant distress and inconvenience which he has suffered in having to deal with this matter.

58. Therefore, I uphold Mr D's complaint against Prudential but not Aon.

Directions

59. Within 28 days of the date of this Determination, Prudential shall:

a) pay Mr D the current value of his AVC fund entirely as a lump sum;

b) as only 25% of it can be paid tax free, compensate Mr D for an amount equal to the tax liability he will have to incur on the remaining 75% of his AVC fund; and

c) pay Mr D £500 in recognition of the out of pocket expenses and the significant distress and inconvenience which he has suffered, dealing with this matter.

Anthony Arter

Pensions Ombudsman
21 September 2016