

Ombudsman's Determination

Applicant	Mr R
Scheme	Aviva Group Personal Pension Plan
Respondent	Aviva

Outcome

1. I do not uphold Mr R'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 R has complained that Aviva has refused to offer an enhancement for ill health early retirement.

Background information, including submissions from the parties

Background

1. Mr R was formerly a member of the KPMG (COMP) Staff Pension Scheme (**the Scheme**), which is a contracted-out money purchase occupational pension. In September 1996, Mr R left KPMG and became a deferred member of the Scheme.
2. In April 1997, the Scheme closed. The Trustees of the Scheme instructed Aviva, then Norwich Union, to write to members detailing their options. One option was to transfer to a replacement 'buy-out' plan with Aviva. In relation to this Aviva said Mr R could:

"Agree for the Trustees of the plan to place the benefits in a replacement policy with Norwich Union in your name. This retains the terms of the existing plan but you cannot pay any future contributions into it."
3. Mr R agreed to transfer to the 'buy-out' plan (**the Plan**) with Aviva. The accrued money purchase benefits from the Scheme, totalling £9,996.74 were transferred to the Plan.

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4. In September 2012, Mr R had a serious road accident, he was left with permanent musculoskeletal injuries and post-traumatic stress disorder. As a result of his injuries Mr R was unable to return to work.
5. In October 2013, Mr R contacted Aviva to apply for ill health retirement. Mr R considered that Aviva's representation when the Plan was sold – that it "retains the terms of the existing plan" – means that his ill health retirement application should be subject to the rules of the Scheme.

Aviva's position

6. Aviva has rejected the complaint on the basis that the terms of the Plan do not allow any enhancement for ill health early retirement.

Mr R's position

7. Mr R has made detailed and lengthy submissions, but has said: "The crux of the matter is that Aviva have not and are not complying with the contract with me and everything else flows from this fact." (Original emphasis).
8. Mr R has said that the decision to transfer from the Scheme to the Plan was based on Aviva's statement that the Plan "retains the terms" of the Scheme. Mr R says this statement provides an unequivocal promise which induced him to transfer and, had it not been for this representation, he would have selected a different option.
9. In declining an enhancement of benefits for ill health retirement, Aviva has failed to comply with the contract.
10. Aviva has failed to respond to this Office's request for information. The failure to reply is evidence of the fact that Aviva does not have a copy of the Trust Deed for the Scheme. On this point Mr R has said:

"This is a truly shocking state of affairs when [Aviva] told me in 1997 that I would retain the terms of the [Scheme] but Aviva in 2017 don't even know what terms they have contracted to maintain."
11. The 2008 variation to the terms of the Scheme, referred to by the Adjudicator, does not apply to Mr R as he became a deferred member of the Scheme in 1996 when his employment with KPMG ended. Consequently, the terms which explicitly prohibit any augmentation of benefits are dis-applied in his case.

Adjudicator's Opinion

12. Mr R'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.

- Putting to one side the validity of Mr R's arguments about whether or not the Plan was misrepresented, the starting point is whether the rules relating to the Scheme provide for enhanced benefits in the case of ill health retirement.
- The original Scheme Trust Deed and Rules were established in 1949 and have been subject to numerous amendments over the years. The 'KPMG Staff Pension Fund Third Deed of Revision' (**the Rules**), dated 24 April 1996, now apply to the Scheme.
- Section 17 of the Rules of the Scheme do not allow for any enhancement for retiring early, the relevant rules say:

"17.4 A Deferred Member may elect that his pension shall commence from a date before his Normal Pension Date if the following conditions are satisfied:-

(1) (a) the Deferred Member has attained the age of 50; or

(b) in the Trustees' opinion after taking medical advice he has become incapable of following his normal employment by reason of ill-health or other incapacity; and

(2) If the pension is to commence before the Member's 60th birthday, the Principal Employer consents to the commencement of his pension from that date.

17.5 The initial amount of a Deferred Member's pension under sub-Rule 17.4 shall be determined by taking the pension to which he would be entitled in accordance with Rule 7 on retiring at Normal Pension Date and reducing it by such amount as the Trustees on the advice of the Actuary consider appropriate in order to take account of the early commencement of such pension..."

- There is also a further Deed of Variation dated 13 August 2008, which amends some of the clauses in Section 17 of the Rules. This Deed of Variation explicitly prohibits any augmentation to allow for an enhanced pension:

"For the avoidance of doubt, the discretion conferred on the Trustees...is not exercisable so as to enable the Trustees to augment any Member's benefits."
- If, as Mr R has alleged, the original terms relating to the Scheme were to apply to the Plan, Mr R would still not be entitled to any enhancement as a result of retiring early.
- When calculating the annuity rate it is prepared to offer, Aviva is taking a number of factors into consideration including economic assumptions and Mr R's expected mortality based on his age and health. By retiring early, and therefore at a younger age, Aviva's actuaries will automatically be factoring in a reduction for early retirement. Aviva's calculation is in accordance with the original Scheme Rules.

- The Rules of the Scheme do not provide for an enhancement so, by refusing an enhancement Aviva is not acting in maladministration. It therefore follows that there has been no financial injustice.
 - It is accepted that Mr R also complained about a number of ancillary issues such as Aviva's customer service; that Aviva has treated him unfairly; and the fact that Aviva did not address all of the questions he had asked.
 - Aviva upheld these heads of complaint and offered £300 compensation for the distress and inconvenience Mr R has experienced. Aviva's offer is fair.
13. Mr R did not accept the Adjudicator's Opinion and requested an oral hearing. In support of his request Mr R said, in summary:-
- The Adjudicator's opinion contains a number of factual errors as well as a number of errors in law. The Pensions Ombudsman has a duty to act in a procedurally fair manner – Mr R's case cannot be fairly determined on the current papers on file.
 - An oral hearing would afford Mr R the opportunity to express himself without any misunderstandings which may arise from his disabilities or writing style.
 - Mr R has a disability – which is a protected characteristic under the Equality Act 2010 – holding a hearing would be considered a reasonable adjustment and is a right Mr R is entitled to under Article six of the European Convention on Human Rights.
14. As Mr R disagreed with the Adjudicator's Opinion, the complaint was passed to me to consider. Mr R 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 key points made by Mr R for completeness.

Request for an oral hearing

15. Mr R submitted a request for me to hold an oral hearing. The purpose of an oral hearing is to assist me in reaching my determination. Circumstances in which a hearing may be appropriate include where there are differing accounts of a particular material event and the credibility of witnesses needs to be tested; where the honesty and integrity of a party has been questioned and the party concerned has requested a hearing; or where there are disputed material and primary facts which cannot be properly determined from the papers.
16. I do not consider that any of these circumstances apply here so I do not consider it necessary to hold an oral hearing in this case.
17. Mr R's initial submissions and his response to the Adjudicator's Opinion are detailed and clearly set out Mr R's position. I do not consider that Mr R's style of writing will give rise to any misunderstanding and there are no facts that have been disputed which cannot be properly determined from the file papers.

18. The application form Mr R completed asked if he had any accessibility requirements. He indicated that he did have communication preferences and this Office has corresponded with Mr R in line with his request. I have not seen any evidence to suggest that Mr R has been unable to present his full and comprehensive submission in writing.
19. Mr R has questioned Aviva's credibility as it failed to provide a response to my Investigation Assistant's initial request for information. However, the Adjudicator assigned to review the file papers felt able to make a decision based on the information already on file. The fact that Aviva failed to provide a response does not mean that its credibility is sufficiently doubtful that it needs to be tested with an oral hearing.
20. I consider that I can properly determine the case on the basis of the detailed written representations and the documentation which has already been submitted by the parties.

Ombudsman's decision

21. Mr R has complained that the Plan was misrepresented as he was led to believe that the original terms attached to the Scheme would apply to the Plan.
22. If Aviva did misrepresent the Plan then this would amount to maladministration. However, for me to be able to uphold this complaint I would also need to find that there has been injustice as a consequence of Aviva's maladministration.
23. In other words, even if Aviva misled Mr R about the terms and conditions applicable to the Plan, I would still need to find that Mr R has been disadvantaged as a result. The Scheme Trust Deed and Rules are, therefore, a sensible starting point.
24. It is accepted that Aviva has not provided a copy of the operative Trust Deed and Rules relating to the Scheme, however my Adjudicator has been able to obtain a copy of the relevant documents to help decide the case. The fact that Aviva does not retain a copy of the Trust Deed and has not provided any evidence to refute Mr R's allegations is not, on its own, sufficient for me to find that Mr R's complaint should be upheld.
25. Section 17 of the Rules, set out above, detail the provisions relating to ill health and early retirement. Section 17.5 says that the member's pension entitlement at the Normal Pension Date will be reduced "by such amount as the Trustees on the advice of the Actuary consider appropriate in order to take account of the early commencement of such pension..."
26. Put simply, the terms of the Scheme do not provide for an enhancement of benefits when a member retires on grounds of ill health, indeed the Rules explicitly state there will be an actuarial reduction to reflect early retirement.

27. Consequently, I cannot agree that if the original Scheme rules were to apply to the Plan, as Mr R has claimed, that Aviva is breaching its contract with Mr R in refusing to provide him with an enhanced pension.
28. Mr R has questioned whether the 2008 Deed of Variation applies to him as a deferred member, saying that contracts cannot be unilaterally varied by one party without the express consent of the other parties. However, it is common for pension scheme Trust Deeds to include a power of variation permitting the employer or Trustees to vary the terms of the Trust Deed and Rules.
29. A power of variation is incorporated into the operative Trust Deed relating to the Scheme. This says:

“The Trustees shall have power with the consent of the Firm at any time or times to alter amend add to and/or cancel all or any of the provisions of the Trust Deed or Rules...”
30. Consequently I must conclude that the provisions within the 2008 Deed of Variation would apply to deferred members to which the Trust Deed and Rules relating to the Scheme apply. However, this is largely immaterial since I have already found that if, as Mr R has claimed, the original Scheme rules were to apply to him, Mr R would still not be entitled to an enhanced pension when retiring on grounds of ill health.
31. Therefore, I do not uphold Mr R’s complaint.

Anthony Arter

Pensions Ombudsman

28 February 2017