

## Ombudsman's Determination

Applicant	Mr Y
Scheme	Aviva Section 32 Buy Out Policy ( <b>the Policy</b> )
Respondent	Aviva

### Complaint Summary

1. Mr Y has complained:
  - 1.1. that subsequent to his request for a cash equivalent transfer value (**CETV**) illustration from Aviva in July 2018, Aviva provided him with conflicting and contradictory information concerning the value of his benefits in the Policy;
  - 1.2. about the poor investment return achieved by Aviva after his benefits reached the Guaranteed Minimum Pension (**GMP**) target, such that he will not receive 5% increases on his pension in payment and the age-based restrictions in accessing those benefits; and
  - 1.3. that changes to the presentation of the annual reports made identifying these issues and making comparisons more difficult.

### Summary of the Ombudsman's Determination and reasons

2. The complaint against Aviva is not upheld.

## Detailed Determination

### Material facts

3. The Policy was originally held with Norwich Union. Norwich Union subsequently merged with Aviva. Hereafter, in this Determination, Norwich Union will be referred to as Aviva.
4. Mr Y commenced the Policy on 25 July 1986. He was previously a member of an occupational pension scheme. Following advice from a financial adviser who was not affiliated with Aviva, Mr Y transferred his occupational pension scheme benefits to the Policy. The Policy has a GMP available at State Pension Age (**SPA**). The total transfer-in payment Aviva received was £6,489.41.
5. When Mr Y commenced the Policy, the ceding scheme's trustee provided Aviva with an unverified date of birth for Mr Y of April 1958. Mr Y's selected retirement age (**SRA**) was set as April 2021 (age 63) for the Policy.
6. In April 2013, Aviva wrote to Mr Y and informed him that he may not have enough funds in his Policy to allow him to claim his retirement benefits before age 65 (**the 2013 Letter**)<sup>1</sup>. Aviva also informed Mr Y that if that were the case, it would write to him approximately 10 weeks before his SRA to let him know.
7. On 18 April 2017, Aviva sent Mr Y an anniversary certificate (**the 2017 Certificate**). This document not only informed Mr Y that Aviva was unable to declare any regular bonuses to his Policy that year, it also stated:

“Your future pension benefits include Guaranteed Minimum Pension (GMP) rights, which means that the future pension benefit payable at age 65 will not be less than the GMP. Taking benefits earlier or transferring to another provider will only be possible if the fund value is sufficient to provide the GMP at age 65.”
8. In July 2018, while considering his options, Mr Y requested a CETV illustration of his benefits from Aviva. In the same month, Aviva received a birth certificate from Mr Y.
9. On 2 August 2018, Aviva emailed a CETV illustration to Mr Y. This informed Mr Y that the CETV of his benefits was £81,676.97.
10. On 6 August 2018, Aviva wrote to Mr Y to inform him that its records had been updated with his correct date of birth.
11. On 21 August 2018, Aviva wrote to Mr Y, following a query from him concerning the Policy. Aviva said:

“Your policy was set up to provide 8.5% escalation a year on all benefits.  
However, under a Section 32 policy there is no legal requirement to provide

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<sup>1</sup> Aviva initially provided a copy of this letter which did not have Mr Y's correct address. Aviva subsequently provided a copy of the 2013 Letter that had Mr Y's correct address.

escalation on GMP Benefits accrued prior to 6 April 1988. Where the retirement fund is insufficient to secure the GMP, any escalation is removed.

Section 9 of the policy document (**the Policy Conditions**)...refers to the increases applicable. I have highlighted the last sentence which explains any escalation will be removed to secure the GMP.”<sup>2</sup>

12. On 28 August 2018, following a request from Mr Y’s independent financial adviser (**IFA**), Aviva sent the IFA an illustration of the CETV of Mr Y’s benefits. The illustration showed the CETV at the time was £82,023.17.
13. On the next date, Aviva wrote to the IFA and informed him that the cost of securing the GMP was £120,603 and until the CETV was greater than the GMP cost, it would not be possible for Mr Y to transfer his benefits.
14. On 31 August 2018, following Mr Y’s request, Aviva sent him an illustration of the retirement benefits he could get at age 62 and 11 months from the Policy. This illustration showed that the value of Mr Y’s Policy at retirement could be £96,800 and that he could get an annual pension of £5,600<sup>3</sup>. It said:

“We can’t predict what your pension fund might be when you retire because it depends on how well the investments do. But to give you an idea we can show how different investment growth rates could affect the retirement income you eventually get. These are examples, not maximum or minimum amounts – and the value of your pension fund can go up or down and may be worth less than what has been paid in.

This illustration shows what you might get back at retirement in ‘today’s money’, which means they take inflation into account. Seeing the figures in this way shows you what they could be worth today. It’s important to note that inflation reduces the worth of all savings and investments...”

15. On 6 September 2018, following a request from the IFA, Aviva sent the IFA an illustration of the benefits Mr Y could get at age 65.<sup>4</sup> This illustration explained that at age 65 the Policy would provide Mr Y with a GMP of at least £5,978.96 per annum. The CETV of Mr Y’s benefits was stated as £82,083.17. The value of Mr Y’s benefits at retirement was estimated to be £94,800 and showed that at age 65 Mr Y could get an annual pension of £5,330. Aviva said:

“One or more of the projected fund values are currently unable to secure the statutory Guarantee Minimum Pension benefit, which is the amount(s) shown

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<sup>2</sup> Section 9 of the Policy Conditions is detailed in the Appendix.

<sup>3</sup> The illustration was based on no further contributions being made into the Policy. It used investment growth rates of -1.20%, 1.80% and 4.70% and annuity rates of -0.50%, 1.50%, 3.50%. It also included details of the assumptions that had been used.

<sup>4</sup> This illustration was based on Mr Y making no further contributions into his Policy and used the same investment growth and annuity rates as the 31 August 2018 illustration.

on the first page. Therefore, any additional increase or guarantee period may not apply.”

16. Subsequently, Mr Y made a complaint to my The Pensions Ombudsman (**TPO**).
17. On 29 June 2020, TPO requested Aviva’s formal response to Mr Y’s complaint.
18. On 8 July 2020, Aviva sent Mr Y its complaint response. In summary it said:-
  - 18.1. Having reviewed the correspondence it had sent Mr Y and the IFA between 2 August 2018 and 6 September 2018 inclusive, it was unable to agree that it had provided contradictory information regarding the value of the Policy, projections or the annual increases that would be applied.
  - 18.2. Past performance was no guarantee of future performance of investment returns. The Policy had not reached the GMP target. The CETV was currently less than the cost of securing the GMP. The age-based restriction, SPA of 60 for women and 65 for men had been there since the start of the Policy.
  - 18.3. It had written to Mr Y in April 2013, confirming that the value of his Policy may not be sufficient to allow him to take retirement benefits before age 65, although his SRA was 63.
  - 18.4. Under a Section 32 policy there is no legal requirement to provide escalation on GMP benefits accrued before 6 April 1988. Where the retirement fund is insufficient to secure the GMP, any escalation is removed to provide this benefit. Section 9 of the Policy Conditions refers to increases applicable.
  - 18.5. It occasionally made changes to the style, content and layout of its annual statements in response to feedback received from its customers, changes in regulatory guidance and needs of its business.
19. Subsequently, Aviva provided to TPO, copies of correspondence it had sent to Mr Y between April 2013 and March 2021. It informed TPO that the CETV of Mr Y’s benefits as at 18 January 2023 was £110,629.29, and the cost to secure the GMP was £102,006.84. It also said that its actuarial team had confirmed that the GMP would not be covered if it added 5% escalation.<sup>5</sup>
20. On 14 March 2021, Aviva sent Mr Y details of options he could take in relation to his benefits at his SRA of 63 (**the 2021 Illustration**).<sup>6</sup>

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<sup>5</sup> Aviva said the GMP cost without escalation is £102,006.84 out of a fund of £110,629.29. 5% escalation would push the GMP cost up to a lot more than the value of the Policy.

<sup>6</sup> Mr Y provided copies of pages 1-4 and pages 7-20 of the 2021 Illustration to TPO.

## **Adjudicator's Opinion**

21. 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 set out below, in paragraphs 22 to 33.

### **Conflicting information**

22. After reviewing the correspondence that Aviva had sent to Mr Y and his IFA subsequent to July 2018, the Adjudicator had not found any evidence that Aviva had provided conflicting information to Mr Y or the IFA concerning the value of Mr Y's benefits in the Policy. So, there was no maladministration by Aviva in this regard.
23. The Adjudicator concluded that this part of Mr Y's complaint should not be upheld.

### **Poor investment returns since his Policy met the GMP target**

24. In its response to Mr Y's complaint, Aviva explained that there was no legal requirement to provide escalation of GMP benefits acquired pre April 1988.
25. Aviva had to administer Mr Y's benefits in accordance with the Policy rules and relevant legislation. As there was no legal requirement for Aviva to apply increases to GMPs accrued before April 1988, there had been no maladministration by Aviva in not applying any increases to Mr Y's Policy.
26. While Mr Y had expressed dissatisfaction with the value of his Policy, it did not follow that this was the result of maladministration by Aviva.
27. Aviva explained that the value of Mr Y's Policy was currently in excess of the GMP. If Mr Y was unhappy with the value of the Policy, he could discuss his options with an IFA.
28. Further, it was not Aviva that set the age that Mr Y could receive his GMP. That was set by legislation which Aviva had to adhere to.
29. The Adjudicator concluded that this part of Mr Y's complaint should not be upheld.

### **Changes made to the annual reports**

30. Aviva was entitled to amend the way it presented documentation it sent to policyholders.
31. Mr Y's dissatisfaction with the way Aviva presented documentation did not mean that changes Aviva had made amounted to maladministration.
32. The Adjudicator said that, in their opinion, I would not direct Aviva to amend the way it presented documentation it sent to its members. If members found it difficult to understand the contents of documentation Aviva sent them, it was open to them to contact Aviva and ask for clarification of any points they did not understand, or to request that Aviva provided the information in an alternative format.

33. The Adjudicator concluded that this part of Mr Y's complaint should not be upheld.

34. Mr Y did not accept the Adjudicator's Opinion and in response made some additional comments.

### **Summary of Mr Y's post Opinion comments**

35. Mr Y provided copies of: the original illustration he received when he commenced the Policy (**the Original Illustration**); the letter he signed in August 1986 accepting the terms of the Policy (**the 1986 Letter**); a copy of the CETV illustration he received from Aviva in 2001 (**the 2001 CETV**); a copy of a letter he was sent by Aviva in 2009 (**the 2009 Letter**); and copies of the anniversary certificates he received from Aviva in 2011 and 2012. He has also made some additional comments, which are set out below, in paragraphs 36 to 44.

36. The crux of his claim is that Aviva's performance is not reflected in the value of his Policy.

37. Mr Y believes:-

37.1. The Policy should have received annual increases at a rate of 5% from the time he attained age 63. This is based on the information detailed on the Original Illustration and the 2001 CETV.<sup>7</sup>

37.2. The 1986 Letter, along with the Original Illustration formed the basis of a contract with Aviva.

37.3. He was penalised in relation to annual bonuses not being applied to his Policy. He has not been allowed to share in Aviva's annual financial success. Aviva's annual correspondence obscures this. Aviva has repeatedly said that the lack of performance was the reason bonuses could not be paid. He had seen evidence from Aviva's records that this was not the true position.

38. Mr Y questioned:-

38.1. The interpretation of Section 9 of the Policy Conditions. He questioned both its intended role within the Policy and its legal validity in not giving "proper emphasis" for an oppressive term that has a significant alteration to the minimum return and conflicts with every other unconditional escalation percentage rate reference that has been made.

38.2. The right for Aviva not to increase GMPs accrued before 1988. He questioned how such a rule could be added after the Policy had commenced in 1986.

39. Mr Y says much has been made of the 2013 Letter, but unlike every other document he has on file, he has no such letter.

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<sup>7</sup> Mr Y highlighted on the Original Illustration and the 2001 CETV, the sections that he believes shows that he was entitled to a 5% increase annually on his Policy.

40. He says he telephoned Aviva in 2018 and told it that it had made administrative mistakes in his CETV illustration. That was the first time Aviva admitted it would not be paying an annual increase. He questioned why he would have ignored the 2013 Letter, when he was so upset about the situation in 2018.
41. Mr Y says he tried to transfer his benefits in the Policy from Aviva but was prevented from doing so because of the penalties he was told he could incur.
42. His original pension was clearly paid to Aviva as two amounts (GMP and enhanced pension). As late as 2011, the separation of his benefits was detailed on a statement he had received from Aviva. All money has since been allocated to meeting the GMP commitment.
43. He was unaware of what his position is or what his wife's position would be if he should die now. He has concerns that his death would allow Aviva to retain all the money in the Policy. Had this been their only financial support they would have been forced to accept Aviva's position out of necessity.
44. He would like consideration to be given to the five years of misery and strain they have endured due to the reluctance of Aviva to recognise the facts. The process itself has allowed Aviva to keep the funds for longer and will undoubtedly reduce the length of time it will have to pay the pension.
45. As Mr Y did not accept the Adjudicator's Opinion, the complaint was passed to me to consider. I issued a preliminary decision (**the Preliminary Decision**) partially upholding the complaint, for Aviva's maladministration in not addressing the 2013 Letter correctly, which resulted in Mr Y not receiving it.
46. Mr Y made further submissions in response to that Decision, which are summarised below, in paragraphs 47 to 51.

### **Summary of Mr Y's response to the Preliminary Decision**

47. The Harris case PO-2269<sup>8</sup> is, in his view, almost identical to his. It is also against Aviva, and he would have thought that it would have been my first point of reference in considering a decision.
48. The benefit date has already been ruled on and reasons given to why it must be met. He questioned how Aviva could write to him and tell him that there were insufficient funds to pay him a pension at age 63. The Pensions Ombudsman upheld Mr Harris' case.
49. The 2021 offer from Aviva outlined how it would pay him a pension from age 63, on the condition that he accepted 0% increases. He challenges whether it was legal for

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<sup>8</sup> <https://www.pensions-ombudsman.org.uk/sites/default/files/decisions/PO-2269.pdf>

Aviva to say that it had capped the bonuses to ensure that it could not meet the annual increases, so now it would not have to pay them.

50. The Original Illustration and any pre policy documents have also been ruled as admissible by the Harris case. The Original Illustration states that the GMP of £5979.16 is payable at SPA. It also says that his pensions would escalate at a rate of 5% compound from the date of payment. The acceptance letter confirms the contract and terms set out in the Original Illustration.
51. He has demonstrated that Aviva made false (if they insist that the 5% increases are conditional) or misleading statements. Aviva failed to disclose the real reason why every year there were no annual bonuses to his policy.
52. In response to the Preliminary Decision, Aviva provided a copy of the 2013 Letter that was sent to Mr Y's correct address.

### **Ombudsman's decision**

53. Mr Y has referenced the case of Harris as he believes his complaint is identical to Mr Harris'. Mr Harris' case concerned Aviva not allowing him to claim his benefits at age 60 as the value of his policy was insufficient to cover the GMP (which would be payable later, at state pension age).
54. Mr Y's case differs from Mr Harris', in that Mr Y has complained about Aviva not allocating bonuses to his policy and also not applying 5% increases to his pension in payment. I have not seen any evidence that Mr Y applied for his benefits at his SRA of 63 and was told that he could not do so because the value of his benefits was insufficient to cover the GMP – and so there is no complaint for me to consider on that point. Rather, the evidence shows that Aviva had offered Mr Y a pension at age 63, albeit on terms that Mr Y did not accept.
55. Furthermore, while I have regard for previous decisions made by my Office, each case is determined on its own facts<sup>9</sup>. As I consider that Mr Harris' case differs from Mr Y's, I do not find that Mr Harris' case is directly relevant to my decision on this case.
56. Mr Y asserts that the Original Illustration and the 2001 CETV both informed him that 5% increases would be applied to his benefits in the Policy. He is disappointed that Aviva has said that it will not apply increases to his pension in payment (if he were to put his pension into payment), on the basis that doing so would result in the value of his Policy not covering his GMP.
57. I have reviewed these documents and note that the 5% increase applies to pensions from the date of payment. As Mr Y's pension from the Policy is not in payment there has been no maladministration by Aviva in this regard.

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<sup>9</sup> By way of just one example, PO-13991, a decision made by my predecessor, also does not uphold a complaint made against Aviva in respect of the escalation rate to be provided on a Section 32 Policy.



58. In any event, even if the pension was in payment, I note that Section 9 of the Policy Conditions makes it clear that “the rate of increases in pensions shall not be such that the pension...which can be purchased by the Capital Sum shall be less than the Guaranteed Minimum Pension.” This, to me, would have allowed Aviva to suspend or reduce the increases applied if the capital sum, after investment returns and taking into account the increases that would otherwise be provided, does not meet the cost of providing the GMP (which, as the GMPs related to service accrued prior to 6 April 1988, did not have to include increases as a matter of law).
59. Further, in 2021, Aviva offered Mr Y the option to purchase an annuity at his SRA. This annuity would have increased at a rate of 8.5% annually, up to Mr Y’s SPA of 65. I find that this is in accordance with Condition 9 (see Appendix). So, there has been no maladministration by Aviva in this regard.
60. Bonuses are allocated to policies at Aviva’s discretion. Aviva is entitled to make commercial decisions not to award bonuses to any of its policies. Mr Y’s dissatisfaction with bonuses not being awarded to his Policy does not equate to maladministration by Aviva.
61. The information that Mr Y received when he commenced the Policy did not guarantee that bonuses would be added to his Policy every year. The 2009 Letter informed Mr Y that his Policy had significant guaranteed benefits, so it had not added a regular bonus to his Policy.
62. Further, the anniversary certificates Aviva had sent to Mr Y in 2011 and 2012, had informed him that a regular bonus had not been added to his Policy in those years. I find that the 2009 Letter along with the 2011 and 2012 anniversary certificates had put Mr Y on notice that bonuses may not always be added to his Policy.
63. If Mr Y believed he had been given a guarantee that bonuses would be applied annually to his Policy, he could have contacted Aviva to query why no bonus had been added to his Policy, following receipt of those documents. I have not seen any evidence that Mr Y did so.
64. Aviva pointed out that the 2013 Letter informed Mr Y that he may not have sufficient funds in his Policy to cover the GMP and therefore benefit from the elements of the Policy that are only available when that is the case (for example, claim his benefits before age 65 or receive 5% escalation on his pension in payment). The initial copy of the 2013 Letter that Aviva provided, evidenced that this letter was incorrectly addressed, so I did not dispute that Mr Y had not received this letter, and partially upheld his complaint on this basis in the Preliminary Decision.
65. However, following the Preliminary Decision, Aviva provided a copy of the 2013 Letter that was correctly addressed to Mr Y. I find that, on the balance of probabilities, Aviva had sent a copy of the 2013 Letter to Mr Y’s correct address at the time. Accordingly, Aviva cannot be held responsible for the letter not being received by Mr Y.

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66. Mr Y asserts that he is unsure of what will happen to the Policy, should he die. Mr Y may wish to consider contacting Aviva to request details of his Policy, so he may discuss his options with an IFA.

67. I do not uphold this complaint.

**Dominic Harris**

Pensions Ombudsman

16 October 2023

## **Appendix**

### **68. Relevant extract from the Policy Conditions**

#### **“9. INCREASES IN PENSION**

Pensions purchased under Condition 7 shall increase at the Escalation Percentage Rate specified in the Second Schedule. If an Escalation Percentage Rate is not specific the Insured may elect that the pensions purchased shall increase at a percentage rate not exceeding 8.5%

compound per annum. The increases in pension shall apply from each anniversary of the Benefit Date or the Substitute Benefit Date. This is subject to the amount of the pension per annum being limited to the Maximum Pension or Maximum Widow's Pension as appropriate increased by the accumulated increase in the Retail Prices Index published in the calendar month preceding the month in which such anniversary occurs since that published in the calendar month preceding the month in which such anniversary occurs since that published in the calendar month preceding the month in which the Benefit Date or Substitute Benefit Date occurred or by 3% compound per annum whichever is the greater less on the case of a pension payable to the insured the pension equivalent of any case sum taken at the Benefit Date or Substitute Benefit Date under Condition 10. If the value of the Retail Prices Index is not published in any particular month the most recently published value will be applied.

The rate of increases in pensions shall not be such that the pension and widow's pension which can be purchased by the Capital Sum shall be less than the Guaranteed Minimum Pension and the Guaranteed Minimum Widow's Pension respectively."