

Ombudsman's Determination

Applicant	Mr N
Scheme	Prudential Personal Pension Plan
Respondent	Prudential

Complaint Summary

1. Mr N held two pension policies with Prudential (**the Prudential Policies**), one of which benefitted from a guaranteed annuity rate (**GAR**). Mr N has complained that, as a condition of honouring the GAR, Prudential required him, when drawing upon the proceeds of the non-GAR policy, to use the proceeds to purchase an annuity through Prudential.

Summary of the Ombudsman's Determination and reasons

2. The complaint shall be upheld against Prudential because it incorrectly limited Mr N's choice regarding the use of the proceeds of the Prudential Policies. Furthermore, Prudential was not transparent and did not provide sufficient evidence to support its stance, which caused Mr N serious distress and inconvenience for which it shall pay Mr N an additional £600 (to make a total award of £1,000).

Detailed Determination

Material facts

3. Mr N was a member of a Small Self-Administered Scheme (**SSAS**). The SSAS was originally administered by Prudential until April 2006, when Prudential's SSAS business was taken over by XPS Administration. The underlying investment in the SSAS consisted of two policies, originally underwritten by Scottish Amicable Life Assurance Society (**Scottish Amicable**). The first policy (**the GAR Policy**) was taken out on 1 June 1983 and was a with profits endowment policy. This first policy contained the GAR. The second policy (**the non-GAR Policy**) was taken out on 1 January 1998 and was a unitised fund policy. These policies were, at some point during their respective terms, assigned by Scottish Amicable to the Prudential.
4. The SSAS rules applicable to Mr N's complaint are the 28 March 2006 Trust Deed and Rules (**the Rules**). Section 8.1 of the Rules provides:

“The Scheme will operate, and any Benefits provided by the Scheme, will be on a money purchase basis. Subject to the following provisions of this clause 8, the Scheme may provide any benefits to or in respect of any Member, which would not be Unauthorised Payments.”

5. In October 2019, Mattioli Woods, on behalf of Mr N, requested a customer information pack (**CIP**) from Prudential to facilitate Mr N's retirement planning.
6. Mr N chased Prudential on 17 January 2020, by email. In his email he expressed his dissatisfaction that he was still waiting for the CIP and was concerned about his GAR.
7. On the same date, Prudential sent Mattioli Woods the CIP. The cover letter said:

“Prudential no longer provide annuities, but as your member has a potentially valuable guaranteed annuity rate included in the [GAR Policy], we will of course honour it. Legal & General will do this on our behalf, so your member won't lose out.

Please note that the guarantee will only be honoured by Legal & General and won't be available if your member chooses another provider. We would still recommend they shop around.”
8. The CIP provided Mr N with the valuation of his two policies: the value of the GAR Policy was £227,587.78 and the value of the Non-GAR Policy was £171,105.13.
9. On 20 January 2020, Mr N emailed Mattioli Woods and Prudential requesting to take out the annuity on the GAR Policy at the rate of 8.7% and cash in the Non-GAR Policy on maturity. The Prudential Policies matured on Mr N's birthday, which was in January 2020. He also said that he had 2016 fixed protection for the amount of £1,200,000 so his understanding was that “the cash drawdown would be less than the 25% limit and tax free”. Mr N also confirmed that he was a non-UK resident for tax purposes and was subject to pension tax in the United Arab Emirates (**UAE**).
10. From 1 February 2020, Mr N started receiving an annuity from Legal & General (**L&G**).
11. On 10 February 2020, Mattioli Woods telephoned Prudential in relation to its letter of 17 January 2020. The note of the conversation states “explained to the [financial adviser] that he can no longer buy an annuity with [GAR] and then transfer the residue from the non [GAR] fund away”.
12. On 14 February 2020, Mr N raised a formal complaint against Prudential. In his submissions, he said in summary:-
 - He was unhappy that Prudential removed the original option which allowed him to split the GAR Policy and the Non-GAR Policy between two providers.

- He believed Prudential was breaking the law on the basis that the Prudential Policies were separate but Prudential was linking them unilaterally.
- Even if Prudential was allowed to link the Prudential Policies together, it imposed the change of contract without his consent.
- Prudential was not complying with the Pension Schemes Act 2015, by compelling him to purchase an annuity.
- Prudential took too long to issue the CIP.

13. On 24 February 2020, Prudential sent Mr N a response to his complaint that said in summary:-

- It was very sorry that he had not received a good level of service from it. It agreed that it took far too long to respond to his request for the CIP.
- It accepted that it had caused Mr N inconvenience by changing its approach with this claims process and the options available to him.
- However, it could no longer facilitate the splitting of GAR and non-GAR funds between two different receiving schemes.
- While this change was allowed under the product rules, it agreed that it failed to communicate this clearly and that Mr N was initially working on the assumption that the funds could be split.
- This assumption would have been formed given that Mr N's brother accessed his funds from the SSAS in that way a year ago. Feedback would be provided to the teams involved and training delivered.
- As an acknowledgment of the obvious distress and inconvenience this had caused Mr N, it had arranged a payment of £400 by way of an apology. This reflected its recognition that it had caused him significant inconvenience through poor communication and the changes which had taken place while he was exploring his options as well as the delay itself.
- It would also review his case for any financial loss, if his policy was claimed within the next 60 days following its letter. It emphasised that this process required Mr N to move forward with L&G directly if he was looking to annuitise to maintain his GAR element. Consequently, it upheld Mr N's complaint.

14. Mr N did not accept the response and requested that further consideration be given to his complaint. On 2 March 2020, Prudential wrote to Mr N and said:

"I have come to the same outcome as [the previous decision maker] did - fundamentally, we were within our rights to make the change, however our communications were poor, in relation to this, and it is understandable why

you believed you could take benefits in a different manner. I also agree with the amount of compensation [the previous decision maker] offered.”

15. Following the complaint being referred to The Pensions Ombudsman (**TPO**), Mr N and Prudential made further submissions that have been summarised below.

Mr N's position

16. He was initially told by Prudential that he had to take the Non-GAR Policy if he wanted to benefit from the GAR on the other policy.
17. Prudential failed to inform him of a change in the process. He also felt that the Prudential Policies should not be linked and should stay separate.
18. He has agreed “under duress” to use the Non-GAR Policy to purchase an annuity with L&G.
19. He has provided a calculation of financial loss over a 27 year period which is £195,868.61. This figure is based on the full tax-free lump sum being invested in a medium risk investment portfolio, similar to investment portfolios that he managed in his SSAS for over 30 years.
20. His intention was to take a cash drawdown on the Non-GAR Policy, which was indicated to Mattioli Woods and Prudential at the time.
21. At the time of his request, he was a resident in UAE for tax purposes and enjoyed the benefit of zero tax rate on any drawdown.
22. After consulting with Mattioli Woods, he also decided to crystallise most of his SSASs before his return to the UK, to benefit from full crystallisation with zero tax. This would give him a tax-free lump sum available to reinvest. This is evidenced in the emails to his independent financial adviser (**IFA**) confirming his residency status in the UAE.
23. It is difficult to have taken steps to mitigate the losses resulting from Prudential's mistake as the funds were annuitised with L&G and not available for alternative investment.
24. Repeated attempts to stop the mistake from happening in the first instance were made by raising the matter to Prudential's internal complaints department but the complaint, and possible rectification, before his tax position changed, was rejected on two occasions.
25. He was pressurised by Prudential to accept its offer to take part of the Non-GAR Policy benefit as an annuity because, if he did not, it said it would not honour the GAR at 8.7%.

Prudential's position

26. It incorrectly advised Mr N that it was not possible to transfer the fund without the GAR.

27. At the time Mr N took the benefits, he did not need to take the Non-GAR Policy with L&G. It should have offered him the opportunity of taking an Open Market Option (**OMO**).
28. It did not have any records of whether Mr N's IFA had started looking into this option and whether he would have any records of what other companies may have offered, as this was something it might not have access to and have difficulty obtaining itself.
29. It understood that Mr N might have also had an option of transferring the full funds to the SSAS trustees and they would have paid the benefits based on their scheme rules.
30. This might have meant that Mr N could have received a higher lump sum. The SSAS administrators would have also calculated what annuity could have been offered. However, it did not look like this option was explained to Mr N or his IFA.
31. This was something it would need to check with the SSAS trustees to see if it was an option. If this was something Mr N would like to look into, Prudential will contact the SSAS trustees for more information.
32. It would like to correct this error and also make a payment to Mr N for the trouble and upset this had caused him.
33. The option was not a standard retirement option offered and therefore was not on the transfer discharge forms. In the past, it was asked to do this on very rare occasions by members and "very few took up this option."
34. As this option was not a standard retirement option, it did not need to inform members directly that it no longer offered this.
35. It is possible that Mr N assumed he was able to split the policies between two providers as he was aware of someone else being able to do this previously.
36. It can only see one telephone call record of Mr N's IFA requesting to take the GAR policy and non-GAR policy separately, which was on 10 February 2020.
37. It is moving away from the annuity market. However, it is aware that some customers have GAR policies with it. These members will lose the GAR options too if they take the OMO or transfer elsewhere.
38. It may have been possible that splitting the GAR and Non-GAR Policies was allowed by "a special concession agreed by management and my understanding is that the SSAS trustees would also have had to approve this."
39. It has provided a copy of the terms and conditions (**T&Cs**) of the GAR policy (extracts of which are set out in Appendix 1).
40. It did not offer the option of splitting the fund on retirement at any point for this member. The issue appears to be that what it had said in response to Mr N's initial complaint on 24 February 2020, was now not correct.

41. It did allow concessions to split the policies between two providers, but this is no longer offered. It was able to grant a concession to allow Mr N's brother to split his funds but that is not something it would now consider.
42. This was never an option under the T&Cs and so was not removed.
43. L&G has confirmed that cashing out the balance of Mr N's annuities is not an option.
44. It was asked to provide its view on which part of the T&Cs' provisions it was relying on. However, it failed to do so.
45. L&G has confirmed to TPO that cashing out the balance of Mr N's annuities is not an option.

Adjudicator's Opinion

46. Mr N's complaint was considered by one of our Adjudicators who concluded that further action was required by Prudential. The Adjudicator's findings are set out below, in paragraphs 47 to 53.
47. Mr N held the Prudential Policies within his SSAS. He has complained that Prudential required him to take the policy without a GAR if he wanted to benefit from the GAR in the other policy when purchasing an annuity.
48. Prudential initially accepted that it incorrectly told Mr N that he needed to take the Non-GAR Policy with it via L&G and that it should have offered him the opportunity of choosing the OMO for this policy. However, in subsequent correspondence Prudential appears to have changed this view and now says that, while it previously allowed concessions to split policies between two providers, it no longer offered this option and that it is not something it would now consider.
49. Despite requests made of Prudential, it has not provided satisfactory evidence that the policy documents and T&Cs provided it with the power to insist that Mr N purchase an annuity with the proceeds of the policy which did not enjoy the GAR, or risk forfeiting the GAR on the other policy.
50. In the absence of such evidence, and in light of the statutory flexibilities conferred by the Finance Act 2004¹ (see Appendix 2), the Adjudicator's view was that Prudential lacked the legal authority to do what it did. Prudential's actions, in limiting Mr N's freedom of choice as regards the use of the proceeds of the Prudential Policies, amounted to maladministration.
51. Since L&G has confirmed that it is not possible to cancel Mr N's annuity, the Pensions Ombudsman cannot place Mr N in the exact position he would now be in. So, the methodology set out in paragraph 53 below, sought to place him as close as possible to that position. To the extent that maladministration has caused Mr N

¹ Section 1 of and paragraph 79 of Schedule 1 to the Taxation of Pensions Act 2014, inserted a new section 273B into the Finance Act 2004, making provision about flexible access to pension benefits.

financial loss, the Adjudicator's view was Prudential should compensate Mr N in respect of that loss to the extent to which that was possible.

52. This situation would have undoubtedly caused Mr N serious distress and inconvenience for which Prudential should pay him £600, to make a total award of £1,000. Prudential was not transparent in its submissions and, in the Adjudicator's view, did not provide sufficient evidence to support its stance. Mr N also had to chase Prudential for his CIP which it took around three months to provide to him, which, in the Adjudicator's view, was too long. This award, in her view, was in line with what the Pensions Ombudsman would award in similar cases.
53. Consequently, the Adjudicator's opinion was that the complaint should be upheld, and she recommended that Prudential should:-
- Pay Mr N an additional £600 to make a total of £1,000 for the serious distress and inconvenience caused by the above maladministration.
 - Ask Mattioli Woods to establish the amount of annuity Mr N could have purchased had he been offered an OMO on the non-GAR policy in February 2020 (**the notional annuity**) and compare this with the annuity from the non-GAR policy currently in payment (**the annuity in payment**). The calculation of the notional annuity should be on the same basis as the annuity in payment from the non-GAR policy.
 - Pay any reasonable administration fee should Mattioli Woods charge a fee for carrying out the above calculation.
 - If the comparison above shows that the notional annuity is higher than the annuity in payment, Prudential should:-
 - For past losses, pay Mr N the difference between each monthly instalment of the notional annuity and the annuity in payment, from 1 February 2020 to the date of settlement together with interest at the base rate quoted by the Bank of England during the intervening period.
 - For future losses, ask L&G to calculate the cost of providing the difference between the notional annuity and the annuity in payment from the date of settlement, making allowance for any remaining guarantee period, contingent benefits and future increases. This sum to be used to purchase the additional annuity with L&G.
 - Pay any reasonable administration fee should L&G charge a fee for carrying out the above calculation or for setting up the additional annuity.
 - If the comparison shows that Mr N could not have purchased a higher annuity in the open market, then no further action needs to be taken.
54. Both Mr N and Prudential provided further comments in response to the Adjudicator's Opinion, challenging the suggested redress. These have been summarised below.

Summary of Mr N's post Opinion comments

55. He was "perplexed" by the methodology recommended by the Adjudicator. His desire was to drawdown the funds in the non-GAR policy and to invest in alternative options, not to take an annuity.
56. The issue was not the fact that he may have got a marginally better annuity using OMO, but that it removed the flexibility of withdrawal and potential death benefits available through flexi-access drawdown.
57. He believed he was compelled, under duress, to accept the L&G arrangement. His contract was with Prudential and not with L&G. He did not accept that his funds could not now be recovered.
58. Prudential should be compelled to return the funds plus interest from 2020, plus a consideration for tax that would be due on the funds, now that the opportunity to receive the funds tax free has been lost.
59. He believed that Mattioli Woods should establish the amount of return on investment that he could have received had he been able to flexi-access the remaining funds in the non-GAR policy in February 2020. This should be compared with the annuity from the non-GAR policy currently in payment over the period of his expected lifetime.
60. The above proposal would give him the most appropriate computation of his financial position had the maladministration not occurred but would not include the potential death benefits which are lost with an annuity.

Summary of Prudential's post Opinion comments

61. Although Mr N had two policies, they formed part of one contract in which he built up one pot to provide benefits on retirement.
62. The HMRC rules that applied at the time Mr N joined the SSAS meant that his maximum benefits were calculated based on his salary and service. It was his overall fund, taking into account all plans from the fund, that was measured against these limits. It could not be divided up between the two policies. The SSAS was set up to reflect that and to provide retirement benefits within HMRC limits.
63. There were very limited circumstances in which a member could vest partial benefits, for instance taking their tax-free lump sum at normal retirement date and deferring taking their annuity. This was only if a member met certain criteria such as budget and employment status.
64. Post "A Day" (6 April 2006) rules continued to reflect this. For instance, members with a scheme specific Protected Tax-Free Cash (**PTFC**) option, have to take benefits at the same time from the same scheme to retain PTFC entitlement. Similar rules apply to a protected age under occupational pension schemes which can be found in the Pensions Tax Manual published on the government website.

65. It told Mr N the GAR and Non-GAR Policies could not be split and the pot had to be used in its entirety.
66. Its plan T&Cs have never allowed the splitting of GAR and non-GAR policies. Its system does not have the functionality to split these policies.
67. Mr N's brother's plans were settled some years ago and the full amount was transferred to the Trustees. He did not take any annuities with Prudential.
68. Mr N had received his tax-free lump sum and was free to invest it as he saw fit.
69. It had considered Mr N's calculation, but it was completely unrealistic. The option of splitting the policies would have never been allowed. At best, it would have allowed Mr N to take the GAR annuity with L&G and the Non-GAR Policy on the open market with another provider.
70. Regarding the redress recommended by the Adjudicator, it did not have access to any open market rates from 2020. So, this would be impossible to implement and pay Mr N. It would require a further form of redress/link to a website that can provide historical rates.
71. As neither party accepted the Adjudicator's Opinion, the complaint was passed to me to consider. I issued a preliminary decision (**the Preliminary Decision**) on 1 May 2024, which upheld the complaint.
72. Prudential and Mr N made further submissions in response to the Preliminary Decision, which are summarised below.

Summary of Prudential's post Preliminary Decision comments

73. It broadly accepted the Preliminary Decision, however it raised some concerns regarding the calculation of the redress as set out in the Directions.
74. It wanted to be provided with an alternative direction if Mattioli Woods was not able to establish the amount of annuity Mr N could have purchased had he been offered an OMO on the Non-GAR Policy in February 2020.
75. In respect of the future loss, it understood that it needed to increase the annuity going forward with L&G. However, it was aware that not all annuity providers are willing to do this. It raised the following question:-
 - If L&G did not agree, what action should it take instead? For instance, should the purchase price of the additional annuity for the future loss be paid as a lump sum to Mr N?

Summary of Mr N's post Preliminary Decision comments

76. He contacted Mattioli Woods and it said that it could not help with the OMO as it could not access that information. To compare annuities, it used third party software

that generated live quotations at the time of the request, and it did not have any way of retrospectively going back and sourcing what that would have been at the time.

77. Mattioli Woods also looked at William Burrows' website and told him that the information needed was not there.
78. His IFA, who works at Mattioli Woods, spoke to William Burrows. The IFA confirmed that for a small fee, he would be able to arrange the required information and he had done it for TPO several times before.
79. In all likelihood, the L&G quotation would be close to the best on the market, at that time, so it was unlikely to yield much extra. The option he wanted to take at the time of drawing down the full tax-free lump sum, and taking out a medium risk investment portfolio, would have provided a much better return, not to mention death benefits, over the remainder of his life.
80. Despite the £1,000 award for distress and inconvenience, he was unlikely to be much better off, as a result of Prudential's maladministration, lack of legal authority and limitation of his choices on how to use the proceeds of the Prudential Policies. It appeared as if Prudential was going to "get off lightly" for its actions while he was going to bear a significant potential loss to his pension.

Post Preliminary Decision actions taken by Prudential

81. No action was taken by Prudential between 1 May and July 2024. It recently explained it had not been able to obtain the information from third parties as it had initially asked for incorrect information. It was only when the Adjudicator requested an update, that Prudential realised it had requested incorrect information and subsequently requested correct information.
82. It provided a copy of the letter dated 11 July 2024 that it had sent to Mr N. The letter explained that it had contacted L&G on 5 July 2024. It said that once it received information from L&G, it would contact Mattioli Woods.
83. It also told Mr N that it would arrange a payment of £600 to him and asked him for his bank details.

Ombudsman's decision

84. Prudential argues that Mr N had one contract with it instead of two separate policies. It also referred to the tax related matters that have a bearing on the way its policies are usually set up.
85. I do not consider that the tax related comments made by Prudential fully answer Mr N's complaint. To the extent that any tax protections applied to Mr N would have been adversely affected by drawdown, the question of whether he wished to forfeit them in favour of drawdown seems to me to be one which should have been put to Mr N and/or the Trustees of the SSAS.

86. I have not seen any evidence that Prudential drew Mr N's and/or Trustees' attention to these tax consequences. It is only now that Prudential has referred to these matters and I do not find that this satisfactorily answers Mr N's complaint.
87. Prudential said that its systems do not have the functionality to permit splitting Mr N's policies. I find, on the balance of probabilities, that this is the reason why Prudential denied Mr N the choice at the time.
88. Regarding Mr N's comments on redress. I appreciate that Mr N has provided his own proposal on how to put matters right. He would like L&G to make the funds available to him as he wants to have the choice to decide what to do with the funds, or to assume that they would have been placed in an undefined medium risk investment portfolio (rather than invested in an annuity, as was in fact the case, albeit not having exercised his open market option). It is not now possible to cancel Mr N's annuity, and it is not clear to me what the outcome would have been had Mr N exercised the OMO, and on that basis the methodology below, in my view, is a reasonable approximation of any loss suffered.
89. I find that this situation would have undoubtedly caused Mr N serious distress and inconvenience for which Prudential shall pay him an additional £600 (on top of the £400 already paid) to make a total of £1,000. Prudential was not clear in its submissions, and I consider it did not provide sufficient evidence to support its stance. Mr N also had to chase Prudential for information prior to his normal retirement date, which it took about three months to provide.
90. Additionally, given that Prudential has not disputed the Preliminary Decision, it should not have taken it over two months, from the date the Preliminary Decision was issued, to contact L&G. In particular, when Mr N was able to contact Mattioli Woods himself, and get an answer to the enquiry to which Prudential is currently (to date) still seeking a response. This is disappointing and has unnecessarily delayed matters.
91. I uphold the complaint.

Directions

91. Within 28 days of the date of my Determination, Prudential shall:-
- Pay Mr N an additional £600, if this has not already been actioned, for the serious distress and inconvenience caused by the above maladministration.
 - Ask Mattioli Woods to establish the amount of annuity Mr N could have purchased had he been offered an OMO on the Non-GAR Policy in February 2020 (**the notional annuity**) and compare this with the annuity from the Non-GAR Policy currently in payment (**the annuity in payment**). The calculation of the notional annuity should be on the same basis as the annuity in payment from the Non-GAR Policy.

- Pay any reasonable administration fee should Mattioli Woods and/or William Burrows charge a fee for carrying out the above calculation.
- If the comparison above shows that the notional annuity is higher than the annuity in payment, Prudential shall:-
 - For past losses, pay Mr N the difference between each monthly instalment of the notional annuity and the annuity in payment, from 1 February 2020 to the date of settlement together with simple interest at the base rate quoted by the Bank of England during the intervening period.
 - For future losses, ask L&G to calculate the cost of providing the difference between the notional annuity and the annuity in payment from the date of settlement, making allowance for any remaining guarantee period, contingent benefits and future increases. This sum to be used to purchase the additional annuity with L&G.
 - If L&G is unable or unwilling to increase the amount of the annuity held with it, then Prudential shall pay Mr N a lump sum in an amount which, in the opinion of an independent actuary, fairly represents the capitalised value of that increase. The cost of obtaining the opinion of the independent actuary shall be covered by Prudential.
- Pay any reasonable administration fee should L&G charge a fee for carrying out the above calculation or for setting up the additional annuity.
- If the comparison shows that Mr N could not have purchased a higher annuity in the open market then no further action needs to be taken.

Dominic Harris

Pensions Ombudsman

16 August 2024

Appendix 1

Extracts of the T&Cs of the Prudential Policies

Scottish Amicable

Superplan policy conditions – SP80

“1.3 Application of Policy Proceeds

The investor shall hold the Policy in a fiduciary capacity as Trustee of the Scheme and the proceeds shall be used to provide lump sums or annuities for the Member or the Member’s surviving spouse or dependants as permitted by the Rules. Such annuities will be purchased from Scottish Amicable or from any other insurer as provided for in the Rules and selected by the Investor and the annuity rates used will be Scottish Amicable’s, or other insurer’s, current rates for pensions business. If such annuities are not being purchased from Scottish Amicable, the proceeds being paid, less any part being paid as a lump sum to the Investor in terms of the Rules, shall be transferred in full to the insurer from whom the annuities are being purchased, or, at the request of the Investor, to a pension consultant arranging the transaction.

The benefits payable under the Policy shall correspond with the liabilities of the Trustees under the Scheme insofar as the liabilities are, or are intended to be, secured by the Policy. Any options in the Policy provisions will be exercised only as permitted by the Rules.”

“6. Guaranteed Annuity Rate

If the proceeds at the Normal Retirement Date are applied, in whole or part, to purchase an annuity from the Society on the file of the life assured and such annuity is payable on the first day of the month following the Normal Retirement Date and monthly thereafter for five years and thereafter during the lifetime of the life assured, then the annuity in the Schedule or, if more favourable, shall be that secured by the Society’s then current annuity rates.”

Appendix 2

Section 273B of the Finance Act 2004

“Power of trustees or managers to make certain payments

- (1) Subsection (2) applies to a payment by a registered pension scheme to or in respect of a person who is or has been a member of the scheme if it is paid in respect of a money purchase arrangement and is-
 - (a) a payment of drawdown pension...
- (2) The trustees or managers of the scheme may make the payment despite any provision of the rules of the scheme (however framed) prohibiting the making of the payment.”