

Ombudsman's Determination

Applicant	Mrs N
Scheme	Thomas Cook UK DC Pension Scheme (the Scheme)
Respondents	Aviva The Trustees of the Thomas Cook UK DC Pension Scheme (the Trustee)

Outcome

1. Mrs N's complaint is partly upheld. I do not find that Aviva or the Trustee need to take any further action at present. However, depending on the final tax treatment of the redress that has already been paid to Mrs N by Aviva, it may be necessary for Aviva, as the party responsible for the maladministration, to take further action to ensure that Mrs N is not placed in an adverse tax position. This is covered below, in the section, "Directions".

Complaint summary

2. Mrs N has complained that Aviva delayed the implementation of the pension sharing order (**the PSO**) in respect of benefits in the Scheme held by her former spouse, Mr N. In the intervening period, the unit prices of Mrs N's preferred investments increased. Mrs N has asserted that she suffered a financial loss because of the delay in transferring her pension credit (**the Pension Credit**).

Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the main points. I acknowledge that there were other exchanges of information between all the parties.
4. On 18 June 2020, the family court made the PSO, which set out that Mrs N should be paid the Pension Credit, equivalent to 40% of the value of Mr N's benefits in the Scheme. The PSO stipulated that the Pension Credit should be paid to Hargreaves Lansdown (**HL**).
5. On 15 July 2020, Aviva received the PSO and a copy of the Decree Absolute.

6. On 22 July 2020, HL wrote to Aviva regarding payment of the Pension Credit (**the July 2020 Letter**). HL requested the necessary information so that it could accept a transfer of funds in respect of the Pension Credit. Aviva said it received this correspondence on 24 July 2020.
7. On 6 August, 21 August, and 8 September 2020, HL wrote to Aviva to request a response to the July 2020 Letter.
8. On 15 September 2020, HL wrote to Aviva to request payment of the Pension Credit (**the September 2020 Letter**). The account details were specified in the correspondence. HL also asked for confirmation of the transfer value in respect of the Pension Credit.
9. On 17 September 2020, Aviva started the implementation process for the PSO.
10. On 24 September 2020, Aviva wrote to Mrs N to confirm that it had everything it needed to implement the PSO. Aviva said it would arrange to calculate the value of the Pension Credit and transfer this amount to HL.
11. On 5 October, 5 November, 20 November, 7 December, and 22 December 2020, HL wrote to Aviva to highlight that the Pension Credit had not yet been paid to HL. It requested that this should be completed as soon as possible.
12. On 18 January 2021, Mrs N complained to Aviva that the PSO had not been implemented within the required four-month timeframe. Mrs N said she was unhappy because the delay meant she had been unable to invest the value of her Pension Credit at a time when stock market returns were favourable.
13. On the same day, Aviva apologised for the delay in implementing the PSO and authorised payment of the Pension Credit to HL.
14. On 27 January 2021, Aviva paid £358,097.02 to HL, in respect of the value of the Pension Credit.
15. On 1 February 2021, Mrs N emailed Aviva. She considered that Aviva had exceeded the time permitted to implement the PSO. She said she had suffered an investment loss as a result, and she had to delay her retirement.
16. On 2 February 2021, Mrs N emailed Aviva for an update. She said she was unhappy about the delay in transferring the value of her Pension Credit. Mrs N explained that she wanted to invest when the stock market was at its lowest. She had now missed this opportunity.

17. On 4 February 2021, Mrs N sent a further email to Aviva as she was concerned that the implementation process was being delayed. Mrs N said she understood that the units had been sold on 22 January 2021, to allow for the payment of the Pension Credit. However, she had received limited information about when the payment would be made and considered that Aviva had breached the terms of the PSO. She said the matter had caused her significant distress and meant she had to contact Mr N, which had been difficult for her.
18. On 8 February 2021, Aviva identified that there was a residual payment of £34.09 (**the Residual Payment**) due to Mrs N in respect of the Pension Credit. The error was caused by Aviva using an incorrect unit price when it encashed the units.
19. On 14 February 2021, Mrs N emailed Aviva. Mrs N said that she held a telephone call with Aviva on 10 February 2021 and was informed that the Pension Credit had been paid to HL on 27 January 2021. She was unhappy that Aviva had not notified her of the transaction sooner. She explained that the Residual Payment could not be paid to HL because she had decided to transfer her benefits to Vanguard.
20. On 16 February 2021, Mrs N held two separate telephone calls with Aviva. Mrs N said that during the second call, Aviva told her that the Residual Payment would be made to her Vanguard account on 19 February 2021.
21. On the same day, Mrs N emailed HL regarding the transfer of her benefits from HL to Vanguard. She said she received an email from HL, on 9 February 2021, which indicated that the transfer had been completed, but the funds were still not with Vanguard. She was concerned that she had been unable to invest the funds at a time when stock markets were rising.
22. On 22 February 2021, Mrs N transferred her benefits from HL to Vanguard.
23. On 23 February 2021, Mrs N purchased units in the following investment funds:
 - 268.7844 units in the Vanguard FTSE UK Equity Income Index Fund, totalling £66,000;
 - 225.5254 units in the Vanguard FTSE Developed Europe ex-UK Equity Index Fund, totalling £66,000; and
 - 575.4643 units in the Vanguard FTSE 100 Index Unit Trust, totalling £66,000.
24. On 24 February 2021, Mrs N complained to Aviva that the time taken to resolve the Residual Payment had delayed the implementation of the PSO. She said it had required her to undertake difficult communication with Mr N, causing her considerable distress and inconvenience. The delay had also prevented her from investing the Pension Credit at a time when stock markets were more favourable. Mrs N emphasised that she was totally dependent on investing the Pension Credit funds for her long-term financial security.

25. Mrs N asked why Aviva started the implementation process on 17 September 2020, when it had received all the necessary information by 15 July 2020. Mrs N considered that Aviva should have been in a position to pay the Pension Credit to HL by 30 October 2020. This would have allowed her to invest £358,097.02, the value of her Pension Credit, in a FTSE 100 index tracker fund on 2 November 2020. However, the Pension Credit was not paid until 27 January 2021, so she had been unable to invest until 28 January 2021.
26. Mrs N highlighted that the FTSE 100 index opened at 5577.27 on 2 November 2020, and at 6567.37 on 28 January 2021. Based on the full sum of £358,097.02, which she said she intended to invest, she calculated that her investment loss amounted to £63,570.86. Mrs N explained that this loss represented the value of the additional units she could have purchased if she had invested on 2 November 2020, rather than 28 January 2021. She asserted that Aviva should pay an award in respect of her calculated loss, plus interest.
27. On 10 March 2021, Aviva emailed a response to Mrs N's complaint. Aviva said it received the PSO on 15 July 2020, and could have implemented it by 31 July 2020. So, it should have been able to pay the Pension Credit to HL by 12 August 2020.
28. Aviva explained that on 31 July 2020, the value of the Pension Credit amounted to £357,998.57. It was investigating whether Mrs N had suffered a financial loss due to the delay in implementing the PSO.
29. On the same day, Mrs N purchased 812.4519 units in the Vanguard FTSE 100 Index Unit Trust, totalling £95,000.
30. On 16 March 2021, Mrs N purchased units in the following investment funds:
 - 158.2279 units in the Vanguard FTSE UK Equity Income Index Fund, totalling £40,000; and
 - 211.0239 units in the Vanguard FTSE 100 Index Unit Trust, totalling £25,000.
31. On 23 March 2021, Mrs N contacted Aviva to request a response to the concerns she had raised on 24 February 2021.
32. On 31 March 2021, Aviva emailed Mrs N a copy of its correspondence dated 10 March 2021.
33. On 30 April 2021, Aviva emailed Mrs N to explain that it was still investigating whether she had suffered an investment loss. It said that Vanguard had indicated that it should make any redress payment to HL, and HL could then forward the payment to Vanguard. Aviva said it was unsure whether it could proceed on this basis and would update Mrs N as soon as it had made progress.

34. On 17 May 2021, Aviva emailed Mrs N. It acknowledged that it had unreasonably delayed the implementation of the PSO. It apologised for the level of service it had provided. Aviva said it had tried to discuss Vanguard's proposed method for payment of redress with HL, but HL had not provided a response. Aviva requested information on Mrs N's investments with HL so that it could calculate her financial loss.
35. On 20 May 2021, Mrs N raised concerns about the communications she had received from Aviva. She questioned why Aviva could not award her an interim settlement, while continuing to discuss her case with HL and Vanguard. She explained that, after taking financial advice, she had chosen to invest the Pension Credit in several Vanguard funds. Given that her account with HL was no longer active, she questioned why HL would need to be involved in discussions concerning her redress payment.
36. Mrs N said that she had to delay her retirement, due to being unable to access her benefits. She considered that Aviva was solely responsible for this delay. However, she confirmed that she had not drawn any income from her benefits that were now held with Vanguard. She also explained that she previously held another drawdown account with HL, from which she had crystallised some benefits. The remaining benefits, valued at £37,419 at the time, had been transferred to a separate account with Vanguard.
37. Mrs N said she had been unable to move on following her divorce. The distress the matter had caused her was compounded by the difficulty of her employment circumstances during the earlier stages of the Covid-19 pandemic.
38. On 21 May 2021, Aviva emailed Mrs N. Aviva explained that it had contacted HL, about her redress payment, because Vanguard could not accept a payment from Aviva unless Mrs N made a new transfer request. Aviva said that in view of the time already taken to progress matters, it had considered the possibility of making an interim settlement to Mrs N. Aviva apologised for the poor service it had provided to Mrs N. It offered her £1,000, in recognition of the distress and inconvenience she had suffered in connection with the matter.
39. On 4 June 2021, Aviva emailed Mrs N. It said it had calculated that Mrs N's investment loss amounted to £19,878.97, based on the three initial investments she had made with Vanguard on 23 February 2021. Aviva explained it had not considered any subsequent investments, because it did not consider that it was responsible for the delay in Mrs N making those investments.
40. On the same day, HL informed Mrs N that it had received the Residual Payment of £34.09 from Aviva.
41. On 6 June 2021, Mrs N asked Aviva to recalculate her investment loss based on her investing the full value of the Pension Credit. She added that the delay in Aviva making the Residual Payment had caused her significant distress and inconvenience.

42. On 13 June 2021, Mrs N provided Aviva with a further breakdown of her calculated investment loss of £63,570.86. She requested that interest of 8% be added to the redress payment, up to the date of settlement. On the basis of the Pensions Ombudsman's guidance on awards for non-financial injustice, Mrs N said that Aviva should also increase its offer for her distress and inconvenience to £3,500. She said this would be a fair recognition of her severe levels of stress and the negative effect on her life choices.
43. On 20 July 2021, Aviva emailed Mrs N. It said it agreed with Mrs N's assessment of her overall financial loss, which she had valued at £63,570.86. Aviva confirmed it would make an award in respect of that loss (**the Award**). It explained that it would pay the final amount of the Award to Mrs N, rather than to Vanguard. Aviva said this approach would mitigate the risk of the payment triggering a tax charge, which could be up to 55%. Aviva added that this would allow Mrs N to use some, or all, of the Award to make a pension contribution, which would be eligible for tax relief.
44. Aviva explained that it would deduct 15% from the Award. It said this effectively allowed for a tax-free element of 25%, with the remaining 75% of the Award being taxed at 20%, the basic rate of income tax. Aviva confirmed that it would apply the deduction on the assumption that Mrs N would not be liable for income tax on a payment of redress. The outcome of this was that Aviva offer to pay Mrs N a net amount of £54,035.23.
45. Aviva said it agreed with Mrs N's request to apply interest of 8% to the Award, for the period 28 January 2021 to 21 July 2021, as Mrs N's investment loss had been calculated to 28 January 2021. Aviva explained that it had deducted an annual management charge (**AMC**) of £72.03 in error, so it would pay Mrs N a further amount of £72.03. Aviva said the total payment would amount to £56,187.38, plus £3,500 in recognition of the distress and inconvenience she had suffered.
46. On 21 July 2021, Mrs N emailed Aviva to accept its latest offer of redress. Later that day, she emailed Aviva to withdraw her acceptance.
47. On 22 July 2021, Mrs N emailed Aviva to explain that she disagreed with the deduction for income tax made from the Award. Further, she considered that if she received this payment, it would not be tax-free. She estimated that she would be liable for income tax of at least £25,428.34.
48. On 28 July 2021, Aviva issued a response to Mrs N. It apologised to Mrs N and said that the service it had provided was unacceptable. It reiterated the terms of its offer, originally set out in its correspondence of 20 July 2021. Aviva said that if accepted, payment would be made directly to Mrs N, due to the tax implications of paying it to her pension provider. It considered that this approach was in line with guidance provided by HM Revenue & Customs (**HMRC**).
49. On 1 August 2021, Mrs N emailed Aviva. She said she had received information from HMRC which indicated that a proportion of her redress would be taxed at 40%, her marginal rate of income tax at that time.

50. On 24 August 2021, Aviva wrote to Mrs N to explain that it had a policy of not paying redress into an individual's pension arrangement. If this was paid into Mrs N's pension arrangement, it would be classed by HMRC as a relievable pension contribution. This could lead to an Annual Allowance tax charge and/or the loss of any Lifetime Allowance protection.
51. In September 2021, Aviva paid Mrs N an interim settlement of £60,323.26 (**the Interim Settlement**).
52. On 7 January 2022, the Trustee issued its response under the Scheme's Internal Dispute Resolution Procedure. It said it agreed with Aviva's position regarding the proposed resolution to the complaint.
53. Following the submission of the complaint to The Pensions Ombudsman, the parties made further submissions, which are summarised below.

Mrs N's position:-

- If the administration of the PSO had not been delayed, she would have invested the full value of the Pension Credit in a FTSE 100 index tracker fund. Her conviction that she would have proceeded in this way was based on discussions she had in Spring 2020 with a long-term family friend, who had professional experience of investment banking. She does not have any evidence to support that this would have been her investment strategy, but Aviva has accepted her well-documented intention to invest the full amount in the stock market.
- She is totally dependent on the investment of the Pension Credit for her long-term financial security. Aviva put this at risk because of its delays and the investment loss she incurred as a result.
- Although she has accepted the Interim Settlement, she is pursuing the complaint because Aviva should not have made the deduction of £9,535.63 for tax.
- The benefits she transferred from HL to Vanguard, shortly after the Pension Credit was paid to HL, included the value of the Pension Credit, which was then invested through Vanguard (**the Pension Credit Benefits**). She chose to transfer largely because Vanguard's investment platform charged significantly lower fees.
- She would not have taken an uncrystallised funds pension lump sum. Aviva has deprived her of some of the redress she is due because of its approach to tax. Her intention is to draw her benefits in a phased manner to minimise the amount of income tax she would have to pay.
- She has submitted tax information for the 2021/22 tax year. This shows that her taxable income in that year was £18,377.34.

- She has submitted tax information for the 2022/23 and 2023/24 tax years. This shows that in 2022/23 she received income totalling £7,542.12, from a pension built up through her former employment as a teacher, plus income drawn from her Vanguard account. In 2023/24, her teacher's pension income was £8,201, and income was again drawn from her Vanguard account. The information confirms that she was not liable to pay income tax in the 2022/23 and 2023/24 tax years.
- She now considers that an award of £5,000 would be appropriate recognition of the distress and inconvenience she has suffered. This matter has impacted her ability to make decisions about her retirement, and has affected her physical and mental health. She planned to retire in October 2020, but Aviva's administrative errors forced her to work beyond her desired retirement date. She then had to pursue the complaint over an extended period. Aviva has not acknowledged this and its communication has been poor throughout; it failed to reply to some of her correspondence.

Aviva's position:-

- The implementation period for the PSO should have started on 4 August 2020¹, as this was when it had all the information it required to proceed. If it had not delayed the implementation of the PSO, the value of the Pension Credit could have been paid to HL on 25 August 2020.
- The Interim Settlement comprised £54,035.23 (net) in respect of Mrs N's investment loss, £72.03 for the AMC that was charged in error, £2,716 in respect of interest, and £3,500 for distress and inconvenience. Mrs N's acceptance of the Interim Settlement was not in full and final settlement of her complaint.
- Mrs N is in the correct financial position, because the Pension Credit Benefits would have been taxed when taken as income. It considers that its redress proposal did not involve the deduction of tax. Instead, it was making a provision for the amount of tax that would have been deducted if the gross amount had been available as pension benefits.
- Its policy in all cases is that it will not pay any redress into an individual's pension arrangement. As such, it did not investigate Mrs N's circumstances and how such a payment might have affected her. Having reviewed HMRC's guidance and statements over many years, it has concluded that redress paid directly to individuals, by an entity that is not the scheme's administrator, is not an unauthorised payment. So, any redress it pays to an individual, which could be recovered by them via legal action, is not subject to income tax.

¹ Although it has since accepted 11 August 2020, as set out in the Revised Timeline in Appendix 1, as the correct date.

The Trustee's position:-

- The Award was intended to compensate Mrs N for the financial loss she claims she has suffered in connection with this matter. However, there are some aspects of the approach that are generous to Mrs N. For example, Aviva accepted the dates proposed by Mrs N as the basis of the calculation of her investment loss.
- It agrees with Aviva's approach to the tax treatment of the Award.
- It does not consider that it would be appropriate for Aviva to pay Mrs N any increased award for her distress and inconvenience.

Adjudicator's Opinion

54. Mrs N's complaint was considered by one of our Adjudicators, who concluded that further action may be required by Aviva, if HMRC notifies Mrs N that she is required to pay income tax on the Interim Settlement. The Adjudicator's findings are summarised below:-

- It is possible that the approach agreed by Aviva and Mrs N, in the calculation of Mrs N's investment loss, may have overestimated that loss. Mrs N asserted that she would have invested the full value of the Pension Credit in a FTSE 100 index tracker fund. However, this did not accord with the more diversified investments made by Mrs N after the Pension Credit was paid.
- On the balance of probabilities, Mrs N was more likely to have followed a similar investment strategy to the one she actually undertook, if the payment of the Pension Credit had not been delayed. Further, the date of investment used by Aviva in its calculation of Mrs N's investment loss was likely a later date than would have been achieved, if the administration for the PSO had been carried out in a timely manner.
- The Adjudicator constructed a notional timeline (**the Timeline**), which set out his view of when it should have been possible for Aviva to have completed the actions to implement the PSO and pay the Pension Credit. This took into account Aviva's service level agreements (**SLAs**) and the timeframe over which Mrs N made her investments through Vanguard.
- Although the Adjudicator did not agree with Aviva's approach to the calculation of Mrs N's investment loss, his view was that as this had been agreed between Aviva and Mrs N, and the Interim Settlement had been paid, Aviva should not recalculate the loss.

- Regarding Aviva's treatment of tax for the Interim Settlement, the Adjudicator explained that the complaint should be reviewed in accordance with established legal principles. This generally means that the conclusion(s) should not be different to that which a court would reach, given the same set of circumstances. In Mrs N's case, redress would take the form of damages to remedy her financial loss. In instances where the financial loss to which the damages were attributable would have been taxable, but the sum paid by way of damages is not taxable, the court would usually reduce the compensation by the amount of tax avoided to ensure the claimant is not overcompensated. This is known as the Gourley principle, after the leading case in this area². In assessing loss, the court will seek to put the claimant in the same net tax position they would have been in, if the maladministration had not occurred.
- While Mrs N has provided evidence that she did not pay income tax in the 2022/23 and 2023/24 tax years, it was not possible to conclude that Mrs N's tax position would remain this way throughout her retirement. As such, Aviva's approach was consistent with that which a court would take to an assessment of her financial loss.
- Aviva's position was that Mrs N was not liable for income tax on the Interim Settlement. If this proved to be correct, then Aviva should take no further action. If Aviva was not correct on this point, and HMRC notified Mrs N that she was required to pay income tax on the Interim Settlement, Aviva should pay Mrs N an additional amount in redress to cover this tax liability, which she would not otherwise have incurred.
- Aviva's award of £3,500 for Mrs N's distress and inconvenience was more than sufficient in view of the circumstances of the complaint.

55. Mrs N did not accept the Adjudicator's Opinion, and the complaint was passed to me to consider. Mrs N's comments in response to the Opinion are summarised below, in paragraphs 56 to 66:-

56. Mrs N has not disputed the details of the Timeline. Rather her concerns relate to Aviva's approach to tax for her redress and the level of award for her distress and inconvenience.

57. Mrs N has quoted an extract of commentary by Professor Stephen Graw on the Gourley principle; this is shown in Appendix 2. She considers that it supports her position that Aviva's tax treatment for her redress was incorrect. She also queried why the Gourley principle, derived from a case in 1956, was applicable to a taxpayer in the present day.

² *British Transport Commissioners v Gourley* [1956] AC 185

58. Mrs N asserted that she does not pay income tax, so does not have a net tax position. She considers she has proved that she will pay no income tax in future and is unclear how else she could demonstrate this. It is not reasonable to place the onus on her to prove her intention to pay no tax, instead of putting the onus on Aviva to prove that she will pay tax.
59. Mrs N said that her financial circumstances will improve significantly in the years to come. She has only drawn part of the tax-free portion of her benefits, so there is the remainder to draw. In a few years, when she reaches age 67, she will begin receiving her State Pension at the full entitlement. She is due to remarry in the near future; she will sell her house, releasing significant capital in the process, and she and her fiancé will combine their finances to reduce their overall living expenses.
60. If the Interim Settlement had not been subject to a deduction for tax, Mrs N said she would have invested the additional amount and made gains similar to those achieved by her investments with Vanguard. As well as redress for the deduction of £9,535.63, she should receive the precedented 8% interest on this amount.
61. With regard to her distress and inconvenience, Mrs N considers that her case falls into the 'exceptional' category and her award should be £5,000. One of the factors for this category is "grave, adverse health consequences for the applicant", which she omitted to highlight at an earlier stage of the complaint. She said this was an indication of her state of mind and poor health at the time.
62. Over a period of 11 months, Mrs N said she had to deal with horrendous customer service from Aviva. This caused her constant worry, uncertainty, sleep deprivation, anxiety and worse still, an inexcusable delay to planned life choices. She had no idea when her funds would arrive and when she could retire. She also had no choice but to reveal personal details about her relationship with Mr N, in a desperate attempt to accelerate the pension split.
63. Mrs N's plan was to retire in October 2020, but this was significantly delayed, because she was unable to access the Pension Credit Benefits. The delay to her retirement was solely down to Aviva.
64. Due to her professional duties, coupled with a long notice period and no other income, Mrs N said she had no option but to continue to work during a pandemic, at almost 60 years old. This was in an environment without personal protective equipment, social distancing, nor an initial vaccination against Covid-19. Her anxiety, fearing for her and her family's safety, was off the scale; she received medication for this. She resents that she was forced to work in a dangerous environment because of Aviva's maladministration.
65. The Adjudicator's opinion of Mrs N's distress and inconvenience was subjective, not factual, and unjustified. She feels doubted, ignored, and that there was a total lack of understanding around being forced to work as a teacher for another year.

66. Mrs N referred to Mr N's circumstances as being similar to her own. Her understanding is that he has received a higher award for distress and inconvenience than she did. She is unclear why she has been treated differently.
67. Aviva did not dispute the outcome reached by the Adjudicator. However, it said there were certain assumptions made in the Timeline that do not accord with its SLAs.
68. Aviva has now confirmed that the disinvestment of Mr N's funds, to pay the Pension Credit, and subsequent payment of the Pension Credit funds to HL, would have had an overall SLA of 10 working days to complete the process. Similarly, its SLA to respond to a request for information, such as the one included in the July 2020 Letter, is five working days.
69. The Trustee agreed with the Adjudicator's Opinion. The only comment it made in response was about the tax treatment applied by Aviva. It said that given the dispute was between Mrs N and Aviva, it had not taken tax advice, but it was comfortable that the tax treatment, and the explanation provided, appeared sensible in the circumstances.
70. The additional comments do not change my view of the complaint. I agree with the Adjudicator's Opinion, with the caveat that there are parts of the Timeline that are revised to reflect Aviva's comments, as set out above. However, this does not alter the overall outcome of the complaint.

Ombudsman's decision

71. I have revised the Timeline dates, proposed by the Adjudicator, in light of the information provided by Aviva in response to the Adjudicator's Opinion (**the Revised Timeline**). The Revised Timeline is shown in Appendix 1. The amendments reflect that Aviva has acknowledged that it should have responded to the July 2020 Letter within five working days, where the Adjudicator had used 10 working days. Aviva has also clarified that its overall SLA to disinvest the funds to pay the Pension Credit was 10 working days, rather than the 15 working days that it had previously stated. The time allowed for all the other activities remains as per the original Timeline, including the staggered approach to investment that was ultimately adopted by Mrs N.
72. This amendment does not affect the remedy for the complaint. Further, Mrs N has not disputed the Adjudicator's construction of the Timeline, and in any event, as Mrs N's complaint has progressed, the remaining issue is the deduction for tax made by Aviva to her redress payment.
73. Specifically, Mrs N has questioned the application of the Gourley principle to her complaint. For example, she has pointed to the age of the underlying case that gives rise to the Gourley principle. Legal precedent is a principle or rule established in a legal case, which becomes authoritative for subsequent cases with similar legal issues or facts. The age of that case does not matter, unless the precedent is superseded by a later case.

74. When assessing damages, the courts will seek to put the applicant in the same net tax position they would have been in, if the error(s) had not been made. I am required to assess financial loss in the same way as the courts, in accordance with established legal principles. So, I would need to have regard to the Gourley principle when assessing loss, to avoid over or under compensating the applicant. As suggested by Aviva, I find that the Gourley principle is applicable to Mrs N's complaint.
75. Mrs N has referred to comments by Professor Stephen Graw on the subject of the Gourley principle. These comments include the point that the Gourley principle is a 'blunt instrument' and does not reflect the complexities of modern taxation law. He suggests an approach which would broadly provide "...compensation for actual loss, but with the overriding qualification that, in cases of uncertainty, awards should err on the side of the plaintiff."
76. Although Professor Graw's comments on this issue are of interest, I am not required to follow his suggestions and must determine complaints in accordance with the relevant legal principles. In Mrs N's case, I acknowledge that there is uncertainty about her future actions and that the Gourley principle is not a perfect solution to the matter of redress, given that the applicable rate of income tax may vary during her retirement. However, the overriding aim when directing redress is, as best as possible, to put the individual in the financial position they would have been in, had the maladministration not occurred.
77. Mrs N has argued that she does not pay income tax and has provided tax returns for the 2022/23 and 2023/24 tax years in support of her position. She said that this will remain the case throughout her retirement.
78. I note that in the year prior to her retirement, Mrs N was employed as a teacher and paid tax on her income. I also note that since retiring, Mrs N has been in receipt of a pension through her previous employment and will, in a few years, begin receiving the full State Pension. Unless the State Pension and/or income tax allowances are changed significantly in the intervening period, when Mrs N starts to receive her State Pension, her annual income is very likely to exceed the Personal Allowance. Although Mrs N has recently chosen to draw her income up to the Personal Allowance, once in receipt of her State Pension, this would mean she could not draw on the Pension Credit Benefits, apart from any remaining tax-free proportion of those benefits, without being liable for income tax.
79. At an earlier stage of her complaint, Mrs N said that she was totally dependent on the value of the Pension Credit being invested for her long-term financial security. She has since asserted that her financial position is such that she will only draw income from her benefits in a way that will avoid income tax.

80. I recognise that circumstances do change, and while Mrs N's financial position may have improved since her earlier complaint submissions, this could change again, in what might be a lengthy period of retirement. As explained in paragraph 78 above, there is a significant proportion of the Pension Credit Benefits on which she is unlikely to be able to draw without incurring at least basic rate income tax. Given Mrs N's originally stated position of long-term dependence on the value of the Pension Credit, I agree with the Adjudicator's view that, on the balance of probabilities, it is less likely that for the remainder of her retirement, Mrs N would only draw income from her benefits in a way that would avoid income tax entirely, as she has asserted.
81. I find that Aviva's approach to taxation for the Interim Settlement was reasonable, and that Mrs N should not receive additional redress for the deduction made by Aviva.
82. Mrs N also argues that she should receive more than the £3,500 which has already been paid to her for distress and inconvenience by Aviva, as part of the Interim Settlement. This was the sum that Mrs N had proposed as being a reasonable recognition of her distress and inconvenience, when she was in correspondence with Aviva about the complaint. Mrs N now considers that she should receive a further £1,500, meaning £5,000 in total, and has referred to a complaint made by Mr N in support of her position.
83. It would not be appropriate for me to comment on the details of Mr N's complaint within this Determination. It would not necessarily hold that the same award should be applied to a separate complaint, even where there are believed to be similar circumstances. Each case is considered on its own merits. Further, any redress offered by a respondent party does not set a precedent for how I should determine a complaint. This does not operate in the same way as legal precedent.
84. Mrs N has provided information about her circumstances around the time of Aviva's maladministration and explained the effect this had on her wellbeing. While I sympathise with the difficulties described by Mrs N, and I appreciate that working as a teacher during the Covid-19 pandemic was likely to have been very challenging, I do not agree that they were solely due to Aviva's maladministration.
85. In her original complaint to Aviva, and on many subsequent occasions, Mrs N asserted that if there had not been a delay, she would have invested the full value of the Pension Credit on 2 November 2020. Aviva ultimately agreed to redress Mrs N's investment loss on this basis. Once the Pension Credit amount of £358,097.02 had been paid, initially to HL, Mrs N proceeded to invest a total of £358,000 in a staggered series of transactions. All of these transactions took place shortly after the funds had been transferred from HL to Vanguard, with Vanguard being Mrs N's preferred platform for investment.

86. Mrs N said she planned to retire in October 2020. Based on Mrs N's stated desire to have invested the full value of the Pension Credit, and the investments she actually made when the Pension Credit was paid, I cannot conclude that Mrs N was relying on the immediate receipt of income from these funds to facilitate her planned retirement. It appears that Mrs N's intention was to finance the initial period of her retirement using resources available to her outside of the Pension Credit Benefits.
87. It is appropriate that Aviva should recognise any distress and inconvenience Mrs N suffered as a direct result of its maladministration. The issues include the late payment of a significant sum in pension benefits, the concern expressed by Mrs N while the matter was investigated, and that she was required to enter difficult discussions with Mr N, whom she had recently divorced. Although I do not find that Aviva's actions prevented Mrs N from retiring, the delay meant she could not make decisions about the investment of the benefits she transferred to Vanguard. I also acknowledge the anxiety suffered by Mrs N and that she took medication to treat this.
88. However, while Aviva is responsible for the direct consequences of its maladministration, I do not consider that it bears any responsibility for the conditions at Mrs N's workplace. This was the result of government legislation in response to the Covid-19 pandemic, and practices put in place by her former employer, over which Aviva had no control.
89. Aviva has accepted that there were significant failings in Mrs N's case. It has apologised and paid redress, largely on the terms requested by Mrs N, other than the deduction made for income tax. I recognise the distress and inconvenience suffered by Mrs N. However, were I to make an award, it would not amount to more than £2,000 – and so would be less than the sum already paid by Aviva. Accordingly, I do not find that she should receive an additional award.
90. The Adjudicator's Opinion also considered the matter of whether Mrs N was liable to pay income tax on the Interim Settlement, which is ultimately a matter for HMRC. Aviva's position is that Mrs N does not have to pay income tax on this sum and to date, she has not received notification from HMRC of a tax charge. I agree with the Adjudicator that provision should be made for the possibility of Mrs N facing an additional income tax liability for the Interim Settlement. This is covered below in the section, "Directions".

Directions

91. If Aviva is (and remains) correct that Mrs N is not liable for income tax on the Interim Settlement, then it shall take no further action. If Aviva is not correct on this point, and HMRC notifies Mrs N that she is required to pay income tax on the Interim Settlement, Aviva shall pay Mrs N an additional amount in redress to cover this tax liability, which she would not otherwise have incurred.

Dominic Harris

Pensions Ombudsman
29 November 2024

Appendix 1 – The Revised Timeline

15 July 2020 – Aviva received the PSO and a copy of the Decree Absolute.

24 July 2020 – Aviva received the July 2020 Letter.

31 July 2020 – HL receives the information it requested from Aviva within Aviva's SLA of five working days.

7 August 2020 – HL writes to Aviva to request payment of the Pension Credit. HL has been allowed five working days for this action.

11 August 2020 – Aviva receives the correspondence from HL, requesting the transfer payment. This would be sufficient to start the implementation period for the PSO.

By 25 August 2020 – Aviva carries out the disinvestment of Mr N's funds to enable the Pension Credit to be paid to HL. Aviva then transfers the value of the Pension Credit to HL. The overall SLA for these actions is 10 working days.

9 September 2020 – Mrs N's benefits are transferred from HL to Vanguard.

10 September 2020 – Mrs N makes the following investments:

- £66,000 worth of units purchased in the Vanguard FTSE UK Equity Income Index Fund;
- £66,000 worth of units purchased in the Vanguard FTSE Developed Europe ex-UK Equity Index Fund; and
- £66,000 worth of units purchased in the Vanguard FTSE 100 Index Unit Trust.

25 September 2020 – Mrs N makes the following investment:

- £95,000 worth of units purchased in the Vanguard FTSE 100 Index Unit Trust.

1 October 2020 – Mrs N makes the following investments:

- £40,000 worth of units purchased in the Vanguard FTSE UK Equity Income Index Fund; and
- £25,000 worth of units purchased in the Vanguard FTSE 100 Index Unit Trust.

Appendix 2 – Professor Stephen Graw’s comments on the Gourley principle

“VII CONCLUSION The Gourley principle has arguably been shown to be, in many respects, a ‘blunt instrument’ for resolving a difficult problem. It provides a degree of certainty in the assessment of damages but it does not reflect the complexities of modern taxation law in all of its manifestations. As a result, it can produce significant injustice to parties on both sides of the equation. It clearly needs to be applied with much more flexibility than the original formulation allowed and it is to the courts’ credit that they have evolved variations that take some of those considerations into account. It is arguable though that there is still some way to go before a set of universally workable principles are put in place. Perhaps at the end of the day the one guiding principle should simply be where it all started — compensation for actual loss, but with the overriding qualification that, in cases of uncertainty, awards should err on the side of the plaintiff.”