CAS-76480-G0L9

Ombudsman's Determination

Applicant	Mr 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. Mr N's complaint is partly upheld. To put matters right, Aviva shall follow the actions set out in the section, "Directions".

Complaint summary

2. Mr N has complained that Aviva delayed the implementation of his pension sharing order (**the PSO**), following his divorce from his former spouse, Mrs N.

3. Mr N said that the delay in implementing the PSO meant the transfer of his remaining pension benefits out of the Scheme was also delayed. By the time the transfer was completed, the unit prices of his preferred investments had increased, so he has suffered a financial loss.

Background information, including submissions from the parties

4. 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.

5. On 18 June 2020, the family court made the PSO. The PSO set out that Mrs N should receive a pension credit equivalent to 40% of the value of Mr N's benefits in the Scheme (**the Pension Credit**). The PSO stipulated that the Pension Credit should be paid to Hargreaves Lansdown (**HL**).

6. On 15 July 2020, Aviva received the PSO and a copy of the Decree Absolute.

7. On 22 July 2020, HL wrote to Aviva regarding the payment of the Pension Credit (**the July 2020 Letter**). HL requested the necessary information to proceed with the transfer of funds in respect of the Pension Credit. Aviva said it received this correspondence on 24 July 2020.

8. On 6 August, 21 August, and 8 September 2020, HL wrote to Aviva to request a response to the July 2020 Letter.

9. 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.

10. On 17 September 2020, Aviva started the implementation process for the PSO.

11. On 24 September 2020, Aviva wrote to Mr 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.

12. 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.

13. On 18 January 2021, Aviva authorised payment of the Pension Credit to HL.

14. On 26 January 2021, Mr N notified Aviva of his intention to transfer his benefits in the Scheme to Vanguard.

15. On 27 January 2021, Aviva paid £358,097.02 to HL, in respect of the value of the Pension Credit.

16. On 28 January 2021, Mr N's request to transfer to Vanguard was registered on the Origo system.

17. 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. Initially, Aviva considered that it could not proceed with the transfer of Mr N's benefits out of the Scheme until the Residual Payment had been settled. It subsequently decided to proceed with the transfer, making a deduction for the Residual Payment.

18. On 16 February 2021, Aviva disinvested the remaining funds that Mr N held in the Scheme.

19. On 19 February 2021, Aviva paid £536,588.52 to Vanguard in respect of the transfer of Mr N's benefits.

20. On 23 February 2021, Mr N purchased units in the following investment funds:

    - 137.3793 units in the Vanguard FTSE UK Equity Income Index Fund, totalling £34,000;
    - 116.0133 units in the Vanguard FTSE Developed Europe ex-UK Equity Index Fund, totalling £34,000; and
    - 294.9597 units in the Vanguard FTSE 100 Index Unit Trust, totalling £34,000.

21. On 26 February 2021, Mr N purchased units in the following investment funds:

    - 184.2624 units in the Vanguard FTSE UK Equity Income Index Fund, totalling £44,000;
    - 150.9901 units in the Vanguard FTSE Developed Europe ex-UK Equity Index Fund, totalling £44,000; and
    - 393.1731 units in the Vanguard FTSE 100 Index Unit Trust, totalling £44,000.

22. On 4 March 2021, Mr N was paid £134,857.53 from his pension account with Vanguard as a pension commencement lump sum (**PCLS**).

23. On 10 March 2021, Mr N purchased 812.4519 units in the Vanguard FTSE 100 Index Unit Trust, totalling £95,000.

24. On the same day, Aviva emailed Mr N. It said it received the PSO on 15 July 2020 and acknowledged that it had delayed the implementation process. Aviva considered that if it had not caused a delay, it should have been able to pay the Pension Credit by 12 August 2020. It would then have been possible to complete Mr N's transfer to Vanguard on 26 August 2020. Aviva said that the transfer value would have amounted to £536,985.19 (**the Notional Transfer Value**). Aviva explained that it was investigating whether Mr N had suffered a financial loss due to the delay in the implementation of the PSO.

25. On 11 March 2021, Mr N emailed Aviva. He explained that if the implementation of the PSO had not been delayed, he could have invested in a FTSE 100 index tracker fund on 1 September 2020, when the index was at 5862.05. By the time he was able to invest, the index had risen to 6658.97. Mr N asserted that his investment loss equated to £73,000.78, based on the Notional Transfer Value. He said he had been unable to take income from his drawdown account until 5 March 2021, and had to borrow money from his daughter in the intervening period.

26. On 17 March 2021, Mr N purchased 185.9178 units in the Vanguard FTSE UK Equity Income Index Fund, totalling £47,000.

27. On 12 May 2021, Aviva emailed Mr N. Aviva explained that for the purposes of calculating his investment loss, it had assumed that he would have transferred his benefits to Vanguard on 26 August 2020, and that the funds would have been available for investment on 1 September 2020. These timescales were in line with the actual time Mr N took to invest the funds, following the transfer to Vanguard.

28. On 15 July 2021, Mr N emailed Aviva to express concerns about its handling of his case. He said his investment strategy at that time was cautious in order to preserve his capital. However, he said he would have taken the opportunity to 'buy on the dips' He considered that the latter half of 2020 represented an opportunity to invest in the FTSE 100 index, and the delays caused by Aviva prevented him from investing as he wished. Mr N confirmed that he did not receive any financial advice in connection with his investment approach. He asserted that it was an obvious decision from him to have invested as he had described. Further, the actual investments he made after his transfer was completed, was proof of his intention to invest in this way.

29. Mr N explained that he used his PCLS to repay debts he had accrued due to the delays caused by Aviva. He also used the PCLS to make a gift to his daughter to use as a deposit for a property purchase. Mr N asserted that he would have invested all of the Notional Transfer Value in September 2020, if he had been able to do so. He reiterated that his investment loss amounted to £73,000.78. In addition, he said he was entitled to an award of £5,000, for the distress and inconvenience he had suffered.

30. On 22 July 2021, Aviva emailed Mr N to set out its position in response to his complaint (**the July 2021 Letter**). Aviva's position in relation to implementation had evolved and it now said the PSO could have been implemented by 2 November 2020. So, it had proceeded to calculate Mr N's financial loss using this date as the starting point. Aviva also considered that in its hypothetical scenario, Mr N would have taken £134,857.53 from his Vanguard Account as a PCLS shortly after his transfer had been completed.

31. Aviva said it had calculated Mr N's investment loss up to 16 February 2021, the date he transferred his benefits to Vanguard. It had undertaken several calculations, based on different scenarios, to allow for the investment decisions that Mr N could have taken at the time. The scenarios were as follows:-

    - Mr N could have invested in the Aviva UK Index Tracking fund. Aviva explained that this fund was not available to members of the Scheme, but Mr N could have transferred the funds to a pension account with Aviva. If he had chosen this option, and had invested the funds on 11 November 2020, his financial loss would have amounted to £30,447.63.

    - Mr N could have kept his benefits in the Scheme and invested in the BlackRock Aq Connect UK Equity Index fund. Based on this scenario, his financial loss would have amounted to £40,502.38. Aviva said that this fund was available to Scheme members and was the closest match to a FTSE 100 index tracker fund.

- If Mr N had been able to transfer the Notional Transfer Value to Vanguard on 16 November 2020, then invested in the Vanguard FTSE 100 Index Unit Trust fund, his financial loss would have amounted to £20,712.40.

- If Mr N had transferred to Vanguard on 16 November 2020, and invested in the investment funds he selected with Vanguard, his financial loss would have amounted to £18,514.33.

32. Aviva said that it would provide Mr N with redress based on the highest potential investment loss it had calculated, which was £40,502.38 (**the Award**). It explained that it would pay the redress directly to him rather than to his Vanguard Account to mitigate the risk of triggering a tax charge, which could be up to 55%. This would allow him to use some, or all, of the redress payment to make a pension contribution, which would be eligible for tax relief.

33. Aviva said that to calculate the net amount of Award, it would deduct 15% from the gross amount. This effectively allowed for a tax-free element of 25%, with the remaining 75% being taxed at 20%, the basic rate of income tax. Aviva explained that it would apply the deduction on the assumption that Mr N would not be liable for income tax on a payment of redress. It would then add interest of 8% to the net amount of the Award, up to the date of payment. This meant that the total amount of the redress for Mr N's financial loss would be £35,628.14 (net). Aviva also offered Mr N £5,000, in recognition of the distress and inconvenience he had suffered.

34. On 25 July 2021, Mr N emailed Aviva. He said he was unclear about the method Aviva had used to estimate his investment loss, including the dates it had used for its hypothetical timeline. Mr N asserted that he would not have taken a PCLS, nor drawn any income, in September 2020, because the potential to invest presented an opportunity of a lifetime. He said that he would not have remained in the Scheme and would have invested in a FTSE 100 index tracker fund through a personal pension. He was unhappy that Aviva had made a deduction for income tax from the Award.

35. On 28 July 2021, Aviva issued a further response to Mr N's complaint. It acknowledged that the level of service it had provided was unacceptable. Aviva explained that it received the necessary information to begin implementing the PSO on 17 September 2020. This meant it had until 17 January 2021, to implement the PSO. Aviva confirmed that its failure to meet this timescale had been reported to the Trustee.

36. Aviva said it had carried out an assessment of Mr N's financial loss, based on the scenarios set out in the July 2021 Letter. It noted that shortly after he transferred to Vanguard, Mr N had taken a PCLS of £134,857.53. Aviva considered that Mr N would have taken a similar amount as a PCLS, if there had been no delay on its part. It said it had factored this into its calculation.

37. Aviva explained that the deduction it had made from the Award was in line with guidance provided by HM Revenue & Customs (**HMRC**). It would pay the total amount of the redress for financial loss directly to Mr N, due to the tax implications of paying it to his pension provider.

38. On 24 August 2021, Aviva wrote to Mr N. It explained that it had used different investment dates to assess his investment loss. This was because a fund switch within the Scheme could be completed more quickly than a transfer to another pension provider. Aviva said that it had offered Mr N redress based on the scenario that would have led to the highest investment loss. However, in order to put him in the financial position he would have been in but for the delay, it assumed that he would have taken a similar amount as a PCLS. Aviva reiterated that it would pay the redress directly to Mr N. This was because of the potential tax implications of paying it to his pension provider, which could include a tax charge if he exceeded the Annual Allowance and/or the loss of any Lifetime Allowance protection.

39. 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.

40. Following the submission of the complaint to The Pensions Ombudsman, the parties made further submissions, which are summarised below.

Mr N's position:-

- Aviva's delay in implementing the PSO prevented him from investing in the FTSE 100 index in the latter part of 2020, when market conditions were highly favourable. It forced him to incur a significant financial loss to the value of his benefits. The investment funds that were available to him through the Scheme at the time did not include a FTSE 100 index tracker fund and the closest option Aviva offered had high charges.

- His benefits in the Scheme remained invested in the MyM BlackRock Sterling Liquidity Fund (**the Sterling Liquidity Fund**) to mitigate the risk of a reduction in the value of the Pension Credit. On 6 April 2020, Aviva quoted a value of £892,783.61 in respect of his benefits. If the Pension Credit had fallen in value during the intervening period, he could have been held legally responsible. He was effectively forced to keep his benefits invested in the Sterling Liquidity Fund, rather than invest in funds exposed to stock markets, until Aviva had complied with the PSO.

- His employer, Thomas Cook, started a redundancy exercise in September 2019. As a consequence of delays by Thomas Cook, and the delays caused by Aviva, he was without an income for 18 months. Nonetheless, he did receive redundancy pay, pay in lieu of notice, a tax rebate and a payment from the administrators of Thomas Cook. This meant that he would not have needed to take the PCLS of £134,857.53 in Autumn 2020, as was asserted by Aviva in its assessment of his financial loss. It would not have been in his interest to take a PCLS at that time, due to the favourable position of the FTSE 100. He would have wanted to invest as much as possible to benefit from a potential upturn in the market.

- He borrowed £4,000 from his daughter in September 2020, and a further £2,000 in January 2021, because he had short-term cash-flow issues and was reluctant to liquidate other investments he held. The money was repaid shortly after he took the PCLS.

- He has submitted evidence to show that he made a gift of £110,000 to his daughter (**the Gift**) to assist her with a property purchase. The deposit for the purchase was paid to the solicitor's account on 14 June 2021. The transaction was completed that month to avoid the higher stamp duty rate, due to come into effect from July 2021. It is unlikely that his daughter would have been able to secure a mortgage any sooner than March 2021, because she had been working abroad until March 2020.

- He moved all of his benefits in his Vanguard account into the Sterling Liquidity Fund in February 2023. This was to consolidate any previous investment gains. His long-term strategy has always been to achieve steady growth and avoid paying tax. He has submitted evidence to show that he was not liable to pay income tax for the 2021/22 tax year.

- The issues raised in his complaint have had a significant impact on his physical and mental health. He already suffered from heart problems, which were exacerbated by Aviva's maladministration and refusal to settle the complaint in line with his expectations.

- He understood that Aviva had adopted a different approach to the calculation of redress in connection with a complaint raised by his ex-wife, Mrs N, and he noted that Aviva used different hypothetical dates of investment. So, his claimed investment loss had increased to £104,070.23. His calculation was based on the Notional Transfer Value, adjusted for the growth in the FTSE 100 index between 2 November 2020 and 24 February 2021. During this period the FTSE 100 index rose from 5577.27 to 6658.97.

Aviva's position:-

- After further analysis of when the implementation period for the PSO should have started, it formed the view that the period began on 4 August 2020[1], 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 proposed redress would put Mr N in the correct financial position, because the benefits of equivalent value to the Award 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.

- It has a policy of not paying redress into an individual's pension arrangement. Having reviewed the guidance HMRC has issued over many years, it noted that any payment of redress made directly to individuals, by an entity that is not the scheme's administrator, would be classed as 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.

The Trustee's position:-

- Aviva's offer of redress is fair and the time it took to make the offer was reasonable.

- Aviva's offer may in fact exceed what would normally have been offered in similar circumstances. This is because prior to the payment of the Pension Credit, Mr N was able to switch his investments out of the Sterling Liquidity Fund to mitigate his loss, but he chose not to do so. This means that his losses may not be legally recoverable. It is not correct to say that he had to remain invested in the Sterling Liquidity Fund.

- It is difficult to assess how Mr N would have taken income after the transfer of his benefits. It is likely that he would have wanted to avoid incurring any debts, so he would not have borrowed money from his daughter. He may also have drawn funds earlier in the process in anticipation of making the Gift to his daughter.

- It agreed with Aviva's approach to the tax treatment of the Award.

- It considered that a more appropriate award, for the distress and inconvenience that Mr N has suffered, would be in the region of £1,000 to £2,000.

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

Adjudicator's Opinion

41. Mr N's complaint was considered by one of our Adjudicators, who concluded that further action was required by Aviva. The Adjudicator's findings are summarised below, in paragraphs 42 to 53:-

42. During the period his benefits were held in the Scheme, Mr N could have switched some, or all, of these benefits to a fund that tracked the FTSE 100 index, to benefit from the market growth that he was anticipating. However, his decision to remain invested in the Sterling Liquidity Fund, prior to the payment of the Pension Credit to HL, was not unreasonable in the circumstances.

43. Aviva has accepted that it unreasonably delayed the implementation of the PSO and the subsequent transfer of Mr N's benefits to Vanguard. Aviva should provide redress for any financial loss Mr N has suffered, because his investments with Vanguard were delayed as a direct consequence of Aviva's maladministration.

44. Regarding Aviva's treatment of tax for its redress proposal, the Adjudicator explained that the complaint should be considered 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 Mr N's case, redress would take the form of damages to remedy his financial loss. In instances where the sum for 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 area[2]. 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.

45. While Mr N has provided evidence that he did not pay income tax in the 2021/22 tax year, it was not possible to conclude that his tax position would remain this way throughout his retirement. As such, Aviva's approach was consistent with that which a court would have taken to an assessment of his financial loss.

46. Aviva's calculation of Mr N's investment loss did not give full consideration to his likely course of action, had the maladministration not occurred.

47. The available evidence did not support Mr N's assertion that he would have invested the full amount of the benefits he transferred to Vanguard into a FTSE 100 index tracker fund, in a single transaction.

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

48. The Adjudicator's view was that if the transfer of Mr N's benefits to Vanguard had not been delayed, he would likely have taken his PCLS earlier. Mr N would have been unlikely to risk exposing the capital value of the PCLS to the fluctuations of stock markets for the relatively brief period over which it might have been invested. For the purposes of calculating redress, the same length of time was assumed between the completion of the transfer and the receipt of the PCLS, as had actually occurred.

49. If Aviva had not delayed the process, Mr N would have had sufficient funds to negate the need to borrow £6,000 from his daughter. As part of his redress, Mr N should be paid interest on the remainder of the PCLS, meaning the total PCLS minus £6,000, to reflect that he was unable to benefit from the use of these funds for approximately five months.

50. The interest on late payment of 8% per annum, proposed as part of Aviva's redress for the complaint, was of a higher level than the Pensions Ombudsman (**the PO**) would determine. Regulation 6 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 provides that where the PO makes an award of interest on late payment of benefit, the prescribed rate of interest "shall be the base rate for the time being quoted by the reference banks". The interest referred to above would be calculated at the base rate for the time being quoted by the Bank of England.

51. 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 implementation of the PSO and transfer of Mr N's benefits to Vanguard. This took into account Aviva's service level agreements (**SLAs**), when Mr N received the PCLS, and the timeframe over which Mr N made his investments through Vanguard.

52. In order to calculate the value of Mr N's investment loss, it was recommended that Aviva use the dates set out in the Timeline, with consideration given to how Mr N proceeded to invest his funds with Vanguard, after the initial investments he made in February and March 2021. Any redress calculated as being due should then be subject to Aviva's proposed deduction in respect of income tax, with the net amount paid to Mr N.

53. Aviva's proposed award of £5,000 for Mr N's distress and inconvenience was more than sufficient, and above the amount the PO would direct for non-financial injustice, in view of the circumstances of the complaint.

54. Mr N did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr N's comments in response to the Opinion are summarised below:-

- He has been informed of Aviva's comments in response to the Adjudicator's Opinion. He does not dispute the amended timescales that would follow from the SLAs it has confirmed.

- He has questioned why the Gourley principle, derived from a case in 1956, was applicable to a taxpayer in the present day.

- He would not have taken a PCLS of approximately £134,000, if there had been no delays by Aviva. He would have taken at most £25,000, then left the rest invested until the latest possible moment. He had a 'defensive' approach to investment and the maximum he could have invested in an ISA was £20,000, so it was best to leave the funds in his pension arrangement.

- He has drawn the following income payments from his Vanguard account: £37,700 on 9 February 2022; £46,000 on 25 May 2023; £700 on 25 April 2024; £50,000 on 16 May 2024; £3,000 on 14 June 2024; £12,500 on 25 June 2024. The amounts were higher than he would normally draw, because he made a second gift, of £100,000, to another of his daughters. He otherwise lives a very frugal life, in an effort to minimise the income tax he pays.

- He does not consider that Aviva is able to calculate his redress accurately. He has provided his own calculations of the redress he believes he is due. This was initially based on the framework provided by the Adjudicator in the Timeline and fund unit prices that he obtained. Following this methodology, he calculated his net redress to be £77,534.47.

- He has asserted that he should receive further interest, at 8% per annum, on his entire redress amount. This should be from the date of Aviva's original calculation of his redress to the present day. He has cited Aviva's original offer of 8% interest as being agreed and therefore setting a precedent for this assertion. He has also referred to previous case reference CAS-38354-V5L8, where 8% interest was to be applied to the financial loss calculated.

- He has set out his own methodology whereby he calculated his investment loss to be £116,138.73. He considers that no deduction for tax should be applied to this sum, because he would draw future income in such a way as to avoid income tax. The further 8% interest, he considers is due from 16 March 2021 onwards, amounts to £31,744.58. Adding the £5,000 offered by Aviva for his distress and inconvenience brings his total claimed redress to £152,883.32.

55. 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.

56. 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.

57. Aviva also explained that there would have been further steps in the process to transfer Mr N's benefits to Vanguard. Once Mr N registered his request to transfer, on the following working day, Aviva would have asked him to complete the risk warning declarations (**RWD**). In terms of his actual transfer, it took Mr N one working day to complete the RWD. This enabled Aviva to begin the disinvestment process for the transfer to Vanguard, for which the SLA was 10 working days.

58. 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 Mr 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.

59. 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. This does not alter the overall outcome of the complaint, but it does mean that certain dates to be used in the calculation of Mr N's redress differ from the Opinion.

Ombudsman's decision

60. 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 Mr N's funds and pay the Pension Credit is 10 working days, rather than the 15 working days that it had previously stated. The same SLA would also apply to the subsequent transfer of Mr N's remaining benefits to Vanguard. An additional two working days has been allowed for Mr N complete the RWD that would have been required by Aviva. The time allowed for all the other activities remains as per the original Timeline.

61. Further, I agree with the Adjudicator's view that, on the balance of probabilities, the evidence suggests it is more likely than not that Mr N would have adopted a similar, more diversified investment strategy, once his benefits were transferred to Vanguard. This is contrary to Mr N's previous assertion, which I consider to have been made with the benefit of hindsight, that he would have invested the entirety of his benefits in a FTSE 100 index tracker fund. So, the Revised Timeline takes the approach that Mr N would have invested the same amounts in his chosen funds, with the same sequence of transactions, following his transfer to Vanguard.

62. Although Mr N has provided his own calculation of his redress, I find that Aviva shall liaise with Vanguard, as necessary, in order to calculate Mr N's investment loss. The process is set out in more detail in the section, "Directions".

63. Mr N has not disputed the Adjudicator's approach to the construction of the original Timeline, whereby Aviva's SLAs were used to determine the time that should have been taken, had there been no maladministration. However, Mr N has disputed some of the other findings made by the Adjudicator, namely that he would have brought forward his PCLS, the relevance of the Gourley principle to his case, and therefore the deduction for tax on his calculated investment loss. Mr N has also asserted that interest at 8% per annum should be applied to his investment loss. He cited the precedent set by Aviva, in its response to his complaint, as well as a previous Determination by my predecessor, reference CAS-38354-V5L8.

64. 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. This precedent does not apply in the same way to a respondent party's handling of a complaint. I am not bound by the position taken by Aviva and I am able to direct alternative means of redress, with consideration given to pensions legislation and the pertinent aspects of the complaint.

65. 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 Mr N's complaint.

66. Mr N has asserted that his intention was to arrange the drawing of his income in retirement, such that he would not pay income tax. In his response to the Adjudicator's Opinion, Mr N provided details of income payments he has received since February 2022. Some of these amounts were well in excess of the income tax Personal Allowance. Mr N has explained that this was to fund a further gift to another of his daughters, so does not reflect the income he would normally draw to fund his own living costs.

67. I cannot be certain as to how Mr N will act for the rest of his retirement. However, I find that, on the balance of probabilities, it is more likely that Mr N will continue to draw from his Vanguard benefits in a manner that will mean he does pay income tax of at least the basic rate, on some occasions. Although Mr said that the recent drawdowns were unusual, his circumstances may require him to make similar drawdowns in future and he has shown that he is prepared to draw on those benefits to a level far above the income tax Personal Allowance. Unless the Personal Allowance changes significantly, Mr N would only be able to draw a limited amount from his benefits without incurring income tax.

68. I find that Aviva's approach for its redress proposal was reasonable, and that the same approach shall be applied to the redress directed in this Determination. This means that 25% of the directed redress is treated as 'tax-free', as if it formed part of the PCLS, and the remaining 75% of the redress has a deduction of 20%, reflecting the basic rate of income tax.

69. Again, I accept it is not known how Mr N would have acted, if Aviva had not delayed the implementation of the PSO and the transfer of his benefits to Vanguard. However, I find that, on the balance of probabilities, the evidence does not support that Mr N would have invested the majority of the PCLS available to him, up to March 2021, as he has asserted.

70. In his reluctance to invest his Scheme benefits in funds exposed to stock markets, during the implementation period for the PSO, Mr N has demonstrated an acknowledgement of, and caution around, the potential short-term volatility of these markets. Mr N received his PCLS on 4 March 2021, nine working days after his benefits had been transferred to Vanguard. Mr N's daughter did not pay the deposit for her property purchase until 14 June 2021. In this instance Mr N did not leave the value of the Gift invested, within his pension arrangement, until the last possible moment. It appears that Mr N's drawing of the PCLS was more closely linked to the receipt of the transfer payment into his Vanguard account. So, I find that it is reasonable to apply an equivalent timescale in the Revised Timeline.

71. Regarding Mr N's assertion that he should receive interest at 8% in addition to his calculated investment loss, I find that this would not be appropriate. The purpose of interest on late payment is to compensate the individual for the loss of access to the funds, as a consequence of the respondent's maladministration. In Mr N's case, the redress I am directing includes a calculation of his investment loss, calculated as close as possible to the date the redress is paid. This will compensate Mr N for any financial loss he suffered due to being prevented from investing his funds at an earlier juncture. The use of the funds that was 'lost' by Mr N is the assumed investment of those funds. Adding further interest to any investment loss that is calculated would mean that Mr N is overcompensated.

72. In CAS-38354-V5L8, the 8% interest awarded by my predecessor reflected that a specific, intended use of the funds, had there not been a delay to the pension transfer, was not established. Interest at 8%, the court's judgement rate, was decided to be appropriate given the circumstances of that case.

73. The Adjudicator proposed that interest at the base rate for the time being quoted by the Bank of England be applied to the remainder of Mr N's PCLS, after allowing for the £6,000 he would not have needed to borrow from his daughter. I agree with this approach, and consider it is in accordance with Regulation 6 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, which is set out in Appendix 2. The PCLS was a benefit payment, so the interest on late payment prescribed in this Regulation is applicable.

74. As part of its redress proposal, Aviva offered Mr N £5,000 in respect of the distress and inconvenience he has suffered. I agree that Aviva's actions amounted to maladministration, but for me to determine an award as high as £5,000 for distress and inconvenience, I would need to see evidence that Aviva's errors were 'exceptional'. I do not find that this would apply in Mr N's case, and, in my view, the distress and inconvenience suffered by Mr N falls into the 'severe' category. So, the offer of £5,000 is in excess of the award that I would have made. Aviva has not notified The Pensions Ombudsman that it has withdrawn its offer. Mr N is therefore at liberty to accept the offer of £5,000 and he should resolve this directly with Aviva.

Directions

75. Within 28 days of the date of this Determination, Aviva shall:-

- Calculate what the value of Mr N's remaining benefits in the Scheme would have been, if it had begun the process of disinvesting of the funds to pay the Pension Credit, and the disinvestment of Mr N's remaining funds, on 11 August 2020 and 28 August 2020 respectively (**the Hypothetical Transfer Value**).

- Liaise with Vanguard to establish what the total value of Mr N's benefits would have been, as at the date it carries out the calculation, if the Hypothetical Transfer Value had been transferred to Vanguard and Mr N had then invested the same monetary amounts in his chosen funds, in line with the dates set out in the Revised Timeline (**the Hypothetical Benefit Value**). For the purposes of this calculation, Aviva shall assume that following his initial investments detailed in the Revised Timeline, Mr N would have made any fund switches, unit encashments, and/or taken income drawdown payments in the same way as he actually did.

- Subtract the actual value of Mr N's benefits, as at the date it carries out the calculation, from the Hypothetical Benefit Value (**the Gross Difference**).

- If the Gross Difference is a negative figure, no further action shall be taken on this point.

- If the Gross Difference is a positive figure, Aviva shall proceed to apply the treatment for income tax, whereby 25% of the Gross Difference is assumed to be tax-free and the remaining 75% is reduced by 20% to reflect income tax at the basic rate (**the Net Difference**).

- Pay the Net Difference to Mr N.

- Calculate the maximum value of the PCLS that Mr N would have been able to take, based on the Hypothetical Transfer Value (**the Hypothetical PCLS**).

- Subtract £6,000, the total borrowed by Mr N from his daughter, from the Hypothetical PCLS (**the Remainder**). Calculate the interest due on the Remainder and pay this sum to Mr N. The interest shall be calculated at the base rate for the time being quoted by the Bank of England, for the period 25 September 2020, the date that Mr N would have taken the PCLS according to the Revised Timeline, to 4 March 2021, the date Mr N received the PCLS.

- Contact Mr N to resolve payment of the sum of £5,000 that it has offered in respect of the distress and inconvenience he has suffered.

76. If at a future date, Mr N is notified by HMRC that payment of the Net Difference is subject to income tax (in whole or part), Aviva shall pay Mr N a further amount in redress to cover the additional tax liability which he 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.

26 August 2020 – Mr N requests to transfer his remaining benefits to Vanguard.

27 August 2020 – Aviva asks Mr N to complete the RWD.

28 August 2020 – Mr N completes the RWD.

14 September 2020 – Aviva carries out the disinvestment of Mr N's remaining funds and completes the transfer to Vanguard within its SLA of 10 working days.

16 September 2020 – Mr N makes the following investments:

- £34,000 worth of units purchased in the Vanguard FTSE UK Equity Income Index Fund;
- £34,000 worth of units purchased in the Vanguard FTSE Developed Europe ex-UK Equity Index Fund; and
- £34,000 worth of units purchased in the Vanguard FTSE 100 Index Unit Trust.

21 September 2020 – Mr N makes the following investments:

- £44,000 worth of units purchased in the Vanguard FTSE UK Equity Income Index Fund;
- £44,000 worth of units purchased in the Vanguard FTSE Developed Europe ex-UK Equity Index Fund; and
- £44,000 worth of units purchased in the Vanguard FTSE 100 Index Unit Trust.

25 September 2020 – Mr N takes his PCLS.

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1 October 2020 – Mr N makes the following investment:

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

8 October 2020 – Mr N makes the following investment:

- £47,000 worth of units purchased in the Vanguard FTSE UK Equity Income Index Fund.

Appendix 2 - The Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996

Payment of interest on late paid benefit

6. (1) For the purposes of section 151A of the 1993 Act M1 (interest on late payment of benefit), the prescribed rate of interest shall be the base rate for the time being quoted by the reference banks.

(2) In paragraph (1) above—

(a) “base rate" means the rate for the time being quoted by the reference banks as applicable to sterling deposits or, where there is for the time being more than one such base rate, the rate which, when the base rate quoted by each bank is ranked in a descending sequence of four, is first in the sequence; and

(b) “reference banks” means the four largest persons for the time being who—

(i) have permission under Part 4 of the Financial Services and Markets Act 2000 to accept deposits,

(ii) are incorporated in the United Kingdom and carrying on there a regulated activity of accepting deposits, and

(iii) quote a base rate applicable to sterling deposits.

(3) Paragraph (2)(b) must be read with—

(a) section 22 of the Financial Services and Markets Act 2000;

(b) any relevant order under that section; and

(c) Schedule 2 to that Act.