PO-25071

Ombudsman's Determination

Applicant	Mrs S
Scheme	Rainbow Plus Personal Pension Plan (1995) (**the Plan**)
Respondent	Aviva

Outcome

1. Mrs S' complaint against Aviva is partly upheld, but there is a part of the complaint I do not agree with.

2. To put matters right (for the part that is upheld), Aviva shall pay £100 to Mrs S for the loss of interest on the initial contribution of £4,000 and reimburse any non-refundable expenditure that Mrs S has incurred as a result of Aviva's maladministration.

3. In addition, if Mrs S pays £4,000 to the pension plan that she has with another provider (**Company B**), Aviva shall reimburse her for any financial loss that she incurs as a result of its maladministration.

4. Aviva shall also pay £1,000 to Mrs S in recognition of the serious distress and inconvenience that its maladministration has caused.

Complaint summary

5. Mrs S' complaint is that Aviva refused to accept a regular contribution of £320 and a single contribution of £4,000 into the Plan, in breach of its terms and conditions, and then failed to adequately remedy this error.

Background information, including submissions from the parties

6. Mrs S took out the Plan with Aviva in March 1995. The maturity date for the Plan was 7 June 2017, her 75th birthday.

7. On 16 January 2017 and 10 February 2017, Aviva wrote to Mrs S reminding her that she could not keep the Plan open beyond age 75 and would have to transfer the Plan to another provider. In March 2017, Mrs S informed Aviva that she was planning to make additional contributions to the Plan, before she reached 75. Aviva then advised her that the minimum single contribution she could make was £4,000.

8. On 17 March 2017,Mrs S sent a cheque for £320 to Aviva to cover the annual contribution, due on 5 April 2017. On 27 March 2017, Mrs S sent a further cheque for £4,000 to Aviva, as payment of a single contribution into the Plan. Aviva did not invest this £4,000 immediately but held it in a suspense account, pending further instructions from its investment team.

9. On 27 May 2017, Mrs S instructed Aviva to transfer her benefits to Company B by 5 June 2017, but it failed to make the transfer in time. On 12 June 2017, Mrs S raised a complaint with Aviva about the delay of the transfer and the investment of the single contribution of £4,000. On 13 June 2017, Aviva acknowledged Mrs S' complaint and informed her that the transfer would proceed, once the £4,000 contribution had been invested.

10. On 14 June 2017, Aviva sent a further letter to Mrs S, asking her to confirm her intention to invest the £4,000 in the Plan, and noted that the unit price would be guaranteed, as at 4 May 2017. Aviva also reminded Mrs S that the Plan's terms and conditions did not allow her to transfer the Plan after she reached age 75.

11. On 14 June 2017, Mrs S wrote to Aviva asking why the £4,000 contribution had not been cashed until 8 May 2017, and why the Plan had not been transferred to Company B. Mrs S also complained that the delay had affected her retirement plans and had caused her stress when she was abroad.

12. On 16 June 2017, Mrs S called Aviva and asked for the return of the £4,000 contribution. On 19 June 2017, Aviva returned the £4,000 to her and, on 20 June 2017, also returned the £320, saying that it considered both payments to be excess contributions.

13. On 20 June 2017, Aviva apologised to Mrs S for its poor service and explained that the investment of the contributions and the transfer to Company B had been delayed, due to an administrative error. Aviva also advised her that the transfer could still proceed even though she was by then over age 75, when she had returned the lifetime allowance form (**LTA form**) that it would send her. Aviva enclosed a cheque for £350 as compensation for the "trouble and upset" it had caused.

14. On 26 June 2017, Mrs S rejected Aviva's offer of £350 as "derisory", saying it did not adequately replace the investment loss on the returned contributions. She also asked why the £320 contribution had been treated as an excess contribution and why she had not been informed about this earlier. She also said she had not yet received the LTA form that Aviva had told her to complete for the transfer to proceed.

15. On 29 June 2017, Aviva informed Mrs S that the investment of the £320 was not permitted because the last due date for making this regular contribution to the Plan was 6 June 2016. Aviva then offered Mrs S revised compensation, totalling £600, consisting of £500 in recognition of the additional trouble and upset it had caused, plus an additional £100, for the investment loss on the £4,000 contribution. Aviva also informed Mrs S that the transfer to Company B was in progress and the LTA form was no longer required.

16. On 4 July 2017, Mrs S referred Aviva to the Plan's terms and conditions that allowed contributions to be paid into the Plan before it closed on 7 June 2017. Mrs S then returned the cheque for £320 to Aviva and again asked for it to be invested in the Plan, as an annual contribution. On 5 July 2017, Company B received the Plan funds from Aviva, but without the £320 or the £4,000 contributions.

17. On 11 July 2017, Aviva again returned the £320 to Mrs S, saying that the premium cessation date was 6 April 2016 and so this was an excess contribution. Mrs S says she then cancelled her holiday abroad so that she could sort the matter out.

18. On 12 July 2017, Mrs S raised a formal complaint with Aviva about the delay in the transfer to Company B and because the transfer had been completed after her 75th birthday, in breach of the Plan's terms and conditions. She added that Aviva had also wrongly advised her that she needed to submit a LTA form before the transfer could proceed.

19. On 13 July 2017, Mrs S returned the compensation payment of £600 to Aviva and asked instead for compensation of £1,000, in total, consisting of £100, as agreed, for investment loss and £900, in recognition of the trouble and upset she had suffered.

20. On 18 July 2017, Aviva wrote to Mrs S and apologised for providing her with incorrect information about the LTA form and for its poor service in dealing with both the contributions and the transfer. Aviva enclosed a cheque for £1,000 that covered £900 for the trouble and upset it had caused, plus £100 for the investment loss. Aviva also reported that its technical team had rechecked the Plan's terms and conditions and confirmed that the £320 was an excess contribution because the premium cessation date for the Plan was 6 April 2016.

21. On 22 July 2017, Mrs S informed Aviva that she would accept a sum of £100 for investment loss relating to the £4,000 contribution but suggested that £1,000 was more appropriate compensation for all the trouble and upset that Aviva had caused her, making a total of £1,100. She then returned the cheque for £1,000 to Aviva.

22. On 26 July 2017, Mrs S informed Aviva that the Plan's terms and conditions allowed contributions to be paid before the Plan closed on 7 June 2017. Relevant sections of the Plan's terms and conditions are set out in the Appendix. Mrs S pointed out that Aviva had wrongly returned the contributions she had paid in March 2017, as excess contributions. She also alleged that there was a breach of contract.

23. On 2 August 2017, Aviva again told Mrs S that the £320 was an excess contribution and that the last date that a regular contribution could be paid was 6 April 2016. On 10 August 2017, Mrs S raised a formal complaint with Aviva, claiming that the Plan's terms and conditions stated that 6 April 2017 not 6 April 2016, was the last premium payment date.

24. On 22 August 2017 and 1 September 2017, Mrs S asked Aviva why she had not yet received a reply to her claim for £1,100 compensation. She also informed Aviva that she would be absent abroad for two months.

25. On 5 September 2017, Aviva's technical team confirmed that Mrs S was correct and that both contributions of £320 and £4,000 should have been included in the funds transferred to Company B. Consequently, Aviva completed a loss assessment in relation to the £320 regular contribution and agreed with Mrs S that it would pay this to Company B, grossed up for tax relief, together with an additional sum to cover any investment loss, totalling £407.30.

26. Aviva also sent Mrs S a cheque for £1,000 that was made up of £900 compensation for the trouble and upset it had caused, plus £100, to cover the investment loss on the £4,000 contribution, as previously agreed. On 22 September 2017, Aviva transferred the sum of £407.30 to Company B to cover Mrs S' loss relating to the £320 contribution.

27. On 8 November 2017, Mrs S returned from her visit abroad. She wrote to Aviva saying: -

    - She could not understand how Aviva could transfer £407.30 to Company B to cover the unpaid regular premium of £320 as the Plan had closed on 7 June 2017, when she reached age 75. This was in accordance with the Plan's terms and conditions.

    - Aviva's payment of £1,000 was inadequate compensation for the trouble and upset it had caused her and so she had returned the cheque.

    - She expected compensation of £4,000 for the inconvenience suffered and for two breaches of contract in wrongly refusing the two contributions and delay in transferring the Plan to Company B, plus the £100 previously agreed for investment loss on the £4,000. She also claimed a further £250, for twenty hours of lost time in sorting out the matter, plus costs of postage and photocopying. The total compensation claimed was £4,350.

28. On 14 November 2017, Aviva confirmed it had received the returned cheque for £1,000 but rejected Mrs S' claim for compensation of £4,350. It said its previous offer of £1,000 plus the payment of £407.30 to Company B was fair and reasonable and suggested that Mrs S could make a claim to the Financial Ombudsman Service (**FOS**) if she was not satisfied with its offer.

29. On 8 and 15 January 2018, Mrs S wrote to Aviva, pointing out that it had displayed a "take it or leave it" attitude even though it had a duty of care to its customers. She again said that she could not understand why Aviva had transferred £407.30 to Company B when it had told her that the Plan had closed on 7 June 2017 and could not accept any more contributions. She also queried why Aviva could not treat the £4,000 in the same way.

30. Accordingly, Mrs S asked Aviva to pay the single contribution of £4,000 to Company B, grossed up, and with investment losses, in the same way as the £320 contribution because the same terms and conditions in the Plan had been breached in both cases.

31. On 17 January 2018, Aviva replied to Mrs S and explained the reason why it was not willing to treat the £4,000 contribution in the same way as the £320 contribution. In summary, it said: -

    - It had offered Mrs S the option of leaving the £4,000 invested in the Plan and to be transferred to Company B, using unit prices on 4 May 2017. However, Mrs S had refused this offer and, on 16 June 2017, had asked for the £4,000 to be returned to her. As a result, Aviva had returned the £4,000 to her on 19 June 2017.

    - Mrs S had repeatedly rejected Aviva's offers of compensation, even though they were all fair and reasonable. In fact, its offers compensated her adequately for the trouble and upset it had caused, as well as the loss of any investment growth on the wrongly returned contributions plus the subsequent delay in transferring the Plan to Company B.

    - Aviva concluded that there was an impasse and again suggested that Mrs S might wish to make a claim to FOS.

32. On 30 January 2018, Mrs S wrote to Aviva and explained why she had asked for the return of the £4,000 contribution, on 16 June 2017. She explained that Aviva had delayed in crediting this contribution to her Plan because it could not decide which account it related to. Then Aviva's letter of 14 June 2017 had reminded her that she could not transfer her Plan to Company B after age 75, under the Plan's terms and conditions. So, she thought that she might breach the Plan's terms and conditions if she invested the £4,000 contribution after 16 June 2017. She explained that If Aviva had informed her, in its letter of 14 June 2017, that the £4,000 was an excess contribution, she would have referred it to the Plan's terms and conditions. She had been faced with "Hobson's choice".

33. On 6 February 2018, Aviva told Mrs S that it was discontinuing all correspondence with her and advised her to refer her complaint to FOS. Mrs S then duly made a complaint to FOS but withdrew her complaint before it could be resolved.

34. On 1 October 2018, Mrs S submitted her complaint to us and said that she would like Aviva to remedy its errors by paying £4,000 plus tax relief and investment losses to Company B, in the same way as it had remedied the error with the £320 contribution. She claimed she would then be in the position she would have been in if Aviva had paid the £4,000 contribution to the Plan, without any delays. She explained that she had rejected Aviva's offer of £1,000 compensation because it was inadequate in relation to the distress and inconvenience she had suffered.

35. In addition, she claimed that she should also be compensated for Aviva's mismanagement that had necessitated additional administration, postage stamps, calls, photocopying, as well as the cancellation of a holiday. Aviva had also made her ill and stressed through its uncertainty and delay. She was particularly distressed that Aviva had not admitted its error in refusing the contributions as excess contributions,

for four months, even though she had drawn its attention to the terms and conditions in the Plan that contradicted this several times.

36. On 25 January 2019, Aviva responded to Mrs S' complaint. It gave a detailed time line of events regarding the two contributions and made the following points:-

- It apologised for not resolving the complaint about the £4,000 contribution at the same time as the £320 contribution.
- It did not think it was appropriate to pay the £4,000 contribution to Company B in the same way as the £320 contribution, as Mrs S had requested, as she would then be unfairly enriched.
- It agreed to prepare a loss assessment, assuming the £4,000 was invested in the Plan in March 2017, with tax relief and then transferred to Company B on the proposed transfer date of 5 June 2017, using the unit price on 4 May 2017.
- If Mrs S agreed to pay £4,000 to Company B, it would then cover any additional costs or tax liabilities that were due. It would then calculate and pay a sum representing all her losses to Company B. However, its administrative systems would not allow it to accept the £4,000 directly from Mrs S for payment to Company B.
- If Mrs S did not agree to pay the £4,000 to Company B, Aviva would calculate the investment losses that had arisen, considering the tax relief she had foregone and pay this sum directly to her.
- Aviva would also pay £1,000 to Mrs S in recognition of the trouble and upset it had caused her, plus any costs she had incurred for holidays that were non-refundable, and evidenced with receipts.

37. In March 2019, Mrs S rejected Aviva's proposals and sent us a revised timetable, correcting some of the dates that Aviva had provided. She said that Aviva's proposal was not achievable on a legal or technical basis and Aviva could pay £4,000 to Company B, plus tax and investment losses. Mrs S repeated that Aviva had agreed to pay £407.20 to Company B to put her back in the financial position she would have been in, if it had not rejected the £320 contribution, and had not asked her to pay a further £320. This was the way that Aviva had chosen to resolve the complaint about the £320 contribution and so the £4,000 contribution could be treated in the same way.

38. She said, "Although this is not the usual way, this is what Aviva did." She stressed that she did not understand how there could be two different solutions for basically the same complaint about two refused contributions that were both governed by the same terms and conditions with the only difference being the amounts involved.

Adjudicator's Opinion

39. Mrs 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 the Adjudicator's view, Aviva failed to invest Mrs S' contributions of £320 and £4,000 into the Plan, in breach of its terms and conditions and so failed to transfer them to Company B, when the Plan was transferred. This amounted to maladministration. Aviva's delay in the transfer of the Plan to Company B, beyond Mrs S' 75th birthday also amounted to maladministration.

- The Adjudicator noted that Mrs S had requested Aviva to remedy its failure to accept the £4,000 contribution, by covering the £4,000 payment itself in the same way as it remedied the refused contribution of £320. However, in the Adjudicator's view, there was no legal requirement for Aviva to offer this remedy to restore Mrs S to the position she would have been in if the £4,000 had been accepted into the Plan.

- In the Adjudicator's view, it was reasonable for Aviva to offer to redress its maladministration by requiring Mrs S to pay the £4,000 directly to Company B, and to agree to pay any costs, tax charges or investment losses that Mrs S incurred by doing so. The Adjudicator noted that Aviva had returned the £4,000 contribution to Mrs S and if it were to pay the £4,000 to Company B, Mrs S would have gained £4,000 and would be in a better financial position than she would otherwise have been in.

- Accordingly, in the Adjudicator's opinion, Mrs S' complaint should be partly upheld, and Aviva should to pay any costs, tax charges or investment losses that Mrs S incurred because of its maladministration, subject to Mrs S paying £4,000 to Company B.

- In the Adjudicator's opinion, Mrs S had also suffered non – financial injustice because this situation had caused her serious distress and inconvenience. This is because Mrs S was over age 75 and in poor health and Aviva repeatedly provided her with incorrect information about the contributions that she had made and the Plan's terms and conditions.

- In addition, Aviva caused her further distress by delaying the transfer of the Plan to Company B beyond her 75th birthday, despite telling her that this was against the Plan's terms and conditions.

- Accordingly, in the Adjudicator's view, Aviva should pay Mrs S an award of £1,000 in recognition of the serious distress and inconvenience that it had caused.

40. Both Aviva and Mrs S provided further submissions in response to the Adjudicator's Opinion. These are as follows:-

- Mrs S claimed she was not able to pay the £4,000 to Company B because she had sought advice and the sum had been "successfully invested elsewhere". She said she was "very reluctant to change this strategy as it might now be a retrograde step" and she was "very happy with the arrangement she has made."

- Mrs S also said that Aviva's maladministration has left her distressed and seriously ill and, consequently, she asked for the award for distress and inconvenience to be increased to £2,000.

- Aviva responded that an increase in compensation above £1,000 was not warranted because Mrs S had invested the £4,000 elsewhere and would not have any losses that it had to compensate her for. It considered that any award for financial loss should be kept separate from compensation for distress and inconvenience.

- Mrs S was then given an opportunity to make additional submissions in response, within extended time limits. She submitted several comments and asked that Aviva should pay £100 for the loss of interest on the £4,000, as previously agreed.

41. These submissions did not change the Adjudicator's Opinion and the complaint was passed to me to consider. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points for completeness.

Ombudsman's decision

42. Aviva has accepted that it failed to invest contributions of £320 and £4,000 into the Plan, in breach of its terms and conditions and delayed the transfer of the Plan to Company B beyond Mrs S' 75th birthday. I consider that this amounts to maladministration.

43. In cases such as this, I may direct the party at fault to put the complainant back into the financial position she would have been in, if the maladministration had not occurred.

44. I consider that if the errors had not occurred, Aviva would have invested the £4,000 contribution into the Plan in March 2017, and then transferred it to Company B, with the rest of the fund. Accordingly, I find that Aviva is responsible for any financial loss that has arisen, together with any loss of interest on the original investment. Aviva previously agreed to pay £100. Aviva should also reimburse Mrs S for any non-refundable expenditure that she would otherwise not have incurred but for Aviva's maladministration and can evidence with receipts.

45. I have considered Aviva's proposal to remedy its error by requiring Mrs S to pay the £4,000 directly to Company B, and then by reimbursing any costs and investment loss that arise. I find this proposal is reasonable. I do not consider that Aviva is legally required to remedy the unpaid £4,0000 contribution in the same way as the unpaid £350 contribution, by itself paying £4,000 to Company B, even though Mrs S has

requested this. If Aviva were to pay £4,000 to Company B, it would unjustly enrich Mrs S.

46. I note that Mrs S has informed us that the £4,000 has been "successfully invested elsewhere" and she is "very reluctant to change this strategy". I consider that if Mrs S does not invest £4,000 with Company B, she will not have incurred any resulting investment loss and so Aviva would not be required to compensate her. Nevertheless, Aviva should reimburse any investment losses she incurs, if she decides to do so.

47. I also consider that Aviva's maladministration has caused Mrs S non- financial injustice. I accept that Mrs S has spent a lot of time and effort in trying to resolve her complaint and that she considers that her wellbeing has been severely affected by Aviva's maladministration.

48. Nevertheless, I do not find that this distress and inconvenience is severe enough to merit an award of £2,000, as Mrs S suggests. I say this because there is no evidence that Aviva's errors prevented Mrs S from making informed decisions about her retirement and she was also able to invest the £4,000 elsewhere, apparently, with good returns. I accept that Aviva delayed for several months before correcting its errors. However, it then took steps to put them right, on several occasions, by offering Mrs S compensation for any investment losses plus £900 for any trouble and upset caused and reimbursement of any non-refundable expenditure. Mrs S continuously rejected these offers. If Aviva had not done so I would have considered increasing the award for distress and inconvenience to one of exceptional.

49. Accordingly, I find that the distress and inconvenience that Mrs S suffered was serious and an award of £1,000 is appropriate, in the circumstances.

50. Therefore, I uphold Mrs S' complaint in part.

Directions

51. Within 14 days of the date of this Determination, Aviva shall pay £1,000 to Mrs S, in recognition of the serious distress and inconvenience, this situation has caused her.

52. Within 21 days of the date of this Determination, Aviva shall pay £100 to Mrs S in relation to the lost interest on the initial investment of the sum of £4,000, plus reimbursement of any non-refundable expenditure that was incurred as a result of Aviva's maladministration and can be evidenced with receipts

53. If Mrs S confirms to Aviva that she has invested £4,000 into her plan with Company B, Aviva shall, within 21 days of receiving such confirmation, determine if Mrs S has incurred any financial loss by:-

    A. Establishing the earliest date that Mrs S' benefits would have been transferred to Company B if there had not been a delay.

B. Establishing from Company B, the current value of Mrs S' plan with Company B.

C. Establishing from Company B, what the current value of Mrs S' plan would have been, had it been transferred on the date established in A, but with an additional £4,000 included in the transfer.

D. Calculate the net return she has made by investing £4,000 in another arrangement until the date she invested £4,000 into her plan with Company B.

E. If B is less than C, Aviva shall credit Mrs S' plan with Company B with the shortfall, minus the amount calculated in D.

F. Aviva shall also cover any tax liabilities and other costs that Mrs S incurs because of the payment of £4,000 to Company B.

Anthony Arter

Pensions Ombudsman
01 August 2019

Appendix

The relevant conditions in the Plan are:

Section C

1.2.2 a single premium can be made at any time before final retirement date (in Mrs S' case, this is before 7 June 2017).

4.1.3 the last regular premium is payable on the premium due date immediately before final retirement date (in Mrs S' case this is before 6 April 2017).