DRN-4244818

The complaint

Mrs N has complained that, despite a 100% pension sharing order (PSO) being agreed in May 2015, Friends Life (now part of Aviva Life & Pensions UK Limited) continued to make pension payments from her ex-husband's plan – and didn't tell her that it was an annuity in payment or chase her for its outstanding requirements. Her understanding was that the pension was now in her name and would come into payment when she retired.

A complaint about subsequent delays from when she resumed querying this matter with Aviva in June 2021, and the change in the transfer value when the PSO was subsequently settled in August 2022, is being dealt with by this service separately.

What happened

Mrs N's ex-husband held a deferred annuity with Friends Life which resulted from the wind-up of his former employer's pension scheme. He reached his normal retirement date in March 2006 and began drawing the annuity. In the rest of this decision I'll refer to Friends Life as Aviva.

In March 2015 the Family Court issued a PSO as part of Mr and Mrs N's divorce. 100% of Mr N's entitlement in the Aviva pension was to be transferred to Mrs N, with the fees for implementing the PSO to be met 50/50 by those parties.

Mrs N was assisted in the divorce proceedings by her local solicitor. They sent a copy of the sealed consent order and decree absolute to Aviva on 12 March 2015, and followed this up by asking Mrs N to pay half of the fees in late March. It appears there was temporarily an issue with Mrs N finding the funds, as her attention was understandably focused on supporting her daughter who was due to have major surgery in mid-April. However, the solicitor subsequently sent Mrs N's fee to Aviva on 15 April.

On 20 April, whilst it was waiting for Mr N to pay his half of the fees, Aviva told Mrs N's solicitor that it would need to receive an application from Mrs N's proposed receiving scheme, including its bank details and ASCON number (this is a reference allowing the 'protected rights' part of the benefits to be transferred).

Mrs N's solicitor appears not to have understood that Aviva was referring to the receiving scheme's own application, rather than a form it provides for implementing PSO's. So, although Mr N's solicitor had sent his part of the fees to Aviva by 21 May, it wasn't until a phone call from Mrs N's solicitor to Aviva again on 11 August that they had the correct understanding that Mrs N would need to complete whatever documentation the *receiving* scheme required. It only seems to be at this stage that Mrs N's solicitor realised that the sale of a new pension was required, to accept the funds. That being a regulated financial services activity, they weren't in a position to arrange it for Mrs N themselves.

On 20 August the solicitor explained to Mrs N, *"I advise you to seek independent financial advice and arrange for the financial advisor to transfer your pension credit…let me know when the PSO has been implemented so I can take steps to close your file."*

The solicitor did remain in contact with Mrs N to check what progress she was making. They established on 28 August that she wasn't able to transfer the pension credit into her local government pension – a new personal pension was needed, hence the requirement for independent advice to select an appropriate provider. I can see that on 15 September the solicitor acknowledged in writing that Mrs N was making her own enquiries, and after being unable to make contact with her successfully on 19 October there are no further entries on its file.

Mrs N's daughter sadly died in November 2015 and Mrs N didn't make further contact with Aviva until 2021. As I've noted above, this is the subject of a separate complaint.

In its final response to Mrs N about the failed implementation of the PSO, on 15 August 2022, Aviva set out that it never received instructions from her as to where the pension credit transfer should be sent. So, the transfer was never completed in 2015 and Mr N had continued to receive the annuity payments since then. It said Mrs N would need to contact Mr N in regard to any money he had received since 2015.

Aviva thought it should have sent reminders for the outstanding information after 2015, rather than waiting for her to make contact. So, it paid Mrs N £250 compensation for the "long delay" in complying with the PSO and for the distress this caused. Mrs N wasn't happy with this payment and referred the dispute to the Financial Ombudsman Service.

One of our investigators began looking at the complaint. He spoke to Mrs N who told him that her ex-husband died in July 2022, but prior to this there had in any event been a restraining order – causing a difficulty in doing what Aviva suggested she would have to do to recover past payments.

Mrs N also forwarded a new response her financial adviser had received from Aviva on 10 November 2022 about the fact the transfer value had changed from what it originally quoted. It gave separate referral rights to this service on that matter.

I've written to both parties recently to explain that the timing of the transfer value (and hence the amount) will depend on this service's view of the alleged delays occurring between 2021 and 2022. So, I won't be referring in this decision to the conclusions the investigator reached about the delay in processing the PSO during 2021 and 2022, or any further compensation he thought was appropriate in respect of that. Further evidence is still being gathered from Aviva so that those issues can be comprehensively addressed under a separate complaint.

In respect of the failure to implement the PSO between 2015 and when Mrs N resumed contact in 2021, the investigator concluded that Aviva wasn't in a position to stop payments to Mr N. He explained the PSO had no effect under the law until Mrs N (or her representative) notified Aviva where the pension credit should be paid to. And he was satisfied that, notwithstanding Mrs N's difficult situation with her daughter during 2015, her solicitor had told her that she would need to arrange a new pension to receive the transfer.

Mrs N didn't agree with the investigator. She said that at no time did Aviva or her solicitor inform her that the Aviva plan was an annuity and would continue to be paid to Mr N. Neither of them followed the matter up after 2015. And Aviva made it impossible for her to act without a financial adviser and a solicitor. She was seeking to recover the annuity payments that shouldn't have been made to Mr N.

As agreement couldn't be reached, I've notified both parties that I'll be making a decision on this issue.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

When a PSO is presented to the existing pension provider by the recipient of the pension credit, there is a set process for every provider to follow. It has a maximum period of four months to implement the PSO from the time it receives all the necessary information. It is under no obligation to do anything until it receives that information. Nor does it have to disclose any other information to Mrs N about Mr N's pension. The process for obtaining the PSO involved Mr N already giving the necessary prescribed information to the court. She is not otherwise entitled to information about someone else's policy.

Further, not all types of pension arrangement will allow the pension credit to sit within the same arrangement as the original member's. Sometimes an occupational pension scheme can do this – by admitting the spouse as a new 'member'. Mr N's pension was originally an occupational pension scheme. But that scheme had been bought out as deferred annuities and then closed down. Aviva has no ability to vary the terms of this deferred annuity, from which Mr N had since started taking benefits.

So, in common with most types of personal pension, Mrs N would need to arrange her own pension plan to receive the pension credit. So Aviva was entitled to respond to Mrs N's solicitor in 2015 that it would require an application from the proposed new scheme – including bank details and a necessary reference number to transfer 'protected rights' – in order to pay the CETV across. And that explains why it didn't act further in 2015, because it didn't receive this.

The requirements are set out at reg. 5 of the *Pensions on Divorce etc. (Provision of Information) Regulations 2000*, known as *"Information required by the person responsible for the pension arrangement before the implementation period may begin"*. The information required for payment to a qualifying arrangement is:

> *"(i) the full name of that qualifying arrangement;*
> *(ii) its address;*
> *(iii) if known, the transferee's membership number or policy number in that arrangement; and*
> *(iv) the name or title, business address, business telephone number, and, where available, the business facsimile number and electronic mail address of a person who may be contacted in respect of the discharge of liability for the pension credit;…*

And "…*any information requested by the person responsible for the pension arrangement in accordance with regulation 4(2)(i) or (k)."* The latter regulation allows the transferring scheme to request *"information additional to that specified in regulation 5… in order to implement the pension sharing order or provision."* So, further information such as bank details and the ASCON number would reasonably fall under that latter regulation.

I'm satisfied that what Aviva referred to as an application wasn't a reference to an Aviva *application form*, even though I'm not sure Mrs N's solicitor initially understood this. From some of the comments the solicitor made at the time, they (or their practice) seem to have been familiar with implementing PSOs. So I think they would reasonably have known that the issuance of the PSO by the Family Court was enough to mean Mrs N was entitled to the pension credit, without other Aviva forms necessarily needing to be completed. But also, that Aviva was likely to require information governed by the *Pensions on Divorce etc. (Provision of Information) Regulations 2000*.

I've taken into account that Aviva initially re-stated its requirements to Mrs N's solicitor, and didn't expand on its explanation until a subsequent enquiry. But it knew that it was dealing with a solicitor and would in my view expect that solicitor to be more familiar with the process than, say, if it were dealing with Mrs N directly. I would also expect Mrs N's solicitor to have been aware that not all PSO's could be satisfied within the existing scheme, and that this case was one where an external transfer would have to be made. To the extent that this may not have been clear initially from the PSO document (and whilst I don't know what was discussed more widely with the Court), it would have been reasonable to make further enquiries when the PSO was first issued. So on balance, I'm not persuaded that Aviva treated Mrs N unfairly at this time.

I'm also mindful that the PSO itself doesn't refer to the fact that Mr N's pension was in payment: it only refers to Mr N's *"rights under his pension arrangement"*. Due to the standardised information that is sought by the Court, this may not necessarily have come out during the court proceedings either. Mr N had started drawing his pension nine years before their divorce, but I appreciate that even if Mrs N was aware of this she may not have known that it was a fixed annuity (as opposed to some sort of ad-hoc drawdown income that he might have stopped).

So, I can readily understand how unfortunate it is that this information didn't come to light. However I have to take into account that Mrs N's entitlement to information about Mr N's policy was limited. All the information sought had to be obtained and provided to the Court by Mr N. The process by which the PSO was negotiated was a matter for the Court, and Mr and Mrs N. Aviva was not a party to that. And in my experience, the divorced parties usually act very promptly to do what is required to effect the PSO and bring matters to a close.

In Mrs N's case, whether or not she knew that Mr N was receiving an annuity, I'm satisfied her solicitor did pass on the key information to her that she would have to transfer to an external arrangement. I appreciate that addressing this was obviously not her priority with her family situation at the time. This might not have been helped by the lack of understanding that Mr N was still receiving payments. But that doesn't unfortunately change that both Aviva and then her solicitor had told her what was required, and Aviva wasn't responsible for giving her any more information about the nature of her husband's pension.

Some solicitors were permitted by the financial and legal regulators to advise on or arrange financial products as an ancillary activity to legal work – as long as those activities remained a minor part of their turnover. However that doesn't mean all solicitors offered this service, and I don't know what the terms of business of Mrs N's solicitor were. From what they said at the time, they didn't offer this service, and that's why they recommended Mrs N sought advice from a regulated financial adviser who could. That's a matter between Mrs N and her solicitor.

Mrs N suggests that Aviva forced her to use both the solicitor and financial adviser. I don't think that's correct. She was already using the solicitor as this is common practice when seeking a divorce. And it looks to me that for the same reason, her solicitor thought that Mrs N would benefit from a financial adviser's guidance. Aviva didn't tell Mrs N in 2015 that she had to use a financial adviser, and indeed it wouldn't have been able to deny payment of her CETV if Mrs N located a new pension provider herself – as long as that provider supplied Aviva with the necessary information to implement the PSO.
Mrs N initially tried to do this herself, but found her local government pension was unable to receive a pension credit. I think this shows why her solicitor felt a financial adviser was needed. I appreciate that losing her daughter in November 2015 meant this was something Mrs N then didn't pursue. However, I think it would have been reasonable for her to address the problem when she was next able to, rather than (as it seems) come to the conclusion

that no further action was required. I think the response she had from the solicitor had been clear.

Aviva has paid Mrs N £250 because it feels it could have followed up the lack of contact from her, or her solicitor, later in 2015. And also it seems because of how doubly upsetting it was for Mrs N to then find out that Aviva was still making payments to Mr N. In some respects Aviva's payment to Mrs N looks very fair to me, because until it had the necessary information to start implementing the PSO – which it had set out – Mr N continued to be its customer. So it wasn't in a position to "take sides" in the divorce settlement.

The fact that the PSO had been ordered by a Court had no impact on Aviva, until Mrs N carried out the necessary steps to implement it. That is what the law required. Aviva had no ability to stop Mr N's annuity payments until then – in fact it is a breach of the tax legislation to stop an annuity in payment for reasons other than death or the valid implementation of a PSO. That would otherwise be treated as an unauthorised payment of the pension and attracted a penal tax charge.

The remedy for Mrs N once she realised that Mr N had continued to receive payments she hadn't anticipated, would most likely have been to go back to the Family Court. I don't know if she would have been successful, given there was a process to implement the PSO which she hadn't completed. And given that Mr N has now died I also don't know if this is a matter she can involve his estate in. Mrs N may wish to speak to her solicitor about this.

In conclusion, I'm satisfied that Aviva's payment of £250 to Mrs N in respect of the possibility that it *could have* – but was under no obligation to – follow up her lack of response in 2015 was fair and reasonable in the circumstances.

My final decision

Aviva has already paid Mrs N £250, which I consider is a fair and reasonable settlement for failing to follow up her lack of response to implementing the PSO in 2015, and the upset this caused in view of the payments to Mr N continuing. Providing that Mrs N has banked this payment I do not require Aviva to pay Mrs N anything further in respect of this complaint.

Her other complaints about events in 2021/22 will be addressed by this service separately.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs N to accept or reject my decision before 10 August 2023.

Gideon Moore
Ombudsman