

The complaint

Mr H complains that he suffered a financial loss as a result of incorrect information provided by Aviva Life & Pensions UK Limited ("Aviva") in relation to a Pension Sharing Order.

What happened

As part of divorce arrangements, Mr H says that financial settlements were agreed in September 2020 between he and his ex-wife. This included an agreement to transfer the sum of £86,000 from Mr H's pension with Aviva to his ex-wife.

Following this, Mr H contacted Aviva by telephone on two separate occasions to confirm some details including the requirements around the Pension Sharing Order which Mr H's solicitors were preparing.

The first of these calls was made on 22 September 2020 during which Mr H was advised by Aviva's representatives that the exact amount agreed, £86,000 could be transferred and that this could be guaranteed provided this was specified. Mr H said in response to this that he would ask for this to be included in the Pension Sharing Order so that it was an exact amount. Mr H also noted to the representative that the value of the plan could go up or down and the Aviva representative agreed that the value wasn't guaranteed. Mr H then asked whether "as long as the solicitor specifies it, you can guarantee the amount which is transferred" to which the Aviva representative said this could be done.

The second call was made on 30 September, when Mr H referred to his previous conversation with Aviva but said that the problem he had found was that the Pension Sharing Order asked only for a percentage to be transferred whereas an exact amount had been agreed with his ex-wife. He then asked the Aviva representative if he should ask his solicitor to prepare a covering letter for Aviva confirming the exact amount. The Aviva representative agreed that this would be best and also advised Mr H that the amount transferred would be "as close as possible" to the precise sum. Mr H ended the call by saying he would ask his solicitor to include the sum in a covering letter as discussed.

Following these conversations, Mr H says that he finalised the Pension Sharing Order and submitted this to court.

Mr H then had a further telephone call with Aviva in January 2021 in which he was told that it would not be possible to transfer an exact amount since the law required that any transfer of a pension should be stated as a percentage of the total value. Mr H says that he then had to re-engage with his solicitors and arrange for the Pension Sharing Order to be changed. This meant he had to pay an additional amount of £3,237 to his solicitors as well as the sum of £7,500 to his ex-wife as part of the arrangement to agree a new transfer amount. The amount transferred under the pension was also £2,795.87 more than the £86,000 initially agreed.

Mr H says that, if he had been informed during either of the initial telephone calls to Aviva in September 2020 that an exact sum could not be transferred, he would have had the Pension Sharing Order amended at that time which would have avoided the additional costs.

Our Investigator's view was that:

- Mr H was given inaccurate information
- It wasn't unreasonable for him to rely on the information provided when filling out the pension sharing order documents.
- It is clear from the call recordings from September 2020 that Mr H made it clear his query related to a Pension Sharing Order as opposed to any other type of transfer
- It is both fair and reasonable for Mr H to have relied on the information he was provided by Aviva on two separate occasions.
- Aviva did not act with due care skill and diligence as required under Principle 2 (PRIN 2.1) in the Financial Conduct Authority's (FCA) Handbook
- The incorrect information provided by Aviva has caused Mr H a significant amount of financial loss.
- This loss includes the additional legal fees of £3,237 and the £7,500 payable to his ex-wife
- The increase in amount transferred of £2,795.87 may have been payable anyway even if Mr H had been given the correct information since it is based on a percentage amount and the total value of the pension may have changed.
- The complaint was upheld

Aviva did not accept this assessment on the basis that:

- They were not involved in the calculation of the pension share percentage
- The share percentage caused the delay in the implementation of the order
- The courts do not allow a specific amount to be stated as a pension share and this has to be expressed as a percentage
- There was a significant difference between the percentage to be transferred and this was because additional contributions had not been taken into consideration at the time Mr H made his calculations
- Mr H's legal representation should have knowledge of how pensions are calculated for divorce proceedings
- Both parties were aware that amendments to the order may be needed as set out in the consent order
- A loss assessment would be expected to confirm the amount claimed by Mr H in relation to the claim for £7,500
- There are insufficient grounds for reimbursing the legal costs for amendment of the order since this would have had to have been amended in any case. The calculation of the percentage was incorrect since Mr H and his legal representatives had not taken into account additional contributions and confusion around the effective date.

I issued my provisional findings on the merits of Mr H's complaint on 19 June 2023. In my provisional findings, I explained why I intended not to uphold Mr H's complaint and offered both sides the opportunity to submit further evidence or arguments in response. An extract of that decision is set out below and forms part of this final decision:

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

Having done so, I have reached a different conclusion to that reached by the Investigator and will not be upholding Mr H's complaint.

I have carefully considered what Aviva has said and have looked at the correspondence as well as Aviva's response to the investigator's view.

In relation to the points they raise, the question here is whether or not Aviva, through their actions, caused the financial loss suffered by Mr H. Based on the evidence provided, although I think Aviva should have acted differently in terms of the information it provided to Mr H, I do not think that their actions led to the financial loss the complaint relates to.

It is clear from the telephone calls between Mr H and Aviva in September 2020 that Mr H was told by Aviva that he could transfer a fixed amount under the Pension Sharing Order and that this is in fact incorrect. Aviva have acknowledged this and accept that what they told Mr H was not something that could be done.

Mr H's original complaint to Aviva described how the loss he had suffered was a consequence of this incorrect information and he said that this related primarily to the costs involved in amending the Pension Sharing Order and the amount payable to Mr H's ex-wife as a consequence of the new arrangement.

The first question therefore is whether or not the Pension Sharing Order would have needed to be amended even if Mr H had been given the correct information by Aviva initially whilst the second issue is whether or not the costs payable to Mr H's ex-wife in relation to a different amount being paid would still have been incurred.

On the changes to the Pension Sharing Order, I can see that the copy dated 21st September 2020 includes an instruction to pay 81.3% of the total pension value. I note also that, although Mr H asked Aviva about using a fixed amount for a pension transfer during the telephone conversations mentioned above, there is no chain of correspondence which indicates that Mr H told Aviva at any point that he would like the amount transferred under this particular Pension Sharing Order to be fixed at £86,000 rather than a percentage amount.

It is worth mentioning that, during each of the two telephone calls with Aviva in September 2020, Mr H tells Aviva that he will either include the fixed amount to be transferred in the Pension Sharing Order or ask his solicitor to confirm the amount in a separate letter. In fact, each time Mr H is told by Aviva that he is able to transfer a fixed amount, it appears to be conditional on providing this specific instruction. It does not appear that this instruction was provided to Aviva in either way.

In the absence of this, the only formal instruction Aviva ever received in this process is the percentage amount indicated on the Pension Sharing Order and I can't see that Aviva had any choice but to comply with these instructions and to proceed with the transfer of the stated percentage amount.

It is also worth mentioning the Pension Sharing Order appears to have been issued on the 21st of September 2020. This is before the date of Mr H's first telephone conversation with Aviva and, if this is the case, the percentage amount had already been included on the Pension Sharing Order. This suggests that it did not matter what Aviva told Mr H during their telephone conversations later in September 2020 and that Mr H would have had to take many of the same steps to amend the Pension Sharing Order and therefore incurred the costs detailed in his complaint. This includes arranging for Mr H's solicitor to resubmit the Pension Sharing Order for approval by the court.

But even putting this to one side, even if Mr H had been told unequivocally beforehand by Aviva that the Pension Sharing Order had to include a percentage figure and that figure would apply whatever the fund value at the time of the actual transfer, I'm not persuaded it would have made a difference. I say this because in order to have considered a lower percentage figure to begin with, Mr H would have needed to have predicted that his fund

was going to grow ahead of the date of the actual transfer of funds to his ex-wife – and his ex-wife would have needed to have agreed to a lower percentage based on that assumption. None of this seems likely to me. Ultimately, Mr H appears to have been caught out by strong investment returns immediately after the Pension Sharing Order had been agreed (because he didn't make substantial contributions to his pension around this time) which caused the amount to be transferred to increase as well. I don't think it's plausible that Mr H would have been able to pre-empt this.

In relation to Mr H's payments to his ex-wife, Aviva have said that, because this references a loss of earnings, they would expect to see a loss assessment carried out to allow them to decide whether this was payable. They have said that, in the absence of any evidence of the loss of earnings, they cannot agree that this is payable. I agree that it is reasonable that they would have required this and would add that any evidence would only have been relevant in any case if it showed that it was the actions of Aviva that caused the loss and not any requirement to amend the Pension Sharing Order. As detailed above, the amendment of the Pension Sharing Order and the change in value of the pension would likely have been incurred irrespective of the incorrect information provided to Mr H by Aviva.

My provisional decision is that I do not uphold the complaint.

I invited Mr H and Aviva to give me any more evidence and information they wanted me to consider before issuing my final decision.

Mr H disagreed with the provisional decision and sent further correspondence to me including information to support his arguments. Aviva also provided some additional information on the rules they apply to pension transfers and the timings which are relevant here.

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.

Having reviewed the responses from both parties, I haven't seen anything that would change my provisional decision and I see no reason to reach a different conclusion. This final decision confirms the findings set out in my provisional decision.

I've read Mr H's email and the attached documents in depth to understand his position regarding this complaint. Mr H has said that, had he known the transfer of a fixed amount was not possible, he would have worked with Aviva on the day of the transfer to move the required amount out of his pension to manage its value so that the percentage of 81.3% indicated on the Pension Sharing Order would have totalled the £86,000 required. Mr H also says that Aviva did not act in a timely manner and this caused the issues he faced in the transfer of his pension and that Aviva were made fully aware of the amount to be transferred under the Pension Sharing Order.

In addition to the above, Mr H said that the reference made in my provisional decision to the Pension Sharing Order being issued on 21 September 2020 before either of the telephone calls with Aviva was incorrect. He said the Pension Sharing Order was finalised after these telephone calls which I acknowledge.

Aviva have provided information on the scope Mr H had to manage the value of his pension fund in the way Mr H suggests. They have advised that, once sealed court documents are received with respect to a transfer under a Pension Sharing Order, a policy holder is unable to take any steps to change the value of the plan. This would mean that Mr H would have

been unable to make changes after the finalised Pension Sharing Order was sent to Aviva by the court. Aviva have also said that Mr H would have been advised of this once it was confirmed to him that Aviva were in receipt of the sealed documents. On this basis, although Mr H asserts that he would have worked with Aviva on the day of the transfer to manage the value of his pension, this would not have been possible.

As to whether there was any unreasonable delay caused by Aviva between the final Pension Sharing Order being received by Aviva and action being taken as suggested by Mr H, Aviva have provided their timeline of events on the matter. This confirms that the court sealed Pension Sharing Order was received by them on 31 December 2020. Aviva have said that, following receipt of this, they contacted Mr H and the other concerned parties on 19 January 2021 to set out additional documents they needed and it is this which I understand led to Mr H being advised that a percentage would be transferred and that this would be higher than the fixed amount he had specified. Although the letter to Mr H was not sent until around 12 working days after the Pension Sharing Order was received, Aviva have said that an internal referral was required in this time due to the reference in the Consent Order to an amount of £86,000. This seems reasonable and I do not consider therefore that there was any undue delay by Aviva in taking the action required to give effect to the Pension Sharing Order.

On this point, I understand there is an element of difficulty here for consumers like Mr H who are seeking to use a Pension Sharing Annex to give effect to the transfer of an agreed sum. Because pension providers like Aviva require certain documents to complete a transfer pursuant to a Pension Sharing Order, there is likely to be a delay between the agreement of the percentage to be included on the Order and the date of the transfer whilst these documents are gathered. During this time, markets are always likely to move and this means that the amount to be transferred may be different to the amount the parties wished to transfer. Avoiding unnecessary delays on both sides would help with this but, in Mr H's situation, it would have been beneficial to ensure all of the relevant documents were collected and additional requirements discussed with Aviva before agreeing the percentage with his ex-wife. I appreciate that this may not have been possible but the nature of the Pension Sharing Order combined with the time required to provide Aviva with the information they needed to be able to make the transfer has led to some of the issues faced by Mr H, as have fluctuating investment markets which, clearly, are outside Aviva's control

Finally, I would like to address the point about whether or not Aviva were aware of the need for the amount transferred pursuant to the Pension Sharing Order to be a fixed amount. I raised an issue in my provisional decision about there seemingly being no chain of correspondence between Aviva and Mr H or his solicitors in which Aviva were advised formally of the need to transfer a fixed amount rather than a percentage. In response, Mr H said that there is no dispute as to whether or not Aviva were told about the fixed amount to be transferred. To demonstrate this, Mr H referenced the telephone calls and several letters and emails in which he says this was discussed. Whilst I agree that Mr H did tell Aviva about wishing to transfer a fixed amount during the telephone calls, as mentioned in my provisional decision, the information provided in these calls was in the context of Mr H providing a specific confirmation either in the Pension Sharing Order or in a side letter from his solicitors setting out that he wished for a fixed amount to be transferred. In relation to other letters or emails mentioning this, I cannot see any correspondence in which Aviva is notified in writing of the fixed amount of £86,000. I do note however that, in an email dated 30 September 2020 following the telephone calls with Aviva, Mr H advises his solicitors that "Aviva have confirmed though that they will transfer £86,000 if the covering letter states that". This indicates that Mr H was aware that Aviva would need some form of notice and it was clearly the intention for the amount of £86,000 to be included in a cover letter to achieve this. Indeed, in an email dated the same date, Mr H's solicitors refer to the cover letter which they intend to provide accompanying the Pension Sharing Order and say "It will be in this cover letter we will include (in bold, capitals and underlined!) that the relevant figure is £86,000". It

does not appear as though this was in fact included in the cover letter or set out in any other correspondence.

I am therefore forced to conclude that, following the telephone calls in 2020, Aviva were never formally advised that a fixed amount should be transferred rather than a percentage. Mr H may well have been unaware that this figure was not included in the cover letter or that Aviva were not given written notice of Mr H's intention in any other way and this may have been an omission on the part of his solicitors. However, it is not something for which I can hold Aviva responsible.

I would like to add that I appreciate that this has been a difficult situation for Mr H and that there has been a great deal of stress in arranging for the transfer from his pension. Ultimately, it was the time taken between the agreement of a fixed amount with his ex-wife and the finalisation of the Pension Sharing Order, which resulted in the fixed amount agreed no longer reflecting the percentage included on the Pension Sharing Order. In order to ensure a more accurate percentage was included, Mr H would either have had to predict the movement of the markets over the course of the following months or to ensure that the transfer could have been made in a very short time following agreement with his ex-wife. Neither of these was possible in the end but, because I do not consider that Aviva unfairly contributed to any of the delays in making the transfer or could reasonably have acted differently to prevent the losses suffered by Mr H, I cannot hold them liable for these losses.

My final decision

My final decision is that I do not uphold Mr H's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 6 November 2023.

Rana Chatterjee
Ombudsman