

The complaint

Mr P complains about the suitability of the advice he received from Century Life – now part of Phoenix Life Limited (Phoenix) - to contract out of the state earning related pension scheme (SERPS) in 1989. He says he was told that SERPS was coming to an end and that he would receive advantageous bonuses for taking out a personal pension plan (PPP) instead. He would like the benefits he says he was initially promised to now be honoured.

What happened

Mr P was advised to opt of SERPS into a new PPP from 1 November 1989. The relevant national contributions continued to be made into the plan until 1 June 2007. During this time over £4,000 was paid into the PPP and invested into a managed fund with an annual management charge of 1% and an investment charge of 0.24%. There was also a bid/offer spread of 5%.

In July 2018 Mr P requested information about his plan while also updating his address. He was made aware that there was an investment charge on his plan. Following receipt of the information he subsequently asked about the process involved in switching from the funds into which he was invested.

By October 2019 the plan was valued at £8,047.64 but a year later it had fallen to £7,565.35.

In February 2021 Phoenix confirmed to Mr P that it had carried out a fund switch in line with his request for a fund which didn't carry an investment charge – which was a “money” (cash type) fund. In January 2022 the plan was valued at £8,309.21.

But in November 2022 Mr P complained about the advice he'd been given to take out the PPP. He said he had been promised “*bonuses and rebates for being an early adopter*” and was told that the government was stopping the SERPS. He said these statements had turned out to be untrue. He also thought that after 33 years of being invested the value of the plan ought to have been greater and he thought this was most likely due to the high level of management costs that had been applied to the PPP. At this time the plan was valued at £8,332.82.

Phoenix didn't uphold the complaint. It said that the advice to contract out of SERPS was suitable. It thought that, based on his situation at the time, it wouldn't have been considered a disadvantage to have contracted out.

But Mr P wasn't happy with this outcome, so he brought his complaint to us where one of our investigators looked into the matter. He made the following points in recommending that the complaint shouldn't be upheld:

- He noted what Mr P had said about being told the SERPS was ending and that he would receive bonuses for contracting out into a separate PPP. But as there was nothing to confirm what information he'd been given at the time he said he was unable to comment further on the claim.

- The advice to contract out at the time was generally based on the “pivotal age” and level of earnings. He thought Mr P was of an age and had sufficient earnings for there to be a reasonable prospect of him being better off by contracting out. He noted there was almost 50 years for the pension fund to grow and negate the risk of Mr P not being in a better financial position.
- He noted that the fluctuations in the value of Mr P’s PPP were as a result of falls and rises in the markets but didn’t think it meant Mr P had been given unsuitable advice. He also didn’t think the management charges Mr P had paid on his PPP were excessive or unreasonable. He said it was a commercial decision for Phoenix to set its plan charges as long as it made its clients aware of those charges.

Mr P didn’t agree with the outcome and suggested that his weekly earnings at the time had been £60 instead of the £160 he had previously advised. The investigator said it wasn’t possible to be sure of Mr P’s earnings and we didn’t have the facility to work them out – but in any case he still thought there was an extended investment horizon which would have allowed sufficient time for Mr P’s pension to grow and demonstrate that the advice to contract out was likely to have been suitable for the reasons he gave previously.

But as no resolution could be found Mr P asked for his complaint to be referred to an ombudsman – so it’s been passed to me to review.

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.

And having done so I’ve reached the same conclusion as the investigator. I know this outcome will disappoint Mr P who has been consistent in saying that he wouldn’t have agreed to “contract out” of SERPS if he hadn’t been giving misleading and incorrect information. And I have some sympathy for the situation he now finds himself in – so I’ll explain my reasons.

The suitability of the recommendation to contract out

SERPS was a top-up to the basic state pension which meant that in an addition to their basic state pension consumers would also receive a SERPS pension at retirement. But the government brought in regulation so that consumers could choose to opt out of SERPS, also known as contracting-out. This meant that instead of accruing the additional state pension, they could build up other benefits by redirecting some of their national insurance contributions to a PPP – or by joining an occupational pension scheme (OPS) that was contracted-out.

This was a fluid situation so that people could contract in or out of SERPS from tax-year to tax-year and there was usually a (pivotal) age at which it was beneficial to contract back into SERPS. The process required the consumer and employer to pay the normal level of NI contributions and, once a year, the state paid (known as rebating) part of these contributions into a PPP.

When the government decided to allow individuals to contract-out of SERPS, incentives were offered to encourage them to do so. No guidance was given on who should be advised to remain in SERPS or on the type of person it was expected that contracting-out would be beneficial for. So pension provider’s actuaries carried out comparisons of the projected benefits from SERPS with those from alternative personal pension arrangements, based on “conservative” assumptions of future investment returns.

As there was little government guidance around “contracting out” providers generally took

four main factors into account when considering whether to advise someone to contract out or not. These were:

- The “pivotal” age, which was an age when the provider thought it reasonable to assume a consumer would benefit from contracting out – usually thought to be “the younger the better”.
- The current salary and whether it met any minimum earning requirement the provider had set.
- A consumer’s attitude to risk (ATR).
- Whether there was an OPS available to join.

So, I’ve looked at the information that was known at the time to assess if the advice was suitable and if Mr P was eligible to contract out of SERPS.

The application form that Mr P completed included a declaration which said, “*are you a member of a superannuation scheme providing retirement benefits in either lump sum or pension form*” (answer no). I think Phoenix was entitled to rely on that as confirmation there was no OPS available, so I don’t think it was unreasonable to rule out the possibility that Mr P could contract out through an OPS. I also note Mr P has said there was no question of being eligible for an OPS in his complaint letter.

The age at which a provider’s advice of whether or not to contract-out might change was called a “pivotal age.” At the time of this advice the original provider, before it was taken over by Phoenix, didn’t set out the maximum age for recommending contracting out. But my experience of those lenders that did operate under such rules, was that it was usually somewhere between 40 to 50 years old – so as Mr P was only 17 at the time this would have been significantly below the pivotal age.

And based on the conservative assumptions used, it was thought in broad terms that men beneath the pivotal age would be better off contracting out of SERPS. In Mr P’s case there was around 30 years or so before it was likely advice would be for him to contract back into SERPS – which would suggest, given the investment horizon available, that it was in his best interests to contract out.

Another factor used to determine whether someone was likely to be better off contracting out of SERPS was their earnings. Phoenix had no minimum salary requirement at the time, although Mr P’s annual earnings – which were initially thought to be around £8,320 per year, were above the lower earnings limit which was considered to be enough to ensure that rebates forwarded by the government would generally cover the charges of the PPP.

However, following our investigators assessment Mr P thought his earnings were more likely to have been around £60 per week instead. It hasn’t been possible to determine the level of Mr P’s earnings from that time so it’s difficult to draw any definite conclusions here. But the earnings level was usually only an issue where the consumer’s pivotal age might mean the advice to contract out was ‘borderline’.

In this case because of the length of time that Mr P’s money would be invested, there was a greater chance that he would be better off by contracting out. And I note that even the lower salary figure Mr P told us about following the assessment was still greater than the lower earnings limit in place at the time - which meant that rebates and bonuses would have been due to some extent.

Phoenix’s recommendation was for Mr P’s contributions to be invested into the default medium risk managed fund. I haven’t been presented with any indication of how Mr P’s ATR

was determined in 1989, although there was no regulatory requirement for this to be recorded. But considering Mr P's age and the length of any investment horizon – the fund recommendation doesn't seem unreasonable to me given Mr P's circumstances at the time. It seems reasonable to recommend a managed fund with a balanced or moderate ATR.

The 10 year bonus and rebates Mr P says he was promised

Mr P has told us that he was mis sold the plan as he was told SERPS was coming to an end, and he would be getting 10 year bonuses added to a PPP as he was an early years adopter. I have no reason to dispute what Mr P has said here, although I appreciate it can be difficult to be specific and completely clear about things some 40 years on from an event. But there's simply no other available written evidence to confirm what the adviser did say at that time, so it's hard to be sure about the context around which he may have made some of his statements.

As an example the application form to contract out, which was signed by Mr P and dated 30 March 1989, contained a ready reckoner which noted the "*rebate & bonus*" for various levels of earnings for the previous and current tax years. And at all the earnings levels noted the total rebate and bonus payments were at least 10% or more of the earnings figure. In addition it was widely publicised and known that the government did give rebates as an inducement for people to contract out – so it's possible that was the thrust of what the adviser was talking about. Any bonuses and rebates that were due would have been paid within the national insurances payments that were made to Phoenix for the PPP.

I'm unclear about the remark about SERPS ending as that wasn't the case at the time although subsequently it was renamed as the state second pension in 2002. As I said previously though I've no reason to dispute what Mr P has told us he was informed at the time. But in any case, what Mr P might have been promised can be seen through the suggestion of whether it encouraged the policy to be mis sold and the advice to contract out to be unsuitable. As I've already explained above, I don't think that's the case here.

The management charges and the investment performance

Mr P doesn't think it's "*ethical*" that he's paid "*in the region of £16,000 in management fees*". He says that he's paid more in management fees than the plan is worth, and the fund he initially invested in carried an investment charge but when he switched in 2021 there was no longer an investment charge.

I can understand Mr P's frustrations here as it doesn't appear to him that he's receiving the benefits and fund value he was originally promised. But, based on my experience, Phoenix's annual management and investment charges seem to be in line with typical charges for similar plans at that time. There's no evidence to support the claim that they are excessive or "unethical". It's for Phoenix to set out its PPP and fund charges and we wouldn't normally interfere with such everyday commercial decisions as long as it made Mr P aware of them.

And I think Phoenix did make Mr P aware as I've seen a copy of the application which he signed and completed in 1989 which set out the "*unit allocation and charges*." *These were explained as, "95% of each contribution will be allocated to accumulation units in the pension fund at the offer price.... your benefits are determined by reference to the bid price which is 5% lower than the offer price."* It also confirmed that "*a monthly management charge is deducted from the fund, currently at the rate of 1% per annum.... where an investment is made via unit trusts there will be an additional management charge of up to 1.25% of that investment only.*"

So I think this confirmed the three charges that were applied to the PPP and set them out clearly at the start of the plan. And I think these charges have been applied to the plan in the way Phoenix said they would be. But I've also seen a copy of a letter that was sent to Mr P in January 1997 which answered a number of questions he had previously asked by telephone. The letter also said, *"this value is not guaranteed and can vary in line with the changes in the bid price of units, in the pension managed fund in which you are invested."*

So while I can understand Mr P's concerns about the charges levied on his PPP there's nothing to support his claim that they were excessive or that he wasn't made aware of them and the amount – at least in percentage terms – of what would be taken. Phoenix couldn't have given notification of the exact amount of fees as they were linked to the size of the fund which fluctuated during the term of the plan.

Having established that Phoenix did set out the charges it intended to deduct I've looked at Mr P's concerns regarding the value of his fund now after around 30 years of investment returns. But investment performance alone isn't something we would usually uphold a complaint for because the very nature of investments is that their values will fall and rise due to external factors which the provider can't control. Unless that performance is linked to unsuitability – which in this case I've said I don't think it is.

Mr P has also questioned that while there was an investment charge on his initial managed fund, there wasn't one applied when he switched to another fund in 2021. It isn't untypical of funds such as the "managed fund" to have charges applied. They are usually levied to pay for the fund managers and general administration of the funds. But all funds levy different charges and when Mr P switched to another fund – which didn't carry a charge, this was because it was a money or cash type fund. These typically carry less fees or as in this case none at all.

Mr P has also told us that there were four years' worth of contributions from 2007 to 2011 that hadn't been included in the plan as he was *"sporadically in employment up until 2011."*

I have carefully considered this part of Mr P's complaint, but I don't think it was Phoenix's responsibility to be aware of which payments were made and when. It simply administered the payments each year when they were issued by the Department for Work and Pensions (DWP). If the payments weren't issued, then this would suggest Mr P was no longer eligible for them to be made. There could be any number of reasons for this to be the case which could be explained by the DWP, but I don't think it was Phoenix's responsibility. I don't think Mr P has "missed out" on those contributions, simply that he wasn't eligible for them to be made during those four years.

Summary

Mr P reached the conclusion that he wouldn't have agreed to contract out of SERPS had he not been provided with *"misleading and incorrect"* information. He says what he was promised turned out to be untrue.

But, while I'm not able to verify exactly what the adviser did promise Mr P, I don't think Phoenix's advice to recommend that he contracted out of SERPS in favour of a PPP was unsuitable. Based on the criteria that was set out I think Mr P was eligible to contract out and there was every reason to conclude that it was in his best interest to do so. Unfortunately since then, investments haven't performed as well as expected and annuity rates have fallen, but Phoenix can't be held responsible for that and to do so now would be with the benefit of hindsight.

My final decision

For the reasons that I've given I don't uphold Mr P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 20 September 2023.

Keith Lawrence
Ombudsman