DRN-2628921

Financial Ombudsman Service

The complaint

Mr S complains that he was given unsuitable advice by The Prudential Assurance Company Limited to transfer his defined benefit (DB) pension to a personal pension.

What happened

Mr S was advised to transfer his DB pension into a personal pension in 1990.

In 1999, at age 51, Mr S took lump sums of around £11,000 from his personal pension together with a small annuity of £1,285.44 from his non-protected rights. He took the remainder of his benefits in 2013.

In 2019 he complained, through a representative (R), that he had been misadvised.

Prudential confirmed that Mr S had been sent invitation letters to have his pension advice reviewed in 1999 during the industry-wide pension review initiated by the regulator at the time. However, R provided evidence that Mr S had moved from the address the letters were posted to and had never received these.

Prudential accepted this and agreed to review the advice they had given in 1989 and subsequently upheld his complaint. They established that he had been financially disadvantaged by the advice to transfer and made Mr S an offer of compensation in March 2020. They calculated his loss as £15,290.37.

In their calculations they assumed that Mr S would have taken benefits from his DB scheme in 1999, just like he did from his personal pension. Using the DB scheme's early retirement factors, they reduced the value of his DB scheme by 40.15% in their calculations.

R disagreed with the way Prudential had calculated Mr S's losses. They said if Mr S had stayed in the DB scheme, he wouldn't have taken benefits at age 51 given the significant reductions. He also said Prudential had not followed the Financial Conduct Authority's guidance on how to calculate redress for unsuitable defined benefit pension transfers (FG17/9) correctly. They point to the guidance which clearly defines the assumed retirement age as:

The earliest date that a customer could retire and receive a non-reduced pension from their DB pension scheme. This is calculated based on the assumption of the customer's retirement age (see paragraphs 15 and 16).

Consumer's retirement age

15. The earliest age at which the customer could have retired from the DB pension scheme without both:

- *requiring the consent of the employer; and*

- *suffering a reduction in benefits.*

16. Where a customer has benefits payable from different ages, the redress calculation should reflect the most favourable option for the customer.

R say following this guidance Mr S's assumed retirement age should be 60 (the normal retirement age in the DB scheme) and not 51.

Prudential say they followed FCA guidance, however they referred to point 7 of FG17/9 which says:

Except where expressly specified below, pension transfer redress should be calculated in accordance with, and using the assumptions set out in, the provisions designated by the Financial Services Authority (FSA) in November 2013 (subject to any amendments made by the FSA after that date) for the selling of rights in, or interests under, personal pension schemes, between 29 April 1988 and 30 June 1994, where those provisions relate to pension transfers.

Prudential explained that- whilst not explicitly mentioned- they interpret the provisions in FG 17/9 to only apply to prospective loss cases. For actual loss cases, for example where the customer has already taken retirement benefits, the previous guidance on how to calculate redress -as set out originally by the Securities and Investments Board (SIB)- still applies. And SIB guidance stipulated that for actual loss cases the loss should be calculated at the date of actual retirement, including early retirement, so on the date Mr S took benefits from the personal pension in 1999.

Prudential says on all their calculations for actual loss cases they use the date of when a customer takes retirement benefits from their personal pension as the assumed date the customer would have retired from the DB scheme. Unless the DB scheme didn't allow retirement at this age. The documents for the DB scheme in Mr S's case showed that early retirement was possible from age 50. So in Mr S's case they assumed he would have taken benefits at age 51, like he did in the personal pension.

One of our investigators considered the complaint and didn't think Prudential had done anything wrong.

As R, on behalf of Mr S, didn't agree this was referred to me for an ombudsman's decision.

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.

As Prudential has conceded that the advice they gave in 1990 was unsuitable, I'm not going to consider this again. The key issue for me to consider here is whether the compensation Prudential offered Mr S is fair and reasonable in the circumstances of this complaint.

I appreciate there have been arguments about how FG17/9 should be interpreted with regards to Mr S's assumed retirement age. However, whilst the guidance is given to help firms calculate fair compensation in a pragmatic way, it shouldn't be forgotten that the overarching objective when compensating customers is to put them as much as possible back into the position they would be in if they had been given suitable advice. This is how this service approaches complaints and the regulator has the same objective in mind. FG17/9 says under point 2:

Where a firm or adviser has failed to give compliant and proper advice, or has committed some other breach of the relevant requirements, the basic objective of redress is to put the

customer, so far as possible, into the position they would have been in if the non-compliant or unsuitable advice had not been given or the breach had not occurred.

So my consideration here is not whether guidance has or has not been correctly applied. I'm considering Mr S's individual complaint and whether it's fair in his particular circumstances to assume that he would have taken benefits from his DB scheme at age 51. We asked Mr S to explain why he accessed his personal pension in 1999. He told us that at the time he was temporarily unemployed and had the need for additional income. He used the lump sums to pay off some household debts. His wife was employed, but he had no other savings, pensions or income at the time.

Having considered Mr S's circumstances in 1999 I think it's not unreasonable to assume he would have accessed his DB scheme at that point if he could. He was unemployed, had no savings and obviously had a real need for some funds.

In these circumstances, where someone likely would have retired from the DB scheme early, I wouldn't necessarily consider Prudential's way of reducing Mr S's DB benefits in line with retirement at 51 as unfair.

However, based on the evidence I've seen I think Mr S's DB scheme more likely than not wouldn't have allowed him to retire early. Early retirement was allowed at the discretion of the scheme trustees. This isn't unusual. However, as Prudential has rightly identified, some schemes are more lenient than others.

Prudential identified that Mr S's DB scheme allowed early retirement as long as the guaranteed minimum pension (GMP) was covered at the selected pension age. And their actuaries who did the calculations considered the GMP would have been met. So they assumed Mr S could have retired early.

However, I don't think making the GMP being covered a requirement to allow early retirement at all, is the same as allowing every early retirement request to succeed in these circumstances.

And here there's evidence that Mr S's DB scheme was quite strict when it came to early retirement. Mr S received a letter in 1988 which said:

You should note, therefore, that if, because of a breakdown in health you wish to claim payment of your pension and lump sum before age 60, you should apply in writing to this Administration Centre at the above address.

*Furthermore, if you are between the age of 50 and 60 and wish to claim payment of your pension and lump sum on compassionate grounds, you should apply in writing to the office where you were employed at the date of your retirement. I should explain, however**, that a change in your financial circumstances alone will not warrant payment of your pension and lump sum before your 60th birthday. [my emphasis]***

Prudential also provided extracts from the DB scheme's booklet in 1995 which said:

Early Payment

If you opt to receive a deferred pension, then circumstances could later arise where this pension may be paid early on ill-health or (rarely) compassionate grounds; e.g. extreme hardship as a direct result of having to give up work to give full-time care and attention to a sick or elderly relative. For further information contact the Pension Centre.

I think the above clearly indicates that the scheme would only consider early retirement for someone who suffered from ill-health or in *rare* circumstances on compassionate grounds. The example given shows in my view that the bar here was high and the trustees confirmed in the letter to Mr S that a change in financial circumstances wasn't sufficient. So on balance I don't think Mr S's temporary unemployment would have been enough to be granted early retirement by the DB trustees.

Of course I don't know for certain whether the scheme would have granted a request for early retirement from Mr S over 20 years ago. Just like I don't know for certain whether Mr S would have accessed his DB scheme at 51. Neither can be established with certainty in my view after such a long time. But where the facts are uncertain, I'll base my findings on the balance of probabilities and looking at the evidence set out above, I'm satisfied that Mr S's DB scheme more likely than not wouldn't have allowed him to access benefits at age 51.

It follows that if suitable advice had been given and Mr S had remained in the DB scheme, he likely would have received his benefits at age 60. So I think Prudential should use age 60 as Mr S's assumed retirement age and not 51.

Putting things right

My conclusion is that a fair and reasonable outcome would be for Prudential to put Mr S, as far as possible, into the position he would now be in but for the unsuitable advice. I consider he would have remained in the DB scheme until age 60. So I think their current offer isn't fair in the circumstances.

Prudential should undertake a new redress calculation in line with the regulator's pension review guidance, as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.

The original calculations were done in March 2020. Prudential should do new up-to-date redress calculations using the most recent financial assumptions at the date of the new calculation.

Prudential may wish to contact the Department for Work and Pensions (DWP) to obtain Mr S's contribution history to the State Earnings Related Pension Scheme (SERPS or S2P). These details should then be used to include a 'SERPS adjustment' in the calculation, which will take into account the impact of leaving the occupational scheme on his SERPS/S2P entitlement.

Given that Prudential offered their first compensation as a lump sum payment and Mr S has retired already, I think redress should be paid directly to Mr S as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. Typically, 25% of the loss could have been taken as tax-free cash and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%, so making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation amount must where possible be paid to Mr S within 90 days of the date Prudential receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Prudential to pay Mr S.

It's possible that data gathering for a SERPS adjustment may mean that the actual time taken to settle goes beyond the 90 day period allowed for settlement above – and so any

period of time where the only outstanding item required to undertake the calculation is data from DWP may be added to the 90 day period in which interest won't apply.

My final decision

I uphold this complaint and require The Prudential Assurance Company Limited to calculate redress and pay this to Mr S as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 17 January 2022.

Nina Walter
Ombudsman