DRN-2799628

Financial Ombudsman Service

The complaint

Mr V via a representative complains that The Prudential Assurance Company Limited (Prudential) hasn't fairly redressed him following a pension transfer in 1990.

What happened

A provisional decision has been issued which set out the background and my provisional findings. This is included below and forms part of this decision.

In 1990 Mr V was advised by Prudential to transfer his Occupational Pension Scheme (OPS) to a Personal Pension with Prudential.

The transfer occurred in three tranches, in line with when the funds were released from the OPS. But formed one pension policy with Prudential.

One tranche was made up of non-protected rights. Whereas the other two tranches were made up of protected rights that came about from the OPS being contracted out of the State Earnings Related Pension Scheme (SERPS).

In 1996, aged 50, Mr V took tax-free cash and an annuity from the non-protected rights tranche. At the time benefits couldn't be taken from protected rights until Mr V reached age 65. So the other two tranches remained invested with Prudential.

Later in 1999 Prudential wrote to Mr V to invite him to have his pension transfer reviewed under the industry wide Pension Review process set up originally by the Securities and Investment Board (SIB Review). Mr V accepted this invite and the review was carried out by a professional actuarial firm who specialised in Pension Review loss calculations.

In 2001, Prudential sent Mr V a letter with its offer of redress which it said had been carried out according to the guidelines set by the regulator in the SIB Review. It enclosed a summary of the loss assessment and the key facts and assumptions used. It said if any of this information was incorrect Mr V should return the form and let it know. Alternatively, Mr V could accept the offer in full and final settlement. Mr V accepted the offer and he was paid a cash lump sum intended to make up for the past shortfall in pension benefits compared with what he would've received from the OPS. Prudential also increased his annuity to account for the additional pension benefits he'd lose out on going forward.

More recently, Mr V's representative complained to Prudential about the advice to transfer. Prudential explained that it had already considered this matter and paid Mr V redress.

Mr V's representative then brought the complaint to this service. He said Mr V hadn't been correctly redressed following the Pension Review. And that the review contained errors. He said he'd got an actuary to assess the calculation and they'd found that:

- *The calculation had been carried out assuming the OPS would've allowed early retirement at age 50. And as a result the scheme benefits had been substantially reduced by 69.5%. But it is practically certain that the scheme wouldn't have allowed retirement at this age.*
- *No allowance for discretionary increases has been made in the calculation. There is no evidence that Prudential checked what the increases were in the five years prior to 2001.*

Mr V's representative said that the only fair outcome considering these errors, would be for the loss calculation to be re-run but, instead, using the regulator's new up-to-date guidance.

Prudential said the OPS would allow early retirement, (and it provided evidence of this), however it wasn't clear how this would be restricted to ensure any Guaranteed Minimum Pension (GMP) is secured. Prudential took the position that, if it was unclear, it would allow in the calculations for full cash commutation and allow early retirement combined with a 'step up' (increased) pension at state pension age to ensure the GMP was met. It said the alternative would be to check at each birthday following retirement if the GMP was met. If it had done this for Mr V the loss would've been lower. It said it chose the first option as it was thought to be beneficial for customers. And it proved to be the case here.

Prudential also provided evidence from the OPS that no discretionary increases would be applied, mainly because the scheme was wound up in 1996. It said if Mr V's representative had evidence to the contrary it would happily look into this for him.

Our investigator looked into matters but didn't think the complaint should be upheld. She said the review had been done in accordance with the regulator's guidance and she couldn't see any grounds to say that Prudential should review matters again.

Mr V's representative didn't agree, he said the investigator had interpreted the regulator's guidance incorrectly. He said that the calculation in 2001 should've been carried out on a prospective loss basis under the review guidance, using Mr V's normal retirement date of 2011 rather than on an actual loss basis at the time.

Mr V's representative argued that the calculation should only be carried out on an actual loss basis if he'd retired. And taking his benefits from the non-protected tranche didn't mean he'd retired for the purposes of the SIB Review.

He also said there was no evidence that Prudential had checked, as it was required to do, if re-instatement into the OPS was an option for Mr V. And that Prudential had not used the correct assumptions for future loss regarding the protected rights tranches. He said Prudential had used assumptions for future charges of zero which was incorrect.

The investigator responded to say that the SIB Review says that early retirement is a qualifying event for actual loss calculations and therefore Prudential was right to do it on this basis. The OPS scheme had already been closed prior to the review so re-instatement wasn't an option. And the loss assessment did allow for future costs on the protected rights.

Mr V's representative disagreed with the investigator. He said the fact that Mr V had taken his benefits early from his non-protected rights didn't mean he'd retired. He re-stated his view that the calculation should've been done on a prospective loss basis. And therefore, it had been carried out incorrectly and now should be done using the new guidance and assumptions.

What I've provisionally 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.

Mr V's representative initially raised a number of issues regarding the calculations that his actuary flagged up. As set out above. But Prudential and our investigator provided further evidence and explanation that answered these points. For the avoidance of doubt, having considered all the evidence, I agree with the investigator's view on these points and for the same reasons.

Subsequently, Mr V's representative explained his point of contention was that the calculation had been carried out incorrectly on an actual loss basis rather than a prospective loss basis. And that the regulator's guidance says it should now be considered under the new assumptions. So as this remains in dispute, my decision will focus on this issue.

What is it I have to decide?

Ultimately, the issue for me to decide is whether Prudential has already fairly redressed Mr V's pension transfer. And whether Prudential needs to do anything more to put things right for Mr V.

Mr V's representative originally complained about the pension transfer. But as Prudential had already carried out a loss calculation, in essence, conceding the complaint about suitability, I don't need to consider or discuss the suitability of the transfer.

Both parties already agree the Pension Review process was the correct way to address this situation. So, I don't need to decide that. (For the avoidance of doubt, I think the Pension Review process represents fair redress in this case. The regulator intended it to be applied in these circumstances and it aimed to put Mr V – as close as was practical – in the position he'd have been if not for the poor advice, which is the usual approach of the ombudsman service to redress.)

Prudential's position

Prudential's position is that it has already considered Mr V's transfer in-line with the SIB Pension Review guidance starting with Pension Transfers and Opt-Outs Review of Past Business – Statement of Policy on 25 October 1994 and updated by subsequent regulators thereafter. Prudential says it paid Mr V redress in-line with the SIB Review guidance and it was accepted in full and final settlement. And that it has no obligation under the guidance to look at this again.

Mr V's representative's position

Mr V's representative says that the review in 2001 wasn't carried out correctly as it was done on an actual loss basis rather than a prospective loss basis and therefore is invalid. And should now be re-done but instead using the new FG17/9 review guidance.

FG17/9 – what is its purpose?

The initial SIB Review guidance issued in 1994 included assumptions to be used when calculating the potential loss, both in the approach to be adopted and the financial data to be used. The financial data was revised regularly by the regulator from 1994 to April 2003 but for many years the approach itself remained largely unchanged.

In general, the assumptions to be used for the calculation were those relevant to the time that the calculation was carried out and compensation paid. This included where mistakes were discovered in the original calculations.

Most of the reviews were carried out between 1994 and 2003. And in 2003 the regulator stopped updating these assumptions. But the Pension Review methodology continued to be used by the industry and this service to assess complaints about the loss of OPS benefits due to advice given by firms. So, our service commissioned a firm of actuaries to continue to revise the assumptions for this purpose.

More recently the FCA issued new guidance called Finalised Guidance in 2017 or FG17/9. FG17/9 was pre-dominantly designed for complaints upheld about OPS transfers received after 3 August 2016.

Initially during the FCA's consultation period, any case that fell within the Pension Review period (regardless of whether it was reviewed) was planned to be excluded from FG17/9. But after the consultation period, FG17/9 introduced some leeway for cases that fell within this period – in instances where the firm did not review the relevant pension transaction in accordance with the regulatory standards at the time and/or the particular circumstances of the case were not addressed by those standards. Mr V's representative argues that this is the case here, as Prudential carried out the review on an incorrect loss basis.

Was there a mistake in the original review?

The original SIB review guidance says in relation to transfers:

'Loss assessment - Transfers

405 There are two types of possible loss:

- ***(a)*** ***Actual financial loss:*** *When an event (such as death or retirement) has already occurred giving rise to benefits and the benefits from the personal pension are less than those the occupational scheme would have conferred.*
- ***(b)*** ***Prospective financial loss:*** *Where the investor (or his/her spouse or dependants) is exposed to the probability of an actual financial loss when an event such as death or retirement occurs in the future.*

406 The reviewer should test for either actual financial loss or prospective financial loss, depending on whether or not the investor has died or retired at the date of the review. It should not be necessary to test for both….

Actual loss (i.e. when death or retirement has already occurred)

411 When: Test for loss as at the date of crystallisation i.e. death or actual retirement - ***including early retirement'*** *(my emphasis).*

Prudential carried out the loss assessment on an actual loss basis as Mr V had taken his benefits ***early*** *and in advance of his normal* ***retirement*** *date.*

Mr V took his benefits in 1996 from the non-protected rights at age 50. But he was unable to take benefits from his other two tranches (the protected rights parts) as the legislation in place at the time required these to be taken at age 65.

Prudential says during the review process this situation was common place – and this was the approach always taken. It said when performing a loss calculation where there's a partial vesting of the Personal Pension the approach taken is to take the initial vesting date as the assumed OPS retirement date.

So, for this reason Prudential calculated the actual loss on the non-protected rights tranche at that date. And for the protected rights tranches it produced a value at the date of calculation. This was to be compared with the benefits that would've been available within the OPS at that date. Therefore, providing a loss at the date of calculation to be paid to Mr V as compensation in full and final settlement. And drawing a line under the matter as the Pension Review was designed.

It's not in debate that Mr V crystallised part of his pension. And took his benefits before his retirement date on that particular tranche.

The SIB review guidance says it's not necessary to test for both actual and prospective loss. As Mr V had taken early retirement and crystallised his benefits for his non-protected rights, as stated in section 411 of the SIB Review this qualifies as actual loss.

Furthermore, the approach taken by Prudential in the calculation, is the same approach I've seen taken on many other cases by many other firms. And as previously stated these calculations were carried out by an outsourced specialist actuarial firm, who were the experts in this field. They deemed this method to be the correct way to assess this type of case. And these reviews were subject to strict internal and external checks. The regulator checked a sample of cases from firms to make sure that they were carrying out the review process correctly. And had there been a problem with a particular approach taken then, I think the regulator would've addressed this at the time.

This is particularly relevant here, as it should also be kept in mind that almost all transfers from defined benefit schemes involved protected rights. And therefore, anyone taking Personal Pension benefits earlier than age 65 (or 60 depending on male or female and legislation changes over the time) wouldn't have been able to draw on their protected rights benefits.

Mr V's representative says that section 405 and 411 (referred to above) are not relevant as Mr V had not taken early retirement. But I don't agree.

Mr V's representative argues that 'retirement' refers to the normal retirement date of the plan, for Mr V this was age 65 in 2011. And therefore a prospective loss calculation should be used. However, actual loss includes early retirement as stated in SIB Review rule 411 quoted above.

It seems to me that this is an argument of semantics that taking your benefits doesn't qualify as retirement. But the SIB Review makes clear the date of crystallisation (taking benefits) is the test to be applied here. And not 'retirement' as in the more general use of the term and/or the normal retirement date of the plan. And within the industry, taking your benefits from a pension plan prior to normal retirement is referred to as (early) retirement.

To support his argument Mr V's representative has quoted page 95 of the SIB Review which is from the appendices section of the SIB Review guidance referred to above.
It says:

'Assumptions for prospective loss assessment Appendix D
Retirement age:
Use the earlier of:
- *Normal Retirement Age in the former scheme;*
- *the earliest age the member could have retired without company/trustee consent and be guaranteed not to suffer a reduction in accrued pension for early payment.*

Do not allow for:
- *early retirement which requires the company's or trustees' consent;*
- *early retirement which imposes an actuarial reduction on accrued benefits to reflect early payment;*
- *discretionary early retirement policies;*
- *late retirement'*

However, this isn't relevant. As mentioned above, this is in the appendices for assessing prospective loss at the end of the SIB Review document. This section relates to those who haven't already crystallised their benefits. But prospective loss isn't what is being assessed here. The test in the SIB Review as to whether actual loss or prospective loss should be used is described in rule 405, 406 and 411(quoted above).

Mr V's representative has also quoted from the FCA's finalised guidance FG17/9, and provided an article discussing the Pension Review and prospective loss to support his argument. The article refers to prospective loss calculations, which as I've explained isn't relevant here.

The FG17/9 guidance isn't relevant here either, as in order for me to conclude that a new calculation was required, I would expect there to be a reason to firstly say the original calculation wasn't in accordance with the SIB Pension Review guidance as it applied at the time. FG17/9 was not set up to re-review cases that have already been considered fairly under the SIB Review.

So, I don't agree with Mr V's representative that Prudential didn't follow the SIB Review guidance. It followed the regulatory standards of the time. And I think the approach taken by Prudential to do the calculation on an actual loss basis was fair and reasonable. The purpose of the SIB Review was to put customers back into the position they would've been, had it not been for the unsuitable advice. The cleanest way to do this was to re-instate a customer into their OPS. But where this was not possible (or cost effective), assumptions had to be made in an attempt to put a customer in a comparable position in the Personal Pension and to draw a line under the matter. Assumptions such as what date would the customer have taken their benefits from the OPS. The approach set out in the SIB Review guidance and the one taken by Prudential here – was that where benefits had been crystallised in the Personal Pension, this date would be used for the purpose of valuing the OPS benefits given up. I don't think this is unreasonable.

Provisional conclusions

As I consider that the review has already been carried out in line with the standards applicable at the time and it was settled in full and final settlement then, I can see no fair or reasonable reason, nor any reason under the relevant guidance (the SIB Review) or FG17/9 to say that Prudential needs to do more here.

That said, I do understand why Mr V and his representative are unhappy with the situation. Unfortunately, the assumptions used in the SIB Review haven't mirrored reality. Since the calculations were carried out, investment returns have generally been lower than assumed. And annuity rates have fallen significantly. Both of these factors have had a big impact on the benefits provided by Personal Pensions.

So, although it was thought the compensation plus the existing value of the pension would be high enough to match the OPS at retirement date, this hasn't been the case for some of those assessed under the SIB Review. But the fact that the assumptions haven't been met, is not reason to say that Prudential did anything wrong or treated Mr V unfairly. Prudential addressed the issues at the time, following good practice at the time. It was entitled to consider the matter closed. Taking everything into account, it wouldn't be fair or reasonable to require Prudential to carry out the loss calculation again now."

Mr V's representative didn't agree with my decision. Initially he made the point that in Prudential's calculations from the time, the document had an error warning that *said '*CA9 *actual loss is prospective'.* Mr V's representative felt this was further evidence that the loss should've been a prospective loss.

Prudential in response told us*:*

*" '**C'** codes are defined in RECAL software manual as calculation warning codes generated to indicate that an item calculated (as opposed to input) may need to be investigated further. The HCAS technical manual takes this further to say they do not necessarily indicate an error but may need further explanation.*

The CA9 code is fully defined as 'Actual Loss is prospective (use redress figure for loss)'. It has been generated as a fund value has been input for (former) protected rights retained on personal pension at calculation date. It warns that the redress calculated at calculation date (24/11/2001) should be used as opposed to the loss calculated at retirement date (vesting date of 24/07/1996). At the date of assessment all warning / error messages are checked by the case-reviewer and where appropriate disclosed / dealt with, in this instance no further action was deemed necessary. You will see from the case modelling notes this warning code was specifically covered."

Later Mr V's representative submitted a barrister's report setting out why more needed to be done to provide Mr V with fair redress. In summary the report said:

- Mr V took the benefits from the non-protected rights in 1996 and bought an annuity. He did not retire from his occupation until age 63 in 2009
- Mr V took these benefits in the belief that the pension available was at least equivalent to what he could've got from the OPS – because of the advice given to him by Prudential.
- The Pension Review offer said the calculation date for the loss used by Prudential was 24 July 1996, described in the loss calculations as Mr V's "date of retirement". Mr V was invited to check the offer but the details of the offer would be beyond anyone other than an actuary's competence to comprehend.
- The issue at hand is whether redress ought to have been assessed prospectively looking to Mr V's actual or normal retirement date and not the date of partial vesting of benefits. The ombudsman had agreed provisionally with Prudential's standpoint

that the SIB Review is clear that taking benefits qualifies as retirement and therefore falls under actual loss.

- To consider this issue and the correct implementation of SIB specification and what is meant by retirement in this context, requires an exercise of contractual interpretation.
- The report quotes case law *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 HL at 913E and *Antaios Compania Naviera SA v Salem Rederiema AB* [1985] AC 191 at 201*;* which said language used needed to consider what a 'reasonable person' with all the background knowledge would have understood it to mean. Words should be given their natural and ordinary meaning
- The report set out that the redress already paid to Mr V didn't meet compensatory principles with reference to case law. In summary that any redress should take into account what the claimant would've done had they been given advice by a competent adviser. The loss suffered should reflect the effects of not receiving that good advice. And that it is impossible to conclude the claimant would comprehend their loss until they appreciate the actual loss they have suffered and how the negligent advice had caused that loss. To do so requires an understanding of what good advice would've looked like and what position they then would've been in.
- The barrister concluded this point by saying that properly read the SIB specification is consistent with this approach.
- If Mr V had been given proper advice he would've retained the benefits in his OPS. He took his benefits in 1996 believing that he would be no worse off doing so than he would've been taking benefits from the OPS.
- Had Mr V not been given the incorrect advice, and instead been advised to retain his benefits in the OPS, he would've known the longer he left the benefits the better. And he wouldn't have taken his benefits until his retirement from employment.
- The flaw in the current position that Prudential and the ombudsman have taken is not considering the position that Mr V would've been in had he been given correct advice. In that situation he would never have taken his benefits early.
- The correct position for redress, should be to redress Mr V against the benefits of the OPS at normal retirement date or actual retirement date with a deduction for the benefits already received.
- The SIB specification says it's aims are to provide proper redress without recourse to courts. And therefore its clear the methodology was expected to replicate the outcome that a court would reach.
- Therefore the SIB specifications should not be interpreted in a way that delivers its own autonomous regime with its own definitions which in turn can lead to results other than that which a court would reach.
- The report then moved on to what the SIB specification said in part II which refers to the compliance assessment. The report points out that this section clearly refers to retirement in the conventional sense rather than taking benefits.
- Whereas Prudential and the ombudsman have relied upon partial vesting of benefits qualifying as an event of retirement- and therefore this fits the actual loss definition. Consistency of definition demands that 'retirement' should have the same meaning wherever it is used in the specification.
- There is nothing to say that an event of partial vesting should automatically equal that of "retirement'. This depends on the facts of an individual case – it may or may not equate to the investor's decision to take "retirement".
- The approach taken by Prudential and the ombudsman does not answer the question: what loss did the non-compliant advice cause? Without proper investigation

of the facts, this approach will lead to a disconnect between the loss (against a value which competent advice would have delivered) and the actual error or mistake made by the adviser which led to the need for compensation.

- Bad advice can have more than one consequence. A foreseeable consequence of the bad advice was that Mr V might choose to take out an annuity at any age from 50 onwards - without understanding that he would've been better off leaving his benefits within the OPS until actual or normal retirement. It is this loss that common law principles indicate that Mr V should be compensated for. And this very loss is deprived by the approach Prudential and the ombudsman have taken.

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.

What is it I have to decide?

I have to decide whether Prudential has already fairly redressed Mr V's pension transfer.

The barrister's report summarised above made numerous points. I've not provided a detailed response to all the arguments raised. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. I've considered all the points raised and I'll answer the relevant points within my findings but not necessarily specifically and point by point. My findings will concentrate on what I think is relevant and at the heart of this complaint.

Having considered all the evidence afresh, I am not persuaded to change my decision. I am satisfied that Prudential carried out the review in line with the regulatory guidance and that this was a fair and reasonable way to resolve the complaint back in 2001. I'll explain in more detail why my decision has not changed and with reference to the further arguments made.

Does taking benefits/crystallising a pension equate to retirement under the Pension Review guidance?

In the barrister's report prepared on behalf of Mr V – it is argued my interpretation of the following parts of the SIB specification is incorrect:

'405 There are two types of possible loss:

> *(a)* ***Actual financial loss:*** *When an event (such as death or retirement) has already occurred giving rise to benefits and the benefits from the personal pension are less than those the occupational scheme would have conferred.'*

and

'Actual loss (i.e. when death or retirement has already occurred)

411 When: Test for loss as at the date of crystallisation i.e. death or actual retirement - including early retirement'

The barrister's report argues that where the SIB specification refers to retirement in actual loss cases, Mr V taking benefits from the personal pension ought not to be considered retirement or early retirement.

The initial SIB guidance and the later updates (as I'll evidence later in the decision) make numerous references to retirement and early retirement equating to benefit crystallisation and taking benefits. I think it is clear that this use of the word retirement is referring to the industry term of retirement – to take benefits from a pension. And not retirement in the sense of occupational retirement (to retire from all work).

Further, the way I've interpreted this is the way that the expert actuarial firms such as Hazell Carr who were setup specifically to carry out these calculations (and carried out this calculation) interpreted it. And in my experience, this is how other firms within the industry interpreted it as well. Furthermore, the various regulatory bodies carried out checks throughout the lifespan of the Pension Review (and these circumstances are not uncommon), yet no guidance was issued to the contrary about this method. In fact as I'll show later, additional guidance supports that partially taking benefits should be treated as retirement and the assumption can be made that benefits would've been taken under the OPS at that date.

The barrister argues to consider what retirement means or should mean in this context - and the correct implementation of the SIB specification – we need to take into account contractual interpretation and what a court would say. And then goes further to say this would result in retirement having its common meaning – to stop working.

However, I don't think this is correct. The SIB specification and the later guidance is not a contract between businesses and customers. It is guidance to be used by the regulatory bodies (and was subsequently adopted by the Personal Investment Authority – PIA) and was subject to monitoring by them.

As set out in *R. v Securities and Investments Board Ex p. Independent Financial Advisers' Association* [1995] Pens. L.R. 123:

> *"Under the Financial Services Act 1986, no person was to conduct investment business unless he/she was an authorised person. There were three ways to become an authorised person: (a) authorisation by the Secretary of State; (b) membership of a recognised self-regulating organisation ("**SRO**") (recognised by the Securities and Investments Board, which had the power to revoke recognition ("**SIB**")); and (c) membership of a recognised professional body ("RPB") (again, recognised by the SIB). The SROs were the front-line regulators, with the SIB as the overall regulator."*

SIB had the power to issue statements of principle in relation to the conduct expected of authorised persons. The SIB Review was guidance for the SROs, as well as the 75 directly authorised firms. Prudential was regulated by the PIA at the time it carried out Mr V's review. It was therefore expected to follow the guidance SIB and subsequently PIA issued.

Therefore, I think the proper approach to interpretation for the SIB guidance is the approach to statutory interpretation, which is as follows:

- The starting point is the ordinary meaning of the word, in the relevant context, but if the word has a technical meaning (e.g in a business context), it should be interpreted using that meaning in that context.
- If this approach produces an absurd result, or a result which is inconsistent with the rest of the statute, the word can be modified to avoid the absurdity or inconsistency.
- If the wording is ambiguous, the court will take the rationale for the statute into account and consider the previous legislation, the defect in it, the remedy which

was being implemented, and the purpose of the remedy.
- The relevant meaning is the one as at the time the statute was passed.

I think it's clear from a statutory interpretation point that retirement in SIB and the further guidance doesn't relate to retirement as in cessation of work. It has a technical meaning to take benefits/crystallisation of a pension.

For example, looking at the test for actual loss. If we remove the word retirement (used as an example of the event) and focus on what the specification actually says:

'405 There are two types of possible loss:

(a) ***Actual financial loss:*** *When an event…has already occurred giving rise to benefits and the benefits from the personal pension are less than those the occupational scheme would have conferred.'*

I think this makes clear that actual loss refers to taking benefits from a personal pension and not 'retirement'. If retirement were to mean cessation of work here – then there would be a complete disconnect between that and the rest of the 405 specification. Retirement in an industry sense is to take benefits. That definition fits with the rest of the specification. Retirement as cessation of work, doesn't.

The barrister has referred to the SIB specification part 21 which says *"A central question is whether the investor would have made a different decision if there had been no material compliance fault."* And has made the point that here retirement clearly refers to retirement in the sense of cessation of work.

However, this is relevant to the compliance section – i.e helping the business to decide whether the case should be deemed non-compliant and upheld. It is not relevant to the loss or redress section. Prudential accepted non-compliance and went straight to assessing loss and therefore this point isn't relevant.

Looking at the test for actual loss it wouldn't make sense if retirement was to mean cessation of work. I'll explain why:

'411 When: Test for loss as at the date of crystallisation i.e. death or actual retirement - including early retirement'

The test is at date of crystallisation – including actual retirement or early retirement. If retirement were to mean cessation of work – this doesn't bring about a date of crystallisation of personal pension benefits. As retiring from work and taking benefits from a personal pension (crystallisation) are not necessarily linked. But taking retirement from a personal pension does bring about an event of crystallisation, both at the set retirement date of the pension (actual retirement) and early retirement.

In conclusion on this point, the SIB guidance is not a contract between businesses and customers, so statutory interpretation is the correct approach. And as I've set out above (and in my provisional findings), 'retirement' and 'crystallisation' are industry terms to mean taking benefits as opposed to meaning to stop working. And I think a court is likely to interpret the guidance to be consistent with this.

<u>Does redress under the Pension Review have to reflect what a court would award?</u>

The over-riding point made in the barrister's report is that the redress under the Pension Review should've reflected the compensation which Mr V would have received if he had

gone to court. And if Mr V had gone to court, the court would have awarded redress on the basis that, if Mr V had been given competent advice, he would have kept his OPS. And he wouldn't have taken benefits early as he would get a better pension the longer he deferred taking it.

However, I don't agree that the aim of the Pension Review was to exactly replicate a court decision. And the guidance in terms of redressing the situation, does not ask a business to consider what a customer would've done had they been given best advice. Rather it requests that firms make assumptions.

Particularly relevant here is the PIA Guidance for Review of Past Business - Transfers (July 1995) "Guidance on Technical Matters - Actual Loss Assessment" part 5 pg 120.

"Investor Options: Where the investor has exercised an option e.g. to retire early or to commute part of his pension for cash at retirement and equivalent options were available under the occupational scheme it should be assumed that the investor would have taken equivalent action to satisfy the same needs had he not transferred."

The guidance therefore asks firms to make an assumption rather than asking the firm to consider what the consumer might have done if given proper advice. The assumption is that the consumer would have taken their benefits at the same date under the OPS – which as I'll explain later in more detail, is what Prudential did.

In reaching a fair and reasonable decision on this case, I have to consider the context of the Pension Review, the guidance issued through time and as this complaint relates to a historical event, what our predecessor scheme would've said. Rather than, as Mr V's representative and barrister are suggesting, to view the situation without this context and come to a new conclusion based on different tests.

Our rules state:

DISP 3.6.5G: "Where the Ombudsman is determining what is fair and reasonable in all the circumstances of a relevant new complaint…, the Ombudsman Transitional Order, … make[s] provision for him to take into account what determination the former Ombudsman might have been expected to reach in relation to an equivalent complaint dealt with under the former scheme in question immediately before the relevant order came into effect."

"Relevant new complaint": "*(in accordance with the Ombudsman Transitional Order) a complaint referred to the Financial Ombudsman Service after commencement [1 December 2001] which relates to an act or omission occurring before commencement [1 December 2001] if:*

> *(a) the act or omission is that of a person who was, immediately before commencement, subject to a former scheme;*
>
> *(b) the act or omission occurred in the carrying on by that person of an activity to which that former scheme applied; and*
>
> *(c) the complainant is eligible and wishes to have the complaint dealt with under the new scheme;"*

Our predecessor scheme the Personal Investment Authority Ombudsman Bureau (PIAOB) issued the following statement in 1996:

> *"Statement by the PIA Ombudsman*

Members are aware that, following the review of past business in connection with Pension Transfers and Optouts published by the Securities and Investments Board in October 1994, the Personal Investment Authority published its Statement of Policy on the same subject in February 1995. This was followed by its detailed Guidance in three sections issued in April, July and August 1995, and further Notes dated December 1995.

The Ombudsman's Terms of Reference require him to have regard to, among other things, such guidance as was relevant to a PIA Member's business at the time of the events which gave rise to the subject matter of the complaint, and any relevant standards of redress as issued by PIA. He has therefore considered the Statement of Policy, Guidance and Notes with the assistance of his independent legal and actuarial advisers. He feels that it would be helpful to publish this statement of his broad approach.

The Ombudsman must consider every case on its individual merits and in accordance with his Terms of Reference. Having said that, he has concluded, in the light of the advice he has received, that the documents published by PIA referred to above constitute an appropriate basis for the settlement of most cases. He will normally decide disputes in accordance with the principles and guidance laid down in those documents, unless the circumstances of a particular case lead him to the conclusion that a different outcome is more appropriate."

News from the Ombudsman Bureau', June 1999, states on page 2:

- *We are aware of criticism of some aspects of the Pension Review redress guidance. …*
- *It may be that from time to time individuals may get redress offers under the Review process which might be less than they could obtain if they went to court. We can only say 'might' because so far there have not been any court decisions in Pension Review cases. Under our Terms of Reference we are obliged to apply any legal rule or principle if it gives a better outcome for the complainant than applying relevant redress guidance. This could mean us unpicking the Review Guidance in any particular case and second guessing what the courts might do. That would not, in our view, be in the general interests of complainants as a whole given that in unpicking the Guidance, other issues could well come to light which were to the detriment of the complainant, such as limitation issues.*
- *We do not think, therefore, that this unpicking of the Guidance would be appropriate. The Pension Review, and continued public confidence in it, is, as we have said, in the public interest. That interest is not served by this Bureau using its resources to question the Guidance, except where those questions arise from criticisms raised by complainants to the effect that the guidance has not addressed their own singular circumstances.*
- *The Ombudsmen and the Bureau's Council feel that it is appropriate for this Bureau to adhere to the Guidance issued by PIA and FSA and, accordingly, our Terms of Reference have been amended, with effect from 1 April 1999, by the insertion of a new paragraph 5.2a which we set out below:*
  - *If, in respect of a complaint relating to a pension transaction, the Ombudsman is satisfied that the firm in question has made an offer which complies with the PIA's standards of redress then he shall make*

no award or recommendation unless he is of the opinion that the particular circumstances of the case are not addressed by the standards.

Also relevant here is: SIB Pension Transfers and Opt Outs: Review of Past Business Part 1: Statement of Policy.

> *"Past transactions must be judged against the regulatory requirements applicable when the advice was given and against the assumptions which were reasonably made at the time; there should be no retrospective imposition of later, more exacting, requirements. In this way it is intended that neither the investment firm nor the personal pension policyholder should be given any reason to litigate to achieve a more favourable outcome."*

Although one of the aims of the Pension Review was that "*neither the investment firm nor the personal pension policyholder should be given any reason to litigate to achieve a more favourable outcome*", the guidance on calculating redress involved a number of assumptions, some of which might result in an outcome which differed from the award which a court might make, depending on the circumstances. I think this is inevitable in a review process such as this, where the firm needed to remediate a large number of cases. I think it is therefore an overstatement to say that the Pension Review aimed to replicate the outcome which the court would've reached. As set out above by the PIAOB in June 1999, the Pension Review might not yield the same result as court proceedings.

It's therefore my view that the PIAOB's approach was that it wouldn't have ordered Prudential to pay any further redress to Mr V, provided it was satisfied that Prudential had followed the Pension Review guidance and that his circumstances were not outside the scope of the guidance.

Did Prudential follow the Pension Review Guidance?

I've already explained in my provisional findings (which forms part of this decision) why I think Actual Loss (according to how it was described in the original SIB specification) was the correct method to use. I won't repeat those arguments here. And I've already set out that I think retirement in this context refers to taking benefits or benefit crystallisation.

Mr V's representative and his barrister have argued that Mr V taking the non-protected rights benefits from his pension early in 1996 shouldn't have been considered under actual loss. Nor should it equate to early retirement under the OPS.

The SIB guidance in 1994 set out the initial review process and guidance. But as I've discussed earlier in the decision, PIA continued to work on and update the guidance and through Pension Review bulletins that it issued periodically.

The PIA Guidance for Review of Past Business Transfers (July 1995) says (p119-121):

"Guidance on Technical Matters - Actual Loss Assessment

> *3. Date of Crystallisation*
>
> *Where the event is retirement, the date of crystallisation is the date with effect from which the pension first commenced from the personal pension. The date of crystallisation is used to determine the benefits valued in the loss assessment…*
>
> ***In some cases, there could be both Actual and Prospective loss. This is most likely to occur where the investor has retired before state pension age and***

there are protected rights. Where this applies, it will normally be appropriate to undertake the loss assessment as at the date of the review **(my emphasis)*.*** *Any shortfall in actual benefits should be accumulated at bank base rates to the date of the review. Bank base rates from 29 April 1988 to July 1995 are shown in Annex E(B).*

…

5. Investor Options

Where the investor has exercised an option e.g. to retire early or to commute part of his pension for cash at retirement and equivalent options were available under the occupational scheme it should be assumed that the investor would have taken equivalent action to satisfy the same needs had he not transferred.

In the case of early retirement at an age not normally allowed by the scheme trustees, the value used should be the value of occupational scheme benefits that would have been available had the investor not transferred. Alternatively, a fair approximation to the benefits the scheme might have allowed on early retirement may be used."

So it's important to acknowledge here that the way the PIA described a situation like Mr V's was somewhat different to how the SIB described it. SIB referred to it as actual loss in the original specification – and in fact said *'it should not be necessary to test for both* [actual and prospective loss]*'*. Whereas PIA clarified that whilst the test is still done on one date (the date of the review) it did in fact involve part actual loss and part prospective loss (on the protected rights).

Importantly this wasn't saying that the whole calculation should be done as a prospective loss – i.e. assuming that Mr V didn't take benefits from his OPS at all until normal retirement age. So whilst it helpfully clarifies the matter it doesn't change the outcome I reached in my provisional decision.

Mr V had taken his benefits before state pension age and there were protected rights. This was a situation that at the time of the original SIB specification was described as an actual loss – which is how I referred to it in my provisional decision – and in the PIA technical guidance as both an actual and prospective loss. And Prudential carried out the loss assessment as at the date of review. This shows that Prudential's approach was in line with the regulatory guidance at the time. It seems to me that this situation is also precisely what the warning *'*CA9 *actual loss is prospective'* in Prudential's calculation conveyed.

As stated above, the Pension Review guidance directs firms to assume the equivalent action taken in the personal pension would've been taken under the OPS. So again here I think Prudential (or the actuarial firm carrying out the calculations on their behalf) followed the guidelines in assessing Mr V's loss.

Mr V's representative has questioned the fairness in using age 50 as the retirement age and the early retirement factor used. And said Prudential had wrongly assumed that he would've been able to retire from the OPS. However, as stated above the guidance allowed assumptions and I think the assumptions made were fair.

Prudential provided evidence that early retirement at 50 was allowed under the scheme with consent of the trustees. It should be noted at the time of review the scheme had been closed. The date of closure and winding up was however after Mr V had taken benefits from the personal pension. In any case, it was believed by the actuaries that it was unlikely Mr V

would’ve been allowed to retire at age 50 from the OPS because of the cost of providing his Guaranteed Minimum Pension which would’ve become payable at age 65.

Unfortunately the scheme documentation that Prudential had received, didn’t show what the early retirement deduction factor would’ve been at 50. The earliest shown was at age 55 – which had a factor of 56%. The actuaries carrying out the calculation thought it very unlikely the scheme would’ve applied the same factor for someone retiring 4 years and 10 months earlier (the date when Mr V took his personal pension benefits). It therefore made an extrapolation using the evidence it did have to determine the early retirement factor here of 69%. I don’t think that’s an unreasonable assumption.

However, importantly, Prudential say that this calculation method was generously in favour of Mr V. It carried out the calculation assuming the scheme would’ve allowed retirement at 50. This essentially means that the scheme would pay the lower level of pension available at that age, but still ‘step up’ to the same GMP amount that Mr V would always have received from age 65. In other words, Mr V’s GMP wasn’t reduced by the assumption that he’d retired early from the OPS.

So, even with the substantial early retirement factor in place this produced a higher loss than calculating at later ages – when he might well have been able to retire under the OPS. Prudential tested retirement at every age from 51 to age 56 and the loss reduced going forward (56 was the first age where the cost of the GMP would be covered at early retirement). At 56 the loss was £8,805.71 compared to the date Mr V took his benefits at 50 and 2 months of £10,472.46.

Therefore, I think Prudential (or the actuaries doing the assessment) made fair assumptions and seemingly gave Mr V the most favourable outcome that realistically met the circumstances.

The guidance also said this in PIA Regulatory Update 46 issued on 11 March 1999:

> “*Where the personal pension has been vested prior to scheme retirement age and it is assumed that the investor would have retired early under the scheme at the same date, the redress offer letter must clearly explain the approach adopted and confirm the overall actuarial reduction factor that has been applied*.”
>
> “*PIA firmly believes that offer letters need to be drafted so they can be clearly understood by the investor. Adopting a similar approach to that used in drafting reason why letters can help to achieve this aim.* ***In general, where there is doubt about how best to proceed, a particular case may often be addressed without delay by making a reasonable assumption and explaining the approach to the investor (my emphasis).***
>
> *In particular, the investor’s attention should be drawn to all of the key assumptions made, for example, in the absence of complete or up-to-date data, or of an indication of what the investor would have done if he or she had not left the scheme. The investor should be advised to consider the assumptions carefully and invited to comment before taking any further action, as the amount of redress may be significantly affected. A more detailed explanation may be offered on request, rather than providing detailed explanations in the initial letter*.”

In Prudential’s offer letter to Mr V it set out amongst other things, *“You would have retired from your employer's scheme on 24 July 1996. This is the date on which you retired from your personal pension.”*

So I think Prudential met their responsibilities under the guidance here as well when making the offer to Mr V. I appreciate from the arguments made that his representative may consider Mr V was ill equipped to engage with Prudential on this point. But it was open to him to take his own advice on the adequacy of Prudential's offer – or question the assumptions made before he accepted it.

In conclusion of this point, I think the Pension Review addressed Mr V's circumstances and Prudential redressed Mr V in line with the Pension Review guidelines. And that leads me to the conclusion that the PIAOB wouldn't have upheld Mr V's complaint. Whilst I've considered what our predecessor scheme would've done when considering this complaint, I don't think under our current rules there is any reason to reach a different result to that of the PIAOB.

Is the redress which Mr V has already received a fair and reasonable outcome?

I've established that Mr V was redressed in line with the Pension Review guidelines, but I also need to consider again, whether this was a fair and reasonable outcome.

One of the central points the barrister made, is that but for the advice Prudential gave Mr V, he wouldn't have retired early. And that therefore the review outcome is unfair. The barrister says that because of the non-compliant advice Mr V wouldn't have known that taking his benefits early would cause him to suffer a loss – when compared to the benefits he could've had at a later date.

However, I think it unlikely that Mr V wouldn't have known that he'd get a higher annuity from his personal pension if he deferred taking it until he was older. He would've received annual statements illustrating the potential benefits at his normal retirement age. But he chose to take early retirement, thus reducing the annuity he would receive quite substantially.

This suggests he wanted or needed the money in 1996 and so it isn't an unreasonable starting point that he might have sought to take benefits from the OPS had he remained within it, at the same time or as soon as he was permitted to do so. I think this supports the position that it was fair to equate taking his personal pension benefits with taking benefits from the OPS. We can never be completely sure what Mr V might have done, if he was in a different position of having an OPS instead of a personal pension. I accept his representative has a strongly held view that he would've acted differently. It's possible that he would have done so. But this very possibility was something addressed by the Pensions Review in allowing Prudential to make an assumption. And in that light, I think that the review produced a fair and reasonable outcome.

Furthermore, when Mr V received the Pension Review offer in 2001 from Prudential it set out to him clearly that the offer was made on the assumption that "*You would have retired from your employer's scheme on 24 July 1996. This is the date on which you retired from your personal pension."* Whilst I understand the review process is a complex one – that particular statement is not difficult to understand for the layman. It was made clear then in 2001 to Mr V that the calculation had been carried out on the basis he would've retired from his OPS. So if Mr V disagreed with this, he had the chance to challenge this then – and Prudential gave instructions of how to do so at the time. But Mr V signed in full and final settlement accepting the offer on the basis set out. So I think considering this, it would be unfair to say decades later that Prudential should offer new redress on a new basis. And when the original offer met the guidelines of the time.

Before I conclude this decision, I suspect from the information we have from Prudential that its possible that there is no loss in terms of comparing the approach Prudential actually took – to do an actual and prospective Loss at the date of the review - with a full prospective Loss

approach to Mr V's normal retirement date. It's important to clarify that I've not relied on this point in making my decision and my decision would be the same regardless.

As I explained earlier, Prudential has shown us that moving the retirement date back each year until 56 – had the result of the loss reducing. Prudential explained that this was due to the fact that Mr V had commuted some of the pension as tax-free cash – therefore lowering the value of the annuity – when compared to the increase needed when the GMP became payable. Using a later retirement date decreases the past loss part of the calculation. So it seems possible and plausible that doing a full prospective loss calculation would not only have been contrary to the guidance Prudential was expected to follow but would also have resulted in less redress for Mr V.

Conclusions

I do not uphold this complaint for all the reasons explained in my provisional findings and the findings within this decision. A summary of the key points why I've reached this decision:

- I think that the Pension Review was the correct method to redress Mr V in 2001
- Prudential carried out the review in line with the Pension Review guidance and it addressed Mr V's circumstances
- Our predecessor scheme the PIAOB likely wouldn't have told Prudential to do anything more if the ombudsman was satisfied the offer was made in line with the relevant guidance and addressed the circumstances. I think the offer did both
- Retirement in the guidance refers to taking benefits and not its more general use
- What the SIB described as actual loss (and the PIA described in its technical guidance as a combined actual and prospective loss) was the correct method to use in these circumstances to calculate the loss
- I think it was both right under the Pension Review and fair and reasonable to equate Mr V's taking of personal pension benefits to taking benefits from the OPS
- Prudential appear to have used a generous assumption in favour of Mr V when carrying out the calculation. And this is in line with the guidance which allows for such assumptions.
- I think the offer made in 2001 represents a fair and reasonable settlement to the complaint
- Mr V accepted the offer in full and final settlement – and the offer letter complied with the relevant guidance.

My final decision

For the reasons explained, I do not uphold this complaint and make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr V to accept or reject my decision before 13 September 2021.

Simon Hollingshead
Ombudsman