

## The complaint

Mr C complains that The Prudential Assurance Company Limited hasn't paid him an enhanced annuity.

## What happened

Mr C had a personal pension with Prudential. In 2009 he took the maximum tax-free cash from his pension pot and bought an annuity from Prudential with the balance of the pot. In 2010 Mr C was diagnosed with a medical condition that he believes he had at the time he bought the annuity, but which had been misdiagnosed.

In 2019 Prudential wrote to Mr C as part of a review of its annuity sales practices. The Financial Conduct Authority ('the FCA'), which regulates Prudential, had asked it to carry out the review to consider whether customers such as Mr C had been made aware:

- that they could receive a higher income if they had certain medical or lifestyle conditions (known as an 'enhanced annuity').
- that they could shop around with other providers to see if they could get a higher annuity income.

Mr C filled in the questionnaire provided, which sought information about medical conditions Mr C had at the time he took out the annuity, including the date of diagnosis. Among other things, it also asked whether he smoked at that time. Mr C indicated that he smoked 15 cigarettes and 5 cigars a day. Mr C also indicated that he'd chosen his annuity options based on the information provided in the retirement pack only, rather than the retirement pack and/or information provided during a telephone call with a Prudential agent.

In the notes section of the questionnaire Mr C indicated he wasn't aware of enhanced annuities when reading the retirement pack or that he could shop around. He mentioned that he was receiving treatment for a medical condition mentioned in the questionnaire that he'd been suffering from before he'd taken out the annuity, but it was diagnosed afterwards. Mr C also rang Prudential to tell it that and that he thought it'd been misdiagnosed by his doctor at the time he'd taken out the annuity.

Prudential wrote to Mr C in mid-July 2019 indicating that it had reviewed the documentation completed by Mr C at the time he took out the annuity, along with any telephone calls at the time. It concluded he had been made aware of the options available to him before purchasing the annuity.

In late July and early August 2019 Mr C rang Prudential a couple of times to discuss the review. He mentioned again the situation with the health condition he'd had at the time he'd taken out the annuity and he also said he wanted evidence as to why his review case was compliant. Prudential's notes indicate it told Mr C that, as he'd selected the retirement pack option on the questionnaire, all information would've been included in the pack.

Prudential treated the early August call as a complaint and provided a response to Mr C by letter dated 5 September. It didn't uphold the complaint. Among other things it said that it

was sorry to hear he'd been misdiagnosed by his doctor, but Prudential was unable to retrospectively take into account a medical condition he'd been diagnosed with after he took out the annuity, as it wasn't made aware of the condition at the time.

Mr C brought his complaint to us. Our investigator looked into it. She didn't uphold it. In her view, Mr C had been made aware of the option of an enhanced annuity at the time he took it out. She also said he'd been made aware at that time that Prudential wouldn't pay an enhanced annuity if he was diagnosed after he took it out. Our investigator said she understood that Mr C now knew he'd had a condition which would've meant he qualified for an enhanced annuity, but it's not reasonable to expect Prudential to retrospectively honour this. Prudential were guided by the answers provided to them at the time and the ombudsman service can't hold them at fault if he was mis-diagnosed by his GP.

Mr C remained unhappy, so the complaint came to me for a decision from an ombudsman.

On 30 April 2021 I issued a provisional decision. My provisional findings were as follows:

*I'm not going to tell Prudential to do anything further about Mr C's annuity in relation to his medical condition, for much the same reasons as our investigator give. I'll explain why shortly.*

*But I do think that based on what I've seen to date, Prudential didn't adequately inform Mr C prior to him taking out the annuity in 2009 that a lifestyle condition such as smoking may entitle him to an enhanced annuity. As this wasn't an issue considered by our investigator, I'm giving Mr C and Prudential a chance to comment before I make my final decision.*

#### The medical condition

*I appreciate that it is very frustrating for Mr C that he was diagnosed with a medical condition shortly after he took out the annuity that, if it had been correctly diagnosed, most likely would've meant he'd receive a higher income. But I don't think it would be fair of me to make Prudential pay an increased annuity for an error that wasn't its fault. Prudential calculate what annuity it can offer based on the information available to it at the time and made it clear that medical conditions diagnosed after an annuity is taken out can't result in an increase.*

*Mr C wants Prudential, as part of its 2019 review, to take account of his then misdiagnosed medical condition. But this wasn't what the review was set up to address. Its review of pension annuity sales carried out at the request of the FCA was meant to look at the information provided to Mr C at the time he took out the annuity and assess whether he was given enough information about enhanced annuities and his right to shop around. Prudential did make him aware that medical conditions could lead to a higher annuity both in the Key Facts information he was provided with and during a phone call shortly prior to him buying his annuity. As far as I'm able to tell Mr C doesn't dispute that he was aware at the time he took out the annuity that he could do this. So I'm not going to ask Prudential to do anything further in relation to Mr C's medical condition.*

#### Lifestyle condition – smoking

*As I've mentioned previously, on the 2019 questionnaire Mr C indicated that at the time he took out the annuity he smoked 15 cigarettes and 5 cigars a day. Smoking is what is known as a 'lifestyle condition' for enhanced annuity purposes and it's possible, and in my view probable, that Mr C would've qualified for an enhanced annuity on that basis.*

*I've listened carefully to the telephone conversation between Mr C and Prudential that took place on 30 September 2009, only two days before Mr C applied for the annuity. During the*

call the Prudential representative said:

*“if you have any illnesses or lifestyle conditions that may shorten your life expectancy, we may offer an enhancement to your income..”*

*The representative then mentioned cancer, diabetes and high blood pressure as examples and asked Mr C if he had anything like that. Mr C said he didn't. There was no explanation by the representative as to what a lifestyle condition was, and smoking wasn't mentioned.*

*Mr C's application for an annuity appears to be dated 2 October 2009, so must've been completed very shortly after receiving the quotes and other information from Prudential. Prudential says Mr C would've been provided with a copy of the Key Facts for the annuity and has provided us with a copy of it for the Income Choice annuity. I've looked at it very carefully, and I can't see any mention at all the possibility of receiving an enhanced annuity for a lifestyle condition, and smoking is not mentioned anywhere. The information about enhanced annuities on page 24 of the Key Facts refers only to medical conditions.*

*Taking account of this information, I'm not persuaded that Prudential did enough to make Mr C aware that smoking was a lifestyle condition that might qualify him for an enhanced annuity. I think if Mr C had been made aware, it's more likely than not that he would've asked Prudential for a quote on that basis. There is no reason to think he wouldn't have, particularly if alerted to it during the telephone call prior to sending the Key Facts and quotes.*

*Subject to any comments from the parties, I propose to tell Prudential to carry out a process designed to assess if Mr C would've qualified for an enhanced annuity on the basis of his lifestyle conditions, including smoking, and if so, to put him in the position he would've been in if that were the case.*

My provisional decision was that Prudential should:

1. Obtain from Mr C a completed enhanced annuity questionnaire, with the questions answered on the basis of Mr C's smoking (and any other applicable lifestyle conditions) at around 2 October 2009.
2. Obtain confirmation from at least three reputable enhanced annuity providers as to whether Mr C would have qualified for an enhanced annuity in October 2009, on the basis of that questionnaire and the value of his fund as at that date.
3. Provide Mr C with a copy of the written responses from those providers.
4. If Mr C could have qualified for an enhanced annuity, obtain confirmation of the best enhanced annuity that would have been offered, on the same basis as the annuity currently in force for Mr C.
5. If the enhanced annuity in (4) would have been higher than the one currently in payment, set up an additional annuity for Mr C, on the same basis as his existing one, to provide the difference.
6. Pay Mr C all backdated income missed between October 2009 and the date the new annuity is set up as a lump sum, together with interest at the rate of 8% simple interest per year on each missed amount from the date it should have been paid to the date of settlement.

Mr C responded to my decision by expressing some doubts about Prudential's likely response and said he would await the outcome.

Prudential said:

- Mr C's level of smoking wasn't enough on its own to qualify him for an enhanced

annuity under Prudential's guidelines unless he had another condition.

- The Key Features Document for the income choice annuity which Mr C would've received at the point of sale as part of the Prudential's Retirement Pack referred to smoking. Since Mr C said in his response to the annuity sales review that he'd only relied on the Retirement Pack, the sale of the annuity to him had been compliant. If Mr C say he also relied on the telephone call to make his decision Prudential is happy to review his case again.
- If Mr C relied on the calls, he would be due a 6.35% uplift to his annuity and Prudential will pay the arrears plus 8% interest.

Prudential also said it had concerns with my proposed redress as:

- The type of annuity Mr C selected, the income choice annuity, is only provided by Prudential. Because of this, as part of the annuity sales review the FCA agreed with Prudential that it couldn't be compared with standard annuities on the open market. Therefore, it was also agreed with the FCA that Prudential would only have to look at what a customer would've received under an enhanced annuity provided by Prudential.

It can't obtain the information from other businesses that I asked it to.

On 19 July 2021 I issued a second provisional decision. My findings were as follows:

*I still propose to uphold Mr C's complaint, but with compensation assessed in a different way. I'll explain why.*

*Neither Mr C nor Prudential have commented on that part of my first provisional decision that dealt with Mr C's health condition, so I see no reason to change that part of my findings.*

*I've thought very carefully about what Prudential has had to say in response to my provisional decision. I think it is more likely than not that Mr C must've relied on the information given in his phone call with Prudential to reach his annuity decision. I say this because the options sent to Mr C were narrowed down during the call. And the call took place only a couple of days before Mr C completed the paperwork for the annuity. For this reason alone I find Mr C did rely on the call.*

*I also note that neither of the Key Features Documents for the income choice annuity provided to our service refer to smoking, although Prudential have said that it did. It may be that the version of the document provided to Mr C did contain such a reference. But since Prudential hasn't provided me with a copy that does, I'm not persuaded that it did. And even if it did, I'm satisfied that Mr C also relied on the phone call.*

*Given my findings, I'm persuaded that Mr C wasn't given the information he needed to consider whether he should apply for an enhanced annuity. I'm also persuaded that if he had been given such information he would have done so.*

*What I need to consider, in light of Prudential's comments on my proposed redress, is what is fair and reasonable in all the circumstances of this case.*

*I'm persuaded that it isn't possible for Prudential to obtain quotes from other companies given the unique nature of its annuity product that Mr C has had the benefit of. I've no reason to disbelieve it when it says that the FCA agreed that it could do a comparison based on what a customer would've received from an enhanced annuity provided by Prudential.*

*In this context I consider the proposal from Prudential is fair. It has said that Mr C would be entitled to an uplift in his annuity level of 6.35% and it would pay arrears with 8% interest. I note that in its comments on my decision, Prudential suggests that Mr C's level of smoking isn't sufficient on its own to qualify for an enhanced annuity. But since Mr C did have another medical condition at the time he took out the annuity, and since it has been prepared to make Mr C an offer if he did rely on the call, I think it fair that I tell Prudential to pay Mr C the increase in his annuity and the compensation that it has proposed.*

*I also propose to tell Prudential to pay Mr C £200 for the distress and inconvenience and distress caused to him by not receiving sufficient information and receiving less annuity than he should've.*

My second provisional decision was that The Prudential Assurance Company Limited should:

1. Increase the amount of annuity income Mr C is entitled to going forward by 6.35%, either by increasing his existing annuity or setting up an additional annuity on the same basis as his existing one, to provide the difference.
2. Pay Mr C all backdated income missed between October 2009 and the date the new annuity is set up as a lump sum, together with interest at the rate of 8% simple interest per year on each missed amount from the date it should have been paid to the date of settlement. If Prudential considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr C how much it's taken off. It should also give Mr C a certificate showing this if he asks for one, so he can reclaim the tax from HMRC, if appropriate.
3. Pay Mr C £200 for his distress and inconvenience.

In response to my second provisional decision Mr C said he awaited the final decision and Prudential said it had no further information to add.

### **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 neither party had any comments on my second provisional decision, I see no reason to change it.

### **My final decision**

The Prudential Assurance Company Limited should:

1. Increase the amount of annuity income Mr C is entitled to going forward by 6.35%, either by increasing his existing annuity or setting up an additional annuity on the same basis as his existing one, to provide the difference.
2. Pay Mr C all backdated income missed between October 2009 and the date the new annuity is set up as a lump sum, together with interest at the rate of 8% simple interest per year on each missed amount from the date it should have been paid to the date of settlement. If Prudential considers that it's required by HM Revenue & Customs to take off income tax from that interest, it should tell Mr C how much it's taken off. It should also give Mr C a certificate showing this if he asks for one, so he can reclaim the tax from HMRC, if appropriate.
3. Pay Mr C £200 for his distress and inconvenience.

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

Helen Wheatley  
**Ombudsman**