

## **The complaint**

Mr S complains about a section 32 buyout policy he bought from The Prudential Assurance Company Limited (Prudential).

## **What happened**

Mr S said he bought a section 32 buyout policy from the Prudential in 1988. The policy secured the benefits from a defined benefit scheme. In late 2020 he asked for a benefit illustration but the Prudential said that it could not provide them. It also said it had sent letters in February and March 1999 regarding a pension review and he had not responded. As 6 years had passed, he was out of time to complain. He said he had no record of the letters, was unlikely to have ignored them and had he received them he would have replied.

Mr S looked back at the 1988 illustrations which assumed growth rates of 8.5 and 13% over the term and stated that those were not guaranteed. However there was no mention that annuity rates were variable. He therefore thought the original illustration was misleading. He thought he should be paid his entitlement based on the annuity rate in the original illustration.

Mr S supplied information to show what he said were extenuating circumstances that prevented him complaining sooner. He said he and his wife had 5 policies with the Prudential and reviews were completed on two, with offers made and accepted. It therefore seemed odd that he would not have replied to similar letters on the section 32 policy.

The Prudential said it considered the information about extenuating circumstances but still felt the complaint was out of time. It wrote twice in 1999 offering a review but he didn't reply. While it noted his wife's health difficulties it noted it had written to him in April 2000 about another policy and he did respond and redress was paid. It said due to that its view had not changed. It said it had addressed the issue of annuity rates. It said the regulator rules allowed 3 years from when you were aware you had reason to complain and he was now out of time as he should have known in 1999. The illustrations were clear they were not guaranteed as were the annuity rates not guaranteed. It referred to the notes on the reverse of the illustrations.

The investigator said he didn't think we could look at the complaint. He said the rules under which this Service operates are set down in the Dispute Resolution (DISP) rules of the Financial Conduct Authority (FCA) Handbook. The Financial Ombudsman Service cannot consider a complaint if it is (a) six years after the event complained of; or (if later) or (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint unless there are exceptional circumstances.

He didn't think there were exceptional circumstances as Mr S replied to another review in 2000. He said that the pension review was done at the instruction of the regulator at the time. The prudential had provided evidence from its database that the letters were sent and provided an example letter. On balance he thought at least one of the letters would have been delivered. This letter would have alerted him to his reason to complain. As there was

now more than six years since the advice was given and three years from the date, he should have known he had cause for complaint, this service could not assist. He also said he had asked the prudential to provide support so Mr S could understand his plan.

Mr S didn't agree. He didn't think it was fair the Prudential was believed when it said it sent the letters but he wasn't believed when he said he hadn't received them. He felt the fact he replied to a review in 2000 showed that there were extenuating circumstance preventing him from replying at the time of the first review, the Prudential had adopted a different interpretation to their advantage. He felt he only became aware he had reason to complain when he contacted the Prudential 18 months ago to ask for illustrations, he felt the Prudential had unilaterally changed the terms of the policy so that the original illustrations were no longer valid. He had not received any reply to his request for help form the Prudential. Since then the prudential had resent the options pack but were still unbale to do illustrations. His big issue remained that the illustration did not make clear that the annuity rate would change.

The Investigator replied to say that the fact Mr S replied to review letters in 2000 showed he could reply at the time and therefore he was in a position to respond to letter at that time which was within 3 years. The letter would have alerted him to the fact he could have cause to complain. Prudential had provided evidence from their database and copy letters. The Prudential were not obliged to provide projections.

Mr S subsequently submitted more evidence and information by way of background including of continuing poor service from the Prudential which he felt underlined they were less likely to have sent the 1999 letter they said they had. He was also frustrated by his options and that transferring the policy value meant he would miss out on the enhanced tax-free cash he was entitled to receive. He repeated his claim that the fact he responded to letters in 2000 showed he would have replied had the 1999 letters been received.

### **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.

Before I consider what Mr S complain about, I must first consider if this is a complaint that this service is able to consider.

#### *What this service can consider*

There are rules that govern what this service can consider, these are in the Dispute Resolution rules, DISP, for short.

The relevant part of paragraph 2.8.2 of the DISP Rules states:

*The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:*

*(1) more than six months after the date on which the respondent sent the complainant its final response or redress determination; or*

*(2) more than:*

*(a) six years after the event complained of; or (if later)*

*(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;*

*unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;*

*unless:*

*(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances.*

It is not disputed that the original policy complained about was taken out in 1998 which is more than six year ago. Under the rules I must therefore consider whether Mr S has brought his complaint within '*three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint*'

For the purposes of this complaint the Prudential argues the three years runs from 1999 when it contacted Mr S about a review of his pension, instigated at the direction of the then Regulator. Mr S says he didn't get those letters and he wasn't aware he had reason to complain until he contacted the Prudential and should therefore be able to complain.

While the letters don't start the three-year period running, they would have triggered a series of events that meant Mr S should have been aware he had cause to complaint (*or ought reasonably to have become aware*) and thus started the three years. The review process was monitored by the regulator and completed by 2004 which is more than 3 years ago so the review would have been completed more than 3 years before this complaint was brought.

Where there is conflicting evidence, such as whether the 1999 letters were sent and received, I need to decide based on the balance of probabilities.

I have seen system records showing a letter and questionnaire was sent to Mr S on 19/2/99 and 18/3/99 (reminder). I have seen a sample review letter and questionnaire for a policy such as Mr S's. The Prudential has confirmed that Mr S's address records have not changed. Based on this evidence I think it is reasonable to accept that the letters were sent as the Prudential says they were. As there has been no change of address it seems reasonable to accept that they were sent to the correct address.

I do however accept that this does not guarantee that the letters were received by Mr S as letters do get lost in the post. However the regulator at the time did not require the letters to be sent by any form of registered post. On balance even if one letter was lost in the post it would seem most unlikely that both letters were lost, so I think it is more likely than not that Mr S received at least one of the letters, even though he has no record of doing so.

I have considered the fact Mr S responded to a similar letter in 2000 regarding another policy. I agree this does show that had he received the letter he would most likely have responded. I cannot explain why Mr S didn't reply in 1999 nor within the following three years but he didn't and I have already concluded that on balance it was more likely than not that at least one letter would have been received.

I have considered Mr S's more recent evidence of what he says is poor service from the Prudential. But that does not mean that the Prudential didn't send the letters in 1999 and I have already decided based on the evidence that on balance he would have received at least one.

As the letters would have led to a process by which Mr S would have understood he had reason to complain (*or ought reasonably to have become aware*) it is now more than 3 years ago and more than 3 years since the complaints were drawn to a conclusion in 2004. Based on the rules as set out I think Mr S is out of time such that this service cannot consider his complaint unless the Prudential agrees, which it does not.

I however consider if I think there were exceptional circumstances that resulted in his failure to comply.

#### *Exceptional circumstances*

It is for this service and not the business to decide if there were exceptional circumstance that meant Mr S could not bring his complaint in time.

I have considered the severity of the circumstances he has described, the period of time they covered and whether they stopped Mr S making a complaint, how close to the end of the time limit they occurred and for how long, to what extent Mr S was able to continue with other day to day activities and how far out of time the complaint was made.

Mr S has indicated that his wife was suffering from an illness that required significant one to one support from him in addition to working full time. Based on what he has said it does seem that he would have been very difficult and busy with significant demands and pressure on him and on this time.

However for the purposes of exceptional circumstances I need to consider whether such issues prevented him from responding throughout the whole of the following three years after the letters were sent or at least until 2004 by which time the complaints were completed. Given that he did respond to other letters in 2000 it does not seem that he was prevented from replying throughout the whole of the three years. So based on that evidence I do not think there were exceptional circumstances that prevented him from replying within time.

#### *What is the nature of Mr S's complaint?*

But the regulator review started in 1999, was intended to deal with claims that the policy Mr S was sold was not suitable for him or in other words was mis-sold to him. That does not mean he cannot complaint about anything relating to the policy such for example a recent administrative error. I have therefore carefully considered what Mr S was complaining about to be sure his complaint relates to mis-selling.

He has complained about the annuity rate applicable to the policy and says that the illustrations did not make clear that it would change. He believes he should be entitled to the rate applicable at the time the policy was taken out and shown in the illustrations. I have reviewed the papers provided and in particular the terms printed on the reverse of the document and also the follow section which said.

*These two amounts do not represent the upper and lower limits of the possible amount of the benefit. What is actually paid will depend on the bonuses added to the guaranteed benefits which in turn allow for the actual benefit which would be payable on death before retirement and the terms ruling at the date of retirement for converting cash into annuity.*

I think this makes clear the annuity rate (broadly the rate at which cash is converted into income) was not fixed at that time. When I pointed this out to Mr S said he said he understood the point I was making. But said that at the time he would have taken it to mean that due to the future value of the fund not being fixed the annuity value shown would

change. He would have taken terms ruling at date of retirement to mean general terms such as when pension would be payable i.e. monthly in advance, legislative changes regarding tax etc.

Going back to the 80's he felt most people's knowledge of pensions was minimal and it was very easy to mislead clients into purchasing policies that were primarily for the benefit of the provider and not the customer. It was not until he retired and was looking at making use of his fund that he started to query how and why he was advised to invest in a Bond 32 in the first place and found that what I had was not what I had believed i.e. a policy to provide me with a straightforward pension.

While I note what Mr S is saying, for the reasons given, I think the policy terms made clear that the annuity rate was not fixed, whether or not he understood that at the time. His complaint that he thought he was buying a 'straightforward pension', is in essence a complaint that what he was sold was not suitable, i.e. it was mis-sold. I have already concluded that he is out of time to bring such a complaint.

Mr S also asked various other questions including:-

1. why he was advised to take out the section 32 bond in the first place?
2. Whether there should have been guarantees attached to the policy?
3. Why the Prudential would not honour what was indicated on the original illustrations which included providing an annuity.

In my view these are in essence questions that relate to the suitability of the policy and therefore mis-selling of the policy. I have already commented that the terms did indicate the annuity rate wasn't fixed.

Mr S also asked why he was not informed when the Prudential decided to no longer offer illustrations on this type of policy and that they would no longer provide annuities. Based on what the Prudential has said it seems this was a business decision and this service cannot tell the Prudential how to run its business. The previous illustrations and terms I have seen do not provide a commitment that illustrations will always be available.

He also said that as he understood it, he could not transfer the policy as a Section 32 to another provider as he would have to forgo the enhanced tax free cash benefit or he could cash in the full amount and pay a heavy tax bill. This service cannot advise Mr S on his options nor which is best for him and he would need to take independent financial advice to assist him.

So while I am sorry to disappoint Mr S I don't think this service can assist him with his complaint as it is out of time.

### **My final decision**

This service cannot consider his complaint of mis-selling as it was not brought to this service within the time limits set out in the rules governing this service.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 31 August 2022.

Colette Bewley

**Ombudsman**