DRN-3638705

The complaint

Miss E complains that Phoenix Life Limited (Phoenix Life) has recently confirmed it will pay her a yearly pension income of £3,304.11, instead of the £4,838.35 it stated it would pay her in correspondence from 2009. She wants the original annuity figure to be honoured. She also thinks the pension should have been index linked or invested from 2009 to date, so that it maintained its real value.

What happened

Miss E had been a member of an occupational pension scheme (OPS) which was wound up in 2009. As a result the cash equivalent value of the OPS benefits was used to purchase a non profit deferred annuity (NPDA) which was then administered by Phoenix Life. I understand the administration of the plan is now carried out by a different firm – who has provided information about this complaint. But for clarity I shall only refer to Phoenix Life throughout this decision.

An email which Phoenix Life sent to Miss E in 2009, which confirmed the plan was a NPDA, explained that no further bonuses would be accrued and the value of the annuity at Miss E's normal retirement date (NRD) of July 2020 would be the same as that calculated in 2009. But the payments would increase in line with certain percentages *during* retirement.

A letter from Phoenix Life's annuities department issued on 29 July 2009 confirmed the annuity payment at NRD would be £4,838.35. It also set out how any tax that might be due would be collected.

But a benefit certificate dated 4 August 2009 that Phoenix Life sent Miss E showing her preserved benefits at her NRD, confirmed she would receive a total pension of £3,304.11. The certificate confirmed that the pension included "*revaluation in deferment to NRD*" and outlined the increases she could expect to her pension "*whilst in payment".*

Six months before her NRD Miss E received a pre retirement pack from Phoenix Life which noted that her annual pension entitlement would be £3,304.11. This figure was also noted in the pack she received just prior to her NRD.

In October 2020 Miss E contacted Phoenix Life about the options on her plan and she requested confirmation of the annuity calculation. But she remained concerned that the annuity she'd been told she would receive was around £1,500 lower than the figure she'd been given in the correspondence from July 2009. So she complained about the shortfall while also requesting further clarification about the (index linked) increases she could expect from her payments going forward.
Phoenix Life asked Miss E to provide the letter she'd received in 2009 so that it could investigate the matter. It then said it had discovered an error had taken place in the calculation from 2009. It said the *death benefit in retirement* figure of £1,534.24 had been added to the annuity payment – which should only have been £3,304.11. Having checked the original annuity it was satisfied the figure was correct but said it recognised its error had caused Miss E some distress and inconvenience and offered her £200 compensation.

But Miss E remained of the view that she should be paid the higher annuity amount that was set out to her in the July 2009 letter, so she brought her complaint to us. In her submission Miss E posed the following questions:

- She had a number of other pensions whose providers all provided annual statements – except for Phoenix Life. She wanted to know why that was.
- She understood her pension provided for index linked annual increases – which meant she had expected her guaranteed pension from 2009 to include annual increases for inflation, instead of facing an overall real reduction in the pension's value.
- She hadn't received any correspondence between July 2009 and early December 2020 to explain that the 2009 letter was sent in error. It wasn't until 10 December 2020 that she was made aware of the "error". She didn't think this was fair especially as Phoenix Life's letter was only sent in response to her query about a discrepancy in its figures.
- She thought that as her pension had been an index linked final salary pension it should have been index linked from 2009 to present day values. She thought to accept the higher 2009 income – which would only be index linked from July 2020, was a compromise on her behalf.
- She had yet to receive any income payments from Phoenix Life.

So, one of our investigators looked into the matter. She didn't think the complaint should be upheld making the following points in support of her assessment:

- Phoenix Life accepted it had made an error in its calculation, so the consideration needed to be whether the error was made in 2009 or 2020.
- Although Phoenix Life said the July 2009 letter gave the wrong annuity figure, a benefit certificate issued the following month did set out the correct payment. Miss E said she hadn't received that correspondence, but the investigator thought that on balance it was likely she had, as it was sent to the same address as the July 2009 letter – which had been received.
- So she was satisfied the error was made in the July 2009 letter and that Miss E's correct entitlement was £3,304.11. She didn't think it was fair to ask Phoenix Life to pay an incorrect amount that Miss E wasn't entitled to.
- But she did think that Miss E had been caused some upset in finding out that her 'expected' pension income had reduced by around one third between 2009 and 2020. She thought Phoenix Life's offer of £200 for this trouble and upset was fair and reasonable.
- She hadn't seen any evidence that, following the OPS being wound up, there were any guarantees that the income would be index linked up to the NRD.

Miss E didn't agree. She made the following points in response:

- She should be able to trust the contents of a letter sent to her from a large company like Phoenix Life – or at least expect any errors to be promptly notified with a full explanation of what had happened, with an apology. She didn't think it was reasonable for this error to only come to light over 11 years later.

- Phoenix Life would have appropriate insurance to cover employee errors such as this rather than the customer having to cover any financial loss which may have occurred.
- She hadn't said she didn't receive any statements about her plan, simply that she hadn't received regular annual statements.
- Phoenix Life's email to her from September 2021 referred to index linking being compounded in 2009 when it took over the scheme. But she wasn't clear how it could

be projected forward without knowing the factors, such as inflation or RPI for example – which would have occurred in the proceeding 11 years. She expected some growth on the annuity to provide the guarantees that are a usually seen as a benefit of final salary schemes.

But as no resolution could be found the case has been passed to me to review.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done so, I've reached the same outcome as the investigator. I know this is an outcome that will disappoint Miss E – I've seen the strength of her feelings about this matter from her submissions. But I don't think Phoenix Life needs to do anything beyond the offer of compensation it's made – so I'll explain my reasons.

I've been provided with a policy information sheet that Phoenix Life said was issued to Miss E at the time her wound up OPS benefits were used to buy a pension plan administered by Phoenix Life. The sheet provided a definition of its plan as follows, "*the benefits are held in the form of a Non Profit Deferred Annuity (NPDA). This is an individual policy held in the member's name that was issued following the wind up of a defined benefit scheme. This policy provides a defined benefit that was decided at the scheme wind up and calculated as at the member's NRD. If the member decides to take theirs before their NRD an early retirement factor may apply. We are unable to provide a table of early factors as these are in-built in the calculators we use.*"

I've set out this definition as a background to the complaint issue which focuses on whether Phoenix Life has provided an annuity along the lines that it said it would and also whether the conflicting information it provided about the amount of pension income was a error that Phoenix Life should now have to put right.

Which annuity payment should Miss E receive?

Miss E says Phoenix Life made her aware that her annual annuity payment - starting in 2020 - would be £4,838.35, in a letter it sent her in July 2009. She says this was the amount she assumed she would receive and has been planning towards that figure from that time.

Phoenix Life doesn't have a record of that letter on its system because it thinks it was a 'one off' letter which clearly contained an error. It says the error was that the *death benefit in retirement* amount of £1,534.24 was added to the annuity figure thereby giving an inflated but incorrect amount. It says the benefit certificate it sent Miss E afterwards contained the correct information – which it has now confirmed as being correct after being rechecked. It says this information was also set out in its retirement pack in January and July 2020.

So I've looked at all the information which Phoenix Life says it sent Miss E in both 2009 and 2020 to work out where the error was, more likely than not, made.

In July 2009 Miss E received a letter from Phoenix Life which stated that, "*we advise you that a pension has been set up with an annual gross payment of £4,838.35 payable in monthly instalments less tax if applicable.*" The letter, which had the reference "*annuities*", gave Miss E confirmation of what she could expect as her pension payment starting on 25 July 2020 – some 11 years ahead.

But Phoenix Life has also provided a copy of a letter it sent to Miss E on 4 August 2009 – to the same address, and which included a benefit certificate. The certificate detailed her "*paid up entitlement"*, and comprised of a pension at NRD as follows:

£1,694.71 p.a pre 6th April 1997 pension.
£525.20 p.a pre 6th April 1988 GMP
£1,084.20 p.a pre 6th April 1988 GMP

Total Pension- £3,304.11 p.a

So Phoenix Life sent Miss E two different annuities payment figures within a week of each other in separate letters. I think the second letter with the benefit certificate would have appeared more 'formal' to Miss E, as it included a lot of personal information about her OPS service and an explanation of how the annuity had been arrived at. Whereas the July letter simply stated the gross annual annuity payment. And I would have expected Miss E to have queried the significant discrepancy between the figures as it would have caused confusion about what she should expect.

But Miss E says she didn't receive the second letter with the certificate. And while I'm satisfied that Phoenix Life would have dispatched the letter and that it was sent to the same address as the other letter from July 2020, I can't discount the fact that it wasn't received by Miss E as there's no evidence to confirm its acknowledgement. So, while I think the evidence does demonstrate the existence of documentation which would have either confirmed the correct annuity payment or at least enabled Miss E to question the discrepancy – which would presumably have led to her being advised of the correct (lower) figure, I can't safely conclude that Miss E was made aware of the information contained in the benefit certificate.

But even if Miss E didn't receive the benefit certificate in 2009, and her only notification of the annuity she was going to receive was the higher figure from the July 2009 letter, there's still good reason to conclude that the figure she was made aware of in the 2020 retirement pack was correct and is the pension income she should receive.

I note the retirement pack, which was issued in January 2020, was consistent in the annuity figure it quoted with the pension information within the benefit certificate from August 2009. But I haven't seen any separate documentation which corroborated the annuity figure contained in the 'one off' letter from July 2009 – which noted the higher annuity of £4,838.35.

I've also taken into account the "*estimated death benefits*" from the January 2020 pack – which was £1,652.06. This was not dissimilar to the figure of £1,534.24 which Phoenix has explained had been incorrectly added to the basic annuity figure in 2009. So overall I've given more weight to this evidence which would suggest to me that the correct figure from 2009 should have been £3,304.11. There's only one reference to the higher figure from 2009 which came within a personal letter to Miss E and set out the starting annuity and arrangements for collecting tax from her payments. I think that letter had more potential for individual employee error.

And I think it's more likely than not that the author of that letter, which was primarily about Miss E's tax position, made an error in adding together the death benefit and annuity figures. It's unfortunate this mistake occurred, and Phoenix Life has identified that the letter shouldn't have been sent out with the incorrect information. But I think it's generally accepted that errors can occur within such documentation and I don't think that automatically means that Miss E is entitled to what was written in the July 2009 letter. I don't think the letter constituted a 'contract'; it was a letter that was sent to Miss E about her tax situation, but which included an incorrect total of the annuity Phoenix Life would be paying her in 11 years' time. So I don't think Phoenix Life should have to honour the erroneous 2009 annuity payment of £4,838.35.

Miss E has suggested that Phoenix Life should absorb the cost of such an employee error through its liability insurance instead of her accepting it. But if I were to reach that conclusion then Miss E would be benefitting from a higher annuity than I think she was due. So it wouldn't be fair to consider that course of action. I don't think there's a loss for anyone to absorb as I'm satisfied the amount Miss E was told she will receive in 2020 is correct.

There's no dispute that an administrative error occurred here and one of Miss E's concerns was that it took over 11 years to come to light. She thought Phoenix Life should have picked up its error and made her aware of it sooner and apologised. And I can understand Miss E's frustrations here especially with regards to the length of time until it did come to light. But the mistake was made in a 'one off' letter which I don't think Phoenix Life would have had any reason to revisit. The information it gave out in its benefit certificate was correct and therefore I don't think Phoenix Life would have been aware of an error. The fact that it provided the same annuity figures in 2020 as it had within the benefit certificate would support that claim. It was only when Miss E was able to send the letter to Phoenix Life that it looked into the matter and realised its error. I don't think it was in a position to correct the error in 2009, or shortly after, as I don't think it was aware it had been made. There was no copy of the July 2009 letter on its system.

The matter of the index-linking

I haven't seen any evidence to show that Phoenix Life promised to increase the annuity in line with any index or benchmark from 2009 to Miss E's NRD. All the references I've seen are for increases "*in payment*". I know Miss E has referred to the usual benefits of a final salary OPS and the guarantees of payments that these usually offer, one of which is index linking. But from 2009 the scheme had been wound up, so Miss E wasn't receiving the benefits of the OPS, but those of a NPDA administered by Phoenix Life. Phoenix Life was entitled to set its own rules around the NPDA, it wasn't obliged to follow those of the OPS.

So I can't say Phoenix Life has done anything wrong by not including index linking each year from 2009. It has explained it included such a feature in 2009 by projecting ahead using its own figures and working out what the annuity would be using revaluations. I know Miss E thinks it isn't fair to make assumptions about the proceeding 11 years in 2009, as Phoenix Life wouldn't have known about the future costs and changes in indices. But that doesn't mean Phoenix Life did anything wrong as it was entitled to set out its criteria – which was its own commercial decision, and isn't something we would usually interfere with.

But I would have expected Phoenix Life to have confirmed the basis of its calculation to Miss E, which I think it did within the benefit certificate from August 2009, which stated that "*the pension shown above includes revaluation in deferment to NRD."* So I don't think it raised any expectations of additional index linking of the annuity up to Miss E's NRD. It also set out the increases that would apply to the various components of the pension "*whilst in payment",* so the only references to any increases were quite specific in referring to the annuity income payment once it was being made to Miss E.

So I don't think it's fair to say Phoenix Life didn't apply index linking according to how it said it would in the benefit certificate.
I've also taken into account that the plan Miss E held was an NPDA which by its very nature wouldn't usually have benefitted from the addition of bonuses or investment growth.

Phoenix's offer of compensation

However, Phoenix Life clearly made an error in the figures it set out in the July 2009 letter. I think this raised Miss E's expectations of what she would receive, so the consideration here is to what extent Miss E's expectations have been raised.

I've thought carefully about the impact this would have had on her over an extended period of time. I don't underestimate the concern and distress she would have experienced when she was made aware that she wouldn't receive the higher annuity amount. But overall, I think the amount Phoenix has offered is within the range of what I would expect to see for an error and subsequent impact such as this.

Putting things right

Phoenix Life has already made an offer to pay £200 to settle the complaint and I think this offer is fair in all the circumstances.

My final decision

So my decision is that Phoenix Life Limited should pay £200.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss E to accept or reject my decision before 6 September 2022.

Keith Lawrence
Ombudsman