

The complaint

Mr J says Novia Financial Plc (Novia) failed to conduct a benefit crystallisation event (BCE) assessment when he reached 75, as required under the Lifetime Allowance (LTA) provisions. He says this meant there were delays when he wanted to switch to a different Self-invested Personal Pension (SIPP) provider. And this caused him financial detriment.

Mr J is represented by his financial adviser firm, The Private Office (TPO).

What happened

Mr J held three SIPP accounts with Novia, which became his provider in the summer of 2016. At the time of the events complained about in 2020 these were worth around £1.1m. Two of his pensions had been crystallised and were in drawdown. His largest pension had a fund value of about £852,000, this was uncrystallised.

The switch of Mr J's Novia SIPPs to a different provider was part of a batch request by his adviser. Both firms had agreed all clients would have their investments sold to cash by Novia on receipt of the transfer paperwork and then funds sent to TPO for reinvestment.

Novia says that the request to switch Mr J's SIPPs was received from TPO on 8 October 2020 at which point his investments were sold to cash in accordance with the process it had agreed. But when it attempted to transfer the funds to the new provider it identified that it didn't have certain LTA information it needed to complete the transaction.

It's of note there are a number of BCE's pension holders are subject to, which can occur at different times. For example, when a member buys a lifetime annuity or when they receive a tax-free lump sum. The full list of BCEs is set out in HMRC's Pension Tax Manual.

Of relevance to this case is the BCE calculation HMRC require when a pension holder reaches 75. This assessment is carried out by the pension scheme administrator. It reviews the value of the benefits in a member's pension(s) against the relevant LTA. This is important as Government sets a limit and if this is breached the member will be liable to a tax charge on any surplus.

As it was preparing to switch Mr J's SIPP, Novia identified that he was already 79, but relevant BCE tests hadn't been conducted when he'd reached 75. This meant it had to carry out the exercise retrospectively before it could release his funds to TPO. The relevant BCE's were:

BCE 5A - Where a member reaches age 75 with a drawdown pension fund or flexi-access drawdown fund.

BCE 5B - Where a member reaches 75 under a money purchase arrangement in which there are remaining unused funds.

On Mr J's behalf, TPO has raised a number of concerns about what happened. It summarised his position in the following terms:

“...Novia, as scheme administrator, had a responsibility and requirement to undertake the relevant BCE test at the point the member reached age 75. Mr J, at the point in time that the recommendation to move away from Novia was made, was aged 79, meaning...it was almost 5 years after the point at which it should have been actioned.’

“...even accounting for the fact that the required BCE test was not undertaken, they failed to follow their own processes whereby checks would be undertaken on an individual’s account as to whether any BCE (or other) tests were required PRIOR to selling down assets held. In this instance, Novia failed to follow this process and dis-investing Mr J’s assets prior to then raising the issue of the BCE test and requesting additional information from Mr J and The Private Office. This resulted in an extended period of time where Mr J’s assets were not invested.”

Novia rejected Mr J’s complaint. It identified the failings of other firms such as TPO and his former pension administrator as causing some of the problems he experienced. In summarising its position it said:

“Since the delay was not due to any processing error on our behalf, that the sale to cash was in accordance with the agreed process with you, that you were aware of the delays and that you could have reinvested Mr J, I am satisfied that Novia is not responsible for any poor outcome for Mr J...”

An Investigator considered Mr J’s case and upheld it. She thought the root cause of the problems encountered in switching his SIPP was due to Novia’s failure to conduct a BCE when he reached 75. And she wasn’t persuaded by the argument made by it that TPO should’ve reinvested his cash through its platform until matters had been resolved.

Novia disagreed with the Investigator’s view, it promised her further arguments and evidence to support its case but this wasn’t forthcoming. Because both parties couldn’t agree with her findings and conclusions Mr J’s case was passed to me to review afresh.

I issued my provisional decision in October. I’m grateful to Novia for its response, which it summarised in the following terms:

“While we may disagree on some points of your decision, we agree that the outcome for the client was not reasonable and fair and we accept the decision to compensate the client accordingly.”

“Where we would like the FOS to review their decision is in regard to the determination that Novia is solely at fault for all losses the client has incurred. As Novia confirmed, TPO instructed Novia to sell down and elected not to reinvest the client and potentially mitigate any potential financial loss the client experienced due to the delays caused by the age 75 test.”

I’ve thought carefully about Novia’s submission in arriving at this final decision.

What I’ve decided – and why

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

Where there’s conflicting information about the events complained about and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what’s most likely to have happened.

I've not provided a detailed response to all the points raised in this case. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I'm upholding Mr J's complaint. I'll explain why.

The first thing I've considered is the extensive regulation around transactions like those performed by Novia for Mr J. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence.
- Principle 3, which requires a firm to take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.
- Principle 6, which requires a firm to pay due regard to the interests of its customers.

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They must always be complied with by regulated firms like Novia. As such, I need to have regard to them in deciding Mr J's complaint.

Mr J switched his pensions to Novia in the summer of 2016. He turned 75 a couple of months later. So the first question is why it failed to conduct the BCE tests 5A and 5B at this point in time.

Novia maintains it acted in accordance with HMRC regulations because LTA tests weren't required prior to the switch of Mr J's SIPP. It said the Pension Tax Manual didn't specify when BCE tests 5A and 5B had to be done, but rather stated they had to be conducted *as at* the members 75th birthday. Its systems enabled it to value members' pensions at any given point in time and therefore the tests could be done after a member reached the age of 75.

In order to consider when the LTA test should have been done, the Investigator reviewed the Pensions Tax Manual. She said:

"I've found the below excerpts to be the most relevant (the emphasis is my own) but I invite both parties to visit <https://www.gov.uk/hmrcinternal-manuals/pensions-tax-manual> [and review what it says]..."

*"There is nothing in the tax legislation requiring benefits to come into payment when the member reaches age 75. The tax legislation imposes a lifetime allowance test on these uncrystallised entitlements **at the member's 75th birthday**, whether or not the scheme pension and lump sum entitlements come into payment at that time."*

*"Benefits held in a registered pension scheme in respect of a scheme member will always have been tested against that member's lifetime allowance **by their 75th birthday**, whether or not those benefits have been drawn by that point. If benefits have not been drawn by the member's 75th birthday they are valued and tested for lifetime allowance purposes **at that point** by reference to one of the following types of BCE."*

*"As no BCE other than BCE 3 (PTM088630) can occur after age 75, benefits paid to or in respect of the member after that date are not tested against the lifetime allowance. However, they will already have been tested **on the member's 75th birthday** under BCE 5."*

I agree with the Investigator's conclusion here. The regulations require a BCE test be conducted once the member reaches the age of 75 and not afterwards. Indeed, it's difficult

to understand how someone could plan for and manage the potential impact of the LTA if the assessment wasn't conducted until a later date.

BCE 5A and 5B were not triggered by the switch of Mr J's pensions to another provider after the age of 75, as Novia suggested. As the Investigator identified, there are no further BCE's after the member reaches the age of 75, apart from BCE 3 (where a scheme pension already in payment to a member is increased beyond a permitted margin).

It therefore follows that Novia failed to follow the regulations correctly and the LTA test should have been done in 2016 (a few months after Mr J had transferred his pensions to Novia).

Novia proceeded to sell down Mr J's funds on receipt of the paperwork from TPO around 8 October 2020.

TPO has supplied notes of a call it had with Novia's Director of Risk and Compliance on 21 May 2021. These record that it wouldn't normally have sold down funds before completing the requirements for the LTA test, but in the case of Mr J it did so because of exceptional circumstances related to the agreement it had with TPO.

Novia provided a copy of the checklist it says was used at the time of processing the transfer for Mr J's SIPP's. While it confirmed the process had been followed, it also acknowledged the step for processors to check if the LTA test needed to be done before selling down hadn't been in place at the time. So it seems Novia has tightened up its procedures.

Given the obligation on pension scheme administrators set out by HMRC, I don't think Novia should've sold down Mr J's funds to cash when it did. It needed to have conducted the appropriate BCE tests against the relevant LTA.

I've also considered Novia's argument that Mr J had an opportunity to have reinvested the cash from his pensions through its platform until matters with the switch had been finalised. It says:

"...we do not agree with TPO that it would have been difficult, insufficient time or would have not been worthwhile [to reinvest Mr J's funds]. We have previously explained that Novia is an online platform and trading can be completed promptly and TPO were aware of the reason for the delay and the impact on the client since they raised these points with Novia on 11 November, 16 November and 3 December 2020, and did not take any action to mitigate the impact on the customer.

I've considered its point here carefully. Novia's response isn't without merit. There's a duty on customers and their advisers to mitigate losses. But I can also understand TPO's position – it said:

"The possibility of reinvesting funds was not considered at the time as re-investing would bring additional complications and potential further delays due to the timescales involved with this and then having to subsequently dis-invest again shortly after, in addition to placing them back in a position that TPO had considered to be no longer suitable. We had no visibility or awareness of how long the transfer process would take to finalise so could not reasonably consider re-investing without a known timescale and with the expectation this would [be] extremely short term meaning the risk of impact or detriment could be increased."

In January 2021, while matters were still being finalised, Novia said to TPO (bolding is my emphasis):

*“Although there is an active transfer request in progress, you are still able to access the client’s SIPP and reinvest the portfolio if you would like to do so. This is not a scenario that we see on a regular basis; **usually [former] schemes are far quicker to respond however in this instance reinvestment may be something that you wish to consider as we truthfully cannot provide a timescale for the transfer while we are reliant on the co-operation of two other pension schemes.**”*

On balance, I think the onus was on Novia. It was the firm which should’ve completed the BCE assessments for Mr J on his reaching 75 in 2016. Had it done so there wouldn’t have been a delay in processing the switch of his SIPP’s. And it sold down his funds without having completed the review against his LTA. The fact that it has now changed its procedure to ensure this doesn’t happen in future is telling.

Further, Novia’s suggestion that TPO should’ve thought about investing Mr J’s cash was made on 22 January 2021. I think the latter’s concerns about uncertain timescales and the potential to invest only to have to dis-invest days later would’ve come to fruition. I say this because the switch of his SIPPs were finally able to proceed on 27 January 2021. And while TPO had been concerned about the position from the middle of November 2020, I haven’t seen Novia gave it a sufficiently strong steer about how long things would take to finalise.

Novia has made arguments about the culpability of TPO and Mr J’s former pension providers for what happened. What it says in relation to the acts and omissions of other businesses and individuals, including the extent and impact of these and any resulting liabilities it incurs as a result, may or may not be the case. It may choose to pursue other parties – that’s a matter for it to decide. But I’m not considering a complaint against those parties here.

Putting things right

The Investigator’s proposal on redress was broadly correct, although a small adjustment needs to be provided for on any loss arising to allow for the returns these may’ve delivered.

If HMRC regulations had been followed correctly, the required LTA test would’ve been done at Mr J’s 75th birthday and it’s more likely than not there wouldn’t have been a delay to the switch of his SIPPs to a new provider.

So, it’s reasonable for Novia Financial Plc to ensure Mr J is put back in the position he would’ve been in now, as far as reasonably possible, had it not been for the failings I’ve identified it was responsible for.

Novia Financial Plc has confirmed that its standard timescales to complete pension switches is around 12 working days. So Mr J’s SIPP funds should’ve been with TPO around 26 October 2020. I understand that TPO received funds from his three SIPPs on 1 December 2020, 3 December 2020 and 29 January 2021.

Novia Financial Plc should therefore make an assessment to consider what, if any, loss of investment growth Mr J has incurred. It should assume TPO received his funds on 26 October 2020 and that these were invested in the same funds and the same proportions as eventually happened. The end date for the calculation will be when the pensions funds were actually received by TPO.

If Novia Financial Plc identified a loss, it should also pay interest on this calculated from the end date of the calculation to the date of settlement at 8% simple. If Novia considers that it’s required by HMRC to deduct income tax, it should tell Mr J how much has been taken off. It should also give him a tax deduction certificate if he asks for one, so he can reclaim the tax from HMRC if appropriate.

Novia Financial Plc should contact TPO directly to request any information it needs to make the required calculations and provide Mr J with the details of its redress in a clear and simple format.

When I'm considering a complaint like Mr J's I think about whether it's fair to award compensation for distress and inconvenience. This isn't intended to fine or punish a business – which is the job of the regulator. But when something's gone wrong, recognition of the emotional and practical impact can make a real difference.

We're all inconvenienced at times in our day-to-day lives – and in our dealings with other people, businesses and organisations. When thinking about compensation, I need to decide that the impact of Novia's actions was greater than just a minor inconvenience or upset. It's clear to me that this was the case here.

Novia Financial Plc caused Mr J worry about his pension arrangements and it's appropriate for it to pay him £200 for the distress and inconvenience it has caused.

My final decision

For the reasons I've set out, I'm upholding Mr J's complaint and require Novia Financial Plc to put things right in the way I've directed.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 2 December 2022.

Kevin Williamson

Ombudsman