

## **The complaint**

Mr W believes Phoenix Life Assurance Ltd (Phoenix) failed to properly reinstate funds into his occupational pension scheme (OPS), following the sale of his personal pension in 1992 having been reviewed as part of the Pensions Review in 1997.

## **What happened**

Mr W joined the OPS of his previous employer in August 1988. In 1991, he was approached by Phoenix who advised him to stop contributing into his OPS, and instead set up a private pension (PP) with them. He accepted this advice and stopped paying into his OPS in March 1991. However, Mr W re-joined his OPS in November 1995 and remained in it until he changed employment in May 2002.

The sale of Mr W's PP by Phoenix was reviewed by them in 1997 as part of the Industry-wide pensions review, and they concluded it had been mis-sold to him. Phoenix agreed to take steps to reinstate Mr W back into his OPS – in other words to put Mr W back into the exact position he would have been in (as much as possible) had he stayed in his OPS. And as part of the pension review resolution, Phoenix also provided Mr W with a 'pension guarantee', which set out that obligation.

Phoenix liaised with the Trustees of the OPS (the Trustees) to find out how much they needed to pay to reinstate Mr W into the OPS. The Trustees advised Phoenix in 2002 that the cost of reinstatement to the OPS was £5,325.95.

Phoenix then considered what Mr W had paid to their PP between April 1991 and November 1995 (the reinstatement period). They calculated Mr W had paid total premiums of £5,364.18, and that he'd paid £1,174.67 in additional National Insurance (NI) premiums – had he stayed in the OPS during the reinstatement period, he'd have benefitted by paying smaller 'contracted-out' rates. As these were the actual amounts paid in the reinstatement period, and the Trustees' reinstatement figure was based on the calculation date in November 2002, they were revalued to November 2002 rates, to allow accurate like-for-like calculations to be undertaken – this amounted to £11,296.08.

From this, they deducted the amount equating to what Mr W would have paid if he'd stayed in the OPS for the reinstatement period and revalued this too – this amounted £4,202.99, meaning Mr W had paid £7,093.09 more in that period (recalculated at 2002 rates) than he would have done had he remained in the OPS.

It wasn't possible for Phoenix to pay this extra amount back into Mr W's OPS plan – the amount paid was limited to the amount needed to place Mr W back in the position he would have been in had he not left the plan during the reinstatement period (£5,325.95 – as above). So, the excess amount was paid to the Trustees to invest in a separate AVC, which would be used to provide an extra pension at retirement. Phoenix sent a cheque to the Trustees for £12,436.16 in December 2002 - £5,325.95 (the cost to reinstate into the OPS), plus £7,093.09 (the extra amounts Mr W had paid), plus a small amount of interest.

Some years later Mr W became aware the reinstatement hadn't been carried out correctly. He'd approached the Trustees for a retirement quote, and in their response, they'd advised Mr W amounts relating to his Guaranteed Minimum Pension (GMP) hadn't been reinstated in 2002. Mr W then approached Phoenix to ask why this was and raised a complaint.

There followed some exchanges between Phoenix, the OPS Trustees and Mr W, to understand whether the 2002 reinstatement figure was correct. Phoenix then responded to Mr W's complaint, explaining the figure they'd used for reinstatement had been provided by the OPS Trustees. But they agreed they'd missed some of the text contained within the 2002 reinstatement letter that mentioned GMP (it was on another page, after the reinstatement figure was listed). They advised they'd made further enquiries with the OPS about this, and they'd make any further payment to the OPS, as necessary, once further information was received from the Trustees. And Phoenix offered to pay Mr W £200 as an apology for any trouble and upset caused.

Unhappy that he was still no closer to establishing the extent of any shortfall within his OPS, Mr W brought his complaint to this organisation. After making further enquiries with Phoenix, and whilst acknowledging that Phoenix had made mistakes, our investigator essentially concluded that Phoenix had taken the necessary steps to try and resolve the issues that caused Mr W's complaint. She felt Phoenix had made enquiries with the OPS Trustees and relied on the information they'd provided. And, that Mr W continued to benefit from the pensions guarantee. She also said the calculations needed to work out the reinstatement cost, and GMP/missing contributions, was complex – these would have been undertaken by actuaries, and if Mr W was unhappy with these he could consider engaging his own actuary to review them. But she felt Mr W had experienced considerable stress and anxiety since 2017 when he became aware of the reinstatement/GMP issues. She felt that Phoenix should pay Mr W an extra £500 to reflect the trouble and upset their actions have caused.

Mr W didn't think this provided a fair outcome and asked for his complaint to be reviewed by an Ombudsman. He said he won't be arranging for any independent checks of Phoenix's calculations to be done, because he believes he's never been reinstated. He also remains unhappy with certain elements of the AVC calculations. He asked that we explain what certain figures, variously provided by Phoenix, represent, and clarify the situation regarding his pension death benefits. Mr W also remained confused by what he felt were inconsistent and contradictory messages he'd received from Phoenix concerning what 'compensation' they'd paid as part of the reinstatement.

The case was passed to me to undertake a further review, in which I broadly agreed with our Investigator's conclusion, but with altered proposed redress. So, I issued a Provisional Decision (PD), inviting responses, in which I said as follows:

### *My Provisional Decision*

I want to begin by making clear I'm only considering a complaint against Phoenix here. I say this because Mr W has expressed dissatisfaction with the OPS/Trustees too, and I'm aware he has instigated separate complaints (via The Pensions Ombudsman) in relation to his concerns with them. This means I won't be commenting on questions Mr W has raised about his OPS death or spousal benefits. And accordingly, whilst I refer to the OPS/Trustees in this Decision, nothing I say should be taken as a criticism of them, or an opinion regarding what they have done or not done.

Turning to this complaint against Phoenix, they've fully accepted making a mistake in 2002 by not properly reading the reinstatement letter they received from the Trustees. This point isn't in dispute, so I don't need to make a finding on that issue here. Instead, I will only focus

on the actions Phoenix have taken – and I repeat Phoenix only, and not the OPS/Trustees - to reinstate Mr W to his OPS.

I also want to reassure Mr W I've read all of the documents he's sent us – he's sent many emails raising concerns about Phoenix's calculations. But in this decision, I won't be responding to every one of these – no discourtesy is intended by this. Instead, I'll focus only on what I consider the key elements of Mr W's Phoenix complaint – essentially did they do enough, or what I think they should have done once becoming aware of the reinstatement oversight, to rectify that issue. And having considered the evidence, broadly speaking I think Phoenix have taken reasonable steps to rectify their mistake. I'll explain why.

But I think it's important to first make clear what I think Phoenix's obligations were here. They knew they'd made a mistake. And to rectify that, it's clear they'd need information from the OPS/Trustees that only they could provide. Phoenix were reliant on the OPS telling them how much they needed to pay them – only the OPS could properly calculate those amounts. That principle applied in 2002 and remained the same in 2017 and indeed now.

So, on finding out in 2017 they'd failed to read all of the reinstatement documentation, I'd have expected Phoenix to contact the OPS Trustees, to find out what else they needed to do (or more precisely, how much to pay, if anything) to ensure Mr W's OPS properly reflects the missing GMP from the reinstatement period. And, it's clear Phoenix did do this.

But, looking at the various recent exchanges that have taken place, I can understand if Mr W remained confused about what the current situation is. I think, at times, Mr W has received some inconsistent messages regarding whether his OPS has been fully reinstated. For instance, in October 2020, Phoenix told Mr W:

*"It has come to our attention that the cost paid by us did not cover reinstating your GMP for the above period and also made no allowance for the contributions that you could have paid. We are liaising with [X] and are trying to rectify it for you. Hopefully they will provide us a cost which we can pay in order to restore all your service"*

Then the OPS Trustees told Mr W there is no shortfall – and that the amount Phoenix paid in 2002 was sufficient to reinstate Mr W into his OPS (even though it was acknowledged there was no GMP for the reinstatement period). They also said, in December 2020:

*"In respect of your GMP, we agreed that no charge is to be made. This reflects the reconciliation work with HMRC to ensure that the GMP's held are correct. As a result, the pension in respect of the reinstatement period is all to be regarded as excess over GMP and will receive the relevant pension increases once in payment"*

But in January 2021, Phoenix wrote to Mr W and said they were waiting for confirmation (from the OPS) that Mr W had been put in:

*"EXACTLY [their emphasis] the same position you would have been in had we not sold you a personal pension" AND "We have not paid the employee contributions to your scheme and believe this should have been included in the calculation of the reinstatement cost"*

And in April 2022, they reconfirmed that position by saying:

*"We have only reinstated you on a contracted in basis and therefore you do not have any GMP in your company period for [the reinstatement period]..Once you retire from your company scheme, we will re-visit our calculations and base them on the actual*

*benefits that you will receive from your company pension scheme. There may or may not be a loss. So in the meantime, your Benefit Guarantee will remain in force"*

I appreciate Mr W is unhappy that he doesn't have certainty at the moment, and he's brought his complaint to us to try and get that certainty. He thinks Phoenix (and the OPS) is to blame for this. But having considered Phoenix's obligations here, I can't reasonably ask them to do any more than they have done or have offered to continue doing. They are reliant on receiving information from the OPS Trustees about whether the missing 2002 GMP calculation has left a shortfall in his pension. The Trustees said there isn't one – Phoenix have no control over that statement or conclusion.

I appreciate too that Mr W has provided suggested shortfall figures. But I can't fairly ask Phoenix to make a payment based on these. Calculations regarding pension reinstatement such as here are extremely complex, and usually undertaken by expert actuaries employed by the pension firms. And the Trustees have said (presumably after some sort of actuarial involvement) there isn't a shortfall. Furthermore, we do not employ actuaries that would be able to undertake these calculations.

But Phoenix have still said they'd wait until there is a 'crystallising event' (i.e. retirement), and then revisit the calculations – using proper dates (not hypothetical ones based on an assumed early retirement date). This will likely mean further contact with the Trustees at that time. They've confirmed their pensions guarantee – guaranteeing Mr W is placed in *exactly* the same position he would have been in had he remained in the OPS – remains valid.

I think this is a fair and sensible outcome. Phoenix were told by the Trustees there isn't a shortfall, and so the best time to revisit that is when Mr W knows he is retiring. But I do think, given the uncertainties this episode has caused, and to provide Mr W with the comfort that I think he now deserves, Mr W should be able to engage his own actuary to check the calculations when that moment arrives – assuming he remains unhappy with the outcome of the reinstatement (re)calculations at that time. And I think Phoenix should cover the cost of the work undertaken by Mr W's choice of actuary as well in this event.

#### *Phoenix's 2002 reinstatement calculations*

Mr W has referred to lots of figures in his various exchanges with this office. I don't list these all here. He wants us to confirm if these are correct, or what they mean. However, whilst I do appreciate Mr W's confusion here, as I've already said I'm not going to address every question that Mr W has asked – just those that I think are relevant to this Phoenix complaint. And, as I've said, we don't have actuaries to undertake these checks. But I do want to comment on, and maybe help explain, the calculations Phoenix made in 2002 – these are fundamental to the amounts Phoenix paid to the OPS, and clarity regarding these may help remove elements of confusion that Mr W has.

The OPS said Phoenix had to pay £5,325.95 to reinstate Mr W back into the OPS. This was calculated in 2002 and was based on the 2002 costs involved (so, not on 1991-1995 rates). This fact is important, because it means the calculations Phoenix then made also had to be done at '2002 rates' – to allow a proper comparison involving amounts that Mr W had paid into his PP and in extra NI.

So, Phoenix began by considering what Mr W had paid to their PP during the reinstatement period. They calculated he'd paid total premiums of £5,364.18 to them, and that he'd paid £1,174.67 in additional National Insurance premiums (had he stayed in the OPS during the reinstatement period, he'd have benefitted by paying smaller 'contracted-out' rates).

As these were the actual amounts paid in the reinstatement period, they were revalued to November 2002 rates - the 'premiums-paid' figure (£5,364.18) was revalued to £9,241.23. The 'excess NI-paid' figure (£1,174.67) was revalued to £2,054.85 – so a total 're-valued' amount Mr W *wouldn't have paid* (to Phoenix or in extra NI payments) had he remained in his OPS of £11,296.08.

The next step was to calculate a revalued amount equating to what Mr W *would have paid* had he stayed in the OPS for the reinstatement period. This was needed to work out how much *extra* he'd actually paid in that period. So, based on a 4% deduction of Mr W's estimated salary, Phoenix calculated Mr W *would have paid* £2,412.88 into his OPS scheme during the period. This was then revalued to £4,202.99 at November 2002 rates.

So, Mr W paid – at revalued November 2002 rates - £11,296.08, whereas he should only have paid £4,202.99. He paid £7,093.09 too much. And as I've said earlier in the 'what happened' section, Phoenix couldn't pay this into his OPS. Instead, they paid it (with a small amount of interest) to the OPS to be invested in a separate AVC plan. And I'm satisfied this sum has been paid to the OPS.

Mr W has repeatedly raised concerns about some of the above numbers, questioning if they've been correctly applied, and if he's lost out as a result of Phoenix's calculations. I don't believe he has, and I hope the above explanation goes some way to helping Mr W understand and accept this (but to be clear, this comment doesn't refer to potential missing GMP amounts, just the above calculations).

### *Distress and inconvenience*

It's clear Phoenix's 2002 oversight has caused Mr W considerable upset and stress, all of which was avoidable. Their failure to read all the OPS reinstatement letter meant the full extent of the required reinstatement calculations weren't undertaken, and the GMP element overlooked. Had Phoenix read the 2002 reinstatement letter properly, it's arguable much of the subsequent uncertainty and confusion would have been avoided.

Phoenix believe their £200 D&I payment is sufficient to compensate Mr W for all of the distress caused by this. I disagree, and think the extra amount awarded by our investigator - £500 – provides a fairer award. So, this is what I intend to ask Phoenix to pay.

### **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.

Phoenix have confirmed they agree with the outcome proposed in my PD. However, Mr W does not agree.

Mr W has sent many detailed emails since receiving the PD, with attachments (many of which I have already seen), reiterating points that he'd made vociferously before. I can assure Mr W that I've read everything he has sent in the past weeks. Mr W has also asked multiple questions in these emails, insisting on answers to each of them. I won't list these here, and nor will I be answering each of them either. No discourtesy is intended.

But I do want to thank Mr W for taking the time to provide this information, and also make separate enquiries with his OPS Trustee, the response to which I've also read fully, and which confirms his pension contains no Member Contributions between 1991 and 1995.

The Financial Ombudsman is an informal dispute resolution service, which means I don't need to comment on, or respond to, every request made, or point raised in the course of our investigation. And it's not our role to calculate what amounts, if any, are missing from the funds Phoenix paid to the OPS as part of the 2002 reinstatement. Instead, I need only to consider and address the points I think are relevant to the crux of the complaint(s) brought to us, which is what I did in my PD and will also do now.

I fully acknowledge that Mr W continues to feel a sense of deep injustice over the way he's been treated by Phoenix, both in hindsight given the (admitted) mistakes they made in 2002, and in their subsequent attempts to rectify those mistakes. He remains unhappy and convinced that his reinstatement into his OPS hasn't been done properly.

He also remains highly critical of the actions of his OPS Trustees too, which I also acknowledge – who he feels have failed to engage properly with Phoenix. As in the PD, I won't be commenting on his dispute with the OPS Trustees – that is not within my remit, and as I understand it continues to be subject to a complaint made to the Pensions Ombudsman. I can only comment on the complaint against Phoenix, and within this Decision can only direct Phoenix to act in a certain way.

Mr W doesn't agree with the calculations that Phoenix undertook before paying funds back into the OPS Scheme, and into the separate AVC policy. But there is little I can add to those calculations, and what I've said before. Repeating what I said in my PD, the Financial Ombudsman does not employ actuaries, who are needed to undertake the very detailed and technical calculations that are required in a case such as this. It's for this reason I included a provision in my PD for Mr W to engage the services of his own actuary, paid for by Phoenix - so not use one connected to Phoenix or the OPS, to ensure complete independence, and give Mr W comfort that this actuary would be acting in his best interests.

And having re-considered all the information provided by Mr W, I remain convinced this is the fairest, and most sensible outcome here. I am unable to calculate what Mr W's OPS pension may still be owed by way of missing GMP. Phoenix accept nothing was paid to the OPS Trustees in 2002 in relation to this – this point in principle has never been in dispute. They also accept, in principle, that further calculations are warranted - but on the basis of what the OPS Trustees told Phoenix (that nothing was due), this calculation would be best undertaken when a crystallising event, Mr W retiring in other words, was due to take place. In the circumstances, this is sensible.

It's clear Mr W's OPS doesn't contain GMP for the periods he'd paid into his Phoenix plan. And it's right he is provided with meaningful, accurate and straightforward information, and calculations, to properly explain what is (or isn't) missing in terms of that GMP (and what Phoenix would then need to pay to put that right). This is what an Actuary, engaged by him, will be able to provide – if ultimately necessary.

So, based on all of the above, I've seen to reason to change the outcome set out in my PD. I think it's a fair outcome, and will provide Mr W with the certainty he deserves that his OPS pension, when finally taken, will be accurate and fully reflect what he would have been due if he'd not paid any funds into the Phoenix plan between 1991 and 1995.

## **My final decision**

I uphold Mr W's complaint, and require Phoenix Life Assurance Limited to do the following:

- Once Mr W advises Phoenix of his intended retirement date, they must revisit the reinstatement calculations, and make enquiries with Mr W's OPS Trustees and/or HMRC

as necessary, to definitively calculate what further GMP-related sums, if any, need to be paid by them to his OPS Plan to fully return him to the exact position he would have been in had he remained in his OPS for an unbroken period between August 1988 and May 2001.

- Ensure that Mr W's pension guarantee remains in force until such time that this exercise has been completed
- Pay for Mr W to engage his own actuary, should he request this, to check the calculations undertaken as part of this exercise
- Pay Mr W an extra £500 D&I compensation

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 10 February 2023.

Mark Evans  
**Ombudsman**