

The complaint

Mr M complains that Phoenix Life Limited (Phoenix) would not let him take out an annuity with his pension monies as he did not live in the United Kingdom.

What happened

Mr M said he completed all the forms to take his pension as tax free cash and the remainder as an annuity. Phoenix said he couldn't take an annuity due to Brexit and that he could only take his pension as a lump sum subject to tax. He said this meant he would then be subject to further tax in the country that he now lived in. He didn't think £125 was enough compensation. He felt Phoenix should have told him about this before Brexit so that he could have taken an annuity or looked at other alternatives at that point.

Phoenix said that six months before his normal retirement date (NRD) it sent him information. This was followed by the retirement pack. In early December 2021 Mr M telephoned and said he wanted to take an annuity and he was sent an application form on the same day and he returned his completed application form on 23 December 2021. In early January Phoenix wrote to say that he did not live in the UK so it was unable to provide him with a new product such as an annuity. It apologised that it did not tell him this in the telephone call in early December 2021 and offered £125 for the distress and inconvenience and sent him a cheque.

My provisional decision

I issued a provisional decision in this case. In summary I said I had considered whether Phoenix had done anything wrong.

The United Kingdom (UK) referendum on European Union (EU) Membership took place on 23 June 2016. The UK left the European Union on 31 January 2020 and the implementation period (referred to by some as the transition period) ended on 31 December 2020.

The Financial Conduct Authority (FCA) which is Phoenix's regulator, issued guidance around Brexit to financial businesses. This included an update first published in 2018 called '*considerations for firms after the transition period*'.

I thought it made clear that Phoenix was supposed to warn Mr M how he might be affected and in good time to enable him to make a decision. It was also clear this communication should be directly with Mr M (in addition to any information it put on its website).

I asked Phoenix to supply copies of any information it sent to Mr M pursuant to this obligation.

It sent me a copy of a letter it issued to Mr M on 23 February 2021 (which was after the end of the implementation period) explaining how the departure from the EU would impact his pension product. It said he could continue to hold his existing product but there would be restrictions with what he could do with it. It said that he would be unable to renew or extend his terms and conditions or accept new payments into the product. It said it also understood

it would not be able to set up a new product such as an annuity (except where it's not considered to be a new contract). It warned that some communication would continue to make reference to options even though they may not be available to him whilst he remained resident outside the UK.

Mr M said he had no recollection of receiving this letter. He said he was informed after he applied for an annuity that he could not take one.

Phoenix supplied a copy of part of its mailing list to show the letter had been sent to Mr M at the time it said. It also said the letter was issued by recorded delivery and details of the recorded delivery reference number was shown on the screen shot it provided. It had not had any correspondence returned undelivered and would therefore assume Mr M received it at the time.

Phoenix also supplied a copy of a letter it sent to Mr M on 21 December 2020 regarding bank account closures but this did not mention the possible change in what he could do with his policy.

It said the February 2021 letter and the letter about the bank account were the only letters it issued to Mr M prior to the retirement pack being issued.

It seemed clear to me that the Regulator expected Phoenix to warn Mr M before the end of the implementation period that the options might change after the period expired. It didn't seem that Phoenix did this. I said that because although it sent him a letter warning this might happen it was not sent until after the implementation period had ended. I thought that meant Mr M was deprived of choices he might have wished to take had he done so before the end of the transition period.

On balance (based on the evidence supplied by Phoenix) I thought it was reasonable to accept the letter was sent whether or not Mr M received it or recalled receiving it. But as the letter was sent after the end of the transition period it could not have made a difference to Mr M's choices. So I thought he lost out and I could therefore consider an award for financial loss and distress and inconvenience.

Financial loss

In considering an award for financial loss due to that mistake I was seeking to put Mr M back as closely as possible to the position he would have been in but for the mistake. That meant I needed to consider what he would have done had he been able to do so.

Mr M said it was always his intention to take 25% tax free lump sum and the rest as an annuity. He said because he now had to take his pension as a lump sum he had paid around £10,500 emergency tax and had instructed a UK accountant to seek a refund.

He said his local accountant had advised that he will be paying tax and social charges at the rate of around 17% on the whole amount of the lump sum that was around £36,000. He felt his loss was having to pay 17% and the cost of having to use a UK accountant to get the refund from HMRC.

He also explained that as he was a resident of another EU country he did not pay tax in the UK on private or state pension due to a double taxation agreement. He said he had to declare his worldwide pension in his country of residence including all pensions or annuity income. As he was a pensioner he did not reach the amount where he was liable for tax. He would now have to pay 17% tax in his country of residence as the lump sum was inflating his income for this year. He mentioned he had also taken another UK pension as a lump sum as

well.

Mr M said he deferred his pension a couple of times and Phoenix confirmed he deferred his pension for 3 years in each of 2015 and 2018 so that he would have been due to take his pension in 2021. Because of this deferral Mr M said he was entitled to take his pension and said he could have opted to take his pension as an annuity at an earlier date before the end of the implementation period.

I agreed that due to Phoenix's failure to warn Mr M before the end of the implementation period he was deprived of a choice to take an annuity. It seemed clear to me that the FCA expected it to warn Mr M but it didn't do so until after the end of the implementation period.

He said that he would have taken an annuity. He would have needed to do this before the end of the implementation period on 31 December 2020. For these purposes I had assumed that would have been possible even though his three-year deferral didn't expire until 2021. If that wasn't the case I invited Phoenix to comment further. If it would not have been possible to take an annuity sooner than 2021, because of that deferral, I couldn't see that Mr M had suffered any loss. His options would therefore have always been limited by Brexit and any business decision Phoenix was fully entitled to take about the products it wished to offer.

If he could have taken a pension before the end of the implementation period this would have been in or before 2020. Mr M says he is now retired but I understand he wasn't retired in 2020 when he would have had to take the annuity.

UK tax position.

If Mr M had taken 25% tax free cash and the remainder as an annuity before 31 December 2020, then based on what he said he would always have been able to recover the UK tax on the annuity under the double taxation treaty with his country of residence. So the need to recover UK tax would have applied whether or not he took the pension as a lump sum or annuity. So I didn't think there was any loss in relation to the cost of an accountant. But even if I was wrong, I was not persuaded he needed to use an accountant to make that claim so would not have made allowance for that as a financial loss.

Local country of residence tax position.

Mr M said that the tax rate in his country of residence on monies deemed unearned income are taxed and incur a social charge added to bring the total to 16.9%. He said that last year (2022) he was still working, as was his wife. In his country of residence they are taxed as a couple so any monies he now received pushed then into a higher tax bracket. The local tax year ran from 1 January to 31 December.

Mr M said that he had now retired so the lump sum was taking him over the limit for taxation. However had he taken the annuity before the end of 2020 it seemed to me he would always have been subject to local tax on the 25% tax free cash and the amount of annuity income because he was still working and in fact the tax rate may have been higher as he was working. So I couldn't see that he was any worse off in relation to the tax-free cash nor the tax on his annuity income in the years prior to his retirement.

I invited him to provide evidence to show how he was worse off due to the payment of the pension as a lump sum rather than as an annuity compared to the position he would have been in.

Duty to mitigate loss

Mr M had a duty to mitigate his loss. I thought this meant that he should have considered what other options might have been available to him. For example it would seem that Mr M may have had other options such as transferring to a QROPS (Qualifying Recognised Overseas Pension Scheme) or to have taken an open market option (OMO) to a provider who may have been able to assist. These might have enabled him to draw the pension over time and therefore smooth the impact on his personal tax position.

I also noted that he deferred taking his pension in 2018 which was after the Brexit vote in 2016, so he would have been aware that there were changes ahead (even if he didn't have details). He might reasonably have considered taking advice at that time and as things developed in order to ensure he was able to make an informed choice before the end of 2020. While Phoenix had an obligation to provide information it was not obliged to give him financial advice.

I noted that Mr M said he had not heard of a QROPS. He also said he did look at transferring his Phoenix pension into another pension he held with a UK provider but he couldn't get a UK financial adviser to help him. I did appreciate that this would have been difficult but presumably it might have been possible to get an adviser outside of the UK who could have assisted. Had he done so he may have been able to mitigate any tax liability.

I thought Mr M could have taken steps to mitigate his loss either by taking UK financial advice prior to the end of 2020 or by taking advice from an overseas adviser after that date. But even if I was wrong, based on the information provided I didn't think Mr M had suffered any financial loss as I thought he would always have had to pay local tax on his lump sum and annuity income. Had he taken these at the time he was working the rate of tax may well have been higher than it is now.

If Mr M continued to believe that he was worse off in terms of local tax I asked him to provide evidence as to the amount of tax he would have paid if he had taken his pension as an annuity before the end of 2020 and how that compares to the tax he is now liable to pay.

So I was not proposing to make a financial award. If I changed my mind in the light of further evidence I commented that I would need to reflect on Mr M's duty to mitigate his liability in reaching any decision on a potential award for financial loss.

Distress and inconvenience

I did however consider an award for distress and inconvenience. Such an award was intended to reflect the impact on Mr M and not to punish Phoenix. I could see that Mr M had been deprived of an opportunity to make a decision to take an annuity. However given that he was not UK resident and was resident in the EU it would seem reasonable that he might have expected Brexit to have some impact.

However the fact remained that Phoenix didn't warn him in good time and I could understand that was frustrating. Had it done so this might have prompted him to take UK advice while he was able to do so. While I noted that Mr M continued to be told he can take an annuity I could see that Phoenix did write to warn him that this might happen. While Mr M says he didn't receive this letter I have no reason to doubt it was sent and that Phoenix did try to warn him.

I noted also that it had already paid him £125 for wrongly telling him this.

It seemed that Mr M would always have had to make a tax reclaim in the UK even if he had taken an annuity. So I didn't think he has been put to greater inconvenience by needing to do so now nor any greater cost. Further it was his decision to use an accountant to help with

that claim.

We all experience frustration and annoyance in day-to-day life but I thought the failure to warn Mr M had caused considerable distress and upset at a greater level than I would expect in day-to-day life. For that reason I thought an award of £400 would be fair and reasonable in the circumstances. For the avoidance of doubt as Phoenix has already paid £125 it need only pay a further £275.00.

In summary I thought Phoenix made a mistake in not giving Mr M advance warning of how Brexit could affect his options. I was of the view that he had not suffered a financial loss but had suffered distress and inconvenience and proposed an award of a further £275.00.

Before I issued my final decision I invited both parties to make further comments. I also asked specifically that:-

1. Phoenix confirm that it would have been possible for Mr M to take his annuity before the end of 2020 notwithstanding his deferment of retirement in 2018.

2. I invited Mr M to provide evidence that he was worse off financially compared to the position he would have been in had he taken his pension as an annuity before the end of 2020.

I proposed to uphold this complaint and direct that Phoenix Life Limited should pay Mr M a further £275.00 for distress and inconvenience.

Mr M said his annual joint income for him and his wife was around 31,000 Euros and they had a personal allowance of around 15,000 Euros each. In 2020 he had a rebate. If he had taken 25% lump sum and the rest as an annuity in 2020 or before he said he would not have been subject to emergency UK tax and he would only have paid local tax on a quarter of the amount compared to this year, he would also be below the tax allowance with his annuity income. He thought his loss was around £4,700 as taking the lump sum value made him pay more tax as it pushed above his tax allowance.

Phoenix said it was willing to pay the further £275 proposed. It also confirmed that Mr M could have taken an annuity before the end of 2020 had he wished to do so. I also asked Phoenix to comment on the reply from Mr M with respect to his tax position and financial loss.

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.

Having done so I have decided to make a financial award for loss in this case. I have corresponded further both with Mr M and Phoenix and said that:-

1. It seemed that Mr M should be able to recover the UK income tax paid due to an emergency tax code and the dual tax treaty with his local country of residence. So while it was frustrating to need to make a reclaim, I told Mr M and Phoenix I was not proposing an award for that. While the delay in getting the tax refund was frustrating this was something that was reflected in my existing award for distress and inconvenience. Mr M didn't disagree with my proposed approach.
2. It seems Mr M would always have paid local tax in his country of residence on the 25% tax free cash. The amount of local tax that he would have paid in 2020 might

have been different– but I thought he was broadly no worse off. So I didn't propose an award for this. Mr M didn't disagree.

3. The timing of taking the tax-free cash and the whole pension as a lump sum rather than tax-free cash and an annuity did seem to result in Mr M paying more local tax on the lump sum value of the annuity income than he might have paid on the annuity income itself. I said that because Mr M indicated the tax on that annuity income could either have been nil or lower than it was now. Mr M estimated that his loss was around 4700 Euros. I was not able to validate whether that amount was correct as it related to tax in another country. I asked Phoenix if it accepted the calculation Mr M provided and whether it required copy tax returns or other information in order to validate the amount. Phoenix confirmed it was willing to accept an award of 4700 Euros (less 10% for mitigation). It said it did not require any further evidence of the additional tax liability incurred. Mr M did not object to this proposed award.
4. Phoenix said it was willing to pay interest at the rate of 8% per annum simple on the tax if it had already been paid in whole or part. It said it would use the exchange rate on the date of payment to Mr M. Mr M later confirmed that he would be receiving his tax demand in July or August of 2023 and would then be able to make payment in four instalments from September to December 2023. It did not therefore seem there was a need to award simple interest as the amount of tax had not been paid as yet.
5. I also considered Mr M's duty to mitigate. I was of the view that it was fair and reasonable to make an adjustment of around 10% to allow for that. I said that because I thought Mr M could have taken advice earlier and been aware that Brexit might affect his choices. However overall I was of the view that on balance the thing that would most likely have helped was a notification from Phoenix that Mr M's choices would change post Brexit. It didn't do that. On that basis I believed it would be fair and reasonable if the award for financial loss was reduced by 10% to reflect Mr M's duty to mitigate. Neither Phoenix nor Mr M disagreed with this proposal.

Putting things right

For all those reasons I think it is fair and reasonable that I make an award for financial loss and distress and inconvenience.

In order to put things right Phoenix should pay Mr M the amount of 90% of 4700 Euros for financial loss and a further £275 for distress and inconvenience. If it has not already paid the amount of £125 it should also now make that payment so that the total amount paid is £400.

My final decision

I uphold this complaint and direct that Phoenix Life Limited should within 30 days of this service notifying it that Mr M has accepted this decision:-

1. pay Mr M a further £275.00 for distress and inconvenience (such that the total amount he is paid for distress and inconvenience is £400. For the avoidance of doubt if it has not already paid £125 Phoenix Life Limited, should make that payment at the same time as the additional £275.00).
2. Pay Mr M 90% (ninety per cent) of 4,700 (four thousand seven hundred) Euros using the exchange rate available to it on the date it sends payment.

If Phoenix Life Limited does not pay Mr M the amount directed under 2 above within 30 days of it being notified Mr M has accepted this decision it should also pay simple interest at the rate of 8% per annum on that amount from the date of this decision to the date of actual payment. Such interest to be paid in Euros at the relevant pounds sterling/Euro rate prevailing for Phoenix at the date of actual payment to Mr M.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 13 June 2023.

Colette Bewley
Ombudsman