DRN-5628940

Financial Ombudsman Service

The complaint

Mr F complains Openwork Limited trading as The Openwork Partnership ("Openwork") gave him inadequate advice on an offshore life policy it recommended to him. He seeks redress for the tax on the policy proceeds and the late payment interest he was charged on this tax.

Background

I wrote to the parties with my provisional decision on 30 May 2025. I set out the complaint background and relevant circumstances there – and my provisional findings – as follows:

What happened

Mr F took the 'lifetime income' policy in 2015. He says he understood from Openwork that it guaranteed him a tax-free income, based on his age, of £975 a month (£11700 a year) or 3.9% on his £300,000 investment. He says the policy fund grew so the monthly income grew by £109.92 from £975 to £1084.92 a month. He says he was told he should declare to HMRC on his tax return the extra monthly £109.92 but not the original £975, and he did this.

In 2015 Mr F's investment risk attitude was assessed by Openwork as 1 on a scale of 0 – 5 where 0 was lowest risk. This was described by Openwork as *"limited risk"* and as follows:

"You are likely to require an investment where the chance of a fall in value is minimal, although you accept that some loss of capital is possible as the value of your investments could fall or rise. You would normally keep your money in a bank account or building society but you are willing to consider other types of investment.

As a limited risk investor, you may not have high levels of knowledge and experience of financial matters, or show interest in keeping up to date with them. You recognise that inflation, especially over the long term, is likely to reduce the real value of your money."

The Openwork suitability letter issued at the start stated: *"You may have a personal liability to UK tax on the proceeds".*

It also explained Openwork had considered other options but decided against these. It said purchased life annuities *"do not offer full access to the invested fund"* and Mr F didn't feel current annuity rates offered good value for money. It said other risk investments *"do not offer a guaranteed income for life"* and deposits investments wouldn't be asset backed or actively managed. It said ISAs were *"one of the most tax efficient investments"* and Mr F had £15,240 of his allowance left to use, but *"our current range of stocks and shares ISAs do not offer a guaranteed income for life".*

A brochure Mr F was given at the outset says: *"You should also know that cashing-in part of your plan or your whole plan may result in a tax liability Any tax payable depends on your own personal circumstances."* Openwork has also referred us to a separate key features document which said:

"Although it has no fixed term, you should view [the policy] as a long-term investment as it's

designed to give you an income from the plan for as long as you live…

Chargeable gains - If you cash in your plan or take additional withdrawals – including any ad hoc adviser charge taken from within your plan – or if we pay out a death benefit on your death, this may give rise to what's known as a chargeable event. If this happens, you (or your estate) will be liable to income tax on the gain. We'll issue a certificate saying how much this gain is.

If you're liable for income tax on guaranteed lifetime income or on a chargeable event, it will be at your marginal income tax rate.

If you qualify for income tax age allowance, in some circumstances a chargeable gain may increase the tax you pay on your other income. A chargeable gain may affect any entitlement to children's tax credits and other means-tested tax credits and benefits. Your financial adviser can give you more information on chargeable gains."

Mr F's policy fund was invested in a fund invested 60% in fixed interest bonds and 40% in a UK equity index tracker. In December 2015 Openwork wrote to Mr F to clarify how this was suitable for him, given that it had assessed him as *"at the lower scale for risk tolerance in terms of the potential falls in the value of your investment."* It said:

"…this fund is a cautious fund it is not the most cautious of the single managed funds available… In fact this fund has the most equity content of the funds offered in the… cautious range, which means that it can suffer larger fluctuations in value. The upside of this fund is that due to the higher equity content greater increases in fund value may be achieved going forward.

We discussed this at our meeting and because the income levels are guaranteed and cannot fall we felt it prudent that a higher risk rated fund in the cautious… range would offer the best potential to see your income base increase in the future from higher investment performance, although as you are aware out-performance cannot be guaranteed. The result from this would be higher income levels being locked out at future income reviews."

In August 2017 Mr F was sent a letter What this said included:

"Your [policy] investment could create an additional tax liability should any of the following circumstances occur whilst the plan is in force.

- *Some or all of the policies making up your plan are encashed*
- *If you die whilst holding the plan*
- *Your yearly income exceeds the available exempt capital content."*

Mr F says Openwork advised him by phone to surrender the policy due to concerns that after Brexit it would no longer be covered by the UK Financial Services Compensation Scheme, due to the policy being domiciled in the Republic of Ireland. He surrendered the policy in the 2020/2021 tax year and received a certificate for a £54,209 'chargeable gain'.

Mr F says the policy hadn't made a capital gain, so he understood the £54,209 to be the income he'd been paid during the life of the policy. He'd understood this income was tax-free for life, aside from the income increase for which he had already made the right declarations to HMRC, so he took no further action. But in 2023 HMRC told Mr F there was tax to pay of £25192.63 plus interest for late payment on this of £1924.39.

Mr F wants Openwork to repay him these sums. He says he understood he'd pay tax on a gain on the original capital sum if it grew – but this wasn't the case here. He says Openwork never told him he'd have to pay tax on the income on death or surrender. Mr F says he's also concerned about what the IHT consequences could've been had he kept the policy.

I've looked at the details of a tax calculation Mr F has provided, which shows £25,192.63 in extra tax was calculated as due for 2020/2021. Interest of £2,678.44 is shown on this for late payment, making a total of £27,871.07.

It appears this extra tax arose due to £54,209 of foreign savings income – the chargeable gain – being added to Mr F's taxable income in the year of the gain. Mr F was a higher rate taxpayer so all this income would be taxed at the higher rate of tax.

This would've meant £21,683 in tax was due, but the extra £54,209 of income in that year increased Mr F's total income to £118,876. This meant his personal allowance reduced by £1 for every £2 above £100,000. This explains the extra £3509 in tax and why the total tax resulting from the gain was £25,192.

Mr F says when Openwork told him his policy investment might all be lost (that is, might not have FSCS protection), causing him to cancel the policy and move the funds to a potentially safer place, Openwork should've told him of all the tax implications - especially the potential for tax on what he had been told was a 'tax free income for life' that had been paid to him over the previous five years or so. He says the potential of additional tax was never indicated at that time or subsequently during his ongoing conversations with Openwork, even when he instructed Openwork to cancel the policy and move the funds elsewhere.

Openwork says it didn't advise Mr F to cash in the bond, so it isn't responsible for any tax that resulted from this. It also says Mr F should've known what to do when he received the chargeable gain certificate for 2020/21, because he'd received a chargeable gain certificate in the past when his income increased so this wasn't something new. Also it says the income he'd had from the policy totalled around £58,000 whereas the chargeable gain was £54,209.

It also says Mr F didn't ask for (or pay for) ongoing advice on the bond, but the Openwork adviser called Mr F anyway to discuss Brexit. The Openwork adviser says FSCS protection of offshore bonds was uncertain after Brexit so he *"thought it was prudent to highlight this to clients"*. He says he spoke to Mr F *"about the situation as he had a considerable sum invested and he asked me my advice on the matter. I was unable to give him specific advice on moving the [policy] as we did not know the facts around the FSCS at the time, but as Mr F was a limited risk investor, I remember he was keen to maintain the FSCS protection around his investment and I left that decision up to him to surrender his [policy]."*

"…as Mr F wanted to surrender the [policy], the tax implications were explained. I told him he would be liable for income tax on any gains made from the [policy] and as it was an offshore bond he would pay tax at his highest rate on the full gain, I did not do any tax calculations. I also told him that he would receive a chargeable event certificate from [the provider] which should be entered onto his tax return. Mr F confirmed he does a tax return every year and he said he had no issues with doing returns. I explained that if he was unsure of his tax liability, he should refer himself to an accountant as I was not a tax expert…"

With regard to the complaint, the Openwork adviser said:

"When Mr & Mrs F recently came to see me, a few weeks ago, they told me they were not happy with the size of their tax bill as they were told and believed that the monthly income generated by their [policy] was tax free and did not realise that it would be counted into the final gain calculation. I explained to them all documentation showing the details of the plan were given to them along with a letter outlining the potential tax consequences of the product. They told me that they did not understand the product at the time… Mr F also told

me that he did not correctly input the amount of the gain, in his tax returns which he filed late and suffered a fine from HRMC. He then confirmed to me that he has started to use a local accountant to do his tax returns."

Openwork says the reason Mr F didn't correctly disclose the gain on his tax return could be plausibly considered to be because he did not seek out sufficient advice from a tax adviser or accountant to correctly and accurately establish whether he was liable.

Our investigator thought Mr F's complaint should be upheld on the basis that Openwork's advice to invest £300,000 into the policy was unsuitable - because it involved investing all of Mr F's available funds and left him without sufficient cash reserves.

Also our investigator didn't think Mr F had sufficient capacity for loss for the policy to be suitable for him and thought Mr Fs objective of flexibility and access to the funds without penalty, wasn't met given that when Mr F accessed the fund he suffered tax. Also our investigator noted that Mr F had an income surplus, so didn't seem to need for a policy that generated guaranteed income rather than one aimed at capital growth.

Mr F has told us he did have other funds including funds of around £215,000 offshore. He says these funds were transferred to Mrs F in the UK and later used to buy two rental properties to provide more income for retirement. He has pointed out his original complaint was never about the affordability of the policy but its taxable status. He says he was never at any time informed by Openwork, either by correspondence or conversation that the "tax free" monthly income of £975 would become taxable at any point in the future, whether on death or cancellation. Therefore, it remained his view that the accrued income of £54,209 wouldn't be taxed and so he didn't declare it on his tax return. He says this unfortunately wasn't so and the accrued income was taxed resulting in a bill of £27,117.02, being the tax plus late payment penalties. He says: *"To my mind none of this was my understanding and I never expected any of the "Tax free" income to be taxed ever".*

Our investigator thought that if Openwork had found out in 2015 that Mr F planned to use his cash to buy property, it ought to have concluded the policy was unsuitable for him - in part because it invested too much of his investable assets. So our investigator thought Openwork should compare what Mr F got back from the policy with a benchmark that had slightly less equity exposure than Mr F's policy fund – and compensate Mr F by paying him the difference if the benchmark produced more. He also thought Openwork should also pay to Mr F what Mr F had paid in tax and penalty interest – but if the policy outperformed the benchmark, the gain could be deducted from what Openwork had to pay Mr F for the tax and interest.

Openwork still didn't agree and asked that particular consideration be given to the fact that Mr F had reported gains before, when the income increased, so he knew the reporting requirements and had been in receipt of a chargeable gain certificate before. It said it was unclear why Mr F *"would feel his chargeable gain certificate received on surrender of the plan should be treated any differently, particularly given the clear wording which must have existed on that certificate regarding the need to report to HMRC and indeed to seek specialist advice".* It said if Mr F did neither this could hardly be Openwork's responsibility.

<u>What I've provisionally decided – and why</u>

The product Mr F was recommended had features of a purchased life annuity – namely a guaranteed income – and features of an offshore bond – namely the investment fund. It was in essence an annuity with a surrender value and a value payable on death. The surrender value could fall to zero if the fund performance was poor, but the guaranteed income would continue. If fund performance was good, the guaranteed income might increase – and this is what happened for Mr F initially. The value on death was the surrender value but it was also subject to an additional guarantee – selected by Mr F - whereby if he had received less in income than what he'd paid into the policy, the difference would be paid out on death.

The brochure makes much of the tax-free status of the income, and although it says tax can arise on surrender or death, it doesn't explain how this tax would be worked out. Indeed, the tax treatment of the policy overall isn't entirely clear from the paperwork I've seen.

But from what I've seen I infer that the initial guaranteed income – 3.9% of what Mr F paid into the policy – was tax deferred income rather than tax-free. Any income increase above this would be treated as immediately taxable (in effect a taxable withdrawal) and Mr F did declare this extra income when it arose and would've paid income tax on it.

That being so, I think what was taxable on surrender was the gain Mr F had made on what he had paid in but deducting that part of the gain that he had already paid tax on (namely the income increase). So Mr F's actual gain (the difference between what he put in and what he got back) was the surrender value plus all the income he had been paid less the sum he paid in at the start. But his taxable gain – or chargeable gain – was the surrender value plus the untaxed (or 'tax free') income less the sum he'd paid at the start. I believe this is how the £54,209 shown on the certificate was arrived at.

I think this means Mr F's £300,000 returned to him around £354,209 plus the extra taxed income (of £109.92 a month from whenever it started, until the date of the policy surrender). From Mr F's point of view, it may have looked as if his money hadn't grown – as what he got back on surrender was similar to what he put in. But this ignores the income he had already been paid. I accept that if the income had been like deposit interest, and this interest had been tax free, then Mr F would've been right to expect that when he received his original capital sum back, or something like it, there wouldn't be tax to pay as there wasn't a capital gain. But the income here was tax deferred I believe, rather than tax free, and the tax arose because the past income is added back in when calculating Mr F's gain.

The point of setting this out here, is to illustrate that Mr F paid tax, but he paid tax because his policy had made him money and the tax was on that gain. But it seems to me that Mr F would've had to pay tax on whatever investment he made if the investment made money – so it isn't obvious to me that this tax in itself caused him a loss.

Also Mr F's gain was a good return for someone with Mr F's very modest risk attitude. I note in this regard that in 2015 Bank of England base rate had been 0.5% for more than seven years and when this rate changed in 2017 the change was a decrease to 0.25%. So on that basis a return of 3.9% plus a return of his capital (or something like it) was very favourable.

In this regard it seems to me that the policy – with its guaranteed income – allowed Mr F to take more investment risk within the policy fund than he would've been able to take with that money ordinarily – as he had the guaranteed income to fall back on - and this appears to have worked to his benefit at the point of surrender. In other words, a very low risk fund is unlikely to have returned for Mr F a gain of £54,209 (and Mr F received also the taxed income element on top).

But in my view, regardless of the outcome, and accepting that the tax position on surrender was not very clear from the paperwork, I think the policy wasn't unsuitable for Openwork to recommend to Mr F and upon appropriate advice I think he would've still taken it out.

I say this bearing in mind Mr F was assessed as an investor wanting very little risk. So his investment options were limited. In my view Openwork covered off the various reasons why it had discounted other possible options. The policy is one that guaranteed an income for Mr F – with the chance of this income growing if the selected investment fund did well. The benefit was the downside was limited due to the income guarantee (so long as the policy was kept running). This guarantee will have had a cost, which would've limited the upside somewhat (as would the cost of the guarantee Mr F selected to add for the death benefit), but I don't see that this made the policy unsuitable for him. Also it seems to me, as Mr F accepts, that Mr F had other resources available and was in a position to make a long term investment with the £300,000 he put in. Notes from 2017 suggest he had £240,000 in cash and was advised then to put some of this into a pension – mainly for IHT purposes.

Mr F's notes on a policy brochure he has sent, suggest FSCS coverage was a consideration for him – and he was interested in whether this was UK or Irish cover and whether it covered the value of the policy fund at the time or the monthly income guarantee. I note that deposit accounts have limits on the amount that is covered in this way – although Mr F could've spread his money across various accounts. But I don't see that this would've been a better recommendation than the policy Openwork recommended to Mr F.

I agree with Mr F that the information he was given at the outset focuses on the immediate tax treatment of the income – and does refer to this as tax free and suggests the tax free element is like that of a purchased life annuity, where part of the income is treated as return of capital and so is not taxable. I don't think much thought was given at the time to how the policy might be taxed if it were surrendered – because I think the intention was to keep the policy going until Mr F's death. This point is reinforced by the fact that Mr F was willing to invest in a relatively risky fund, which put at risk the surrender value, but wouldn't put at risk the minimum value guaranteed on death or the guaranteed income. So it seems to me that it was the lifetime income that was his focus rather than the position on early surrender. The circumstance that led to the policy surrender wasn't something contemplated at the time of the investment decision – it was an unforeseen later development.

I accept Mr F did suffer tax, but this was because he made a gain. It seems to me he would've had to pay tax on gains however he made these. Also, as I've noted above, other investments might not have given him the chance to make as much as he did make.

I note Mr F appears to have been assessed by Openwork as a basic rate taxpayer in 2015 but the 2020/21 tax return suggests he was a higher rate taxpayer even disregarding the increase to his taxable income resulting from the policy gain. Had the policy been kept until Mr F's death, it is possible any gain might have been taxed at a lower rate – because more personal allowance may have been available. For example, if Mr F died towards the start of a tax year his total income for the year might have been lower and so with less other income to use up personal allowances, a gain might have been taxed at a lower rate – for example basic rate rather than higher rate. But it seems to me that the priority here was for Mr F to secure a return on this money within a secure environment, and I think the policy did that.

I note in this instance, Mr F's chargeable gain meant he paid extra tax due to a reduction in his personal allowance – as the gain pushed his income that year above £100,000. This isn't something that seems to have been considered – and it wasn't mentioned in the 2017 letter that was sent to Mr F specifically warning of some situations in which he might pay more tax.

That said, it isn't obvious to me that there was a better way for Mr F to invest that would've avoided these sorts of tax consequences while also giving him the chance to make the sort of gain he made (with the guarantees and security the policy gave).

In saying this I note what Mr F put into the policy included sums from Mrs F. Had he invested less in the policy, the lower investment would've made a lower gain and so would've been less likely to lead to a reduction in personal allowance. But I assume Mr and Mrs F chose to invest in Mr F's name, rather than in Mrs F's, because his age meant the policy guaranteed a higher income. Also it was an income return that was attractive to them compared to other options like annuities. Also their primary focus at the time was the lifetime return, rather than the potential tax on early surrender. Also I note they had various other sources of income to divide between them – including rental property that it appears they put into Mrs F's name.

With all this in mind, on balance my view is that had more information been given by Openwork to Mr F at the outset about the potential tax treatment of the policy on early surrender, I don't think it likely this would've changed his investment decision. Openwork's internal notes in 2015 also said Mr F was content not to address IHT at that time due to not having yet decided on what to do about it (avoiding IHT generally involves having to give up assets to others). The note says: *"Not sure on any particular direction, feel that he will spend monies or gifting in future".* The policy was surrendered before death, so no IHT loss was suffered but I don't find that the potential IHT treatment of the policy on death made the initial advice unsuitable.

With all I've said above in mind, I don't see grounds for saying Openwork should carry out an assessment of investment loss, or that it should cover the tax Mr F had to pay on his gain.

I turn now to the question of Mr F's tax return and the conversation he had with Openwork about surrendering of the policy. As I've touched on above, I think Mr F is right in saying the brochure he was given doesn't say anything specific about tax if the product is cashed in. He had identified that the suitability letter makes an 'ambiguous' reference to tax on the policy proceeds (as does the brochure). But I tend to agree with him that it doesn't make clear the tax-free element of proceeds would ultimately become taxable (or how the proceeds would be taxed generally).

As such it seems to me that Mr F would've been guided by what the adviser told him about this. Openwork chose not to make a record at the time of what it told Mr F during the phone call during which Mr F was prompted to cash in the policy. It is apparent that Mr F's reason was to do with the potential loss of FSCS coverage. I'm satisfied that Mr F was concerned about this point and on balance I don't find Openwork at fault for causing Mr F to cash in the policy like he did.

Mr F says Openwork didn't explain on the phone how cashing in the policy might lead to him needing to pay tax – and didn't say anything about this later when it received his instruction to surrender – or, I gather, when it helped him reinvest the funds. Openwork in contrast says this was fully explained. I need to decide which is more likely on balance.

Openwork made no record at the time of what was discussed with Mr F in the call – so it is relying on memory. Also from what Openwork has said, Mr F wasn't the only person it called at the time in this way. So it seems to me Openwork could well be mistaken in what it thinks it explained to Mr F in its call to him.

Also if Openwork had explained the tax implications to Mr F in the way it says it did, I think it unlikely Mr F would've made the error he made in failing to report the gain on his tax return.

With all this in mind, I find it more likely than not that Openwork was at fault for undertaking to explain the position to Mr F but not putting the position to him clearly enough.

I don't overlook what Openwork says about what Mr F would've been told on the chargeable gain certificate. But it seems to me Mr F would've relied most on what Openwork told him personally over the phone - and Openwork claims it told him quite a bit on the phone about how the policy was taxed - and interpreted what he was sent in light of that information. As such I'm satisfied that more likely than not it was an error by Openwork that led to Mr F making the error he made on his tax return. In saying this I don't overlook the obligation Mr F had to take care in completing his tax return – and I gather he has since decided to have professionals help him with this in future.

Mr F's error, caused by Openwork, did not lead to the tax Mr F paid – he would have had to pay that tax on his gain anyway. But it did lead to the penalties – namely the interest on the tax. So my view is Openwork should compensate Mr F by paying to him the sum he paid to HMRC in interest on the extra tax he was charged that resulted from his gain on the policy.

What Mr F has sent us suggests this figure is £2,678.44. Openwork should pay this to Mr F with simple interest at the gross rate of 8% running until the date the redress is paid and from the date Mr F paid this interest to HMRC. Mr F should inform Openwork of that date to allow the interest calculation to be done.

Also Openwork should pay Mr F £100 for the inconvenience its error has caused him.

- Provisional decision text ends.

Both Mr F and Openwork responded to my decision with further points. In brief summary:

Mr F said:

- What Openwork gave him and told him emphasised a tax-free income. There was a *"potentially massive"* difference between this and the resulting tax liability arising from a *tax deferred* income. Openwork should have made this clear to him in what it said and the information it gave him.

- On his part a *"lack of understanding and seeking of proper financial advice regarding tax issues"* was an obvious oversight, *"leading to the… issues and the late tax return which resulted in tax penalties".*

- As there were obvious faults and failures on both sides – responsibility for the tax liability (£25,192) should be borne *"proportionately by both parties"* not just by him.

Openwork said:

- It agreed with most of my provisional decision but candidly was very surprised at my conclusion, based on Mr F's recollections of an unrecorded phone call, that Openwork did not properly describe the tax implications and so was responsible for Mr F not reporting his gain and incurring interest. Its adviser's recollection of the call was *very* different. Openwork would like *"the report the client gave FOS of the details of that call".*

- The adviser's recollections (which it attached again as it wasn't sure I'd seen them) seem very clear and are factually accurate because the adviser knows how this plan would be taxed and that gains at encashment would be taxed and should be entered on a tax return. Openwork can't see why the adviser would've told Mr F anything different.

- Mr F had reported previous gains. Openwork would be very interested to hear Mr F's explanation of why he understood gains resulting from income had to be reported, but not a gain from encashment. His comments to Openwork include reference to his incorrect *"assumptions"* regarding the nature of the gain.

- It is more likely Mr F misunderstood the adviser or made a mistake in his tax return or didn't wish to report the gain because of the potentially high levels of tax.

- Openwork understands chargeable gain certificates include a statement saying gains must be reported to HMRC. As he had such a certificate, it is hard to fathom why Mr F would believe such gains didn't need to be reported. This would be so even if he thought the adviser had told him otherwise. Openwork hasn't seen a copy of the certificate and would like to see a copy.

- Openwork has already pointed out Mr F at the start was given a brochure stating: *"You should also know that cashing-in part of your plan or your whole plan may result in a tax* *liability Any tax payable depends on your own personal circumstances."* Also the key features document said: *"Chargeable gains - If you cash in your plan or take additional withdrawals – including any ad hoc adviser charge taken from within your plan – or if we pay out a death benefit on your death, this may give rise to what's known as a chargeable event. If this happens, you (or your estate) will be liable to income tax on the gain. We'll issue a certificate saying how much this gain is."*

- Openwork completely disagrees with my conclusion and if I'm not minded to change it, it would like to see Mr F's report of the call and the certificate outlined above.

The adviser's recollections resent by Openwork include those I've already quoted above from my provisional decision, so I won't quote them again here.

As the matter couldn't be resolved informally it has been passed to me to decide.

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've arrived at the same conclusions as in my provisional decision and for the same reasons. I won't repeat here all that I said there, but I've commented on points Openwork and Mr F have raised since.

The return generated by the policy was taxable. The way it was taxed – as income in the year of surrender – reduced Mr F's personal allowance. This possibility wasn't explained to Mr F at the start, as far as I can see. Its effect was that Mr F paid more tax than he would've paid if he'd just paid higher rate tax on the income as it arose. He paid £3509 more in tax as a result of this than he would've had he just paid higher rate tax on the income as it arose.

But if Mr F had known about this possibility, I don't think he would've changed his decision to take the policy. I've explained my reasons for this view above but in brief Mr F didn't take the policy expecting to surrender it – he took it expecting to receive its income for life. Also he was attracted to the guaranteed income and the policy guarantees allowed him to invest in a more adventurous way for a better return than he might have been able to otherwise.

I don't find Openwork at fault for causing Mr F to cash in the policy either, as my provisional decision explained. In view of this, and as the plan was right for Mr F at the start, Openwork wasn't at fault for Mr F having to pay tax on the plan surrender proceeds and I don't agree with his view that this liability should be shared.

But Mr F also incurred interest on the tax because he didn't declare his gain in the way he should have done when it first arose. His explanation for this was given in his complaint to Openwork For example, Openwork has sent us an extract from a letter Mr F sent, in which he said:

"We did receive from [name] a certificate informing of a chargeable gain, but to the best of our knowledge and understanding based on the advice provided, knowing there was no actual capital gain, assumed that the £54,209 gain was the accumulation of all the "tax free for life income" we had been receiving over the five year period this investment was in place. To our mind any taxable portion of this money had already been declared in our annual tax returns over the five year period of the investment since the monthly return of £975 was "tax free income for life"."

It seems to me this explains Mr F's point and is in line with what I outlined it in my provisional decision. In essence he didn't realise the plan income was potentially taxable and would be brought back into account when he surrendered the policy. Rather he'd understood the £54,209 on the chargeable gain certificate to be income he'd been paid during the life of the policy (which in essence it was) which he'd understood as tax-free income for life – having had this aspect of the plan put to him strongly. The only income he understood was to be taxed was the income increase for which he had made the right declarations to HMRC when it arose, as explained and outlined to him by Openwork and the plan material. The rest of the plan return didn't show a gain, so he didn't think there was a gain to declare.

If find this comprehensible – although it is wrong and it isn't how the taxation of the plan works on surrender. Openwork says Mr F was at fault for not understanding this. But from what Openwork has said, it undertook to explain to Mr F the tax position on surrender. So it was up to Openwork to convey the information to Mr F in a way that he would understand.

It didn't succeed in this. Openwork says Mr F may have misunderstood what Openwork told him on the phone. This may be so, but I don't think it follows from this that Mr F was at fault for the misunderstanding. It seems to me also possible that the clarity with which the position is set out in Openwork's recollections was lacking in what was actually said at the time.

In saying this I note that Openwork initiated the call for business purposes, helped to reinvest the surrender proceeds and, from what I can see, had good reason to document the content of the call at the time – but it did not do so. Had it done so, its recollections would carry greater weight (and had it set out its thoughts for Mr F to look at, his error may not have arisen at all). On balance I think it likely the error – and Mr F's misunderstanding - was Openwork's fault. In saying this I bear in mind also that Openwork was the expert with the duty and Mr F was the lay person and the customer.

My provisional decision said Mr F says Openwork didn't explain on the phone how cashing in the policy might lead to him needing to pay tax. To clarify, Mr F hasn't offered recollections of what *was* said about tax on the phone or of the phone call beyond that – so I've no report on that - rather he maintains he was never told the 'tax free' income might become taxable. For example, Openwork's final response Mr F's as follows: *"During our meetings… and discussions regarding this investment product, there was never at any time mention that the so called "tax free income "could or would be subsequently taxed".*

Mr F thinks he could have asked for more advice with hindsight – but according to Openwork it did give him an explanation of the tax situation. In my view Mr F's understanding of what he needed to do, as explained by him in his complaint, isn't consistent with the idea that Openwork's explanation was adequate in the circumstances. If Openwork had explained the tax implications to Mr F in the way it says it did, I think it unlikely he would've made the error he made in failing to report the gain on his tax return.

Openwork says Mr F may have been reluctant to report the gain due to the size of the tax liability involved. But he did report the income increase when it occurred. Openwork says it would be interested to know why Mr F thought this was different to the position on surrender, but to my mind Mr F has explained his understanding and why he thought income above the 'tax-free' income would be taxable but the 'tax-free' income would not be taxed. Also, as I noted in my provisional decision, Mr F's and Openwork's focus at the start, and that of the brochure material, was the tax position and potential benefits that could arise during the life of the plan – it was intended that he keep the plan for life. So I don't find it at all surprising his understanding of what to do and what to report if his income rose during the plan's life – which was something anticipated and hoped for - was better than his understanding of what to do if he surrendered the plan early – which wasn't anticipated or planned at the outset.

Openwork asks to see a copy of the chargeable gain certificate, so I infer that it hasn't seen a copy and didn't obtain one before arriving at its own final response for the complaint. So it considered it could reach a fair conclusion without it. I've not seen a copy of the chargeable gain certificate. I've thought carefully about whether I ought to seek this out now. On balance I've decided that this wouldn't throw much more light on this matter.

I say this bearing in mind that the certificate was viewed by Mr F in light of what Openwork told him in the phone call – and the phone call itself wasn't documented at the time, so what we have about it is uncertain. As such I reach the view – as Openwork seems to have done in its own investigation – that reviewing a copy of the certificate isn't necessary to reach fair outcome and wouldn't do much to help clear up the areas of uncertainty here.

Openwork points out Mr F told Openwork he had made incorrect *"assumptions",* but I don't think too much can be made of this choice of words. What Mr F calls assumptions were inferences he drew from the information he had – and that information included the explanation Openwork had given him. I think it is entirely foreseeable Mr F would rely on what Openwork told him and take this into account when interpreting paperwork he received. The fact he was a person who relied on what Openwork told him seems apparent in his decision to surrender the investment based on what Openwork told him on the phone about the potential issues arising for it from Brexit.

So for the reasons I've given and in light of all I've said above, I uphold Mr F's complaint in part and on the basis outlined above.

I'm grateful to Openwork for its prompt responses, which have assisted us in this matter. I thank Mr F too for his replies.

Putting things right

I find Openwork at fault for Mr F incurring interest on the tax liability that arose on the gain on his plan when he surrendered his plan.

Openwork Limited, trading as The Openwork Partnership, should put things right by paying to Mr F a sum equal to the sum he paid in interest on the tax on this gain on the policy. What Mr F has sent us suggests this interest amounted to £2,678.44. Mr F should give Openwork evidence of this interest liability if Openwork asks him for it.

Openwork Limited should pay this redress to Mr F with simple interest at the gross yearly rate of 8% from the date Mr F paid this interest to HMRC until the date the redress is paid to him. Mr F should tell Openwork the date he paid the interest, so it can calculate this interest.

Openwork should also pay Mr F £100 for the inconvenience its error has caused him.

My final decision

For the reasons I've given and in light of all I've said above, I uphold this complaint.

Openwork Limited trading as The Openwork Partnership should put things right by doing what I've said above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr F to accept or reject my decision before 25 July 2025.

Richard Sheridan
Ombudsman