

complaint

Mrs L has complained about Phoenix Life Assurance Limited's application of a Market Value Adjustment (MVA) to her pension plan at age 60. (This firm was formerly known as NPI, but I will refer to it by its current name of Phoenix in the rest of this decision.)

A broad summary of the complaint (which I shall cover in more detail below) is that Phoenix isn't legally or reasonably entitled to apply the MVA under the contract. And that it also misrepresented in the sales literature that there would be no 'penalty' in Mrs L's situation.

background

Mrs L's pension was set up when she worked for a financial services company. She says that she didn't get financial advice from that company. It was a 'staff sale', which qualified her to have any commission reinvested into the plan. But she believes both she and her then employer relied on what she considers was a misrepresentation in the sales literature, when choosing Phoenix as a provider.

The plan received rebates of Mrs L's National Insurance contributions as well as her own payments. These were all split between a with-profits fund and a managed fund. Mrs L believed from the sales literature that she could retire 'without penalty' at age 60; on account of paying contributions into the plan for more than 10 years. When Mrs L discovered there was an MVA, her husband raised the complaint on her behalf. I understand Mrs L has proceeded to buy an annuity using her funds, which have been reduced by the MVA.

Mr L raised a significant number of points. Our adjudicator told him that she had considered what she thought to be the core points of the complaint. But she didn't think that the complaint should succeed. She accepted that the sales literature had promoted, amongst other things, the following benefit of the plan:

"Flexible benefit age – the option to take benefits at any time between 50 and 75, without penalty if contributions have been paid for 10 years or more"

But in her view the literature was referring to the plan as a whole and not the specific funds it might be invested in. An MVA was a particular characteristic of a with-profits fund, not of Mr L's plan as a whole.

She explained that the plan as a whole might suffer a deduction at retirement from the value of the 'initial units', unless contributions had been paid for 10 years or more. This was set out at point 17(iii) of the terms and conditions. In her view this was what Phoenix's reference to 'without penalty' meant.

By contrast, the valuation of the with-profits fund was set out at point 17(i); where it applied to a policyholder taking benefits in an annuity (as in this case). It said:

"...If the member has not attained the age of sixty five at the date of cancellation the value of any cancelled units in the with-profit fund will be determined by the Actuary"

The adjudicator explained that it's common practice for only a summary of the terms and conditions to be supplied before the sale. And as Mrs L's application was submitted by a financial adviser, Phoenix would reasonably have expected that adviser to ensure she understood how the plan worked. That would've meant the adviser requesting whatever further information they thought they needed to ensure the plan was suitable for Mr L.

She also took into account the discretion Phoenix had in managing the with-profits fund. As a result she didn't feel there was a requirement for it to specifically justify how the MVA had been calculated on Mrs L's policy. Instead she referred to the fact that Phoenix was required to regularly publish a Principles and Practices of Financial Management (PPFM) document. This explained such things as its approach on the application of MVAs. Phoenix was also accountable directly to the regulator in its management of the fund.

On behalf of his wife, Mr L didn't agree. He raised a number of points, expanding on those he'd mentioned throughout his complaint. I'll cover these in some detail below. Phoenix had no further comment.

my findings

I understand Mr L feels strongly that I should consider all of the points he has raised. He points out that the Financial Ombudsman Service has a similar standing to a court; in that we can make a binding determination on both parties. I agree with what Mr L is saying. I would like to assure him that I've considered *all* the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

However the Financial Ombudsman Service doesn't operate exactly like a court. When deciding what's fair and reasonable, our rules don't just require me to take into account the law. I must also take into account any relevant regulations or codes of practice; and where appropriate what I consider to have been good industry practice at the relevant time.

We conduct our investigations in an inquisitorial manner, rather than just relying on how well either side has argued their case. So I think the adjudicator was entitled to focus on what she considered were the core points. However I understand this is an important matter for Mr and Mrs L. I can't guarantee to address every point specifically. But I'll group their points into a number of common headings below. I trust that this will give them confidence that I have taken everything they've said into account when reaching my decision.

Do Mrs L's plan conditions allow an MVA to be applied?

In my view clause 17(i) in the terms and conditions is clear. It sets out that Phoenix's actuary may determine the value of Mrs L's investment in the with-profits fund if she draws the benefits before age 65. In other words, it may not simply be the value of her units increased by any bonuses added in the past. The clause implies further adjustment may be made.

Mr L says that this explanation is too vague. And that this isn't compatible with the Unfair Terms in Consumer Contracts Regulations. He believes it should have specifically set out that there could be an MVA. I understand the point, and as language evolves it's indeed possible this clause may be phrased differently in a newer contract. But it isn't an unusual term to find in a contract from 1989. The fact that insurers have a wide amount of discretion is a long-standing feature of with-profits funds, and has been well-known in the industry for many years.

Even today, I'm not aware that unfair contract terms legislation has taken away the discretion insurers must be allowed to have to successfully operate these funds. It is for the insurers to decide how to apply bonuses to 'smooth' the return throughout the intended term (in this case to age 65). And how to adjust that return if funds are withdrawn part-way through the term; to ensure that no investor leaves with more than their fair share of the fund's assets. I'm satisfied that the terms and conditions here allow Phoenix to do this.

I take the point that the benefits under Mr L's plan were originally illustrated to age 60. And in respect of the life insurance and protected rights element, the retirement age specified on the proposal form was also 60. But the issue here isn't with Mrs L being allowed to retire at that age. It concerns the level of benefit that will be payable.

Protected rights replace the benefits Mrs L had been entitled to under the earnings-related part of the state pension. So I accept she may feel it is logical for the MVA-free date on her plan to coincide with the state pension age for women (which was 60 when she took the plan out). Indeed some providers may operate their policies in this way. So another provider's plan may have been more suitable for Mrs L if she had a firm intention to retire at 60. But there is no rule or regulation requiring Phoenix to make this an MVA-free date.

It seems that Phoenix treats male and female customers in its with-profits fund the same, and only guarantees that they can retire MVA-free after age 65. I think this can clearly be seen in clause 17(i) of the terms and conditions. It's implicit in this clause that the value determined by the actuary might be lower than the face value of the units themselves; otherwise there would be no need to include this clause at all. But I will address Mr L's concerns that this wasn't clear before his wife took out the policy.

Was Mrs L induced into the contract by a misrepresentation?

Mr L says that he and his wife regard the MVA as a penalty. And therefore, Phoenix misrepresented in the various brochures his wife received that there would be 'no penalty' if contributions were paid to the plan for at least 10 years. In his view, Phoenix has never explained what this claim referred to; if it wasn't intended to mean there would be no MVA.

However I consider that in this statement Phoenix was setting out the basis on which Mrs L could avoid a charge insurers typically deduct, if contributions cease sooner than they expected. It's important to emphasize that this type of charge, often referred to as an 'exit penalty' or 'discontinuance charge' is applied at a policy level. It's based on the contributions being paid; rather than the funds the policy is invested in.

So in answer to Mr L's question, the charge Phoenix was referring to was set out at clause 17(iii) in the terms and conditions, and is different to the one he's disputing. It says:

"if the pension date is for any reason before the sixty-fifth birthday of the member at a time when ten years' or more regular contributions have been paid...the deduction from the value of initial units allocated to this policy is zero. The deduction may however be varied at the discretion of the Actuary."

I realise this hasn't been clear to Mrs L. So I've considered whether it was reasonable for her to expect that the full value of the with-profits fund would be available at age 60, based on what she read in the sales brochures. To clarify, I've looked at all the brochures Mrs L says she received. I haven't considered a further brochure entitled "*way ahead for employees*", as it doesn't appear Mrs L had a copy of this brochure.

Central to this is whether an MVA can fairly be regarded as a 'penalty'. I can see why, having previously been told that her entitlement in the with-profits fund was a greater sum, Mrs L will see the reduction as a penalty. But I think that's a false starting point. It's common for insurers to quote with-profits values on an ongoing basis on the assumption that the investment will remain in force until the date benefits are guaranteed (age 65 in this case). That doesn't guarantee the same value will be available for immediate payment.

The MVA is the final balancing item in valuing Mrs L's entitlement from the with-profits fund. It's not the same as a charge that might be deducted from the policy itself (once the funds have been valued). So I don't think this could fairly be termed a penalty. It's a core part of how the with-profits holding is valued. The fact that the sales brochures don't refer to any particular funds when mentioning a penalty supports this. I don't think it would've been reasonable to infer how the with-profits fund would operate from these brochures.

I've also borne in mind that Phoenix sold its products through advisers. Whilst Mrs L maintains her employer didn't give her advice, Phoenix would still reasonably have expected – based on how the sale was presented – that she was getting advice. Mrs L also admits that both she and her employer interpreted the sales brochures the same way.

If Mr L's employer had been giving advice – and arguably, even if not – I think there would reasonably have been some understanding that providers operated their with-profits funds in different ways. And it could be important for a consumer seeking the safety of a with-profits fund to check when the MVA-free date was.

Nothing specific to the with-profits fund was mentioned in the sales brochures. Yet Mrs L seems to have drawn some confidence that her employer also believed there would be no charge or adjustment at all if she retired at age 60. I think that confidence was misplaced. Or it's possible that, given the comparatively healthier state of with-profits funds in 1989, the specific MVA terms might not have been something Mr L's employer had addressed when they'd sold Phoenix products before.

Either way, I don't consider I could fairly conclude that this feature of Mrs L's policy was misrepresented – when there's a reasonable explanation for the reference to 'without penalty' in the plan brochure. Nor could I conclude that Phoenix is at fault if Mrs L chose not to seek full advice; or if her employer hadn't checked whether their expectations of Phoenix's with-profits fund were correct.

Does Phoenix have to demonstrate the specific calculation of the MVA in Mrs L's case?

I do have sympathy with Mr and Mrs L on this point. The amount of discretion given to Phoenix in how it operates the fund should rightly come under some scrutiny. That is one reason why these funds are less popular with investors these days.

However I don't agree with Mr L's point that clause 17(i) requires Phoenix to provide a bespoke calculation breaking down the MVA to each investor in writing. In order to ensure fair treatment between investors, it's reasonable to expect there will be a general formula employed in the calculation of all MVAs. Phoenix has already written to Mr L to explain how this is based on the premiums paid and the underlying return on the fund's assets.

I would also echo the adjudicator's point that Phoenix is already supervised by the regulator in its management of the fund. The regulations also require it to produce the PPFM document she mentioned. I find it highly unlikely that Phoenix will have been able to calculate MVAs using a different basis than that set out in the PPFM (and in its reply to Mr L) given its level of regulatory supervision and accountability.

I understand Mr L has a specific concern that Phoenix might mistakenly have based its calculation of the MVA on all the premiums his wife paid; not just the proportion she paid into the with-profits fund. I would however comment that the MVA quoted amounts to about 15% of Mrs L's plan as a whole. (Therefore, if only about half of the plan is in the with-profits fund it would be nearer 30% of that fund.)

Phoenix has given Mr L an example showing a typical MVA on a with-profits plan started in 1989 is about 30%. So I think it's highly unlikely Phoenix has made a clerical mistake with Mrs L's calculation. I also don't find it surprising that the MVA is this high. The with-profits fund Mrs L was in guaranteed annual bonuses of 4%, providing units were held until age 65. This is an expensive guarantee to meet in today's environment. The underlying assets in the fund are unlikely to be able to support it if funds are withdrawn before age 65.

I'm sure Phoenix will be able to check and confirm to Mr L in response to this decision that there hasn't been a clerical error. Nevertheless, if Mr L isn't satisfied and considers the with-profits fund isn't being appropriately managed, he is entitled to bring that matter to the attention of the Financial Conduct Authority (FCA) himself. In the highly unlikely event that any action was required, it would obviously affect all policyholders. That isn't something the Financial Ombudsman Service can do. I would however warn Mr L that due to confidentiality constraints, the FCA doesn't give feedback on an individual basis when concerns are raised.

Are the offers of compensation Phoenix has made sufficient in the circumstances?

Phoenix initially took over two months to respond to Mr L's complaint; although I should note that some points were clarified whilst it was considering the matter. It offered Mrs L £200 for any inconvenience this caused. Mr L had further discussions with Phoenix, but these didn't prevent him referring his complaint to our service if he remained dissatisfied. On balance I think what Phoenix has offered here is fair and reasonable compensation.

It was then very unfortunate that Phoenix did make a clerical error in an exercise to issue a 'Pension Plan Summary' to customers who were taking their benefits. This incorrectly suggested that Mrs L *could* retire without an MVA. Whilst I do think Mrs L would've had reason to believe this was an error – or at least that it might have been an error – it can only have dented her confidence in Phoenix further. I think Phoenix was right to recognise this, and its offer of a further £100 is fair.

my final decision

I do not uphold the main part of Mrs L's complaint about the application of the MVA and whether this was misrepresented in the sales literature.

However I consider Phoenix Life Assurance Limited has made a fair and reasonable offer of £300 in respect of the distress and inconvenience it's caused Mrs L, and she should now consider accepting this offer. Phoenix should also check its MVA calculation and confirm to Mrs L that it was based on the correct premiums she paid into the with-profits fund only.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs L to accept or reject my decision before 1 February 2016.

Gideon Moore
ombudsman