

complaint

Mr B has complained that The Prudential Assurance Company Limited won't let him transfer out the part of his section-32 pension plan that wasn't allocated to 'GMP units' to another provider.

background

Mr B transferred the benefits he held in an employer's pension scheme to Prudential in November 1992. When the transfer took place Prudential accepted the liability to provide Mr B with a Guaranteed Minimum Pension (GMP). Although Mr B's plan has a selected retirement age of 60 (which falls in 2021), the pension in payment from the plan from age 65 has to be at least equal to the GMP.

When Prudential accepted the transfer value, it allocated £1,665 allocated to 'GMP units' and the remaining £2,923 to excess units. The GMP units were invested in special with-profits units (With Profit II), which had a lower bonus rate – reflecting the cost to Prudential of providing the GMP guarantee. Mr B also chose to invest the excess units in Prudential's with-profits fund – these went into the standard (With Profit I) fund, which enjoyed a higher bonus rate.

Mr B would like to take what benefits he can from the policy without affecting the GMP guarantee. His adviser has asked to transfer the excess units away from Prudential. Prudential says it can't permit this because whilst the value of all his units (in April 2016) was about £23,387, the cost of providing the GMP at that point was about £54,376. It explained:

'...we will meet the shortfall of the fund at your normal retirement date (NRD) and your With Profits I and AVC Fund of £16,047.77 will be used to provide benefits in excess of your GMP. If benefits are taken before NRD we reserve the right to use some of your With Profits I and AVC Fund to secure the cost of the GMP and we will not meet any shortfall.'

But in its final response to the complaint Prudential has said:

'This policy does not facilitate the independent payment of the non GMP element before the member has reached their normal retirement date. At that time, a member can choose to transfer the non GMP element or take the benefits either as a cash lump sum or an annuity.'

Mr B's adviser wanted Prudential to demonstrate how it has the right to use some of the With-Profits I fund to make up the shortfall. Prudential referred to the wording on Mr B's annual statements, which read:

'The amount used to credit special With-Profits units depends on the amount of your Guaranteed Minimum Pension (GMP) benefits, but we do not guarantee that those units alone will provide enough to pay for your GMP benefits.'

The payment of benefits cannot take place if the amount raised on realising all of the units credited to the Policy is insufficient to provide your GMP payable from Selected Pension Date (SPD). You must wait until there are sufficient funds available on realisation to provide these benefits, however this restriction ends when you reach your SPD. When all of the units credited to the Policy are cancelled on or after SPD, we guarantee there will be sufficient funds to provide your GMP.'

One of our adjudicators considered the complaint. She concluded that at the current time Prudential was entitled to use Mr B's non-GMP fund in order to meet the requirements of the GMP. So this meant it was able to prevent the non-GMP funds being transferred away.

Mr B's adviser replied saying it was unfair that Prudential had 'moved the goalposts' since his policy was sold; because it was relying on wording added to annual statements rather than in the original policy term and conditions.

In an attempt to assist resolving this matter, Prudential provided a copy of the Pension Transfer Brochure and Technical Guide, which would've been available to Mr B when he originally completed his application. Mr B's adviser saw these and commented that they appeared to bear a date of 1993 – just after Mr B's plan went into force. Prudential has been unable to locate any earlier documents.

As agreement couldn't be reached, the matter has been passed to me for a final decision.

my findings

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

I understand Mr B's concern about the later documents Prudential has provided. Although it tells us it's very likely these weren't changed from the 1992 version, I have to exercise some caution because the very fact they were reprinted might suggest that something had changed. And these aren't the terms and conditions of the policy itself, but rather supporting (and in some respects 'promotional' literature).

What actually determines what Mr B may or may not do with his policy is set out in the terms and conditions his adviser sent in to us at the start of the complaint. The relevance of these terms and conditions doesn't seem to be in dispute. So I'll be completing my review based on these.

I agree with Mr B's adviser that sections 3.1 and 3.2 set out that part of the policy is allocated to GMP units and part is allocated to excess units. But that, in itself, doesn't give any undertaking as to how those units will be used at retirement. It merely sets out Prudential's discretion to decide how much of the transfer value forms GMP units.

It was necessary for Prudential to do this because Mr B had greater investment freedom with the excess units. I'm not aware he had to invest these in the with-profits fund at all. Taking into account the additional reserves it anticipated it would build up by paying a lower annual bonus on the GMP units than it did on other with-profits units, Prudential had to calculate what sum it could permit Mr B to invest more freely (if he wanted to do so) in excess units, whilst ensuring the GMP guarantee could still be met.

It's necessary to look elsewhere in the terms and conditions for an explanation of how the GMP and non-GMP units are actually used in providing benefits. Section 7.3 ('Option of Advancing Payment of Benefits') says that Mr B may retire earlier than his Vesting Date (that is, his selected retirement age of 60):

'...Provided that this option shall not be available unless the Accumulated Fund (after any deduction that may be applicable under Provision 4.2.1) would be sufficient to secure on the Vesting Date

(i) a pension for the Policyholder which from State Pension Age is of an annual amount no less than the Guaranteed Pension...'

The Accumulated Fund is defined in the policy as the amount produced by cancelling *all* the units – not just the GMP units. (The deduction under Provision 4.2.1 relates to what is commonly termed a market value adjustment from the with-profits fund, and is not crucial to the meaning of this section.)

So this confirms that, at the current time, Prudential *is* entitled to use all of the units in Mr B's plan when deciding if they are sufficient to provide the GMP. The answer is that currently, they are not. And that has a knock-on effect in whether Mr B can transfer any units out of the plan in section 9 ('Transfer to receiving scheme'). That says, with my emphasis:

'9.3 Unless the requirements of the Occupational Pensions Board would permit the transfer to the receiving scheme of the rights and prospective rights to Guaranteed Benefits applicable in respect of the Member, all GMP Units (plus such other Units as the Prudential may in its absolute discretion consider necessary to provide the Guaranteed Benefits) shall remain allocated to the Policy.'

This tells us two things:

- It wasn't strictly correct of Prudential to say to Mr B's adviser *'This policy does not facilitate the independent payment of the non GMP element before the member has reached their normal retirement date'*. The above term suggests this is (albeit only in theory possible); but:
- As Mr B's total fund in 2016 was less than half the cost of providing the GMP, it's not going to be possible here. It's clearly within Prudential's discretion to decide that it must hold back *all* of the non-GMP units to cater for such a significant shortfall.

So although I've considered all of Mr B's adviser's points carefully, I think the terms and conditions are clear on the question of whether or not Prudential must allow him to transfer out his non-GMP fund at this time. I'm satisfied that Prudential doesn't have to do so.

my final decision

I do not uphold Mr B's complaint and make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 1 March 2017.

Gideon Moore
ombudsman