

Complaint

Mr M has complained that Phoenix Wealth Services Limited (Phoenix), previously known as AXA Wealth Services Limited (AXA) didn't carry out a discretionary ad hoc review of his Family SunTrust Scheme (FST) as it had promised to do in July 2016. He believes he hasn't been treated fairly and has suffered a large tax liability as a result.

Background

The FST was a self-invested personal pension scheme (a "SIPP") which had been on the market since 2009. It allowed individual pensions to be grouped together and included a facility where investment growth could be re-allocated between members' pensions on a non-proportionate basis – (the "flexibility option").

The scheme was provided by a part of AXA which was subsequently bought by Phoenix.

In August 2014, Mr M completed paperwork to apply for the FST and to vary the terms of the FST to apply the flexibility option. The scheme was registered by HMRC at the end of August 2014.

Mr M's financial adviser was told on 25 July 2016 that AXA intended to withdraw the flexibility option on 2 September 2016. At the same time AXA told the adviser Mr M could request an ad hoc review provided it was registered with AXA by 29 July 2016. AXA received an email request for the ad hoc review on 28 July 2016.

AXA wrote to Mr M on 22 August 2016 confirming its notice to remove the flexibility option with effect from 2 September 2016. It explained that after 2 September 2016 any growth would be *proportionately* distributed between the scheme members.

Under advice from his financial adviser Mr M applied for Fixed Protection on 12 August 2016. This provided a guaranteed lifetime allowance in exchange for giving up further benefit of accrual rights. The application for Fixed Protection also removed Mr M's ability to use the flexibility option from that date onwards.

On 22 August 2016 AXA told Mr M's adviser that the invitation to carry out an ad hoc review was an error and no such review or revaluations could be carried out. It clarified the scheme would be revalued at its yearly anniversary only and for Mr M the anniversary date was 21 August 2016.

Despite this Mr M proceeded to drawdown a tax-free lump sum from his pension at which point his adviser queried with AXA whether the growth on the plan had been allocated on a non-proportioned basis. AXA explained the growth had been proportioned as per the terms and conditions of the scheme which stated that if a member had Fixed Protection, they couldn't have growth distributed on a non-proportioned basis.

Mr M complained to AXA. He stated that after incorrectly telling his adviser on 25 July 2016 that he could request an ad hoc revaluation, AXA took too long to correct the error and he had already taken out Fixed Protection. He said had he known that the ad hoc review wouldn't take place then he wouldn't have applied for Fixed Protection on 12 August 2016 and therefore would have been able to distribute the growth in the scheme in the way he originally wanted.

The complaint was investigated by one of our adjudicators who felt it shouldn't be upheld. He found that ad hoc reviews could take place at the *discretion* of the scheme's administrators – they weren't a guaranteed facility. And that the error was caused by a misunderstanding between AXA and the administrators after the decision had been made to withdraw the flexibility option.

He also found that the terms and conditions of the scheme allowed AXA to withdraw the flexibility option if it met certain criteria, giving 30 days' notice, which it did.

He also explained that it wasn't clear why the Fixed Protection had been applied for when it was, as the Fixed Protection stopped the non-proportioned distribution of growth for the valuation of the scheme at its anniversary on 21 August 2016.

I issued my provisional findings in August 2020 where I set out why I felt the complaint should be upheld but only in part. An extract is set out below and forms part of this final decision:

Mr M's main complaint is that the wrong information about the ad hoc review that AXA gave his adviser led him, under independent advice, to take Fixed Protection thereby causing him to lose the use of the flexibility option. However, given this situation came about following the decision AXA made about withdrawing the flexibility option, and there has been some speculation about the reasons for this, I think it would be useful to set out the background to this decision by AXA and why I think it has acted within its terms and conditions.

The terms and conditions of the Family SunTrust scheme state:

[AXA] has the right to decide that the provisions set out in the "Operative provisions" in part 3 of the document [i.e. the provision of the flexibility option] will cease to apply..... [AXA] can exercise this right only if there are changes in, or [our] interpretation changes of, applicable pensions, tax or other law, legislation, regulation or industry codes of practice. [AXA] can exercise this right upon giving....30 days written notice so far as practicable to do so.

So, I am satisfied that AXA had the ability to remove the flexibility option if it met the criteria in the terms and conditions. I have next considered whether AXA did indeed meet the criteria mentioned above. In particular, did it change its interpretation of the applicable pension laws and regulation. To do this I have looked at the history of AXA's involvement and dealings with the FST.

AXA has provided me with information concerning the development of the FST as well as the communications that took place between AXA and HMRC regarding the flexibility option. I have seen:

- The template letters from the AXA FST manager to advisers where the scheme was applied for /or had been taken out. These are dated 2015 and 2016.*
- The timeline of the development of the FST scheme, provided by AXA.*
- Letters between HMRC and the FST team at AXA from May 2015 to July 2015 discussing the scheme and more specifically the flexibility option.*
- The confidential reports to AXA from legal counsel regarding the flexibility option.*

From this information I can see that:

- AXA started to look into the feasibility of launching the product in late 2006. In light of*

HMRC legislation and after legal advice it launched the FST on a limited basis in March 2008 and launched it fully in February 2009.

- It's documented in the timeline provided by AXA that at this point in time HMRC's view was that the flexibility option was within the rules, but it was noted that HMRC provided no guarantees that position wouldn't change in the future.*
- For the next few years, until 2015 the information indicates AXA kept reviewing the scheme and despite some changes to pension regulation over these years AXA remained satisfied that HMRC was content with the scheme and that its flexibility option was within the relevant rules. This included further legal opinion in 2013 indicating that the environmental risk in the area of pensions had increased but that the underlying legislation had not changed. In light of this AXA decided to continue operation of the FST unchanged.*
- However, in May 2015 HMRC asked for further details from AXA about how the pooled growth in the scheme was allocated to its members. This appears to have been prompted by an increase in 'pension liberation' scams (a type of fraud). AXA's response tried to reassure HMRC about the flexibility option, but HMRC advised that it had concerns over the model being used to allocate growth and it felt that this could be contrary to sections 172 (Assignment of benefits) and/or 172A (Surrender of benefits) of the Finance Act 2004.*
- Because of these concerns, HMRC stopped registering new schemes.*
- There was a further meeting between AXA and HMRC in September 2015.*
- HMRC resumed registration of the FST in October 2015. In the same month AXA issued communications to advisers that registration of the FST had resumed but it's discussions with HMRC were ongoing and all features of the product couldn't be guaranteed to remain into the future. Advisers were invited to withdraw applications from new clients.*
- Again in the same month AXA obtained further legal opinion in response to specific points HMRC raised at meetings between itself and AXA in September 2015.*
- This led to AXA writing to HMRC in October 2015 asking it to withdraw their objections in light of its most recent legal opinion.*
- There then followed much discussion between AXA and HMRC. And AXA again sought legal advice during this period.*
- In January 2016 AXA issued second communications to advisers informing them that HMRC continued to investigate elements of the FST and that registration of the new schemes was at their own risk.*
- However, because of the continued HMRC investigations AXA closed the FST to new business in May 2016.*
- In June 2016 HMRC advised AXA its investigations were continuing.*
- In July 2016 AXA obtained further legal opinion. The finding of this was that the risk environment within the area of pension had changed and more notably that HMRC continued to investigate the FST position even after submission in October 2015 of legal opinion and evidence that supported the flexibility option of the FST.*
- Later that month the Board of AXA made the decision that it was no longer appropriate to continue with the interpretation that disproportionate allocation of growth was appropriate within the pension framework as it was at that time.*

Taking account of this information, I'm satisfied AXA had been carefully considering the nature of the flexibility option for some time but that no decision was made to withdraw the flexibility option until legal advice was received in July 2016. And that the decision was made due to a genuine change in AXA's interpretation of applicable "pensions, tax or other law, legislation, regulation or industry codes of practice".

Turning now to ad hoc reviews and the information Mr M's adviser was given by AXA.

Firstly, I know Mr M has said that he's heard through a former employee of AXA that it continued to carry out discretionary ad hoc reviews for other FST schemes. However, AXA has confirmed this wasn't the case and that any reviews that took place were those that were required under the schemes' rules, in other words where reviews were non-discretionary reviews. At this stage, Mr M hasn't provided any information that leads me to doubt AXA.

Mr M's intention was to request an ad hoc review and use the flexibility option to distribute the growth since the pension scheme's last anniversary statement to benefit Mrs M, on a non-proportionate basis. If AXA's communication error had not occurred on 25 July 2016 it is reasonable to assume rather than an ad hoc review request the anniversary review would have taken place on 21 August 2016 as scheduled, as anniversary reviews would always occur whether or not an ad hoc request had been made. So, there was the option to use the flexibility option at that time prior to 2 September 2016. However, because of the wrong information Mr M applied for the Fixed Protection which meant he lost the use of the flexibility option before it was finally removed on 2 September 2016. This is what Mr M has said has caused him a potential tax liability.

What I need to ascertain is whether Mr M's actions were wholly due to the incorrect information he received from AXA and whether Mr M acted reasonably when he took the actions he did.

Mr M says he applied for Fixed Protection before he received confirmation from AXA that the revaluation would take place or how the growth had been distributed since August 2015 and he's said he did this quickly because of the short deadlines involved. But from everything I have seen there was no deadline to apply for the Fixed Protection. The only deadline involved at that time was to apply for an ad hoc review, which Mr M met. So Mr M had no reason to rush to apply for the Fixed Protection and so could have waited for confirmation from AXA about the ad hoc review. If Mr M was acting under short timescales, then I can't see this was down to anything AXA had communicated to him in regards to the Fixed Protection. Also, it's important to point out that the ad hoc reviews were discretionary therefore I think it was reasonable that Mr M waited for confirmation from AXA about the ad hoc review before he took any further action.

Also, it appears it was Mr M's adviser who told him to apply for the Fixed Protection and not AXA. Had he spoken to AXA at the time it may have been discovered earlier than it was that the ad hoc review wasn't going to happen. And so Mr M wouldn't have submitted the application for the Fixed Protection.

There is no doubt AXA gave Mr M and his adviser the wrong information about the ad hoc review. And while this was due to a misunderstanding between the scheme administrators and the AXA advisers, I think the inconvenience this caused to Mr M should be recognised by an award of £200.

Overall, whilst I appreciate Mr M's frustration I don't think it was reasonable for him to apply for the Fixed Protection without receiving confirmation from AXA about the ad hoc review bearing in mind it was only a discretionary service. He applied for this on an assumption the review would take place and also perhaps on a misunderstanding of the scheme's terms and conditions. AXA did provide the wrong information about the ad hoc review, but I don't think

it can be held responsible to Mr M taking the hasty action that he did before receiving any sort of confirmation from AXA which ultimately caused him to lose the use of the flexibility option.

AXA confirmed it had received the provisional decision and accepted my findings.

Mr M responded to the provisional decision with the following comments:

1. Why was there so much information in the provisional findings about the product and AXA's withdrawal of the flexibility option. He feels none of this is relevant as his complaint is not, about AXA's withdrawal of the flexibility option.
2. AXA "invited" Mr M on 25 July 2016 to request an ad-hoc review, giving him just four days to submit such a request. He states he met this deadline and paid the required fee of £113. Mr M feels this constitutes a legally binding agreement and so expected AXA to carry out the ad-hoc review. He doesn't understand why it was considered he should check up on AXA and why he should have waited for confirmation from AXA.
3. AXA state, in its letter of 22 August 2016 that *whilst it has previously agreed to such requests in certain circumstances.....* which Mr M feels confirms it did carry out ad-hoc requests. He's asked how was it concluded AXA had not carried out any other ad-hoc reviews? Did it provide an affidavit, sworn under oath? Why was it concluded that the statement made by a former employee of AXA, was incorrect? How was it determined that the statement made by the former employee was a lie?
4. AXA's failure to any action on his request until 22 August 2016, some 25 days after his request was submitted, when they advised Mr M that the ad-hoc review would not be carried out, is "*nothing short of outrageous*". He thinks that in taking that amount of time AXA wasn't treating him fairly or reasonably.
5. He doesn't understand why AXA refer to the "invitation to request an ad-hoc review" being an error. Surely this step would have been approved by someone high up in the organisation. Who was it and what was their role/job title?
6. The provisional findings are correct in stating there was no deadline to apply for Fixed Protection. Mr M states he had complied with AXA's deadlines to request an ad hoc review and his adviser believed that it was reasonable to assume that the review would be undertaken. He feels that under the law of causation, his actions were prompted by AXA to assume there was no reason why his adviser should not advise him to apply for Fixed Protection. It was not done in a rush. It was not a hasty action and Mr M has questioned why I concluded it was.
7. He is insulted by the suggestion of £200 compensation. He doesn't understand on what basis this was assessed. The redress he is seeking is to be in the position that he would have been in, if AXA had carried out the ad-hoc review that he was "invited" to have. This would have meant that the growth, up to the point of the request, would have been apportioned to his wife.

My findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. Having done so while I have taken

account of Mr M's comments, I am not persuaded to change my initial outcome of this complaint.

I have addressed Mr M's concerns below, using the same numbering as above.

1. I can assure Mr M that I fully understand what his complaint concerns and I included background of the FST and the event leading up to the withdrawal of the flexibility option in the provisional decision for information purposes and completeness. Furthermore, it is evident by my provisional findings I have addressed Mr M's complaint about AXA not carrying out the ad-hoc review.
2. In my view the key fact in this complaint is in the way Mr M's FST was set up, the ad hoc reviews were not guaranteed to always take place. They were to be carried out at AXA's discretion. Therefore, by not carrying this one out AXA wasn't breaching any terms of any contract. In law Mr M is correct when he says by accepting the fee (a "consideration") AXA was effectively agreeing to carry out the ad hoc review however this Service is not a court and we have the discretion to look past this if appropriate. And I think in this specific complaint it is appropriate. Also, AXA was entitled to withdraw this offer providing it returned the fee. The ad hoc reviews were not guaranteed for Mr M as they were for some other FST clients and he was invited to have one at this point in time due to a mistake. This was a clear mistake on the part of AXA with no hidden agenda in my view. Therefore, it's not unreasonable from everything I have seen that it corrected its mistakes and informed Mr M it couldn't carry out the review. As the review wasn't guaranteed under his contract Mr M should have waited to see if AXA agreed to conduct the review before he applied for the Fixed Protection.
3. For Mr M's information this Service doesn't require sworn affidavits when we gather the information required for investigation of a complaint. We are an *alternative* to a court and work in a different way. I haven't said the information from a former employee was a lie. I have simply said that AXA provided me with different information which I was more persuaded by and I have no reason to doubt. AXA knows it is under a duty to provide me with full and correct information in this process. Therefore, I have to accept that in good faith. And just to reiterate, some reviews were carried out but the information I have indicates they were those that AXA was contracted to carry out unlike Mr M's reviews which would only be carried out at AXA's discretion.
4. I agree that taking 25 days to rectify a mistake is a long time. However, I also understand why this could happen. The process of withdrawing the flexibility option was not a simple one and unfortunately sometimes mistakes do happen. Ultimately Mr M's contract with AXA didn't require it to carry out his ad hoc review – as already stated this was to be carried out at AXA's discretion meaning it wasn't obligated to do so. With that in mind Mr M really should have waited for confirmation that AXA would agree to the review before he took any further action. This wasn't a new term for Mr M – it had been that way since he started his investment in the FST and using the flexibility option.
5. Again I know that AXA made a mistake in inviting investors to request an ad hoc review. I have seen this throughout my investigation of this complaint and others. And while I appreciate this was frustrating for Mr M and he wants information about

who approved this I don't need to provide that information as it doesn't make a difference to the outcome of my final decision.

6. My reference to hasty action was down to the fact Mr M didn't wait for confirmation from AXA that the review would go ahead in light of the fact the ad hoc reviews were discretionary. I think it would have been prudent for Mr M to have waited for confirmation and as he didn't, I concluded Mr M was hasty in applying for the Fixed Protection.
7. Because I have concluded AXA didn't have to carry out the ad hoc review I don't think the right thing is for AXA to put Mr M into the position he would have been *had* AXA carried out the ad hoc review. It was entitled to not carry out the review regardless of the invitation and regardless of Mr M paying the fee for this. I think the mistake, while frustrating, was something that was very unfortunate but I don't think is something AXA should be disproportionately penalised for. Nevertheless, recognition of this mistake must happen therefore a nominal amount of £200 is appropriate in my view. While Mr M doesn't understand how I have reached this amount it is in line with the way this Service approaches such matters and he can find more information about these payments from this service on our website.

Overall, I don't think it was reasonable for Mr M to act so quickly without confirmation from AXA about the ad hoc review, which was never guaranteed. By doing this and applying for the Fixed Protection Mr M missed the opportunity of having the annual review of the FST take place. But I don't think it's reasonable to hold AXA entirely responsible for this because Mr M applied for the Fixed Protection without confirmation from AXA and there should always have been a question in Mr M's mind about the ad hoc reviews given it was never guaranteed under his FST contract.

I appreciate Mr M is unhappy with my decision, but I remain of the view that the complaint can only be upheld in part. If Mr M wishes he can pursue this complaint through other routes and he doesn't have to accept this final decision should he not want to.

My final decision

My final decision is that I uphold this complaint in part.

Phoenix Wealth Services Limited (Phoenix), previously known as AXA Wealth Services Limited (AXA) should pay Mr M £200 for providing him with the incorrect information about his ad hoc review.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 30 October 2020.

Ayshea Khan
Ombudsman