

complaint

Mr P is unhappy that The Prudential Assurance Company Limited is not allowing him to access his pension in the way he wants.

background

A brief summary of the circumstances leading to this complaint, and my initial conclusions, were set out in my provisional decision, a copy of which is attached and forms part of this final decision.

In short, Mr P was declared bankrupt in 1998. He had a pension at that time with another provider, which Prudential is now responsible for. Prudential says the pension had a forfeiture clause which meant Mr P gave up his pension benefits when he became bankrupt. This was to prevent his pension being claimed by his creditors.

Mr P is now looking to retire. He wants to draw on his pension as and when he needs to along the lines of an income drawdown plan. Prudential says the forfeiture clause means it can't pay benefits directly to Mr P which means certain options, such as a transfer to another provider and income drawdown, aren't available to him. Prudential says it will still pay Mr P a pension, but any payments have to be made to a third party (a spouse for example) and not directly to him. It says Mr P would still have *some* flexibility (for instance, it says the whole pension could be taken as a taxable lump sum) but Mr P can't have complete freedom with regards to his pension. Mr P doesn't think this is fair, and he says he was given conflicting information by Prudential.

Prudential paid Mr P £200 because it thought the information it provided to him about his pension options could have been better. But it didn't reverse its decision on the payment of Mr P's pension. Mr P referred his complaint to us.

In my provisional decision I explained why I wasn't intending to uphold Mr P's complaint. I invited both parties to provide further comments. Prudential didn't have anything further to add. Mr P made a number of comments, which I address below.

my findings

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 decided to not uphold Mr P's complaint.

First of all I think it worth reiterating here that the forfeiture clause means control of Mr P's pension was (ultimately) transferred to Prudential. And the forfeiture clause doesn't require Prudential to transfer control back to the policy holder at some later date. All the clause requires Prudential to do is consider paying some (or potentially all) of the pension in support of the policyholder if they've run into financial difficulty:

"If, through the operation of this Clause, a benefit ceases to be payable, the Society may, in case of hardship apply all or any part of it for the support and maintenance of the person who would have been the recipient had the benefit not ceased to be payable"

Mr P confirms he is in hardship, so there's no issue on that front. Prudential has also agreed to pay the entire pension, so there's no issue here either. The issue is Prudential won't pay

benefits directly to Mr P, which reduces his flexibility. I understand Mr P's frustration, but I'm satisfied Prudential's decision is in line with the clause's requirement to pay in "support and maintenance" of the policy holder.

Mr P says Prudential has agreed to pay the pension in its entirety. He says he can choose whether payment is as a lump sum or a partial lump sum. He says any tax liability would be based on his own particular circumstances. And he says paying the whole fund to him (via a third party) is no different to transferring the entire fund to another provider.

I understand the points Mr P has raised. He is saying Prudential (and HMRC) are, effectively, treating the pension as Mr P's. And he is saying there doesn't appear to be a substantive difference between what Prudential is willing to do for Mr P and what it isn't willing to do (and there's no obvious cost either way to Prudential). However, the simple fact is control of the pension has passed to Prudential – meaning it now has discretion on how (or if) it is paid. And there's nothing in the forfeiture clause directing Prudential to act in the way Mr P wants. So Mr P has very little leverage here, and little in the way of contractual rights. There's also a broader point which is that Prudential is trying to minimise the possibility (however remote) of Mr P's bankruptcy arrangements being compromised. I recognise this might come across as being overly cautious and its approach might seem arbitrary. But I don't think Prudential is acting unreasonably given what's at stake and given Mr P can still receive his entire pension.

Mr P says he wasn't told about the forfeiture clause. This may well have been the case. But that doesn't mean Mr P lost out as a result. My view was – and remains – that Mr P would have kept the policy even if he had been informed of the forfeiture clause at the time. After all, it was designed to protect his pension in the case of bankruptcy, which I can only assume would have been seen as being beneficial.

Mr P also points out that the change in law means the forfeiture clause wouldn't have been needed shortly after Mr P became bankrupt. But the issue here is that the forfeiture clause was needed in Mr P's case, meaning he did give up his pension and he is subject to the forfeiture clause. Mr P's situation has to be seen in this light, rather than what would have happened had he become bankrupt at a later date.

Mr P goes on to say he will lose out financially because his fund is too small to pay a "reasonable" pension but taking the pension as a lump sum would result in it being heavily taxed. So he says he will lose out unless he can draw on his funds as and when he wants to in a tax efficient way. This is a crucial point because if the forfeiture clause does financially penalise Mr P then it would be difficult to see what purpose it served. However, I don't think I can reasonably say that's the case here. Yes, Mr P is losing some flexibility. But I think it would be a stretch to say he will suffer a financial loss given his pension was sheltered from his creditors and he can now benefit from that pension in full.

As Mr P points out, all the above does give Prudential discretion in relation to the paying of his pension. And that *could* result in an unfair outcome for Mr P. But, for the reasons given above, and in my provisional decision, I don't think that applies here.

Finally, Prudential has paid Mr P £200 because it says the information it gave him could have been better. I think this is fair and reasonable so I won't be asking Prudential to pay him more.

It follows that I don't uphold Mr P's complaint.

my final decision

For the reasons given above, my final decision is to not uphold Mr P's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 27 April 2019.

Christian Wood
ombudsman

COPY OF PROVISIONAL DECISION

complaint

Mr P is unhappy that The Prudential Assurance Company Limited is not allowing him to access his pension in the way he wants.

background

In 1998 Mr P was declared bankrupt. He had a pension at that time with another provider, which Prudential is now responsible for. Prudential says the pension had a forfeiture clause which meant Mr P gave up his pension benefits when he became bankrupt. This was to prevent his pension being claimed by his creditors.

Mr P is now looking to retire. He wants to draw on his pension as and when he needs to along the lines of an income drawdown plan. Prudential says Mr P can't do this because it would mean transferring his pension assets back to him and it can't do this under the terms of the forfeiture clause. It says it will still pay him a pension, but any payments have to be made to a third party (a spouse for example) and not direct to him. It says Mr P would still have *some* flexibility (for instance, Prudential says the whole pension could be taken as a taxable lump sum) but, because his pension can't be transferred back to him, certain options are precluded such as income drawdown or a transfer to another provider. Mr P doesn't think this is fair, and he says he was given conflicting information by Prudential.

Prudential paid Mr P £200 because it thought that the information it provided to Mr P about his pension options could have been better. But it didn't reverse its decision on the payment of Mr P's pension. Mr P referred his complaint to us.

Our investigator upheld the complaint. She didn't think there was any reason why Prudential couldn't be flexible on the payment of Mr P's pension. Prudential disagreed and asked for an ombudsman's decision.

my provisional findings

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, my provisional decision is to not uphold Mr P's complaint.

I think it's useful first of all to recap what the forfeiture clause was intended to do. By giving up – “forfeiting” – his or her pension, a person was able to protect their pension benefits from being claimed by their creditors during bankruptcy. I don't have much detail on Mr P's situation at this time. But I can only assume that the forfeiture worked as intended because Mr P's pension hasn't been claimed by his creditors. And I can only surmise that protecting his pension in this way was beneficial to Mr P. Not all pensions had this in place at that time and, as Mr P rightly points out, the law didn't change to protect pensions in bankruptcy until later. So I think Mr P did benefit from the foresight of his pension provider.

Mr P now wants to be able to draw cash from his pension as and when he needs to. To do this, his pension assets need to be transferred back to him. I can understand why he thinks this shouldn't be a problem. His Trustee in Bankruptcy has written a letter to say it no longer has an interest in Mr P's pension. Prudential has said it will still pay Mr P a pension, albeit to a third party. And, as far as I can tell, there would be no cost to Prudential (beyond its normal costs) in granting Mr P's request.

Our investigator made similar points. She also referred to the scheme rules which are silent on how pension benefits following bankruptcy could be paid. So she saw no reason why Prudential shouldn't pay Mr P's benefits to him directly. The relevant forfeiture clause in the scheme rules say the following:

"If sequestration of a Member's estate is awarded or a trustee in bankruptcy appointed in respect of a Member after 20 December 1995, the Member's Total Fund and entitlements under the Scheme shall not vest in the trustee in bankruptcy. If, through the operation of this Clause, a benefit ceases to be payable, the Society may, in case of hardship apply all or any part of it for the support and maintenance of the person who would have been the recipient had the benefit not ceased to be payable, or his spouse children or remoter Issue (but In no case shall any payment be made to an assignee or purported assignee)"

I agree that the clause doesn't provide much detail on what happens to pension payments following bankruptcy. But it does say benefits could be paid *"for the support and maintenance"* of the policyholder which I think is very different to saying benefits would be paid *directly* to that policyholder. And the more important point here is that Mr P forfeited his right to the pension. This means he can't compel Prudential to pay his pension directly because he no longer has a right to that pension. It's now up to Prudential to decide how it's paid. That said, I could still ask Prudential to pay Mr P his pension directly if I think it's the fair and reasonable thing to do. But I don't think it is.

I say this because if Prudential was to agree to Mr P's request it would be effectively saying the forfeiture was a forfeiture in name only and was actually reversible all along. This might have repercussions for Mr P because his creditors might feel aggrieved that they could have – with a bit of pressure – claimed his pension assets if they had wanted to. I realise the Trustee in Bankruptcy has written a letter saying it no longer has an interest in Mr P's pension, so such a scenario seems unlikely. But I don't think Prudential is acting unreasonably in interpreting the forfeiture clause, and Mr P's current position with regards his creditors, in a cautious way. It seems to me that Prudential is sticking to the letter, and spirit, of the forfeiture clause as it sees it and in so doing is minimising the possibility – however remote – of Mr P's bankruptcy arrangements being compromised. I don't think this is unreasonable.

I might take a different view if Mr P is being financially penalised by Prudential's actions – for example, if Prudential isn't willing to pay a pension. In such a scenario, it's difficult to see what purpose forfeiture would have served. But that doesn't appear to be the case here. Prudential has confirmed that it is willing to pay a pension, albeit to a third party. So, based on the evidence provided, I don't think Mr P has lost out, or will lose out, financially – he's just lost some flexibility.

So all things considered, I don't intend to ask Prudential to pay Mr P his pension directly.

Mr P also says the forfeiture clause wasn't brought to his attention and that he would have "considered other options" if it had been. He says the policy was mis-sold as a result. I don't have much information on how the policy was sold. However, I don't consider it likely that anyone – Mr P included – would have changed their minds about a pension based on what would happen in the case of bankruptcy (which presumably, Mr P wouldn't have been expecting). And the clause was designed to protect a person's pension which, I have to assume, would have been seen by Mr P as being a good thing. So I think Mr P would have still bought his policy even if the forfeiture clause had been brought to his attention at the time. The forfeiture clause was only incorporated into the scheme rules in 1996, so it's possible – as Mr P has suggested – that this was after Mr P bought his policy. But, for the same reasons as above, I don't think Mr P would have cancelled his policy if the clause had been brought to his attention.

Finally, Prudential has paid Mr P £200 because it says the information it gave him could have been better. I think this is fair and reasonable so I won't be asking Prudential to pay Mr P any more.

my provisional decision

My provisional decision, subject to any more evidence or arguments I receive from either party, is to not uphold this complaint.

Christian Wood
ombudsman