

complaint

Mr N's complaint is in several parts:

- He has a pension plan with the Prudential Assurance Company Limited. He wants to take the maximum tax-free cash and then withdraw money from time to time through an income drawdown plan (with Prudential).
- But Prudential says he must get financial advice before doing so. This can be provided by Prudential or another firm.
- He doesn't want to pay fees for what he sees as an unnecessary advice requirement. And there's nothing in his original agreement with Prudential which says he must.
- As someone with experience of investing, he doesn't need advice.
- Prudential's quoted advice fee is unreasonably high. The fees other advisers have quoted him are also too high.

background

I outlined the background to this complaint in my provisional decision of August 2015. A copy of this is attached and forms part of this decision. Neither Mr N nor Prudential disputed the chain of events, so I won't repeat it here.

In my provisional decision, I asked Mr N and Prudential if they had anything to add. Prudential said it did not. Mr N replied as follows:

- He was very disappointed with my provisional decision and felt it was biased in favour of Prudential.
- My initial findings were incomplete and failed to address the issue of financial advice fees. Mr N repeated that they were much too high, as he had no need for advice.
- There'd been no justification for these charges from this Service (or others). And several articles in the press had criticised insurance companies for applying - or seeking to charge - such fees.
- He was upset that Prudential would charge him between about £800 and £1,400 a year on top of financial advice fees - just for leaving his money with it.
- My provisional decision hadn't dealt with the issue of fees in the financial advice sector more generally. These amounted to £190 an hour in some cases.
- Prudential had gone against government policy and the law by not allowing him to access his pension benefits without taking financial advice - which he had no need of. There was also nothing in legislation which restricted pension withdrawals to those who had taken financial advice.
- He said a reasonable choice had been taken away from him and that his Human Rights had therefore potentially been breached.
- Until such legislation existed, Prudential should abide by Government legislation and not interpret it to suit its own purposes.
- It was not the case that Prudential had no way of protecting itself against the possibility of a future claim for unsuitable advice. Mr N referred to another financial business which had issued policyholders with disclaimers. These allowed them to confirm that they had no need of advice, before taking out income drawdown plans.

A further submission has also been made by a third party on Mr N's behalf as follows:

- Government policy was to allow people more flexibility over how they use their pensions. But my provisional decision was contrary to this. Its effect was to make it more expensive, slower and more complicated for Mr N to access his money or use it in the way he wants.
- My provisional decision didn't address the level of fees Prudential proposed to charge Mr N for advice and ongoing management. It also didn't say whether Mr N should have a choice of providers for either or both of these services. The result seems to be an excessively high level of charges. This was particularly so when they were considered as a percentage of the value of Mr N's funds.
- Mr N was being treated as a "captive client". As he was legally hemmed in, Prudential was able to offer him poor value for money.
- Mr N didn't need to take advice before he set up the plan. The need to have it now (at such poor value and with no choice of providers) seemed unbalanced, inconsistent and unfair.

I have been asked if I would review my findings and place as much emphasis as possible on whether Mr N was suffering consumer detriment. And that this should be considered in the context of Mr N being a captive customer who was facing obstacles to getting his own money. This was being done in the name of an outdated and discredited approach to consumer protection.

I've also been asked if I would give less weight to whether Prudential's actions could be reasonably justified. The objective should not be to justify Prudential's approach, but rather to prevent Mr N from being disadvantaged by regulatory and administrative barriers.

After considering the further submissions from all sides, I wrote to Mr N and Prudential on 11 November 2015. I said the following:

- Prudential's position had previously been that *it* had decided Mr N would have to take financial advice before taking out an income drawdown plan.
- However, Prudential had since confirmed that Mr N's policy contained "safeguarded benefits". This was because he had a Guaranteed Basic Annuity (GBA) in his policy. This meant the income he would receive was not dependent on the performance of an underlying pot. Rather, he would be guaranteed a certain amount of yearly income from the beginning of the policy, plus bonuses.
- If safeguarded benefits exceed £30,000, they cannot be converted into a more flexible form of benefit under pension freedoms (such as a lump sum or flexi-drawdown) without taking financial advice. This was a *legal* requirement rather than Prudential's own requirement.
- But it appeared that Prudential had not recognised this aspect of Mr N's policy or explained it to him. Therefore, I said it should pay him £400 for the trouble and upset I thought such an important omission had caused.

Mr N replied as follows:

- The new information still didn't alter the unreasonably high costs Prudential had said it would charge him for financial advice, setting up a flexi-drawdown plan and administering it.
- He had been denied his pension benefits for more than a year and had to continue working as a result of Prudential's refusal to give him what he wanted.
- The ombudsman agreed that he had been mis-led by Prudential. He was therefore entitled to a significant amount of compensation.

- Prudential hadn't insisted that he take financial advice when he took out the policy. Therefore, it was unreasonable to insist that he take advice now.
- He'd like to see a copy of the legislation requiring financial advice in these circumstances. He'd also like to know when the legislation came into force.
- He wouldn't accept £400. But he would accept £5,000, on the condition that Prudential set up the income drawdown plan for free and administer it at considerably lower cost.

Prudential did not accept Mr N's suggested settlement and replied to my own proposal as follows:

- The suggested award of £400 was neither fair nor reasonable. It was higher than awards the Financial Ombudsman Service typically makes.
- Mr N had raised his complaint prior to the implementation of the Pensions Schemes Act 2015. The Act didn't introduce the new advice requirements until 6 April 2015 and Prudential had made Mr N aware of the requirements in its letter of 29 May 2015.
- Therefore, it Mr N was made aware of this requirement soon after his complaint was made.

As no agreement could be reached, the complaint was referred back to me for further consideration.

my findings

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

Having done so, I have not changed my decision. I sympathise with Mr N. But I am not persuaded that Prudential is acting contrary to the rules as I understand them. Nor do I think it is acting unfairly or unreasonably or putting unnecessary obstacles in Mr N's way.

However, I still believe it did not explain - as soon as possible - *why* financial advice was a legal requirement. I'll explain why below.

Prudential's explanation

Although Prudential's letter of 1 June 2015 explained that Mr N would have to take financial advice, it didn't explain that this was a *legal requirement*. Prudential has now sent a letter dated 29 May 2015, in which it described the legal basis for the advice requirement. I'll address this shortly. But first, it might be helpful if I set out some background to what I think providers should have known around the time Pension Freedoms were introduced. The Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) Regulations 2015 requiring financial advice for safeguarded benefits over £30,000 were dated 17 March 2015, and came into force on 6 April 2015.

And so Prudential also could have made Mr N aware of this when the legislation came into force on 6 April 2015. Or for that matter, at any point afterwards.

The letter of 29 May 2015 set out the legal basis for the advice requirement. But this hasn't until recently been received by this service and neither Mr N nor the third party has made reference to it in any correspondence. But as I said above, in the letter issued just three days later, which also made no reference to the letter of 29 May 2015, Prudential did not mention

the legal requirement to get advice before converting – or exiting – safeguarded benefits. Instead, it continued to approach the complaint from the position that it was entitled to require advice to be sought before entering flexi-drawdown.

In a later letter dated 17 June 2015, Prudential suggested that Mr N refer the matter to the Minister of State for Pensions about the position on getting advice when safeguarded benefits exceeded £30,000. But there was no accompanying explanation in that letter that this was what Mr N actually had. And so even if Mr N received the letter dated 29 May 2015, I remain of the view that the information he received before and after this was inconsistent and confusing.

Given the comments relating to the cost of advice and administration, I think it likely Mr N would still have pursued the complaint about those specific aspects. But I Mr N would have had a better understanding much earlier as to why the advice was a requirement imposed by the legislation, rather than Prudential itself.

In deciding how much compensation to award for this, I have considered several aspects; our guidelines; the confusion caused by Prudential's failure to properly explain why the advice was a legal requirement; the amount of benefits involved; and the time it's taken for Mr N to receive accurate information.

The Pensions Schemes Act 2015

Mr N has also asked for details of the legislation. The requirement for advice to be taken in these circumstances comes from the Pension Schemes Act 2015. Specifically, section 48 says:

(1) Where a member of a pension scheme has subsisting rights in respect of any safeguarded benefits, or a survivor of a member has subsisting rights in respect of any safeguarded benefits, the trustees or managers must check that the member or survivor has received appropriate independent advice before—

(a) converting any of the benefits into different benefits that are flexible benefits under the scheme;

(b) making a transfer payment in respect of any of the benefits with a view to acquiring a right or entitlement to flexible benefits for the member or survivor under another pension scheme;

(c) paying a lump sum that would be an uncrystallised funds pension lump sum in respect of any of the benefits.

(8) In this section—

“appropriate independent advice” means advice that—

(a) is given by an authorised independent adviser, and

(b) meets any other requirements specified in regulations made by the Secretary of State;

“authorised independent adviser” means a person who—

(a) has permission under Part 4A of the Financial Services and Markets Act 2000, or resulting from any other provision of that Act, to carry on a regulated activity specified in regulations made by the Secretary of State, and

(b) meets such other requirements as may be specified in regulations made by the Secretary of State for the purpose of ensuring that the person is independent;

“safeguarded benefits” means benefits other than—

(a) money purchase benefits, and

(b) cash balance benefits.

There is an exception to this in Section 3a—

(3) The Secretary of State may by regulations—

(a) create an exception to subsection (1) in the case of a member or survivor whose subsisting rights in respect of safeguarded benefits under the scheme, or safeguarded benefits under the scheme and any other schemes, are worth less than a specified amount;

(b) create other exceptions to subsection (1).

This final section was clarified in the Pension Schemes Act 2015 (Transitional Provisions and Appropriate Independent Advice) Regulations 2015 as follows:

Exception to section 48(1)

5.—(1) The trustees or managers are not required to carry out the check in section 48(1) of the Act if the total value of the member’s or survivor’s subsisting rights in respect of safeguarded benefits under the pension scheme is £30,000 or less on the valuation date.

In summary, there is no legal requirement to obtain advice before taking out a flexi-drawdown plan. But there *is* a legal requirement to get advice before converting those safeguarded benefits above £30,000 into a more flexible type of arrangement such as flexi-drawdown.

I appreciate Mr N feels strongly that there should be no requirement to take financial advice on *leaving* the plan if there was no such requirement on *entering* it. If Mr N was taking benefits on the basis of the options available when the policy began, i.e. an annuity with or without tax free cash, there would be no legal requirement for advice.

However, the pension freedoms legislation has created new options. And it has replaced some previously available options – for example the only form of income drawdown now available as a new contract is flexi-drawdown. But there are rules and requirements governing those new options. And one of them is that, by law, advice needs to be sought to convert safeguarded benefits worth over £30,000 into flexi-drawdown.

Financial advice fees

I'm sorry if Mr N felt my provisional decision didn't cover the issue of financial advice fees. I decided to focus on what I thought was the key issue - that Prudential would not allow him to take out a flexi-drawdown plan without taking financial advice first. Although for the reasons now set out, I hope it's clear that the advice is a legal requirement rather than at Prudential's discretion.

To address the actual amount Prudential has said it would charge Mr N, I understand that Prudential has said it would charge about £2,400 to advise him about taking out the flexi-drawdown plan. I know Mr N feels this is unreasonable.

But taking everything into consideration, I think the amount charged is within Prudential's discretion as a provider of financial services.

As to the comment about the charges proposed by other advisers, I cannot comment on that here. I can only deal with the specific complaint against Prudential. The matter of the wider charging structure throughout the industry is also not something this Service could intervene in. This would be a matter for HM Treasury and the regulator, the Financial Conduct Authority (FCA), to consider.

Mr N can, of course, also take benefits (in the form of tax-free cash and an annuity) without having to pay any financial advice fees. I understand he doesn't want this type of arrangement. However, I mention it because I do not think Prudential is denying Mr N access to his money.

I also appreciate Mr N feels he knows enough about investments to be able to make this decision without advice. However, I can only repeat that it's a legal requirement that he seek advice. There's no discretionary provision in the current legislation to take account of someone's investment experience where safeguarded benefits exceed £30,000.

Disclaimer form

I know Mr N has said it is not true that Prudential cannot issue a disclaimer form before allowing him to take out a flexi-drawdown plan without advice. He says there is another financial business that has done precisely that.

However, the fact that Mr N's benefits are safeguarded means that Prudential cannot rely on this type of disclaimer form. Mr N must, by law, obtain confirmation that financial advice has been given. Although Mr N may already be aware of this, it is worth saying that this advice does not need to endorse what he wants to do – Prudential just needs confirmation that advice has been received.

Exit fees

My understanding is there are not any exit fees applicable to Mr N's policy. If Mr N chose to transfer his policy to another provider to go into flexi-drawdown, he would still need to seek advice. But Prudential would not charge him for the transfer itself and so it is *not* the case that Mr N is a "captive customer".

In summary, I appreciate that Mr N will remain frustrated with my decision. But I hope it has helped explain why he cannot convert his safeguarded benefits into a more flexible arrangement such as flexi-drawdown without first getting advice.

These requirements may change in the future. If they do, Prudential will need to take account of this. If it doesn't, Mr N may then bring a complaint to us on that basis.

my final decision

My final decision is that the Prudential Assurance Company Limited should pay Mr N £400.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr N to accept or reject my decision before .

Terry Connor
ombudsman

COPY PROVISIONAL DECISION

complaint

Mr N's complaint is that:

- He has a pension plan with Prudential. He wants to take the maximum tax-free cash (25%) then take out an income drawdown plan;
- Prudential says, however, that he must take financial advice, either from it or an independent financial adviser, before doing so; and
- The fee for this advice is unreasonably high; and anyway, there is no provision in the original agreement with Prudential requiring him to pay for financial advice.

background

Mr N took out a personal pension ("the plan") in December 1978 on the advice of Prudential.

The original agreement provided that on reaching retirement age, Mr N would take benefits in one of two ways:

- Tax-free cash *and* a taxable income; or
- Taxable income only.

The precise method of payment was not prescribed. However, it was generally understood that it meant an annuity. An annuity is a guaranteed lifetime income. It can be paid by the original provider or by some other provider.

Mr N complained to Prudential in March 2015. He said he was unhappy that he could not take out an income drawdown plan without receiving financial advice. Prudential did not uphold the complaint. It said:

- It insisted that all policyholders wishing to take out income drawdown plans engage a financial adviser or take advice from its in house advisory team.
- This was because it was not possible to take tax-free cash and leave the rest of the plan as it was. The remainder of the funds would have to be invested in an income drawdown product. This was classed by the regulator as riskier than an annuity.
- The regulator's guidance about income drawdown plans, says, among other things: '*A drawdown pension using income withdrawal or using short-term annuities, is complex and is not suitable for everyone. It is riskier than an annuity as the income received is not guaranteed and will vary depending on the value and performance of the underlying assets. Advisers must make sure their customers are aware of the risks involved in choosing a drawdown pension.*'
- It was trying to ensure customers in Mr N's position understood the product and any future issues. Therefore, it would not accept a request for an income drawdown plan which had not received financial advice.

Prudential later told Mr N that:

- It had sent him the Open Market Option paperwork to allow him to transfer the plan to another provider.
- The cost of advice would be 3% of the plan value. The advice fee would be £2,460
- It apologised if he thought it was trying to delay matters.

Mr N subsequently wrote to Prudential. In summary, he said:

- It was unreasonable that Prudential was trying to charge 3% of the value of the plan. He had originally been told that advice was free; only later did Prudential clarify that he would be charged in relation to any option chosen.
- As far as he knew, there was no legislation compelling him to take financial advice. And, as a qualified accountant with experience investing in property, he had no need of financial advice; he knew what he was doing.
- The original paperwork made no reference to financial advisers or the need to take financial advice.
- If he was unable to access his pension without receiving financial advice, then the plan had been mis-sold.
- He wished to take 25% of the value of the plan as tax-free cash, then drawdown varying amounts one or twice a year, leaving any remaining benefits to his son.
- Prudential's delay in adhering to his request had caused a financial loss. He wanted redress for this and compensation for the distress caused by the original mis-selling.

Prudential responded and said:

- Having considered the additional points raised, it was still unable to uphold Mr N's complaint.
- It re-iterated it would be unable to set up an income drawdown plan unless Mr N took advice. This did not have to be with Prudential. Mr N could take advice from his own financial adviser.
- There was no legislation requiring him to have a financial adviser. But financial services was becoming more complex and regulated; Prudential therefore had a duty of care to ensure policyholders take out the right policy for their needs.
- It had, therefore, made a commercial decision to insist that advice be sought. Other companies had followed a similar policy.
- When the plan was taken out in 1978, Prudential did not offer income drawdown plans. By default, therefore, the plan would provide an annuity on retirement.
- As annuities could be taken out without taking financial advice, the original paperwork would not have mentioned it.
- There was no evidence that Mr N needed the proceeds of the plan to pay a tax liability. Therefore, it did not agree that he had incurred a financial loss.
- It also did not agree that it had given incorrect information about how it would deal with Mr N. So it did not agree compensation was due.

Mr N responded. He said that:

- When he took out the plan, he assumed it would automatically convert into an annuity at retirement, with no need to pay any fees.
- Now the legislation had changed, he should be able to continue with Prudential and take income drawdown, without incurring any fees.
- His understanding was a new contract to do this was unnecessary.
- He wanted confirmation that once he had taken financial advice, there would be no further fees associated with setting up an income drawdown plan.
- He understood he would be charged if he transferred to another provider; in that case, he expected Prudential to cover those charges.
- He wanted documentation supporting Prudential's stance. He had found no evidence that Prudential had the right to charge fees.
- Other customers would be likely to lose out as a result of Prudential's decision to require financial advice.
- He wanted to know how Prudential could justify a fee of £2,460.
- He had already spoken with The Times; in addition, he was considering taking legal action against Prudential.

my provisional findings

I have considered all the available evidence and arguments to provisionally decide what is fair and reasonable in the circumstances of this complaint.

I agree there is no evidence in the original agreement that it would be a requirement to take financial advice and that Mr N would have to pay for that advice. Mr N is therefore correct in saying that there seems to be no contractual requirement to pay financial advice fees in the terms and conditions. Before 1995, however, when investors wished to retire they could only receive part of the value of the fund as a tax-free lump sum; the remainder had to be used to buy an annuity *at the same time*.

That changed with the introduction of income drawdown in June 1995. In other words, the agreement could not have referred to income drawdown, or any requirements in relation to this type of plan, because it did not exist at the time.

I know Mr N is concerned because his original agreement made no reference to advice fees. However, if he were to choose between the only two options available to him at the time, an annuity with or without tax-free cash, there would be no need to pay any financial advice fees. In other words, it is the introduction of income drawdown (and Prudential's subsequent decision in relation to it) that has caused the disagreement in this case, rather than the terms and conditions of the plan or how it was set up. And I do not consider that Prudential's decision was unreasonable.

Income drawdown

Income drawdown is more complex than an annuity. With an annuity, a policyholder is essentially signing over his pension fund to an insurance company, which will then pay him a guaranteed income for the rest of his life. The only risk then from his point of view is that he will die before receiving an amount equal to that which he gave the insurance company. The risk that he will receive more than that is borne by the insurance company.

Income drawdown, on the other hand, is inherently more risky. The first risk is that the policyholder will run out of money. If he draws down too much, he can find himself with insufficient provision for his retirement. The second risk is that the investments underlying the income drawdown plan will not perform as well as expected. That means he could potentially get back less than he put in.

This is why Prudential has made a commercial decision that advice must be taken before taking out this type of plan. In my view, it is entitled to do this. Taking everything into consideration, I do not think it is unfairly imposing a burden on plan holders such as Mr N.

Financial advice

Financial advice protects Prudential. It will be able to point to the advice received in the event the income drawdown plan does not work out in the way anticipated and a complaint is subsequently raised by the plan holder.

Financial advice also protects the plan holder, as it ensures he understands the risks associated with income drawdown. I understand that, as an accountant with experience investing in property, Mr N feels he does not require financial advice. He says he understands and is prepared to accept the risks of taking out an income drawdown plan.

However, I know of no mechanism that would sufficiently indemnify Prudential against the risk of a future claim. I do not, therefore, consider that it is acting unreasonably by requiring Mr N to take advice.

In addition, Prudential takes the view, not unreasonably in my opinion, that pensions are complex and even professionals trained in *other* areas of financial services may not understand all the rules and risks involved. So advice is desirable.

Finally, in an update published on 1 July 2015 the regulator said:

'The pensions and retirement income market is in the middle of the most significant change for more than a generation. Changes in legislation introduced by the Government, and subsequent rule changes by the FCA, have changed the choices and protections available to consumers, as they save and then choose how to access their retirement savings'.

In light of the significant changes mentioned above, it is not unreasonable that Prudential has decided that plan holders must receive financial advice before taking out an income drawdown plan so that decisions are made on an informed basis.

Contract

My understanding is Mr N would have to enter into a new agreement to take out an income drawdown plan. The plan he took out with Prudential in 1978 was essentially an insurance contract designed to provide tax-free cash and/or lump sum benefits at a pre-selected age.

In other words, the agreement only covered those options. I do not, therefore, consider that Prudential would be acting incorrectly or unfairly requiring Mr N to enter into a new agreement, with new terms and conditions, if he took out an income drawdown plan.

Guaranteed benefits

Prudential has confirmed that Mr N's plan includes a valuable benefit, a Guaranteed Basic Annuity. This being the case, I understand why Prudential is concerned that Mr N fully understands the consequences of choosing an income drawdown plan over an annuity. And financial advice would help with that.

Pension freedom

The stated purpose of the new pension freedom rules is to give savers more freedom and control over their pensions. However, there is a recognition that savers should be properly advised, so they do not make decisions that leave them worse off later on.

I appreciate Mr N's view that if a plan holder is unable or unwilling to pay financial advice fees, they are left in a difficult position. I appreciate Mr N says he needs less protection than other, less well informed or experienced plan holders.

However, as issues relating to pension freedom evolve, it seems to me that Prudential is erring on the side of caution. Taking everything into consideration, I provisionally do not think it is unreasonable in this case that Prudential requires Mr N to receive financial advice before taking out an income drawdown plan.

my provisional decision

My provisional decision is I do not uphold this complaint.

Terry Connor
ombudsman