



<u>Decision Ref:</u>	2018-0134
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Cash Investment
<u>Conduct(s) complained of:</u>	Failure to provide product/service information Delayed or inadequate communication
<u>Outcome:</u>	Substantially upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The complaint concerns an executive pension plan which was taken out with the Provider in December 2009 to provide retirement benefits for the Complainant as an occupational pension scheme administered by his then employer. The Complainant's employer was the trustee of the executive pension plan. Three contributions of €50,000 each were paid into the plan by the Complainant's employer – one in January 2010, a second in March 2013 and the last in March 2014. Each contribution was invested in a different bond: the first and last were invested in government bonds and the second in a secured cash fund. While it was open to the Complainant to switch out of the two government bonds at any time, the contribution directed into the secure cash fund could not be accessed for a period of five years, or until 31 March 2018.

The Complainant requested a list of winding up options from the Provider in December 2015. In January 2016, a list of options was provided to him which included his chosen option of transferring the value of his executive pension plan to a personal retirement bond. In April 2016, the Provider informed the Complainant that as his secure cash fund could not be accessed at any time before March 2018, it was unable to transfer his transfer request. The Complainant states that in expectation that he would receive the value of his plan he began to enter into new contracts concerning property purchase and so forth. He states that he was dismayed to then learn that the Provider had issued the options letter in error and that he instead had to await the maturity dates on the deposits. The Provider acknowledges that the options letter was sent to him in error, initially offering him €500 on compensation and later offering him €1000 in compensation in recognition of the administrative error. It has

since been confirmed, however, that it was not possible for the Complainant to access his funds before the maturity date of the secured cash fund.

The complaint relates to the Complainant's request for leaving service or winding-up options in December 2015.

The Complainant's Case

By letter of complaint dated 7th February 2017, the Complainant explains that he has been a customer of the Provider since December 2009. He states that he tried to resolve this issue with the Provider directly but that apart from apologies and a token gesture of compensation, a satisfactory solution has not been forthcoming. He suggests that the Provider has either purposely misinterpreted his complaint or tried to dissuade the true nature of his complaint. He states that the first contribution to the executive pension plan was in December 2010 and that the chosen fund was a 2016 Government Bond fund which followed two meetings with a life company consultant. His second contribution to the same pension was in December 2012 and the fund accredited was a March 2018 secure cash fund. The third premium of €50,000 was lodged in December 2013.

The Complainant states that in October 2015 he received a letter from the Provider advising that he switch his funds in the 2016 Government Bond immediately rather than awaiting maturity in 2016. He states that when he rang the Provider in January 2016, he was told he would receive options on drawing down his fund in the post and that these options duly arrived. He states that in good faith he accepted the options contained in the letter and returned the necessary paperwork. He states that in the justifiable expectation that he would shortly receive funds, he began to enter into new contracts concerning property purchase and so forth. He states that to his dismay, the Provider then wrote to him saying that it issued the options letter in error and telling him he must instead wait for four years for money, citing maturity date on the deposits. He acknowledges that he was offered €1,000 in compensation. He argues that this was an attempt to distract the issue by enclosing paperwork and attempting to apportion blame to Revenue. He states that the bottom line for him is that he took the written documents (i.e. the options letter) to mean what it said, to be correct and factual, and that he is now out of pocket losing out on the intended purchase of a year ago and prevented from access to his funds.

By email dated 3rd April 2018 in response to a letter submitted by the Provider, the Complainant notes that he was advised in writing in January 2016 that he could draw down funds but it took a further three months to be told that it was now not possible to access the funds. He states that during those three months he had entered into negotiations regarding the further investment of the funds and as a result of the Provider's actions he had missed out on two investment opportunities that he had spent a considerable amount of time on. He also suggests that mixed information was provided to him on a recorded telephone conversation on 27 June 2017 in relation to the transfer of his pension to a third party.

The Provider's Case

By letter dated 7 March 2018 in response to queries raised by this Office, the Provider states that an executive pension plan was put in place by the Complainant's employer on behalf of the Complainant on 22 December 2009.

The plan was taken out to provide retirement benefits for the Complainant and was approved by Revenue as an occupational pension scheme and administered by the employer in accordance with Revenue rules and pensions legislation. The application form for the plan was completed on 22 December 2009 and policy documents were issued to the plan trustee, the employer, on 1 February 2010. The Complainant indicated on the application form that his intended retirement date was 29 December 2028. The Provider states that a total of three contributions were paid into the plan by the Complainant's employer following which it ceased trading and the plan was made paid-up. The contributions were received by the Provider in January 2010, March 2013 and March 2014 respectively.

The Provider states that the Complainant chose to invest the first contribution in the 2016 Government Bond Fund. He invested the second contribution the Secure Cash March 2018 Fund. The third contribution was invested in the 2020 Government Bond Fund. The Provider notes that while it was open to the Complainant to switch out of the 2016 and 2020 Government Bond Funds at any time, the contribution which he directed into the Secure Cash March 2018 Fund in March 2013 could not be accessed until 31 March 2018.

The Provider notes that the Complainant requested leaving service options in December 2015 as he had left the service of his employer and wished to consider transferring the value of the plan to a personal retirement bond with another provider. The Provider states that Revenue rules do not permit the partial transfer of a pension fund to a personal retirement bond. The Provider notes that as the Complainant had chosen to invest a portion of his pension contributions into a fund which could not be accessed until 31 March 2018, it was not possible for him to transfer the value of his pension fund into a personal retirement bond until after 31 March 2018. The Provider regrets that rather than confirming this to be the case to the Complainant, and due to an administrative oversight on the Provider's part, leaving service options were issued to the Complainant on 12 January 2016. The Provider states that the final requirement to complete the transfer of the fund to the third party provider was received by the Provider on 12 March 2016. When all of the documentation was reviewed for processing, the oversight was identified and a letter was issued to the Complainant on 4 April 2016 informing him the transfer could not take place until after 31 March 2018.

The Provider states that it apologised to the Complainant for any confusion caused as a result of issuing leaving service options to him in January 2016 at a time when it was not possible for him to access his pension fund. The Provider notes, however, that its record reflects that steps had been taken by the Provider in March 2013 to ensure the Complainant understood that he could not access any accounts invested in the Secure Cash March 2018 Fund until 31 March 2018. The Provider states that its records also reflect that during a telephone call to it on 20 April 2015, it was explained to the Complainant that the earliest he could access his pension fund would be 31 March 2018.

/Cont'd...

The Provider states that prior to the Complainant or any policyholder taking the decision to invest in the Secure Cash March 2018 Fund in March 2013, it was necessary to meet with an Insurance and Investments Manager. This was because any amounts invested in that fund would not be accessible prior to 31 March 2018. The Provider notes that the Complainant met with TM, an Insurance and Investments Manager, on 8 March 2013. During the meeting, it is suggested that the Complainant was provided with an information leaflet which he was asked to read, which leaflet stated on several occasions that the amounts invested could not be accessed until 31 March 2013.

The Provider draws attention to important warnings in bold text set out in the leaflet to that effect. The Provider also draws attention to a Secure Cash Funds Declaration/Switch Form which was signed by the Complainant on 8 March 2013 confirming the Complainant's understanding that he could not access his investments in the Secure Cash March 2018 Fund at any time before 31 March 2018.

The Provider also refers to records of a telephone call in April 2015 during which it was explained to the Complainant that he had chosen to invest a portion of his pension contributions in the secure cash fund and so he would be unable to access his pension fund until 31 March 2018. The Provider also points to a telephone conversation with the Complainant dated 27 June 2017 in which the Complainant acknowledges that he had signed the aforementioned declaration form and retained a copy of the declaration for his records.

The Provider argues that the Complainant was aware when he invested a portion of the pension contributions in the Secure Cash March 2018 Fund that he could not access that fund until 31 March 2018 at the earliest. The Provider points out that it offered him the sum of €500 in full and final settlement of this complaint and that this was later increased to €1000 which the Provider believes to have been more than fair in circumstances in which the Complainant was aware he could not access his pension fund until 31 March 2018. The Provider notes that while the Complainant has stated in correspondence during the process that he entered into contract for the purchase of property in the period January to April 2016 in the expectation that he would have access the funds to be transferred to the personal retirement bond, no evidence has been provided in support of this. The Provider again apologises to the Complainant for any confusion caused as a result of it issuing leaving service options in January 2016 and confirms that the offer of €1,000 remains open to the Complainant until the adjudication of the complaint. The Provider notes that the executive pension plan in which the Complainant is a member is an occupational pension arrangement and as such is not subject to the provisions contained in the Consumer Protection Code. It notes that it is unaware of any additional regulatory obligations relevant to the issues raised in the complaint.

By letter dated 18 April 2018, in response to submissions made by the Complainant, the Provider points out that the information leaflet provided contain important information for individuals considering investing in the secure cash fund including that it was not suitable for individuals considering retirement before 31 March 2018. It accepts that administrative error resulted in a leaving service options letter issued to the Complainant in January 2016 at the time but that it was not possible for him to avail of the options. It notes that although

/Cont'd...

the options were issued to the Complainant on 12 January 2016, the Provider did not receive the final requirements to transfer the fund to the selected retirement bond provider until 10th of March 2016. It states that it was only on receipt of the final requirements that it was identified that the transfer could not be affected and this was communicated by letter dated 4 April 2016. The Provider suggests that its goodwill gesture of €1,000.00 is very fair in the circumstances and points out that although the Complainant had suggested that he had entered into contracts that he had been forced to fulfil on the understanding that he could access his pension fund, that his most recent email suggest that this was not the case.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 20 August 2018, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, my final determination is set out below.

The essence of this complaint is that the Complainant alleges that he was informed in January 2016 that he could transfer the entire value of his pension plan to a personal retirement fund, which he opted to do. He was then informed in April 2016 that this was not possible due to a restriction of access condition in one of the three investments made with his pension.

The investment made by the Complainant in the Secure Cash March 2018 Fund is therefore essential to this complaint. A written instruction signed by the Complainant and dated 20

/Cont'd...

December 2012 has been provided in evidence which requests that an enclosed cheque for €50,000 is invested as a single premium into the Secure Cash March 2018 fund.

It appears that a meeting was arranged between the Complainant and TM, an investment manager, on 20 December 2012 prior to the final decision to enter into the investment. No evidence has been submitted in relation to what was or was not said in the course of this meeting. The Complainant has suggested in phone calls to the Provider that he did not understand that the limitation inherent in this fund would apply more generally to the rest of his pension plan. For its part, the Provider points to a declaration that was signed by the Complainant at the time of the investment. In that declaration, signed by the Complainant and dated 8 March 2013, the Complainant confirms as follows:

"I confirm that I have received and read the Secure Cash Mar 2018 information leaflet and I understand the terms set out. I am aware Secure Cash Mar 2018 provides a return of 3.15% p.a. before charges and tax (where applicable), until 31 March 2018.

I understand I cannot access my investment in Secure Cash Mar 2018 and I am aware the value of my investment may be less than the amount invested at any time in advance of this date.

...

For Pension customers only – I confirm that I do not intend to retire before 31 March 2018.

..

I wish to invest in the Secure Cash Mar 2018 fund as indicated on my application and I understand and accept the terms as set out."

The information leaflet highlights the aim, security, access and risk associated with the fund in a box at the top of the first page. "No access until 31 March 2018" is set out clearly in that box. A warning box on the bottom of both the front and second page states in bold as follows:

"Warning: If you invest in this fund you will not have any access to your money until 31 March 2018."

The leaflet goes on to state who the secure cash fund for pensions is suitable for and states as follows:

"Secure Cash Mar 2018 for Pensions is for customers who are intending to retire after 31 March 2018 and who want to save for their retirement in a tax efficient way while receiving a secure and attractive return on their funds."

In relation to access, the leaflet provides as follows:

"You will not have access to amounts invested in the Secure Cash Mar 2018 for Pensions fund before 31 March 2018. For those investing through an Approved

/Cont'd...

Retirement Fund, an income of up to 7.5% p.a. can be taken from the fund. You should invest in this fund only if you intend to remain invested until 31 March 2018."

A disclaimer at the bottom of the leaflet notes that while great care is being taken with preparation, the document is of a general nature and should not be relied on in relation to specific issues without taking appropriate financial, insurance, investment or other professional advice.

There is no doubt that the above leaflet and declaration indicates that the Complainant was clearly informed and accepted that his €50,000 investment in the secured cash fund would not be accessible until 31 March 2018. What is less clear from the available documentation is whether the Complainant was clearly informed or advised, or informed or advised at all, that a limitation on access on one of the investments in his pension plan would mean that he could not access other investments within his plan which had less restrictive accessibility conditions, such as the Government Bond 2016.

I note that in signing the declaration, the Complainant accepts that he does not intend to retire prior to the maturity date and the product is suitable only for those retiring after 31 March 2018. On the other hand, the language in the leaflet and the declaration expressly indicates that the investment in the "Secure Cash Mar 2018 Fund" is not accessible; it does not go any further than that in relation to other investments contained in the same pension plan.

As the Provider has not furnished any evidence to show that the Complainant was informed that by investing in the "Secure Cash Mar 2018 Fund" he would no longer be able to access other investments in his plan, I have no reason to doubt the Complainant's recollection of what he was and was not told at the time of investing in the Secure Cash Mar 2018 Fund.

The Provider has submitted a recording of 10 telephone calls between the Complainant and the Provider between March 2015 and June 2017. In a call on 20 April 2015, the Complainant calls to discuss his options in relation to the 2016 Government Bond on its maturity in April 2016. It was clearly explained to him by the Provider's representative on this call that he could not access the funds invested in this government bond as some of his policy was invested in a fund that did not mature until 2018. The Provider stated that three separate funds were invested in one policy. It was explained to him that Revenue does not allow pension providers to split claims on a pension in that way so he could only access the total fund when it was all available. The Complainant noted that this was not explained to him when he bought the plan. The Complainant reiterated his understanding that the fund was maturing in 2016 and the Provider responded that although that particular fund was maturing in 2016, the policy was not maturing at that point. The Provider informed him that from March 2018 onwards, the Complainant could access a quarter of the value of the fund by way of a tax-free lump sum and that the remaining 75% of the fund could be reinvested and a decision could be made in relation to monthly or annual payments.

By letter dated 30 October 2015, the Provider wrote to the Complainant indicating that the 2016 Government Bond was showing a negative yield to maturity so he may wish to explore other fund options available within his plan. The letter recommended that he meet with an

/Cont'd...

insurance and investment manager. By email dated 25 November 2015, the Complainant wrote to the Provider requesting a Scheme Wind Up Option for the policy. He was requested to confirm in writing that he left service with the employer and that the company had been liquidated. The relevant letter was sent on 30 November 2015.

On 16 December 2015, the Complainant telephoned the Provider to request an update in relation to his wind-up options. The Provider stated that the request was being processed and it would be another few days, perhaps the following week. On a further call on 12 January 2016, the Complainant noted that he was unsuccessfully trying to get a wind-up options letter from the Provider and that he had been promised these the previous week and the week before that. He was informed that the team were checking the accuracy of the drafted options letter and that the letter would be sent by swift post that day.

This letter of 12 January 2016 is particularly relevant to the basis of this complaint. It is clear therefore that not only were there delays in sending the requested options letter to the Complainant but he was assured on the phone that day that the accuracy of the said letter was being verified before sending. It subsequently transpired that the letter was completely inaccurate as there were no wind-up options available to the Complainant at that time pending the maturity of the Secure Cash Fund in March 2018.

The Complainant filled out the relevant enclosures to the letter requesting the transfer of the cash value of his pension to a personal retirement fund and signed a winding up resolution in relation to the plan dated 19 January 2016. By letter dated 4 April 2016, the Provider wrote to the Complainant noting that it had recently reviewed his request to transfer the value of his executive pension plan and that it could not process his transfer request as the policy was invested in Secure Cash Term and the fund could not be accessed at any time before March 2018. The Provider has indicated in a subsequent letter to this Office that certain "final requirements" were needed before the transfer could be processed and which were not provided until March 2016. No detail in relation to these requirements have been submitted and no documentation has been provided demonstrating the reason for this delay.

It appears that the Complainant contacted the Provider by email and by phone having received this letter of 6 April 2016 but no record of same has been provided. By letter dated 16 May 2016 to the Complainant, the Provider states that the Complainant met with TP, an investment manager, in December 2012 and requested to top up his pension by €50,000 into the Secure Cash Mar 2018 Fund and signed the relevant declaration confirming that he understood he could not access his investment in this fund before 31 March 2018. The letter explained that the pension is invested in three separate funds and he is not permitted by Revenue to transfer all or part of the investment until all funds have matured. There was no reference in this letter to the inaccurate options letter of January 2016. This was pointed out by letter from the Complainant dated 20 May 2016. By letter dated 9 June 2016, the Provider acknowledged that when the Complainant's options were being generated, the staff member did not release his fund selection and therefore when producing the options was unaware that the options were not valid for the Complainant. The June 2016 letter reiterated that as the pension is invested in three separate funds, the Complainant is not

/Cont'd...

permitted by Revenue to transfer all or part of the investment until all funds have matured. €500 in compensation for the error was offered to the Complainant at that stage.

A letter was sent to the Provider dated 30 August 2016 by solicitors acting on behalf of the Complainant expressing the view that the €500 offered was not satisfactory. By letter dated 6 October 2016, the Provider again referred to the meeting of 20 December 2012 and the signed declaration. It again acknowledged the error in the options letter sent in January 2016. The Provider stated that it was satisfied based on the information provided to the Complainant and the signed declaration form that he was aware of the access restrictions that applied to the funds he invested in but that it was happy to enhance its offer of compensation to €1,000.

Finally, in relation to alleged mixed information provided in a telephone call on 27 June 2017 by the Provider, while I accept that the Provider's representative was initially unaware of the limitation that applied in relation to the Complainant's pension plan, it is acknowledged from the outset that the pension type might limit the type of pension to be transferred. Once the Provider's representative accessed the pension plan in question, he immediately clarified that because part of the fund was invested in the secure cash fund, it could not be accessed until it matured in March 2018 because three different funds were selected. I therefore do not accept that mixed information was provided to the Complainant on this call as the representative in question took some time to discuss and explain the limitation present on the policy with the Complainant upon accessing his pension plan.

In that call and a later call of the same date, the Complainant notes that it was not clear from the information provided to him that the rest of his pension plan would be affected by the limitation on access to the secure cash fund as the policy had been clear that he could take out up to 25% at any time. It was indicated to him that there was a difference between the two understandings and that perhaps the issue would be resolved in the complaint to this Office.

It appears that between the end of November 2015 and start of April 2016 the Complainant was either waiting for a scheme wind-up options letter to be sent by the Provider or waiting for the option that he selected (transfer to a personal retirement bond) to be processed. It further appears, and has been accepted by the Provider, that the options letter that was sent to the Complainant in January 2016 was completely inaccurate as no options were then available to the Complainant. This amounts, in my view, to the provision of inaccurate and misleading information and delay in the processing of the Complainant's requests.

I acknowledge that in April 2015, the Provider's representatives had made it clear to the Complainant that he could not access any funds in his pension plan until the maturity of the secured cash fund i.e. 31st of March 2018. On the other hand, the Complainant is entitled to rely on documentation sent to him by the Provider and is entitled to expect that such information is accurate. He is further entitled to expect that any inaccuracies would be quickly rectified.

I accept that the letter of January 2016 was inaccurate and further accept that the limitation on access to the secure cash fund rendered the entirety of the Complainant's pension fund

/Cont'd...

inaccessible until 31 March 2018. Though as I have outlined above, I have not been provided with any evidence that the Complainant was informed prior to investing in the Secure Cash Mar 2018 Fund that by doing so, he could no longer access his other investment Funds prior to March 2018. The letters of January and April 2016 therefore did not affect the essential conditions attaching to the fund; rather the January 2016 letter provided inaccurate information to the Complainant in relation to his options and access to the funds in his pension plan and added to an already confusing situation.

It is difficult to understand how this error occurred considering that the Provider had taken a period of a month and a half to process the options letter request and further had confirmed on the phone to the Complainant that it wished to verify the accuracy of the options letter before sending it out to him. This is also difficult to understand as it appears from the recording of the telephone conversations supplied that all of the Provider's representatives who had access to the Complainant's pension plan could immediately see that the limitation that applied to the secure cash fund applied across the pension plan as a whole.

I accept and welcome that the Provider acknowledged the error that it had made in relation to the options letter very quickly upon receipt of the Complainant's complaint. I further acknowledge that it has apologised several times to the Complainant for this error. I note that the Provider made an offer of compensation in the sum of €500 to him which was later increased to €1,000.

In my view, the Provider fell short of its obligations in relation to the provision of information to the Complainant.

In my view, there was also a delay in rectifying the incorrect information provided in January 2016 of some three and a half months, during which time the Complainant proceeded to explore further investment options on the understanding that the entire value of his executive pension plan would be imminently transferred to a personal retirement bond. I accept that the Complainant spent time considering his options in relation to the future investment of the pension plan funds during this period and that he was disappointed to learn that the restriction that had been explained to him in April 2015 applied in spite of the January 2016 letter.

In all of the circumstances, I do not believe the offer of €1,000 by the Provider to be sufficient. I believe a greater amount of compensation is merited. Therefore I substantially uphold this complaint and direct that a payment of €4,000 be made by the Provider to the Complainant to compensate him for any inconvenience suffered.

Conclusion

My Decision pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017**, is that this complaint is substantially upheld, on the grounds prescribed in **Section 60(2) (e)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €4,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the provider. I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

**GER DEERING
FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

19 September 2018

Pursuant to **Section 62** of the **Financial Services and Pensions Ombudsman Act 2017**, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

- (i) a complainant shall not be identified by name, address or otherwise,**
 - (ii) a provider shall not be identified by name or address,**
- and**

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.