



<u>Decision Ref:</u>	2018-0224
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Pension
<u>Conduct(s) complained of:</u>	Failure to advise of options available in pension Failure to consider vulnerability of customer
<u>Outcome:</u>	Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant's wife sadly passed away in 2015. Before her death she had retired from employment and had drawn down her retirement benefits.

Based on information that she was given by the provider the Complainant's wife had used her accumulated pension fund to purchase an annuity after taking some of the accumulated fund as a lump sum. She died within a year of starting the annuity and even though the annuity is guaranteed for five years the Complainant would be in a much better financial position if an option other than annuity had been chosen at retirement.

The Complainant feels that his wife and he were pressured into the purchase of the annuity by the Provider and the Complainant wants to have his wife's accumulated pension fund refunded to him.

The Complainant's Case

The Complainant states that his wife had a history of poor health and that it was her poor health that led to her resignation from work in September 2014.

The Complainant claims that his wife made enquiries to the Provider about her pension and he states that after his wife received correspondence from the Provider he contacted the Provider and informed the Provider that his wife was very ill.

The Complainant claims that he returned forms to the Provider on behalf of his wife and the Provider said that the forms were not received.

The Complainant alleges that ultimately both he and his wife felt pressure to make a decision on the retirement options that were available to her.

The Complainant states that they should not have been pressured to decide on the options given the state of health of his wife. He claims that his wife was too ill to avail of financial advice.

The Provider's Case

The Provider states that before the Complainant's wife drew down her pension benefits she was provided with a Leaving Service Options Statement and she chose to take her benefits as a lump sum and annuity.

The Provider claims that the Complainant's wife was supplied with information and contact details for the Provider's Financial Planning service but she did not avail of the service.

The Provider states that there is no pressure on any member to draw benefits on leaving service. The Provider claims that it was informed of the intention of the Complainant's wife to retire early and the Provider sent the appropriate documents to facilitate this in line with standard procedure.

The Provider claims that it was informed that the Complainant's wife had decided to retire early by her employer on 14 October 2014 but was not made aware of the reason for the early retirement. The provider states that an early retirement options statement was supplied to the Complainant's wife on 25 November 2014.

The Provider points out that the early retirement options statement supplied to the Complainant's wife on her resignation was comprehensive and contained a clause that strongly recommended seeking advice about the options available to her and also contained a clause that an enhanced annuity may be available to those with health issues who choose the annuity option.

The Provider states that the Early Retirement Options statement outlined the following options and contained extensive explanatory notes in relation to each option.

"Option 1 – Preserved Benefit Payable at Normal Retirement Date

Option 2 – Transfer of Benefit

Option 3 – Immediate Early Retirement. Within this option there were sub options as follows:

Option A – Approximate pension of €1,116.10 p.a.

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Option B – Approximate pension of €808.80 p.a. plus Lump Sum of €8,322.60

Option C – Investment of all or part of your retirement in an ARF/AMRF. For information on this option please refer to the explanatory notes and attached flyer. If you exercise the ARF/AMRF option and choose to take a lump sum, the lump sum amount cannot exceed 25% of your fund value.”

The Provider states that when the Complainant contacted the Provider to discuss the options that were available to his wife on 18 December 2014, the Provider explained the various options that were available to his wife, including what would happen in the event of her death. The Provider claims that at no point during the call did either the Complainant or his wife indicate that the Complainant's wife was ill.

The Provider states that all options were clearly outlined to the Complainant's wife based upon the information that was supplied to the Provider.

The Provider claims that if the Complainant's wife had taken up the offer of advice each option would have been explained to her and this would have included questions on her health status in order to clarify if she was eligible for an enhanced gratuity. The Provider claims that the Complainant's wife was strongly advised to seek advice on the retirement options available to her but did not seek such advice.

The Provider states that on 2 January 2015 it received a completed Early Retirement Statement from the Complainant's wife indicating that she was taking a tax free lump sum and a reduced pension.

The Provider states that the Complainant's wife completed her Member Decision Form and she chose to take her benefits as a lump sum and a reduced pension. The Provider claims that the completion by the Complainant's wife of the Member Decision Form was the formal instruction from her as to how she wished to draw her benefits from the scheme.

The Provider claims that the Annuity Statement of Reason Why that was given to the Complainant's wife before she made the formal decision to take a lump sum and annuity acknowledged that she had not taken up the opportunity of getting advice from the Provider's Financial Planning service.

The Provider claims that the relevant steps were followed for the drawing of the benefits of the Complainant's wife and during each stage of the process she was given the opportunity to request advice or query the terms of the annuity set up.

The Provider states that the Complainant contacted the Provider on 2 January 2015 and confirmed that his wife had a lot of health problems, suffered from stress and had a heart machine.

The Provider acknowledges that the Complainant referenced his wife's ill health during this call but claims that information regarding the health of the Complainant's wife was not provided to it whilst her early retirement options were being confirmed and her ill health was not referenced on her decision form. The Provider states that the information

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provided within member decision forms is used when selecting appropriate products for members and is treated as absolute.

The Provider states that the helpline contacted by the Complainant on 2 January 2015 would not note references to ill health in relation to product offerings as the helpline is not aware of the individual circumstances surrounding members or the options that have already been communicated to members, which may incorporate products that are offered to members with ill health.

The Provider claims that the ill health information about his wife provided by the Complainant on this occasion was only for the purposes of gaining access to information about her application.

The Provider states that, based on the information supplied within the member decision form, its Financial Planning Team researched the open market to secure the most competitive annuity rate for the Complainant's wife and purchased a standard single life annuity, guaranteed for five years, in line with the option outlined by the Complainant's wife on her early retirement options statement.

The Provider claims that it issued a statement of suitability to the Complainant's wife on 3 March 2015 acknowledging that she had not taken up the opportunity for advice from the Provider and outlining that a Third Party Insurance Company were the provider who could provide the most competitive annuity rate for her.

The Provider claims that the Complainant was keen to expedite the payment of his wife's benefit and that it received various calls from the Complainant who was insistent that the payment of his wife's benefit be made as soon as possible.

The Provider states that the amount of residual fund that was available for annuity purchase was €25,372.01 and it purchased an annuity of €847.55 from the Third Party Insurance Company guaranteed for five years in the event of death within five years.

The Provider claims that it has adequately demonstrated that it made clear the range of options available to the Complainant's wife including the possibility of enhanced annuity and she was provided with the opportunity throughout the process of retirement to inform the Provider of her ill health and to avail of advice from one of the Provider's Qualified Financial Advisors.

The Provider claims that any references made to the health of the Complainant's wife were only made in relation to passing the data protection safeguards in place and were omitted from the key documentation on which the Provider prepares its recommendations.

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

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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 13 November 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.

Following the issue of my Preliminary Decision the Provider made additional submissions to this Office under cover of two letters dated 4 December 2018, copies of which were transmitted to the Complainant for his consideration.

Having considered the content of the Provider's two submissions, I set out below my final determination.

The Complainant's wife resigned from work for health reasons in 2014. On resigning she was provided with a Leaving Service Options Statement outlining the options available to her in relation to the benefits that she had accrued under the defined contribution pension scheme. The statement indicated that the Transfer Value available for her benefit was €31,136.82 and the following three options were outlined on the statement:

1. Preserve benefits until Normal Retirement Age
2. Transfer benefits to another scheme
3. Retire early and draw down benefits immediately

Given that she was in poor health it is not surprising that the Complainant's wife chose to retire early and draw down her benefits immediately. The early retirement option had three sub options as follows:

Option A: Purchase an annuity that would provide a pension of €1,116.10 per annum

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- Option B: Take a lump sum of €8,322.60 and purchase of an annuity that would provide a pension of €808.80 per annum
- Option C: Invest the Transfer Value in an Approved Retirement Fund (ARF) or an Approved Minimum Retirement Fund (AMRF) after taking up to 25% as a lump sum

An annuity is a contract with a life insurance company that will pay a guaranteed, regular pension income for life in return for a capital sum. In this case the net annuity rate offered by the Provider is low, making the corresponding pension low. Generally there are better annuity rates for purchasers who are in poor health.

Unfortunately the Provider in this case claims not to have known that the Complainant's wife was in poor health and the Provider did not make her aware of the better rates that may have been available to her for the purchase of an enhanced annuity.

It is often the case that the decision to purchase an annuity by an individual who is in poor health turns out to be a bad financial decision because the purchaser succumbs to health issues before the annuity has had an opportunity to give value. For this reason financial advisers rarely recommend the purchase of an annuity for a client who is suffering ill health where there is another option available. Unfortunately for the Complainant's wife she chose not to take advice from a financial adviser despite recommendations from the Provider to do so.

Revenue Commissioner regulations state that instead of purchasing an annuity, a retiring defined contribution pension scheme member can invest their Transfer Value in an ARF or AMRF, as appropriate. This option applies to that part of a Transfer Value remaining after the drawdown by the individual of the appropriate retirement lump sum.

An individual wishing to have the balance of their Transfer Value, after taking any retirement lump sum, transferred to an ARF, must, if under 75 years of age, have a minimum guaranteed annual pension income for life in payment at the time an ARF option is exercised. The specified income amount is currently €12,700. The Complainant's wife did not meet the minimum income requirement so the ARF option was not available to her.

Where the specified income requirement is not satisfied in the case of an individual aged under 75, he or she must, after taking a retirement lump sum, transfer the lesser of the balance of the Transfer Value or €63,500 to an AMRF if it is not being used to purchase an annuity. The option of taking a lump sum and investing the remainder in an AMRF would have been available to the Complainant's wife.

Before 1 January 2015 the holder of an AMRF could only withdraw investment gains from the AMRF while under 75 years of age. Since 1 January 2015 the holder of an AMRF is allowed to make one withdrawal of up to 4% of the balance of an AMRF in any year. The change to the regulations for withdrawing from an AMRF that came into effect on 1 January 2015 was formally announced on 23 October 2014.

For the average person who is not dealing with annuities and retirement funds on a regular basis the options available in retirement are complicated and it is understandable that the Complainant and his wife contacted the Provider by telephone on 18 December 2014 to get more information about her options. A recording of this telephone call has been provided in evidence. After the Provider had confirmed the identity of the Complainant's wife the first question she put to the Provider was if she could take the entire Transfer Value as a lump sum. The response from the Provider went as follows:

Provider: *You can't take it all as a one off payment. It is not possible under Revenue rules, all the options that you have are the ones that are permitted under Irish law that governing (sic) pensions and Revenue rules. So you can take... the only one that has the lump sum would be Option B or Option C but Option C I don't think is going to be available to you.*

Complainant's wife: *What's option ... Yes?*

Provider: *You need to meet specific Revenue ... Is this the only private pension plan you have?*

Complainant's wife: *Yes, it is yes*

Provider: *OK, so basically ... no, Option C is not available because you need to be in receipt of a guaranteed income for life from pension sources of €12,700 for Option C to come into play.*

Complainant's wife: *What's C?*

Provider: *B is the tax free lump sum of €8,322 and the annual pension of approximately €808*

Complainant's wife: *That's all I'd be getting?*

Provider: *That's it. The earlier you take the benefit the less the annual pension will be, the lump sum is not going to change.*

At 4 minutes and 40 seconds into this telephone call the Provider clearly states to the Complainant's wife that Option C is not available to her. The Provider gave her the wrong information. There are two elements to Option C – the ARF element and the AMRF element. While the ARF element was not available to her because she did not meet the minimum income requirement, the AMRF element of Option C was available to her and the Provider should have informed her that it was available and explained to her the relevant particulars and implications of the AMRF element of Option C. It was unreasonable of the Provider to fail to give the Complainant's wife the proper and complete information.

In spite of all the information that was given to her in the Leaving Service Options statement I think it is easy to understand that the Complainant's wife would have believed, following the telephone call of 18 December 2014, that the AMRF option was not available to her.

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Shortly after that telephone call, and before any other communication took place between her and the Provider, the Complainant's wife chose Option B (lump sum of €8,322.60 with reduced pension of €808.80 per annum). She signed the Member Decision Form, indicating her choice of lump sum and annuity, on 30 December 2015.

The Provider in this case has given a full account of its actions in relation to its handling of the retirement of the Complainant's wife. From the initial communication of the Leaving Service Options Statement issued to the Complainant's wife on 25 November 2014, the Provider consistently recommended that she should take advice about the retirement options available to her.

The Leaving Service Options Statement given by the Provider to the Complainant's wife on her resignation, was comprehensive and provided a significant amount of information in relation to each of the options that were available to the Complainant's wife.

It is unfortunate that the Provider then gave the Complainant's wife incorrect information about the availability of early retirement Option C when she spoke to the Provider via telephone on 18 December 2014.

The Provider claims that it explained to the Complainant's wife during this call what would happen to her benefit in the event of her death. However, it is clear from the recording of the telephone call that the Provider only explained what would happen in the event of her death following the purchase of an annuity. The Provider does not explain what would happen in the event of her death following investment in an AMRF.

While we can never know what option she would have chosen if she had been in possession of all of the facts, the Provider should have given the correct and complete information so that the Complainant's wife could make an informed decision.

Another issue raised by the Complainant is that he insists that he had informed the Provider about his wife's poor health. The Provider maintains that it was not informed about her ill health until the same day that it received the Member Decision Form on which the Complainant's wife indicated her preference for a lump sum and reduced pension.

The Provider also maintains that it was not made aware of the ill health of the Complainant's wife in the context of providing information in relation to the retirement options available to her.

On 2 January 2015 the Complainant called the Provider's helpline and the recording of the conversation confirms that the Complainant informed the Provider about the ill health of his wife. There is no indication that the Complainant was giving this information to the Provider as additional information in relation to her application to draw down her retirement benefit or that he understood that the ill health of his wife could have led to a better annuity rate. The information was given to the Provider as an explanation that the Complainant was contacting the Provider instead of his wife who was unwell at the time.

The Provider claims that the helpline team contacted by the Complainant on 2 January 2015 would not note references to ill health in relation to product offerings as they are not aware of the individual circumstances surrounding members nor are they aware of the options that have already been communicated to members. However, according to the Provider's response dated 11 July 2018, it was the same helpline team that the Complainant and his wife contacted on 18 December 2014 and on the earlier occasion the team member was aware of the options that had been communicated to the Complainant's wife.

As far as the Complainant is concerned he gave the Provider information in relation to the poor health of his wife. The Complainant should not have to concern himself with ensuring that the information that he has given to the Provider has been passed on to the appropriate personnel within the Provider's organisation.

It is unfortunate in this case that the Complainant's wife did not act on the Provider's recommendation to get financial advice in advance of deciding on the appropriate early retirement option. I am sure that had she obtained such advice she would have properly understood the better annuity rates that would have been available to her because of her ill health and the option of the AMRF that would have been available to her.

It is always easy in hindsight to ascertain what would have been the best course of action for a given set of circumstances. In the case of the Complainant's wife the most financially rewarding retirement option for her and her legacy that she could have chosen would have been the AMRF option.

Even if it is assumed that the AMRF does not experience any growth over the following years, the Complainant's wife would have had to live for many years before the option that she chose would become a better option than the AMRF option from a purely financial perspective. Given her state of health at the time that she opted for the annuity it is unlikely that she would have expected future longevity.

I am satisfied that at the time she made her decision to purchase an annuity, the Complainant's wife was not aware of all of the options that were available to her because she had been given incorrect information by the Provider in the telephone call of 18 December 2014 and that the conduct of the Provider, in failing to give the Complainant's wife the correct and complete information, was unreasonable.

The Provider claims that my Preliminary Decision contains an Error of Fact in that it was based on the inherently uncertain assumption that the Complainant's wife would have chosen the AMRF option if she had been notified of that option and sought financial advice.

I have not made the assumption that the Complainant's wife would have chosen the AMRF option. The investigation into this complaint established that the Provider gave the Complainant's wife the wrong information in relation to her retirement options. My intention is to put her estate back in the financial position that pertained before the Provider gave the wrong information.

For this reason I uphold this complaint.

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Conclusion

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

Pursuant to **Section 60 (4) and Section 60 (6) of the Financial Services and Pensions Ombudsman Act 2017**, I direct the Respondent Provider to rectify the conduct complained of by making a payment to the personal representative of the Complainant's wife's estate equal to the amount that was used to purchase the annuity, less any payment that has already been made, or is guaranteed to be made in the future, to the Complainant or his late wife under the terms of the annuity.

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 December 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) in accordance with the Data Protection Acts 1988 and 2003.