



<u>Decision Ref:</u>	2019-0005
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Additional Voluntary Contribution (AVC)
<u>Conduct(s) complained of:</u>	Maladministration
<u>Outcome:</u>	Substantially upheld

**LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

Background

This complaint concerns the Respondent's administration of the Complainant's last minute additional voluntary contribution (AVC).

The Complainant's Case

In May 2013 the Complainant who was 59 years old, met with an agent of the Respondent in her home, to seek advice and organise her pension in a manner that would limit her tax liability and leave her in the most financially advantageous position on retirement. She was due to retire at the end of August 2013.

The Complainant had expected the Respondent to conduct a searching examination of her financial affairs, and had prepared a detailed file of paperwork containing all of her financial and tax documents for the period 2004 - 2012 which was available to the Respondent on the day. However, she believes that the representative of the Respondent, who met with her, did not make adequate enquiries with her about details of her financial affairs that she believes were relevant to the exercise.

In particular, she states that her non-pensionable earnings as an examiner, for the Department of Education ought to have been taken into account when calculating her Final Remuneration for the purposes of her last minute AVC. The Respondent advised her that

the maximum payment for her to gain benefit from a last minute AVC, was €9,000. The Complainant believes that this figure should in fact have been €29,000. The Complainant has calculated that her loss as a result of the non-pensionable earnings being excluded, is in the region of €9,000.

The Complainant states that she was offered a number of forms to sign as a mere formality, and she did not read the fine print of each one. She did so based on the trust she had placed in the Respondent. She gave the Respondent a cheque for €9,000, and she received a receipt. She was given a certificate of registration with terms of business, a statement of authorised status, and a blank statement of suitability.

During June 2013 she received contract documentation, policy documentation, disclosure note and an AVC certificate. At the end of October, having not heard from the Respondent since July, the Complainant contacted the Respondent, who quickly wrote to her seeking further documentation, which she duly provided. She received a cheque for €8,620.11 from the Respondent in December 2013.

In April 2014 the Complainant's husband met with a different agent of the Respondent to organise his affairs for retirement. The Complainant became concerned as she took the view that further information was being sought from her husband that had not been sought from her during her meeting the previous year. It appeared to her that her husband's Final Remuneration figure was being calculated on a different basis from how her figure had been calculated. She was told that, as the previous agent no longer worked for the Respondent, the Respondent could not answer her queries.

A few days later she contacted the Respondent to follow up on her queries. She states that she was told that there were no documents or figures on her file, and that there was therefore nothing more the Respondent could do. She states she was not told that she was entitled to a written response to her complaint. In February 2015 the Complainant formally asked the Respondent to investigate her complaint. The Respondent furnished documentation to her in response and gave her the details of this Office should she wish to take her complaint further. In May 2015 the Respondent stated that there was no evidence that she had furnished figures in relation to her non-pensionable earnings to it, and it informed her of her right to bring her complaint to the attention of this Office.

The complaint is that in 2013, prior to her retirement, the Respondent failed to correctly advise her in relation to her entitlements, it failed to properly administer her pension and subsequently, it failed to adequately respond to her complaint. The Complainant wants compensation in the amount of her claimed loss which she estimates at €9,000.

The Respondent's Case

The Respondent states that the Complainant was correctly advised as to her entitlements under the last minute AVC scheme.

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The Respondent does not dispute the timeline put forward by the Complainant, other than to put forward a clarification in respect of certain conversations that occurred between it and her. The Respondent states that it did not tell the Complainant in 2014 that it had no information, in relation to her. Rather it says that it held no information furnished by her to it, in relation to her non pensionable earnings.

In relation to her non pensionable earnings, the Respondent states that these earnings cannot be used in the calculation of scope for a last minute AVC against her employer gratuity. It has furnished correspondence between the pension provider and Revenue in support of that contention.

It notes that nowhere in the paperwork signed by the Complainant did she indicate additional earnings and neither is there any evidence that she furnished details of higher earnings prior to 2013, over and above the figures used by it, in making its calculations.

The Complaint for adjudication

The complaint is that in 2013, prior to her retirement, the Respondent failed to correctly advise the Complainant in relation to her entitlements, failed to properly administer her pension and subsequently, it failed to adequately respond to her complaint

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 21 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

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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 consideration of a number of additional submissions from the parties, the final determination of this office is set out below.

The first aspect of the complaint I will deal with is in relation to the Respondent's conduct during the meeting of the 30th of May 2013. The agent who met with the Complainant (and her husband) on that day is no longer working for the Respondent, and his personal account of events has not been made available.

The Complainant states that the Respondent's agent arrived late for the meeting, and gave the impression that he was in a hurry. Having said that, I have reviewed the factfind and application forms and they are fully completed, and signed by the Complainant. The statement of suitability on file is also completed, and signed. The calculations sheet sets out the figures. It contains figures for salary, years of service, and a calculation of lump sum shortfall, rounded up to €9,000.

At the end of the meeting the Complainant was asked to sign certain documents, and she was provided with a cheque receipt, certificate of registration with terms of business, statement of authorised status and statement of suitability.

The statement of suitability (SOS) that the Complainant was provided with was blank. It seems that the completed SOS was retained by the Respondent. Section 5.19 of the Consumer Protection Code 2012 (CPC) sets out the Respondent's obligations in relation to an SOS. The Respondent's failure in this instance was to not provide a copy of the completed SOS to the Complainant, instead giving her a blank undated copy. From the blank copy it would not have been clear to the Complainant that she was obliged to claim tax relief directly from Revenue (as this was not part of the Respondent's services) for the tax year 2012 before the October 31 deadline. Fortunately, this did not become an issue, but it serves as a reminder that the customer-specific information on an SOS can be extremely important.

I am satisfied that the Respondent failed in its obligation under section 5.19 of the CPC to provide a signed and dated copy of the SOS when providing the service to her in May 2013.

The signature portions of the SOS contain acceptances and confirmations from the customer about what they understand and the advice they have received. It is not at all clear to me whether or not the Complainant in this instance understood or accepted the matters to which she was signing up as she has confirmed that she did not read all the details before signing the forms. However, in the absence of special circumstances, a person will be bound by their signature and there is no suggestion made by the Complainant that the signature is not hers.

The Complainant takes issue with the manner in which her Final Remuneration figure was calculated. The Respondent has furnished email exchanges between Revenue and the policy provider which confirm that the Complainant's earnings from correcting exams for the State Examinations Commission, cannot be used for the purposes of her own Department of

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Education and Science pension scheme. In those circumstances, I am satisfied that the Respondent Provider was not under a duty to take those earnings into account.

The Complainant has taken issue with the figure of €77,796 being used as her Final Remuneration figure. The calculations she supplied all include the non-pensionable earnings as part of her reckonable income for the purposes of calculating Final Remuneration. The difference is roughly €10,000 per year. When excluding her non pensionable earnings however, and calculating the average income for the three best years (2008, 2009, 2010), the average income is nevertheless higher, at €80,667.02. On that basis, it seems that the maximum amount which could have been invested in the AVC was calculated at less than it should have been, though not to the degree which the Complainant has suggested, as her non pensionable earnings could not be taken into account. This however, is the view based only on the Complainant's figures in her letter of 29 March 2015. The Provider points out that when asked to produce the P60 for 2009, it was noted by the Provider that the earnings figure showed was €75,346.28. The Provider suggested that this is *"notably less than the figure later provided by the employer that [the Complainant] now seeks to rely on of €84,722.21"*. The Provider also points out that the P60s for other years 2008 and 2010 have not to date been made available. It suggested that in circumstances where the figure noted from the P60 for 2009 was €75,346 *"the three-year averaged across 2008, 2009 and 2010 would be likely to be lower than the final salary figure used of €77,796"*.

Having considered the matter at length, it is clear to me that whether the figure used by the Respondent's representative in 2013 was too high, or too low, the position remains that the figure utilised by the representative does not appear to have been accurate.

The Respondent says that there is no evidence that the relevant financial details were made available by the Complainant. It strikes me in that proffering financial advice to the Complainant, in the context of her request for advice in the lead up to her retirement, if such evidence of earnings over the relevant years had not been made available, it begs the question as to why the Respondent's representative, did not seek such details from the Complainant, in order to adequately explore the relevant information, and thus guide his advice regarding her options. Whilst the Complainant, in order to proceed with the AVC, confirmed the correctness of the figure of €77,796 and this figure seems to have been a correct one, it did not however, take into account her higher earnings in previous years.

The evidence before me suggests that the correct figure available to the Complainant was not used to calculate her Final Remuneration for the purposes of her last minute AVC.

It seems clear that the Respondent failed in its obligation to the Complainant to gather and record all of her information that could have been relevant to the advice being given to her at that time. I am also concerned that the sales process of the AVC does not appear to have provided information or advice to the Complainant in any adequate fashion, such that she could understand how or why the figure selected of €9,000 had been calculated to be the figure which, by way of investment in an AVC, would leave her in as financially advantageous a position as possible, in the run up to her pending retirement.

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Quite apart from that more substantive failure, it is also clear that the Respondent failed in its duty to provide a copy statement of suitability to the Complainant as required under section 5.19 of the Consumer Protection Code, 2012.

I also note that there is no documentation evidencing that the Respondent adhered to its own complaints procedure the following year, by offering the Complainant an opportunity to have her oral complaint treated as a written complaint; or by offering the Complainant an update as to the status of her complaint at intervals of no greater than 20 days.

The Complainant has maintained that the appropriate amount of compensation which is due to her is in the order of €9,000. She has suggested that this office should direct compensation at a level which would put her in the financial position that she would now be in if she had been given correct information and advice from the Provider in the lead up to her retirement.

The Provider points out that the figures made available at the meeting between the parties in May 2013, did not suggest any benefit in "*dynamising*" any of her salary figures as she has more recently contended would have been appropriate. In order to do so, the Provider has recently suggested that the calculations and work required to carry out dynamisation would have required the Provider to have been furnished with all of the correct salary figures for each year for the preceding 10 years. Each of those years' figures would "*have to be inflated up to the present time*". In addition to the challenge of maintaining accuracy over the relevant period, the Provider maintains that all of the newly inflated figures would have to have been calculated under the various definitions of "*final salary*" allowed by the Revenue and each of those various definitions would then have needed to have been compared against the expected final salary and gratuity the client was due to receive, which of necessity could only have been an estimate, given that accurate estimated pension statements from the Department of Education are very rarely furnished ahead of retirement. The Provider has suggested that this would have given rise to additional costs to the Complainant which have not been taken into account.

In a submission dated 17 December 2018 the Provider set out its up-to-date assessment of the relevant figures, leading to a conclusion that additional tax relief of €7,096 may have been available, though the Complainant would have incurred charges of some €1,327. As a result, the Provider has suggested that the maximum potential gain the Complainant could have made, utilising a dynamised 2009 salary, would have been €5,769.

The Complainant is quite firm in her contention that "*dynamisation*" is an integral part of the process of calculating final remuneration for public servants, and that it is not an "*optional extra*", particularly in the case of retiring teachers, from 2010 onwards, given the previously suffered severe pay reductions. She points out that an experienced advisor to the public service, would anticipate this, and take good care to secure details of a teacher's 2009 salary figures (which she suggests were the highest "*pre-recession*" salary figures).

The Complainant has also submitted that the Provider is incorrect in its suggestion that she would have incurred potentially higher costs, if the advisor had undertaken a "*dynamisation*" of her salary figures. She says that the advisor in question proposed a fee for the Provider's services, in the form of a commission of 3.5% of the figure to be invested.

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She therefore denies the suggestion that she would have incurred additional charges to any great degree, if the Provider's representative had taken the time to explore all of her relevant salary figures.

It is of course notable that both parties have now had the benefit of finalised figures which were not examined in any detail in May 2013 when the parties met. In my opinion however, it is appropriate to accept the Complainant's evidence that she came to the meeting fully prepared having put together a folder of detailed paperwork. As the Financial Service Provider, it fell to the Provider to assess the reliability of the figures made available at that meeting and to discuss all of the Complainant's options with her, including the potential to dynamise her figures, so as to understand all of her options. The Complainant's grievance is essentially that she was denied those options owing to the Respondent Provider's failure to correctly advise her regarding her potential entitlements.

At this remove, it is essentially admitted by the Provider that additional tax relief of €7,096 is likely to have been available to the Complainant, if a correct assessment of the figures had taken place in 2013. It has taken a very considerable period of time to achieve that acknowledgement, and one can well understand why the Complainant takes the view that she has been somewhat thwarted in her attempts to progress this complaint.

In those circumstances, taking all of the evidence into account, I am satisfied that the complaint against the Provider must be upheld and, at this remove, in order to redress the Provider's errors in the manner in which it dealt with the Complainant in 2013, and subsequently after she made a complaint, I direct the Provider to make a compensatory payment to the Complainant in the total sum of €8,000, in order to conclude. This payment is to be made to an account of the Complainant's choosing, within 35 days of the Complainant nominating account details to the Provider.

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) (g)**.

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 €8,000, 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.

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

30 January 2019

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.