An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0241
Sector:	Investment
Product / Service:	Additional Voluntary Contribution (AVC)
Conduct(s) complained of:	Mis-selling Delayed or inadequate communication Complaint handling (Consumer Protection Code) Maladministration
Outcome:	Upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The Complainant had two separate additional voluntary contribution ('**AVC**') pension schemes in respect of two personal retirement savings accounts ('**PRSA**') with a financial services provider. On **25 April 2017**, the Complainant met with the Provider, a financial advisor, in order to discuss changing to a new AVC PRSA scheme with a new financial services provider.

Subsequent to the meeting, the Complainant decided to set up the new AVC PRSA predicated on the advice from and meeting with the Provider. After submitting the request for the new AVC PRSA, the Complainant decided to cancel the application and to return to the original pension schemes. The Complainant asserted that the information given by the Provider concerning the new AVC PRSA was incorrect and would not have resulted in a financial benefit to her.

Between **July 2017** and **October 2017**, the Complainant and Provider engaged in written correspondence concerning the various allegations made, but they were not able to resolve their differences. On **30 November 2017**, the Complainant's complaint was received.

The Complainants' Case

The Complainant's case is set out in the documentation submitted and in particular in the letters dated **3 July 2017**, **30 August 2017** and **30 October 2017**. Additionally the Complainant's case is set out in the letter of complaint and also the responses to the Provider's letters submitted during the investigation process.

The Complainant's case is detailed, and comprises many different elements, but her position can be categorised into the following discrete elements: the advice received; the documentation provided; the general conduct of the Provider.

Advice

In respect of advice, the Complainant asserts that she received incorrect advice from the Provider in the course of their meeting in April 2017 and subsequently. In particular, the Complainant asserts that she did not receive advice pertaining to the increased risk of the new AVC PRSA. The Complainant states that she had an ESMA risk profile of 3, and that the proposed changes would have increased her ESMA risk profile to 5, but the Provider stated that it was a similar risk category. The Complainant asserts that the Provider misrepresented that there was a 5% bonus on the maturity of the new AVC PRSA, and that the Provider now accepts that this was wrong. The Complainant asserts that the management charge on one existing policy was 0.75%, but that the recommended policy had a management charge of 1%, which was higher. Also, the Complainant asserts that she specifically told the Provider that there was a rebate on one of her pre-existing schemes, which meant that the full charge would not be applicable, provided the policy was not encashed earlier.

The Complainant asserts that the Provider initially denied this, but then conceded that the Complainant was correct after checking twice with the financial service provider. The Complainant asserts that the figures provided by her pre-existing financial services provider, shows that she would have been financially worse off if she had persisted with the new AVC PRSA. In particular, the Complainant asserts that she would have a final pension fund value of €252,358.79 on her pre-existing AVC PRSAs, but that she would have had a final pension fund value of €243,288.56 if she had changed to the new policy. All things considered, the Complainant states that she has been misled and that the Provider misled her in order to obtain financial benefit by increasing the commission.

Documentation

In respect of documentation, the Complainant asserts that she did not receive documentation after the inception of the new policy. The Complainant states that she has only been provided with unsigned terms of business and a product booklet for the new financial service provider. The Complainant asserts that she did not receive a statement of suitability which should have been provided with the policy. The Complainant had to request replacement policy documentation in order to cancel the policy. The Complainant asserts that this contravenes the provisions of the Consumer Protection Code, pertaining to the provision of information.

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Conduct

In respect of the Provider's conduct, the Complainant states that on **18 May 2017** she e-mailed the Provider raising some queries. On **22 May 2017**, the Complainant wrote to her initial financial service provider to reinstate her two original AVC PRSAs and to cancel the proposed transfer.
On **30 May 2017**, the Complainant was debited €615.00 by the new financial service provider. On **2 June 2017**, the Complainant wrote to the new financial service provider requesting that the new policy be cancelled. On **14 June 2017**, the Complainant wrote again to the new financial service provider requesting that the policy be cancelled, but the Complainant also had to apply for the replacement policy document in order to do so, as the original policy document was required.

On **15 June 2017**, the Complainant was debited €615.00 again, by the new financial service provider. On **11 July 2017**, the Complainant was reimbursed for the two incorrect direct debits. The Complainant asserts, therefore, that the Provider did not arrange for the cancellation of the policy, as she continued to be debited and she herself had to arrange for the cancellation.

The Provider's Case

The Provider's case is set out in their responses dated **19 July 2017** and **19 September 2017** and also in its official response during the investigative process and subsequent correspondence.

Advice

The Provider concedes that an error was made in respect of the 5% maturity bonus. The Provider states that this 5% rebate only applies with respect to group AVC PRSA schemes, as opposed to the Complainant's one. The Provider states that this was not factored into the overall retirement figures, but it accepts that it may have caused confusion. The Provider states that this only came to light one month after the Complainant had made her decision to transfer to the new policy.

The Provider asserts that risk was discussed during the meeting on 25 April 2017. The Provider asserts that documentation was furnished which showed that the Complainant's pre-existing AVC PRSA had a risk profile of 4, while the proposed new AVC PRSA would have had a risk profile of 5. The Provider states that this would be a normal risk evaluation for someone in the Complainant's position who was not far off retirement. In respect of the management charges, the Provider asserts that the Complainant did not furnish information that set out the precise nature of the management charges on one of the pre-existing AVC PRSAs.

The Provider asserts that it contacted the financial service provider which confirmed that there was no rebate in respect of the management charges. It was only after the Complainant reverted that the Provider contacted the financial service provider again,

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which only then confirmed that there was, in fact, a rebate in respect of the management charges. Upon learning this on **22 May 2017**, the Provider contends that it immediately sent an instruction to cancel the policy.

In respect of figures, the Complainant states that her projected pension fund with her existing policy was €252,358.79 and that the Provider represented that her projected pension fund on the new policy would have been €268,746.00 whereas with the proper calculations applied that fund on the new policy would, in fact, have been €243,288.56. The Provider has explained this variance by reference to the allocation rate which was used by the existing financial service provider.

Documentation

The Provider furnished a copy of the terms of business signed by the Complainant at the meeting on **25 April 2017**. The Provider states that the statement of suitability and the policy documents were not sent, as the policy was cancelled on **22 May 2017** once the Provider sent the instruction to the new financial services provider. The Provider states that its files record that the Complainant was provided with the terms of business at the time. In respect of documents furnished by the Complainant, the Provider asserts that the Complainant did not provide all of the policy documents for her existing policies, at their meeting. The Provider states, therefore, that it could not advise the Complainant of the rebate of management charges.

Conduct

In respect of conduct, the Provider states that it immediately arranged to cancel the policy on **22 May 2017** upon realising the error that had been made. The Provider asserts that the new financial service provider did cancel the transfer of the policy, but did not cancel the direct debit payment. The Provider does acknowledge that the Complainant had to contact the new financial service provider directly in June 2017, in order to fully cancel the policy and to obtain the repayment of the premia that had been deducted. The Provider asserts that it did not receive the policy documentation either, until June 2017 from the new financial service provider and, therefore, the Provider states that it did not know that the policy remained in force.

The Provider confirms that it changed its office location in 2016 and informed the new financial service provider of this change of address, but that the policy documentation was still sent to the old address.

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The Complaint for Adjudication

The complaint is that the Provider was guilty of maladministration insofar as it failed to:-

1. Act appropriately in advising the Complainant.
2. Furnish her with proper documentation and comply with its obligations pursuant to CPC.
3. Act reasonably and fairly in its conduct with the Complainant in respect of the cancellation of her new policy.

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 12 July 2019, 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, within the period permitted, the final determination of this office is set out below.

My determination is set out below in accordance with the identified elements of the complaint.

1. *Advising the Complainant*

Firstly, it is apparent that the Provider furnished incorrect information to the Complainant in two respects. The Provider indicated that the new AVC PRSA policy had a 5% maturity

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bonus. This was no doubt an inducing and enticing proposition for somebody considering making the significant decision of changing a pension arrangement. It is common case that there is no 5% maturity bonus in respect of the new policy. It was not appropriate for the Provider to misrepresent critical information such as this to the Complainant or to any consumer.

Secondly, it is also apparent that the Provider furnished incorrect information in respect of applicability of the rebate of the management charge that would apply in respect of one of the pre-existing AVC PRSA policies. While I accept that the Provider may have relied on the financial service provider indicating that there was no such rebate, it seems that the Complainant had to insist that there was such a rebate.
After doing so, the Provider contacted the financial service provider again, which then confirmed that the Complainant was correct. There is a dispute with respect to the precise documentation that was furnished to the Provider at the time of the initial consultations. Regardless of whether or not the Provider had the full documentation required, it was not appropriate, in my opinion, for the Provider to rely on financial calculations based on assumptions, when incepting a new pension arrangement for the Complainant. If the Provider did not have all the required existing policy documentation, it ought to have postponed taking further action, until such time as it did.

I note that the Provider immediately sought to cancel the policy, upon receiving the correct information. The Provider in its letter dated **19 July 2017** indicates that the policy was cancelled '*to ensure that it was still [in the Complainant's] financial interest to transfer this plan.*' Clearly the applicability of the rebate was of material relevance to the assessment of whether or not the Complainant should avail of the new policy and this was a detail to be specifically confirmed, before proceeding with the new policy, rather than simply proceeding on the basis of an understanding which had not been definitively checked.

In that respect, I take the view that the Provider acted unreasonably and contrary to the Complainant's best interests, though it moved swiftly to cancel the policy, once the correct details came to light. I note that the Provider indicates that even with the proper numbers that the proposed new AVC PRSAs would have resulted in a projected pension fund of €257,376.00 as opposed to €252,358.79 with the pre-existing policies. Even if this is true, it does not absolve the Provider of the obligation to provide proper and definite advice to the Complainant at the material time, based on facts, rather than assumptions.

In respect of the risk assessment, I note initially that a great deal of the interaction in this regard appears to have been oral at the April 2017 meeting. While I cannot make any finding in respect of the precise conversation that occurred in April 2017, I accept that there is arguably some logic in marginally increasing the risk profile as the Complainant approaches retirement. Furthermore, in the document entitled Financial Review which was signed by the Complainant it suggests that a discussion occurred about increasing the risk profile of the Complainant's investment. It is important of course to note that the Complainant should have been fully apprised of and furnished with written details of all relevant information in order to allow her, as a consumer, to make a proper informed decision. All things considered, I do not find that the Provider acted inappropriately or unreasonably or unfairly in respect of the risk assessment undertaken.

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2. *Documentation*

In respect of documentation, it appears that the Complainant was not furnished with proper documentation. The Complainant maintains that she would have kept a copy of the terms of business if such had been provided to her. I accept, based on the Complainant's meticulous approach to the submission of her complaint, that the Complainant would have been likely to have retained a copy if these had been provided.

Furthermore, the Complainant did not receive the policy documentation that she should have received. It seems that the Complainant had to go as far as to submit a replacement form application, to the new financial service provider in order to obtain a copy of her policy, in order to then cancel it.

It seems that the primary reason for certain documents not arriving, was due to the change of address of the Provider. While I accept that the Provider endeavoured to ensure that its change of address was noted, and that responsibility for this may lie with the new financial service provider which did not acknowledge that change of address, it is important to bear in mind that this is not something over which the Complainant had any control.

3. *Conduct*

On the evidence before me, I am satisfied that the Complainant had to go to great lengths to arrange for the cancellation of the new policy. The Complainant's account was debited on two occasions when it ought not to have been, and this should not have happened. The Complainant had to apply for a replacement policy in order to arrange for the cancelation of the new policy. The Provider states that it communicated immediately with the new financial service provider, and that the policy was cancelled, but the direct debit was not. Once again, the Complainant could not control this and it was up to the Provider to ensure that the Complainant's instructions were properly executed. In circumstances where the instruction was sent in May, but it took until July for it to be properly processed, this was not acceptable. Once again, while some blame may potentially be attributed to the new financial service provider, it was for the Provider to liaise in that regard to ensure that the Complainant's instructions were implemented in a timely manner.

I am satisfied based on the evidence before me that the Provider did not meet all its obligations to the Complainant when the parties met in April 2017, as a result of which a policy came into place which transpired not to be suitable for the Complainant. Owing to the Complainant's determination, she succeeded in having the policy cancelled, but was then required to pursue the return to her account of the wrongfully collected direct debits.

The Complainant has made it clear that she is not seeking financial compensation and instead, has expressed concerns

> "*… that other teachers in other schools will be subject to the same treatment. I feel I was unfairly treated and misled. If feel* [the Provider's] *position during the complaint correspondence has been extremely defensive, deceptive and untruthful. The*

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correspondence has caused me to doubt my own position. These matters are very complex and are difficult for a non-professional to understand. With that said, to me the matter is simple. I was going to be worse off based on [the Provider's] *advice* [it] *was going to receive payment for switching me to sub-standard policies. If your office upholds the complaint I would request that it is referred to the Central Bank as regulators of financial intermediaries."*

It is unclear whether the errors which occurred in the Complainant's situation, have been repeated in any way, with other clients of the Provider. In circumstances however where the Complainant's desired redress is to ensure that the Central Bank, as regulator of the Provider, is given an adequate opportunity to consider whether further investigation is warranted, I propose, as requested by the Complainant to send a copy of my Decision to the Central Bank of Ireland, for such action as it considers may be appropriate.

Taking account of the Complainant's position that she seeks no monetary redress, I do not consider it appropriate to make any further direction.

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) and 60(2)(c).***

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

6 August 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.