An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0289
Sector:	Investment
Product / Service:	Approved Minimum Retirement Fund AMRF
Conduct(s) complained of:	Failure to advise on revenue restrictions
Outcome:	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

The complaint concerns the Complainant's Approved Retirement Fund (ARF) with the Provider.

The Complainant's Case

The Complainant submits that in 2016 he initiated drawdown from his ARF and sought advice from the Provider, the manager of the ARF, in respect of same. The Complainant contends that the advice provided to him was "*inadequate and incomplete*" and that, as a result of same, he will "*be at a financial loss in any future contributory pension*" that he qualifies for. The Complainant calculates his annual loss in the amount of €416 per year for the rest of his life.

Specifically, the Complainant states that, in **August 2016** (at which point he was aged 60), he raised a query regarding making withdrawals from his ARF "*for the principal purpose of increasing my social welfare contributions in order to qualify for a contributory pension in the year 2023".* The Complainant indicated in August 2016 his view that he needed to make up a shortfall in contributions in order to qualify for the pension and he specifically queried whether he could "*make up this shortfall in my social insurance record with the PRSI class S (4%) liable on my withdrawals from my ARF until the age of 67?*". The Complainant contends that the advice he received in response was deficient.

The Provider's Case

The Provider maintains that it answered two specific queries and that it provided accurate responses. The Provider maintains that, as it is neither the Complainant's financial advisor nor tax advisor, "*it was not in a position*" to advise the Complainant regarding what ARF regular income he should drawdown. The Provider insists that it was the responsibility of the Complainant's financial advisor to provide the advice required and the Provider highlights the fact that the Complainant communicated his intention to seek such independent advice.

The Complaint for Adjudication

The complaint is that the Provider provided deficient advice to the Complainant. The Complainant wants the Provider to compensate him for his loss.

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 August 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.

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In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

Before embarking on my analysis, I consider it useful to set out the content of certain relevant correspondence and communications.

Correspondence

4 August 2016	Email from the Complainant to the Provider: *I am contemplating making withdrawals from the* [ARF] *fund for the principal purpose of increasing my social welfare contributions in order to qualify for a contributory pension in the year 2023, should I live that long. At present, according to my social insurance records, I have* *420 Paid contributions (A1)* *37 Reckonable Credited Contributions for Pension* *That gives me a total of 457 combined.* *My understanding is that post 2020 I will need a minimum of 520 full rate contributions to qualify for a minimum 1/3 pension. Each additional 52 contributions will qualify me for another 1/30th.* *My query to you is can I make up this shortfall in my social insurance record with the PRSI class S (4%) liable on my withdrawals from my ARF until the age of 67?* *If I receive my payments from the ARF in 12 monthly payments will this amount to 52 contributions over the whole year?*
8 August 2016	Phone call from the Complainant to the Provider regarding his earlier email in the course of which the Provider stated as follows: *Just reading through your email there and the query on it is, you're looking for advice on what to do to make up the shortfall of the social insurance record. Now, really who you'd need to contact on that is an advisor because we're not qualified to give that financial advice.* The Provider went on to confirm that the Complainant would pay "*PRSI at class S*" on any deductions from his ARF, "*depending on the tax cert received from the revenue*" regarding the Complainant. The Provider finished by saying:

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	To help you make your decision on say what to do with the shortfall, I would recommend just speaking to a financial advisor if you wished. In response to this, the Complainant confirmed that he would be seeking such advice the following day.
8 August 2016	<u>Email from the Provider to the Complainant:</u> *Thank you for your phone call today.* *As requested I can confirm that the PRSI deducted from your ARF plan would be PRSI Class S (4%) until age 66 and then it will no longer apply.* *You can receive your payments as a monthly automatic income if you wish to do so.*
12 August 2016	<u>Email from the Provider to the Complainant:</u> *Thank you for your email of 4 August 2016.* *I wish to confirm that your query was sent to our pensions department to review for you. They have advised that if you received twelve monthly payments from your ARF plan, this would amount to 52 contributions to your PRSI.*
16 August 2016	<u>Letter from the Provider to the Complainant</u> indicating that monthly payments would start from 01 September 2016 and that the Complainant would receive 5% of this fund per annum. This resulted in monthly payments of €402 - € 408 or annual payments of €4,824 - €4,896.
8 May 2017	<u>Letter from the Department of Social Protection</u> to the Complainant indicating that a minimum annual drawdown of €5,000 is required in order to be liable to PRSI and noting that the Complainant's 2016 drawdown was less than €5,000.
10 May 2017	Instruction from the Complainant to increase payments from the ARF to €450 per month.
4 August 2017	<u>Email from the Provider to the Complainant in response to (undated but possibly dated 2 August 2017) written query raised by the Complainant and in response to phone call of 2 August 2017 (no recording of this call provided):</u> -[The Provider] *deduct all PRSI payments under schedule S as agreed with the department of social protection, You were advised by* [the

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	Provider] *previously. If <€500 is deducted in total from all sources of income welfare can issue a refund and they can change the class to M* *-The withdrawal amount required to be withdrawn from your ARF to deduct €500 will be €12,500 for the full tax year. That is assuming that your* [Provider's name redacted] *ARF is your only source of income.* *I would suggest that you contact your financial advisor/accountant in relation to the above.*
15 August 2017	Complaint from Complainant
5 September 2017	**Final Response Letter number 1** In this letter, the Provider asserted as follows: *I note from our records that we made you aware that* [the Provider] *will deduct 4% PRSI regardless of the amount of the withdrawal. We also made you aware that the minimum amount to be considered for a PRSI contribution for this purpose was €500 per annum. Therefore, a withdrawal of €12,500 would need to be made from your ARF for the tax year for* [the Provider] *to pay this amount of PRSI on your behalf*.
11 September 2017	Letter from the Complainant to the Provider disagreeing that he had been advised as to the minimum amount to be considered for a PRSI contribution (namely €500) and disagreeing that he was advised of the necessity to drawdown €12,500
14 September 2017	**Final Response Letter number 2** In this letter, the Provider expressly referred to a letter said to be dated 4 August 2016 but proceeded to quote from its letter of 4 August 2017. The Provider reiterated its view that it had provided the correct advice as to the minimum drawdown.
18 September 2017	Phone call from the Complainant to the Provider regarding the letter of 14 September 2017 pointing out the error.
20 September 2017	**Final Response Letter number 3** In this letter the Provider acknowledged its error regarding the date of the correspondence quoted in the previous Final Response Letter. The Provider went on to state: *However, it is important to note that* [the Provider] *is not responsible for advising you on matters such as tax or Social Welfare requirements. I am sorry that this was not explained to you when you contacted us in August 2016.*

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	However, based on information provided already I would like to restate the following: *The eligibility requirement for State Pension benefits is a requirement of the Department of Social Protection and not* [the Provider]*. Any withdrawal is charged at 4%. If this is less than the amount the Social Protection require for eligibility, then it is up to the individual to make up any shortfall. We can't charge more PRSI than the actual withdrawal will allow.* *If you qualify under the minimum withdrawal of €5,000, under the Department of Social Protection, you then qualify for deduction of PRSI.*
25 September 2017 (inaccurately dated 2016)	Letter from the Complainant to the Provider reiterating his complaint and citing the correspondence exchanged in August 2016.
3 October 2017	**Final Response Letter number 4** In this letter the Provider repeated parts of the letter of 20 September 2017 before stating: *However, as previously stated to you,* [the Provider] *had no information about any other pensions you may have had or employment you were in. Therefore, we could only answer the questions posed by you, in respect of your* [Provider's name redacted] *pension.* *You should have been told to refer this matter to your financial advisor or tax consultant. I am sorry that you were not told this and as a gesture of our apology I would like to offer you €150.* *…* [The Provider] *is not in a position to make up any potential shortfall in your PSRI contributions as we are not Tax Consultants and could not possibly advise you on this matter.*

Analysis

The problem in this case was that the annual drawdown taken by the Complainant from his ARF for the year 2016 was less than €5,000.00 (I will refer to this as the minimum threshold requirement) rendering it an ineligible contribution as regards the state contributory pension. The question is whether, and if so, the extent to which, the Provider can be characterised as responsible for this failing.

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In August 2016, the Complainant sought specific advice from the Provider as to a mechanism whereby he might make up a shortfall in his social insurance contributions so that he might, in 2023, qualify for a state contributory pension. Specifically, the Complainant wished to initiate a drawdown of his ARF which he anticipated would be subject to PRSI and which would therefore satisfy contribution requirements going forward and serve to make up the shortfall.

The Complainant made his intentions perfectly clear in that it was entirely unambiguous that the principal goal of the transaction was to satisfy social insurance contribution requirements. The Provider's written responses of 8 and 16 August 2016 provided specific answers to two questions which were not incorrect. The responses did not however make any reference to any minimum annual drawdown or minimum threshold requirement which would be needed in order to satisfy contribution requirements. In the circumstances, the response conveyed the impression that any PRSI deducted from the payments (and there would be deductions even if the annual drawdown was less than €5,000) *would* meet the contribution requirements. In coming to this conclusion, I am particularly persuaded by the content of the Complainant's initial missive of 8 August 2016 and the two subsequent emails from the Provider, neither of which advised the Complainant to seek external advice.

The Provider relied to a significant degree in the Final Response Letters of 20 September and 3 October 2017, on the proposition that it is not, and was not, responsible for advising the Complainant on tax or social welfare matters. However, certain observations can be made about this proposition. In the first instance, the proposition came only after the Provider had initially sought (in the first two Final Response Letters) to rely on the suggestion that it *had* in fact provided the requisite advice to the Complainant in August 2016 only to then realise that it had mistaken the date of a particular letter. There is a certain inconsistency with relying, initially, on the contention that the advice had been given, only then to acknowledge that it had not been given but to claim that there was no 'responsibility' to provide the advice.

The second observation is that, though there may very well have been no 'responsibility' to provide any advice at the outset, and although on 8 August 2016, the Provider's representative on the telephone guided the Complainant correctly, to seek independent financial advice, the Provider nonetheless then responded to the Complainant's query in writing with certain advice. Consequently, it seems to me that the Provider must bear a certain responsibility for the accuracy of that advice and any material omissions within it. Given the nature of the Complainant's query and given that the Provider engaged on the topic of PRSI deductions, I am satisfied that the failure to make reference (in the written communications) to the minimum threshold requirement or, alternatively, the failure to explicitly advise in writing, that external advice should be sought on the matter, represented a material omission of the type referenced. Indeed, the Provider appears to accept this insofar as it stated in the last of its Final Response Letters dated of 3 October 2017:

> *You should have been told to refer this matter to your financial advisor or tax consultant. I am sorry that you were not told this…*

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It is also noteworthy that the first time that the Provider referred to the minimum threshold requirement in any manner, was in the course of its third Final Response Letter dated 20 September 2017.

Separate from the foregoing, it seems to me that the Provider may also have provided certain other advice that was misleading. In its letter of 4 August 2017, the Provider implied that, in order for the Complainant to meet the contribution requirements, it would be necessary to withdraw €12,500 per year from the ARF. This was restated in the letter of 5 September 2017. However, this failed to take account of the possibility subsequently referred to in the letter of 20 September 2017 of simply making up the shortfall (ie any amount less than €500 paid in PRSI in the year) directly with the Department of Social Protection. In this regard, I take the view that the content of the first two Final Response Letters also breached the standards that might have been expected of the Provider.

Ultimately, I am satisfied that the Provider bears a responsibility for failing to advise the Complainant of the minimum threshold requirement in its correspondence of 8 and 16 August 2016 or, alternatively, for failing to explicitly advise in these emails that the Complainant should seek independent advice on the matter. The fact that the emails detailed certain advice in response to a very clear query could have given rise, in the absence of any caveats being raised, to a reasonable presumption that the mechanism intended to be deployed would be effective.

However, I consider it necessary and appropriate to also look at the Complainant's own responsibility for the matter. The Complainant was advised orally in the phone call of 8 August 2016 to speak with "*an advisor*" and indeed he indicated that he would be speaking with such an individual. The Complainant is thus, to a certain degree, the author of his own misfortune for failing to secure the relevant advice externally. I am satisfied therefore to conclude that he bears 50% of the responsibility for the events which ensued.

I must now turn to the matter of compensation. The Complainant calculates his loss in the amount of €416 per annum. The Complainant arrives at this figure on the basis that he would have made 52 reckonable payments in respect of the year 2016 but for the shortcomings in the advice given to him by the Provider. In his letter of 25 September 2017 (inaccurately marked '2016'), the Complainant states as follows:

> *I have missed out on the opportunity to pay PRSI in 2016 and gain 52 Class S stamps*

The Complainant contends that this would have given rise to an additional 1/30th in terms of the value of his pension annually to which he will become entitled in 2023. The Complainant calculates the value of this 1/30th share as €8 weekly or €416 annually.

It is clear that when the Complainant first made contact with the Provider he had calculated that he currently held 457 social contributions but he indicated his own understanding that post 2020, he would need "*a minimum of 520 full rate contributions to qualify for a minimum 1/3 pension. Each additional 52 contributions will qualify me for another 1/30th.*"

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I note in that regard that notwithstanding the period of 10 months which elapsed between August 2016 and the end of May 2017, when the position was then clarified to him by the Department of Social Welfare, the Complainant still remained capable of meeting the minimum threshold of 520 full rate contributions by the end of 2019.

His suggested loss, is in respect of the period during which he might have made additional contributions towards qualifying for a larger contributory pension in the year 2023. I note in that regard that the period at issue is not a full year, but rather a period of some 10 months from August 2016 onwards until May 2017. Accordingly, even accepting the Complainant's own figures, which I note the Provider has elected not engage with or comment on in any manner, the suggested misunderstanding did not continue for a full period of 12 months and the suggested annual loss therefore at €416, can be reduced to the proportionate figure of circa €346 per annum; the position regarding tax to be paid on any such additional pension earnings, is unclear.

Taking account of the Complainant's own proportion of responsibility for the situation which ensured, I am satisfied that the Complainant's recoverable loss from the Provider is in the order of €173.00 per annum, assuming that when he turns 67 years old, he will have made sufficient contributions, such that he will become entitled to the contributory pension.

I am conscious of the provisions of ***Section 60(5)*** of the ***Financial Services and Pensions Ombudsman Act 2017*** which permits this office to direct the payment of compensation by way of an annuity, only where "*the subject of a complaint is an annuity*". This is not such a situation.

I consider it appropriate therefore to direct a lump-sum compensatory payment to the Complainant. As an Irish male can now expect to live to an age in the order of 80 years, the period of the Complainant's loss is arguably some 13 years. Accordingly, to conclude this matter, I intend to direct the Provider to make a compensatory payment to the Complainant in the sum of €2,000, to an account of the Complainant's choosing, within a period of 35 days from the date of his nomination of account details to the Provider.

Conclusion

- My Preliminary Decision is that this complaint is substantially upheld, pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017*** 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 €2,000, 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.

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- 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

3 September 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.