An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2020-0137
Sector:	Investment
Product / Service:	Personal Pension Plan
Conduct(s) complained of:	Fees & charges applied
Outcome:	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns deductions made from the encashment/surrender value of the Complainant's personal pension plan ('the Plan'). The Complainant has held the Plan with the Provider (and its predecessor) since **December 1993**.

The Complainant's Case

On **12 October 1993**, the Complainant completed a proposal form in respect of the Plan, which came into force on **1 December 1993**. The Plan remained in force until **May 2018** at which time the Complainant, having passed his 60th birthday, decided on its encashment/surrender. During the time the Plan was in force, the Complainant made a number of amendments to it, including variations to the monthly rate of contribution.

On encashment/surrender in **May 2018**, the Provider made deductions, which the Complainant says were in the sum of €25,916.64, from the gross value of the fund and it is with these deductions that the Complainant takes issue.

In his Complaint Form, the Complainant states that he first became aware of the nature and extent of the early encashment/surrender charges applying to the Plan on **1 November 2017**.

The Complainant argues that when he commenced the Plan in late **1993**, he was aware of the legislative provisions that permitted the proceeds of the Plan to be taken between the ages of 60 and 70. He explains that it had always been his intention to retire at age 60 and to take the proceeds of the Plan at that time and he argues that the Provider was, or ought to have been aware of this.

The Complainant submits that the Provider did not inform him or his financial advisor at the time of the proposal or inception of the Plan that penalties would apply in respect of the early encashment/surrender of the Plan, *i.e.* before the Complainant's 70th birthday. He argues also that the Provider never gave him the option of choosing a retirement age for the Plan. Further, he argues that the Provider did not communicate clearly the nature and extent of the penalties applying to his Plan in the event of its early encashment/surrender to him or his financial advisor during the lifetime of the Plan. He argues therefore that the Provider has wrongfully imposed the charges at issue, arising out of the encashment/surrender of the Plan prior to his 70th birthday.

The essential elements of the Complainant's complaint are that:

- At the time of the proposal of the Plan, the Provider did not give him any option to select a retirement age and consequently he cannot be said to have selected a retirement age of 70. The Complainant relies also on later amendments to the Plan where he says he consistently chose a retirement age of 60;

- The Provider did not make him aware on the proposal form that a retirement age of 70 would be the default retirement age selected by the Provider;

- The Provider did not inform him or his financial advisor of the consequences, in terms of the penalty, that would arise if the Plan was encashed/surrendered before he reached the age of 70;

- He was not informed by the Provider of any mechanism for opting out of the default retirement age of 70;

- While a retirement age of 70 and final contribution dates in **2028** were shown on documents issued by the Provider to the Complainant during the lifetime of the Plan, the Complainant argues that this information was not shown on all documents to him and is at variance with the reference to a *"selected retirement age"* stated in some of the documents.

- He argues that he understood the reference to a *"retirement age of 70"* in documents issued to him by the Provider to mean that this was the age beyond which he could no longer contribute to the Plan and when the proceeds of the Plan would have to be taken.

/Cont'd…

- He argues also that, in the form completed by him to effect a single premium contribution to the Plan in **October 2003**, he selected a retirement age of 60, *"in the clear belief that the policy already had a 60 retirement age"*, and that this selection by him was effectively overridden by the Provider, without being drawn to his attention.

- The Complainant explains that in or about the same time as the inception of the Plan, he completed a proposal form for a convertible terms assurance policy. He says that this application did allow a term to be selected and that he did so *"to age 60"*. He says that while he did not proceed with that policy, it shows his express intention to fix 60 as his retirement age.

- The Complainant accepts that some of the documents sent to him did show either, a retirement age of 70 or a final contribution date as being in **2028**, but he argues that he understood this to be a maximum retirement age, as he contends that it conflicts with the content of other documents issued by the Provider.

In his letter to the Provider dated **30 March 2018**, the Complainant asserts that *"the financial advisor confirmed to me that at the time the policy was set up he gave* [the Provider] *clear instructions to set the policy up with a retirement age of 60"*. In the same letter, the Complainant refers to correspondence in **May 1998** to his financial advisor showing estimated encashment/surrender values and stating that benefits could be taken at ages 60, 65 and 70. He argues that there should have been a warning that a penalty would apply if benefits were taken before the age of 70. Similarly, the Complainant explains the circumstances surrounding his making a single premium contribution to the Plan in **October 2003**; he says that the application form completed to effect this amendment did offer the option to select a retirement age, which he says that he set at age 60. He complains that notwithstanding this selection, a new plan was set up with a retirement age in line with that on the original policy.

The Complainant also states that a bank loan application dated **26 November 1993** and a convertible term assurance policy that he filled out in **1993**, clearly show his intentions to retire at an age prior to 70.

In his response to the Provider's letter dated **9 May 2018**, the Complainant asserts that the decision to set the retirement age on his Plan at 70 was made by the Provider but *"this fact was not disclosed to me by* [the Provider] *at the time"*. In this same letter, the Complainant argues that the statement contained in an earlier letter dated **12 March 2018** to his financial advisor regarding *"flexibility of retirement ages"* is *"not consistent"* with the retirement age having been set at 70 by the Provider.

Ultimately, the Complainant wants the Provider *"to administer a second claim on* [his] *Plan for a gross amount of the charges deducted of €25,916.64 and consequently pay* [him] *an additional tax free lump sum of €6,479.16 and transfer the balance of €19,437.48 to* [his] *Approved Retirement Fund".*

/Cont'd…

The Provider's Case

The Provider states that the product offered and accepted in **1993** had the flexibility to retire at any age between 60 and 70. If the policyholder wanted a specified date of retirement with no flexibility then he and/or his advisor should have selected such a product. The Provider states that at no stage was it advised, communicated with or had any prior knowledge of the Complainant's requirement to retire at age 60 on the **1993** policy. The policy documentation and correspondence issued at the time and since has always had a retirement to age 70 or premium payments to **2028**. The Provider also states that policy condition number 5 allowed a change in the pension date and the policyholder was therefore informed through this documentation of the terms and conditions of his personal pension plan.

In earlier correspondence with the Complainant's financial advisor dated **12 March 2018**, the Provider explains that at the time of the issue of the Plan in **1993** it was *"standard practice"* in the industry to set the retirement age for this type of financial service product at 70. The Provider states that if the Complainant/his broker had written in age 60 on the application form, it would have written the policy to that age. The Provider states that approximately 4% of its policies had a lower retirement age (usually 60 or 65) specified.

The Provider has accepted that the proposal form for the Plan did not allow the Complainant to select a retirement age. It goes on to state that *"the decision to select a retirement age 70 was not made by us, this was the product offered and accepted"*. The Provider states that the policy documentation it furnished to this Office demonstrates that the flexible retirement policy was written to age 70 in **1993** and again in **2003**. Furthermore, it states that the Complainant could have requested age 60 at the time the original policy was set up. The Provider states that the policy terms also allow for a change in the retirement age if required during the term, however, the policy documentation does not support the Complainant's view that a flexible age 60 to 70 retirement age product was selected.

The Provider asserts that in correspondence with the Complainant and/or his financial advisor during the lifetime of the Plan, the Provider informed the Complainant and his financial advisor that the retirement age on the Plan was 70 and that the final contributions were due to be made on dates in **2028** that would coincide with his 70th birthday. The Provider asserts also that, in its correspondence with the Complainant and/or his financial advisor during the lifetime of the Plan, it fully informed them regarding the application of the Market Value Adjustment to the Plan. It contends therefore, that the Complainant was, or ought to have been, aware of the penalties applying to the Plan in the event of its encashment/surrender before the Complainant's 70th birthday.

In respect of the **October 2003** pension single premium, the Provider states that this premium did have a selected retirement age of 60 on the application form but also had an instruction to invest the single premium in the existing policy. The Provider states that it invested the premium in the existing policy and that this benefited the Complainant by providing for a 4% p.a. guaranteed price return.

/Cont'd…

The Provider states that if a retirement age of 60 was provided for in respect of this **2003** single premium then a new contract and policy would have been required and would only have provided the Complainant with a 2.5% p.a. guaranteed price return.

The Provider states that aside from the **October 2003** pension single premium there are no other references to age 60 on any documentation issued by it.

In essence, the Provider states that it was industry practice to write the policy to age 70 and the contract entered into by the Complainant was written to age 70. The Provider states that the Complainant's broker should have been aware of this and understood the policy recommended for the Complainant. The Provider further states that the policy documentation at the time showed to age 70 and the policy terms & conditions explain the implications for retirement pre-age 70.

The Complaint for Adjudication

The complaint is that the Provider wrongfully made deductions amounting to €25,916.64 from the encashment/surrender value of the Complainant's Personal Pension Plan when he encashed it on passing his 60th birthday, in **May 2018**.

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 13 March 2020, outlining my preliminary determination 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.

/Cont'd…

In the absence of additional submissions from the parties, within the period permitted, I set out below my final determination.

In respect of this Office's jurisdiction to hear this matter, I note that the Complainant states that he first became aware of the nature and extent of the early encashment/surrender charges applying to the Plan on **1 November 2017**. As the Complainant made his complaint to this Office on **30 October 2018**, this means that the Complainant has made his complaint to this Office within the time limits prescribed in ***Section 51(2)(ii) of the Financial Services and Pensions Ombudsman Act 2017***.

I note that the **1993** policy taken out by the Complainant with the Provider allowed encashments at any time between the ages of 60 and 70. I further note that there is no evidence before me sufficient to suggest that the Complainant selected an age of 60 at the time he selected this product. I have been provided with no substantive evidence that the Complainant selected any age at all for the Product. However, I note that the Complainant selected this product under the advice of his broker and said broker would and/or should have been aware of the standard industry practice in **1993** for products of this nature to have a default age of 70 and for market value adjustments to apply if encashment occurred at an earlier date.

I must point out that the conduct of the broker, as a third party, is not being investigated as part of this complaint.

I further note that a market value adjustment is not a penalty as such, rather it is a mechanism to ensure that a policyholder receives a value on encashment that reflects the value of the underlying instruments within the fund. A market value adjustment acts to protect all other investors within the fund by ensuring that each policyholder gets a fair value and no policyholder or group of policyholders has to underwrite higher payments.

I note that the annual statements issued to the Complainant over the lifetime of the Plan showed deductions for market value adjustments and these clearly applied post the age of 60.

The convertible term assurance policy, filled out by the Complainant in **1993** but not proceeded, has no relevance to this complaint and the pension plan that the Complainant did actually select. Similarly, I accept that the third party provider loan application by the Complainant dated **26 November 1993** is not a document that the Provider would have been aware of.

I accept that the Complainant did select a retirement age of **October 2003** pension single premium but that this conflicted with his instruction to invest the premium under his existing policy, which had a default age of 70. I note that the discrepancy between those two contradicting instructions was not resolved, nor was any clarification sought from or by the Provider.

/Cont'd…

Had clarification been sought at this stage by the Provider, perhaps the misapprehension the Complainant was labouring under regarding the retirement age of his pension product could have been flagged at a much earlier juncture. This would have allowed the Complainant to more adequately plan for his retirement and future financial needs.

In essence, I accept that the Complainant had a genuine belief that he was entitled to encash his pension plan at age 60 without incurring any deductions. However, I must also accept that the Complainant never communicated this belief to the Provider in **1993** when he selected the pension product or on any of the occasions when he received pension documentation and/or annual statements relating to the product. I further accept that it would be a breach of the Provider's fund management process rules to pay a higher amount from its fund to the Complainant to the detriment of other policyholders.

Notwithstanding the above, I accept that the Provider should have been alerted to the Complainant's misapprehension in **October 2003** and should have taken steps at that stage to clarify the retirement age of the selected pension plan.

Having regard to the particular circumstances of this complaint, in particular the failure of the Provider to take any positive steps to clarify the retirement age of the Complainant's selected pension plan when it ought to have realised in **October 2003** that the Complainant thought the retirement age of the Plan was 60, I partially uphold this complaint and direct the Provider to make a compensatory payment of €5,000 (five thousand euro) to the Complainant.

<u>Conclusion</u>

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is partially upheld, on the grounds prescribed in ***Section 60(2) (b) and (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 €5,000 (five thousand euro), 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

7 April 2020

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.