



<u>Decision Ref:</u>	2020-0211
<u>Sector:</u>	Investment
<u>Product / Service:</u>	Additional Voluntary Contribution (AVC)
<u>Conduct(s) complained of:</u>	Failure to process instructions in a timely manner Complaint handling (Consumer Protection Code) Dissatisfaction with customer service
<u>Outcome:</u>	Partially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

This complaint concerns the Complainant's request to transfer a pension bond held with the Provider, against which this complaint is made, to a third party provider.

The Complainant's Case

The Complainant submits that on 2 July 2018 he requested that the Provider transfer his pension bond to a named third party provider in order to purchase shares through its Self-Directed Investment Option. He further submits that he spoke with the Provider by telephone on 12 July 2018 and returned the signed documents that the Provider had requested that same day.

The Complainant asserts that he wrote to the Provider on 8 August 2018 stating that he was still awaiting the transfer of funds, and expressing his *"annoyance with [the Provider] and its failure to comply with [his] instruction"*. The Complainant states that the Provider wrote to him on 30 August 2018, advising that it was *"having difficulty in locating a party that is authorised to sign on behalf of the Trustees"* of the scheme, and that this was *"causing a delay"*.

In the Complainant's reply to the Provider, he advised that he has experienced a financial loss as the price of the shares he intended to purchase was continuing to rise, and he asked that the Provider indemnify his loss, arguing that his loss had occurred due to the Provider's delay in effecting the requested transfer.

The Complainant submits that he subsequently furnished the Provider with a full detailed calculation of this loss, comparing the share price on 8 August 2018 (the date of his complaint to the Provider regarding the delay in transferring funds) with the share price on 1 November 2018 (the date he purchased the shares once the funds had been transferred by the Provider).

The complaint is that the Provider unreasonably delayed in transferring funds from the Complainant's pension bond to a named third party provider; and throughout the processes received poor customer service; and that as a result of the delay and poor customer service, the Complainant incurred a financial loss because of an increase in share prices in the period between the date he requested the transfer and the eventual date of transfer.

The Complainant wants the Provider to:

1. Pay him compensation in the amount of \$96,499.46 for the financial loss incurred as a result of the delay in transferring funds; and
2. Pay him compensation in the amount of \$9,649.90 for the *"stress [the Provider] and its staff has caused"*.

The Provider's Case

In its letter to the Complainant dated 30 August 2019, the Provider stated that the reason for the transfer delay was that *"the transfer out form, and application form from [the named third party provider] need to be signed by a Trustee on behalf of [the Complainant's former employer]"*. The Provider advised it was having difficulty in locating a party authorised to sign on behalf of the scheme Trustees, and the delay in transferring funds was due to this difficulty.

The Provider wrote to the Complainant on 4 October 2018, stating that his claim had been processed, and the funds transferred to the named third party provider. The Provider offered the Complainant *"a once off payment of €500"* and apologised for *"the level of service [the Complainant] experienced throughout this process and for the delays incurred"*. The Provider wrote to the Complainant again on 16 October 2018 stating that the TPP had not yet received the *"signed Trustee Declaration"* from the Provider and advising that this document had been forwarded four days previously. The Provider also apologised for *"any inconvenience caused"*, and stated that it was *'not in a position to issue [the Complainant] with a letter of indemnity as requested"*. The Provider requested that the Complainant revert with details of his losses when the information became available.

The Provider issued its Final Response Letter to the Complainant on 12 November 2018, acknowledging that there had been a significant increase in the share price of the investment as outlined in the Complainant's previous letter.

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The Provider stated that it *“was not in a position to make a payment to [the Complainant] for \$106,147.36 as requested”* and further states that its offer of €500 remained open. The Provider contended that it was *“not in a position to make up any difference in potential gains had [the Complainant] invested in a particular share on a particular date”*.

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 20 May 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.

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

I will deal first with the complaint that the Provider did not effect the Complainant’s instruction to transfer the pension bond to the named third party provider within a reasonable period of time. The Complainant states he gave the instruction in July 2018, and it appears it was not effected until 4 October 2018.

From the evidence provided, it would appear from reviewing the file that not only was there a significant delay of 3 months before the requested transfer took place, but also there were a number of customer service failures on the part of the Provider during this period.

The Complainant received correspondence from the Provider dated 9 July 2018 which included a Transfer out form, this correspondence stated:

"In order to proceed with a transfer on the above policy, we will need:

- *The enclosed transfer out form to be completed and returned to us.*
- *The enclosed deed of substitution to be completed and returned to us.*

Upon receipt of the above, we will be in a better position to review this request".

After receiving this documentation, the Complainant contacted the Provider by telephone on 11 July 2018. A recording of this call has been provided in evidence. I have considered the content of this call and I note that during this call the Complainant expressed that:

"The forms that were sent, sure I can't complete them. It's you [the provider] that completes those".

The representative of the Provider then requested the Complainant to hold while she contacted the relevant department. Once the representative resumed the call an apology was offered to the Complainant and the representative stated that the relevant department has had a look at the correspondence and forms. The representative stated:

"...you wouldn't need to fill it out it would be someone like the managing director of the old company. They [the relevant department of the Provider] are going to look into it a bit further. So if you could hold off on sending those forms back and we will be in contact with you in the next few days and let you know exactly what needs to be done. I am very sorry that you got that letter".

From the timeline of events furnished by the Provider, I note that after this call took place the Complainant returned the forms by post. They were received by the Provider on 12 July 2018. Following this the next correspondence between the two parties was a letter of complaint from the Complainant received by the Provider on 9 August 2018. It appears that internal communication was ongoing, for some time, trying to identify who was the correct person to sign the forms. However, the Complainant did not receive a follow up call or correspondence as assured from the telephone conversation which took place on 11 July 2018.

In its response to this Office, the Provider expressed that the reason for the delay was due to the fact that:

"Unfortunately, this was the first time the Provider had received a claim on an AVC pension, connected to employment with [Named third party provider], but where the party was not a member of the main pension scheme.

While it was initially assumed that the forms in question had to be signed by a Trustee of the Main Pension Scheme (held by the Provider's Corporate Business area), it later came to light that this was not the case. Rather, the forms had to be signed by someone who had the appropriate level of sign off to do so, within the retail area of the company.

Unfortunately, the process of determining who had the legal authority to sign the transfer form involved many internal referrals and took several months".

The Provider submits that although it took longer to determine who had the authority to sign the declaration, the internal email chains submitted show that the Provider:

"Worked continually during this period".

While the internal emails furnished by the Provider do demonstrate a continued effort to determine the individuals with authority to sign. They also demonstrate a level of confusion by agents of the Provider as to what exactly was required. I note that one agent of the Provider makes the comment that *"this is really going around the houses..."*

The Provider details in its company file that its:

"Turn –around time for Pensions Claims, is five to seven working days, after the last requirement has been received".

This applies to its normal procedures, whereas in the current complaint the delay was due to the:

"Extenuating circumstances resulting from the fact no such claim or transfer had been requested previously".

I note from the submissions made by the parties that the claim was processed and the proceeds transferred to a named third party provider on 4 October 2018. The actions of the Provider seemed to have caused an additional delay to the Complainant. Both the Complainant and the named third party provider contacted the Provider on 12 October 2018, advising that the third party Provider was unable to issue the Complainant's policy without the Trustees' declaration page being signed.

The Provider submits that it then supplied the third party provider with the signed declaration on 12 October 2018. The Provider then issued correspondence to the Complainant on 16 October 2018 informing him the declaration had been sent and offered an apology for any inconvenience caused.

On 22 October 2018, again both the Complainant and the named third party provider contacted the Provider. The Complainant had received an email from the named third party provider, detailing that it could not accept the declaration as it was amended to include the term “employer” and not “trustee”. The Complainant included this in his correspondence to the Provider. The named third party provider contacted the Provider by way of email on the same date. The email details that:

“Unfortunately we are unable to accept the attached as we require the application form to be signed by a trustee of the scheme and not the employer”.

It appears that the declaration was amended and forwarded to the named third party provider. I have not been provided with evidence to show that the amendment, identity and title of the signatory was explained to the named third party provider, prior to forwarding it. The identity and authority of the signatory was only detailed by the Provider to the named third party provider in correspondence dated 22 October 2018.

The lapse of time between the forms being submitted and the transfer being effected is not in dispute. The reasonableness, or otherwise, of the delay must be viewed in the context of both the Provider’s obligation to process a customer’s instruction properly and promptly, the applicable contractual terms, and the Provider’s contention that there were extenuating circumstances in this instance – namely the fact that the Complainant was not a member of the main pension scheme, and as such it was the first time the Provider had to consider how to properly process an instruction of this nature.

While I acknowledge that the Provider may not have had a procedure in place for transfers of this nature, the delay in effecting the transfer was significant. The evidence furnished shows that the Provider was taking continuing action to find the correct signatory. While the delay was significant, I also acknowledge that it would be unable to authorise the transfer until the appropriate signatory was identified. However, there have been a number of shortcomings in the customer service on the Provider’s part.

The Complainant has submitted that as result of the delay and poor customer service received from the Provider, he has incurred a financial loss as a result of an increase in share prices in the period between the date he requested the transfer and the eventual date of transfer.

The shares that the Complainant states he intended purchasing rose sharply in value during September and October of 2018. From October 2018 to date the shares have both risen and fallen in value from time to time, as shares do.

The Complainant’s contention is that this delay caused him a loss and that the Provider is liable for that loss. To assess the merit of that contention, the concepts of certainty, proximity and foreseeability of loss would (amongst other factors) have to be considered.

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The certainty of loss, in this complaint, relates to the extent to which it can be said that a given date is the date upon which the shares ought to have been purchased had it not been for the unreasonable delay. This is made all the more complicated by the fact that loss claimed is based on a commodity, the value of which constantly fluctuates. There is also the consideration of how much of the monies intended for share purchase would have gone towards fees associated with effecting the share purchase, not to mention consideration of whether in fact the Complainant would have used the entirety of the monies for the shares, or just a portion. Clearly, in hindsight, one can appreciate that he would have liked to have purchased as many shares as he could prior to September/October 2018.

In the event, it appears that he purchased the stock near its 2018 peak price. If he had purchased it a few days earlier or later, the loss he puts forward in this complaint would be lower. I must consider whether this Office can make a finding, on the evidence before it, that had it not been for the unreasonable conduct of the Provider, the Complainant would have purchased the stock near its lowest price and sold it at or near its peak. I would also have to consider what the net profit would have been after fees, tax etc.

It is not contested that once the transfer was completed the Complainant had access to the full sum of his entitlement. He did not suffer a loss as to the original amount. Instead the Complainant has put forward that he has suffered a loss due to share price rising and the potential amount of shares he could purchase was, as a consequence, reduced.

Foreseeability is an issue in that the type of loss ought to have been reasonably within the contemplation of the parties at the time a contract was entered into, or that might fairly and reasonably be considered as arising naturally from any wrongdoing.

The foregoing is not intended as an exhaustive list of the matters which fall to be considered, nor should it be construed as enumerating a definitive test to be applied for any of the issues of certainty, proximity, or foreseeability. It is set out merely to illustrate the complexity involved in assessing the Complainant's complaint – the exercise of fairly calculating a loss of the type claimed is not a simple one.

I am unable to determine that, had the transfer taken place within the Provider's standard *"five to seven working days"*, the full sum would have been used to purchase shares. Nor can I determine if the Complainant would then go on to sell the purchased shares at a gain or loss. Where it is a question of potential financial gains and losses based on *'what could have been done if'*, I am unable to speculate on what actions might have been taken. I do not find that the Provider is liable for the potential gains and losses of the Complainant.

I note that the Provider originally offered the Complainant the sum of €500 as compensation for the *"level of service you experienced throughout this process and for the delays incurred"*. The Complainant was dissatisfied with the offered amount.

The Provider, during the investigation of this complaint by this Office, subsequently increased its goodwill gesture:

“In acknowledgement of the impact of the delay in being able to process the transfer, the Provider would like to increase the original goodwill gesture of €500 to €2,000”.

To my knowledge, the Complainant has not accepted this gesture.

In consideration of all of the above I intend to partially uphold this complaint. While I cannot find that the Provider is liable for the potential gains or losses of the Complainant, and indeed I accept that it was required to identify the appropriate signatory for the declaration, nevertheless, the delay in completing the requested transfer was significant and I believe, unreasonable.

The delay was made worse by a number of customer service failings throughout the Complainant’s engagement with the Provider, and while the Provider did not have a procedure in place for requests of this kind, the period of time which elapsed, and the poor communication, was nevertheless unreasonable. I do not believe the compensation offered by the Provider to be sufficient.

For these reasons, I partially uphold the complaint and direct the Provider to pay a sum of €6,000 in compensation to the Complainant for the inconvenience caused. I further direct the Provider to undertake the necessary actions to ensure a procedure is put in place so that in the event a transfer request similar to the one in the present complaint was to occur again, a set procedure would be in place on how to handle such a transfer request.

Conclusion

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 €6,000, 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 further direct the Provider to undertake the necessary actions to ensure a procedure is put in place so that in the event a transfer request similar to the one in the present complaint was to occur again, a set procedure would be in place on how to handle such a transfer request.

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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**

11 June 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.