An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2022-0079
Sector:	Investment
Product / Service:	Personal Pension Plan
Conduct(s) complained of:	Failure to advise on key product/service features Failure to provide correct information Maladministration
Outcome:	Upheld

LEGALLY BINDING DECISION OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

The complaint concerns a personal pension policy held by the Complainant with the Provider.

The Complainant's Case

In **1994**, the Complainant's policy was taken out with the Provider's predecessor. The Complainant says that 20 years later, the policy was taken over by the Provider in **2014**.

The Complainant submits that in **November 2011**, it became necessary to take a premium holiday in respect of the policy, due to the recession and a drop-off in his business. The Complainant states that in **2013**, he was asked to resume payment of the premium before he would be permitted to avail of a further premium break. The Complainant contends that he therefore decided to resume payments of €200 month, to avoid the policy becoming paid-up.

The Complainant submits that in **early 2015**, he was advised that after **April 2015**, he would no longer be permitted to increase his contributions. As a result, the Complainant decided to increase his contributions to €300 per month, which he submits was all that he could afford at that time.

The Complainant says that the Provider then advised that it would allow no more increases in contributions to the pension fund. He says that he complained to the Provider about the restriction, as it was contrary to the reasons why the Complainant had taken out the pension plan in the first place in 1994, which was to allow him flexibility in his contributions because

he was a sole trader. The Complainant submits that making increased contributions was allowed for within the original policy provisions agreed and put in place in 1994.

The Complainant says that not being able to increase his contributions will affect him after his retirement. He submits that it is recommended that a person contribute up to 25% of their salary, to ensure a reasonable standard of living in retirement and to obtain the maximum income tax relief available to the individual. At the time when he made his complaint to this Office he submitted that his current contributions stood at approximately 5% or 6% of salary, so they were neither sufficient for his future needs, nor tax efficient.

The Complainant submits that he has not been in a position to avail of the optimum levels of income tax relief on premiums. He has submitted a table which he says shows the tax relief that he would have been entitled to, if he had been allowed to contribute at a higher level. He submits that this demonstrates additional income tax overpaid for the five-year period in question, at €11,304.

In one table, the Complainant has presented calculations of the estimated shortfall in the pension plan due to not making increased contributions. He has estimated that between **2015 and 2019**, he would have made additional contributions of €32,184. He estimates that the growth rate in his pension fund of those additional contributions would amount to €4,877.52 using a simple interest calculation. The table sets out further calculations on the contributions which he argues would have been made to the fund, and what those additional contributions would mean for the fund value. The Complainant submits that the total shortfall in the fund value over the relevant period, amounts to €37,061.52 (on the assumption that those additional contributions of €32,184 had actually been made).

The Complainant has submitted evidence that the sum of €19,204.04 was put aside by him to a savings account during the relevant period, representing pension contributions he was not allowed to make.

The Complainant has also submitted a letter from his accountant dated **16 December 2019** setting out his ability to increase pension contributions during the years **2015 to 2019**. The accountant confirms that additional contributions which could have been made during the period **2015 to 2019** were in the sum of €26,136, which would have resulted in tax savings of approximately €10,500.

The Complainant has advised that the Provider has subsequently confirmed that he can increase his monthly contributions and it will allow one-off single premium payments also.

In response to submissions from the Provider, the Complainant argues that the Provider is incorrect to say that the operation of clause 3(g) of the policy terms and conditions (which provides for top ups) is discretionary. He argues that clause 3(g) is related to clause 4 which provides for increases in contributions to account for inflation. He argues that the clause does not permit or justify the actions of capping the contributions, and does not give the Provider the power to do so.

/Cont'd…

The Complainant notes that the Provider has conceded that its reason for suspending the contribution increases, was because of a systems constraint when moving from one system to the other. The Complainant argues that this is not acceptable and he says that system constraints did not affect how the policy operated between **1994 and 2015**. The Complainant points out that after the intervention of this Office in **February 2020**, the system constraints were adjusted and additional contributions were permitted thereafter.

The Complainant argues that he was first advised by his financial adviser, tied agent X, on **20 March 2015** that the Provider was restricting the contributions. He argues that he did not receive any notification from the Provider and he was only given seven days to increase the pension contributions, after which he was told that no further increases would be permitted. The Complainant argues that the only written reply to his complaint was by letter dated **26 March 2015**.

The Complainant argues that he and his wife continually complained to X at this treatment. The Complainant argues that the only solution offered by the Provider was to open another retirement policy. He argues that this was not appropriate because he was 50 years of age and had started a policy in **1994** which suited his needs. He argues that he and his wife looked carefully at the options in **1994** and paid higher costs in the early years to capitalise on the advantages of the policy he incepted. He further argues that the policy offered attractive bonuses set at certain intervals, and also on the maturity of the policy.

The Complainant submits that he and his wife decided to put money aside on deposit to supplement the income that the existing policy would provide and that their bank records support a steady growth of the fund between **2015 and 2019**.

The Complainant argues that in **October 2018,** he changed his financial adviser from tied agent X to an independent adviser, Y. On the advice of Y, the Complainant states that he initially agreed to move the fund to another provider to begin increased contributions with the new provider into the same fund, though he subsequently decided to remain with the Provider.

The Complainant is also critical of the Provider in respect of certain clarifications sought regarding bonuses and allocation rates. The Complainant argues that this proved to be a laborious process and that even tied agent X, had difficulty in extracting the required information. The Complainant states that at one point, financial adviser Y was given incorrect information by the Provider which would have resulted in a large penalty for early encashment, if they had proceeded.

The Complainant rejects the Provider's offer in open correspondence, of **€3,000** in compensation. He does not deem this suitable for the damage inflicted on the fund over a five-year period by the Provider's "*restrictive and unjustifiable practice*".

The Complainant wants the Provider to compensate him for the loss of growth of the fund and the impact of overpayment of income tax.

/Cont'd…

The Provider's Case

The Provider states that the Complainant took out a personal retirement plan with the original provider in **June 1994**. It states that the plan migrated to its systems in **May 2015**. It states that it wrote to the Complainant on **19 May 2015** about this, providing him with his new plan number, following migration.

The Provider states that in advance of the migration, it exercised its right to suspend the acceptance of all top up contributions, which included regular contribution top ups and lump sum top ups, to all pension plans which migrated across to it from the original provider. The Provider states that this decision was made at the time, because of system constraints following the migration.

The Provider notes the desire of the plan owners (such as the Complainant) to top up at any point in time, and the acceptance by the Provider of such top ups as discretionary. The Provider relies on paragraph 3(g) of the pension terms and conditions in this regard. The Provider argues that with effect from **27 March 2015**, it exercised its contractual right under paragraph 3(g) of the terms and conditions, to suspend the acceptance of top up contributions.

The Provider argues that in **2019**, the Complainant raised a complaint with this Office about the application of the top up suspension and following a further review at the time, the Provider agreed that it would no longer apply paragraph 3(g) of the terms and conditions meaning that the Complainant could now top up his plan going forward.

The Provider argues that it was fully entitled to suspend accepting top up contributions during the period between **2015 and 2019**. The Provider notes that the Complainant increased his regular payment of €382.88 to €682.66 with effect from **1 March 2020**.

The Provider states that despite the fact that the Complainant is now submitting that he wanted to save additional funds for his retirement, during the period when the top up facility on his existing plan was unavailable, it is the Provider's understanding that he did not take out another retirement product to allow him to do this.

The Provider argues that it made the decision to no longer apply paragraph 3(g) because the Complainant's plan provides for bonuses to be applied to the premium units on his plan, at set intervals. The Provider argues that the Complainant would not get such bonuses on a new retirement product today, but these bonuses could be offset by a higher fund management charge and reduced allocation on its existing plan, versus a new product.

The Provider argues that when the Complainant's plan moved to its systems, it continued to be administered exactly in line with his original plan terms and conditions issued to him in **1994**.

/Cont'd…

In respect of the company accounts and spreadsheet submitted by the Complainant to demonstrate the additional payments he contends he would have made to the plan, during the period when tops were suspended, and the loss that he claims to have suffered, the Provider rejects any claim for a financial loss. It argues that it was entitled to suspend acceptance of top up contributions and that the Complainant was aware that the top up facility was being suspended on receipt of its final response letter dated **26 March 2015**.

The Provider argues that if it was the Complainant's intention to invest additional money for his retirement after this time, he could have done so through another retirement instrument, maximising his tax relief each year.

The Provider offers €3,000 in the form of a customer service award to the Complainant by way of apology it says, for the fact that correspondence in **May 2015** when his plan migrated to its systems, was not clear that the top up facility has been suspended.

The Complaint for Adjudication

The complaint is that between 2015 and 2019 the Provider wrongfully withdrew the Complainant's option to "*top up*" or increase the monthly premiums to his personal pension policy, contrary to the terms and conditions of the policy, thereby resulting in a financial loss to the Complainant.

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 December 2021**, 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

/Cont'd…

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

The Complainant holds a Personal Pension Plan. A dispute has arisen between the parties to the present complaint, as to whether the Provider was entitled to suspend a facility in **March 2015** by which the Complainant could make 'top up' or additional contributions to his pension plan, over and above his normal pension contributions. The Complainant argues that the Provider was not entitled to suspend acceptance of the additional contributions and he further says that he would have made additional contributions during the period from **March 2015 to March 2020** if the Provider had not prevented him from doing so.

The Complainant argues that he has lost the benefit of tax relief on the contributions he would have made, and that the value of his pension fund is lower, as a result of the Provider's conduct. The Provider argues that it was entitled under the terms and conditions of the pension plan to suspend acceptance of additional contributions. It has further argued that the Complainant has not demonstrated that he would have made additional contributions during this period, because he failed to put in place an additional retirement product in order to do so.

I note that the start date of the Complainant's personal retirement plan was **1 June 1994**. A premium amount was set out on the policy document issued in **1994,** but it has increased substantially since then.

The evidence shows that the Complainant had taken a premium break between **2011 and 2013** due to financial pressures, but in **2015,** he had resumed monthly repayments of €200 per month in advance of the issue of the suspension of additional contributions arising.

In respect of additional contributions, the relevant policy conditions provide as follows:

> "***3. PAYMENT OF CONTRIBUTIONS***
>
> *(g) Increments to Normal Pension Contributions:*
>
> *Subject to such conditions as the Company may from time to time determine, increments may be made to the Normal Pension Contribution:*
>
> *(i) at the discretion of the Contract Holder; or*
> (ii) *by the Company at the Contract Anniversary under the operation of clause 4*."

The "*Contract Holder*" in this regard is the Complainant and the "*Company*" is the Provider.

I note that Clause 4 relates to inflation protection, which applies to the policy in question. It provides that the Provider "*shall increase the Total Normal Contribution annually by an amount deemed by the Actuary as corresponding in proportion to the increase of the level of consumer prices over the preceding year*".

/Cont'd…

I note from the relevant correspondence submitted by the Provider, that it has increased the Complainant's normal pension contribution in line with clause 4 at various intervals, to account for inflation (such as from €200 to €210 per month from **June 2014**) and that there is no dispute arising between the parties in this regard.

The question arising in this matter is whether clause 3(g) gives a discretionary power to the Provider to suspend acceptance of additional contributions in their entirety. Having considered the matter at length, I do not accept that the relevant clause gives such a power to the Provider.

In *Law Society v MIBI* [2017] IESC 31, para 5.3, the Supreme Court held that:

> "*the main underlying principle is that a document governing legal rights and obligations should be interpreted by the courts in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but would also interpret that text in its proper context*."

Furthermore, I am conscious that it has been held that in considering complaints, this Office is entitled to lean against a sophisticated construction of a key and significant term in a financial service provider's contract with its customer, where the term is not expressed in plain language; *Irish Life and Permanent plc v Financial Services Ombudsman* [2012] IEHC 367 at para 43.

In *Jackie Greene Construction Ltd v IBRC* [2019] IESC 2, Clarke CJ indicated at para 8.1 that "*a first, and particularly important, aspect of the proper construction of*" the disputed part of an agreement, is to identify the purpose behind that part. In this instance, I note that the purpose behind clause 3 of the Complainant's policy terms is helpfully set out in the clause itself as follows:

> "*This section sets out the amount of the premium, the various ways in which it can be paid and what will happen if you fail to make a premium payment*."

Clause 3(a) deals with the frequency of normal pension contributions and clause 3(b) deals with the method by which premium payments can be made. Clause 3(c) provides that normal pension contributions must be paid during the two first contract years but that in subsequent years, contract holders may elect whether to pay them in full or in part. The subsection therefore provides for the payment of reduced normal pension contributions.

Clause 3(d) provides that the contract will lapse if the contract holder defaults on payment of the normal pension contribution within the first two years. Clause 3(e) provides that default during a subsequent year will result in the contract holder being deemed to have elected not to pay the relevant contribution.

Clause 3(f) provides that no contribution is payable after payment of the annuity.

/Cont'd…

Clause 3(g) then provides for increments to the normal pension contribution, or 'top ups'. Breaking down the relevant parts of clause 3(g), the following is provided for:

(i) increments may be made to the normal pension contribution;

(ii) the making of increments to the normal pension contribution are at the discretion of the contract holder OR alternatively by the Provider at each contract anniversary in accordance with clause 4 on inflation protection; and

(iii) the payment of increments are "*subject to such conditions as the [Provider] may from time to time determine*".

[My emphasis]

The Provider has argued that section 3(g) provides it with a discretion as to whether it will accept increments or not. I do not accept that this is a proper reading of the clause in question. The clause provides that:

> "*… increments may be made to the Normal Pension Contribution:*
>
> *i. at the discretion of the Contract Holder; or*
> ii. *by the Company at the Contract Anniversary under the operation of clause 4*."

The only discretion that is specified is the discretion of the contract holder (ie the Complainant in this instance) as to whether he will make increments to his normal pension contribution. In contrast, the power provided to the Provider is to set increments to the normal contribution by reference to clause 4, to account for inflation.

Beyond that, clause 3(g) provides that the making of increments is:

> *"subject to such conditions as the [Provider] may from time to time determine*"

The Provider interprets clause 3(g) to mean in that regard that one of the conditions it is entitled to impose regarding the making of increments to the normal pension contribution, is a full suspension of top up payments. I do not, however, accept that a full suspension of additional contributions falls within the meaning of this part of the clause.

By way of an example of a "*condition*", this might be that the Provider would only allow increments to be made to the normal pension contributions, on a certain number of occasions per year. This would allow a customer to avail of the contractual term which allows him or her to make increments at his or her discretion, but subject to a condition imposed by the Provider that the customer can only do so at certain times.

In my opinion however, the suspension which was imposed by the Provider from **March 2015** negated the entitlement of the Complainant to make additional contributions at all; it did not simply impose a condition on that entitlement.

/Cont'd…

In my opinion, if it had been intended that the original provider (or its successors or assignees) would have a discretion to completely suspend acceptance of additional contributions from contract holders, this would have been provided for expressly.

I believe that much significance must be attached to the operative words used in clause 3(g) which state that "*increments may be made to the Normal Pension Contribution*" in certain circumstances. Those circumstances are listed as: (i) at the discretion of the contract holder; or (ii) by the Provider under the operation of clause 4.

Clause 4 is not the clause at issue in this matter. The contract holder in the present case wanted to make additional contributions at his discretion. In my opinion, the only power that the Provider had under clause 3(g) was to impose conditions on the making of those increments. In my view, it did not have the power to prevent the Complainant from making any increments to his normal pension contribution.

I am satisfied that *"a reasonable and informed member of the public who understands the context of the document in question"* would interpret clause 3(g) as allowing the Complainant to make increments to his normal pension contribution. While I am satisfied that the same member of the public would read the clause as allowing the Provider to impose conditions on the Complainant's ability to do so, I do not believe that it would be interpreted as entitling the Provider to completely suspend the entitlement given to the Complainant under clause 3(g), for a period of five years, or at all.

It is my opinion that the correct construction of clause 3(g) entitles the Complainant to make increments to his normal pension payments at his discretion, subject only to such a reasonable condition or conditions that the Provider decides to impose on that entitlement. Such a 'condition' does not include the power to negate the Complainant's entitlement in its entirety by refusing to accept additional contributions. The only discretion provided for under clause 3(g) is given to the contract holder, as to whether or not to make additional contributions. In my view, the clause does not contemplate the Provider having a discretion as to whether or not it will accept additional contributions from a contract holder.

The Provider was aware that when the pensions of the original provider migrated to its systems in **2015,** that contract holders such as the Complainant had previously availed of a right under clause 3(g) to make additional payments into their pension plans. The Provider has submitted that the reason it decided to suspend accepting those additional contributions was due to systems limitations.

Bearing in mind that the terms and conditions of the plans in question expressly contemplate the making of additional contributions at the contract holder's discretion and that contract holders had previously exercised the right to make those additional contributions, I am of the view that the Provider's decision to suspend top ups in their entirety was entirely unjust and unreasonable in its impact to the interests of the Complainant, within the meaning of ***s60(2)(b)*** of the ***Financial Services and pensions Ombudsman Act 2017***, as amended.

/Cont'd…

As the Complainant has pointed out, the Provider has more recently agreed to accept additional contributions from him, which in his opinion proves that it had been possible all along, for the Provider to make whatever adjustments were required to its systems, to allow for this. I take the view that the Provider's refusal to make those changes, rather than to facilitate the Complainant as a contract holder who wished to increase his retirement funds by way of additional contributions from March 2015 onwards, was contrary to the policy provisions which were in place, and was unreasonable, as referred to above, and that accordingly, it is appropriate to uphold the complaint.

I am satisfied that in opting to interpret clause 3(g) in a manner that completely negated the contractual entitlement provided to the Complainant to make additional contributions to his plan, the Provider was not acting in his best interests.

It seems that the Provider did not formally notify contract holders such as the Complainant, that it intended to suspend additional contributions to plans which were migrating from the original provider. It appears to have notified customers in **2014**, that it was taking over the plans from the original provider, but no other detail seems to have been given at this time.

Instead, the Complainant was informed of this decision verbally through his then financial adviser, tied agent X, on **20 March 2015** with just one a week before this took effect, in which to make any increases to his normal contribution. Subsequently, the Provider's letter of **19 May 2015** formally notified the Complainant that his plan had now migrated to the Provider and supplied him with his new plan number, but there was no mention at this time of the Provider's decision to suspend accepting top ups or additional contributions.

Considering that this was a decision of great significant to the Complainant, I am of the view that the Provider's conduct in failing to properly communicate with him about the proposed suspension and to provide him with a reasonable period of opportunity (rather than one week) to increase his contributions before he lost his entitlement to do so, was unjust and unreasonable in its impact on his interests.

I note that the Complainant's wife raised an immediate complaint in respect of the suspension, by email dated **20 March 2015** after X informed them about the imminent change. In her complaint, she stated as follows:

> "*Further to our telephone conversation this afternoon, I would like to state our dissatisfaction regarding the latest development on the Pension Policy we have with [the original provider].*
>
> *I appreciate your call with regard to the review which is due, but am quite unhappy with the fact that the Pension will shortly be changed to a very restrictive operational manner.*
>
> *When we purchased this pension in 1994, it was a flexible manner of saving for retirement. We could make monthly contributions and then in a good year, pay an additional sum at the end of the financial year should we deem it prudent.*

/Cont'd…

We are in the retail trade which has taken a severe hammering over the last 6/7 years in the recession. We have had to make cutbacks in all areas to survive and the pension is one of those areas we cut back on, with an intention to increase when things improve. However we would like this increase to be on a gradual basis and not next Friday 27th!

This is grossly unfair to us who have been paying into a pension for 20 years. [The Complainant] most likely will not retire until he is 65, thus you are tying our hands for the next [XX] *years at the current level – or indeed what we can afford by next Friday.*

I do not accept that there is nothing can be done - I do not believe [the Provider] will be happy to handle top up pensions of small amounts as we can afford them, and will only leave us in a position of paying more charges and more paperwork to look after.

We wish to retain the flexibility of the Pension we have. [The Provider is] a large company with large resources to assist with customers – it is very difficult to believe this is in our interest but more in theirs.

I would appreciate if you could look into this matter and revert to me."

By final response letter, the Provider wrote to the Complainant as follows:

"*We note [the Complainant's wife's] comment in her email of 20 March 2015 and are sorry to hear that you are both unhappy with the decision to cease the "top up" facility for this particular policy.*

*We wrote to you previously to advise that [the Provider] had purchased [the previous provider] and all [the previous provider's] policies became [the Provider's] policies with respect of 01 January 2014. We are currently in the process of switching all policies over to the [Provider's] system. As part of this process the current policy number [****976W] will change to a new [Provider] number and we will issue details to you of this in the coming weeks. Unfortunately, once the changeover is complete any personal pension policies that were set up with [the previous provider] will no longer have the facility to "top up" i.e. it will not be possible to increase the monthly premium or contribute a single premium additional contributions to these plans.*

We understand you have spoken to your financial adviser [X] who has outlined alternative options to you."

The alternative option discussed seems to have simply been that an additional pension plan could be opened by the Complainant. The Complainant has explained that he and his wife were unwilling to do this because, firstly, they were of the view that they were entitled to make additional contributions under their existing plan and, secondly, because a second plan for only occasional contributions would be impractical and not subject to the bonus structure available on the original plan.

/Cont'd…

The Provider has argued that the fact that an additional pension plan was not taken out by the Complainant undermines or disproves his submission that he intended to make additional contributions between **2015 and 2019**. I disagree.

In my opinion, the email of **20 March 2015** (written the same day that they were informed of the suspension) explained with perfect clarity, the importance of the top-up facility for the individual financial circumstances of the Complainant and his wife, and expressly notified the Provider that the Complainant retained the intention to make additional contributions over the next few years, as their financial position improved.

Considering that the Provider was therefore on notice from **March 2015** that the Complainant wished to make additional contributions to the policy, I don't accept its argument that the Complainant has not proven that he would have made additional pension contributions during the relevant period.

Whilst the level of likely additional contributions may be in dispute between the parties, there is no real dispute in my opinion that additional contributions are likely to have been made by the Complainant between **2015** and **2019,** if the Provider had not prevented him from making them. The fact that, within one week, the Complainant opted on **26 March 2015** to increase his normal contribution to €300 per month, underlines the intention of the Complainant and his wife to increase the pension contributions as their financial position improved. They also increased their contribution by €300 per month in **March 2020** once the 'suspension' was lifted.

The Complainant has also submitted that they regularly brought up the suspension problem with the tied agent X, during the relevant period, and this has not been denied by the Provider.

I am satisfied that clause 3(g) of the plan terms and conditions provides for the making of additional contributions by the Complainant at his discretion. I do not accept that the Provider was entitled to suspend accepting those additional contributions. I am of the view that the Provider's decision to suspend contributions from **March 2015** onwards constituted a breach of those terms and conditions. Likewise, I am of the view that the Provider's communication/notification of its decision to suspend the additional contributions was severely lacking, such that its conduct was unreasonable and was far below the standard which the Complainant was entitled to expect, and it gave the Complainant very little time to increase his normal contributions under the policy.

I note in this instance, that it was not the Provider which originally sold the pension plan to the Complainant in **1994**. The Provider, however, stands in the shoes of the original provider which sold the pension plan to the Complainant, at that time.

Insofar as the conduct complained of by the Complainant in this matter is concerned, in the period from 2015 onwards, I note that the Provider was acting in its capacity as a regulated financial service provider, in its provision of services to the Complainant concerning this personal pension plan.

/Cont'd…

It is disappointing that, having taken over the policy from the original provider in 2014, the Provider notified the Complainant of its intention to fundamentally alter the manner in which he could use the product, from 2015 onwards. The Provider explained this position at the time, by reference to systems constraints, though I note that in more recent times since 2020, it has altered its position and facilitated the Complainant in varying his contributions to his plan.

As I consider it appropriate to uphold this complaint, I must consider what redress is suitable, and I am satisfied that the Complainant has likely suffered a loss due to the conduct of the Provider. While one cannot be certain as to the additional sums that would or could have been invested by him between **March 2015** and **March 2020**, I note from the letter dated **16 December 2019** from the Complainant's accountant, that he took the view at that time, that it would have been possible for the Complainant to have contributed up to €26,136 during the relevant period, which would have resulted in tax savings of approximately €10,500.

I further note that the Complainant has submitted evidence that he saved a sum of €19,204.04 into a savings account during the relevant period to represent the additional sums that he would have contributed to the pension plan if he had been in a position to do so. Even taking the lower figure, the tax saving could have been quite significant.

The Complainant has submitted that there was financial loss to him in the form of a shortfall in the value of his pension plan, as compared to what it would have been if the additional contributions had been made during the period from 2015 - 2020. The Complainant has submitted a detailed table of the projected shortfall in the fund owing to this shortfall in contributions. I note that this table is based on additional contributions of €32,184 over the five-year period, which does not align with the evidence submitted by the Complainant's accountant that there was a maximum of €26,136 available. Together however, this evidence gives an idea of the Complainant's potentially significant loss of opportunity during that time.

The Complainant has made clear that he did not wish to incept a new pension policy which might have facilitated tax efficient contributions through an alternative product, because he would not have secured the benefits attainable through his existing policy in terms of bonuses etc. Nevertheless, I take the view that if the Complainant had indeed been minded to ensure that the monies in question were directed towards his future pension needs, he could have explored the possibilities open to him and, albeit reluctantly, he could have incepted an alternative pension product to facilitate those contributions in a tax efficient way.

At this remove, it is simply not possible for the Complainant to make contributions now which would have the same effect as if they had been made in 2015, 2016 or at any time prior to the actual time when they are made. The Complainant has to that degree lost out on the opportunity to have made such additional contributions as he might have, during the relevant period. Quite apart from the tax relief which he might have achieved, I am conscious of the stateable argument regarding a loss of growth on the fund from 2015 onwards.

/Cont'd…

Having considered all of these circumstances, I am satisfied that as a matter of fairness, it is appropriate for the Provider to compensate the Complainant for its failure to adhere to the contractual policy provisions it was and is bound by, and to recognise its denial of the opportunity to the Complainant to make increased contributions, that he might otherwise have made, throughout the period 2015 - 2020.

Since the preliminary decision of this Office was issued in December 2021, the Complainant's representative has submitted additional details concerning contributions made by the Complainant from February 2020 onwards which she said were lodged, but not invested. The Complainant indicated that this issue had gone un-noticed during 2020 and it was only rectified at the beginning of 2021, when he was assured that it would not happen again. The Complainant pointed out however, that a further monthly increase made in 2021 of €200 per month, was also lodged, but not invested in the policy funds.

When the Complainant wrote in January 2022, he referred to a single annual investment of €10,000 made in November 2021, but pointed out that he had yet to receive the investment confirmation. The Complainant pointed out his view that this position was unacceptable as it placed an obligation of very significant vigilance on him, as a customer.

The Complainant also pointed out that although in 2015, he could have opened another policy with another Provider, the policy at issue in this complaint had been taken out with the aspect of potential top-ups to the contributions, as a major consideration for him at that time, when he incepted the policy in 1994. The Complainant also pointed out that when he sought to explore the possibility of moving the fund to another provider, he was advised of punitive penalties to do so, and he referred to the unfairness of the situation he had found himself in.

The Provider furnished confirmation to this Office that the policy was a Personal Pension Plan rather than a Personal Retirement Savings Account (PRSA). The Provider pointed out that it remained of the opinion that it was contractually entitled to suspend acceptance of top-up contributions from the Complainant.

The Provider has submitted that it believed the Complainant's case to be an isolated one and one which turns on its own individual facts.

The Provider pointed out that when the original provider's plans migrated to its systems, a business decision had been taken to withdraw the acceptance of all top-up contributions (subject to certain other details). This suspension included regular contribution top-ups and lump-sum top-ups. The Provider says that this decision was not taken lightly but it was made following extensive analysis and reviews that showed the Provider that:

- The volume of top-ups being received by the original provider was very low relative to the level of system reconfiguration needed to facilitate them on its systems.
- In the opinion of the Provider, the terms and conditions provided it with the contractual right to withdraw the top-up facility.

/Cont'd…

The Provider says that to ensure that customers were not disadvantaged or negatively affected in any way by this decision, it decided that customers who wished to top-up would be offered a new plan on terms that did not disadvantage them. In addition, if a situation arose in which it was unable to offer a new plan where the terms were at least equivalent to the existing plan (such as in the Complainant's case) it would complete the work required on that product and re-open it to facilitate top-ups.

The Provider says that a decision was made not to write to customers to tell them that their plans were closing to top-ups, because the Provider had resolved to address individual customer requests on a case-by-case basis, as and when such requests arose. It pointed out that the Complainant's personal pension is one of the pension products that it has re-opened to top-ups. As a result, when this issue for the Complainant was first brought to the Provider's attention by the FSPO in 2019, it was able to clarify very quickly that it did allow top-ups on this type of plan and the Complainant's top-up requests were subsequently accommodated. The Provider said it was confident that if the Complainant had contacted the Provider about applying top-up contributions to his plan, after it had migrated to the Provider's system in May 2015, and before he raised the issue for the first time with the FSPO in 2019, it would have been able to confirm that his top-up requests would be accommodated. The Provider recognised that the outcome of the Complainant's complaint to the former provider in March 2015 should have been different and for this it said it was sorry. The Provider also confirmed that it should have informed the Complainant's financial advisor with whom the Complainant had been dealing in 2015, and for a period after that, that the product type held by the Complainant had been subsequently re-opened to top-ups. The Provider acknowledged that it was at fault in this matter, and it sought to put things right.

The Provider advised that if the Complainant wished now to apply the monies that he would have invested over the period 2015 – 2019, he could do so now and the Provider would apply the growth that would have been achieved by these funds, if they had been invested during that time "*when [the Complainant] understood that the top-up facility was closed to him*." In addition, the Provider said it would pay him any tax relief that he may be unable to claim back himself, together with payment of the customer service payment of €3,000 previously offered to the Complainant on 4 August 2020. It seems that the Provider was in further direct contact with the Complainant thereafter.

On **21 January 2022**, the Provider wrote to the Complainant acknowledging an error in a top-up to his regular monthly contribution processed on its system from March 2020, which was corrected in February 2021. This letter also acknowledged another error which had occurred in March 2021 which had also been corrected to ensure that the plan was in the same position that it would have been in if the error had not occurred. The Provider expressed confidence that the issue had been resolved and that an error of that nature would not occur again.

Following consideration of these submissions, the Complainant furnished additional comments making clear his position that it was entirely incorrect for the Provider to suggest that no issue or complaint had been raised regarding his inability to top-up his contributions to the plan from 2015 onwards.

/Cont'd…

He stated that he had repeatedly requested the top-up facility to be reinstated over a period from 2015 until 2019, when he felt he had no option but to raise the matter with the FSPO. He pointed out that it was only due to the intervention of the FSPO that the top-up facility was reinstated, and he could commence increasing contributions in early 2020.

I have considered the parties' submissions since the Preliminary Decision of this Office was issued. I remain of the opinion that the Provider was not entitled to entirely suspend the acceptance of top-up contributions to the Complainant's Personal Pension Plan and I am satisfied that this caused financial consequences to the Complainant, until such time as the issue was resolved and he recommenced top-up contributions to his plan from 2020. In addition, I am satisfied that the communication from the Provider surrounding this issue was entirely unsatisfactory. The decision was made by the Provider not to communicate the suspension of top-ups directly to the Complainant on the basis it seems that the Provider had resolved to address individual customer requests, on a case-by-case basis. The Provider also states that it believes that the Complainant's case is an isolated one, but it is difficult to reconcile this opinion with the Provider's decision not to communicate with customers impacted by its decision to suspend all top-up contributions. It is also disappointing that when ultimately the Complainant was permitted to re-introduce top-up contributions, it seems that he encountered quite a number of errors by the Provider in putting these into effect.

I am satisfied from the evidence, that when the Complainant expressed his dissatisfaction in 2015 regarding this issue, no suitable resolution was made available to him at that time. If there was a breakdown in communication between the Complainant and the Provider regarding his level of dissatisfaction over that period, I do not accept, on the evidence, that it is the Complainant who bears responsibility for that absence of communication.

In all of those circumstances, I consider the Provider's compensatory gesture to the Complainant of €3,000 to be inadequate, though I do not necessarily accept that all of the monies which the Complainant saved over the relevant period, would have been contributed to his Personal Pension Plan, if he had been permitted to do so. I accept nevertheless, that he is likely to have topped-up his contributions to some degree over that period, but he was not permitted to do so by the Provider, notwithstanding his contractual entitlement. Accordingly, I take the view that a more generous compensatory payment is warranted.

I am conscious that the Provider has more recently advised that if the Complainant now wishes to apply the monies that he would have invested over the period 2015 – 2019, he will be permitted by the Provider to do so now, and the Provider will:

- apply the growth to the plan that would have been achieved by these funds, if they had been invested in the period 2015 – 2019 and
- pay the Complainant any tax relief that he may be unable to claim back himself.

/Cont'd…

It is unclear whether the Complainant has availed of this offer to now apply some of those monies to his plan, but I consider this facility now being made available by the Provider to be a welcome one. For that reason, in addition to the compensatory payment directed, as detailed below, I consider it appropriate to direct the Provider to hold that option open to the Complainant for a period of 60 calendar days from the date of this decision.

For the avoidance of doubt, it should also be noted that the compensatory payment directed below, takes account of the regrettable errors of the Provider which it confirmed in January 2022, had been rectified.

Although the Provider believes that the Complainant's situation, was an isolated one, I am very mindful that the issue that has arisen in this complaint, concerns a point of interpretation of a clause that seems likely to have potentially affected a number of other customers of the Provider. I note in that regard, from a call recording dated **26 February 2020** that the decision of the Provider to allow additional contributions to the Complainant's plan, was being treated as an exception, and that the Provider continued to stand by its general policy of refusing top ups to relevant plans, which had migrated from the original provider.

As this issue therefore appears to be one which may have affected other policyholders of the Provider, in the same or a similar position as that of the Complainant, I am drawing this decision to the attention of the Central Bank of Ireland, for such action as it may consider to be appropriate.

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).***

- Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to rectify the conduct complained of by permitting the Complainant to now, within a period of 60 calendar days of today, apply such portion of those monies that he says he would have invested over the period 2015 – 2019 had he been permitted to, and the Provider is directed to:
    - apply the growth to the plan that would have been achieved by these funds, if they had been invested in the period 2015 – 2019 and
    - pay the Complainant any tax relief that he is unable to claim back himself.

- In addition, I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of **€7,000** (seven thousand euros) 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.

/Cont'd…

- 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
Financial Services and Pensions Ombudsman (Acting)

3 March 2022

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.