DRN-2624134

The complaint

Mrs P has complained about an error made by Aviva Life & Pensions UK Limited (Aviva) with respect to a pension plan she held with them. She has also complained about the service received when attempting to have the error corrected and the way in which Aviva has offered to put things right.

Mrs P is represented in this matter by her brother, Mr B.

What happened

Mrs P started a personal pension plan with Aviva in April 1992. At the time, a single contribution was made and allocated to the Deposit fund. A year later she switched her investment to the Equity fund.

On 29 March 2001 Mrs P made another single contribution of £6,751. Aviva invested this contribution in the Deposit fund. No further contributions were made after this point. But in July 2015, after being made aware that the Deposit fund was low risk and so the potential for growth was limited, Mrs P switched the contributions which were in the Deposit fund to the Equity fund.

In November 2018, Mr B complained to Aviva on Mrs P's behalf. He said in summary that *"[Mrs P] should have been advised to leave it [the Deposit fund] within (at most) a year of the investment*" and "*Aviva should certainly not have waited till 14 years later to alert her [that she was invested in the Deposit fund]*." Mr B said that as a result, Mrs P may have suffered a loss of investment growth during the time she'd been invested in the Deposit fund and was entitled to compensation.

Aviva investigated the complaint but didn't agree that it had done anything wrong. In its response to Mr B of 29 November 2018 Aviva explained that the March 2001 contribution was correctly invested in the Deposit fund "*in accordance with the proposal form that said the contributions would be 'invested in the same percentages to the same funds as existing contributions'".* It also said it didn't provide advice or consider the Deposit fund to be a temporary option. Aviva concluded that it had "*invested the additional contribution as per the proposal form, and subsequently kept the policyholder informed of the fund in which they were invested and how they were performing*."

Unhappy with this response, Mr B contacted Aviva numerous times over the next four months, also engaging a journalist to assist him, in an attempt to resolve his sister's complaint.

In March 2019 Aviva conceded that a mistake had been made regarding the March 2001 contribution – these funds should have been invested in the Equity fund. It offered to "*put the policy back in the actual position it should be and would be have been in*" but for the mistake. Included with this offer was an actuarial report detailing the number of units purchased their value both on the day of the investment and the day the redress was calculated.

Aviva did not propose to add 8% interest to the award, explaining that "*as the policy in question is still an active policy, and the benefits have not been taken there is no requirement for us to add 8%.*"

Aviva also apologised about the poor service it had provided both when the single contribution was invested incorrectly and when the complaint was made. It offered £500 as a "*way of saying sorry and in full settlement*" of the complaint.

Mr B, on behalf of Mrs P, didn't accept this offer. He objected to the figures provided and accompanying calculations, the applicable time period for the calculation and the failure to add 8% interest to any award. He also didn't think £500 was sufficient to compensate him and Mrs P for Aviva's numerous service failings and the impact these had on them.
On 17 May 2019, Mrs P transferred her policy to a new pension provider. The new provider confirmed the investments in the new policy were completed on 25 June 2019. Mr B confirmed that no fund switches have been made since the start of this plan.

Mr B remained dissatisfied with Aviva's proposed offer and brought Mrs P's complaint to this service for review.

One of our investigators looked into Mrs P's complaint. He concluded that as Aviva accepted that they made an error when investing the March 2001 single contribution, the only issue in dispute was the compensation required to put Mrs P as close as possible into the position she would be in now but for the error. He then set out the methodology he proposed Aviva use to calculate redress. In doing so, the investigator also considered the arguments put forward regarding the calculation period to be used, Aviva's Equity value for 29 March 2001, and whether interest should be awarded.

The investigator didn't agree with Mr B that the redress calculation period should be from 29 March 2001 to 22 July 2015 (when Mrs P's funds were all moved to the Equity investment) and then 8% interest added to this sum. He explained using the notional value of what the Equity fund would have been worth, but for Aviva's mistake, on 25 June 2019, when Mrs P's funds were transferred away, to the amount actually transferred on this date was the fairest method of redressing the 2001 error. He reasoned this period covers investment loss as well as consideration of how the single contribution investment would have performed if it had been invested as it should have been.

And, the investigator didn't agree 8% interest was warranted as this is an award made to reflect that a consumer was deprived of the use of funds and in this case, Mrs P's funds were always invested and not available for her to access. Instead, he said a fair way to calculate compensation for the period after Mrs P transferred was to look at how the investment loss which should have been transferred would have performed if it had been invested in the funds Mrs P transferred to, until the date the complaint is settled.

The investigator also thought the £500 Aviva offered was fair and reasonable compensation for the trouble and upset caused to Mrs P by Aviva. And he explained this service was only able to award compensation for losses sustained by Mrs P, as their customer. Since Mr B wasn't a customer but representing his sister in this matter, the investigator concluded we could not make an award for Mr B's time, trouble and upset.
Mr B did not agree with the investigator's findings and provided a robust review explaining what he thought the investigator had got wrong. Although the investigator considered Mr B's points, he wasn't minded to change his view.

As the complaint couldn't be resolved, it has been passed to me for a final decision.

Mr B has since provided substantial submissions on numerous occasions detailing at length his continued reasons for disagreement.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

When considering what is fair and reasonable, I have taken into account relevant law and regulations; regulator's rules, guidance and codes of practice; and what I consider to have been good industry practice at the time. Where the evidence is incomplete, inconclusive, or contradictory, I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

It is my role to fairly and reasonably decide if the business has done anything wrong in respect of the individual circumstances of the complaint made and – if I find that the business has done something wrong – award compensation for any material loss or distress and inconvenience suffered by the complainant as a result of this. Where I reach a finding that a business hasn't acted as it should have done, I then go on to consider what the consumer's position is likely to have been, had the business acted correctly.

And, although I take into account the legal position, I'm not obliged to follow the law strictly. Often where there's been a breach of regulatory obligations a customer won't have been treated fairly. That's logical, given that a main aim of regulation is to ensure fair consumer outcomes. But not every breach of regulations (or infringement of legal rights) will mean a customer hasn't been treated fairly. Conversely, a consumer may still have been treated unfairly, even if there's been no breach of the rules or the law.

Given some of the concerns Mr B's raised, it might also be helpful to say here that, unlike the courts, the nature of our process is informal. So, it's not for us to test evidence in the same way a court might. But, in order to reach my decision, I have considered all of the evidence afresh. And, having done that, I have come to the same overall conclusions as the investigator, for essentially the same reasons.

This service is impartial between, and independent from, consumers and businesses. What this means is that we don't represent either party, and I don't act under either's instructions or take directions on how a complaint will be looked at and what questions should be asked or answered.

Mr B has provided substantial submissions in support of his sister's complaint, both in response to the investigator's initial view and subsequently. I am grateful for the considerable detail provided. And, I have carefully reviewed all of these submissions in their entirety. However, I'm very aware that I've summarised this complaint in far less detail than the parties have, and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. The purpose of this decision is not to address every point raised in detail, but to set out my findings and reasons for reaching them. No discourtesy is intended by this. If I don't comment on any specific point, it's not because I haven't considered it - I have carefully considered all of the submissions made in this complaint – but because I don't think I need to comment on it in order to reach the right outcome. Instead, I've focussed on what I think are the key issues here. Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts.

Mr B is concerned about our impartiality and feels that we've just taken Aviva at its word. I'm sorry Mr B feels this way. I'd like to reassure him that I have been impartial and have considered all submissions without bias. I'm also aware that Mr B is unhappy that I have not contacted him directly. But in the vast majority of cases that this service deals with, there is no need for the ombudsman to contact the parties to hear their detailed arguments. The parties discuss the matters of concern with the investigator and an ombudsman can request further information if they think it is necessary for their final decision. I'm satisfied both sides have been able to make their case fully. I have not been in touch directly with either party to this complaint.

I've read in the file that Mr B has also complained about the service we've provided him and his sister since bringing the complaint against Aviva to us. I can see that these have been dealt with separately, in line with our usual process. In this final decision I am only able to look at the merits of Mrs P's complaint against Aviva.

March 2001 allocation

It is not disputed that Aviva made a mistake when it allocated the 29 March 2001 single contribution to the Deposit fund instead of the Equity fund. It is also not disputed that Aviva erred again when it initially denied that it had made a mistake. But Aviva has now accepted – admittedly after a four-month delay – that the contribution should have been invested in the Equity fund. It has also conceded it was wrong to deny its liability from the outset. To put things right, Aviva calculated the investment loss Mrs P suffered as a result of its mistake, apologised and offered £500 for the trouble and upset this caused.

Mr B didn't accept this. He thought the compensation calculated by Aviva was too low. He said this was because Aviva based its calculations on an incorrect notional Equity fund value for 29 March 2001; the time period used for the calculation was wrong; and the offer didn't include 8% interest. The investigator didn't agree, and he set out a methodology to be used by Aviva to update its calculations regarding the investment loss. Mr B maintained his objections and provided substantial arguments in support of his position and the redress he proposed. But, as I will explain, I've not seen sufficient evidence to persuade me that Mr B's methodology is the right one to use in this case. I consider that the methodology proposed (including the inputs provided by Aviva) is in line with the industry accepted methodology and does provide fair and reasonable redress in all the circumstances of this case. I will now address in turn what I consider to be the arguments relevant to reaching a fair and reasonable outcome.

Equity fund value

In awarding compensation in this complaint, my aim is that Mrs P should be put as closely as possible into the position she would likely now be in if Aviva had correctly allocated her single contribution to the Equity fund on 29 March 2001.

To do this, a comparison must be made between the actual value of Mrs P's pension when she transferred, to what its value would have been at that time if Mrs P's single contribution of £6,751 was correctly invested in the Equity fund at the outset.

Mrs P already held units within the Equity fund when the single contribution was made. The value of this investment is at issue in determining redress as Mr B thinks Aviva's value isn't correct. I note that Aviva has provided the offer and bid prices that apply to all investments in the Deposit and Equity funds at all times relevant to this complaint. I understand this information has been provided to Mr B as well. This information is important because when making an investment contribution the amount contributed is used to buy units in an investment, typically at the offer price. To then determine the actual value of that investment, the number of units bought at the offer price is then multiplied by the bid price. Using the offer and bid prices on 29 March 2001 as provided by Aviva, the value of the Equity fund at this time was £3,437.76.

Mr B thinks this value isn't correct and so redress should not be calculated using this as a starting point. Instead he thinks that the Equity fund value on 29 March 2001 should be calculated by subtracting the £6,751 contribution from the actual total value (both Deposit and Equity funds) of Mrs P's investment on that day. This gives a sum of £2,972.08.

Having looked at the information provided and after careful consideration of Mr B's arguments, I'm not persuaded that the starting sum should be as Mr B suggests. I say this because Mr B's methodology assumes the entirety of the single contribution would be used for the investment, when in reality only 98% of the contribution was invested, with the remainder used to pay fees and charges. This would be the case regardless of whether the contribution was made to the Equity or the Deposit funds.

In addition, Mr B's calculation doesn't fully take into account how investments of this sort are valued. As I explained above, the amount of money invested is used to purchase units in a fund. So, the investment is the number of units held. The number of units purchased depends on the offer price of the units.

But to determine the value of those units, and therefore the value of the investment, the number of units purchased is multiplied by the bid price. The bid and offer prices often vary from each other. This means the actual value of an investment will not necessarily equal the same sum as was invested. The bid and offer prices can also vary from day to day, so the value of an investment will go up or down. And, I also note that the bid and offer prices for units in the Equity fund differ from those for units in the Deposit fund.

Taking all of this together, I am satisfied the value of the existing investments in the Equity fund on 29 March 2001 was £3,437.76. And, had Aviva correctly allocated the single contribution, Mrs P's investment in the Equity fund – which would have been the only fund she was invested in at that time – would have been valued at £9,722.96 on 29 March 2001.

Calculation period and interest

Mr B asserts that when calculating the loss Mrs P has suffered as a result of Aviva's allocation error, the calculation period should run from 29 March 2001 to 22 July 2015 (the date Mrs P transferred her investment in the Deposit fund to the Equity fund) and interest added to any investment loss suffered during this time. He contends this is the correct way to redress the "*unsuitable investment*" in the Deposit fund. I appreciate Mr B's strength of feeling about this, and I realise he will be disappointed, but I do not agree.

As I've said, when awarding compensation, my aim is to put Mrs P in the position she would be in (or as close as is possible) but for Aviva's mistake. So, if Aviva had acted as it should have in March 2001 and invested Mrs P's contribution in the Equity fund, there would have been no need to move her investments from the Deposit fund to the Equity fund as no investments would have remained in the Deposit fund on 22 July 2015. Instead, the March 2001 contribution would have remained invested in the Equity fund from the outset

until Mrs P transferred her entire pension to another provider. So, to determine whether there was a past investment loss, a comparison should first be made between the actual value of Mrs P's pension plan when she transferred and the notional value of her pension plan at that time, had the March 2001 contribution been allocated correctly.

From the information I've been provided, it appears Mrs P's pension was transferred away from Aviva on 17 May 2019 with a value of £18,429.76. The new pension provider confirmed by letter dated 26 June 2019, that the sum transferred was received and invested on 25 June 2019.

If the contribution of 29 March 2001 was invested into the Equity fund, Aviva has calculated using the relevant bid and offer prices, the amount that would have transferred out would have been £22,435.58. Therefore, Mrs P has suffered a past investment loss. As set out below, Aviva must compensate Mrs P for this loss.

In addition, had things happened as they should have, Mrs P would have transferred and invested this larger sum with her new pension provider. But because this didn't happen, Mrs P has also lost out on potential investment growth. It is this investment growth that is to be used as part of determining the redress owed, not 8% interest as Mr B asserts.

Mr B argues that 8% interest is required to redress the "*unsuitable investment*" in the Deposit fund. I am not going to address the accuracy of this contention in general. But, even were I to agree that we'd award 8% interest to redress unsuitable investments, it is simply not the case here that the issue which needs redressing is an unsuitable investment. Suitability is a term generally used by the regulator regarding investments made following advice. Mr B's use of "*unsuitable*" isn't correct here as such a conclusion assumes that the investment in the Deposit fund was made after a personal recommendation was given to Mrs P by a financial adviser and that that advice was not appropriate for her objectives and circumstances. But, Aviva as a pension provider didn't give unsuitable investment advice; it made a mistake when allocating a contribution.

Furthermore, we typically make interest awards when a consumer has been deprived of the use of her funds. In this case, Mrs P's funds have remained invested at all relevant times within a pension plan. From what I've been provided, Mrs P had not accessed her pension benefits with Aviva (now with a different provider) and I've been given no evidence to suggest this would have been different even if Aviva had correctly allocated the March 2001 contribution to the Equity fund.

Therefore, Mrs P has not been deprived of access to these funds; she has instead lost out on the potential growth that would have been generated by the difference between the actual and notional values of her pension fund when she transferred. The calculation methodology I've set out below ensures that Mrs P is compensated for this financial loss as well.

Trouble and upset

I have considered carefully the redress offered for the trouble and upset this matter has caused. I've looked at everything that happened since the allocation error came to light and considered everything Mr B has told us about how it impacted Mrs P in order to decide how to fairly redress her for this non-financial loss. Whilst I have no wish to underplay the frustration this matter has caused, I find £500 to be fair and reasonable in the circumstances of this complaint. I appreciate Mr B will be disappointed but I'm not going to ask Aviva to increase it further.

Mr B has provided at least 33 examples of things that he says caused him and his sister trouble and upset while trying to get Aviva to correct its allocation mistake. And, he asked to be personally compensated for the time he's spent representing his sister in this complaint.

I feel it important to reiterate here that the role of this service isn't to regulate or to punish businesses. That is the job of the regulator, the Financial Conduct Authority (FCA). We don't fine or punish businesses if we think a consumer hasn't been treated fairly. We look at the impact on the consumer in terms of any financial and/or non-financial loss, including any trouble and upset caused. And as I've explained, not every breach of regulations (or infringement of legal rights) will mean a customer hasn't been treated fairly nor will every mistake or unpleasantness cause a consumer to suffer a redressable non-financial loss.

Many of the examples provided demonstrate Mr B's concerns about Aviva's actuarial department and his displeasure with the way Aviva conducts business, including how it handles complaints. These are issues to be considered by the FCA, and he has been told how he can raise these issues with them directly.

Additionally, our rules only allow compensation to be awarded, in terms of the distress caused, to the complainant not their representative(s). Whilst it is clear that Mr B was caused unnecessary inconvenience and incurred costs, I must consider my powers with regard to any compensation I can award in a situation such as this. This service can only look at complaints from eligible complainants and can only tell a business to pay compensation for trouble and upset experienced by their customer – not by a third party. Representatives, both personal and professional, aren't eligible complainants – and so we can't award for any impact experienced by them personally as we don't have the power to do so.

In this case, Mr B is a representative and not an eligible complainant so I can't direct Aviva to compensate him for his time. And, this service will not generally award compensation for inconvenience to a representative of a consumer. We would normally only award such compensation if the representative's inconvenience in turn led to distress or inconvenience for the business' customer (Mrs P in this case). There is not sufficient evidence for me to conclude this is the case here.

And, although Mr B has provided a long list of things Aviva did or didn't do that he says were problematic and need to be redressed, very little has been said about how they have directly impacted Mrs P. But taking everything together, including the time taken for Aviva to accept it had made an error, it's actions before and after, and bearing in mind that having a representative generally shields a consumer from some of the inconvenience and possible upset that could arise in these situations, I'm satisfied the £500 offered is fair and reasonable compensation for the non-financial loss Mrs P has suffered as a result of Aviva's errors.

Putting things right

In summary, my aim is that Mrs P should be put as closely as possible into the position she would likely now be in if Aviva had correctly allocated her single contribution to the Equity fund on 29 March 2001.

What should Aviva do?

To compensate Mrs P fairly, Aviva must:

- Calculate the notional transfer value of Mrs P's Aviva pension when the policy transferred on 17 May 2019 assuming the 29 March 2001 single contribution had been correctly invested in the Equity fund.

- Then, compare the current value of Mrs P's pension with its current notional value on the basis that the notional transfer value calculated above had been invested in the same funds, in the same proportion from 25 June 2019. If the current *notional value* is greater than the *actual current value,* there is a loss and compensation is payable. If the *actual current value* is greater than the *notional value*, no compensation is payable.

  If it isn't possible to obtain a current notional value, Aviva may use the FTSE UK Private Investors Income Total Return Index to calculate the loss of investment growth attributable to the difference between the notional transfer value calculated above and the actual amount transferred on 17 May 2019.

- If there is a loss, Aviva should pay into Mrs P's pension plan to increase its value by the total amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief.

  Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

  If Aviva is unable to pay the total amount into Mrs P's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to *notionally* allow for any income tax that would otherwise have been paid. The *notional* allowance should be calculated using Mrs P's actual or expected marginal rate of tax at her selected retirement age.

  For example, if Mrs P is likely to be a basic rate taxpayer at the selected retirement age, the reduction would equal the current basic rate of tax. However, if Mrs P would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

- Pay to Mrs P £500 for the time, trouble and upset caused by Aviva's mistakes.

My final decision

I uphold the complaint. My decision is that Aviva Life & Pensions UK Limited should pay the amount calculated as set out above.

Aviva Life & Pensions UK Limited should provide details of its calculation to Mrs P in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 29 December 2021.

Jennifer Wood
Ombudsman