

The complaint

Mr A complains that an appointed representative of Aviva Life & Pensions UK Limited failed to provide him with suitable advice, or sufficient information, when it recommended that he open, and later increase his contributions to, a Free Standing Additional Voluntary Contribution ("FSAVC") pension plan.

What happened

Mr A was advised by an appointed representative of Friends Provident. However that firm is now part of Aviva, so it is Aviva that is responsible for dealing with the complaint. And Mr A has been assisted by his wife in making the complaint. But, in this decision, for simplicity I will simply refer to Aviva and Mr A.

Mr A was a member of an occupational pension scheme ("OPS"). In June 1996 he met with Aviva to discuss making additional provision for his retirement. Aviva recommended he open a personal pension plan in order to make FSAVCs. And Mr A then had a further meeting with Aviva in April 1999 following an increase to his salary. Aviva recommended that Mr A increase the payments he was making each month to his FSAVC plan.

Mr A says that he recently became aware that he might have been better off paying Additional Voluntary Contributions ("AVCs") to his OPS instead. He says that Aviva failed to make him sufficiently aware of that option when it advised him to pay FSAVCs in 1996 and 1999. So he complained to Aviva. It took Aviva some time to respond to Mr A's complaint so it paid him £100 for the trouble and upset the delay had caused him. But Aviva didn't agree it had done anything wrong when it provided its advice to Mr A. So he brought his complaint to this Service.

Mr A's complaint has been assessed by one of our investigators. He thought that Aviva had failed to provide sufficient information about the difference in charges between an AVC and a FSAVC scheme when it provided its recommendation to Mr A in 1996. And he thought that the advice it provided in 1999 was simply a top up of the existing arrangement. So our investigator thought that the complaint should be upheld and he asked Aviva to pay Mr A some compensation.

Aviva didn't agree with that assessment. It pointed our investigator to another decision issued by an ombudsman that concluded the information it had given Mr A in 1999 was appropriate. It said that it thought that, even if what it had provided in 1996 had been deficient (which it didn't), then Mr A should have been aware of the differences between the two contribution options by 1999.

So, as the complaint hasn't been resolved informally, it has been passed to me, an ombudsman, to decide. This is the last stage of our process. If Mr A accepts my decision it is legally binding on both parties.

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.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mr A and by Aviva. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

At the outset I think it is useful to reflect on the role of this service. This service isn't intended to regulate or punish businesses for their conduct – that is the role of the Financial Conduct Authority ("FCA"). Instead this service looks to resolve individual complaints between a consumer and a business. Should we decide that something has gone wrong we would ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred.

As part of its initial submissions on this complaint Aviva confirmed that it provided its consent for us to consider it. So that means I don't need to decide whether the complaint has been made in time, in accordance with the complaint handling rules set by the FCA. That means it is appropriate for me to consider the entire complaint.

What was Aviva required to do?

In May 1996 the Personal Investment Authority ("PIA" – Aviva's regulator at the time) issued Regulatory Update 20 (RU20), codifying the procedures it expected product providers to follow in future sales. The PIA said that, before selling a FSAVC, tied advisers (such as the appointed representative of Aviva that Mr A dealt with) should:

- Draw the consumer's attention to the in-house alternative
- Discuss the generic differences between the two routes '(taking account, among other things, of the features described in this article)'
- Direct the consumer to his employer or the OPS for more information on the in-house option

The article also refers to the lower charges under an in-house AVC in general terms. It says:

'Charges under in-scheme AVCs will usually be lower than those under FSAVCs, reflecting economies of scale, rebated commission or a contribution to administration expenses by the employer. Of all the differences between the two routes, this is likely to exert the greatest impact on which route would offer the greater benefits to the client.'

What does the evidence suggest happened in 1996 and 1999?

Aviva has provided us with its records from the two meetings that were held with Mr A. From those records it appears that copies of the meeting notes were sent to Mr A by post following the meetings. Mr A has said that he doesn't recall receiving those letters, and that he didn't sign any of the reports that were produced.

I've no doubts that Mr A has provided his complete and honest recollections of what happened at the time. But the events in question took place up to 25 years ago. I'm mindful that over such a lengthy period of time even the most careful of memories can, and do, fade. On balance I have no reason to doubt that the reports of the meetings that Aviva has sent us

are a fair and accurate reflection of the discussions it had with Mr A. And I think those reports were most likely sent to, and received, by Mr A.

The relevant notes from 1996 say;

“Having checked the details of AVCs available under your occupational pension scheme you are satisfied there is no reason why the purchase of a FSAVC would not be suitable for your needs.”

And Aviva says that Mr A was also given a factsheet at the time. That offered consumers comparisons of various features of AVC and FSAVC plans. In relation to charges/expenses, the following comparison was offered;

FSAVC	AVC
<i>Individually costed contract</i>	<i>Cost basis will vary dependent upon the scheme, but may have the advantage of spreading costs between members</i>

And later on the factsheet went on to say;

“if you want full details of the in-house AVC scheme it will be necessary for you to contact your employer / scheme trustees for the information”

On the basis of the above I am not satisfied that Aviva did enough to sufficiently draw Mr A's attention to the strong likelihood that the costs of an AVC arrangement would be lower than the FSAVC plan it was recommending. I don't know what information it was suggested Mr A should gather from his employer before agreeing to Aviva's recommendation. But there is nothing in the notes from the time that suggests a full and frank discussion about the difference in the charges took place.

Mr A next met with Aviva in 1999. By that time he had been promoted at work, and his annual salary had increased. So he again reviewed his retirement provision with Aviva. The letter Aviva sent him summarising those discussions said;

“We discussed the fact that you are eligible to make additional contributions to your occupational scheme and that you should contact your employer for more information. I explained the different features of employers' AVC arrangements and the Free Standing AVC and these are detailed on the comparison chart that I left with you”.

And since the meeting in 1996 Aviva had updated the comparison factsheet. The section on charges / expenses now read;

FSAVC	In-House AVC
<i>Individually costed contract</i>	<i>Charges under in-house AVCs will usually be lower than FSAVCs reflecting economies of scale and reduced administration expenses</i>

So whilst I would agree that the information Aviva provided to Mr A in 1999, when considered in isolation, reasonably disclosed the difference in charges I'm still not persuaded this was enough. As before there is nothing to suggest that Aviva had a full discussion with

Mr A about the difference in charges, or even highlighted the importance of him reading that specific section of its factsheet. And there is the very real possibility that, since Mr A was simply increasing the contributions he had started in 1996, the failings in that sale simply carried forwards into the discussions in 1999.

Did Mr A lose out as a result of Aviva's failings?

Generally, as I've explained above, the cost differences between an AVC and FSAVC plan might be of greatest importance to a consumer. These were additional pension savings being made to provide an income in retirement. So the over-riding aim would be to maximise the value of those savings when they were needed in future years.

Of course the charges might not have been the only reason why Mr A might have chosen a FSAVC arrangement. Generally the benefits from an AVC plan would need to be taken at the same (or occasionally later) time as the benefits from the main pension plan. But Mr A wanted to retire at 55, and the normal retirement age of his OPS was 60. He could only retire earlier, and take benefits from the OPS, with the consent of his then employer. Obviously given that was some twenty years in the future, that could not be assumed. So Mr A might have found it attractive to be able to determine when he took his FSAVC benefits himself.

But the FSAVC benefits would only have formed a small proportion of Mr A's overall provision for retirement. On their own it is unlikely they would have been sufficient for Mr A to retire. He would have needed the additional benefits from the OPS. So, on balance, I think the main area that would have been of importance to Mr A here was the difference in cost. Had Aviva made that difference sufficiently clear in 1996, I think it more likely that Mr A would have chosen to make AVC payments rather than those to a FSAVC plan.

But although, three years later, Aviva corrected the information failings that had occurred in 1996 I must make it clear that I doubt Aviva highlighted the changes in its factsheet wording when Mr A agreed to increase his contributions in 1999. And so I don't think it is unreasonable to conclude that there is a strong risk that the sale in 1999 was heavily influenced by what had happened before. On balance I think it most likely that Mr A paid little attention to the revised information, and simply agreed to continue with the FSAVC plan he'd already opened albeit with increased contributions. I haven't seen enough to persuade me that Aviva's discussions with Mr A in 1999 would have negated the problems that occurred previously.

So I think that Aviva providing better information to Mr A in 1996 would have resulted in him deciding to utilise an AVC arrangement, rather than taking out the FSAVC plan that Aviva recommended. I accept there was no requirement for Aviva to provide a detailed comparison of the differences between the two arrangements – that was an investigation that Mr A needed to conduct for himself. But I think Aviva did need to specifically highlight the most important differences, of which cost was undoubtedly the most relevant. And given the deficiencies of the sale in 1996 I'm not persuaded that Aviva did enough to correct those problems when Mr A increased his contributions in 1999. I don't think the evidence suggests the cost difference was given sufficient prominence in those discussions to persuade him he should reverse the steps he took in taking a FSAVC in 1996.

So I don't think Aviva did enough, in either 1996 or 1999, to meet its regulatory responsibilities when it sold the FSAVC plans to Mr A. So Aviva needs to put things right.

Putting things right

Aviva should undertake a redress calculation in accordance with the regulator's FSAVC review guidance, incorporating the amendment below to take into account that data for the CAPS 'mixed with property' index isn't available for periods after 1 January 2005. The FSAVC review guidance wasn't intended to compensate consumers for losses arising solely from poor investment returns in the FSAVC funds, which is why a benchmark index is used to calculate the difference in charges and (if applicable) any loss of employer matching contributions or subsidised benefits.

In our view the FTSE UK Private Investor Growth Total Return Index provides the closest correlation to the CAPS 'mixed with property' index. So, where the calculation requires ongoing charges in an investment based FSAVC and AVC to be compared after 1 January 2005, Aviva should use the CAPS 'mixed with property' index up to 1 January 2005 and the FTSE UK Private Investor Growth Total Return Index thereafter.

If the calculation demonstrates a loss, the compensation amount should if possible be paid into Mr A's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr A as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid in retirement. 25% of the loss would be tax-free and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

My final decision

My final decision is that I uphold Mr A's complaint and direct Aviva Life & Pensions UK Limited to put things right as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 12 May 2022.

Paul Reilly
Ombudsman