

The complaint

Mr K complains that Aviva Life & Pensions UK Limited failed to carry out sufficient due diligence activities when he asked to transfer some pension savings to a Small Self-Administered Pension Scheme ("SSAS") in 2014.

What happened

Mr K has been assisted in making his complaint by a claims management company (CMC). But, in this decision, I will largely refer to all communication as having been with, and from, Mr K himself. At the time of the transfer Mr K's pension savings were held with Friends Life. But Aviva is now responsible for that firm, and so is dealing with the complaint. For ease, I will refer to Aviva as the responsible business throughout.

Mr K held pension savings with Aviva. His pension savings were held in six different pension plans. Aviva completed the transfer of Mr K's pension savings in two tranches. Four policies were transferred in March 2014 and the remaining two policies were transferred in later in the year, in December.

Mr K says that he was cold called by a firm offering him a free pension review. He found the proposals from the firm to be attractive and agreed to the transfer of his pension savings from Aviva (and another firm). Mr K says he was told that by investing his pension savings in an overseas property scheme he would receive a better return on his investments..

Mr K completed the paperwork the firm provided that created a new company that would employ Mr K, and set up a SSAS to provide him with pension benefits after it received the transfers from Aviva and the other provider. Aviva received the request for the transfer of Mr K's pension savings in February 2014 via the automated Origo Options system.

In his letter of complaint Mr K said that during the entire transfer process there was no effective communication from Aviva to him. In particular he said that Aviva should have warned him that his transfer request might be as a result of a scam, and warned him about the risks he was facing. Mr K said that those warnings would have resulted in him cancelling the transfer activity.

Mr K's complaint has been assessed by one of our investigators. He accepted that Aviva might have done more in its communication with Mr K before the first tranche of transfers. But he noted that Aviva had warned Mr K about the dangers of the transfer before the final two policies were transferred. Since Mr K didn't stop the second part of the transfer when he received those warnings, our investigator didn't think that further communication with Mr K at the time of the first transfer would have made a difference. So he didn't think the complaint should be upheld.

Mr K didn't agree with that assessment. Although I am only briefly summarising here what he and his CMC have said, I want to reassure Mr K that I have read, and carefully considered, all the representations that have been made.

Mr K's CMC says there is no evidence that Mr K received any information from Aviva in relation to his pension transfer that would have led him to become aware of the risks he was taking. So it doesn't think that Mr K completing that transfer gives any indication that he wouldn't have taken on board the warnings Aviva should have provided. It says that, had Aviva continued to delay the second part of Mr K's transfer, it is likely that he would have changed his mind about moving his pension savings.

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.

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 K 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. 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.

The Pension Regulator's (TPR) scorpion guidance

The scorpion guidance was issued on 14 February 2013 and updated the following year, in July 2014. Several bodies including the FSA (the Financial Services Authority which was succeeded by the Financial Conduct Authority, the FCA, shortly afterwards) were part of this initiative so it's a relevant consideration for personal pension providers like Aviva which come under FSA/FCA regulation, rather than TPR regulation.

Briefly, the scorpion campaign involved an 'action pack' that highlighted the warning signs present in a number of transfer examples, specifically: being cold-called, money being transferred overseas, incentives to transfer, inadequate information about investments and pressure to complete a transfer quickly. It suggested transferring schemes should "look out for" these issues, as well as receiving occupational schemes that were newly registered or were suddenly involved in multiple transfer requests. The 2014 update replaced many of the 2013 warnings about pension liberation, with similar warnings about "scams".

If any of the warning signs applied, the action pack provided a checklist schemes could use which suggested asking the member for copies of promotional materials, emails or letters about the scheme and for further details about how they became aware of the receiving scheme and how it had been described to them. If those enquiries established the member had been advised, it went on to suggest checking whether the adviser had been registered with the FCA. Where transferring schemes had concerns, they were encouraged to consider delaying the transfer and to seek legal advice.

The scorpion campaign also included:

- An insert to issue to members when a transfer pack was requested. The insert warns about offers to cash-in pensions early, cash incentives, cold calling, being put under pressure to transfer and the potential tax consequences of accessing pensions early.
- A longer leaflet which gives more information, including 'real life' examples, about pension liberation. This was to be used in order to help raise awareness about pension liberation amongst pension scheme members.

In addition to endorsing this guidance, Aviva's regulator, the FCA, had since its inception set out Principles and Rules for Aviva to follow – including COBS 2.1.1R (the client's best interests rule) which Mr K's representative has highlighted. So I think it was also appropriate for Aviva to have regard for this TPR guidance in meeting its existing regulatory obligations. In light of this I'll consider what (if any) warning signs Aviva ought reasonably to have noticed in Mr K's request to transfer to the SSAS.

Status of the receiving scheme

Every SSAS is specific to its members, and consideration will often be given to transfers from a member's existing pensions when a scheme is first set up. So it may not necessarily have been surprising that a transfer request was being received to a scheme Mr K had recently established as trustee, for what appeared to be a new employer he had incorporated as a director.

At the time, the actions being taken by TPR against suspected pension liberation schemes tended to involve larger multi-member schemes operated by unscrupulous trustees which were hurriedly set up and admitted members from all over the UK, with no connection to each other, over a short space of time. That wasn't the form of arrangement Mr K was entering into, which might have appeared a lot more like a decision he entered into to form a pension scheme for his own company. It wasn't until a further update to the action pack in March 2015 that TPR specifically highlighted that the focus of liberation or scam activity had now moved to single-member schemes.

And the SSAS administrator itself had been in existence for a number of years at the time of the transfer and was well regarded as a market leader. So I don't consider it should have been regarded as a recently established operator in the market. The transfer request that Aviva received was made through the industry wide Origo scheme. That scheme allows for vetted members of the scheme to move pension monies quickly and with limited paperwork. But although the use of Origo might have given Aviva some comfort, I don't think it absolved the firm from its responsibilities to conduct the appropriate due diligence on the transfer request.

Aviva says the transfer request provided it with little information about the ultimate investment Mr K intended. If Aviva had suspected the investment Mr K was making might be a scam there were several options open to it under TPR's guidance. It's important to say here that this applies whether or not that suspicion was correct, so I'm making no judgement here about the status of Mr K's investment. Part of the problem is that investment scams are often outwardly indistinguishable from what might simply be a risky investment proposal that could lose all the investor's money.

The options Aviva had were to investigate whether there were grounds to delay or refuse to transfer to the SSAS altogether; or and particularly if not, to engage further with Mr K by providing risk warnings and check he understood the implications of what he was doing.

Did Aviva have a basis on which to delay or refuse the transfer?

When Aviva first received Mr K's transfer request it relied on its knowledge of the scheme administrator, and the use of the Origo system, to derive some reassurance that no further checks were needed. But, for reasons that aren't entirely clear to me, Aviva only transferred four of the six pension plans that Mr K held.

Shortly after the initial transfer had been completed, Aviva updated its processes. It had become concerned about the volume of similar requests it was receiving for transfers to SSAS's and so decided it would be appropriate to conduct further due-diligence activities on those requests. So the transfer of the final two pension plans was delayed.

Aviva has explained that the rules of its personal pension meant a customer had a right to transfer their pension plan to any scheme capable (and willing) to accept a recognised transfer under Section 169 of the Finance Act 2004. The HMRC registration of the scheme meant it fulfilled those criteria. Although Aviva didn't make any further enquiries of HMRC here, I have no reason to think additional enquiries would have highlighted any problems.

A statutory right to transfer to a SSAS would also exist given that the sponsoring employer of the SSAS was Mr K's own company of which he was acting as a director. To ensure that it would have been necessary for Aviva to inspect the SSAS trust deed and rules – again it doesn't seem that was done. When considering the second tranche of transfers Aviva did ask for that information from the scheme administrator but it wasn't received. But it appears Mr K was entitled to secure transfer credits as a member of that SSAS using his Aviva personal pension, given he was clearly holding office as a director of that employer at the time.

Before making the second transfer Aviva appears to have had concerns that the new employer Mr K had set up might not have been genuine and therefore this wasn't a valid exercise of his statutory rights. But that stance by Aviva was met by a letter of complaint from Mr K about it delaying the transfer.

The scheme was validly registered with HMRC, and there would have been nothing to suggest at the time that it was being used for pension liberation, particularly given that Mr K was already past the minimum pension age of 55. The case law subsequently established in *Hughes v Royal London* [2016] EWHC 319 (Ch) indicates that as Mr K already had earnings from his main occupation, a lack of further earnings from the sponsoring employer of which he was a director of in this case wouldn't have invalidated his statutory right to transfer.

I'm not saying that Aviva should have anticipated the outcome of a court case that hadn't yet happened – if it had suspicions at the time, it should have communicated what those suspicions were, as I'll explain later below. But I think it's important to recognise what it's now been established the law actually meant for this sort of transfer.

Having considered all of this I think Aviva was right to conclude that its prospects were limited, for delaying or blocking Mr K's transfer out of a suspicion that the sponsoring employer wasn't genuine - and could ultimately have been unsuccessful.

In the case of an actual investment scam, it might be expected that engaging further with the member about the potential risks they were taking might lead to the member reconsidering whether they wanted to transfer in any event – and therefore was a more constructive way for Aviva to proceed in the particular circumstances of this case. So I've next considered what happened when Aviva got directly in touch with Mr K to explain its concerns.

Risk warnings

At a time when the TPR guidance was less prescriptive than it, and other industry codes, now are on the degree of contact a transferring scheme should have with the customer, a key method of passing on these risk warnings was to issue the scorpion leaflet. Since February 2013 TPR had been saying on its website that it would like to see the use of this insert in transfer packs for members becoming best practice.

At first Aviva seems to have taken the view that this wasn't a necessary step given that Mr K's request had been received through the Origo system. But the danger in taking that approach is that Aviva is effectively relying on what might be a fraudulent party to protect its customer. So in my view Aviva should have sent the leaflet to Mr K before the first transfer, both to provide him with information about the risks he might be facing, and to ensure that it could demonstrate it followed the TPR guidance.

But the evidence suggests that Aviva did send the scorpion leaflet to Mr K, on two occasions, when it was considering his complaint about the delay to the second tranche of his transfer. I have seen copies of the letters Aviva sent to Mr K, that warn him about the tax implications of unauthorised payments from pension savings and about potential pension liberation activities. And the letters also say a copy of the scorpion leaflet was enclosed. I appreciate Mr K says that he doesn't recall receiving these leaflets. But on balance I have no reason to think they weren't sent.

The Action Pack provided guidance to firms as to the steps they might take should they have concerns about a transfer. It suggested firms could:

- *Contact the member to establish whether they understand the type of scheme they'll be transferring to and send them the pension scams booklet available at www.pension-scams.com*
- *Speak to the member at risk – over the phone, via email or letter. It could help you establish answers to more of the questions in the checklist, where you've been unable to answer them with the information you have available*
- *Direct the member to Action Fraud if you think it is a scam, or The Pensions Advisory Service (TPAS) to discuss the potential consequences of the transfer, including tax repercussions, if any part of the arrangement is deemed as unauthorised*
- *If the member insists on proceeding with their transfer request, and your concerns remain, then you should alert Action Fraud yourself. There could still be time to protect this member, or others who follow in their footsteps.'*

Aviva's own investigations suggest that it decided not to make any direct contact with Mr K when it first received his transfer request. But I don't think I need to consider here whether or not that was a reasonable approach. I think that Mr K's response to the delays on the second tranche of his transfer, and his lack of response to the scorpion leaflets he had been sent, suggest it would have made little difference.

Could Aviva have gone further, and would it have made a difference?

The Action Pack does suggest getting in touch with the member but that is the only expectation – it doesn't specify how that contact should be made, and certainly not that the contact should be by telephone. This is left to the discretion of the provider. Although I know some providers have tried engaging over the phone it is not without its difficulties, including the risk of it being wrongly perceived as a self-interested attempt to retain Mr K's business. Given that the staff involved in processing payments out of the transferring scheme are neither qualified nor authorised to provide financial advice, in reality such a conversation would also need to be heavily scripted – and might not end up being a lot more effective than a letter. So I couldn't fairly fault Aviva for deciding that it was best to engage with Mr K by letter.

The main risk in Mr K's transfer was not one of liberation, but the potential for the subsequent investment to be either a scam or wholly unsuitable for him. However even if the Aviva had been alerted to the possibility of a scam (when it discovered the nature of the proposed investment), that doesn't mean it was straightforward for Aviva to tell Mr K directly that it thought it was unsuitable (or even likely to be unsuitable) for him. It would have been forming such a view based on insufficient information about Mr K's personal circumstances – and of course it was not qualified to formally provide such advice. If it had attempted to directly caution Mr K against making the investment it wasn't in a position to advise what he should invest in, which is a natural question to follow.

When Aviva initially blocked the transfer of the final two policies, citing concerns in line with the new guidance, I can see that the SSAS administrator, on behalf of Mr K, complained about Aviva's actions. Ultimately those remaining plans were transferred in late 2014. So even in the face of resistance from Aviva, Mr K still pressed ahead with the transfer request.

Mr K had already taken some significant steps here, not least the setting up of a limited company that bore the names of his children and the taking on of director duties for that company. There had been a lot of activity leading up to the transfer request with numerous points where someone less committed to changing their pension arrangements could easily have pulled out. Obviously, Mr K didn't do so which, to my mind, shows he had more than just a passing interest in the investment.

So in that context, I don't think a statement from his old pension provider about regulated financial advice being a good idea would have prompted Mr K to take independent advice or to pull out of the transfer. I think he would only have done so if he had doubts about his investment and was prepared to unwind the steps he had already taken. Taking everything into consideration, including listening to two calls between Mr K and our investigator, I don't think this was likely.

I'm not satisfied that flagging up any of the other messages in the scorpion guidance – for example the availability of TPAS to discuss any concerns – would have fundamentally altered Mr K's decision to proceed in this case. I'm drawn to the regrettable conclusion that Mr K was already satisfied enough with the advice he was getting – whether that was from the SSAS administrator or another firm that appeared to have been involved in the discussions – to have been willing to make the decisions he made at the time. I cannot reasonably say he would have been deterred from going ahead in spite of any further steps Aviva might have taken to alert him in line with what I've set out above.

My final decision

For the reasons given above, I don't uphold the complaint or make any award against Aviva Life & Pensions UK Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 15 April 2022.

Paul Reilly
Ombudsman