DRN-3227092

The complaint

Mr M complained about advice he received in 1994 to take out a free-standing additional voluntary contribution (FSAVC) plan.

He says that he was given incorrect advice by Aviva Life & Pensions UK Limited.

Mr M says had he been given the right information about his options, he would have acted differently, including using additional voluntary contributions (AVCs) linked to his employer's 'in-house' occupational pension scheme (OPS)

What happened

In November 1994, Mr M met with a representative of Aviva to take advice on enhancing his pension in retirement.

Aviva completed a fact find, and recorded details about Mr M's age, employer, salary, marital status and finances.

Mr M then agreed to take out a FSAVC plan. The application was signed on 7 December 1994, and Mr M agreed to pay £35 a month towards it.

He paid £35 a month between 1 January 1995 to 1 October 1997.

In 2020, Mr M made a complaint to Aviva about the FSAVC plan he was sold. Aviva didn't uphold his complaint, so he brought the complaint to this service.

Our Investigator considered Mr M's complaint and didn't think the advisor had done everything they should have at the time they sold the plan. They found that had the advisor done everything they should have Mr M would have taken an in-house additional voluntary contribution (AVC) policy.

Aviva didn't agree, so the complaint has been passed to me to make a decision.

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 what is fair and reasonable, I've also taken into account relevant law, any relevant regulatory rules and relevant guidance and what I consider to have been good industry practice at the time.

Having done so, I agree with the outcome reached by our investigator, and uphold this complaint and direct Aviva to put things right. I'll explain why.

Firstly, I've considered what was expected of the adviser as they were a 'tied' appointed representative of the company at the time. This meant they could only recommend products

Aviva offered. They couldn't actively recommend any other products from any other product providers including Mr M's in-house options.

However, a tied adviser was required to follow rules set in 1988 – called LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation). The LAUTRO Code said advisers should have maintained high standards of integrity and fair dealing, exercise due skill, care and diligence in providing any services, and generally take proper account of the interests of investors. It added that businesses should:

- Have regard to the consumer's financial position generally and to any rights they may have under an occupational scheme, and

- Give the consumer all information relevant to their dealings with the representative in question.

So, this means tied advisers should have known that 'in-house' AVC options would most likely be available to consumers like Mr M. And in addition to highlighting the benefits of the FSAVC, mention of the generic benefits of the 'in-house options' should have been made, including that:

- Money purchase 'in house' AVCs could potentially offer lower charges than the FSAVCs

- 'Added years' might have been available under a defined benefit OPS

- The consumer's employer might match or top-up the amount the consumer paid into either in-house option.

I've looked at the recommendation completed by the advisor which states;

'When advising Mr M to take out an FSAVC, I asked [him] on 23/11/94 to investigate and compare the costs and benefits of the past added years and scheme AVC options available from [his] current pensions scheme. Having had an opportunity to do this, [he] now wished to proceed with the received contract'.

There is no other evidence within the document that shows the generic benefits were discussed, including that it was likely an in-house AVC would be cheaper.

Aviva suggests that this shows that the advisor did enough to make Mr M aware that there were other options available – and that it was explained to him to conduct his own research. But I don't think that the mention of AVC's as above goes far enough. The adviser should have discussed and recorded the generic differences between the proposed FSAVC and other in-house options.

Before January 1995 a suitability letter wasn't required. But I would expect to see that the adviser made a note on file, such as on the 'fact find', at least to the effect that the charges under both the FSAVC and the AVC had been discussed – not just that they had mentioned the existence of the AVC.

Had this been discussed I think it would have prompted Mr M to consider his options in more detail and he would likely have taken more time to consider what option would have worked best for him.

And I think that had Mr M been given the required information from the outset I think it is likely he would have opted to take an in-house AVC option as it likely offered him substantially the same product at a cheaper cost.

Aviva has said that Mr M would have been aware of the available options and appeared to be open to a greater risk with the potential for higher returns. But this doesn't take away from Aviva's responsibility to have fulfilled its obligations listed above. And as I've said, I don't think Mr M would have taken the FSAVC if it had.

Aviva has also looked at other complaints this service has considered which is says are broadly similar in circumstance and have not been upheld. But as Aviva is aware, each case is considered on its own merits, so this doesn't change my decision.

It follows that I uphold this complaint, and Aviva should take steps to put things right.

Putting things right

Aviva Life & Pensions UK Limited 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 Life & Pensions UK Limited 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 M'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 M 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

I uphold this complaint. Aviva Life & Pensions UK Limited should put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 20 June 2022.

Claire Pugh

Ombudsman