DRN-3416697

The complaint

Miss S complained about advice given by a tied adviser from a predecessor business of Aviva Life & Pensions UK Limited ("Aviva") to take out a Free-Standing Additional Voluntary Contribution (FSAVC) plan.

For ease, I'll refer only to Aviva as the relevant business in this decision.

Miss S is represented in this complaint but again, for ease, I'll refer to all actions and comments as those of Miss S.

What happened

Miss S was a teacher and a member of her employer's occupational pension scheme. She told this Service she wanted to make additional pension contributions with a view to retiring at age 50. So in 1992, at the age of 23, Miss S was advised by the Aviva adviser to take out an FSAVC plan provided by Aviva. Miss S started making monthly contributions of £35 to the FSAVC plan at the start of 1993.

Miss S again met with a broker tied to Aviva in 1999 and increased her FSAVC pension contributions.

Miss S complained to Aviva in February 2021 about the suitability of the advice given to her by the Aviva adviser in 1992.

Aviva responded to Miss S's complaint and said its advisor recommended a product that was suitable for Miss S's needs. It said in 1999 it fulfilled its requirement to refer Miss S to her employer's pension scheme for information about alternative Additional Voluntary Contribution (AVC) schemes. Aviva said if Miss S didn't recall that its adviser discussed both the FSAVC and the in-house AVC options available to her at the original sale, then it was reasonable for Miss S to have raised any concerns within three years of the sale in 1999. So Aviva told Miss S it thought her complaint was raised out of time.

Miss S remained unhappy and brought her complaint to this Service. She said if she had been aware of a reason to complain in 1999 then she would have stopped contributing to her FSAVC at that point. She didn't think enough was done by Aviva in either 1992 or 1999 to raise her awareness of any critical issues, namely the difference in charges and the detrimental effect that this would have. Miss S said she only became aware of a problem in 2020, when she saw a claims management company advertisement on television.

Our Investigator thought Miss S's complaint was not one we could look into as it had been brought out of time. Looking at the rules under which we operate, they said the complaint was made more than six years after the advice to take out an FSAVC was given. Our Investigator said that when Aviva provided Miss S with further advice in 1999, she was given a factsheet that provided an overview of the AVC scheme, provided a generic comparison and directed Miss S to contact her employer's scheme administrators for further details of the AVC scheme. So they thought this information should have alerted Miss S that there

may have been a problem with the advice given and so she should have been aware at that point in time that she had cause for complaint.

Miss S was unhappy with what our Investigator said and so this came to me for a decision.

I contacted Aviva and told it I intended to come to a different conclusion to that of our Investigator and say this Service could look into Miss S's complaint. I said while I could see Miss S had been provided with a leaflet about the various pension contribution options, I couldn't see that these had been discussed with her. So I told Aviva I intended to say its adviser didn't do enough in 1999 to draw Miss S's attention to the alternatives to taking out an FSAVC.

I also told Aviva I had looked at the merits of Miss S's complaint and intended to uphold it, as I thought if the advice given to Miss S in 1992 and 1999 had been compliant, then it was likely she would not have taken out an FSAVC, as her employer's in-house AVC was likely a better option that offered lower charges. I asked Aviva to provide a copy of the 1999 suitability letter, as well as a copy of the complaint submitted by Miss S to it in 2021.

Aviva responded and said it was unable to provide the 1999 suitability letter. But it thought the information already provided showed that the advice given in 1999 was compliant. It said the document signed by Miss S in 1999 confirmed the options available to her for increasing her pension. It also said Miss S would have been provided with details of her employer's in-house pension scheme when she joined her occupational pension scheme. It felt it was reasonable that Miss S raised concerns within three years of the advice in 1999.

I issued a provisional decision on 13 December 2022 that repeated what I had earlier said to Aviva about this Service being able to look into the complaint, and I said I intended to uphold the complaint. I gave both parties the opportunity to respond. Miss S responded and agreed with what was outlined in my provisional decision.

Aviva also responded and didn't agree with the provisional decision. It said the sales process would often involve an initial meeting by phone to establish a consumer's main objectives and then a final meeting where documentation would be signed. It said its advisor was expected to ask consumers to contact their employer / scheme to find out about the in-house AVC prior to the final meeting. So Aviva said it's reasonable to assume the advisor discussed the information provided at the meeting, including about the in-house AVC options. Aviva said there wasn't any additional information the advisor could have documented in a Reasons Why letter. So it didn't think there was anything else the advisor could or should have done to draw Miss S's attention to the alternative in-house scheme. Aviva also pointed to previous decisions issued by this Service where it said similar complaints were not upheld.

I am now in a position to issue my final 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 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 Miss S and 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.

When it responded to my provisional decision Aviva provided details of other decisions issued by this Service which it thought were similar to this, but where a different outcome had been reached. Each individual complaint brought to this Service is considered on its own merits and a decision is made based on the particular circumstances of each complaint. While some complaints may seem similar, it's the case that there are often key differences in the complainant's individual circumstances and the evidence that this Service has been provided with by both parties. In this case, my decision is based on the particular circumstances of Miss S's complaint.

I know Miss S wants this service to consider the merits of her complaint against Aviva, but I have to first of all look at whether this Service can consider the complaint. Having reviewed everything provided by all parties, I'm satisfied that Miss S's complaint was brought to this Service in time and it's one I can look into. I'll explain why.

Our Service can consider a wide variety of complaints about financial services, but we aren't free to look into every complaint that's referred to us. The rules that set out what complaints we can consider are the Dispute Resolution (DISP) rules in the Financial Conduct Authority handbook.

One of these rules (DISP 2.8.2 R) says we cannot consider a complaint, unless the business consents, if it was referred to us more than:

(a) six years after the event complained of; or (if later)
(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that she had cause for complaint;

unless:
(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2 R was as a result of exceptional circumstances

I've looked first of all at DISP 2.8.2 (a), and I'm satisfied that Miss S's complaint about the suitability of the advice given to her by Aviva in 1992 – that Aviva didn't provide her with enough information about in-house AVCs for her to make an informed decision – was made more than six years after that event. Miss S didn't complain to Aviva until February 2021. So I'm satisfied Miss S's complaint was not made in time under the six year part of the DISP rules.

I've then looked at DISP 2.8.2 (b), namely, when Miss S became aware (or ought reasonably to have become aware) that she had cause for complaint.

Aviva considers that Miss S was given enough information during the sale in 1999 to make her aware of any concerns about the earlier sale. So it considers the complaint about both sales has been made too late as they weren't raised within three years of 1999. However, Miss L is complaining that she wasn't given sufficient information in 1999 during the sale, so that sale needs to be considered, in order to see if it was compliant. Only after it has been determined whether the 1999 sale was compliant, will I be able to determine if the complaint about the earlier sale has been made out of time.

Put simply, if I'm satisfied Miss S was properly informed about the important differences between the in-house scheme and the FSAVC in 1999 – then I'd agree that the complaint about the earlier sale would have been made too late. But if I conclude that Miss S wasn't properly informed, it follows that the argument that she ought to have been aware of having cause for complaint about the earlier sale would be undermined. So, given the nature of the

time bar objection raised, the matter of the sale in 1999 needs to be settled before I can consider our jurisdiction to consider the sale in 1992 or the merits of that case.

Due to the passage of time, Aviva has been able to provide some, but not all, of the documentation relating to both meetings.

Looking at the 1999 sale, by this time the Aviva advisor had to follow the rules set in 1988 by LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation), as well as those set out in the regulatory update (RU20) that had been issued by the then regulator (the Personal Investment Authority or "PIA"). This said that before an adviser sold an FSAVC they should have:

- Drawn the consumer's attention to the in-scheme alternative;
- Discussed the differences between the two routes in generic terms;
- Directed the consumer to his employer, or to the scheme trustees, for more information on the in-scheme option.

I've looked at the leaflet provided by the Aviva adviser to Miss S in 1999. This provided a generic outline of the three options available to Miss S at that point in time to increase her pension. This included that FSAVC charges might be higher than in-house scheme charges.

While I think it's fair to say the leaflet drew Miss S's attention to the in-house scheme alternative and directed her to her employer for more information about their scheme, I haven't been provided with evidence that suggests the differences between the FSAVC and AVC routes were discussed with her. The PIA regulations say the Aviva adviser would have been expected to do this before an FSAVC was sold.

I would have expected the suitability letter, which should have been drawn up at the time, to outline the discussion between the adviser and Miss S about the differences between the options available to her. But Aviva hasn't been able to provide a copy of this, and without it I can't know what was discussed.

The declaration on the leaflet signed by Miss S doesn't tell me anything about whether the options were discussed with her.

The declaration says Miss S had the opportunity to obtain details of her Scheme AVC and its charges and had compared them to the FSAVC option, and having done so she decided to proceed with the FSAVC application. I said in my provisional decision that I couldn't see how Miss S would have had the opportunity to do this as there appears to have been only one meeting between Aviva's representative and Miss S – all documents are dated 12 May 1999.

Aviva responded and said there might well have been a phone conversation between Miss S and its advisor prior to the final meeting, and it says its advisor would have been expected to ask their consumer to contact their employer or scheme to find out about the in-house option prior to the final meeting.

The issue here is whether the advisor discussed the options with Miss S – this is what was required under PIA rules. While I appreciate the expectations Aviva may have placed on its advisors about discussing in-house options, the declaration signed by Miss S only evidences that she was provided with the leaflet, it doesn't tell us anything about what the advisor did to discuss the options with her.

So, from the limited evidence I've been provided with, I can't see that enough was done to draw Miss S's attention to the alternatives to taking out an FSAVC. I think more needed to be done than simply providing her with a leaflet about other options, which she might well

not have had a chance to fully investigate before opting to increase payments to the FSAVC. This means I'm not persuaded Miss S was provided with enough information, in line with the PIA rules, to enable her to make a fully informed decision about whether to take the FSAVC or join her in-house AVC.

Had the 1999 sale been compliant, and Miss S provided with the information she should have been provided with about alternative options, then I think it's more likely than not she would not have opted to take out an FSAVC. It appears that for someone in Miss S's position an in-house AVC seems to have been a better option that offered lower charges. I can't see any reason at this stage why Miss S would have opted for an FSAVC that cost more. So I'm satisfied the 1999 FSAVC plan was mis-sold to Miss S.

Because I'm not satisfied Miss S was provided with sufficient information during the 1999 sale, it follows that I don't think she would have been aware, or ought reasonably to have been aware, that she had cause for complaint about the earlier sale in 1992. I've not seen anything else that would lead me to conclude Miss S was aware of the cause for complaint for more than three years before she complained. So I'm satisfied the complaint about the 1992 sale has been made in time. As such, I've gone on to look into the merits of the 1992 sale.

In 1992, the Aviva advisor had to follow the rules set in 1988 by LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation). These rules said, amongst other things, that advisers should exercise due skill, care and diligence and deal fairly with consumers. This means having regard to any rights under occupational pension schemes and providing consumers with relevant information. So, while I wouldn't expect the advisor to know what precisely would have been offered to Miss S under her employer's in-house AVC scheme, I would expect a tied advisor to mention the generic benefits of such schemes.

Having looked at the documentation available from 1992, I can't see anything that suggests Miss S was provided with any information by the adviser about alternative options. I know that Aviva has said the alternatives were discussed, but that discussion is not documented. At this stage, given how long it's been since the advice was given, Aviva can only assume the adviser provided Miss S with the information they should have provided her with but, without this being documented, it can't know for certain that it happened. So I am placing more weight on what the documentation completed in 1992 tells me. As this doesn't mention the alternative options being discussed, I'm satisfied Miss S most likely wasn't provided with enough information in 1992 about other options.

If the advice given to Miss S in 1992 had been compliant, and she was provided with the information she should have been provided with about alternative options, then I think it's more likely than not she would not have opted to take out an FSAVC. I've considered Miss S's circumstances at the time she was first advised in 1992 to take out an FSAVC and I haven't seen anything to make me think the FSAVC plan would have been more beneficial for her – an in-house AVC seems to have been a better option that offered lower charges. I can't see any reason at this stage why Miss S would have opted for an FSAVC that cost more. So I'm satisfied the 1992 FSAVC plan was mis-sold to Miss S.

Some occupational pension schemes offered an alternative to AVCs known as added years, where additional contributions could be used to purchase additional years of service in the occupational scheme. I haven't seen anything conclusive to show whether that option was available in Miss S's occupational scheme. Nor have I seen anything that makes me safely conclude that option would have been the most beneficial for Miss S. And when Miss S brought her complaint to this Service, it was in relation to not being provided with information about the in-house AVC scheme, and not added years. So I am not considering that alternative any further here.

Putting things right

I think that if Aviva had provided enough information to Miss S in 1992 and then again in 1999, she would have most likely started making contributions to her employer's AVC scheme rather than taking a FSAVC plan.

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 Miss S'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 Miss S 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 her 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 am upholding Miss S's complaint and require Aviva Life & Pensions UK Limited to take the actions outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss S to accept or reject my decision before 24 February 2023.

Martina Ryan
Ombudsman