DRN-3474196

The complaint

Mr A's representative has complained, on his behalf, that he was unsuitably advised by Aviva Life & Pensions UK Limited to establish a Free Standing Additional Voluntary Contribution (FSAVC) policy.

What happened

In April 1994, Mr A established an FSAVC policy through Colonial Mutual (now Aviva) and then incremented his contributions in 1995.

In 1994, Mr A was 30 and had been employed as a teacher since 1989. His initial contribution was £40 pm, and the increment increased his contribution by £34 pm.

Following the complaint made by Mr A's representative in February 2021, Aviva declined to uphold the complaint, saying that its adviser would only have been able to discuss and recommend its products, but that it would have been expected to make Mr A aware of the alternative in house arrangements.

It said that it couldn't find the fact find document from 1994, but in that created in 1995, in answer to the question *"Are you aware that you can pay AVCs into the scheme?"*, Mr A had answered "yes".

Further, Aviva said, in the notes section of the fact find, it said the following:

"When advising [Mr and Mrs A] to take out an FSAVC, I asked them on 11/10/95 to investigate and compare costs and benefits of past added years and scheme AVC options available from their current pension scheme. Having had an opportunity to do this they now wish to proceed with the Colonial contracts."

Aviva said that this declaration was signed on 31 October 1995. Mr A had also confirmed at this second meeting that he wished to retire at age 55, but the adviser explained that this would be at the discretion of the scheme.

The personalised illustrations projected to both 55 and 60 said the following:

"You have 3 options to increasing your main scheme pension. You can purchase added years, pay into the scheme AVC or pay into a Free Standing AVC. You must examine all 3 options before making a choice."

Aviva concluded that it had it had recommended a suitable product for Mr A's needs and that he was made aware of the alternative in house AVC arrangements so that he could compare his options.

Whilst the sale documentation from 1994 couldn't be found, Aviva nevertheless considered that the 1995 sale evidenced that such discussions were held, and that if Mr A felt that he hadn't previously been informed of his options, he would have had the knowledge of this in 1995.

Dissatisfied with the response, the representative referred the matter to this service. One of investigators considered the complaint and thought it should be upheld. He said that, with regard to the 1994 sale, as there was no documentation to evidence that the alternative options were discussed with Mr A, he thought that this aspect should be upheld.

As to the increment in 1995, although he acknowledged what had been recorded in the sale documents, the investigator didn't think that this had gone far enough. He said that, in addition to highlighting the different options available to Mr A, the adviser would need to have discussed and recorded the generic differences between the different options. And although Mr A was directed to carry out his own investigations, and the completed form indicated that Mr A had done this, the evidence didn't support the position that Mr A had been informed, for example, that the in house AVC would have been cheaper.

As such, the investigator recommended that Aviva undertake a redress calculation to determine whether Mr A had been financially disadvantaged in terms of higher charges levied within the FSAVC policy.

Aviva disagreed, however, saying that the records from the 1995 increment, and in particular the statement relating to the adviser having asked Mr A to investigate his in house options, had been approved by Colonial Mutual's quality assurance team as being in line with the regulator's requirements at the time.

Having had the opportunity to compare the costs and benefits of the options, Mr A wished to proceed with the FSAVC policy increment. And it said that it was reasonable to assume that any information Mr A had obtained on his options would have been discussed with the adviser. The requirement upon the adviser was to explain that in house AVCs were likely to provide better value for money, but Aviva said that it hadn't seen any requirement of the adviser to record what was said or the generic differences.

By referring Mr A to his employer and then for the employer to provide details of the in house options, Aviva didn't think it would have been possible for Mr A to revert to its adviser and not have questions which he would want answering before proceeding with the increment to the FSAVC policy.

Aviva also said that, although it noted the investigator had proposed a redress calculation on the basis of Mr A instead having bought added years, it didn't think this was appropriate given that this would have been calculated as a percentage of his salary, and so would have increased in cost as his earnings also increased. The premium would have been based on affordability, and furthermore, as Mr A had indicated that he wished to retire early, added years wouldn't have met this requirement.

As agreement couldn't be reached on the matter, its been referred to me for review.

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.

Having done so, I've reached broadly the same conclusions as the investigator, and for similar reasons.

I don't think that the lack of evidence from the 1994 sale should automatically mean that the complaint should be upheld – in the absence this, I'd reach conclusions on a balance of probability as to what was more likely than not to have been the case. And in this instance, I think the 1995 increment is indicative of the likely discussion which would have taken place a year earlier.

In 1994, under the LAUTRO code of conduct which was in place at the time, Aviva needed to have regard to Mr A's right to contribute to an AVC arrangement and deal with him fairly.

But although I've noted Aviva's comments relating to the adviser's recommendation that Mr A investigate his in house options, as with the investigator I don't think this went far enough. Making Mr A aware of the generic differences and benefits of the different types of solution for enhancing his pension should have included, as Aviva has itself identified, reference to the in house AVC scheme likely being cheaper in terms of costs than the FSAVC policy.

Mr A may well, as a result of the adviser's recommendation, have looked into the in house options, but I think there's a difference between Mr A, as the pensions layman, drawing the conclusion of his own accord that there was a likely cost benefit in choosing the in house AVC route, and the adviser pointing this out to him when advising him to look into his options.

I think that the latter would have been consistent with Aviva having regard for Mr A's in house options and its requirement to deal with him fairly. And if this likely difference in costs had been brought to Mr A's attention by the adviser, I can conceive of no reason as to why this wouldn't have featured in the documentation at the time.

And so I agree with the investigator's position that the complaint should be upheld.

Putting things right

I've noted Aviva's comments about the manner of calculating whether redress is due to Mr A, but I think some confusion may have arisen here. The investigator recommended that a comparison be undertaken on the basis of the difference in charges between the in house AVC arrangement and the FSAVC policy – not on an added years basis.

And so 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 my 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 FSAVC 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 the complaint and direct Aviva Life & Pensions UK Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr A to accept or reject my decision before 26 October 2022.

Philip Miller
Ombudsman