DRN-3656081

The complaint

Miss J complains that she was provided with inappropriate advice, or insufficient information, by Aviva Life & Pensions UK Limited about making some additional pension contributions.

What happened

The advice that was provided to Miss J was from a representative of Colonial Mutual. That firm is now the responsibility of Aviva, so it is Aviva that is required to deal with this complaint. For ease, in this decision, I will refer to Aviva as the responsible business throughout. And Miss J has been assisted in making her complaint by a claims management company ("CMC"). But, again for ease, in this decision I will refer to all communication on the complaint as being from, and to, Miss J herself.

I issued a provisional decision on this complaint in July 2022. In that decision I explained why I thought the complaint should be upheld and what Aviva needed to do to put things right. Both parties have received a copy of the provisional decision but, for completeness and so those findings form part of this decision, I include some extracts from it below. In my decision I said;

> *In 1995 Miss J was aged 49 and was a teacher. She had been a member of her occupational pension scheme ("OPS") for almost 20 years. She recalls that she met with a representative of Aviva at her school in May 1995, and later in October 1995.*
>
> *Following those meetings Aviva advised Miss J that she should make additional provision for her retirement by making Free-Standing Additional Voluntary Contributions (FSAVCs). It noted that it had suggested that Miss J could alternatively make Additional Voluntary Contributions (AVCs) to the OPS, or alternatively purchase added years benefits from the scheme. But it noted that, having compared the costs and benefits of the various options, Miss J wished to proceed with the FSAVC contract.*
>
> *Miss J started paying FSAVCs in December 1995. She stopped making the contributions in May 1997 when she said her financial situation was not as good as it had been in the past. Although the option was available to Miss J, she didn't restart her contributions before she retired.*
>
> *The advisor that met with Miss J was what was known as a "tied" advisor. That meant they could only recommend products offered by Aviva. They couldn't actively recommend any other products from any other product providers including the in-house options (AVCs or added years) offered by the OPS.*
>
> *However, a tied adviser was required to follow rules set in 1988 by the regulator at that time - LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation). The LAUTRO Code said advisers should maintain 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 that tied advisers should have known that 'in-house' AVC options would most likely be available to consumers like Miss J. And in addition to highlighting the benefits of the FSAVC, a tied advisor needed to mention the generic benefits of the 'in-house options', including that:

- *Money purchase 'in house' AVCs could potentially offer lower charges than the FSAVCs*
- *'Added years' might be 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.*

The advice that Miss J was given by Aviva was provided more than 25 years ago. So it might not be surprising if some of the documentation from the time is no longer available. I've noted that an internal checklist from the time suggests that a fact find document should have been produced following the meetings with Miss J. And that requirement is also noted on the OPS illustration that was provided to Miss J. Aviva hasn't provided a copy of any fact find from the time, so I don't know whether one was produced, or if it is simply no longer available. But it does mean that I can only base my decision on the information that has now been provided.

Miss J first met with Aviva in May 1995. It seems that at, or shortly after, that meeting Miss J was provided with a personalised illustration of the benefits she had accrued under the OPS. The document also says the following;

> *"You have three options for increasing your main scheme pension. You can purchase Past Added Years, pay into a Scheme AVC or pay into a Free Standing AVC. You MUST examine all three options before making a choice."*

And following a subsequent meeting, in October of that year, she was provided with a document titled "Your Financial Planning Summary". Within that document was a section relating to retirement planning, that contained the following paragraph;

> *"When advising you to take out an FSAVC, I asked you on 02/10/95 to investigate and compare the costs and benefits of the Past Added Years and Scheme AVC options available from your current pension scheme. Having had an opportunity to do this, you now wish to proceed with the Colonial contract."*

So I don't think it would be unreasonable to conclude that Aviva made Miss J aware that she had a number of options available to her in order to make her additional pension contributions. But I'm not currently persuaded that the information above is sufficient to conclude that Aviva met its regulatory responsibilities.

Generally it would be unlikely that a tied advisor would have access to the information that would be required in order to provide a detailed comparison between an AVC and a FSAVC option. So that is why the regulator would generally consider the provision of generic information to be sufficient. But I don't think that Aviva has gone far enough in the provision of that information here..

Miss J recalls that the initial meeting took place at the school where she worked. The two-page illustration provided to Miss J, showing her OPS benefits, contained some quite detailed information about how the OPS operated and how its benefits were structured. And I've noted that the application form Miss J completed for the FSAVC noted a "Special Connection" as being "NAS/UWT Special Series 1". So from that I assume the FSAVC plan offered some sort of special terms for members of those teaching trade unions.

So I think it would be reasonable to conclude that the advisor from Aviva might have had a better than normal understanding of the structure and charges of the AVC scheme offered by the OPS. And I think that, more detailed, information is something that should have been shared with Miss J before she was asked to accept Aviva's recommendation and take the FSAVC contract.

But even if a different interpretation on that specific point was possible, as I noted earlier I would in any case have expected to see some evidence that Miss J was made aware that an AVC scheme would most likely have lower charges than a comparative FSAVC product. I cannot conclude, from the evidence Aviva has provided, that those sorts of discussions took place. Although Miss J was directed towards the OPS administrator to discover further information about the in-house options, I think it quite likely she might have found it difficult to generate any meaningful comparison between the costs of the two options.

Miss J had been a teacher for around 20 years and had around 10 years left to retirement. I haven't seen anything that makes me think she had any intention of leaving her profession, and so needing the flexibility or portability a FSAVC product might provide. I think that, had Miss J been given all the required information from the outset, it is likely she would have opted to take an in-house AVC option, as it likely offered her substantially the same product at most likely a cheaper cost.

So I currently think that Miss J's complaint should be upheld. I intend to direct Aviva to put things right as set out below.

I invited both parties to provide us with any further comments or evidence in response to my provisional decision. Miss J said that she agreed with my provisional decision and had nothing further to add. Aviva didn't agree with my findings and provided some additional comments. Although I am only summarising what Aviva has said here I want to stress that I have read, and carefully considered, Aviva's entire submission.

Aviva says that the CMC that has helped Miss J with her complaint is of the opinion that, if consumers were made aware of the lower charges on an AVC, they would never have taken a FSAVC – or in other words that all FSAVCs were mis-sold. But Aviva wanted to stress that if that view had been shared by the regulator then it would have required all sales to be reviewed rather than just some for specific schemes. Instead it says the regulator simply updated its guidance. Aviva says that where it has insufficient evidence to show that it met its regulatory responsibilities it upholds complaints.

Aviva pointed out that its advisor was unable to recommend products (such as an AVC) from another provider. But they did need to provide generic information about the AVC scheme in line with the regulator's guidance. It says that product providers were often invited by Trades Unions to give talks about insurance products including FSAVCs. But that doesn't mean they would have any greater knowledge about the corresponding AVC schemes.

Aviva says the illustration confirms that Miss J was made aware of the in-house AVC scheme and asked to compare the costs and benefits. It says the in-house information would have told Miss J that the main selling point for AVCs over FSAVCs was lower charges. So it thinks it is reasonable to conclude that the costs would have been discussed and so its advisor met their regulatory responsibilities.

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.

I've thought carefully about what Aviva has said in response to my provisional decision. But having done so I am not persuaded that I should alter my provisional conclusions. I would, however, like to comment further on the matters that Aviva has raised.

Aviva has provided me with an extract from the regulator's rules relating to tied advisors. I do note that guidance wasn't issued until May 1996, whereas Miss J was sold the FSAVC in October 1995. But, since I consider those regulations to have simply been a restatement of the regulations previously in place, I accept Aviva's conclusions that they should reasonably form the basis of my decision.

The 1996 regulations provided some further clarity to those I set out in my provisional decision from the 1988 LAUTRO code. The 1996 regulations said that tied advisors should not recommend a FSAVC until they have;

- *Drawn the client's attention to the in-scheme alternative*
- *Discussed the differences between the two routes in generic terms (taking account, among other things, of the features described in this article)*
- *Directed the client to his employer, or to the scheme trustees, for more information on the in-scheme option*

But the article then went on to say that

> *"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."*

I think that statement supports the argument made by the CMC - that Aviva has said is contrary to the intentions of the regulator. I have seen nothing to persuade me that Miss J's circumstances were such that other features of the FSAVC would make it more attractive to her despite the fact that the charges she would need to pay would be greater, and hence the value of her pension savings would be lower.

I think that generic difference between the two schemes – that the AVC would offer lower charges – should have been known to the advisor without any specific knowledge of the AVC scheme. So I don't think it was sufficient for Miss J to simply be directed to the OPS to try to gather that information for herself. I think that, had Miss J been given all the required information from the outset, it is likely she would have opted to take an in-house AVC option, as it likely offered her substantially the same product at most likely a cheaper cost.

So I think that Miss J's complaint should be upheld, and I direct Aviva to put things right as set out below.

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 that date 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 a pension plan for Miss J. 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 a pension plan isn't possible or has protection or allowance implications, it should be paid directly to Miss J 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 – assumed 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 Miss J'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 Miss J to accept or reject my decision before 15 September 2022.

Paul Reilly
Ombudsman