DRN-3707978

Financial Ombudsman Service

The complaint

Mrs C says Aviva Life & Pensions UK Limited (Aviva Life), trading as Colonial Mutual, gave her unsuitable advice in 1992 to take out a Free Standing Additional Voluntary Contributions (FSAVC) plan instead of informing her about the option to buy added years from her occupational pension scheme (OPS).

Mrs C is represented by Greg Vaughan Financial Services Ltd (GVFS).

Mr C received similar advice from Aviva Life at the same time as Mrs C. He was also in the same profession. A separate complaint has been set-up to consider the specific merits of his case. Inevitably there is some read-across between the two.

What happened

In December 1992 Mrs C met Aviva Life to discuss her pension provision. At the time she was a member of a public sector OPS. A fact find was completed with information about her circumstances, requirements and risk profile. It assessed her needs and made a recommendation based on suitable Aviva products.

Aviva Life recommended Mrs C took out an FSAVC policy. She agreed and the plan began in January 1993, with non-indexed contributions of £35.00 per month. The last contribution she made was in May 2002 and the policy was made paid up.

In January 2021 GVFS raised a number of concerns about what had happened to Mrs C in 1992. At the heart of that complaint was that she hadn't be properly informed about the options open to her through her employer for making additional contributions to her pension provision.

Aviva Life noted that as company representatives, its advisers were only authorised to discuss and recommend its own products. But it acknowledged they were expected to check customers knew about the alternative options offered by any in-house scheme. It wasn't able to confirm this had happened and it upheld her mis-selling complaint.

Aviva Life went on to calculate the financial loss to Mrs C. It said had it informed her about her options she would've most likely opted for the in-house added voluntary contributions (AVC) plan, which would've been cheaper than its FSAVC product.

GVFS disagreed with the proposed method for calculating redress. It considered that given Mrs C's circumstances at the time, she'd have chosen to buy added years from her scheme. Aviva Life thought its offer was correct. And so Mrs C's case was brought to this Service.

The last Investigator to review Mrs C's complaint upheld it. Amongst other matters, he thought the initial cost to her of added years was cheaper than the FSAVC and that given her career situation this option would've been more suitable.

Aviva Life disagreed with the Investigator. It noted that at the time the sale of money purchase plans was considered to be a more affordable way of maximising retirement

incomes. It noted Mrs C had chosen not to index her FSAVC contributions and that the alternative of buying added years would've led to increasing and higher costs over time.

As both parties couldn't agree with the Investigator's view on redress, Mrs C's complaint has been passed to me to review afresh and to provide 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.

Where there's conflicting information about what happened and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I've not provided a detailed response to all the points raised in this case. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I'm upholding Mrs C's complaint. I'll explain why.

Aviva Life has already accepted based on the available evidence Mrs C was mis-sold her FSAVC in 1992. What I need to consider is whether it's more likely than not if it had done what it should've she would've opted to buy added years from her OPS rather than contribute to an AVC. I must do so recognising over 30 years have passed since the events in question and the information available is limited. And I must also guard against hindsight.

In considering Mrs C's options there are a range of factors that I think are relevant. I need to think about the relative cost of the alternatives and the features provided; her age and family status; her job prospects and likely earnings; flexibility and affordability; and her attitude to risk.

At the time of the advice in 1992, Aviva Life recorded that Mrs C's priority was retirement income. She was 29 years old and earning around £19,000 a year. She already had seven years reckonable service. The Normal Retirement Age (NRA) of her OPS was 60, which provided for a maximum of 40 qualifying years. So, she had a potential shortfall of two years in terms of being able to achieve a maximum pension, assuming she remained in the profession. Mrs C was recorded as having a cautious attitude to risk.

Aviva Life's arguments aren't without merit. It's true to say that in the 1990's investment returns were better than they have been recently. Money purchase arrangements for pensions were considered as offering a good way of maximising income in retirement. I also accept that the cost of buying added years would've been linked to Mrs C's salary and so would've cost more over time. It was also less flexible than the alternatives in some respects, for example in terms of stopping payments.

However, on balance, I think had Mrs C been in possession of the information Aviva Life was obliged to provide, she'd have investigated buying added years from her employer and ultimately would've done so. I say this because:

- Aviva Life has calculated it would've been cheaper initially for her to have bought added years than the premiums for the plan it recommended. And while the cost of such would've exceeded the money purchase arrangement after several years, given her profession and reasonable expectation for income growth, it seems more likely

than not the cost of added years in terms of her disposable income would've been falling, and certainly affordable.

- There's nothing to indicate Mrs C was interested in anything other than providing for her income in retirement. And the limited information we have suggests she had a cautious risk appetite. Buying added years presented no risk to her, whereas a money purchase arrangement required the exposure of her funds to some risk. So, I think the former was more compatible with her outlook.
- At the time of the advice, Mrs C was already established in a profession with seven years of service, a good career structure and a reasonable prospect of progression. This is suggestive of someone less likely to be an early leaver or someone who changes jobs regularly, where a money purchase arrangement might provide useful flexibility.

In addition, I think Mrs C's defined benefit scheme provided a broader range of benefits than either the AVC and FSAVC proposed, and these would've applied to any added years she bought. For example, the pension entitlement accrued was uprated each year prior to retirement whether she was an active member or not member. And it also enjoyed uprating after retirement. Her OPS provided benefits for her family, as well as tax-free lump sum provision and ill-health enhancements.

And my overall conclusion here is further strengthened when I consider the position of Mrs and Mr C's household in the round. For example, it makes arguments around affordability even more persuasive.

Given the, albeit limited, information we have about Mrs C's circumstances, objective and risk attitude, I've concluded she was a credible candidate for buying added years from her OPS. I say this because I think it's more likely than not this option, which provided for a risk free, affordable approach to topping up her guaranteed benefits, would've been a more attractive option than an AVC or FSAVC policy.

Putting things right

Mrs C needs to be put back into the position she would've been in now, or as close as reasonably possible, had it not been for the failings of Aviva Life & Pensions UK Limited. I consider she would've bought additional years from her DB scheme.

On 2 August 2022, the FCA launched a consultation on new DB transfer redress guidance and set out its proposals in a consultation document - https://www.fca.org.uk/publication/consultation/cp22-15.pdf.

In this consultation, the FCA said that it considers that the current redress methodology in Finalised Guidance (FG) 17/9 (Guidance for firms on how to calculate redress for unsuitable defined benefit pension transfers) remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.

A policy statement was published on 28 November 2022 which set out the new rules and guidance-https://www.fca.org.uk/publication/policy/ps22-13.pdf. The new rules will come into effect on 1 April 2023.

The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.

We’ve previously asked Mrs C whether she preferred any redress to be calculated now in line with current guidance or wait for the new guidance /rules to come into effect. She would like her complaint to be settled in line with new guidance /rules. I consider it’s fair that Aviva Life & Pensions UK Limited calculates Mrs C’s redress in line with new guidance and rules when they come into effect.

So, Aviva Life & Pensions UK Limited should undertake a redress calculation in line with the regulator’s FSAVC review methodology on an added years basis. This involves using, in part, the Pension Review methodology as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers. It must undertake the calculation in line with the updated methodology as soon as any new rules and/or guidance come into effect (rather than to calculate and pay any due compensation now in line with FG17/9).

In accordance with the regulator’s expectations, Aviva Life & Pensions UK Limited will need to ensure the calculation is undertaken or submitted to an appropriate provider promptly once any new guidance/rules come into effect.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mrs C’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 Mrs C as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid. 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.

The compensation amount must where possible be paid to Mrs C within 90 days of the date any changes to DB transfer redress guidance or new rules come into effect and Aviva Life & Pensions UK Limited has received notification of her acceptance of my decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date any changes to DB transfer redress guidance or new rules come into effect to the date of settlement for any time, in excess of 90 days, that it takes Aviva Life to pay Mrs C.

Income tax may be payable on any interest paid. If Aviva Life & Pensions UK Limited deducts income tax from the interest, it should tell Mrs C how much has been taken off. Aviva Life should give Mrs C a tax deduction certificate in respect of interest if she asks for one, so she can reclaim the tax on interest from HM Revenue & Customs if appropriate.

My final decision

For the reasons I’ve already set out, I’m upholding Mrs C’s complaint. I require Aviva Life & Pensions UK Limited to carry out a loss assessment and to put things right in the way I’ve directed.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs C to accept or reject my decision before 22 February 2023.
Kevin Williamson
Ombudsman