

The complaint

Mrs H has complained that Aviva Life & Pensions UK Limited ("Aviva") mis-sold a Free Standing Additional Voluntary Contribution ("FSAVC") plan which led to her suffering a financial loss.

Mrs H is represented in this complaint by a claims management company ("CMC").

What happened

In September 1992, Mrs H was employed as a teacher and a member of the Teachers' Pension Scheme ("TPS"). Aviva advised her to start a FSAVC plan to increase her retirement provision. The plan started in December 1992 with a monthly contribution of £40.00. Aviva advised Mrs H to increase the monthly contribution to £73.33 from September 1993 and then to £164.24 from March 1998. She continued paying monthly contributions until August 2009, following which the plan was made paid up. Aviva recorded Mrs H's marital status as single each time it advised her.

This complaint

The CMC, on behalf of Mrs H, complained to Aviva about the suitability of the advice in 1992 to start the FSAVC plan and subsequent advice in 1993 and 1998 to increase contributions.

Aviva didn't uphold this complaint. It stated it was satisfied it had provided suitable advice that met Mrs H's needs. And that it had made her aware of the alternative in-house AVC schemes and told her to obtain details from the TPS so that she could compare this to the FSAVC plan.

The CMC didn't accept the final response provided by Aviva and referred the matter to this service. Our investigator concluded that the advice provided by Aviva in 1992, 1993 and 1998 was unsuitable and this complaint should therefore be upheld. To put things right, he recommended that Aviva carry out a loss assessment in accordance with the regulator's FSAVC review guidance based on a 'charges only' comparison and on the basis that Mrs H would be a 20% taxpayer in retirement. And if this comparison showed a loss that compensation be paid to her.

The CMC provided its response to our investigator's assessment. It repeated its previous comments that Aviva's advice to Mrs H in 1992, 1993 and 1998 was unsuitable and agreed that she should be compensated in respect of this. It stated that our investigator didn't consider whether redress should be calculated on the basis that Mrs H purchased Past Added Years ("PAYs") rather than a 'charges only' comparison. In response, our investigator stated that, based on the information provided, he was unable to reach the opinion that Mrs H would've opted for PAYs rather than an in-house AVC plan had she been placed into an informed position.

Following our investigator's assessment, Aviva agreed to carry out a 'charges only' loss assessment in respect of the 1992 and 1993 advice. However, despite multiple chasers sent by our investigator, Aviva has, as at the date of this final decision, failed to provide its

response regarding whether it would also be prepared to carry out a 'charges only' loss assessment in respect of the 1998 advice. Since Aviva failed to respond by the latest deadline stipulated by our investigator, this complaint has 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.

When considering what's fair and reasonable, and in accordance with the Financial Services and Markets Act 2000 and the Dispute Resolution section in the FCA's handbook, I need to take into account relevant: law and regulations; regulators' rules, guidance and standards, and codes of practice; and, where appropriate, what I consider to have been good industry practice at the time

Aviva previously agreed to carry out a 'charges only' loss assessment in respect of the advice it provided to Mrs H in 1992 and 1993. So it's not necessary for me to consider the suitability of that advice. All that remains is for me to consider the suitability of the advice it provided to Mrs H in 1998 and the basis of redress. I've considered these points under separate headings below.

1998 advice

In 1996, the Personal Investment Authority ("PIA") published its Regulatory Update in respect of the sale of AVCs and FSAVCs ("RU20"). The advice here, in 1998, postdates that update. So at the time of the Aviva's advice, in accordance with RU20, it was required to:

- draw Mrs H's attention to the in-house AVC scheme;
- discuss the differences between the FSAVC plan and the in-house AVC schemes in generic terms, including the likely lower charges of in-house AVC schemes; and
- direct Mrs H to her employer or occupational pension scheme trustees for further information about the in-house AVC scheme

In responding to this complaint, Aviva stated that it couldn't locate the 1998 sales file, but was able to find and provide a copy of the illustration, key features leaflet, *'It's Your Choice'* retirement brochure and declaration signed by Mrs H. I've reviewed these documents. This evidence proves that Mrs H was made aware of the availability of in-house AVC schemes. However, there's no reference about the likely lower charges of in-house AVC schemes or that Mrs H should refer to her employer or occupational pension scheme trustees for further information.

Based on what I've seen, I'm not persuaded Mrs H was made adequately aware of the difference in charging structures between the FSAVC and in-house AVC options. This is a key point. As such, I don't think she was given enough information during the advice process in 1998 to understand the important differences between the schemes. And in my view if fully informed of the likely cost benefit of the in-house AVC option, Mrs H would have chosen this. So, in addition to the 1992 and 1993 advice, I think it's fair and reasonable that Aviva carry out a loss assessment in respect of the 1998 advice too and pay any redress due to Mrs H.

Basis of redress

The CMC stated that our investigator didn't consider whether redress should be calculated

on the basis that Mrs H purchased PAYs rather than a 'charges only' comparison. In response, our investigator stated that based on the information provided, he was unable to reach the opinion that Mrs H would've opted for PAYs rather than an in-house AVC plan.

Having considered the matter, I've reached the same conclusion as our investigator. I'll explain why. I've seen nothing to make me think PAYs would've appealed to Mrs H more than the in-house AVC plan. On realistic assumptions of future growth when the advice was given in the 1990s, the benefits from the in-house AVC at retirement would've likely appeared greater than those benefits from PAYs. At that time PAYs would've looked like the more expensive option. In addition, PAYs come with spousal benefits which Mrs H would've have been paying for despite the fact her marital status was recorded as single when she was advised. Under the in-house AVC she would've have been able to secure an annuity on a single life basis, maximising her income compared to income on a joint life basis. So, overall, I'm not convinced that redress should be on the basis Mrs H would've chosen to buy PAYs.

Putting things right

Aviva has already agreed to carry out a 'charges only' loss assessment in respect of the advice it provided to Mrs H in 1992 and 1993. For the avoidance of doubt, I direct it to do this. In addition, I direct it to carry out a 'charges only' loss assessment in respect of the advice it provided to Mrs H in 1998. The redress calculation must be carried out 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 Mrs H'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 plan isn't possible or has protection or allowance implications, it should be paid directly to Mrs H as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid in retirement. Of this amount, 25% of the loss would be tax-free and 75% would have been taxed according to her likely income tax rate in retirement – which I've decided is 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 must redress Mrs H as I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs H to accept or reject my decision before 24 November 2022.

Clint Penfold
Ombudsman