DRN-3781938

The complaint

Mr G complains that, in 1993, Aviva Life & Pensions UK Limited failed to provide him with appropriate advice, or information, about making additional contributions to his occupational pension.

What happened

Mr G has been assisted in making his complaint by a claims management company. But in this decision, for ease, I will generally refer to all communication as having been with, and from, Mr G himself.

I issued a provisional decision on this complaint in September 2022. In that decision I explained why I thought the complaint should be upheld. 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;

> *The advice that was provided to Mr G in 1993 was from a firm called Colonial Mutual Life. That firm is now the responsibility of Aviva, and so it is Aviva that is required dealt with this complaint. In this decision I will refer to the advising business as Aviva throughout.*
>
> *Mr G is a teacher, and in 1993 was a member of the teachers' occupational pension scheme ("OPS"). He met with Aviva to discuss making some additional contributions to his pension. Mr G's wife, Mrs G, was also present at the meeting. She was also a teacher and received similar advice from Aviva at that time. I am dealing with Mrs G's complaint separately, but given the similarity of their circumstances, and that a single recommendation was made to them both, it is unsurprising that my conclusions on the two complaints are the same. I make no apology for the similarities in my two decisions.*
>
> *Aviva advised Mr G that he should start to make free-standing additional voluntary contributions (FSAVCs) to a personal pension plan. Mr G started those contributions in October 1993 before increasing his monthly payment around a year later, and again in 2003. Aviva hasn't provided us with copies of the advice that was given to Mr G, but it has provided details of the background information it gathered at the time. That information showed that Mr G was aged 28 and had been teaching for around four years.*
>
> *Aviva has been unable to safely conclude that Mr G was provided with sufficient information to ensure it met its regulatory responsibilities at the time of the advice. In particular it hasn't been able to demonstrate that Mr G was given sufficient information, or directed to seek additional information, about the additional contribution options offered by the OPS – in particular, paying additional voluntary contributions (AVCs) to the scheme or purchasing added years benefits.*
>
> *So Aviva agreed to uphold Mr G's complaint. It considered his circumstances at the time and concluded it was unlikely that Mr G would have chosen to purchase added*

years benefits. So it offered Mr G some compensation, in line with the regulator's guidance, to reflect the higher charges he would have paid by taking the FSAVC option. Mr G didn't accept that offer, as he thought his circumstances were such that he would have chosen the added years option. So he brought his complaint to us.

The advisor that met with Mr G 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 Mr G. 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.*

As I said earlier, Aviva has accepted that it is unable to show that its advisor provided the information that was necessary about the options available to Mr G through the OPS. It is on that basis that Aviva has upheld the complaint. So, for the same reasons, I consider it reasonable to conclude that it is unlikely that Mr G was made aware of the availability of the added years option, or directed to explore the costs of purchasing additional retirement benefits in that way.

The teachers' pension scheme allowed members to accrue a maximum of 40 years' service. If Mr G worked until his normal retirement age he would have only been able to accrue around 36 years' service. So it would have been possible for him to purchase added years benefits if he had chosen to do so. But that alone doesn't mean that I should conclude that Mr G would have chosen this option. I also need to consider whether added years would have been more attractive for Mr G than paying AVCs.

At the time of the advice Mr G had been teaching for almost four years. He says that he was committed to the profession and had already changed schools in order to further his career. I haven't seen anything that would make me think that Mr G expected to leave teaching at any stage of his life, or that he didn't think he would make good progress through promotions. So I'm persuaded that Mr G would have expected the majority, if not all, of his retirement provision to be provided by the OPS.

Mr G agreed to make monthly contributions to the FSAVC plan amounting to £420 per annum. And as I said earlier, those contributions were increased the following year, and in 2003. So I have no reason to conclude that Mr G found the starting level of contributions to be anything other than affordable, or that he expected he might find them difficult to pay in the future. He, and his wife, had stable employment and owned their own home, albeit they were paying a mortgage. And as I said above Mr G had a good expectation of increases to his salary, in excess of normal cost of living rises, in the future.

Mr G has provided us with details of the costs of taking an added years contract in 1993. At that time, based on the purchase of the maximum four added years benefit, and taking account of his salary, the annual cost of the added years benefit would be less than what he had committed to pay into the FSAVC plan. So that doesn't suggest he would have faced any issues, at that time, affording the payments he would need to make.

But the costs of purchasing added years benefits are calculated based on a percentage of salary. So as Mr G's salary increased, as he expected it to, the costs of purchasing the added years benefits would also rise. But I'm not persuaded that would have dissuaded Mr G from making this choice.

In order for the cost of purchasing the added years benefit to increase, Mr G would need to have enjoyed a rise in his income. Only a relatively small part of that salary increase would have been taken by the increase in his pension contribution to fund the added years benefits. On balance I don't think Mr G would have found that unattractive. And, as I said earlier, Mr G increased the amounts he was paying to his FSAVC plan a year later, and in 2003. That also suggests, although admittedly with the benefit of hindsight, that Mr G might have had sufficient disposal income to absorb any additional added years costs.

Aviva has noted that Mr G didn't apply any automatic escalation to his FSAVC payments when he first took out the plan. It suggests that indicates that Mr G might not have found the likely increases to the cost of the added years benefits to be attractive. But I don't think I can reach the same conclusion. The increases to the added years costs would only occur when Mr G benefitted from an increase to his salary - whereas an automatic escalation to the FSAVC payment would apply regardless of any changes to Mr G's salary. Effectively he might have faced a fall in his disposable income as a result of an automatic escalation being applied.

Mr G, and his wife, appeared keen to start a family in the following years. Whilst I accept that, in the short term, that might have seen them face a reduction in their disposable income, I haven't seen anything to make me think that any changes would be of a longer-term nature. Mr G's wife appears to have been equally committed to her career.

So the additional protection benefits offered by added years benefits might have been very attractive to Mr G. Should he need to cease work due to ill-health, his *ultimate pension would take the added years into account. And of course his ultimate pension benefits would have a direct correlation to any salary increases that he had enjoyed over his working life. A salary that he had a reasonable expectation of being far higher than he received at the time of the advice.*

Aviva's paperwork from the time suggested that Mr G had indicated that he wanted to retire at age 55. And on that basis Aviva suggests that the FSAVC (or even AVC) option might have been a better fit since those benefits wouldn't have been impacted in the same way as added years by that early retirement. I have thought carefully about this part of the evidence.

Mr G says that he had no firm plans to retire at 55. He had simply answered a question posed by Aviva asking whether he would find retiring early to be attractive. I think most consumers in that situation would have answered in the affirmative. But that time was more than 25 years away – I haven't seen anything that makes me think Mr G, or his wife, had any firm plans that would support his answer. And, whilst again with the benefit of hindsight, Mr G has pointed out that he continues to work, and enjoy his career, well past the selected retirement age of 55.

I think it would have been generally accepted that teachers were able to retire before age 60. Doing so would mean however that they would face an actuarial reduction in the value of their pension to reflect the fact that it would be paid sooner, and for a longer period. But it could be argued that a similar loss of value might be faced in FSAVC or AVC savings. Those savings would need to be taken at the same time as the main occupational pension. And so would miss out on a number of years of investment growth. Any annuity the AVC savings would be used to purchase would also face similar reductions in value to reflect the longer period for which it would be paid.

So, on balance, had he been given all the appropriate information and guidance, I currently think that Mr G would most likely have chosen to make added years contributions rather than taking the FSAVC plan that Aviva recommended to him. So I think that Aviva now needs to assess whether Mr G has lost out as a result, and if so to pay him compensation.

I invited both parties to provide us with any further comments or evidence in response to my provisional decision. Mr G has said that he agrees with my findings and has nothing further to add. Aviva doesn't agree with my findings and has provided some additional comments. Although I am only summarising here what Aviva has said, I want to confirm that I have read, and carefully considered, the entirety of its response.

Aviva says that it understands that the applicable regulations when the advice was provided in 1993 didn't place an obligation on its advisor to discuss or provide guidance on added years availability or potential costs. But the advisor did have to point out that an in-house AVC arrangement was available. Since it cannot demonstrate that was done, it decided to uphold the original complaint.

Aviva says that means that it is reasonable to conclude that Mr G would only have found out about added years from his employer. And it says that the following year, when he increased his FSAVC contributions, Mr G confirmed he was aware of the in-house AVC scheme. So Aviva thinks that Mr G should also have been made aware of the added years option at that time. Since he didn't change his pension contributions, Aviva thinks it likely that Mr G would have been unlikely to choose added years in 1993.

Aviva says that its fact find is a reasonable reflection of Mr G's intention to retire at age 55. It says that was the reason he agreed to make additional pension contributions and so that suggests it was more than just an attractive possibility.

Aviva notes that purchasing added years would have initially cost Mr G around £40 per month. It says that in 1993 Mr G declined its recommendation to take family protection cover at a cost of around £11 per month as it was too expensive based on his budget. So it doesn't think that the cost of the added years benefits would have been affordable for Mr G.

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 the additional comments that have been made by Aviva in response to my provisional decision. Those comments haven't led me to conclude that I should change the provisional findings that I reached. But I will comment further on the matters that Aviva has raised.

I set out in my provisional decision the specific regulations that were applicable in 1993, and my interpretation of what that meant in relation to the advice given to Mr G. I don't agree that Aviva's responsibilities were solely related to the in-house AVC scheme. I think those responsibilities equally applied to all the contribution options that were open to Mr G.

But in saying that I am not suggesting that Aviva needed to provide Mr G with any advice, or even information about the structure of the added years option. That might be further than the knowledge or understanding of its advisor needed to go. But Aviva did need to ensure that Mr G was directed to make sufficient enquiries of his own so that he could determine what might be the right course of action to take.

Aviva has already agreed that it fell short of that requirement in respect of the AVC options when it gave Mr G advice in 1993. And so that would lead to a reasonable conclusion that Aviva also failed to direct Mr G towards gathering information about the other in-house options that were available, such as the added years option.

I have looked closely at the application form that was completed the following year when Mr G increased his payments to his FSAVC. It seems likely to me that the form that was completed was populated by Aviva, rather than Mr G himself. And it doesn't seem that, when initially upholding Mr G's complaint, Aviva thought that the advice given in 1994 was sufficient to correct any failings from the year before and so restrict its liability. So on balance I cannot be sufficiently confident that any information Mr G was given in 1994 was sufficient to make him aware of all the in-house options available to him, or even that he should make further enquiries of his own. Even if the application form was a full representation of the discussions held with Mr G, it simply indicated that, at that time, he was aware that he could pay AVC's to his occupational scheme.

There is no further record of the meeting that Aviva held with Mr G in 1993 other than the fact find that suggests an aspiration to retire at age 55. But that same aspiration was used as the justification for the recommendation of the FSAVC plan. Alternatively Mr G has provided his testimony about how that retirement age was derived. Whilst I appreciate that the discussion took place many years ago, I don't think I should simply discount his recollections. So I'm not persuaded that I have sufficient evidence to decide that, in 1993, Mr G had any firm plans that would have led to a conclusion that retirement at age 55 was needed or even likely.

As I said in my provisional decision the cost of the added years option was less than Mr G had agreed to pay to his FSAVC each month. And of course the added years costs would have been paid instead of the payments to his FSAVC, rather than in addition to them. So I cannot agree with Aviva that Mr G's decision to decline the family protection cover as it was too expensive based on his budget would give any reasonable grounds to conclude that Mr G would have considered the added years costs to be unaffordable. He had already agreed to make additional pension contributions in excess of that cost.

So on balance, I still think that Mr G would most likely have chosen to make added years contributions, had he been given all the appropriate information and guidance, rather than taking the FSAVC plan that Aviva recommended to him. So I think that Aviva now needs to assess whether Mr G has lost out as a result, and if so to pay him compensation.

Putting things right

I have made Mr G aware that the FCA is currently considering revisions to some of its guidance than might affect the compensation that Aviva needs to pay to him. But Mr G has agreed that he is content for Aviva to proceed with its calculations under the current methodology. And the FCA considers that its current methodology will still provide a fair outcome to compensate consumers in circumstances such as these.

I think that, had Aviva provided Mr G with appropriate advice and information, he would have chosen to use his additional pension contributions to purchase added years benefits (to the maximum allowed by his OPS) instead of taking out a FSAVC plan. A fair and reasonable outcome would be for Aviva to put Mr G, as far as possible, into the position he would now be in but for the unsuitable advice.

Aviva 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.

This calculation should be carried out as at the date of my final decision, and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr G's acceptance of the decision.

If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr G'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 Aviva is unable to pay the total amount into Mr G's pension plan, it should pay that amount direct to him. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the total amount should be reduced to notionally allow for any income tax that would otherwise have been paid.

The notional allowance should be calculated using Mr G's expected marginal rate of tax at his selected retirement age. I think that it's reasonable to assume that Mr G is likely to be a basic rate taxpayer when he retires, so the reduction would equal 20%. However, as Mr G would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation, resulting in an overall reduction of 15%.

Where I consider that total fair compensation requires payment of an amount that might exceed £160,000, I may recommend that the business pays the balance.

determination and money award: I require Aviva to pay Mr G compensation as set out above, up to a maximum of £160,000.

The compensation resulting from the loss assessment must where possible be paid to Mr G within 90 days of the date Aviva receives notification of his acceptance of my final decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes Aviva to pay Mr G this compensation.

recommendation: If the amount produced by the calculation of fair compensation exceeds £160,000, I also recommend that Aviva pays Mr G the balance. I further recommend interest to be added to this balance at the rate of 8% per year simple for any time, in excess of 90 days, that it takes Aviva to pay Mr G from the date it receives notification of his acceptance of the decision, as set out above.

If Mr G accepts my determination, the money award is binding on Aviva. My recommendation is not binding on Aviva. Further, it's unlikely that Mr G can accept my determination and go to court to ask for the balance of the compensation owing to him after the money award has been paid. Mr G may want to consider getting independent legal advice before deciding whether to accept this decision.

My final decision

My final decision is that I uphold Mr G'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 Mr G to accept or reject my decision before 29 November 2022.

Paul Reilly
Ombudsman