DRN-3787342

The complaint

Mr H complains he was given unsuitable advice by Colonial Mutual, now Aviva Life & Pensions UK Limited (Aviva), in 1992 and 1998 about a Free Standing Additional Voluntary Contributions (FSAVC) policy.

What happened

I issued a provisional decision on 20 October 2022. I've recapped here what I said about what had happened and my provisional findings.

'*In October 1992 Mr H was advised to take out a FSAVC policy. At the time he was 28 and a teacher. The FSAVC policy commenced in November 1992. Mr H paid the premiums of £35 pm until August 1994 when he asked for the premiums to be frozen. After a year the policy was made paid up.*

In March 1998 Mr H had further advice from a different Colonial Mutual adviser who recommended that Mr H recommence payments to the FSAVC. From April 1998 Mr H paid premiums of £32 pm until June 2005 when the policy was again made paid up.

I understand that Mr H saw a social media advert in January 2021 which raised some concerns. Mr H complained, through his representative, to Aviva in February 2021 that he'd been given unsuitable advice in 1992 and 1998.

Aviva said the complaint about the 1992 advice had been made too late. Aviva looked into, but didn't uphold, the complaint about the advice given in 1998.

The complaint was referred to us. Our investigator issued her view on 12 August 2022. She agreed the complaint about the October 1992 advice had been made too late. But Aviva had consented to us dealing with the later advice and she upheld that complaint.

Mr H's representative didn't agree the complaint about the 1992 advice had been made too late. The representative said, if the 1998 sale was non compliant and the adviser hadn't done enough, that further advice wouldn't have made Mr H aware he had cause for complaint about the earlier advice. His complaint wasn't that he hadn't been made aware of alternative products but that the FSAVC wasn't suitable for him. There was nothing in the 1998 file to draw to Mr H's attention to the possibility that the FSAVC had been mis sold in 1992. The representative queried why Mr H would've increased his payments to a product knowing it had been previously mis sold.

The representative said that the 1998 sale was after Regulatory Update 20 (RU20) which made it clear that discussion - rather than just the provision of information - was required. That discussion needed to be around the critical issue of the difference in charges and the effect that would have on retirement provision. There was very little recorded about what was discussed and the booklet wasn't sufficient.

Aviva commented that we'd said the 1992 sale as out of jurisdiction as Mr H's complaint was that he was unaware of in house alternatives. But he'd been made aware of those options in

1998. As the complaint about the 1998 advice was the same, then three year rule also applied to that advice.

Aviva disagreed with what the investigator had said about why the complaint about the 1998 advice should be upheld. We'd said we couldn't see any actual reference to charges being discussed in the suitability letter or other sales information. But RU20 said advisers should:

- *draw the consumer's attention to the AVC (Additional Voluntary Contributions) plan – that was done and was the reason we'd said the 1992 sale was out of time;*
- *discuss the generic differences between the FSAVC and the AVC – the sales file confirmed that. RU20 didn't say that details of what was discussed must be recorded;*
- *direct the consumer to his employer or the occupational scheme for more information on the AVC options – the booklet provided to Mr H did that.*

RU20 also said that IFAs should discuss the specific differences between AVC and FSAVC options with the consumer, including the difference in charges and expenses. But that didn't apply here as the adviser was a tied agent, not an IFA.

As agreement wasn't reached the complaint has been referred to me.

What I've provisionally 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.

But I've considered jurisdiction first – whether Mr H's complaints have been made in time. My understanding is that Aviva consented to us looking into the 1998 advice but not the advice given in 1992. But I note, from Aviva's comments in response to the investigator's view, that Aviva suggests the complaint about the 1998 advice might be time barred too.

As the investigator explained, we're governed by the DISP (Dispute Resolution) rules set out in the regulator's Handbook. The applicable provision is DISP 2.8.2R which (in so far as is relevant here) says:

'The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:
…
(2) more than:

(a) six years after the event complained of; or (if later)
(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;

unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and has a written acknowledgement or some other record of the complaint having been received;

unless:

(3) in the view of the Ombudsman, the failure to comply with the time limits in DISP 2.8.2R … was as a result of exceptional circumstances;'

Mr H's complaint, about advice given in 1992 and 1998, was made in February 2021. That's more than six years after the event. So his complaint will only have been made in time if it was made within three years of when he became aware (or reasonably ought to have *become aware) he had cause for complaint.*

Aviva says Mr H's complaint about the 1992 advice is that he was unaware of the in house options until the second sale in 1998. But that's only part of Mr H's complaint. His overall complaint about the 1992 advice is that it wasn't suitable. Given that the FSAVC was recommended again in 1998, I don't immediately see why Mr H would've known the earlier recommendation wasn't suitable. I'd have thought the further recommendation, in effect, endorsed the earlier advice. I also agree with the representative's point that Mr H wouldn't have recommenced his payments to the FSAVC if he'd had any reason to believe the earlier advice had been unsuitable (although I don't think Mr H increased his payments – in 1992 he paid £35 pm whereas in 1998 it was £32 pm).

The position might be different if it was clear that in 1998 Mr H had been made aware, not only that there were in house options but that the charges for AVCs were likely to be cheaper. He'd then have known, not only that there were alternatives to the FSAVC, but that there was a cheaper option too. I think that reasonably ought to have made him think about why that more cost effective option hadn't been recommended in 1992.

I know Aviva's position is that the 1998 sale was compliant and Mr H was given sufficient information about the comparative benefits of in house AVCs and FSAVCs. But, as I've gone on to explain below, I'm not satisfied that was the case. So, in considering if Mr H's complaint about the 1992 advice has been made in time, I can't say he had all the information he needed in 1998 to become aware that the 1992 advice may not have been suitable.

So I've gone on to consider both complaints, about the 1992 advice and the 1998 advice.

In 1992 a tied adviser (who could only recommend products provided by the company they worked for) had to follow the rules set in 1988 by LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation). Amongst other things, the LAUTRO Code of Conduct said advisers should exercise due skill, care and diligence and deal fairly with investors. And have regard to any rights under an occupational scheme and give consumers all relevant information. We'd expect a tied adviser to know, for members of an occupational pension (and Mr H was a member of the Teachers' Pension Scheme), in house options would be available. We'd also expect the generic benefits of the in house options, including that AVCs could potentially offer lower charges than the FSAVC, to be mentioned.

There's no suitability letter for the 1992 sale as, at the time, one wasn't required. There's a fact find which Mr H signed on 20 October 1992 but it doesn't record that in house options were discussed. Aviva hasn't provided anything else (for example a file or meeting note) which might show that Mr H was made aware of in house options and given information about those. Based on what I've seen, I don't think the 1992 sale was compliant.

The regulatory position for the later sale was the same, except that a suitability letter was required. The 1998 sale was after RU20, issued in May 1996. But that didn't introduce new requirements and just restated the existing position. It said tied advisers should draw the consumer's attention to the in house alternative; discuss the generic differences between the two routes; and direct the consumer to his employer or the occupational scheme for more information on the in house option.

Aviva says the adviser did all that and refers to the signed fact find that was completed on 9 March 1998, the suitability letter sent on 6 April 1998 and the booklet that was given to Mr H. I agree that in house alternatives were mentioned. The fact find records that Mr H was a member of his employer's pension scheme and he was aware he could pay AVCs to the scheme. And the suitability letter records he was proceeding with the FSAVC after receiving *an explanation of the comparative benefits of in house AVCs and FSAVC plans and he'd received written material summarising those.*

But what's unclear is exactly what may have been said. I understand Aviva's point that RU20 didn't specify that details of what was discussed must be recorded. But the adviser was required to discuss the generic differences between the FSAVC and the AVC and Aviva needs to show that was done. So exactly what was discussed is relevant.

Aviva has also suggested that part of RU20 applied to only to IFAs, not tied advisers as was the case here. I don't agree but in any event the generic differences between in house AVCs and FSAVC included the difference in charges and expenses. RU20 notes that as being the difference likely to exert the greatest impact on which route would offer the greatest benefits.

It's possible that the adviser did have a detailed discussion with Mr H about the merits of FSAVCs versus in house AVCs. But, without any further details as to exactly what was said and what information was given to Mr H, it's difficult to know if the discussion was fair and balanced and covered important generic points of difference, such as the fact that the charges for in house AVCs were likely to be lower.

I've considered the booklet – 'Improving your retirement benefits' – which Mr H was given. But I don't think it adds much. It clearly sets out there are two ways of making AVCs – in house AVCs or a FSAVC. Added years are detailed too. The section about charges referred Mr H to his personal illustration for the FSAVC for details of the benefits included and the cost. About charges for in house AVCs the booklet said it might be possible to obtain an illustration. But there's no indication that the charges for in house AVCs are likely to be lower. I don't think it was sufficient for Mr H to be referred to his employer or the scheme for details of the charges that might apply to the in house AVCs.

Under the heading, 'Its's your choice' the booklet recommended that the benefits and options outlined for the FSAVC be compared with those available under the employer's in house AVC scheme. It added that, in particular, portability, contribution flexibility, investment choice and fund performance should be considered. Charges aren't referred to.

And, as far as any discussions are concerned, I don't think it's unreasonable to assume that they'd have been in line with the written literature. If that didn't mention that the charges for the in house AVCs would likely be cheaper, it's perhaps unlikely that would've featured in any conversation either.

All in all I can't say I'm satisfied, on the balance of probabilities, that the generic differences between in house options and FSAVCs, including the difference in charges, were clearly covered and that Mr H was in a position to make an informed choice.

Like the investigator, I think, if Mr H had been told that the charges for in house AVCs would likely be lower, I think it's likely he'd have chosen to make in house AVCs instead of setting up the FSAVC in 1992 and recommencing contributions to it in 1998. There's nothing to indicate he wasn't going to remain in the teaching profession and so his membership of the Teachers' Pension Scheme and his ability to continue to pay AVCs would likely continue.

For the reasons I've indicated I think the complaint about the 1992 advice isn't time barred by virtue of the 1998 advice. And I'm upholding the complaint about both the 1992 and the 1998 advice. I'm not satisfied the recommendations to set up and restart the FSAVC were suitable.'

Mr H's representative accepted my provisional decision (and agreed that when Mr H had recommenced his contributions to the FSAVC in 1998 the payments were at a slightly lower level than previously).

Aviva also accepted my provisional decision. It was still of the opinion that current standards were being applied and which, when the policy was taken out, would never have been met. But, in the interests of resolving the complaint, Aviva was prepared to accept my provisional 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.

Both Mr H and Aviva have accepted my provisional decision. I don't have anything to add to my provisional findings which I've set out in full above and which form part of this decision.

Putting things right

I'm repeating what I said in my provisional decision about how Aviva needs to put things right for Mr H. The redress I've set out applies to both the 1992 and the 1998 sales.

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 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 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 isn't possible or has protection or allowance implications, it should be paid directly to Mr H 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

I uphold the complaint. Aviva Life & Pensions UK Limited must undertake the redress calculation I've set out above and pay any redress due.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr H to accept or reject my decision before 1 December 2022.

Lesley Stead
Ombudsman