DRN-3953073

The complaint

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

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

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

What happened

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

Aviva Life recommended Mr C took out an FSAVC policy. He agreed and the plan began in January 1993, with non-indexed contributions of £35.00 per month. The last contribution he 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 Mr C in 1992. At the heart of that complaint was that he hadn't be properly informed about the options open to him through his employer for making additional contributions to his 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 Mr C's mis-selling complaint.

Aviva Life went on to calculate the financial loss to Mr C. It said had it informed him about his options he 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 Mr C's circumstances at the time, he'd have chosen to buy added years from his scheme. Aviva Life thought its offer was correct. And so Mr C's case was brought to this Service.

The last Investigator to review Mr C's complaint initially upheld it. Aviva Life disagreed. It noted that at the time of the sale money purchase plans were considered to be a more affordable way of maximising retirement income. It noted Mr C had chosen not to index his FSAVC contributions and that the alternative of buying added years would've been more expensive. Based on the evidence it provided, the investigator changed his mind and concluded Mr C's case shouldn't be upheld.

GVFS disagreed with the new outcome and restated its arguments. As both parties couldn't agree with the Investigator's findings and conclusions, Mr C's complaint has been passed to me to review afresh. I issued my provisional decision in January and as I haven't received any new evidence or arguments I see no reason to depart from my initial findings and conclusions.

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 Mr C's complaint. I'll explain why.

Aviva Life has already accepted based on the available evidence Mr C was mis-sold his FSAVC in 1992. What I need to consider is whether it's more likely than not if it had done what it should've he would've opted to buy added years from his 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 Mr 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; his age and family status; his job prospects and likely earnings; flexibility and affordability; and his attitude to risk.

At the time of the advice in 1992, Aviva Life recorded that Mr C's priority was retirement income. He was 30 years old and earning around £18,000 a year. He already had six years public service. The Normal Retirement Age (NRA) of his OPS was 60, which provided for a maximum of 40 qualifying years. So, he had a potential shortfall of three years in terms of being able to achieve a maximum pension, assuming he remained in the profession. Mr C was recorded as having a cautious attitude to risk.

I note Mr C actually left his profession in 2004 after 20 years qualifying OPS service. I also understand he began drawing pension benefits from his OPS in 2017, when he reached 55. Along with the fact that he stopped making contributions to his FSAVC in 2002, I consider these are largely matters of fact about what happened much later and don't weigh significantly on my findings and conclusions about what happened in 1992. Although clearly they are considerations in relation to the approach to redress.

Aviva Life's arguments aren't without merit. For example, it's true to say that in the 1990's investment returns were better than they have been in recent years. Money purchase arrangements for pensions were considered as offering a good way of maximising income in retirement. I also accept the cost of buying added years would've been linked to Mr 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 Mr C been in possession of the information Aviva Life was obliged to provide, he'd have investigated buying added years from his employer and ultimately would've done so. I say this because:

- While Aviva Life has shown it would've been more expensive from the outset for him to have bought added years (about £41 per month) compared to the plan it recommended (£35 per month), I don't find this difference material to his circumstances. And while the cost of added years would've continued to increase, given his profession and reasonable expectation of income growth, it seems more likely than not in terms of his disposable income the relative cost would've been falling, and certainly if affordable in the beginning would've been more so over time.
- There's nothing to indicate Mr C was interested in anything other than providing for his income in retirement. And the limited information we have suggests he had a cautious risk appetite. Buying added years presented no risk to him, whereas a money purchase arrangement required the exposure of his funds to some risk. So, I think the former was more compatible with his outlook.
- At the time of the advice, Mr C was already established in a profession with six 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 Mr 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 he bought. For example, the pension entitlement accrued was uprated each year prior to retirement whether he was an active member or not. And it also enjoyed uprating after retirement. His OPS provided benefits for his 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 Mr and Mrs C's household in the round. For example, it makes arguments around affordability even more persuasive.

Given the, albeit limited, information we have about Mr C's circumstances, objective and risk attitude, I've concluded he was a credible candidate for buying added years from his 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 his guaranteed benefits, would've been a more attractive option than an AVC or FSAVC policy.

Putting things right

Mr C needs to be put back into the position he 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 he would've bought additional years from his 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 Mr C whether he preferred any redress to be calculated now in line with current guidance or wait for the new guidance /rules to come into effect. He would like his complaint to be settled in line with new guidance /rules. I consider it’s fair that Aviva Life & Pensions UK Limited calculates Mr 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 Mr 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 Mr 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 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.

The compensation amount must where possible be paid to Mr 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 his 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 Mr 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 Mr C how much has been taken off. Aviva Life should give Mr C a tax deduction certificate in respect of interest if he asks for one, so he 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 Mr 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 Mr C to accept or reject my decision before 8 March 2023.
Kevin Williamson
Ombudsman