

The complaint

Mr L complains that Quilter Financial Planning Solutions Limited allowed more initial fees to be taken from a personal pension it set up for him with Aviva, than he agreed it could take.

What happened

Mr L originally took out an Aviva pension on advice from a partner of Positive Solutions – now Quilter. I'll refer to the business as Quilter in this decision. The suitability of the investment advice Mr L received is not the subject of this complaint.

An Aviva personalised illustration for Mr L dated 24 September 2012 shows him making a £80pm net contribution, made up to £100pm by tax relief. The initial fees to the adviser were stated to be £20 taken from each regular payment for 5 years from the payment start date, but 0%pa of the fund on an ongoing basis. At that time fees were more commonly known as 'commission', so I'll refer to either term in this decision.

It appears that the adviser then applied for Mr L's pension online. The printout of the data entered on 25 September shows a fee of 20% of the £100 premium – but there is no field for an end date to be displayed, or any clarification as to whether the stated premium is net or gross. The printout contains a declaration that the adviser is applying on Mr L's behalf and concludes with an instruction: 'Please now print off this confirmation and ask your client to complete and sign the declaration documentation'.

Mr L signed the declaration on 25 September that he understood and agreed to Aviva's adviser charge agreement, which said this would be 'in accordance with your most recent illustration or as otherwise directed by you and your financial adviser'. The agreement clarified that Aviva made these payments on Mr L's instruction, and that Aviva was not liable for interest on late payment. It said any queries regarding those charges 'including entitlement to a refund' should be referred to the adviser – and that if Mr L unilaterally stopped the charges he may still be liable to pay them to the adviser. Aviva would give him a statement every six months showing the charges paid, so that he could alert it to any errors.

My understanding is that the adviser would have posted the signed forms to Aviva. I can see he did on 25 September for Mrs L, who was also applying for a pension at the same time as Mr L and has experienced the same issue in this complaint. Enclosed would have been the application summary, but not a copy of the illustration. The direct debit mandate was not required to state what Mr L would be contributing (net) to the pension.

Mr L has only sent us a partial screenshot of a further illustration Aviva generated dated 28 September 2012. But I have seen a full copy of the one issued on that date for his wife, whose application was largely identical to his. That shows Mrs L would make contributions of £100pm net (rather than £80), so tax relief would make this up to a gross contribution of £125pm. Therefore at the same rate of 20%, the monthly fee payable would be £25. No end date was shown for this fee.

In the adviser's suitability letter to Mr L on 2 October 2012, he referred to an illustration he had given Mr L. He said that the charges had been explained verbally and were outlined in

the illustration. The letter referred to a £100pm premium without specifying if that was net or gross. But it referred later on to the affordability of Mr L contributing £1,200pa of his own money to the pension, and said that tax relief was available on the premiums. So, I'm satisfied that the adviser was now referring to £100pm as the net premium in the letter. Mr L signed a separate fee agreement with Quilter on 12 October 2012 which said it would collect *'20% of Gross premiums...for a period of five years on a monthly basis'*.

The adviser later sold his business to a different adviser at around the time the five year period should have ended. However that adviser was also a representative of Quilter. The new adviser noticed that the continuing fees were being taken in error when a new system was introduced in February 2021, giving him easier access to this information. By that time contact with Mr L had already broken off. So, he instructed Aviva to stop the fees on 11 February. This resulted in Aviva sending confirmation to Mr L.

Quilter says this happened whilst the new adviser was arranging to return the excess payments to Aviva. However, I can only see that the new adviser emailed Aviva about the excess amount about an hour after Mr L got in touch to query why he'd received the letter and they'd discussed it on the phone. There is no reference in that email to an ongoing query. So it's not entirely clear what would've happened had Mr L not contacted the adviser.

Initially, Aviva's response to Quilter – about a month after the issue was logged - was that it *was 'unable to establish the root cause as to why the [ongoing fees] continue to have been paid'*. It later added *'we may never be able to establish why'*. It calculated that the overpayment came to £880 and invited Quilter to return that sum. Quilter immediately agreed to do this and I understand that it has been credited against Mr L's policy.

Mr L disagreed with the refund as it was not a multiple of £25 and he thought it should be £1,000 – as he had paid 40 extra payments of £25. It doesn't appear that Quilter took up that particular dispute on Mr L's behalf, but Mr L was already in contact with Aviva about it. Mr L was also seeking the loss of investment growth, and Aviva later told Quilter that it was arranging for *'loss assessments to be calculated'*.

Later, on 10 May Aviva informed Mrs L that it had located the original illustration from its storage area showing the initial fee ran for a period of 5 years and had added it to the case file. On 11 May Aviva decided it needed to see further evidence of Quilter's original fee agreement with Mr L. Quilter provided essentially the evidence I've summarised above. This led to a final response from Aviva to Mr L on 16 July in which it said Quilter was responsible for any further losses – on the basis that the printout of the online application didn't specify a date for the fees to cease.

Some of Aviva's final response went into the terms of its own business agreement with Quilter, which I don't see is relevant to Mr L's own client relationship with either firm. But it also suggests that on some of Aviva's policies *'...there is no indicated end date for a regular payment fee (also known as a spread initial adviser charge...)'* – which would continue until contributions stopped, the client or adviser cancelled it or Mr L reached age 75. (However, I can see that Aviva's internal notes indicate that it might have stopped the initial charge at an outer limit of 10 years, rather than the longer term to Mr L's normal retirement age.)

Quilter disagreed. It said it was Aviva's responsibility to ensure the performance of Mr L's pension hadn't been affected by the deduction of excessive charges. But Aviva remained of the view that the onus was on the adviser to stop the fees if his instruction had been wrong.

Quilter told this service that Aviva, not it, had calculated the amount of the fee refund due to Mr L. It remained of the view that it had given Aviva a clear instruction only to collect them for the first five years, and thought Aviva had taken responsibility for the resulting investment

losses when it said at an earlier stage that it was carrying out a 'loss assessment'.

Our investigator essentially agreed with Aviva's position on the complaint. In particular, he was satisfied that Mr L had received an illustration dated 28 September 2012 (as Mrs L had received the same). And that illustration did not mention the five year period. So, he considered that meant Aviva was complying with its terms to pay the fees in accordance with the most recent illustration.

However, in his view to Aviva the investigator acknowledged that Quilter had in effect already given its agreement to that firm for any overpaid fees to be reclaimed so that they could be credited to Mr L's pension. He was unable to establish why Aviva had calculated the amount at £880, and invited Aviva to provide its reasons for this. Otherwise, he said that the full £1000 requested by Mr L should be credited back to the pension. From what I can see, Aviva did not provide any argument against doing this. However, the complaint against Aviva has been closed and did not progress to a final decision.

The investigator thought Quilter was ultimately responsible for ensuring that a loss assessment was carried out on the missing investment returns resulting from these fees.

Quilter didn't agree with the investigator, as it never received the illustration of 28 September 2012: Mr L did. It thought its own commission agreement with Mr L should be the pivotal document, as well as the illustration of 24 September 2012. It also disagreed that it was practicable for the adviser attached to the pension to be aware of the ongoing charge, given his retirement and sale of several hundred clients' business at around the same time as the five year period ended. As Mr L had never sought advice from the new firm, there wasn't an opportunity for it to identify the issue sooner – and in regulatory terms there wasn't an obvious error with an ongoing commission payment that had started before January 2013.

Confusingly, Quilter's records showed that from 9 November 2017 to 5 February 2021, Aviva had actually paid commission totalling £956.68 from Mr L's pension plan – i.e. not a round figure of £1,000 either. It said that so far, Aviva had only asked it for £880 and a further £50 back. It was however happy to refund the additional £26.68 of commission that it had received. In addition, it could not find a reason why Aviva had been deducting a further £5pm fee in addition to the original £20pm on the 24 September 2012 illustration, so it was also willing to refund five years' worth of this fee to Mr L (£300), plus £250 for the distress and inconvenience caused to him.

As Mr L decided not to accept this offer, the investigator issued a further view on the complaint. He thought in all likelihood, Quilter's adviser had generated the illustration of 28 September 2012. Quilter hadn't objected to the collection of a £25pm fee instead of £20pm until now, and its head office (rather than individual advisers) should have been aware of the total amount of fees it had accumulated. So, that suggested it had originally been satisfied this illustration was correct and superseded the 24 September 2012 illustration. However, if Quilter was now saying this illustration was wrong and there was no agreement with Mr L to collect the additional £5 per month, he thought it should additionally do a loss assessment on the extra £5 per month.

Again, Quilter wouldn't accept this. It said that its fee arrangement with Aviva was like a standing order, and it was for Aviva to cancel this at the end of the five year period - as Quilter had no ability to directly debit Mr L's pension. It pointed out there was also no evidence that the adviser generated the 28 September 2012 illustration, which in any case did not reflect what actually happened: it said that the gross monthly premiums paid to date had been £100; not £125.

As agreement couldn't be reached, I issued a provisional decision on this complaint on

29 December 2022. I explained (for the reasons set out further below) that Quilter didn't actually need to have made its further offer to Mr L. I thought its offer of £250 for distress and inconvenience was sufficient, but the other sums were not necessary - as this service would be willing to look into the matter of the loss assessment and the question of any further upset caused again, in the complaint against Aviva.

Quilter accepted my provisional decision.

Mr L wanted Quilter to honour its offer in full, but also agreed that this service should reconsider the issues for which Aviva was responsible. Since then Aviva has agreed to the loss assessment part of the compensation and to pay compensation to Mr L for distress and inconvenience – an offer which he has accepted. So it remains for me here to respond to Mr L's request for Quilter to honour the rest of its offer.

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.

This dispute began as one about the duration of the fee Quilter had received from Mr L's pension. Mr L had also observed that the refund paid by Aviva was not a multiple of £25, reflecting his understanding that the fees he was paying were meant to be £25 per month. However Quilter has now raised the suggestion that the fees should only have been £20 per month, so I've considered that issue first.

What monthly amount should have been paid in initial fees?

Mr L's original illustration (24 September 2012) was based on £100 being his gross premium – that is, with tax relief included. But as I've already said above, the suitability report was issued on the understanding that Mr L would be contributing £100 himself and HMRC adding tax relief of £25 to that each month, giving a gross premium of £125.

If Mr L had only expected to pay a net premium of £80 himself each month, I would have expected him to question this long before now. Obviously, the more he pays into the pension the more tax relief he gets and the more potential the gross amount has to benefit from investment growth. I note the adviser discussed the affordability of Mr L paying £1,200pa (which is £100pm) rather than any lower figure in the suitability report, which acts as a record of the advice. So I'm satisfied that Mr L would have understood he was paying £100pm net and therefore £125pm gross, once the tax relief was added on.

Mr L signed a fee agreement for Quilter to take 20% of his gross premium. And what Aviva collected from the plan to remit to Quilter was 20% of a total gross premium of £125 – so at £25 per month, Aviva was collecting the agreed amount.

Quilter says that the 28 September 2012 illustration is incorrect because it shows £125pm gross premiums but only £100pm gross premiums have been collected. We only have complete statements for Mrs L, but her plan was set up on an identical basis to Mr L and show total annual amounts of £1200 in premiums plus tax relief of £300. Where they are itemised, the contributions show a £100 premium plus a £25 tax relief credit each month. So, that's consistent with what the 28 September 2012 illustration did show. I asked that if Mr L had different figures to this on his own statements, he could provide them in response to this provisional decision. He hasn't shown me anything different.

The investigator said that this illustration was likely generated by the adviser, but I think that's wrong. Product providers will always send out a new illustration when they've received

an application, as this accompanies the customer's cancellation rights. I have no reason to doubt this is why Mr L had a copy of this illustration, part of which he sent to us with his complaint. And whilst some providers might also send a copy of this to the adviser, I'm not aware that Aviva was under any obligation to do that.

In any event, I don't think the amount of the premium on this illustration was wrong, for the reasons I've given above. The only issue is that unlike the previous illustration, it no longer showed an end date for the fees. So I don't think Quilter actually owes Mr L a refund of the 'additional' £5 per month fee. The issue is that the fees totalling £25pm should have **stopped** in 2017.

Who is responsible for there being no end date for the fees?

Unlike the investigator, I think Aviva initiated the 28 September 2012 illustration as a result of the adviser submitting the electronic application (of which he had printed out a summary) to Aviva on 25 September. In my view, there are potential shortcomings in the way this application summary is presented which weren't originally explored by the investigator when this service was considering the Aviva complaint.

It doesn't seem that Aviva retained its own records of the electronic application that were more extensive than the summary Quilter has, because it hasn't now challenged the matter further and now settled its part of the complaint. To my mind, on a matter as important as whether the initial fee is ongoing or has an end date, the application summary should have either captured a date or "not applicable", or made some other distinction to make this clear.

I cannot reasonably expect Quilter to provide screen shots of what the adviser saw when entering the online application, and again no such evidence was produced by Aviva. Without such persuasive evidence I can't fairly say that the adviser either intentionally or negligently failed to put in an end date for the initial fees. I also can't fairly say that he should have noticed that the application summary was potentially misleading either, because it remains possible that it looked clear what he was asking for when he entered it on the screen.

Who should refund Mr L the overpaid fees after the five-year point?

Aviva now has a copy of the fee agreement between Mr L and Quilter which clearly post-dates even its final illustration on Mr L's plan. Furthermore that final illustration was generated on the basis of an electronic application, which is not in my view summarised in a robust enough way on the printout Aviva generated at the time.

There are also potential questions to be addressed as to why Aviva's system was able to accept an instruction for ongoing fees taken from **each premium** with no end date, rather than a percentage of the fund with no end date. The latter was a common basis of commission at the time Mr L applied for his plan, but the former would strike me as decidedly unusual. It seems from comments Aviva has made in its own file that it may in actual fact have had checks and balances to stop such payments after ten years, but the question could be asked why not after five or six years – which reflects a far more common fee arrangement for advisers to enter into.

So, I think there would always have been an issue here for Aviva to consider accepting - on the basis of the evidence it now has - that it has the primary responsibility to refund the £1,000 worth of premiums Mr L is claiming for to his plan. It already has its own contractual arrangements with Quilter to recover any such overpayment, but I don't consider that should have delayed Aviva making the refund to Mr L. To do otherwise would be to forget that Mr L is also its customer.

In any event, I also don't see why Quilter would not return the amounts it has actually received from Aviva in respect of fees charged after the five-year period ended – on receipt of a proper demand from Aviva. I note that Quilter has a somewhat different figure (by some £40 or so) to Mr L's, but that is something that needs to be resolved between Quilter and Aviva privately. It does not need to be resolved through this service and should not affect the amount of the refund Mr L receives from Aviva. So I don't require Quilter to pay the sum it has identified of £26.68 directly to Mr L. It should resolve this with Aviva because the money needs to go back into Mr L's plan – not to him.

Who is responsible for assessing any investment loss?

On the basis of the evidence I've seen, I think Aviva was in a better position to prevent the overpayment of fees than the adviser. And after Aviva saw a copy of my provisional decision in this complaint, it agreed to do the loss assessment and Mr L has accepted that offer.

I haven't seen evidence that the commencement illustration of 28 September 2012 was sent to the adviser as well as Mr L - and even if it was, the adviser wouldn't necessarily have anticipated that Aviva had interpreted his instruction the way it did.

This service considers any dispute on the basis of what is fair and reasonable. Whilst I am bound to take into account the nature of the Aviva declaration Mr L signed, which suggested any dispute about fees was the adviser's responsibility alone, that does not prevent me deciding whether it would be fair and reasonable to find Aviva responsible to some degree once all the wider evidence had been considered. I did not ultimately need to do that, as Aviva has now accepted responsibility to correct the value of Mr L's policy.

Putting things right

In my provisional decision I thought Quilter had caused further confusion during its investigation of Mr L's complaint by not understanding or explaining as clearly as it could have done – either when the policy was sold or subsequently – that the extra £5 was because a separate payment of tax relief was going into Mr L's plan.

That muddled the waters further, and I also didn't think it helped for Quilter to begin offering partial further refunds of fees to Mr L that only reflected the actual sums Aviva paid to it, rather than what was wrongly taken out of his policy. I thought it had begun to confuse its dispute with Aviva, with its dispute with Mr L. Overall, I thought that this would have been a confusing experience for Mr L, and it was fair that Quilter honoured the £250 payment for distress caused – because it was consistent with awards this service might otherwise have made for the upset caused to him.

However I didn't think it was necessary for Quilter to repay the £300 of fees it took as a portion of the tax relief, as I'm satisfied this was always contemplated in the arrangements that were made. Nor did it have to repay the sum it has identified of £26.68 directly to Mr L, as instead it needs to resolve any outstanding amount directly with Aviva - so that once Aviva has done its loss assessment, Mr L's policy value is restored to the correct amount.

I appreciate that Mr L is disappointed to lose out on the amounts Quilter had offered him over and above the £250 distress payment. However he had the option to accept Quilter's offer before the matter was referred to me for a fresh review. I've also reviewed the offer Aviva has made Mr L, which he accepted. My overall aim is to put Mr L – and the value of his policy – back in the position it would have been in if the pension plan had been set up correctly. I don't see a basis for Quilter to put Mr L in an improved position than that, other than by way of a payment for distress and inconvenience.

I proposed a settlement that was fair and reasonable to *both* sides. And I think the £250 payment for the upset Quilter's actions caused Mr L is reasonable. So, whilst this is frustrating for Mr L I hope he can now see that the actions of Quilter and Aviva working together will put him back in the position he should have been in, if none of these errors had been made.

My final decision

I uphold Mr L's complaint against Quilter Financial Planning Solutions Limited and award him the sum of £250 for the distress and inconvenience Quilter has caused.

To the extent that it has not done so already, I also direct that Quilter completes the refund to Aviva of any amount of fees it has collected that exceeds the commission based on agreed amounts of £25 per month for the first five years.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 10 March 2023.

Gideon Moore
Ombudsman