

## **The complaint**

Mrs N complains about the suitability of the advice she was given by Aviva Life & Pensions Limited (Aviva) to take out a free standing additional voluntary contribution (FSAVC) plan in 1997 and then to increase the premiums in 2000. She says she ought to have been advised to take up the in-house alternatives instead.

## **What happened**

Mrs N was a teacher who had joined the Teachers' Pension Scheme (TPS) in 1983. In 1997 she met with Aviva and took out an FSAVC plan with gross monthly contributions of £78.95 – to run alongside her occupational pension scheme. In 2000 she again met with Aviva and agreed to increase her gross monthly contributions by another £100.

Mrs N said she saw an advert on social media in June 2021 which prompted her to approach the representative from the advert and complain about the advice she was previously given. In October 2021 a complaint was made to Aviva, which said that the advice to take out – and subsequently increase an FSAVC plan had been unsuitable, and that Mrs N would have been better off making contributions to an in-house additional voluntary contribution (AVC) plan through her employer.

Aviva said that its records showed Mrs N had been given a booklet which set out the available AVC options – which she confirmed she had read and understood. It also said that in 2000 Mrs N was again made aware of the comparative benefits between AVCs and FSAVCs through an information sheet. So on both occasions it felt its advisor's recommendation was suitable and that Mrs N was made aware of the alternative options. It also suggested that Mrs N's complaint may have been made outside of the time limits allowed. But Mrs N wasn't happy with that outcome and brought her complaint to us through her representative.

Initially we considered the matter of whether the complaint had been brought "out of time", but an ombudsman decided it hadn't, so an investigator looked into whether the advice had been suitable. She didn't think the complaint should be upheld – making the following points in support of her findings:

- The adviser had provided an information leaflet and booklet which highlighted the differences between AVCs and FSAVCs. The literature noted that FSAVC charges can be higher than AVCs and recommended that Mrs N obtained scheme details from her employer. So she was satisfied the adviser had done what was expected of him.
- One of Mrs N's key objectives was early retirement. She noted Mrs N did leave her employment at age 54 – so she thought the FSAVC plan met this objective.
- Mrs N was issued with a personalised FSAVC illustration showing potential returns at prescribed growth rates. There was nothing to suggest the FSAVC would provide greater returns than an in-house AVC.

She thought Aviva had met its regulatory obligations in making the sale and didn't think the FSAVC had been mis sold.

Mrs N's representative didn't agree. It made the following points in response:

- Having read both of Aviva's information leaflets and booklets from 1997 and 2000, it didn't think they fully explained the differences between in-house AVCs and FSAVCs.
- It set out the guidance given in the regulatory update (RU20) from 1996, which it said Aviva should have been aware of especially as it simply reiterated the existing rules. It also thought there should have been documentary evidence that RU20 had been followed.
- Although Mrs N signed to say she'd been given the information and understood her choices, there was little documentation of any discussions which ought to have taken place looking at the difference between AVCs and FSAVCs.
- The investigator suggested that early retirement had been a key objective for Mrs N. But it noted that at the time of the initial advice any AVC or FSAVC benefit had to be drawn at the same time as the main scheme. So it thought that the idea of early retirement would have needed to be carefully thought through – and wouldn't have been something Mrs N could automatically have assumed would be possible.

No resolution could be found so the complaint was referred to an ombudsman and was passed to me to review.

#### My provisional decision

In my provisional decision I said the complaint should be upheld making the following points in support of my findings:

- I looked at whether Aviva had met the regulatory guidance from the RU20 update of May 1996. Aviva hadn't been able to provide any of the sales file from 1997 – so I looked at the information from the advice in 2000 when Mrs N increase her FSAVC premiums.
- The "confidential financial plan" that Aviva completed did meet some of the RU20 guidelines but not all of them. However, the adviser had directed Mrs N to a separate brochure and leaflet which Aviva said explained the differences between FSAVCs and AVCs.
- I didn't think the booklet made a direct reference to the charges of each scheme, so I didn't think Mrs N would have concluded that - in respect of charges - she would be better off making in-house AVCs.
- With regards to the accompanying leaflet, I didn't think it made it clear enough that charges on in-house AVCs were *likely* to be lower. And I noted the leaflet was unsigned so I couldn't conclude that the differences had been discussed or that the adviser met the RU20 requirements.
- I also concluded that the evidence from 2000 would reasonably be an indication of what happened in 1997. The only available evidence from 1997 was Mrs N's signature that she'd received the accompanying booklet (the one that was issued in 2000).
- But I'd already concluded that the booklet didn't go far enough in explaining the difference in charges, so I wasn't persuaded that Mrs N had been made aware that AVCs would likely be cheaper than FSAVCs.
- In my view there was insufficient evidence to show that, in particular, the charges of both the schemes were discussed.

- I looked at the other in-house option Mrs N had and thought that, on balance, ‘added years’ would have seemed expensive when compared with in-house AVCs. I thought it was unlikely that Mrs N would have chosen that option.
- But I thought – if she had been made aware of the difference in costs between AVCs and FSAVCs in 1997, Mrs N would have chosen the in-house alternative and so would consequently have increased her contributions to the same arrangement in 2000.

### Responses to my provisional decision

Mrs N accepted the provisional decision and had no further comment to make. Aviva said that, while it still believed the advice wasn’t unsuitable, it was prepared to carry out the calculation as recommended in order to resolve the complaint.

### **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.

As both parties have in principle accepted my provisional decision, I see no reason to depart from those findings. I’ll set out below the basis for this final decision along the lines of my provisional decision.

### The suitability of Aviva’s advice

Before May 1996 the regulator required company representatives to exercise due skill, care and diligence in dealing fairly with investors. In relation to FSAVC sales this meant knowing that in-house AVC options existed and explaining the generic benefits of these options as well as highlighting the benefits of their own FSAVC plan.

But in May 1996 the regulator issued a regulatory update called “RU20” which set out the procedures it expected product providers to follow, although this wasn’t new guidance but restating what was already in place. The update said that a tied adviser shouldn’t recommend their own company’s FSAVC until they had:

- *drawn the client’s attention to the in-house scheme alternative*
- *discussed the differences between the two routes in generic terms (taking account, among other things, of the features described in this article)*
- *directed the client to his employer, or to the scheme trustees, for more information on the in-scheme option.*

The *article* mentioned above included discussion of the tax treatment of contributions and benefits, employers being willing to match or top-up benefits, and the ability to provide additional life cover. It also referred to the lower charges under an in-house scheme in general terms noting that, “*charges under the scheme will usually be lower than those under FSAVCs, reflecting economies of scale, rebated commission or a contribution to administration expenses by the employer. Of all the differences between the two routes, this is likely to exert the greatest impact on which route would offer the greater benefit to the client.*”

So the guidance – which wasn’t new guidance as such, made it clear that of the factors which needed to be discussed about the differences between AVCs and FSAVCs, the lower charges of an in-house AVC was a very important difference.

I’ve therefore looked at whether Aviva met these requirements when it made its recommendation to Mrs N.

Unfortunately, Aviva hasn't been able to locate any of the sales file from 1997 – except for signed confirmation from Mrs N that she had received a brochure about the alternatives available to her. And so I can't know what was discussed, or provided to Mrs N, at that time.

Aviva's "*confidential financial plan*" from February 2000 included the reasons for its recommendation. It said that "*I have recommended the above product to increase your contributions to your FSAVC. This will help towards maintaining your standard of living in retirement. Before proceeding you should consider the comparative benefits of arranging additional benefits through an in-house AVC. To assist you, I have explained the differences between an AVC and a FSAVC and have also given you an information sheet, 'Additional Voluntary Contributions (AVCs) - The options available to you to increase your pension' which summarises the factors that you should consider before making your decision.*"

I've looked carefully at the financial plan to see how it met the requirements from RU20. It said Mrs N should consider the benefits of arranging an in-house AVC and that the adviser had explained the differences, but I haven't seen anything to suggest that it directed Mrs N to her employer for details of the in-house alternatives. And I'm not satisfied it confirmed sufficient detail about the discussion of "*explaining the differences between an AVC and a FSAVC*". However, the adviser referred to a booklet and a leaflet he said he had provided Mrs N to confirm the information, so I've also looked at those documents carefully.

The brochure, which was entitled "*improving your retirement benefits- it's your choice*", explained the difference between the schemes. It said that "*you may make payments to an Additional Voluntary Contribution (AVC) scheme set up by your employer to run alongside the occupational pension scheme. This type of arrangement is known as an "in-house" AVC scheme. You may make payments to a completely separate scheme of your choice that is separate from your employer. This type of arrangement is known as a Free Standing Additional Voluntary Contribution (FSAVC) scheme*".

In my view the general comparison of the schemes within the brochure mainly set out the benefits of the FSAVC in some detail, while listing (in italics underneath each FSAVC benefit) a neutral statement about AVCs.

The section entitled "*it's your choice*" said that "*we recommend that you compare the benefits and options outlined within this booklet with those available under your employer's in-house AVC scheme. Some of the features outlined will be available, some will not. Your choice of product for increasing your retirement benefits will depend on which method best suits your personal needs and attitudes. In particular, you should consider portability, contribution flexibility, investment choice and fund performance. Your Financial Advisor can give you detailed advice on the suitability of xxx Pension Plan. They cannot however advise you on pension plans that are available from other sources, such as an in-house AVC*".

I haven't seen any evidence within the booklet of a direct reference to the charges of each scheme, and I'm not persuaded that Mrs N would have understood from the available information that she would more likely than not be better off from a charges point of view by making in-house AVCs.

So I went onto consider the leaflet the adviser said he gave to Mrs N. The copy of the leaflet I've seen was undated and, crucially, unsigned. Entitled "*Additional Voluntary Pension Contributions*", it set out "*the options available to you to increase your pension*." It stated that, "*your choice should not be based on any single factor such as charges alone. There are others to consider including what happens if you change employment, whether you can change your contributions and your investment choices. We strongly recommend that you*

*obtain from your employer's scheme administrator details of the benefits and charges applicable in respect of your employer's own Additional Voluntary Contribution Scheme."*

With regards to charges it says, *"the charges on scheme AVCs can be lower than an FSAVC but this is not always the case. Charges are difficult to quantify on conventional with profit and deposit type funds because investment managers generally retain discretion over the total returns they give you."*

Looking at the content of the leaflet, I think it may have drawn Mrs N's attention to the in-house scheme alternative and directed her to her employer. And if I consider that there was clear evidence that the adviser did discuss the content of the undated leaflet, then I might conclude that he had met the regulatory requirements of RU20. But I don't think it did and I say that for two reasons. Firstly, I don't think Aviva's documentation makes it clear enough that in-house AVCs are *likely* to be lower. It simply says that they *"can be lower...but this is not always the case."* In the absence of clarification from the adviser on this point, I think this would reasonably have given Mrs N cause to doubt that, from a charges point of view, an in-house AVC would have been in her best interest.

And, as I've already suggested, within the document was a declaration for Mrs N to sign to confirm that she had, *"been given my own copy of this sheet and understand its contents and realise the importance of obtaining details of my scheme AVC and its charges from my employers pension scheme and comparing them with my FSAVC options"*. But this section was unsigned.

I think this is particularly important as Aviva has relied on this document having been discussed – so I would expect to see a signed copy in support of this. As I've said above, if I had been provided with a signed copy I may have been satisfied it was enough to demonstrate that the adviser did discuss the generic differences and the likely lower charges. However, without a signed copy of the document or additional notes to explain what was actually discussed – for example generic differences such as lower costs etc, I can't reasonably conclude that the adviser met the regulator's RU20 requirements.

Although, as I've said above, I can't know what was discussed in 1997, I think the evidence from 2000 might reasonably be indicative of what happened then as well.

The only available evidence from the time of the original sale is a document with Mrs N's signature, dated 26 February 1997, which was to *"confirm that I have read and understood the information contained in the booklet entitled "improving your retirement benefits- it's your choice". After comparing the options available, I have decided to proceed with my FSAVC application..."*

But looking at the later documentation that I've been provided with from 2000, I've already concluded that the *booklet* didn't go far enough in comparing the schemes charges or even suggesting that AVCs were likely to be cheaper. There was no direct reference to the charges of each scheme anywhere in the booklet. So I'm not persuaded that, even if it could be said that Mrs N did receive the booklet in 1997, that she would have been made aware that AVCs would likely be cheaper – in terms of charges - than FSAVCs.

And as there's no evidence to show that Mrs N signed to say she'd received the other leaflet that Aviva referenced about AVCs, it would be difficult for me to conclude that she was issued with it and that the *"differences between the two routes in generic terms"* were discussed. There's insufficient evidence in my view to show that these differences, and in particular the charges of both the schemes, were discussed.

### What should Aviva have done?

Having decided that I don't think Aviva sufficiently explained the cost differences between the in-house and FSAVC alternatives, I've also gone on to consider the situation with regards to 'added years' as this also needed to be brought to Mrs N's attention during the sales process.

'Added years' was a different option to the other two in that it provided a guaranteed benefit. It depended on a member's salary so the final amount of benefit couldn't be known at the beginning. At the time of the advice 'added years' would likely have looked expensive compared to the projected returns and benefits of the FSAVC. So it was unlikely that Mrs N would have wanted to spend a potentially greater monthly amount to get the same projected benefits from 'added years' as she could have from a money purchase arrangement – such as AVCs.

In 1997 a mid range projected illustration rate, as set out by the regulator, would still have been 9%. So it's clear to see why an illustration of what she could receive from that type of plan may have seemed more attractive to Mrs N than 'added years'. Aviva wasn't expected to offer an opinion on whether Mrs N should buy 'added years' but simply needed to refer her to the employer so that she could have found out what was involved. Considering the likely issues I've set out above, I think it's likely she would have thought the cost of 'added years' was high compared to the in-house AVC option.

I've also taken into account that, at the time of the initial advice, Mrs N was 36 with 14 years' service. So at age 60 she would have achieved around 38 years of service. I accept that, as a teacher who had already been in that profession for 14 years, it was perhaps more likely than not that she would have remained in that type of vocational profession, and so might arguably have been a credible candidate for buying added years. Further, in 2000 she noted, in her reasons for increasing the FSAVC contribution, *"increase benefit on age of retirement and perhaps allow earlier retirement. Could take at 60 and there was some doubt about employers one making me work longer (sic) and so I could retire earlier perhaps."*

But, alongside what I've said above about the projections for the returns on FSAVCs likely seeming more appealing due to the lower cost of achieving a similar overall result, I don't think early retirement was a clear objective for Mrs N - perhaps more of a "hope" should the possibility exist in the future.

So I think Mrs N might have considered that in 1997, had she approached her employer for an illustration to make up the two lost years, it would have held less appeal to her than the opportunity of achieving earlier retirement and the chance to build up a fund of money as offered by the in-house AVCs. I think, on balance, that the issue of 'added years' seeming 'expensive' when compared to in-house AVCs would most likely have prevented Mrs N from choosing that option in any case.

So, based on the evidence I've seen, I don't think Mrs N was provided with enough of an explanation about the difference between the costs of an FSAVC compared with the in-house AVC alternatives. I think that if she had been made aware then she would have chosen the in-house AVC option in 1997 and consequently she would have increased contributions to the in-house alternative in 2000 in the same way she did with her FSAVCs. I've set out below what Aviva needs to do to put things right.

## **Putting things right**

Aviva Life & Pensions Limited 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 Mrs N'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 Mrs N 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 her 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**

For the reasons that I've given I uphold Mrs N's complaint against Aviva Life & Pensions UK Limited.

Aviva Life & Pensions UK Limited should pay the amount calculated as set out above. It should provide details of its calculation to Mrs N in a clear, simple format.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs N to accept or reject my decision before 30 March 2023.

Keith Lawrence  
**Ombudsman**