

## The complaint

Ms W complains that Aviva Life & Pensions UK Limited (Aviva) has misplaced or misappropriated a pension contribution she paid in 1987. She would like the current value of the contribution transferred to another pension plan.

## What happened

Ms W says she made a pension contribution to a group retirement annuity contract (the Scheme) with Provident Mutual (now Aviva) which was administered by her insurance broker in 1987. Her employment contract required her to make a certain level of pension contribution and her employer would then re-imburse two thirds of the contribution on evidence of payment. Ms W says she'd made contributions to various pension providers over the years through the same broker without issue. For the 1987/88 tax year her broker suggested splitting the contribution between two pension providers, with £4,060 to be invested in the Scheme with Provident Mutual.

The broker forwarded Ms W self-employed contribution certificates (SEPC), generated by Provident Mutual and the other provider. The SEPC were required by HMRC for tax relief on the contributions to be granted. Ms W says both tax relief and her employer's reimbursement towards the contributions were successfully obtained. Ms W says she raised queries with the broker about a policy document from Provident Mutual and was advised, that, as the broker administered the Scheme such documents were not issued.

Ms W subsequently emigrated but retained her various UK pension plans and says she recently decided to consolidate these into a SIPP arrangement for inheritance planning reasons. Coming across the original records for the payment to Provident Mutual, Ms W contacted Aviva. It made various enquiries over several months and located a membership register for the Scheme. This contained a partial entry for her against a membership number of 85. But said it was unable to locate any policy for her. It suggested that the policy had either never been set up, refunded or might have been transferred out.

Ms W complained about the lost contribution and poor record keeping. Aviva rejected her complaint, saying it couldn't locate the policy having conducted a "*thorough investigation of our systems*". Ms W provided further documents from her records relating to the contribution, but Aviva didn't change its decision.

Ms W referred her complaint to our service and our investigator looked into it, but he didn't uphold it.

He said the key evidence was the SEPC, which specifically states the contribution and date it was paid. He said he felt it was more likely than not that the policy was set up. But that he couldn't speculate on what had happened after this as there was no evidence. He said that Aviva was only required to keep records for six years or for as long as they remained relevant and needed. He said the contribution may have been refunded to her or any policy subsequently transferred which Ms W may have forgotten about. He said there was no evidence of an error, and he didn't think Aviva needed to compensate Ms W.

Ms W disagreed and made a number of points:

1. She said our investigator said he couldn't speculate about what had happened after the policy was set up. But then did so in favour of Aviva by saying the contribution may have been refunded or the policy transferred, despite there being *"not one shred of evidence to support that speculation"*.
2. She said there was evidence of Provident Mutual making errors over the date the contribution was paid. And in the handwritten records of the Scheme, where an abbreviation (U/L) had been entered only against Ms W's name and none of the other members (more than eighty people). Which no one had been able to identify or explain the meaning of. She said this should not have been allowed to be entered or remain in *"such a vital document as a pension membership register"*. She said these two errors showed a lack of due care and diligence.
3. That the records which had been produced, would only have been generated had a contribution been made, which *"Provident Mutual/Aviva appear to have lost, kept for their own benefit or otherwise misappropriated those funds."*
4. She said repeated reference to the absence of an obligation to keep records for more than six years was a red herring given the longer-term nature of pension investments and such an obligation shouldn't be turned into a *"shield against malfeasance"*. And a pension provider which chose not to keep records needed to assume the risks of doing so and not pass those risks onto investors, who have kept records.
5. In terms of the potential early refunding of the contribution Ms W disagreed that the documents and correspondence she held in addition to the SEPC didn't add anything to the evidence. These demonstrated that neither she, her broker, or HMRC had been notified by Provident Mutual of any issue with the contribution or refund of it. The broker was a Trustee of the Scheme and would undoubtedly have known about any problem and was involved in subsequent calculations carried out for Ms W to maximise payment of pension contributions before she left the UK.
6. If the contribution had been refunded at a later date, as also speculated, she said she would expect some entry to be made against the Scheme records, but Aviva had confirmed that the entry about her joining the Scheme was the only reference to her in *"the entire 256 page file"*.
7. In terms of her forgetting about a refund, she said she did not rely on memory but kept carefully maintained records. This included details from inception of the other 13 pension contributions she had made in the same way between 1986 and 1989. Had there been a refund she would have retained a record of it. And she would have not called for a refund as at no time had she had a requirement for the funds, which were invested for old age or for an inheritance for her heirs which is why she had consolidated her other pensions into one SIPP and hadn't drawn on any of the funds.
8. She said that Provident Mutual had lost or misappropriated the contribution, and had failed to account to her for her money, was consistent with the evidence and did not rely on unsupported speculation.

As Ms W didn't agree it has come to me to decide.

### **My provisional decision**

I issued my provisional decision on 1 March 2023, I explained the reasons why I was planning to uphold the complaint. I said:

*I've considered all the available evidence and arguments to decide (provisionally) what's fair and reasonable in the circumstances of this complaint. Having done so, I'm planning to uphold the complaint.*

*It isn't possible to know exactly what has happened here. Where the evidence is incomplete, inconclusive, or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances*

*I am mindful about not further adding to the speculation about what might have happened without having some basis for that opinion. This includes some thoughts about the "U/L" abbreviation on the Scheme membership register which might point to some different system being used in respect of Ms W's contribution. I raised this and some other queries with Aviva. But despite being given significant time to respond, it hasn't fully done so.*

*Taking all the evidence into account and what I think is most likely to have happened I'm persuaded by Ms W's arguments. The arrangement of the Scheme in question is relatively unusual and the records Aviva has discovered lack detail and predate much of the financial services regulation now in place. But Ms W herself has very good records. And taking all the evidence together I think Ms W did make the contribution. And I think it is highly unlikely that it was refunded and also unlikely that it was subsequently transferred.*

*Several theories have been proposed by Aviva to explain what has happened. I'll consider these in turn.*

### **Aviva's conclusions**

*It says it has conducted a thorough search of its records and there's no evidence of the policy.*

*Aviva has concluded that the policy must have either been refunded, or more likely transferred away many years ago. It states that it is unlikely to have detailed records going back more than seven years after a plan was "terminated", due to FCA and data protection requirements.*

*It agrees Ms W has good records, and says it seems unusual that she didn't query not receiving annual statements in the past.*

### **The contribution was paid and refunded**

*There is confusion here about payment dates which Ms W has noted herself. The counter cheque she drew from her bank for the combined contribution of £5,800 payable to her broker is dated 30 November 1987. This is the day after the date entered on the SEPC. This seems irregular and it would be Provident Mutual that generated the SEPC rather than the broker. It may be that the broker registered Ms W's membership in order to catch the November month end, with the premium to follow a few days later. As this didn't happen with the smaller contribution sent to a different provider, which was invested a few days later.*

*Despite this irregularity I think the SEPC and correspondence both before and several months after this are strong evidence that the contribution was made. The SEPC was an important document, effectively a tax relief certificate from the pension provider proving that a contribution had been paid, to enable tax relief to be claimed from HMRC. Consequently,*

*refunding this type of pension contribution was far from straightforward and required the agreement of HMRC. That would certainly involve Ms W and most likely her accountants. It would have impacted her subsequent tax planning arrangements before she left the UK.*

*Ms W says this wasn't the case and she has shown detailed records about her financial affairs including subsequent HMRC correspondence which indicates the contribution amount in question was paid to the satisfaction of HMRC. And it was considered in HMRC correspondence over unused pension relief for Ms W to top up her contributions before she left the UK in 1989. This strongly suggests it hadn't been refunded. And as Ms W has said if the policy was refunded, I would expect the Scheme membership register to be updated accordingly.*

*So, I'm satisfied the contribution was paid and, on balance, wasn't refunded.*

### **Was the policy transferred**

*I accept Aviva has limited records and if the policy had been transferred many years ago it might not hold records about that any longer. But based on the evidence that is available I think it is unlikely the policy has been transferred.*

*Ms W emigrated in 1989 and still resides outside the UK. She says she didn't, until recently, transfer her other pension arrangements. There was another plan with Provident Mutual which Aviva has found some records of. It says this was "terminated" on 15 May 2013. It is interesting that it still has some records of this arrangement – one that was conventionally arranged directly with Provident Mutual rather than through the auspices of the broker/trustee as for the missing Scheme.*

*There is some evidence indicating Ms W's membership of the Scheme as late as 2009 when she received a letter, which at the time, meant little to her. This was from SBJ Benefit Consultants Limited, who had taken over the trusteeship from her broker in 2005. I'll consider this evidence further below.*

*I think it is unlikely that Ms W would have decided to transfer this Scheme in isolation, retain no records about it and then forgotten doing so. This would be inconsistent with the methodical manner she appears to manage her other financial affairs. As Ms W has provided copies of letters about the Scheme from her broker, the application she completed, a copy of the cheque used to pay the two contributions at the time and letters to and from HMRC over the same.*

### **Aviva's investigation**

*I've considered Aviva's investigation. Initially this seemed most thorough, particularly in the email summaries compiled by the staff involved. These raise a number of pertinent questions about Ms W contribution, what might have happened to it and the operation of this type of Scheme. The summary seems well judged and balanced.*

*But I haven't seen any proper clarification on the internal queries raised which enabled Aviva to conclude in its final response to Ms W that:*

*"that after a full and thorough investigation of our systems it had been unable to locate the policy"*

*and as such that was the end of the matter.*

Amongst the queries that were raised in the summary email were the mechanics of the SEPC being issued, the operation of this type of Scheme, and that:

*“Actuarial, ... have said that it appears that the policy was not set up (though they do not explain what basis this is on)”.*

*And the letter Miss W received from SBJ Benefit Consultants Limited, mentioned above, which supports her membership of the Scheme as late as 2009, is discussed but then dismissed. I think without proper explanation. The letter dated 1 January 2009, advised her, as a client, that it will be taken over by another business in a few days. Ms W says she'd had no dealings with SBJ before this and didn't subsequently.*

*In its investigation Aviva confirmed that SBJ had become the Trustee of the Scheme from 2005. But the investigation notes conclude that “I think this is in relation to one of the other investments set up through” her broker. But no explanation of why or what this arrangement could be is given. If Ms W had never joined the Scheme or had transferred out, I'd expect the Scheme records to be updated and wouldn't expect the Trustees to be sending this type of correspondence to “former” members.*

### **The U/L abbreviation in the Scheme membership register**

*The notation by Ms W's name on the pension Scheme membership register is “U/L” and there has been speculation as to what this means. I think it is important as it potentially explains how her contribution could have been lost.*

*I think “U/L” does stand for the commonly used abbreviation in the pension industry for unit linked. It describes the type of underlying investment to be held – a unitised investment fund rather than the traditional conventional with profit investments that were more common in the 1980's.*

*I think this for the following reasons:*

- *As Ms W has pointed out she completed an application form dated 29 November 1987 headed:*

*“PROPOSAL FOR A UNIT LINKED RETIREMENT ANNUITY”*

*and the investment is to be 100% in the Managed fund.*

- *In its letter to Ms W of 16 November 1987 her broker (and administrator and trustee of the Scheme) recommends she split her total pension investment of £5,800 between unit linked managed funds and conventional with profits funds in line with her existing portfolio. It further recommends Provident Mutual for the unit linked investment in view of its recent outperformance during the October 1987 stock market crash.*
- *The letter continues that the broker had negotiated the Scheme with Provident Mutual, and summarises some benefits of the arrangement including (my emphasis in bold):*

*“The contract **now** allows investment into Provident Mutual's Unit Linked Funds”*

*I think this is significant because in 1987, a unit linked investment was still a fairly novel way of doing things for traditional life and pension providers like Provident Mutual. It may be the broker Scheme had been in place for a number of years and all other members were*

invested in with profits, hence the "U/L" annotation in the Scheme register solely against Ms W's entry.

And it's likely this involved some different type of record keeping requirement or procedure.

The brokers recommendation letter mentions another benefit of the Scheme being:

*"On retirement, policyholders are granted more favourable annuity rates"*

A conventional with profit arrangement offering a guaranteed annuity rate might well have required some input from Provident Mutual's actuarial team in terms of calculating a minimum fund value at retirement date and so on. That would not be applicable to a unit linked policy where no guarantees about future fund value would be provided. That might explain the comment in Aviva's own notes:

*"Actuarial, ... have said that it appears that the policy was not set up"*

And it might be that such a unit linked investment required establishing and recording in a different manner to the rest of the members of the Scheme and might explain why Ms W didn't receive annual statements.

I raised these points with Aviva. It did provide some further internal emails relating to the investigation. These confirmed that no answer to the internal queries had been found and there was no evidence the plan was set up. It referred my further queries about guaranteed benefits and the charges that would have been applied on this level of premium to its actuarial department.

But Aviva did agree that if the plan was unit linked, then actuarial might not have been involved at the time. And that it may well have been held on a different system. But is said it had searched all records and found no trace of the plan.

As no response from the actuarial department has been provided and in the absence of further evidence or comment from Aviva my thoughts at this stage are as follows:

1. The contribution was paid
2. It wasn't refunded
3. It wasn't transferred
4. The nature of the investment into a unit linked fund, was a sufficient departure from the operation of the rest of the Scheme administered by Ms W's broker and Provident Mutual, it called for a different administration channel or route. And unfortunately, the ongoing administration of the investment fell between the cracks in these different systems
5. And if the plan was never set up properly it might explain why no record of it existed
6. This would also explain why no annual statements were provided to Ms W

So, I think on the balance of probability the contribution was paid and not transferred and the most likely explanation for the loss is that it wasn't properly set up at outset. And despite the absence of annual statements there was no reason for Ms W to be concerned about any problem given that multiple other arrangements put in place for her by the same broker all operated successfully.

As I think Aviva has made an error and likely lost the contribution Ms W paid, it is fair that she be put back in the position she should be in.

**Putting things right**

*What I think Aviva should do is calculate what the single premium contribution of £4,060 invested on the date entered on the SEPC into the Provident Mutual Managed Fund and its successors would now be worth and what the current transfer value of this policy would have been.*

*Aviva should establish what charges would have been applicable at the time.*

*These may be some sort of allocation rate, which was variable depending on the size of the premium paid. At lower premiums the allocation rate could be less than 100%, in effect a straight up-front charge. Followed by a bid offer spread, typically 5%. Aviva should confirm what the charges are in the calculations.*

*The notional current transfer value of Ms W's policy should be paid into her SIPP to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.*

*If Aviva is unable to calculate a notional value, Aviva will need to determine a fair value for Ms W's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index. I've chosen this benchmark as Ms W at the time would have wanted capital growth and was investing in a unit linked policy. I think she would have been prepared to take some risk given being still many years away from retirement.*

*This benchmark doesn't make allowances for charges, so unless Aviva can provide evidence of different charges, average annual charges of 1% per year should be assumed.*

*If Aviva is unable to pay the compensation into Ms W's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore the compensation should be reduced to notionally allow for any income tax that would otherwise have been paid. This is an adjustment to ensure the compensation is a fair amount – it isn't a payment of tax to HMRC, so Ms W won't be able to reclaim any of the reduction after compensation is paid.*

*The notional allowance should be calculated using Ms W's actual or expected marginal rate of tax at her selected retirement age. Ms W lives abroad and I don't know whether she is a UK resident for tax purposes or will be when she retires.*

*If she is or will be, it's reasonable to assume that Ms W is likely to be a higher rate taxpayer at the selected retirement age, so the reduction would equal 40%. However, if Ms W 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 30%.*

*If she isn't, she likely would still have to pay some tax abroad. This might be less or more than in the UK. I invite Ms W's comments around her tax position, i.e. whether she is still a UK tax resident or might become one again in retirement and if not what tax she'd be expected to pay on UK pension income in the country where she currently lives which I will consider. I'm mindful this might be complicated and not easy to answer. For this reason, I'm currently minded to allow the UK income tax reduction of 30% as set out above.*

*If either Aviva or Ms W dispute that this is a reasonable assumption, they must let us know as soon as possible so that the assumption can be clarified, and Ms W receives appropriate compensation. It won't be possible for us to amend this assumption once any final decision has been issued on the complaint.*

*Pay Ms W £300 for the distress and frustration this matter has caused her.*

*As I said above it's possible the plan had guaranteed annuity rates. If so, these rates would have been likely somewhat higher than current annuity rates. If it had guaranteed annuity rates and Ms W's plan value was now more than £30,000, she would need advice to transfer it to a SIPP as upon transfer this annuity rate would be lost. If Ms W was considering an annuity, I would be minded to ask Aviva to reinstate the policy with any applicable guaranteed annuity rates and allow her to take this annuity.*

*However, given what Ms W has told us about her plans to transfer to a SIPP and her wider financial circumstances I'm assuming she doesn't intend to take an annuity whatever the annuity rate. And she doesn't rely on the income from this plan. So, the above is based on this assumption. However, if I misunderstood and Ms W has concerns around this, she should let me know in response to this decision.*

I asked both parties to now send me any further information or comments they would like me to consider.

### **Response to provisional decision**

Ms W agreed with my decision, and made a number of points in respect of how the matter should be put right:

1. She confirmed her preferred option would be to transfer the value of the Scheme to her existing SIPP and that she had no interest in buying an annuity.
2. That the payment and acceptance of the contribution by Aviva in 1987 had created a "vested right" that didn't depend on it having set aside and invested any physical pot of money and that this "contractual obligation" should be honoured, enabling a transfer to be made.
3. She confirmed she wasn't a UK tax resident and that her tax advisers had confirmed that the payment of a contribution for her by Aviva, if possible, potentially had tax implications in her country of residence as well as reporting requirements which would incur costs.
4. That her tax advisers had confirmed the payment of the appropriate value to her directly would also have both reporting and tax implications which would incur further costs.
5. And that a direct payment would also not meet her primary objective of continuing to invest her UK pension arrangements.
6. She said she had incurred tax advice costs of around £375 in establishing the above details.

Aviva also accepted my provisional decision. It said it would make a transfer payment to Ms W's SIPP as her preferred option on her acceptance of my final decision. It said it didn't think any GAR applied on the Scheme as it had located a document that said that any pension would be determined by "investment conditions at the time". It said it thought Ms W's professional costs seemed high and that it would comment further on these, but it hasn't done so.

### **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.

Having done so, I've decided to uphold the complaint.

As set out in my provisional decision I think the contribution was paid and wasn't refunded or transferred and that errors in the setting up of the policy resulted in it being misplaced. So, it's fair that Ms W be now put as closely as possible into the position she should have been in but for the error.

Aviva has agreed to arrange a transfer to Ms W's UK SIPP. This best meets her ongoing financial planning objectives and minimises other tax considerations arising from her non-UK tax residency. So, I think this is a fair outcome.

Because Aviva hasn't confirmed if it is able to calculate the value of the actual plan to make the transfer, I've set out an alternative option below. Which I think is fair in the circumstances if it can't.

Ms W says she has also had to consider taxation issues in her country of residence and incurred professional costs of around £375 in doing so. The tax issues around any redress payment being made to her personally or as a contribution, are complex. Ms W has provided an overview of them, and I agree they are sufficiently complex to make expert advice essential. So, whilst our service doesn't usually award professional costs, I think it is reasonable to do so here. That's because I think these costs were only incurred due to the error made. And any taxation issues needed to be considered to ensure fair redress was paid if Aviva was unable to pay a transfer into her UK SIPP, as it has subsequently confirmed it can.

I also think Ms W has suffered distress and frustration over what has happened, and it is fair that Aviva pays compensation for this.

### **Putting things right**

Using the charges applicable to the Scheme, Aviva should calculate what the single premium contribution of £4,060 invested on the date entered on the SEPC into the Provident Mutual Managed Fund and its successors would now be worth and what the current transfer value of this policy would be. This is the notional value.

If Aviva is unable to calculate a notional value, Aviva will need to determine a fair value for Ms W's investment instead, using this benchmark: FTSE UK Private Investors Income Total Return Index. I've chosen this benchmark as Ms W at the time would have wanted capital growth and was investing in a unit linked policy. I think she would have been prepared to take some risk given being still many years away from retirement.

This benchmark doesn't make allowances for charges, so unless Aviva can provide evidence of different charges, average annual charges of 1% per year should be assumed.

It should then transfer the notional or fair value calculated to Ms W's existing UK SIPP in the normal manner.

Aviva should provide Ms W with a simple calculation of how it has arrived at the notional or fair value calculated.

Pay Ms W £375 towards her professional costs for taxation advice around matters relating to redress.

Pay Ms W £300 for the distress and frustration this matter has caused her.

## **My final decision**

For the reasons I've given above and in my provisional decision, my final decision is that I uphold this complaint against Aviva Life & Pensions UK Limited.

I direct Aviva Life & Pensions UK Limited to calculate the notional, or if not possible, the fair value of Ms W's pension contribution as explained above and pay this as a transfer to her UK SIPP.

I further direct Aviva Life & Pensions UK Limited to pay Ms W £375 towards her professional costs for taxation advice around matters relating to redress.

I further direct Aviva Life & Pensions UK Limited to pay Ms W £300 for the distress and frustration caused.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms W to accept or reject my decision before 31 March 2023.

Nigel Bracken  
**Ombudsman**