DRN-4082276

The complaint

Mr B complains that Aviva Life & Pensions UK Limited treated him unfairly by moving the value of his pension into a Deposit Fund when he reached the policy's normal retirement date (NRD). He says that, because Aviva didn't make him aware of that fact, it cost him the opportunity of selecting an investment that would give investment returns.

What happened

Mr B holds a personal pension product with Aviva. Aviva explain that Mr B took out this policy in 1972 with a third party and the policy transferred to them.

Aviva describe the policy as a legacy policy. It says that the policy was set up with a one off premium of £80 to provide an annual annuity. And the fund was valued using a cash conversion factor to provide that annuity.

The NRD for Mr B's policy was reached in 2014. Aviva informed Mr B that the value of his pension fund was almost £19,000. Mr B decided not to take his pension benefits and leave it invested with Aviva.

In 2016 Aviva informed Mr B that his pension was valued at just over £19,000. And again Mr B decided not to take any benefits from his policy.

In 2018 Mr B enquired again of Aviva what the value of his policy was as he explained he was intending to take benefits from it. He was informed in December 2018 that his policy was, in fact, worth around £6,700. When Mr B complained about this drop in value, Aviva explained that the earlier values were calculated in error and his policy had never been worth the figures he'd been quoted in 2014 and 2016. Mr B's complaint about the incorrect valuations was referred to our service and the complaint was resolved by an Ombudsman's Final Decision in May 2020, albeit not to Mr B's satisfaction. Our service is not able to consider this complaint issue further.

Mr B obtained a further valuation of his pension fund in November 2021 and its value had not changed at all. He queried this and on 31 December 2021 Aviva wrote to Mr B with details of his policy. It confirmed that his fund was invested as a "*cash amount that provides increases in line with the Provident Mutual Deposit Fund"* from the policy's NRD.

Mr B complained to Aviva about the fact that his pension had been held as cash since 2014. And he asked for full information about the performance of his pension fund since 2014.

Aviva didn't uphold Mr B's complaint. It explained that it isn't its policy to provide full tabulation of the performance of Mr B's pension since 2014. And explained that it also isn't its policy to state how the pension fund is invested when sending illustrations. It said that it was normal for a policy like Mr B's to move to a Deposit Fund at NRD and it would have been explained in the policy terms that he agreed to in 1972.

Our investigator looked into this case and thought it should be upheld. He didn't think that it was fair or reasonable for Aviva to place Mr B's pension fund into a cash position with no explanation being offered that it was happening. The investigator on the case has subsequently changed, but the current investigator's view of the merits of the case remains the same. He has however proposed a means of putting things right. He suggested that Aviva should calculate the notional fund value had it been invested in a similar way as invested prior to the NRD. But identified that may not be possible so suggested that it would be fair to instead compare the actual fund value with the notional value had it been invested in a way to give comparable investment returns as a benchmark index. And proposed that the '*FTSE UK Private Investors Income Total Return Index*' would be a fair benchmark.

Mr B accepted our investigator's proposed resolution. Aviva however disagreed that compensation should be paid at all. It said that Mr B should have known since 2018 how his pension fund was invested. And that Mr B could have re-invested it from 2018 and yet chose not to.

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.

I will start my decision by explaining that I will not be considering the matter that was already addressed in an earlier Ombudsman's final decision. After a final decision has been issued, our service has no power or authority to re-examine that decision.

As our investigator has explained, the crux of Mr B's present complaint relates to a different issue. Albeit extending from what, Mr B describes as, Aviva's ongoing failings. The issue that I am addressing is whether or not it was fair and reasonable for Aviva to place the transfer value of his personal pension into a cash fund that was indexed to a Deposit Fund without explicitly informing him that this was happening.

I've taken into account relevant law and regulations, regulator's rules, guidance and standards and codes of practice, and what I consider to have been good industry practice at the time. This includes the Principles for Businesses ('PRIN') and the Conduct of Business Sourcebook ('COBS'). And 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.

The applicable rules, regulations and requirements

The below is not a comprehensive list of the rules and regulations which applied at the time of the advice, but provides useful context for my assessment of Aviva's actions here.

From PRIN 2.1 'The Principles':

- Principle 6: *A firm must pay due regard to the interests of its customers and treat them fairly.*
- Principle 7: *A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.*

From COBS 2.1.1R - *A firm must act honestly, fairly and professionally in accordance with the best interests of its client (the client's best interests rule).*

Mr B took out his pension policy in 1972. Over 50 years ago now. And he didn't take that policy out with Aviva, but with a company that Aviva took over at some point. Aviva have explained that it doesn't have a copy of the terms and conditions for Mr B's policy. And Mr B has explained that he doesn't either. What this means is that I'm denied the opportunity of seeing exactly what terms and conditions Mr B agreed to. Or how clearly they were explained to him. I accept that it is more likely than not, that he would have had some form of terms explaining his policy. But, in the absence of the evidence, I'm unable to conclude that the contents of those terms made it clear what would happen to Mr B's pension policy after his NRD. And it also means that Aviva had no way of being satisfied that the terms were sufficiently clear either.

However, in this case it doesn't impact on my overall finding. That is because I don't think it was fair or reasonable of Aviva to have made such a fundamental change to Mr B's policy at the NRD without any form of explanation. Whilst the Principles for Businesses didn't exist in 1972, they did apply to the way Aviva had to conduct its business with regards to Mr B from 2014 onwards. To comply with principle 6 and principle 7, Aviva's communication with Mr B ought to have made it clear what was happening with his pension. And for the following reasons, I've concluded it didn't.

I've seen the letter that Aviva sent to Mr B in May 2014. It told him that the value of his pension fund was £18,589.24 and that the actual fund value on retirement could be different. Setting aside the fact that Aviva provided an inflated fund valuation in 2014, nothing in the illustration Mr B was sent indicated that the fund value was invested in the way that Aviva now say was the case. Instead the illustration explained, "*your retirement fund could go down as well as up".* Which would infer that it is invested in some way linked to financial markets. And certainly doesn't reflect what Aviva now say was the actual position. Which it says meant the fund value could not go down as it was in cash.

I've also looked at the letter Mr B was sent in December 2018 when he was given a pension valuation of £6,754.64. This correspondence included a section, headed, "*leave your money where it is and make your choices later*". It explained, "*the value of your pension pot can go down as well as up as it remains invested".* Which, again, Aviva explain wasn't the case. It has explained that these are standard forms. But that does not make it reasonable to send a consumer information that is misleading. There is nothing in this correspondence that would indicate to Mr B that his pension fund is effectively in cash. On the contrary, I think it indicates that he remains invested. The letter even explained, "*you may be able to review the funds you're invested in to make sure they're right for you".*

Overall, the information Aviva sent Mr B failed to comply with its obligations under principles 6 and 7, and failed to comply with COBS 2.1.1R. And I don't think it is fair or reasonable to suggest that terms and conditions from around 50 years earlier should offset the impact of that failing. I think it more reasonable to conclude that Mr B would have paid attention to the information Aviva provided him at the time.

For these reasons I think that Mr B's complaint should be upheld.

Putting things right

Having concluded that Aviva treated Mr B unfairly, I've considered what the impact of that mistake was. And how to put him into the position he'd most likely be but for Aviva's mistake.

In 2014 Mr B appeared to make a conscious decision to defer taking the benefits available to him through this pension. And whilst he thought it was of a higher value at the time, when he knew the value was actually lower (in 2018) he still deferred taking the benefits. The evidence suggests that Mr B reasonably believed his pension was invested and subject to investment growth. Given the likely term that he expected his pension fund to remain untouched I think that Mr B would, more likely than not, have arranged for his pension to be more suitably invested to allow the opportunity for growth if he'd known it was instead held in cash.

I’ve seen no evidence that Mr B was made aware of the nature of his pension fund until, in response to his direct query, Aviva wrote to him on 31 December 2021. In that letter it explained that his fund had been in cash since his NRD in 2014. And that it provided increases in line with the Provident Mutual Deposit Fund. The earliest that Mr B could have received this information was Tuesday 4 January 2022. And, whilst I can see that Mr B complained very soon after this revelation, he didn’t seek to move his pension fund into an alternative investment at that time.

By 4 January 2022 Mr B was in a different position. Closer, perhaps, to actually taking the benefits in his pension. So I don’t think it’s fair to infer that, because he didn’t look to invest his pension in 2021, whilst his complaint was being resolved, means that he wouldn’t have sought to invest it in 2014. The likely investment terms are too different and the events too far removed. I do however agree that it isn’t fair to hold Aviva responsible for the fact that Mr B’s pension remained where it was from 4 January 2022 when it finally made his position clear to him. He had all of the information needed to make his choice, which for better or worse, was to leave his pension fund as it was.

To compensate Mr B Aviva must:

- Compare the performance of Mr B’s pension with that of the benchmark shown below. If the ***fair value*** (see below) is greater than the ***actual value*** (see below), there is a loss and compensation is payable.

- If there is a loss, Aviva must pay into Mr B’s pension plan, to increase its value by the amount of the compensation and any investment growth due on that loss (based on his actual fund performance from 4 January 2022 until the date it is notified that Mr B accepts my Final Decision). The payment should allow for the effect of charges and any available tax relief. Aviva shouldn’t pay the compensation into the pension plan if it would conflict with any existing protection or allowance.

- If Aviva is unable to pay the compensation into Mr B's pension plan, it should pay that amount direct to him. 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 Mr B won’t be able to reclaim any of the reduction after compensation is paid.

- The notional allowance should be calculated using Mr B’s actual or expected marginal rate of tax at his selected retirement age.

- It’s likely that Mr B will be a basic rate taxpayer at the selected retirement age, so the reduction would equal 20%. However, If Mr B 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 15%.

- I have also considered the distress and inconvenience that Aviva’s mistake has cost Mr B. Following on from Aviva’s earlier mistake with Mr B’s pension this subsequent mistake has caused a greater impact. Having suffered the previous loss of expectation regarding his pension, he had to endure the additional disappointment of learning that his pension had been in a cash position for seven years without having been told. So Aviva must pay Mr B £300 in compensation for the distress and inconvenience caused.

Actual Value

This means the actual value of the plan on 4 January 2022.

Notional Value

This is the value that Mr B's pension would, more likely than not, have had but for Aviva's mistake. It's likely that he would have requested that it be re-invested in a way similar to that before he reached the NRD. If possible Aviva should calculate the value of the pension fund if it had remained invested in a similar way from the NRD of the policy until 4 January 2022.

I have not seen any policy certificate or terms and conditions for this pension though. And based on what Aviva have said, it seems likely that this policy didn't have an invested fund value, as such, prior to the conversion that happened on the NRD. So it may not be possible for Aviva to compare based on any previous investment type. If that is the case, Aviva should instead use the following benchmark for fund performance between the NRD and 4 January 2022:

FTSE UK Private Investors Income Total Return Index

Why is this benchmark suitable?

I've chosen this benchmark as a way to calculate compensation because:

- Mr B wanted capital growth and was willing to accept some investment risk

- The FTSE UK Private Investors Income Total Return Index (prior to 1 March 2017, the FTSE WMA Stock Market Income Total Return Index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.

If payment of compensation is not made within 28 days of Aviva receiving Mr B's acceptance of my final decision, interest must be added to the compensation at the rate of 8% per year simple from the date of my final decision to the date of payment.

Income tax may be payable on any interest paid. If Aviva deducts income tax from the interest, it should tell Mr B how much has been taken off. Aviva should give Mr B a tax deduction certificate in respect of interest if Mr B asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

Finally, Aviva must provide Mr B with details of its loss calculation in a clear simple format, including the pension's starting valuation at NRD.

My final decision

For the above reasons I uphold Mr B's complaint and direct Aviva Life & Pensions UK Limited to compensate Mr B in the manner I have set out under the heading 'Putting things right'.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 5 October 2023.

Gary Lane

Ombudsman