DRN-4137830

The complaint

Mrs O's complaint concerns Aviva Life & Pensions UK Limited's mis-sale of her Free-Standing Additional Voluntary Contribution ('FSAVC') plan. Mrs O is represented in this complaint, but for ease I'll refer only to Mrs O.

What happened

Mrs O was a member of the Teachers' Pension Scheme ('TPS'). In November 1994, she was sold an FSAVC plan by a firm Aviva later became responsible for. And in 1998, Mrs O bought an in-house AVC plan after the in-house provider visited her workplace. Mrs O paid into her FSAVC plan until 2006, the year she took her FSAVC plan benefits.

In 2022, Mrs O complained to Aviva that its 1994 advice was unsuitable as it should have advised her to buy an in-house AVC, not an FSAVC plan.

Aviva upheld Mrs O's complaint, as it couldn't be sure it had made her aware that FSAVC charges were likely higher than for in-house options. But Aviva thought it was only liable for this until 1998, when Mrs O bought her in-house AVC plan. Aviva calculated it had caused Mrs O a financial loss of £841.62 for the difference in charges between her FSAVC plan and an in-house AVC. But it made a 15% deduction to allow for income tax that would otherwise have been paid in retirement. Therefore it ultimately offered Mrs O a lump sum of £715.38.

Mrs O came to our Service. She said Aviva was unfair to limit its liability to 1998, as she'd paid into the mis-sold FSAVC until 2006. And when she bought the in-house AVC in 1998, the information she was given focused on the in-house options, not a comparison with an FSAVC. So buying an in-house AVC didn't alert her to any problem with the 1994 FSAVC sale, and she wasn't told she could stop paying into the FSAVC.

Our Investigator upheld Mrs O's complaint, as she thought Aviva was unfair to limit its liability to 1998 given Mrs O was only paying into the FSAVC due to Aviva's incorrect advice.

Aviva disagreed with our Investigator. It said an FSAVC had been suitable for Mrs O, but it had upheld her complaint because its 1994 sale hadn't complied with the regulator's requirements, as Aviva couldn't evidence it had told Mrs O that FSAVC charges were likely higher than in-house options. But when she bought an in-house AVC in 1998, she would then have been fully aware of the differences between an FSAVC and an in-house AVC, because she had both. And she could've stopped her FSAVC direct debit if she'd wanted.

Our Investigator noted Aviva had ultimately upheld Mrs O's complaint about the suitability of the 1994 advice. And she thought that while Mrs O had held both an FSAVC and an in-house AVC from 1998 and would've seen they had different charges, that didn't mean she knew there was something wrong with the 1994 advice. Our Investigator said Aviva hadn't fully informed Mrs O about the differences between FSAVCs and in-house AVCs, and if it had, Mrs O would've chosen an in-house AVC. So she thought Aviva shouldn't limit its liability to 1998.

Aviva further explained that it thought the 1998 in-house AVC sale had broken the ‘causal link’ in line with the ‘FSAVC Review Model Guidance’ published by the regulator in 2000. But our Investigator didn’t change her view. She said she’d considered the FSAVC Review Model Guidance, but also the particular circumstances of Mrs O’s complaint. And she still thought it wasn’t fair or reasonable for Aviva to limit its redress to 1998, as it should fully compensate Mrs O for the financial loss its 1994 mis-sale caused her.

As agreement couldn’t be reached, this complaint came to me for a decision.

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 well as the particular circumstances of this complaint, I’ve also taken into account the 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 of the sale.

Aviva argues that the FSAVC was a suitable product for Mrs O in 1994. But I note Aviva itself says it can’t confirm that, at the time of the 1994 sale, it told her the charges were likely to have been higher with an FSAVC – and this is why Aviva accepts the 1994 FSAVC sale was non-compliant with the regulator’s requirements at that time and why it upheld Mrs O’s complaint that the 1994 advice was unsuitable. So Aviva nonetheless accepts the sale was non-compliant - in other words, it accepts the FSAVC was mis-sold to Mrs O.

Therefore, I’ve thought about whether Mrs O would most likely have opted for one of the in-house options rather than the FSAVC, if Aviva had complied with the regulator’s requirements. And if the advice given to Mrs O in 1994 had been compliant and she had been provided with the information she should have been about the likely differences in charges and expenses between the FSAVC and an in-house AVC, then I think it’s more likely than not she wouldn’t have opted to take out an FSAVC.

I say that because, given what I know of Mrs O’s circumstances at the time of the 1994 sale, an in-house AVC seems to have been a better option for her. Her objective was to maximise her pension contributions in a tax efficient way. And in-house AVCs usually had lower charges than FSAVCs, meaning more of Mrs O’s contribution would have been invested into her pension fund for retirement. So I can’t see why Mrs O would have opted for an FSAVC that would cost more and meant less of her contributions went towards her pension fund.

Some occupational pension schemes offered an alternative to AVCs known as added years, where additional contributions could be used to purchase additional years of service in the occupational scheme. So for completeness, I’ve also thought about whether Mrs O would most likely have opted for added years rather than FSAVCs or AVCs, if Aviva had complied with the regulator’s requirements at the time of the 1994 sale.

Based on the evidence provided to me by Aviva, I can see that at the time of the 1994 sale, Mrs O had about 14 years of service in the TPS once her breaks in service were taken into account. And I don’t think the amount Mrs O was contributing to her FSAVC plan would have been enough to buy the added years she’d need to reach the maximum number of years’ service in her occupational pension scheme. Further, the cost of buying added years is determined by government actuaries, and is based on a set of conservative assumptions. This means added years would have seemed expensive when compared with the potential benefits available from money purchase options like the FSAVC or AVC. And at the time of the sale, it would’ve been expected that the AVC scheme would produce greater benefits on retirement as investment returns were expected to be high. So I think it's more likely Mrs O would've opted to invest in the in-house AVC option, as opposed to buying added years.

Taking everything into account, I'm satisfied that if Mrs O been given all the relevant information during the 1994 sale, she would more likely than not have opted for the in-house AVC option, as opposed to purchasing an FSAVC plan or added years.

Aviva thinks it's fair to limit its liability for the 1994 mis-sale to 1998, because it says that when Mrs O bought an in-house AVC in 1998, she would then have been fully aware of the differences between an FSAVC and an in-house AVC. And so the 1998 in-house AVC sale broke the 'causal link' in line with the FSAVC Review Model Guidance. I've considered this.

It's important to note that while the Model Guidance is useful, it's still simply guidance. It doesn't set out rules that all businesses must follow. And, in some circumstances, it's not appropriate to apply the guidance if it will result in unfair redress for a consumer that has been mis-sold an FSAVC plan.

I acknowledge that from 1998, Mrs O had both an FSAVC plan and in-house AVC plan and so may have seen that the charges were different. But even if she did see that the charges were different, it doesn't follow that this meant Mrs O ought to have realised that Aviva hadn't told her everything it was required to in the 1994 sale, in particular about the difference in charges and expenses between the FSAVC and an in-house AVC.

Mrs O did buy an in-house AVC plan in 1998, after the in-house adviser visited her workplace. This was a tied adviser and so I think it's more likely than not that it would only have discussed the in-house options with Mrs O; it wouldn't have discussed FSAVCs with Mrs O or compared them with the in-house options. And I've seen nothing else to make me think Mrs O ought reasonably to have realised that Aviva hadn't told her everything it was required to in the 1994 sale. Instead, I think Mrs O continued to rely on what Aviva told her when it sold her the FSAVC in 1994. But as Aviva itself now accepts, it mis-sold that FSAVC in 1994.

Taking everything into account, I don't think it's fair or reasonable for Aviva to limit its liability for its 1994 FSAVC mis-sale to 1998.

Putting things right

I think that if Aviva had provided Mrs O with the information it should have done in 1994, she would have most likely started making contributions to her employer's in-house AVC scheme rather than taking a FSAVC plan.

Aviva 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. And for the reasons I've already explained, Aviva should calculate its redress from when Mrs O started paying into her FSAVC in 1994 until she stopped paying into it in 2006 - Aviva should not limit its calculation to 1998.

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 O'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 O 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 set out above, I'm upholding this complaint. Aviva Life & Pensions UK Limited should pay Mrs O the compensation amount as set out in the steps above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs O to accept or reject my decision before 23 June 2023.

Ailsa Wiltshire
Ombudsman