DRN-4153817

The complaint

Mr H says Aviva Life & Pensions UK Limited (Aviva), trading as Colonial Mutual, gave him unsuitable advice in 1998 to take out a Free Standing Additional Voluntary Contributions (FSAVC) plan instead of informing him about options available to him through his public sector employer's pension scheme.

Mr H is represented by It Is Your Money (IIYM).

Mrs H received similar advice from Aviva at the same time as Mr H. She was also in the same profession. A separate complaint has been set-up to consider the specific merits of her case.

What happened

In July 1998 Mr H met with Aviva and was recommended a Colonial Mutual RainbowPlus Voluntary Contribution Plan (FSAVC policy). At the time of sale, Mr H was a member of the Teachers' Pension Scheme. Given his starting date, he was unable to achieve maximum service (40 years) by the scheme's normal retirement age (60). He was advised to make an initial monthly contribution of £64.94 and select indexation of 5% per year. The FSAVC policy started in September 1998 and was made paid up in August 2004.

In February 2002, Mr H applied for a Stakeholder pension using the services of an independent financial adviser (firm Z). In August 2004 Z arranged for the contribution to his Stakeholder plan to be increased. This happened at the same time as his FSAVC policy was made paid up. And in October 2006 Z arranged for the FSAVC fund value to be transferred to his Stakeholder pension.

On behalf of Mr H, IIYM complained to Aviva on 15 February 2022 about what had happened in 1998. It said:

"The adviser failed to accurately assess the level of risk our client was willing to take. There was no justifiable reason to our client having the portable FSAVC(s) as they were likely to remain in the same employment until their retirement."

"The adviser failed to establish if our client's occupational pension scheme had an added years or any other enhanced benefit AVC arrangement that our client would have chosen if properly advised."

"There is no evidence that the adviser compared the benefits of the FSAVC with additional contributions to the occupational AVC scheme. The adviser should have referred our client to the company scheme for the full details of charges in order to make an informed choice."

"There is no evidence that the adviser made our client fully aware of the comparison of charges with the FSAVC recommended and the in house AVC scheme."

"There is no evidence that more suitable retirement alternatives were discussed with our client in a fair and balanced way. If the adviser had advised our client correctly, they would have contributed to the most suitable in house AVC arrangement."

On 5 April 2022 Aviva responded to Mr H rejecting his complaint in the following terms:

"After examining the sales documentation, I'm satisfied our representative recommended a suitable product for Mr H. It was not possible for Mr H to reach maximum pension benefits with the Teachers' Pension Scheme by the scheme's retirement date of 60. It was appropriate to recommend making extra pension contributions (AVC) to help cover the expected shortfall in scheme membership."

"As company representatives, our advisers were only authorised to discuss and recommend our products. But they were expected to check customers knew about the alternative option of an in-house AVC. I'm satisfied Mr H was made aware of the alternative in-house AVC arrangements and informed he should contact his employer to obtain full details. He signed the declaration to confirm:

'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 to Colonial.'"

Mr H approached this Service for a review. Aviva initially made a challenge as to whether he'd brought his complaint in time. But it later consented to this Service reviewing the merits of his case.

An Investigator upheld Mr H's complaint. He didn't think Aviva had done enough to show it had made him aware that an in-house option for making additional voluntary contributions to his employer pension scheme was likely to be cheaper. And that if it had done so, it was more likely than not he'd have opted for that. He didn't consider the role of Z from 2002 to have a bearing on his recommendations.

Aviva disagreed. It considered the original advice had been suitable and that it had acted appropriately in making the original recommendation. It also noted the role of firm Z in 2002, 2004 and 2006 in providing him with pension advice. It says it's reasonable to assume it provided compliant advice. It suggests Z would've had a role in assessing his provision on each occasion and therefore as part of that process would've considered his FSAVC policy.

As both parties couldn't agree with the Investigator's view, Mr H's complaint was passed to me to review afresh. I issued my provisional decision earlier this month. As neither party has provided any new material evidence or arguments, I see no reason to depart from my initial findings and conclusions.

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.

Where there's conflicting information about the events complained about and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I've not provided a detailed response to all the points raised in this case. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I'm upholding Mr H's complaint. I'll explain why.

Aviva has provided the application and sales illustration from 1998. In addition it's supplied a copy of the 'Choices' brochure with a declaration signed by Mr H. It says:

"The declaration signed by Mr H confirmed he had compared the options available and knew the following:

- An in-house AVC scheme is usually a money purchase scheme too. However, some schemes offer an "added years" option as an alternative to a money purchase facility. This means that your contributions will be used to buy you a number of years of additional pensionable service.

- Will I receive information about charges? ... With an in-house AVC scheme, set up through an insurance company., you should be able to obtain an illustration with which to make a comparison.

- We recommend that you compare the benefits and options outlined within this booklet with those available under your employer's in-house AVC. Some of the features outlined will be available, some will not."

I've considered the regulatory position. In May 1996 the Personal Investment Authority (PIA) issued Regulatory Update 20 (RU20) which set out the procedures it expected product providers to follow. It said that a tied adviser like Aviva shouldn't recommend its own FSAVC until it had:

- Drawn the client's attention to the in-scheme alternative.
- Discussed the differences between the two routes in generic terms (including likely lower charges for AVCs and the possibility of employers being willing to top-up benefits).
- Directed the client to their employer, or to the scheme trustees, for more information on the in-scheme option.

I've thought carefully about the evidence Aviva has provided from 1998. In particular the brochure it provided to customers, which I can see Mr H signed to say he'd read and understood. Unfortunately for Aviva, there are significant weaknesses in the document which undermines its position.

For example, on the costs of its FSAVC compared with the in-house AVC option the brochure said:

"With [the FSAVC plan], your Colonial Financial Advisor will provide you with a personal illustration giving details of the benefits included and the cost of these benefits."

"With an in-house AVC scheme, set up through an insurance company, you should be able to obtain an illustration with which to make a comparison. However, if the in-house AVC has been arranged with a building society, it is currently not possible to obtain an illustration because law does not require building societies to provide them."
Aviva will be familiar with what RU20 said about such cost comparisons at the time:

"Charges under in-scheme AVCs 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 benefits to the client."

The brochure doesn't fulfil RU20's requirement.

Further, there are other weaknesses in Aviva's brochure that means I can't rely on it to show it met the regulatory requirements when giving Mr H advice. For example, I don't think there was a clear direction in Aviva's document for customers to approach their employer for more information before making a decision. And I find the way certain matters are presented, such

as the “special” and “very rare” situation where employers might make contributions to AVC plans are skewed or overly nuanced.

Aviva says it’s satisfied its adviser made Mr H aware of the in-house options for making additional voluntary contributions to his pension and informed him he should contact his employer to obtain full details. A problem I have is that I can’t be sure what was discussed between Mr H and Aviva in 1998.

Aviva is on the backfoot here because it hasn’t been able to produce a copy of either the fact-find it conducted with him or the suitability letter it was required to provide him with.

Based on the available evidence, given weaknesses in its supporting brochure and the absence of a suitability letter, I can’t reasonably conclude the likely cost difference between the FSAVC policy and Mr H’s employer’s in-house scheme was pointed out to him effectively. And I think that if he had been made aware of the cost difference, it’s more likely than not he would’ve contributed to his employer’s AVC scheme.

Overall, for the reasons given, I think it’s more likely than not that Aviva didn’t comply with the regulatory requirements for FSAVC sales, and that it’s advice to set up such a plan was unsuitable. Mr H should be compensated on the basis that he would’ve contributed to his employer’s in-house AVC scheme if he’d had suitable advice.

In responding to the Investigator’s recommendation, Aviva advanced the following argument:

“We only know about the Stakeholder (taken out in 2002) because it is an Aviva policy. The stakeholder contribution was increased at the same time the FSAVC policy was made paid up (2004) and then the FSAVC fund was transferred to the Stakeholder (2006).”

“Our records show an IFA was involved in 2002, 2004 and 2006. The complainant may consider it 'extremely unlikely’ [Mr H] would have been given anything other than information about the Stakeholder, but I believe it is reasonable to expect the IFA to have been compliant with the regulatory requirements in 2002, 2004 and 2006. And it is for the complainant to provide sales documentation from those dates to evidence the IFA failed to give compliant advice.”

The Investigator asked IIYM for information about Mr H’s engagement with Z in 2002, 2004 and 2006. It wasn’t able to provide any documentation but responded in the following terms:

“…we have spoken to Mrs H and her husband today regarding their recollections of the advice meetings they had in the early 2000's. [They do not] recall the exact meetings but [say] that in house AVCs were never mentioned when [they] took out a stakeholder pension. It is our understanding that advisers selling stakeholder pensions were not required to discuss in house AVCs and it certainly wouldn't have been expected of any adviser to highlight a possible previous mis selling issue.”

“For anyone to impose what we would consider an unfair time bar of the case at this late stage after the jurisdiction issue has previously been resolved, we would need to have evidence that the advisor in the early 2000's told Mr H that he had been given unsuitable advice in 1998. We can’t assume that this happened, just because Mr H started contributing to the stakeholder pension from that point. Furthermore, even if Mr H was advised that the FSAVC wasn’t suitable for him in the early 2000's, it doesn’t mean that he would automatically think he’d been given the incorrect advice in 1998 as advice and circumstances can often change.”

The question Aviva raises is reasonable. But I should make clear at this point, as it has consented to this Service reviewing the merits of Mr H’s complaint, it can’t now retract.

It isn't disputed that Mr H received services from firm Z in 2002, 2004 and 2006 related to his pension provision. We don't know what the scope of that service was, what his objectives, circumstances or even risk appetite were at the time of these interactions.

I'm mindful Mr H has told this Service that AVC's were never mentioned in his engagement with Z. But it's plausible that if Z was providing Mr H with an advice service relating to his retirement provision, some consideration was given to his FSAVC plan. Aviva says his contributions ended in 2004, and that he increased his contributions to his Stakeholder plan at the same time. And that in 2006 he transferred his benefits away from the FSAVC to his Stakeholder plan. These events suggest some linkage in the decision making process.

There are of course a range of open questions here. For example, had Mr H been a member of his employer's AVC plan, would he ever have considered a Stakeholder plan in 2002? We know he remained with his public sector employer until 2020.

Aside from drawing on Z's engagement with Mr H in support of its initial arguments around the jurisdiction of this case, presumably Aviva now argues an element of any liability arising from this case could rest with Z for the period between 2002 and 2004.

Helpfully, the then Financial Services Authority (FSA) FSAVC Review Model Guidance from May 2000, indicates an approach here which I think is fair. In the section on redress, under Section 8.2 it says:

"*8.2.1 Where a firm concludes that it may be jointly liable along with one or more other firms for the investor's loss then the firm that gave the first advice should review the whole period (including the period after the other firm(s) became involved) and then seek to obtain redress from the other firm(s).*"

"8.2.2 Where a firm believes that the causal link between the advice it gave and any ongoing loss has been broken, perhaps because a second firm gave advice at the same time as a change of employment, then the first firm need only consider the period up to the second advice."

In my provisional decision I said I took the view the approach at 8.2.1 is more likely to apply in Mr H's case. Neither party has challenged that view.

Of course, whether Aviva seeks to pursue other parties in relation to any liabilities arising from this case which it considers should be shared, is a matter for it to decide, and if so to then be able to demonstrate. But recognising this, in making provision for redress I will require Mr H to make certain undertakings to Aviva.

Putting things right

Aviva Life & Pensions UK 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 Mr H'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 Mr H 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 his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

Mr H will need to provide Aviva with a letter of authority to make enquires and secure information from Z about its interactions with him in 2002,2004 and 2006, in order to understand the nature and scope of those interactions, as well as his circumstances and objectives at the relevant time. This will assist it with any claim it might deem appropriate to make against Z.

Further, Mr H will need to undertake that if he has brought any complaints against Z, any redress he's received can be used to offset any liability arising for Aviva from this complaint. And if he hasn't complained to Z, that he assigns any rights to do so about this matter over to Aviva. As he will appreciate, he can't benefit from double recovery in respect of the same case.

My final decision

For the reasons I've already set out, I'm upholding Mr H's complaint. I require Aviva Life & Pensions UK Limited to pay compensation to him in line with the redress I've outlined above.

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