DRN-4187020

The complaint

Mrs R complains that Aviva Life & Pensions UK Limited (Aviva) mis-sold a Free Standing Additional Voluntary Contribution (FSAVC) plan to top up her pension benefits but didn't make her aware of the in-house alternatives and she suffered losses as a consequence, but Aviva won't offer fair compensation for this.

Mrs R is represented by a claims management company (CMC), but I will just refer to Mrs R except where necessary.

What happened

Mrs R was advised to take out the FSAVC with Aviva in 1989. She says it didn't make her aware of the in-house alternatives offered by the Teachers' Pension Scheme (the TPS) as required by the financial services regulations at the time. These were the in-house AVC (the TAVC) administered by Prudential and added years where additional years of membership of the TPS could be bought. Mrs R paid contributions to the FSAVC until she retired in 2004 and took benefits from the plan in 2007.

Mrs R says she wasn't aware of any potential problem with the advice until August 2022 when she saw an advert from by her CMC. A complaint was raised. Aviva said there was no evidence she'd been told about the in-house alternatives, so it upheld the complaint. It said it didn't think she would have taken the added years option in 1989.As she'd wanted to retire early and had decided to pay further AVC contributions by joining the TAVC in 1997. It carried out a loss assessment based on the difference in the charges between the TAVC and the FSAVC, but only until 1997, as it said she was aware of the alternative options by then. Aviva calculated a loss of £944.83 gross and £803.11 net after an allowance for basic rate income tax.

The CMC disagreed. It said losses for the whole period should be considered as Mrs R continued to rely on Aviva's advice. It said the alternative loss calculation basis considering added years should have been used, as she could have afforded this option at the time. Mrs R referred her complaint to our service.

Our investigator asked Aviva for its file. It sent this but said it didn't think our service could consider the complaint as it had been made too late.

Aviva said Mrs R had either six years from when the advice was given in 1989 or three years from when she should reasonably have known she had cause to complain if later. It said she should have known this by 1997, when she joined the TAVC, and knew about the alternative options. So, she'd had until sometime in 2000 to complain. However, Aviva didn't withdraw its offer to pay redress calculated on a charges basis, capped until 1997.

Our investigator said he thought our service could consider the complaint. Because whilst Mrs R had joined the TAVC in 1997, that didn't mean she should have suspected she'd been given poor advice in 1989. He said had she known about the different charges in 1997, logically she would have stopped the contributions to the FSAVC. He said Mrs R hadn't been provided with specific advice by Prudential about any difference between the FSAVC and the TAVC and as a lay person it was unreasonable to expect her to have made a comparison herself.

Our investigator then considered Mrs R's complaint. He said Aviva accepted the policy had been mis-sold. He said as she wasn't aware she had grounds to complain about the advice in 1997, it wasn't fair to cap any possible loss calculation to that date either. So, the whole investment term to retirement should be considered. But he said it was fair to base the loss calculation on the difference in charges between the FSAVC and the TAVC rather than to added years.

Our investigator said added year were generally regarded as an expensive and inflexible option at the time when compared to the projected benefits from AVCs. And that arguments made now about the relative merits and risks compared to AVC's were often made with hindsight. He said whilst some added years may have been affordable, Aviva couldn't give Mrs R advice about them. He said her attitude to risk (ATR) had been recorded as *"average"* by Aviva, not risk adverse. This indicated she was willing to take risk and the projected benefits from the FSAVC would have been greater than added years from the same level of contributions. And it was likely she would have opted for the AVC option over added years.

Aviva didn't agree that Mrs R's complaint was one our service could consider and said its proposal to calculate any loss up to 1997 was fair.

The CMC said the loss calculation should be based on added years. It said Mrs R's initial contribution to the FSAVC would have purchased 4.5 added years. And that basing any decision on the ATR recorded on the fact find was *"completely absurd"*, as it was already established the FSAVC was mis-sold. It said that the ATR recorded didn't reflect Mrs R's circumstances at the time. As apart from a low-cost endowment she held no risk-based investment products. And it was unlikely she'd have taken a risk with her retirement savings and would have opted for the guaranteed added years.

Our investigator said his opinion hadn't changed.

As neither Mrs R nor Aviva agree it has come to me to decide.

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 that our service can consider the complaint and that it should be upheld in part. I'll explain why.

Why we can consider this complaint

We can't consider every complaint we receive. The complaints we can look into are set down in the rules under which we operate. Our rules are written by the regulator, and flow from legislation, specifically the Financial Services and Markets Act 2000.

The Dispute Resolution (DISP) rules say we:

> *"cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service more than:*
>
> *(a) six years after the event complained of; or (if later)*

(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint"

If a complaint is brought outside these timescales our service can only consider it if either the business consents, or I think something truly prevented it being brought in time. Aviva gave the advice to take out the FSAVC plan in 1989, this is clearly more than six years ago, and Mrs R is out of time on this part of the rule.

For the second part of the rule, it's important to note that this doesn't require Mrs R to have had certain knowledge of cause for complaint on a specific basis. The sense that something wasn't right might be enough to place an individual on a path to discovery of an actual cause for complaint, if they reasonably acted on that unease, in other words the "ought reasonably to have been aware" part of the rule.

I've thought about the available evidence and arguments made by both parties. 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.

It is generally the case that the in-house TAVC had lower charges than most FSAVC plans. Mrs R says she only became aware Aviva's advice might have caused her losses when saw an advertisement placed by her CMC in 2022. Aviva says as she should have known this by 1997 when she joined the TAVC. And if not, then certainly by the time she took benefits from the FSAVC.

Aviva makes a number of points about what Mrs R should have known as a result of joining the TVAC in 1997. And what Prudential, who ran the TAVC, were required to do at the time and its responsibilities in advising her. It says this information and advice would have made her aware about the charging differential between the in-house AVC and FSAVC. Leading her to question the merits of continuing the FSAVC. But it also said it didn't agree that knowing the charges were higher on the FSAVC would have led her to cease contributions to it as there were *"many reasons a customer would be willing to accept higher charges*". Including that the plan was written to age 55 to facilitate early retirement which wasn't possible with the in-house alternative. And if Mrs R wasn't aware in 1997, she would have been able to see the difference in charges and projected benefits between the TAVC and FSAVC as they *"ran in parallel"* subsequently.

I've considered these arguments. Mrs R clearly knew there were alternative options by 1997. But she says she doesn't recall being given individual advice by Prudential, only listening to a group presentation. We don't know exactly what was said in this presentation. Prudential's literature from the time indicated charges for the TAVC could be lower than FSAVCs, but it could only talk about its own products. So, I think it is unlikely that there would have been specific discussion about the merits or otherwise of existing FSAVC plans those listening to the presentation might have had. There is no evidence that any comparison was made between the in-house AVC and the existing FSAVC with Aviva.

And I don't think it is reasonable to say Mrs R should have linked general comments about charges that might have been made during a presentation or in set out in a leaflet that might have been provided to her, to a potential problem with the advice given by Aviva around eight years before.

If instead Mrs R had been given compliant advice about taking another FSAVC or increasing her contributions in 1997, the situation would have been different. By then the regulations required there to be an actual discussion about in-house AVC options and the generic difference between these and FSAVCs and the likelihood that in-house charges might be lower. Had this happened this might have raised a concern about the earlier advice. Concerns that I think would logically lead her to at least redirect contributions to the TAVC. But there is no evidence that such a discussion took place.

I'm not persuaded that comparing annual statements or the eventual benefits paid by the TAVC and FSAVC would have alerted Mrs R to any charging differences. I haven't seen details of how the TAVC was invested, but the default position with this arrangement was Prudential's traditional with profit fund. The operation of which was quite different to the unit linked Managed and Equity funds held in the FSAVC. And I don't think it is reasonable to expect a non-expert to interpretate the information on annual statements, possibly sent several months apart, and conclude there was cause for concern about one of them.

I don't think the evidence shows that Mrs R should have become reasonably aware she had grounds to complain about Aviva's advice before she did. So, I think our service can consider this complaint.

Aviva doesn't dispute the FSAVC may have been mis-sold. So, the issue for me to decide is whether the compensation calculation basis offered by Aviva is fair in the circumstances of Mrs R's complaint.

Period of calculation

As I don't think Mrs R was aware there may have been a problem until 2022, if follows that I don't think it is fair to cap the loss calculation to 1997 when she joined the TAVC scheme. As she'd continued to pay contributions to the FSAVC I think it's reasonable to assume this was because she was still relying on Aviva's initial advice and the period to retirement should be considered.

Basis of calculation

The CMC argues this should be on the added years basis, as Mrs R could afford them. And was risk adverse and added years were more appropriate to her ATR. But I'm not persuaded by the arguments made here.

I've thought about what Mrs R might have done in 1989 had she been given the direction to obtain information about in-house options. There is little contemporaneous evidence to consider. And any comments made now could easily be influenced by hindsight. Where 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.

When the advice was given the general view prevailing was that buying added years of service in the main pension scheme was an expensive and fairly inflexible option. Added years provided guaranteed benefits, costed on a conservative basis to minimise the possibility that any liability for paying the extra benefits would fall back to the employer or taxpayer. The CMC says the contributions paid to the FSAVC could have funded around 4.5 added years. Although that would assume that the contributions continued to age 60, which they didn't as she retired at age 55, as it seems she'd long planned to do so.

In comparison both in-house AVCs and FSAVCs didn't offer guaranteed benefits but were expected to provide better investment returns in the future than most have actually achieved. So, the benefits projected for the same level of contribution were often rather higher than those from added years and could be perceived as a more cost-effective option as a consequence. And contributions could be stopped, reduced, or increased within the allowable limits at any time, which generally wasn't the case for added years which required a bigger commitment.

Whilst it appears Mrs R could afford the commitment of added years, it also appears she intended to retire early and her FSAVC was set up to age 55. If early retirement was taken any added years benefits would be pro-rated down in proportion to the number of years contributions had been paid compared to the original term. Then, as with the main TPS benefits the added years would be reduced on actuarial basis to reflect the early payment. This could result in significantly lower benefits than "expected" with no clear idea of what they would be at retirement. AVC's in comparison would have seemed more straightforward where early retirement was being considered.

And when Mrs R did have more information about in-house alternatives and could have made enquiries about added years in 1997, she chose to make further AVC contributions. I think this indicates that she was comfortable with the investment risk presented by the AVC compared to the guarantees offered by the added years option.

Aviva's adviser recorded Mrs R's ATR on the fact find as *"Average"*, the other options being *"Cautious"* and *"Speculative".* There's no explanation of what these classifications mean or how the ATR was determined. But Mrs R signed the fact find and I'm not aware that she has contested the limited information recorded. Presumably, then, she was content that the ATR reasonably reflected her view on investments. And she did have an investment backed mortgage when she took out the FSAVC. If she was as risk adverse as her CMC has argued I think she would have opted instead for the risk-free repayment mortgage alternative.

So, considering everything I think it is more likely than not that Mrs R would have opted for the apparently cheaper and more flexible AVC rather than the seemingly expensive and inflexible added years option in 1989. Just as she did in 1997, when she did have further information. And had she had this information in 1989 I think she would've taken the in-house AVC option. As this was likely to have forecast higher benefits than the FSAVC for the same contribution due to differences in charges.

That means I think Aviva's offer to resolve the mis-selling complaint by calculating any potential loss on a charges basis is a fair one provided it is applied to the investment term to retirement.

Putting things right

Aviva should update its loss calculation on a charges basis to reflect the investment term to retirement.

If this shows a loss it should pay the compensation to Mrs R having made a notional allowance for tax. The initial calculation it prepared allowed for a 15% allowance, applicable for a basic rate taxpayer. I'm not aware that Mrs R has queried this but if that assumption isn't appropriate, she will need to provide Aviva with evidence of her tax status so that this may be adjusted accordingly.

My final decision

My final decision is that I uphold the complaint against Aviva Life & Pensions UK Limited.

I direct Aviva Life & Pensions UK Limited to update its loss calculation on a charges basis to reflect the investment term to retirement and pay compensation accordingly to Mrs R, reflecting her tax position.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs R to accept or reject my decision before 11 July 2023.

Nigel Bracken
Ombudsman