

## **The complaint**

Mrs D has complained to Aviva Life & Pensions UK Limited about the sale of her Free Standing Additional Voluntary Contribution (FSAVC) plan. She says she should have been advised to buy added years in her employer's occupational pension scheme instead.

Mrs D is being represented in this complaint by a third party. For ease, I'll refer to all representations as having been made by Mrs D.

## **What happened**

Mrs D met with Aviva (formerly Colonial) and received advice to take out an FSAVC. The paperwork completed at the time of the sale confirmed that Mrs D was married. She was working as a Teacher, earning just under £21,000. And she'd been a member of the Teachers Superannuation Scheme (TSS) since 1972. To top up her pension provision, Mrs D was advised to start making monthly contributions to an FSAVC until age 60.

In 2022, with assistance from a representative, Mrs D complained to Aviva about the sale of her plan. In summary she complained the FSAVC plan was unsuitable. And that the adviser had failed to give her any information on the alternatives she had for topping up her pension through the TSS. Mrs D said that, had the plan not been mis-sold, she would have purchased added years in the TSS instead of the FSAVC.

Aviva considered the complaint and said that it hadn't been able to establish that Mrs D had been made aware of the in-house alternatives with the TSS. So it upheld the complaint on the basis that, had the plan not been mis-sold, Mrs D would have chosen to contribute to the in-house additional voluntary contribution (AVC) scheme instead of taking the FSAVC. So Aviva offered to complete a calculation to compare the difference in charges between the FSAVC and the in-house AVC.

Mrs D didn't accept Aviva's offer. She believed the redress should be based on her having joined the added years arrangement, instead of the in-house AVC. So she referred her complaint to this service for review.

One of our investigators reviewed the complaint and based on the information that had been provided she thought Aviva's offer was fair; she didn't think Mrs D would have bought added years. Mrs D didn't accept the investigator's opinion. She maintained that she would have bought added years had the FSAVC not been mis-sold.

Aviva was subsequently able to locate further paperwork from the time of sale and an earlier complaint Mrs D had made about the sale of the plan. It also said that it was still prepared to honour the initial offer it had made Mrs D. Within the paperwork provided was a copy of the client profile document that had been completed at the time of the sale. In the additional information section of this document, it had been noted that the adviser had asked Mrs D on 5 December 1994, "to investigate and compare the costs and benefits of past added years and scheme AVC options available from their current employer. Having had an opportunity to do so client now wants to proceed with Colonial Contract". Mrs D had signed this statement and dated it 10 January 1995.

The investigator forwarded a copy of the new documentation to Mrs D, along with Aviva's comments, and confirmed that her view remained the same; the complaint should be upheld on the basis that Mrs D would have joined the AVC arrangement had the FSAVC not been mis-sold. The investigator asked if Mrs D still wished to pursue matters or accept the offer. Mrs D confirmed that she would still like an ombudsman to consider matters.

In summary, Mrs D has said:

- she doesn't agree the AVC would have looked more attractive as the added years would have looked preferable when compared to the FSAVC illustrations.
- At the time of the advice, the FSAVC fund had to be taken in the form of an annuity rather than 25% tax free cash and annuity with the remainder.
- The pension quoted in the illustration was for a single life annuity whereas the TSS added years would have provided a valuable spouse benefit.
- If Aviva had provided a more realistic illustration (rather than the most basic) that included a spouse benefit and guarantee, the illustrative figures would have been far lower. The growth rates used in the illustrations of 6%, 9% & 12% were correct at the time. But they couldn't be guaranteed and furthermore nobody could even start to predict what annuity rates would be at the time of retirement.

The complaint has been passed to me to make a final 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.

For completeness, I should confirm that although Mrs D complained to Aviva in 2021 about the sale of the FSAVC, Aviva has confirmed that it consents to us looking at this later complaint, raised about the same issue.

Aviva has already accepted that the FSAVC plan was mis-sold. So all I'm considering is whether to put things right it needs to base its redress on Mrs D having bought added years or joining the in-house AVC. In doing this, I've thought about the rules that were in place at the time of advice.

Mrs D's FSAVC plan was sold by an adviser that was tied to Aviva. In late 1994 and early 1995 a tied adviser could only recommend products provided by the company they worked for. And they had to follow the rules set in 1988 by LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation) and adapted by the Personal Investment Authority (PIA - a predecessor of the Financial Conduct Authority) in 1994.

Amongst other things, the LAUTRO code of conduct said advisers should exercise due skill, care and diligence and deal fairly with investors. And they had to have regard to any rights under an occupational scheme and give consumers all relevant information.

In the case of Mrs D, I'd expect the adviser to have known that in house options would be available. I'd also expect the adviser to have mentioned the generic benefits of the in-house options. These generic benefits would include that:

- Money purchase AVCs could potentially offer lower charges than the FSAVC

- Added years' might have been available
- That Mrs D's employer might match or top-up the amount she paid into an in-house option

And if the adviser couldn't make further enquiries with the employer, potentially due to being tied to Aviva, I would have expected the adviser to recommend that Mrs D explored those options herself with the scheme, before considering whether to take out an FSAVC.

Although I acknowledge Mrs D's comments, I think the adviser fulfilled their duty in terms of the requirements under the rules for added years. I say this because the adviser does appear to have made Mrs D aware that added years were an option she could take through her employer; the adviser wasn't required to compare the benefits of the added years option against the FSAVC. They merely had to make Mrs D aware that added years existed and direct her to her employer for more information on this option. It wasn't a requirement for the adviser to provide an illustration on the same basis on added years, so it didn't need to include a spouse benefit in its illustration.

In the sales paperwork, there is a note to support a discussion between Mrs D and the adviser on the Client Profile more than a month before she agreed to take the FSAVC plan out. Mrs D has signed this note directly underneath, which suggests to me that she agreed with what the adviser had written. This discussion was also referenced again in the recommendation letter. I therefore think that, on balance, Mrs D was made aware that added years were an option for her. So while I accept that Mrs D says now that she would have bought added years, I won't be asking Aviva to base its redress on her having done this because I think the adviser did what they needed to do in terms of making her aware that they were an option.

It's not necessary for me to comment on whether the adviser fulfilled their duty in terms of the in-house AVC. This is because Aviva has already accepted the adviser didn't do this and it has offered redress on this basis.

I therefore uphold this complaint on the basis that Mrs D would have joined the in-house AVC arrangement instead of taking the FSAVC plan out. As such, I think Aviva's offer to complete a calculation to compare the difference in charges between the FSAVC and the in-house AVC is fair.

### **Putting things right**

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.

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 D'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 D 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. Aviva should clarify the tax position with Mrs D. If it's presumed she will be a 20% tax payer in retirement, it should make a notional deduction of 15% overall from the loss to adequately reflect this. If presumed to be 40% it should make a notional deduction of 30% overall from the loss to adequately reflect this.

### **My final decision**

For the reasons explained, I think Aviva Life & Pensions UK Limited's offer is fair so subject to Mrs D's acceptance, it should complete a loss assessment calculation in line with the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 20 July 2023.

Lorna Goulding

**Ombudsman**