

## **The complaint**

Mr O, in conjunction with his representative, has previously complained about advice given by Aviva Life & Pensions UK Limited (Aviva) trading as Colonial Mutual, to purchase a Free-Standing Additional Voluntary Contribution (FSAVC) plan. This complaint has been assessed and upheld by Aviva who have offered redress based on a charges comparison between the FSAVC and the in-house AVC scheme.

Mr O has rejected this outcome and has stated redress should be based on the fact he should have been advised to purchase added years through his occupational defined benefit (DB) pension scheme.

## **What happened**

In May 1994, following a fact-finding meeting with an Aviva adviser, Mr O was advised to commence a FSAVC policy.

This fact-find recorded Mr O's circumstances at the time of advice and noted:

- Mr O was aged 40 and married, with three dependent children.
- Income and expenditure details were recorded with Mr O having a disposable income of £700 per month.
- "Expected retirement age" was recorded as 60, with "desired retirement age" being noted as 55.
- Mr O had joined his occupational DB pension scheme in 1977 and would have a three-year shortfall at age 60.
- Mr O's attitude to risk (ATR) was recorded as "moderate".

Following this, a regular premium of £68 per month gross (£51 net) was agreed with the premiums to be invested into the Managed and Equity funds in line with Mr O's ATR. The premiums were set up to rise automatically by 5% each year.

Premiums were maintained, increasing each year as detailed above, until 2009 with benefits then accessed in 2010. Mr O retired from teaching in 2012.

In 2022, through his representative, Mr O complained to Aviva stating that he did not believe the advice to purchase the FSAVC scheme was suitable.

Following their investigation Aviva upheld the complaint and offered redress based on a charges comparison between the FSAVC scheme and the in-house AVC scheme. This offer was rejected with Mr O stating that he believed a calculation based on him opting to purchase added years within his occupational DB scheme would provide a fairer level of compensation.

As Aviva did not agree the case was forwarded to this service.

Our investigator looked into things and concluded that the charges comparison offered by Aviva was fair.

It was noted in the findings issued that due to the expense and inflexibility of the added years option, in addition to Mr O's willingness to take a moderate amount of investment risk, it was reasonable to conclude that Mr O would not have chosen the added years option.

Mr O did not agree and provided additional commentary stating that the added years option would have in fact been cheaper than the premium paid into the FSAVC policy, that flexibility would not have been required given his intention to remain a teacher, and that had it been explained he could meet his objectives through the no-risk option of the added years facility, he would have chosen this over the risk based approach available through the FSAVC / AVC schemes.

Our investigator was not persuaded to change their findings and as no agreement could be reached the case was forwarded to me.

I issued a provisional decision which stated:

*"Firstly, there is no need for me to consider the suitability of the Aviva advice. It has already been accepted that this was unsuitable. The only decision I need to make is whether Mr O would have opted to pay his additional contributions into the in-house AVC scheme or whether he would have opted to purchase added years within his DB scheme.*

*The decision is based on the information that would have been available to Mr O and the adviser at the time with an emphasis based on the contemporaneous evidence available.*

*Over the 30 plus years since this advice was given, the relative value of defined benefit pension provision has increased as returns achieved on other investments has fallen.*

*It is also worth noting that in 1994 a tied adviser (an adviser who could only recommend products provided by the company they worked for) had to follow the rules set in 1988 by LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation). These rules stated that advisers should exercise due skill, care and diligence and deal fairly with customers.*

*Whilst tied advisers could not give advice regarding the suitability of occupational pension schemes, they had to consider any available occupational schemes customers may have access to.*

*It is impossible for me to know exactly what Mr O would have done around 30 years ago had he been given appropriate information and directed to his occupational pension scheme prior commencing the FSAVC policy. As such the decision I have made is based on the weight of evidence available and the principles of fairness and reasonableness.*

*Added years options are not usually subsidised by the sponsoring employer and as such they can appear expensive when compared to alternatives. However, in this case the cost of the three added years available for purchase has been confirmed as £64.82 per month. This is less than the gross premium Mr O agreed to contribute to the FSAVC scheme and as such it is clear the added years option would have been affordable to Mr O.*

*I accept that the cost of the added years option would increase over time as Mr O's salary increased (either through inflationary rises in salary or through promotions etc), however Mr O agreed to have his FSAVC premiums increased each year by 5% and as such I believe*

*it is reasonable to conclude this aspect of the added years option would not have been a concern to Mr O.*

*Additionally, the file also shows that Mr O had a household disposable income of £700 per month, further reducing any affordability concerns. There is also no evidence of any future changes to Mr O's circumstances that could impact ongoing affordability.*

*Added years can be considered inflexible in that it is not easy to start and stop contributions, nor can they be continued in the event of a change in employer. However, I do not believe that these issues would have been a major concern for Mr O.*

*As above the premiums were clearly affordable at outset with there being no evidence to suggest that this would have changed over time. Mr O was a teacher and had been so for around 17 years at the time of advice. Mr O was established in his career with there being a high probability he would remain a teacher in some capacity until retirement. This would support the suggestion that the added years option would have been desirable to Mr O with there being no need for any additional flexibility.*

*Whilst the added-years option could be considered a no-risk approach to increasing retirement provision the file does indicate Mr O was willing to accept a "moderate" amount of risk with his premiums. There is some indication of limited investment experience within the sales file. Mr O held two different investments although one of these was linked to his mortgage and (although not specifically detailed within the file) both were likely to be with-profit based investments, which would limit Mr O's exposure to downside investment risk.*

*Whilst this "moderate" ATR could be considered to align more closely with the occupational AVC scheme rather than the added years option, the argument made by Mr O stating that if he had been aware he could meet his objectives through a no-risk option it would be logical for him choose this and limit / remove the risk of any investment losses is persuasive.*

*I have also considered the fact that Mr O was recorded as having a desired retirement age of 55. Early retirement would have a significant impact on the added years option with an actuarial reduction in the value of benefits if taken before the standard retirement age of 60.*

*However, there are also consequences of early retirement on the other options. By retiring early fewer premiums are paid and therefore a lower overall amount invested. The lower amount is also invested for a shorter period of time – limiting the potential for investment growth, and if accessed earlier, the accumulated funds then need to support expenditure over a longer than expected retirement.*

*In this case we can see from Mr O's actions from 2010 – 2012 that early retirement did in fact occur. Mr O's early retirement could be assessed in different ways. It could be stated that the flexibility provided by the FSAVC scheme (which would have been mirrored by the in-house AVC scheme) allowed Mr O to retire early and as such could be considered to support the idea that Mr O would have chosen the AVC scheme.*

*Alternatively, the fact Mr O was willing to accept the penalties applied to his occupational DB scheme when he retired in 2012, could be considered to support the idea he would also have been willing to accept these penalties on any added years he had accumulated at that time, had appropriate advice been given.*

*Overall, I do not believe Mr O's desired retirement age of 55 – as recorded in 1994 – provides enough of a reason to alter the conclusion that Mr O's needs, objectives and circumstances predominantly support the suitability of the added-years facility available to him. Based on the weight of evidence on file, I have concluded that had all the relevant*

information been given to Mr O, it is the added-years option which would have been chosen.

Given this, I am intending to uphold this complaint.

### **Putting things right**

*I currently think that, had Aviva provided Mr O with appropriate advice and information, he would have chosen to use his additional pension contributions to purchase added years benefits (to the maximum allowed by his OPS) instead of taking out a FSAVC plan. A fair and reasonable outcome would be for Aviva to put Mr O, as far as possible, into the position he would now be in but for the unsuitable advice.*

*I intend to direct Aviva to undertake a redress calculation in line with the regulator's FSAVC review methodology on an added years basis. This involves using, in part, the Pension Review methodology as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable DB pension transfers.*

*This calculation should be carried out as at the date of my final decision and using the most recent financial assumptions at the date of that decision. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr O's acceptance of the decision.*

*If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr 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 Aviva is unable to pay the total amount into Mr O'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 total amount should be reduced to notionally allow for any income tax that would otherwise have been paid.*

*The notional allowance should be calculated using Mr O's marginal rate of tax in retirement. I think that it's reasonable to assume that Mr O is likely to be a basic rate taxpayer in retirement, so the reduction would equal 20%. However, if Mr O 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%.*

*If either Aviva or Mr O dispute that this is a reasonable assumption, they must let us know as soon as possible so that the assumption can be clarified, and Mr O receives appropriate compensation. It won't be possible for us to amend this assumption once any final decision has been issued on the complaint.*

*I am aware that on 2 August 2022, the FCA launched a consultation on changes to this guidance and has set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice.*

*In this consultation, the FCA said that it considers that the current methodology in FG17/9 remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.*

*Nevertheless, the basic objective of the proposed amendments still remains to put a consumer, as far as possible, into the position they would be in if the business had advised*

*them to remain in the DB scheme.*

*A policy statement was published on 28 November 2022 which set out the new rules and guidance-<https://www.fca.org.uk/publication/policy/ps22-13.pdf>. The new rules will come into effect on 1 April 2023.*

*The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 for the time being. But until changes take effect, firms should give customers the option of waiting for their compensation to be calculated in line with the new rules and guidance.*

*I think it's fair for me to give Mr O the same choice.*

*I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr O. And, having reviewed the FCA's consultation and policy statement, I'm satisfied that the changes still reflect a fair way to compensate Mr O in this case.*

*Therefore, if Mr O wishes to have his redress calculated in line with the new guidance and rules, I intend to ask Aviva to undertake a redress calculation in line with the updated methodology as soon as the new rules and guidance come into effect (rather than to calculate and pay any due compensation now in line with FG17/9).*

*The aim of the new guidance and rules remains the same as in FG17/9, which is to put consumers in the position they would be in if they had remained in their DB scheme (recognising actual reinstatement into the former scheme might not be possible).*

*This Service can't advise Mr O on whether or not he should wait. The FCA has published some information and answers to likely questions consumers might have about how redress is calculated. I recommend Mr O reads this information before he makes his choice.*

*This can be found here: <https://www.fca.org.uk/consumers/pension-transfer-defined-benefit/redress-calculations>.*

*Mr O should let me know in response to this view whether he wishes for Aviva to calculate any compensation that may be owed to him:*

*a) in line with the guidance in FG17/9 (as recommended above)*

*or*

*b) in line with any new rules or guidance that will come into force on 1 April 2023.*

*If I don't receive a response on this point, I'll assume Mr O doesn't wish to wait and I'll continue to recommend compensation to be calculated in line with FG17/9.*

*If the complaint hasn't been settled in full and final settlement by the time the outcome of the consultation is published, I'd expect Aviva to carry out a calculation in line with the updated rules and guidance in any event."*

### **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 part of the provisional decision detailed above, I gave both Aviva and Mr O until 18 July*

2023 to respond.

Aviva did not provide any further commentary.

Mr O responded confirming he accepted the outcome of the provisional decision and noted he would like redress to be completed based on the new guidance – option (b) noted above.

As neither party have provided any additional commentary or evidence to challenge the provisional decision issued, I have concluded that this represents a fair and reasonable outcome to the issues faced and as such am not making any changes to it.

### **Putting things right**

Aviva Life & Pensions UK Limited must calculate the redress as detailed above based on Mr O's decision to have that redress based on the new guidance – option (b) noted above.

### **My final decision**

As per the rationale above I am upholding this complaint. Aviva Life & Pensions UK Limited must calculate the redress as detailed above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 17 August 2023.

John Rogowski  
**Ombudsman**