DRN-4307691

The complaint

Mrs K complains that Aviva Life & Pensions UK Limited (Aviva) gave her unsuitable advice to start contributions to a Free Standing Additional Voluntary Contribution (FSAVC) plan.

Another business, which is now part of Aviva, provided the advice. But Aviva is responsible for the complaint. I'll only refer to Aviva in my decision.

Mrs K is represented in her complaint by a Claims Management Company, but I'll only refer to her in my decision.

What happened

Mrs K was employed and a member of her employer's Occupational Pension Scheme (OPS) since 1961. In 1989, she decided to make Additional Voluntary Contributions (AVCs) through her employer's in-house AVC scheme.

In 1990, Aviva advised Mrs K to start an FSAVC policy. The policy started in May 1990 for a contribution of £50 gross each month. Her application noted that her normal retirement date (NRD) was in late 1999, and that she'd be invested in a managed fund.

In November 1994, Mrs K met with an Aviva adviser again as she wanted to ensure she maintained her standard of living once she'd retired. Aviva carried out a fact find. And told her that she had three options for increasing her retirement provision – added years through her OPS, the in-house AVC plan, or the FSAVC policy.

Aviva produced a retirement planning report in November 1994. This noted that Mrs K wouldn't be able to achieve maximum service in the OPS by the scheme's Normal Retirement Age (NRA) of 60. And that she was hoping to retire early.

I understand that Mrs K took early retirement benefits from her OPS in August 1996. And that she also took the benefits from her FSAVC policy around this time.

Mrs K complained to Aviva about the unsuitable advice to start the FSAVC policy in November 2022. She wanted it to return her to the financial position she would've been in but for the unsuitable advice. Her representative made the following complaint points on her behalf:

- *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 scheme 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.*

Aviva issued its final response to the complaint on 5 April 2023. It said it hadn't been able to find the 1990 sales documentation. But it felt that the documentation from the 1994 advice showed that the adviser had discussed all of the AVC options available to Mrs K at the time. And that it had made it clear that in-house AVCs would likely be cheaper to provide than the FSAVC. It therefore felt that it had been appropriate to recommend making extra pension contributions through an FSAVC.

Unhappy with Aviva's response, Mrs K brought her complaint to this service in May 2023, through her representatives.

Aviva told this service that although it was now a regulatory requirement to retain records of pension sales indefinitely, this wasn't the position in either 1990 when the policy started, or 1996 when it ended. It also felt that it wasn't unreasonable that it no longer retained the 1990 sales documentation. And that the 1994 documentation clearly showed that Mrs K was informed about the alternative in-house AVC options. It gave its consent for this service to consider the merits of the complaint.

Our investigator didn't think the complaint should be upheld. He felt that Aviva had met regulator's requirements in 1994 when it told Mrs K the alternatives to taking an FSAVC. He also felt that it was more likely than not that it had provided Mrs K with the same information in 1990. But even if it hadn't, he felt that the fact that Mrs K had been contributing to an in-house AVC before 1990 showed that she'd been aware of the alternative options.

Mrs K's representatives didn't agree with our investigator. It felt that Aviva hadn't met the regulatory advice in place in 1990. And that it wasn't fair to Mrs K to make assumptions for the 1990 advice based on the evidence from the 1994 advice. It also felt that the 1994 advice itself wasn't sufficient to comply with the rules from 1988. And that the 1994 advice wouldn't have been needed if the correct advice had been provided in 1990. The representatives also felt that it was a requirement of COBs rules to keep sales files for FSAVCs indefinitely.

Our investigator considered Mrs K's representatives views, but it didn't change his opinion. He felt that the 1994 report had highlighted the availability of the in-house options, and the fact that these may be more cost effective. He also felt that the report could be relied upon as a reflection of what was discussed between the business and Mrs K at that time. Therefore he was satisfied that these points would've been discussed during her meeting with the adviser.

As agreement couldn't be reached, the complaint has come to me for a review.

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.

Although the events in this complaint date from many years ago, and might normally be time barred for that reason, Aviva has given its consent for the complaint to be considered despite the time that's elapsed. So this is a complaint that I can consider.

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.

Having considered all the circumstances of this complaint, I'm not going to uphold it. I know this will be disappointing to Mrs K. I'll explain the reasons for my decision.

In order to decide this complaint, I need to consider whether Aviva complied with the regulatory guidance in place at the time of the advice. And, if there were any failings, whether the failing made a difference. In particular, would Mrs K have still taken out the FSAVC.

I first considered whether it was a requirement of COBs rules to keep sales files for FSAVCs indefinitely.

Should Aviva have kept the sales files from 1990 under COBs rules?

Aviva said this hadn't been a requirement over the entire duration of the FSAVC policy. It felt that it wasn't unreasonable that it no longer retained the 1990 sales documentation.

The advice in 1990 and 1994 was provided long before COBs rules were introduced. Therefore I'm satisfied it wasn't a requirement under COBs rules for Aviva to retain the sales file for Mrs K's FSAVC policy.

I agree with Aviva that it hasn't acted unreasonably by not retaining the 1990 sales documentation.

I next considered the regulatory guidance in place at the time of the 1990 and 1994 advice.

The regulatory guidance

The advisor that met with Mrs K was what was known as a "tied" advisor. That meant they could only recommend products offered by Aviva. They couldn't actively recommend any other products from any other product providers including the in-house options (AVCs or added years) offered by the OPS. They weren't required to carry out a detailed comparison of the in-house options and FSAVC, nor could they advise Mrs K to take out anything but Aviva products.

A tied adviser was required to follow rules set in 1988 by the regulator at that time - LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation).

The LAUTRO Code said advisers should maintain high standards of integrity and fair dealing, exercise due skill, care and diligence in providing any services, and generally take proper account of the interests of investors. It added that businesses should:

- Have regard to the consumer's financial position generally and to any rights they may have under an occupational scheme, and

- Give the consumer all information relevant to their dealings with the representative in question.

So, this means that tied advisers should've known that 'in-house' AVC options would most likely be available to consumers like Mrs K. And in addition to highlighting the benefits of the FSAVC plan, a tied advisor needed to mention the generic benefits of the 'in-house options', including that:

- Money purchase 'in house' AVCs could potentially offer lower charges than the FSAVCs

- Added years' might be available under a defined benefit OPS

- The consumer's employer might match or top-up the amount the consumer paid into either in-house option.

The advice Aviva gave Mrs K was provided over 30 years ago. So it's not surprising that some of the documentation from the time is no longer available.

I agree with Mrs K's representatives that there's no documentary evidence that Aviva made it clear to Mrs K in 1990 that it was likely an in-house AVC would be cheaper. I don't think the evidence provided confirms that the requirements were met for the 1990 advice. This is because there's no evidence to show that it was made clear at this time that the charges on the FSAVC were likely to be higher. There's also no evidence that it was made clear that added years might be available in the OPS.

Therefore, there's no documentary evidence that Mrs K was able to make an informed decision about whether the FSAVC was the best option for her in 1990.

But the documentation from the 1994 advice goes further. The adviser wrote a handwritten note on the November 1994 report stating: "*Information acquired about [in-house provider name] AVC. Scheme facility is well-placed to provide higher benefits than FSAVC due to low deductions for expenses*."

The November 1994 retirement planning report also confirmed the following three ways available to Mrs K to enhance her benefits at retirement:

a. *By purchasing Past Added Years: you can purchase extra years in the scheme by paying a set percentage of salary into the [OPS name]. This usually continues up to age 60. Part of your contribution is on behalf of the employer.*

b. *By contributing into the "in-house" AVC: contributions are taken from salary before tax deductions (usually a set percentage) and are set up for retirement at age 60. Should you leave [your profession], your AVC becomes "paid up" and remains with your [OPS name] until your pension is paid at normal retirement age. Low deductions for expenses make the AVC well-placed to provide higher benefits than a FSAVC if fund performances are the same.*

c. *By contributing into a FSAVC Pension. Contributions are taken out of your bank account (Net of Basic Rate Tax), giving you control and flexibility. Higher Rate Taxpayers can claim additional tax relief from the Inland Revenue. A FSAVC can be set alongside another OPS should you leave [your profession] and take up alternative employment.*

The adviser then recommended that Mrs K increased her FSAVC contributions by £22 each month gross. Mrs K accepted this recommendation by signing the following declaration on 29 November 1994:

"*I acknowledge receipt of this report as part of my Financial Appraisal and confirm that it has been explained to me, the risks and financial commitment involved and that the above product is suitable for my needs*".

On the same date, Mrs K also signed a further declaration which stated:

"*I have received information regarding the "in-house" AVC with the [in-house provider name]. I wish to continue my current FSAVC and make additional contributions now and in the future*."

The documentation from that time also shows that Mrs K confirmed that Aviva had explained the product it had recommended to her.

So, this time, Aviva clearly did tell Mrs K that the in-house AVC had preferential costs. So I'm satisfied that, in 1994, Mrs K was able to make an informed decision.

Mrs K's representatives say that if the 1990 adviser had made it clear that an in-house AVC would be cheaper, this would've prompted Mrs K to consider her options in more detail. And that it would've been likely that she would've chosen to contribute further to the in-house AVC option, given it offered her substantially the same product at a cheaper cost.

Mrs K's representatives take the view that, had the 1990 advice been done 'correctly' then she would've taken out the in-house AVC at that point. And that the 1994 advice wouldn't have taken place, because Mrs K wouldn't have needed to meet with Aviva. It also feels that the 1994 advice itself wasn't sufficient to comply with the rules from 1988. And that it's unfair to Mrs K to make assumptions based on the 1994 advice as it was four years after the original advice.

I acknowledge that Mrs K's representative considers that the statements in the documentation simply show that an in-house option existed, not that the benefits had been discussed/compared to those of the FSAVC in any way. But there was no requirement on the tied adviser to compare the benefits of the in-house AVC and the FSAVC. And I consider that the evidence shows that the adviser did discuss the in-house AVC with Mrs K.

From what I've seen, the advice Aviva gave Mrs K in 1994 met the regulatory requirements. And she was clearly told about the preferential costs of the in-house AVC. But she still chose to increase her contributions to the FSAVC, rather than the in-house AVC.

I've not seen any evidence which indicates there would've been a compelling reason why Mrs K wouldn't have made the same choice in 1990 as she did in 1994. So I don't agree with her representatives' analysis on this point, despite the 1994 advice taking place four years later than the initial advice.

Overall, although there's no documentary evidence that Aviva's 1990 advice met the regulatory guidance at the time, I'm satisfied that the 1994 advice did meet those

requirements. So, in my view, Mrs K was given enough information in 1994 to make a fully informed decision on which option she wanted to proceed with. I'm also satisfied that Mrs K may well have chosen the FSAVC in 1990 if she had been given full information by her adviser at that time. And that it was appropriate to recommend the in-house AVC to Mrs K, given she had a shortfall at her OPS's NRA and was hoping to retire early.

Therefore I don't agree that Aviva gave Mrs K unsuitable advice to start contributions to a FSAVC plan in 1990. And I don't uphold the complaint.

My final decision

For the reasons I've set out, I don't uphold Mrs K's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K to accept or reject my decision before 8 May 2024.

Jo Occleshaw
Ombudsman