DRN-4368962

The complaint

Mr H complains that Aviva Life & Pensions UK Limited (Aviva) mis-sold him a Free Standing Additional Voluntary Contribution (FSAVC) plan, causing him losses. He wants compensation for the losses incurred.

Mr H is represented in his complaint by a claims management company (CMC), but I will just refer to Mr H in this decision.

What happened

Mr H was sold the FSAVC in 1992 by Colonial Mutual and Aviva are now responsible for the advice given. He was a member of the Teacher's Pension Scheme (TPS). This offered in-house alternatives to FSAVC's in the form of an Additional Voluntary Contribution (AVC) plan and the option to buy added years. In 1998 Mr H joined the TPS in-house AVC following a presentation at his school by Prudential, who ran the AVC. He continued to pay into his FSAVC plan until 2015, before transferring it to another provider in 2018 and taking his tax-free cash.

After speaking with his CMC Mr H made a complaint to Aviva saying it hadn't mentioned the availability of in-house alternatives in 1992 as it should have done under the regulations at the time. And, as in-house AVCs often had lower charges than FSAVC's, he might have suffered losses because of this.

Aviva said it couldn't evidence that these options had been discussed, so it upheld the complaint. It said it would undertake charges-based calculations as set out by the financial regulator's "FSAVC Review Model Guidance" from 2000 (the guidance) to compare the charges of the FSAVC plan to the in-house AVC, to establish if there had been a loss. It said in line with the guidance the *"causal link"* to the advice in 1992 had been broken when Mr H took out the AVC in 1998. So, it would only be liable for any loss due to charges between 1992 and 1998.

Mr H disagreed. He said the whole period should be covered as when he bought the AVC in 1998 this wasn't based on a comparison with the FSAVC. And it hadn't alerted him to any problem with the advice he'd been given in 1992.

Mr H referred his complaint to our service and our investigator looked into it, and he said it should be upheld.

Our investigator said as Aviva didn't dispute the FSAVC had been mis-sold the issue to decide was what loss calculation was fair. He said the regulator's guidance was only guidance and shouldn't be applied if it would result in unfair redress being paid. He said he didn't think Mr H would have made the association in 1998 that there was a possible problem with advice given in 1992. As he'd attended a group presentation rather than being given individual advice by Prudential. He said if Mr H had been given the correct information in 1992, he was more likely to have taken out the AVC, not the FSAVC, because of the lower charges. So, it was fair that the whole period from 1992 until 2015, when Mr H stopped paying contributions, be considered in the loss calculation. He said if the calculation showed a loss, Aviva should pay compensation to Mr H's new pension plan, or to him directly if this wasn't possible.

Aviva disagreed. It said it felt the policy wasn't mis-sold, rather that the sale wasn't fully compliant as there was no evidence alternative options were discussed. It said the main selling point of the in-house AVC was that it was likely to have lower charges. So, it was unlikely this wouldn't have been mentioned during the presentation Mr H had attended. It said it was also likely that Mr H would question why he should take out the AVC when he already had the FSAVC. It said the regulator's guidance on FSAVC's gave the specific example of someone taking out an AVC as breaking the causal link with the original advice. And that Mr H would have been able to make an informed decision then. So, the calculations should be capped to 1998.

Our investigator said there was no evidence Mr H knew there was a problem with the advice from 1992 in 1998. He said the Prudential adviser in 1998 wouldn't have been allowed to give advice on the existing Aviva FSAVC. And Mr H's decision to take out the AVC was independent to the advice provided in 1992, which he continued to rely on. So, it was fair the whole period be considered.

Aviva said it *"was difficult to believe"* that the FSAVC wouldn't have been discussed with the Prudential adviser in 1998 or that the lower charges of the AVC wouldn't be mentioned. It said that it could be argued that because Mr H continued to contribute to his FSAVC after 1998 it indicated that in-house options were discussed in 1992, meaning Mr H had made an informed decision then.

As Aviva doesn't 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 am upholding the complaint.

There's no evidence that Aviva provided Mr H with information about in-house options in 1992. That means it can't show the FSAVC sale was compliant, which does mean it was mis-sold. It is likely that charges on the in-house AVC would have been lower. So, had Mr H been told about the alternatives and gone on to make enquiries about them, I think it's more likely than not that he would have opted for the in-house AVC. As it would be logical for him to have done so.

I've also considered the added years option. Although Mr H hasn't argued he would have gone down this route. Added years offered benefits linked to final earnings like the main TPS. But at the time these were generally seen as being rather expensive and inflexible compared to AVCs. So, whilst Mr H was in a stable occupation he was likely to remain in, which did favour the commitment added years required, I think it is more likely than not he would have opted for the AVC.

As the AVC charges were likely to be lower than those of the FSAVC, Mr H may have suffered a loss. So, it's fair that calculations be undertaken to compare the charges between the two options to establish this. And redress paid if required, to put Mr H back in the position he should have been in. That means the period of the calculation is important. And the decision I need to make here, is whether by 1998 Mr H should reasonably have known about the possible charging difference and whether this would have led him to question the advice from 1992, and no longer rely on it.

There is little evidence available for me to consider. 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.

Aviva thinks that taking out the Prudential in house AVC in 1998 should have made Mr H aware that there might have been a problem, breaking the causal link to the advice given in 1992. The guidance it refers to from the regulator does mention someone joining an in house AVC as being something that might break the causal link. The guidance also discusses the situation where more than one Firm has been involved in the advice the consumer has received. This is set out in section 8.2.

Section 8.2.1 says:

> "*Where a firm concludes that it may be jointly liable 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)"*

Section 8.2.2 says:

> "*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."*

So, I think the guidance is giving examples of what might break the link, rather than saying certain events did break the link.

Having considered the situation carefully I think the most likely position is that the causal link to the 1992 advice wasn't broken here. It's clear by 1998 Mr H was aware of the in-house alternatives. But there's no evidence about what was said at the presentation he attended. He has said he wasn't provided with individual advice by Prudential, and it was a tied adviser meaning it could only discuss its own products. It may have only talked about the in-house AVC. And made no direct comparison to the FSAVC alternative, other than noting that this was available.

Prudential wouldn't have been able to offer Mr H any advice about the Aviva plan. So, it doesn't seem reasonable to me that Prudential could be held liable for any loss under the Aviva plan under section 8.2.1.

If Prudential provided no advice about alternatives or his existing Aviva plan and there was also no change of employment for Mr H, as mentioned in 8.2.2 above. Then there wasn't anything that would have necessarily triggered him to review the entirety of his pension arrangements. Particularly if, as he must have been, Mr H was mindful to increase his pension provision at the time and Prudential's attendance at his school to talk about the in-house AVC provided a convenient and easy way to accomplish this.

And even if Prudential had said the in-house option was likely to have lower charges than most FSAVC's, that wouldn't necessarily have made Mr H question the advice he'd received back in 1992 or compared the two arrangements. And, even if he had made a comparison, that doesn't mean that he should have realised there was a problem with what Aviva had or hadn't told him when he took the FSAVC out six years before. As he continued the FSAVC contributions I think it is reasonable to conclude that he was still reliant on Aviva's advice and the causal link to it hadn't been broken.

That means I think it is fair that Aviva considers the whole period over which Mr H made contributions to the FSAVC in the redress calculation.

Putting things right

I think that if Aviva had provided Mr H with the full information it should have done in 1992, he would have most likely started making contributions to his employer's in-house AVC scheme.

Aviva must complete a redress calculation in accordance with the regulator's 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.

For the reasons I've explained above, Aviva must calculate its redress from when Mr H started paying into his FSAVC in 1992 until he stopped paying into it in 2015. The calculation should not be stopped at 1998.

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 and 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.
As 25% of the loss would be tax free and 75% would have been taxed according to his income tax rate in retirement. Mr H has confirmed he is retired and is a basic rate taxpayer.

So, making a notional deduction of 15% overall from the loss adequately reflects this. As this is only a notional deduction Mr H won't be able to claim anything back from HMRC.

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 calculate and pay the compensation as set out in the steps above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 27 December 2023.

Nigel Bracken
Ombudsman