DRN-4439561

The complaint

Mrs W's representative complains that Aviva Life and Pensions UK Limited provided unsuitable retirement planning advice by incorrectly advising her to take out a Free Standing Additional Voluntary Contribution (FSAVC) plan, rather than join her cheaper, in-house teachers' Additional Voluntary Contribution (AVC) scheme.

Mrs W would now like Aviva to see if she's lost out financially because of their advice and recompense her accordingly.

What happened

In February 1992, Mrs W, who was 41 years old and a teacher at the time, met with a representative from Sun Life (which is now part of Aviva), to discuss improving her retirement income. After considering her circumstances, Aviva recommended that Mrs W set up a FSAVC, contributing £133 gross per month with those monies being invested in the Managed and Retirement Distribution Fund.

The FSAVC policy started in March 1992 and two years later, Mrs W met with Aviva to review the plan. In February 1994, Mrs W increased her monthly premium to £143.66 and in March 1997, she incremented it again, this time to £157.89 per month.

In May 2012, Mrs W took a tax-free cash sum from the Aviva plan and transferred the balance to purchase an annuity.

After seeing a claims management company's advertisement in June 2022 about AVCs, Mrs W raised a complaint with Aviva in April 2023. In summary, she said that she didn't believe that Aviva's original advice was appropriate and that she should have been advised to take out her cheaper teachers' in-house AVC scheme.

After reviewing Mrs W's complaint, Aviva responded in May 2023, concluding they were satisfied that they'd done nothing wrong. They also said, in summary, that based on Mrs W's circumstances at the time, it appeared that the FSAVC recommendation was appropriate because not only did their adviser highlight the fact that the in-house AVC was likely cheaper, but she was also advised to refer to the teachers' pension scheme for more details about the availability of in-house top-up options, which Aviva say, Mrs W chose not to explore.

Mrs W was unhappy with Aviva's response, so she referred her complaint to this service. In summary, she repeated the same concerns that she set out to Aviva, principally that she didn't feel the FSAVC recommendation was appropriate for her.

The complaint was then considered by one of our Investigators. He concluded that Aviva hadn't treated Mrs W fairly and that from what he'd seen, he felt it more likely than not that Mrs W would have taken out her employer's in-house money-purchase AVC scheme had Aviva followed the regulator's rules that were in place at the time.

After reflecting upon the Investigator's view, Aviva explained that they agreed with the outcome. However, Mrs W disagreed with our Investigator's findings. In summary, she said that it was more likely that she would have taken out the 'added years' AVC option.

Our Investigator was not persuaded to change his view as he didn't believe that Mrs W would have done so given her limited financial circumstances at the time. Unhappy with the outcome, Mrs W then asked the Investigator to pass the case to an Ombudsman to review that outcome.

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.

I have summarised this complaint in less detail than Mrs W has done and I've done so using my own words. The purpose of my decision isn't to address every single point raised by all of the parties involved. If there's something I've not mentioned, it isn't because I've ignored it - I haven't. I'm satisfied that I don't need to comment on every individual argument to be able to reach what I think is the right outcome. No discourtesy is intended by this; our rules allow me to do this and it simply reflects the informal nature of our service as a free alternative to the courts. Instead, I will focus on what I find to be the key issue here, which is whether the FSAVC recommendation was appropriate for Mrs W.

My role is to consider the evidence presented by Mrs W and Aviva in order to reach what I think is an independent, fair and reasonable decision based on the facts of the case. In deciding what's fair and reasonable, I must consider the relevant law, regulation and best industry practice, but it is for me to decide, based on the available information that I've been given, what's more likely than not to have happened. Where there's conflicting information about what happened 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.

And, having done so, I'm upholding Mrs W's complaint and it's largely for the same reasons as the Investigator. I'll explain why below.

Before I go on to explain the reasons behind my decision, I will address Aviva's view that Mrs W's complaint should be time-barred because, they say, she has raised her concerns outside of the timescales allowed for this service to be able to look into her complaint.

I can't look at all of the complaints that are referred to me. The rules applying to this service say that I can't look at a complaint made more than six years after the event being complained about – or (if later) more than three years after the complainant was aware, or ought reasonably to have been aware, of their cause for complaint. Unless that is, the business being complained about agrees. This is Dispute Resolution rule 2.8.2R(2) – which can be found online in the Financial Conduct Authority's handbook. And in this case, Aviva hasn't agreed to us considering Mrs W's complaint.

Those rules are in place to protect both the consumer and the business. Mrs W referred her complaint to this service in July 2023. So, it's clear that the complaint has been brought more than six years after the event that she is complaining about, which is the arrangement of the FSAVC in March 1992.

Even though Mrs W complained more than six years after the event that she's now complaining about, this isn't the end of the matter. This is because the DISP rules can potentially provide Mrs W with longer than six years to complain, as long as she complains within three years of when she was aware, or she ought reasonably to have been aware, that she had cause to. So, I've considered when Mrs W was aware, or she ought reasonably to have been aware, that she had cause to complain.

I've thought carefully about whether there were any trigger events that should have helped Mrs W to realise that something may not be right with her pension sooner, leading her to the point at which she ought to have known that she had cause for complaint. Aviva have said that because Mrs W had a number of interactions with their adviser and topped up her plan on an additional two occasions, she should have known at the review meeting in March 1997 that there was a problem. Aviva felt that was the point at which the three-year clock should have started and as Mrs W didn't bring a complaint by March 2000, the case should be considered out of time.

However, I don't think it's as simple as that and I'll explain why. Mrs W had a number of interactions with Aviva after the original advice in February 1992. She met with their representative in both February 1994 and March 1997, on each occasion to top the existing plan up. From what I've seen of the file notes, the 1994 interaction suggests that Mrs W was pleased with the earlier (1992) advice that she had received - specifically the fund performance, and she decided to increment her policy. So, I think at that point, she would have had no reason to complain. Whilst there wasn't a suitability letter on file for the 1994 interaction, there was one for the March 1997 advice. Mrs W's complaint is twofold; she says that the advice to take out the FSAVC was unsuitable and negligent, and also, that she was never informed of the alternative options available to her.

Despite what Mrs W says, the 1997 letter does explain that there are alternatives to the FSAVC plan that she currently holds such as the in-house money purchase AVC and an added years option. So, I do believe at that point at least (March 1997), she was made aware of both the in-house products. But, despite this, having carefully considered Aviva's 1997 letter, there is nothing contained within it that I believe would lead Mrs W to think that there was something wrong with Aviva's advice. I say that because the 1997 letter gave an overview of both the in-house AVC and free-standing option but importantly, it didn't give the notion there was something wrong with the original advice. Nor did it clearly alert Mrs W to the fact that the original advice may not have been suitable. So, it only made Mrs W aware of what the employer offered, not that any FSAVC advice may have been unsuitable.

In addition, Mrs W went to the adviser for advice, which she's relied upon as being suitable for her or she wouldn't have agreed to it. So, whilst Mrs W may have been aware of the alternative in-house options, it doesn't automatically follow that she should have realised any previous advice given was unsuitable. So, knowing there are different arrangements to top up a pension doesn't mean the consumer would be aware that any advice previous or otherwise would be unsuitable.

So, I can't safely say that the 1997 meeting would've put Mrs W on a path of discovery that she might have cause to complain. Therefore, I've looked at the final interaction that Mrs W had with Aviva. She drew the benefits from her FSAVC in May 2012, while she also took the pension from her main scheme. As she took her benefits in 2012, Mrs W wouldn't have received any further statements from Aviva or needed to have further appointments with them about the FSAVC plan. And, as she was taking benefits at that point (through Aviva), I don't think that would've prompted her to consider that something might have been wrong with the advice that she received from them some 20 years earlier.

So, it seems that the first point at which Mrs W would reasonably have known that there might be a problem with Aviva's advice was when she saw the claim management company's advert in June 2022. As Mrs W complained to this service in July 2023, I'm therefore of the view that she has complained within the time limits set out by the regulator (under the three-year leg) and this is a complaint that this service can consider.

Was Aviva's advice to take out a FSAVC suitable?

Given that Aviva advised Mrs W to take out the FSAVC nearly 30 years ago, I've looked at what rules were in place by the various regulators at that time. The Life Assurance and Unit Trust Regulatory Organisation (LAUTRO) said advisers should have maintained high standards of integrity and fair dealing, whilst exercising 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 that they may have under an occupational scheme, and give the consumer all information relevant to their dealings with the representative in question.

And in addition to highlighting the benefits of the FSAVC, tied advisers had to mention the generic benefits of the in-house options. Even if a tied adviser only knew the consumer's occupation, these generic benefits would include:

- Money purchase AVCs could potentially offer lower charges than the FSAVC
- 'Added years' might have been available under a defined benefit occupational scheme, particularly in the public sector - these provided a guaranteed benefit linked to salary and an additional component of tax-free cash, neither of which were available under an FSAVC
- The consumer's employer might match or top-up the amount that the consumer paid into either in-house option

Mentioning these things – to the extent that they applied – was consistent with having regard to the consumer's right to contribute to an AVC arrangement and dealing fairly with investors – both of which were requirements under the LAUTRO Code of Conduct.

The Personal Investment Authority (PIA - a predecessor of the Financial Conduct Authority) initially adopted the LAUTRO rules when it took over from them in 1994. And, in May 1996, ten months before Aviva's final piece of advice to top-up the FSAVC, the PIA issued Regulatory Update 20 (which is sometimes referred to as RU20), codifying the procedures it expected product providers to follow. The PIA was simply restating what was already there, saying that before selling a FSAVC, tied advisers (which in short, means those firms that can only recommend the products of the business they're tied to, which in this case is Aviva), should:

- Draw the consumer's attention to the in-house alternative
- Discuss the generic differences between the two routes and explain the likelihood that the charges under the in-house AVC would be lower
- Direct the consumer to their employer or the Occupational Pension Scheme for more information on the in-house option

Even in the more general introduction to the article, RU20, it mentions the tax treatment of contributions and benefits, employers being willing to match or top-up benefits, and the ability to provide additional life cover. The article also refers to the lower charges under an in-house AVC in general terms. It says: *'Charges under in-scheme AVCs will usually be lower than those under FSAVCs, reflecting economies of scale, rebated commission or a* *contribution to administration expenses by the employer. Of all the differences between the two routes, this is likely to exert the greatest impact on which route would offer the greater benefits to the client.'*

So, taking account of the regulator's rules of the time, the generic differences of AVCs and FSAVCs, along with the lower costs, **should have** been clearly explained to the consumer. I've looked closely at the three different interactions that Aviva had with Mrs W at the time, along with the various records that were provided to her as part of the original FSAVC recommendation.

The facts of the case are well known to both parties in the complaint, so I will focus on what I feel to be the main points. In February 1992, Mrs W was 41 years old and had been a member of the teachers' pension scheme for around six years. At the point Aviva provided advice to her, their representative noted that she planned to give up work between the ages of 55 to 60 years old. To accrue the maximum pension in the teachers' scheme, Mrs W would've had to have contributed for 40 years, but because she'd taken time out from teaching to start a family, she wasn't in a position to be able secure the full 40 years in the scheme. Based on her circumstances, that meant Mrs W could potentially build up a further 14 to 19 years in the main scheme. Aviva's recommendation was therefore designed to plug some of the missing 20 or so years' worth of benefits that Mrs W was projected to miss out on.

Whilst it seems that in-house AVCs were discussed with Mrs W in 1992, it doesn't appear that the adviser did so to any meaningful extent – more weight appears to have been provided on information around the FSAVC option over the general AVC route. And, whilst Aviva's letter did highlight that in-house AVCs usually have lower charges, both the suitability letter and the file notes are silent on whether Aviva discussed the added years option that was also available to her, something which the LAUTRO code of conduct required.

When Mrs W met with Aviva in February 1994 to review and top-up the existing FSAVC plan, the adviser didn't issue a further suitability letter confirming the recommendation. Although a fact-find was completed with Mrs W, it fails to shine any light on what was discussed in respect of the in-house options and importantly, as in the 1992 advice, whether Mrs W was advised to contact the teachers' scheme for more information on her wider options. It seems as though Mrs W was happy with the investment performance so topping up the existing FSAVC was a fait-accompli. So, it seems that in both instances, Aviva failed to satisfy LAUTRO's code of "exercising due skill, care and diligence and deal fairly with consumers".

In their 1997 letter to Mrs W, Aviva's adviser explained that the in-house AVC plan offered 'probable cost advantages'. So, it seems that their adviser did highlight that the teachers' scheme could offer a likely saving on what she was paying on the FSAVC, but given the manner within which the wider features of the FSAVC were covered in the suitability letter, I'm not persuaded that Mrs W was provided with a balanced view of her options. I say that because their letter stated that the FSAVC was more appropriate for her over the in-house AVC option because it offered:

- *Greater choice of investment fund*
- *Portability (you can continue the plan if you join another superannuation scheme. You can also switch contributions to a personal pension plan on "portability terms" if you should change job to join a company without a company pension scheme or become self-employed)*

- *More flexibility (choice over retirement date, contribution level)*
- *Growth potential*
- *Privacy involved in the free-standing plan*

Whilst I don't disagree that the FSAVC plan offered all of the features noted above, the extent to which any of those options were of any benefit to Mrs W was, in my view, limited. I say that because Aviva's adviser failed to provide any evidence with the suitability letter on why Mrs W would find these features useful. Whilst the FSAVC scheme may have offered more investments to chose from than the in-house AVC scheme, I think that was of little benefit to a consumer who appeared to have limited investment experience. In addition, it seems that throughout the duration of holding the FSAVC, Mrs W stayed in the same fund.

I think it's very clear from the adviser's file notes that Mrs W was very much focused on her career as a teacher. Indeed, in January 1994 the records evidence that she had just been promoted to deputy head teacher and her aim following this was to secure a head teacher position in the future. So, I think having a plan that was 'portable' was of little benefit to Mrs W, who was clearly planning on staying within the teaching profession for the remainder of her career. In addition, I also think it improbable, given the length of time taken to train as a teacher that she would change industry, especially not to a self-employed position which the suitability letter highlights as a benefit.

I also think that suggesting the FSAVC has 'more flexibility' over an in-house AVC plan isn't providing the consumer with a balanced picture of all the facts. That's because she could vary the contribution levels within the in-house scheme too (but after 1997, she chose not to so it seems that feature wasn't of primary importance to her). I also don't place much weight on the possibility of early retirement being a key driver for accepting the higher charges. Increased pension provision generally could be used to allow someone to retire earlier, however this would apply equally to the in-house AVC or added years options available. In 1997, the FSAVC itself would provide benefits that would have to have been taken at the same time as Mrs W took benefits from her main teachers' scheme, and as such provided no additional 'flexibility' in relation to early access.

In addition, whilst Aviva's adviser may have considered privacy as being a benefit of having a FSAVC, the file is silent on why that would be useful to Mrs W. The monies held within the teachers' occupational scheme were not controlled by Mrs W's employer, but the pension trustees were tasked with running the pension fund for the benefit of members. Whilst there would have been an element of separation between the FSAVC policy and Mrs W's employer, Aviva would still have had to inform the teachers' scheme that Mrs W had commenced the FSAVC scheme, so it wasn't necessarily as private as the adviser may have thought.

It was only in the 1997 letter that Aviva suggested that Mrs W could contact her existing scheme for more information about the in-house AVC options should she wish. However, that option was immediately discounted and even had Mrs W wanted to contact the teachers', scheme to understand more about the choices available, she wouldn't have been in a position to do so because the top-up application form was completed on the same day (12 February 1997) as the suitability report was issued.

So, it seems to me that the original advice to invest in the FSAVC failed to meet the regulatory requirements that were in place at the time it was provided. However, I do think it's clear from the records that Mrs W was very motivated to want to plan for her retirement and was cognisant of having a shortfall from her main scheme. So, I think she would have arranged an in-house AVC, had she been placed in a properly informed position by Aviva.

I’ve gone on to think about the type of in-house AVC that Mrs W would’ve likely selected had she been placed in an informed position. Mrs W claims that given her circumstances at the time of the advice, it was more likely than not that she would have taken out the added years option over the in-house money purchase route. It’s important to note that it is impossible for anyone to know exactly what Mrs W would have done in 1992 had alternative information been given to her by Aviva. As such, my decision is based on what I consider most likely based on the evidence available and the principles of reasonableness and fairness.

Whilst Aviva’s representative recommended a FSAVC to Mrs W, I should explain here, that Mrs W wouldn’t have received advice on added years based on her specific circumstances from Aviva. Even by making Mrs W aware of the existence of in-house AVCs and even if she chose to contact her employer - which isn’t guaranteed in itself - she only would have been provided with information about added years. It would have been then up to Mrs W to make a decision on what she preferred.

In each of the interactions that Mrs W had with Aviva, there’s evidence of an attitude to risk discussion having taken place where Aviva’s representative has noted that Mrs W is happy to invest her monies in up to a medium or balanced manner. I don’t consider that level of risk as being at odds with either the fund that Mrs W’s FSAVC was invested in (Managed and Retirement Distribution Fund) or for someone who was recommended a FSAVC over the added years option to achieve their retirement goals. The premiums would then be invested over the 14+ years and run alongside the guaranteed benefits being built up within Mrs W’s teachers’ scheme.

So, whilst added years would have provided guaranteed benefits whereas AVC or FSAVCs were subject to investment risk, Mrs W was still many years from retirement and could accrue additional guaranteed benefits as well as take some risks with part of her pension. As I’ve already explained, the fact finds do cover Mrs W’s attitude to risk - these reflect the fact that she was prepared to take some risk with her monies and importantly, I think that she was willing to take some risk with her pension. I’ve had to base some of my thinking on the balance of probabilities, and I think from what I’ve seen, it’s more likely than not that Mrs W was comfortable taking risks and that’s reflected in the fact that on three occasions, she chose to do so.

In 1997, there’s also evidence that Aviva’s representative discussed buying extra years with Mrs W in the main teachers’ pension scheme as well as a discussion taking place around their in-house money purchase AVC. Beyond covering the likely cost savings on in the in-house money purchase AVC, it doesn’t go on to say a great deal more, but it seems that Mrs W chose not to explore that option further. However, I can see why a money purchase arrangement may have looked more attractive to Mrs W than purchasing added years. Buying additional years in the main scheme is expensive, and there’s good reason for that – it’s because, whilst the main scheme is subsidised by the employer, the added years scheme isn’t and as such, the full cost is borne by the employee.

I’ve thought about what scope Mrs W had to buy added years. In the 1990s, HRMC limited employee pension contributions to 15% of salary. As Mrs W was already contributing 6% of her monthly wages to the main scheme, that left her with 9% that she could contribute to either an in-house or FSVAC scheme. In 1992, Mrs W was noted as earning £21,000 per annum. However, the maximum number of added years that Mrs W could have purchased was just six - that’s based on the tables that Mrs W’s representative provided of a 41 year old over 14 years at 1.42% of salary. Therefore, to purchase the 20 years that she was missing would cost well in excess of HMRC limits at the time. That meant Mrs W would’ve been limited to purchasing just six added years, leaving her well short of her goal by around 14 years.

In addition, when Mrs W met with Aviva in 1994 and 1997, her budget was very limited (to just £10 per month extra) because, she explained, all of her available disposable income was being spent on the children – that's despite the fact that she'd benefited from pay increases of nearly £5,000 in the five years following the first appointment. So, given cost was a very important consideration to her, I think the money purchase option would've looked more attractive than added years. And, I don't believe that added years would have looked particularly good value when compared to the potential investment returns of the FSAVC option.

Whilst recent investment returns and annuity rates have made final salary pension schemes look extremely attractive, I must consider the circumstances of Mrs W in 1992. That's because investment returns were much higher in the 1990s than they are now and that's reflected in the growth rates providers used at the time. In 1992 for example, providers projected potential returns being as high as 13% per annum. In the illustration provided to Mrs W, her contribution at that time (based on a growth rate of 13%) was projected to yield an annuity income of £10,400 per annum. So, it's clear to see why a FSAVC may have seemed much more attractive than added years - the goal of getting better benefits for a lower monthly contribution, when potential returns were so high.

Finally, I've also thought about the ancillary benefits that purchasing added years would've given Mrs W that her FSAVC wouldn't, such as an increased spouse's pension. Having looked at the fact-finds submitted with the complaint, it seems that whilst Mrs W is married, her husband's details or indeed his financial circumstances were not initially included but some of his information was included in a later meeting. Her spouse was recorded as also being a teacher with a reasonable level of income coming into the household and a member of the teachers' pension scheme. So, whilst that suggests she had the capacity to take risks at the level she was doing with her AVCs, I also think it points towards a spouse's pension being more likely than not of secondary importance to Mrs W, with the primary focus on ensuring her own retirement benefits were maximised because her husband had his own pension.

I think overall, given Mrs W's specific circumstances, the cost of the added years option compared to the high investment returns that were projected through the money purchase route, that would've more likely than not have made the added years choice less attractive to Mrs W and as such, I have concluded that it is the in-house money purchase AVC scheme which would have been chosen - as such, that should form the basis for Aviva's redress calculation.

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 W'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 W 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 his likely income tax rate in retirement – presumed to be 20%**.** So, making a notional deduction of 15% overall from the loss adequately reflects this.

My final decision

I'm upholding Mrs W's complaint and require Aviva Life and Pensions UK Limited to take the actions above to put things right for her.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 4 March 2024.

Simon Fox
Ombudsman