

The complaint

Mr K complains that Aviva Life & Pensions UK Limited didn't inform him that he was able to transfer his policy as was his intention when he took an annuity and tax-free cash.

What happened

In 2022 Mr K through his financial adviser contacted Aviva about transferring his pension. However, Aviva said Mr K was unable to do this as the cost of meeting his Guaranteed Minimum Pension (GMP) had not been met. It said he could only take an annuity and there would be no tax-free cash available.

Mr K was unhappy with this but accepted what Aviva had said and completed an application to take his annuity. Subsequently Aviva told Mr K that actually he could have tax-free cash of around £7,000 and therefore Mr K proceeded on this basis.

Mr K told his IFA about the tax-free cash being available and so he contacted Aviva to find out what had happened. He asked that any payment be stopped whilst he tried to get information about Mr K's options but before he received a response Aviva paid the tax-free cash and annuity.

A complaint was raised as it became clear the GMP cost had reduced and therefore Mr K would've been able to transfer after all. Aviva said they had looked into matters but said at the point Mr K's adviser contacted them it had already crystallised the fund. And it had taken a business decision that it couldn't reverse the transaction despite its empathy with Mr K's situation.

The complaint was referred to one of our investigators and he upheld the complaint as he didn't think Aviva had acted fairly. He recommended that Mr K keep his tax-free cash but the annuity should be unwound. He then said Aviva should calculate the investment loss in line with a suitable index compared to what the policy would be worth now had it remained with Aviva. And it should then add to the policy any loss and allow a transfer.

Aviva initially accepted this as did Mr K and the case was closed. However, Aviva then raised that the settlement methodology was unworkable as the GMP wasn't met and it therefore couldn't transfer the policy. The investigator said if this was the case Aviva should make up the difference but Aviva disagreed that this would work either, as it believed either the initial payment of the tax-free cash or the subsequent transfer of the remaining funds would be seen as an unauthorised payment due to the complexities of the GMP arrangement. The investigator felt a resolution couldn't be reached and referred the case for an ombudsman's decision but Aviva said it was still willing to find a solution. But it felt Mr K would have to return all the money and not just the annuity proceeds for it to be able to put things right.

It is at that point that my involvement began and I wrote to both parties outlining my thoughts as set out below:

'For the avoidance of doubt, I think Aviva has made an error in its communication with Mr K.'

And it is responsible for Mr K taking his tax-free cash and annuity rather than just his tax-free cash which is what he likely would've done on transfer. The issue left is to work out how to put Mr K back in the position he would've been in – which is having the opportunity to transfer his pension.

Aviva says to do so it will require all the funds back, so it does not attract the attention of HMRC as being an unauthorised payment. This is something that obviously needs to be avoided, so I don't think this is an unreasonable request. I appreciate the investigator said Mr K should be able to keep the tax-free cash but it appears this makes any solution unworkable (and for reasons I'll go onto explain wouldn't in my view put him back in the correct position in any event), I think it would be fair and reasonable to say that Mr K should return all the money he has received so far and not just the annuity payments.

As Mr K's IFA was very quick to realise things hadn't gone to plan initially and suggested the crystallisation of the benefits should be unwound, I'd hope Mr K hasn't utilised the funds so far. So, I'd like confirmation from Mr K that he will be able to return all the funds he's received so far including the tax-free cash.

Mr K intended to transfer to a drawdown arrangement where he could access his funds flexibly. So this is the position Aviva needs to put Mr K back into, where he can transfer and take his tax-free cash whilst retaining access to his funds without the restrictions of the GMP.

Secondly, Aviva has raised the issue of the GMP now not being met if the funds were returned. However, I agree with the investigator's recommendation that in the event the GMP is underfunded Aviva should make up the difference. Aviva has said even in this event, Mr K won't be able to find a provider willing to take on the GMP (which I agree a firm won't take on the liability for a GMP that is not met). However, if Aviva makes up the difference as directed, the GMP will be met and so Mr K and Aviva wouldn't encounter this problem upon transferring.

Aviva said if the loss assessment pushes the value over the GMP amount it would then allow the transfer. However, I don't think this is fair, Aviva should make up the difference regardless of the loss assessment and then the transfer will be viable. Mr K needs to be put back in the position he would've been in on 8 November. That position was that the GMP was met and a transfer option was available. Obviously, the transfer cannot occur in the past and so the GMP cost will now be at the mercy of current rates but this is not the fault of Mr K but Aviva – and so I think it is fair that it will have to carry any financial penalty that it incurs in putting this right.

In this instance where the GMP is costlier than it was before and the funds are returned, Mr K will receive more on transfer and so there hasn't been a financial loss. But only if this is less than the investment loss Mr K would've suffered if he'd transferred and invested in line with the benchmark the investigator recommended.

That said given Aviva's most recent information regarding the current cost of providing the GMP, it has risen significantly and this cost is likely well above any investment growth received. So I propose that the investment growth aspect is ignored here if the

GMP is costlier to provide.

I appreciate this would mean Mr K being paid a higher transfer value than he otherwise would've had to get around the GMP issue but Aviva is suggesting there is no other way. If the restrictions of GMP in terms of the past transfer value cannot be overcome it is my view that Aviva needs to shoulder any financial burden. I say this because it did have the chance to put this right very quickly, initially, but it took a business decision not to do so, which I

think was a particularly poor decision in the circumstances. Also, Mr K has had to go through all of this inconvenience due to Aviva's error, so even if we could put Mr K perfectly back into the same position, I would then be looking to make an award for distress and inconvenience.

Having looked at the circumstances and correspondence so far it seems an important matter may have been overlooked. If Mr K had been able to transfer as he'd wished, it's my understanding the GMP restrictions would be resolved, and Mr K would've had the option to take tax-free cash to the value of 25% of the whole fund and not the £6,000+ he actually received. This is the position that Mr K needs to be put back into and is another reason why returning the tax-free cash is required, so that a full transfer can occur, and he can then access the higher amount of tax-free cash without the GMP restrictions.

I am aware this matter has already been ongoing for some time so I would like both parties' responses by 18th of March. I am ultimately prepared to issue a final decision along these lines, so it is in Aviva's interest to consider this matter promptly and if there is another solution to put this forward in a timely manner. If it fails to do so I will proceed to final decision along these lines unless either party has a compelling argument as to why this wouldn't be fair and reasonable.'

Mr K responded to say he would be able to return the full funds to Aviva and agreed with the proposal but he and his IFA would like to see a copy of Aviva's calculations before proceeding to the next stage.

Aviva said it agreed it would put things right and it may have to make up the difference, but the previous instructions hadn't been workable. And it had been unable to take action up to now as the funds haven't been returned.

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 see no reason to depart from what I outlined above in the letter I sent to both parties. It seems both Aviva and Mr K are broadly in agreement now to how things should be put right.

I appreciate Mr K has said he would like to see Aviva's calculations before proceeding, I'm not entirely sure at what stage this refers to. I suspect it could be the calculations in terms of the cost of the GMP now compared to the value of the fund if returned. But if this is the case, I don't think it makes sense to delay matters further as the cost of the GMP will need to be recalculated at the date of settlement/transfer – and this requires Mr K to return the funds. And it is at that point that I would expect Aviva to share information about its calculations.

I think the method I've suggested whilst somewhat simplified is still fair and reasonable in the circumstances and will bring a fair resolution to this issue. It will allow Mr K to access full tax-free cash if he wishes to do so and use his funds flexibly in the future. And it seems likely he will receive a higher transfer value than he would've done in late 2022. Mr K wasn't reliant on these funds as he has been able to retain them and so whilst I understand his frustration about what has occurred, this resolution will put him broadly back into the position he would've been in and able to move forward with his plans for these funds.

In conclusion, I think Aviva failed to give Mr K all the information required to make an informed decision. And it should've acted immediately to resolve this matter when Mr K's IFA realised that in fact a transfer ought to have been possible. However, it has now agreed to put things right. I have suggested a methodology for resolution which requires Mr K to return

all the funds to date. And then for Aviva to reconstruct the policy and allow Mr K a transfer, so that he can access his benefits without the restrictions of the GMP. It appears that Mr K will benefit in terms of the transfer value paid compared to what he would've got had things gone to plan at outset. And my redress has been designed so Mr K cannot receive less than he would've got initially, in the unlikely event (given the trending up of the cost of the GMP since late 2022) the GMP cost has decreased. And there is provision for any investment growth Mr K would've received had the policy remained invested to be added to the transfer value paid.

Putting things right

The redress set out below is intended to put Mr K in as close a position as possible to the one he would've been in before the error occurred:

1. Mr K needs to return all the funds to Aviva and Aviva should stop all future payments and unwind the annuity and reconstruct the policy as soon as the funds are returned.
2. Aviva should then calculate the value of the policy had it always remained invested with it until the date it carries out this calculation and bring the value of it up to date. Mr K is then in the position he would've been in had benefits not been taken.
3. Once the policy has been reconstructed, within two months of being notified of this Mr K will need to apply for his funds to be transferred. If this time elapses, I think it's fair to say Mr K has chosen not to transfer and his ability to transfer going forward will be at the mercy of the cost of the GMP compared to his transfer value.
4. If the value of the policy is higher than the cost of the GMP at the calculation date on transfer, Mr K will be able to transfer his policy as he wishes. If it isn't Aviva should proceed to step 6.
5. In the unlikely event the future transfer value (including the investment growth Mr K would've received in the period the fund was crystallised) is less than the transfer value Mr K would've received when the funds were originally crystallised, Aviva should pay the difference to Mr K. If this cannot be added to the funds transferred it should pay this directly to him. This can include a 15% deduction to account for the tax he would've paid in reality had benefits been taken as part of the pension fund. This assumes 25% of the fund would've been taken as tax-free cash.
6. If the cost of the GMP is higher than the value of the policy, Aviva is required to make up the difference so that the GMP is met, and Mr K can transfer his funds to a provider of his choice. If the value of the GMP here (and therefore the transfer value payable) is less than the transfer value that would've been available when the funds were originally crystallised, Aviva should pay the difference to Mr K as set out above in step 5.
7. Aviva should provide Mr K and his adviser with a clear explanation of the calculations it has carried out.

My final decision

I uphold this complaint and direct Aviva Life & Pensions UK Limited to put things right as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 17 April 2024.

Simon Hollingshead
Ombudsman