DRN-4832556

The complaint

Mr A has complained about the transfer of his pension held with Aviva Life & Pensions UK Limited (Aviva) to the DataSpec Pension Scheme (the Scheme) in 2012. The Scheme was subsequently found to be fraudulent and as a result of this Mr A feels it is very likely that he has lost the total funds he transferred. He feels Aviva should have done more to protect him and to warn him about the potential dangers of transferring his pension.

Mr A is represented by a claims management company (CMC), which has made various arguments on his behalf. However, for simplicity, I'll refer to all submissions made on Mr A's behalf as being from Mr A, except where necessary.

What happened

In 2012 Mr A held a pension with a business that Aviva is now responsible for.
Very little information has been provided by both parties that can clarify exactly what happened to lead Mr A to transfer his pension, so I am unable to confirm whether Mr A received a cold call or was offered a free pension review by any firm. All the CMC has said that Mr A became interested in transferring his pension because at the time there was a national advertising campaign encouraging people to amalgamate all their pensions into one pot.

From the little that has been provided I can see that Aviva received an LOA from a firm in early 2012 which asked for information about Mr A's pensions and also for transfer/discharge forms.

Upon confirming the request to transfer Aviva received the, HMRC registration form for the Scheme which stated it was a money purchase occupational pension scheme; the Registration Certificate which showed a registration date of 26 July 2012 for the Scheme; and the appropriate pension scheme HMRC tax reference.

It appears that the paperwork was submitted by Target Consultants (Target) as administrator of the Scheme.

Aviva then completed the transfer and made the payment on 23 August 2012.
Mr A's pension was invested into Hawkhurst Capital PLC (Hawkhurst) and both Target and Hawkhurst were dissolved at Companies House within the last three years, since 2020.

Points of complaint

Mr A complained to Aviva in December 2021 saying that Aviva had not followed the correct procedure for pension transfer at the time and didn't warn him of the risks involved in transferring his pension. He also said Aviva failed to carry out sufficient due diligence; that the HMRC register letter was of poor quality and wasn't sufficient proof of the newly registered scheme's status; and that Aviva made no further enquiries or requests to HMRC to determine if the scheme had been set up to facilitate pension liberation.

Aviva's response to the complaint

In its final response letter Aviva stated that it wasn't able to refuse pension transfers unless it had evidence a scheme didn't comply with HMRC rules. And if this was the case it would have sent all the appropriate warnings to Mr A. However, as this wasn't the case at the time of this transfer it completed the request according to Mr A's instructions and its standard procedures.

Overall Aviva felt it had carried out the appropriate due diligence steps. It also commented that due to the length of time since the transfer it has very little documentation about the transfer.

Aviva also raised an objection to this Service considering the merits of the complaint Under the Dispute Resolution (DISP) Rules set out in the Financial Conduct Authority (FCA) handbook (set out below). As the transfer took place in 2012 it felt the complaint had been brought outside of the six-year element of the rule.

It also felt that there were a number of points in time, more than three years ago when Mr A would have been aware of a cause to complain. It specified that this would have been in 2015 when The Pension Ombudsman (PO) published a decision involving the Scheme against another business. As this decision acknowledged the Scheme had been a liberation one Aviva believed it was reasonable that when this decision was published in 2015 Mr A would have become aware that he had a cause to complain.

Aviva also felt that as Mr A would have received statements from the Scheme from the point of transferring, he would have been able to see that his pension was potentially losing value and therefore was in a position to make a complaint about the transfer.

Aviva also felt that Mr A had initially worked with a different CMC in 2018 and this CMC would most likely have told him he could complain against Aviva as the ceding scheme
The time bar objection was assessed by one of our investigators who felt the complaint had been made in time. However, Aviva didn't agree with the outcome and remained of the view the complaint had been brought to this Service too late. So the complaint has now been passed to me to decide.

I issued a provisional decision in April 2024 where I set out my reasons why I thought the complaint had been made in time, also why I felt the complaint couldn't be upheld.

An extract of these findings are set out below and form part of this final decision:

Time Limits

Because Aviva has raised a time bar objection and didn't accept the investigator's view I must first consider whether Mr A has brought his complaint to this Service within the timescales set by the FCA DISP Rules (as already mentioned) under which I am required to operate.

Without the consent of the business involved, we can't consider a complaint that is brought to us outside set time limits.

The rules setting out which complaints this Service can and can't consider are found in the DISP rules, mentioned above.

Specifically, DISP 2.8.2 R sets out the following:

"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial

Ombudsman Service:
……..
(2) More than:
(a) Six years after the event complained of; or (if later)
(b) Three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint;
Unless the complainant referred the complaint to the respondent or to the Ombudsman within that period and had written acknowledgement or some other record of the complaint being received;
Unless:
(3) in the view of the ombudsman, the failure to comply with the time limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances; …….

The transfer of Mr A's pension took place in 2012, so given he brought his complaint to this Service in 2021 it's clear his complaint is out of time under the first part of the rule, as it was referred more than six years after the event complained of. I therefore need to consider whether Mr A became aware, or ought reasonably to have become aware, that he had cause for complaint against Aviva more than three years before he referred his complaint to our service in 2022.

To determine this, I will need to consider:

a) When I think Mr A became aware, broadly that he had suffered some sort of loss.
b) When I think he became aware that this was a result of some act or omission, and
c) Whether on the basis of facts known to Mr A, or reasonably ascertainable by him at that time (including facts he might reasonably have been expected to acquire with the help of appropriate expert advice) Mr A should have been aware there was a real possibility that his loss was attributable to the acts or omissions of Aviva.

The appropriate question is not whether Mr A was aware that he could make a complaint against Aviva, but rather whether he ought reasonably to have known he had cause to complain about Aviva. In order to have the requisite awareness, it is not necessary that Mr A understood that Aviva may have been responsible for omissions that amounted to 'due diligence failures' as such. All that is required is that Mr A ought reasonably to have been aware that there was a real possibility his loss was attributable to failings by Aviva. He need not know with any precision what it was that Aviva had failed to do – it would be enough that he understood the 'essence' of the failings that may have occurred (such as a broad understanding that Aviva had failed to take reasonable steps to ensure the transfer was not made to a fraudulent or otherwise inappropriate scheme). In addition, in order for the three-year clock to start to tick, the loss reasonably attributable to Aviva need only be part of the loss suffered – he does not need to have had requisite awareness of Aviva's possible role in causing the whole of the loss suffered.

It seems Mr A didn't receive anything from Aviva at the time he requested the transfer. So I have no reason to think that he should reasonably have known that Aviva had any specific duties (as required by the FCA, for example) as part of the transfer process other than Aviva being the provider of his pension.

Aviva has said that the Scheme had been subject to investigations around 2015 and also referenced the PO decision. While this may have been the case for this to have triggered Mr A's awareness of a problem with the Scheme he would have to have known about it and/or the information had to be something he would have reasonably come across. Having researched the Scheme I can't find anything apart from the PO decision that refers to it so it would seem there was little information in the public domain about the problems facing the Scheme at that point in time. So I think it's unlikely Mr A would have been aware of the *problems with the Scheme. I also don't think it is reasonable that Mr A would have or even should have become aware of the PO decision. He was not working within the financial industry and so would have had no reason to look into this or be aware of PO decisions in general. Therefore, I don't think Mr A should have or would have had a cause to complain at this point in time. Furthermore, even if Mr A had seen information about the problems the Scheme was facing, I think it unlikely that he would have known about Aviva's responsibilities in relation to the transfer.*

While the CMC has said that Mr A would have been receiving statements from the scheme from the point he transferred his pension, I don't know if Mr A definitely did. Having said that, it is likely that he did so if his pension was losing value this would have been evident from the statements. However, it doesn't follow that Mr A would have known this was something that could be attributed to Aviva and any possible wrongdoing on its part.

In terms of the contact that Mr A had with another CMC in 2018 it is possible that this CMC could have made Mr A aware of the responsibilities of the ceding scheme. However, despite asking of the information I haven't been provided with anything to confirm what discussion took place. Also the letter from the CMC to Aviva states that it is considering making a complaint to FSCS about the advice and was writing to Aviva to obtain information and no mention is made of Aviva's responsibilities throughout the transfer process. So, I think if Mr A/the CMC was planning to complain about Aviva back then this would have been mentioned in the same letter and/or there would have been a letter from the CMC to Aviva stating this and raising a complaint.

Overall, therefore, in my view, having considered the evidence available from the time of the transfer, and later when the trustees became involved, there is not enough evidence to establish the requisite awareness required by DISP2.8.2R started until 2022 when Mr A made his complaint to this Service.

It therefore follows that I am satisfied that Mr A's complaint was made in time.

The merits of the complaint

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this case. I've taken into account relevant: law and regulations; regulatory rules; guidance and standards; codes of practice; and (where appropriate) what I consider to have been good industry practice at the relevant time.

Where the evidence is incomplete or inconclusive (as some of it is here) I've reached my decision based on the balance of probabilities – in other words, on what I think is more likely than not to have happened given the available evidence and wider circumstances.
The relevant rules and guidance

Before I explain my reasoning, it will be useful to set out the environment Aviva was operating in at the time with regards to pension transfer requests, as well as any rules and guidance that were in place. Specifically, it's worth noting the following:

- *At the time of Mr A's transfer, Aviva was regulated by the Financial Services Authority (FSA). As such, it was subject to the Handbook, and under that to the Principles for Businesses (PRIN) and to the Conduct of Business Sourcebook (COBS). There have never been any specific FSA rules governing pension transfer requests, but the following have particular relevance to transfer requests:*

  – Principle 2 – A firm must conduct its business with due skill, care and diligence;

– Principle 6 – A firm must pay due regard to the interests of its customers and treat them fairly
– Principle 7 – A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading; and
– COBS 2.1.1R (the client's best interests rule), which states that a firm must act honestly, fairly and professionally in accordance with the best interests of its client.

- *The Pensions Schemes Act 1993 gives a member of a personal pension scheme the right to transfer the cash equivalent value of their accrued benefits to another personal or occupational pension scheme.*

- *The possibility that this might be exploited for fraudulent purposes was not new, even in 2012 when Mr A transferred. The transfer of benefits to a fraudulent receiving scheme used to be known as "trust busting" and was, for example, specifically referred to in practice note changes made in the Inland Revenue's Pensions Update No.132 (May 2002). The Inland Revenue asked all pension schemes to be vigilant to the possibility of receiving transfer requests to these schemes. But, at this time, the obligation on the ceding scheme was limited to ascertaining the type of scheme the transfer was being paid to and that it was a tax-approved scheme.*

- *The various different pensions tax regimes were brought under a single regime with the implementation of the Finance Act 2004, and the Inland Revenue became HMRC in April 2005. The previous Inland Revenue practice notes were replaced with a new manual which didn't specifically refer to liberation. However, the new Act only permitted a range of payments that were deemed 'authorised payments' to be made from a tax-approved scheme. It therefore rendered a transfer to a liberation scheme liable to be treated as an unauthorised payment with the possibility of tax charges both on the member and the ceding scheme.*

- *On 10 June 2011 and 6 July 2011, the regulator at the time, the Financial Services Authority (FSA), warned consumers about the dangers of "pension unlocking". It referred to cold-calling and websites promoting transfers to schemes that invest money overseas to avoid paying UK tax and/or result in cash being drawn from the pension ahead of retirement, including as a loan. Particular concerns related to the tax implications of these transactions, the fees charged and potential investment losses from scam activity. The FSA said it was working closely with HMRC and The Pensions Regulator (TPR) to find out more information and encouraged affected consumers to contact the FSA, HMRC or TPR helplines.*

- *July 2011 the FSA/FCA published an announcement about early release pensions schemes on its website aimed at consumers. It mentioned that consumers had reported being approached by scammers. It said the first contact comes out of the blue and consumers are offered to transfer existing pension to a QROPS or an overseas pension structure to avoid paying UK tax. Or to transfer the pension to an alternative provider that will arrange for the money to be invested overseas, such as in property abroad. It also detailed the risks involved.*

- *In August 2011 the FSA published an announcement on its website aimed at consumers entitled "Protecting yourself from fraud and unauthorised activity". It recommended four checks to carry out before accepting advice to transfer:*
    - *Check whether the firm contacting you is regulated and it gave a link to the FCA's website and consumer helpline number.*

    - *Check you have the firm's correct details by looking at the website if possible and companies house – this is especially important if you have been cold called.*

    - *Check the FCA's list of unauthorised firms and individuals (website link provided)that are currently targeting UK investors and that the FCA has had complaints about.*

    - *Keep in mind that authorised firms that you have no relationship with are highly unlikely to contact you out of the blue offering to buy or sell shares or other investment opportunities.*

- *TPR announced in December 2011 that it was working with HMRC and the FSA and had closed some schemes that were used for liberation.*

- *February 2012, TPR published a warning, and factsheet, about pension liberation. The FSA supported this campaign. It was designed to raise public awareness about pension liberation, and remind scheme trustees of their duties to members, rather than introduce any specific new steps for transferring schemes to follow. The warnings highlighted in the campaign related to websites and cold callers that encouraged people to transfer in order to receive cash or access a loan.*

- *For context, it's also worth noting that on 14 February 2013, TPR launched its "Scorpion" campaign. The aim of the campaign was to raise awareness of pension liberation activity and to provide guidance to scheme administrators on dealing with transfer requests in order to help prevent liberation activity happening. The Scorpion campaign was endorsed by the FSA (and others). The campaign came after Mr A's transfer, but I highlight it here to illustrate the point that the industry's response to the threat posed by pension scams was still in its infancy at the time of Mr A's transfer and that it wasn't until after Mr A's transfer that scheme administrators had more specific guidance to follow in this area.*

What did Aviva do and was it enough?

With the above in mind, at the time of Mr A's transfer, personal pension providers had to make sure the receiving scheme was validly registered with HMRC. Aviva had the Scheme's HMRC registration certificate, and PSTR, so it didn't need to do anything further in this respect.

I have considered the quality of the HMRC certificate as Mr A feels this was of poor quality and wasn't sufficient to prove the scheme was a valid one. However, I am satisfied Aviva didn't have any reason to question whether it was genuine or not. The quality seems of its time and it contains the necessary information about the scheme and HMRC.

Aviva has told us that upon receiving the transfer request and the completed transfer forms as well as the letter confirming the Scheme was registered with HMRC it was satisfied that there were no warning signs to cause it to think the Scheme was suspicious. I appreciate it turns out the scheme was a fraudulent one but this was discovered after Mr A pension was transferred. And the timing of this transfer request is key to deciding whether Aviva did enough when processing Mr A's transfer. The fact this took place before TPR guidance it would be unfair to impose the expectations that were put upon firms after the Scorpion guidance was implemented. This was almost a year before the guidance was introduced therefore, for the time, Aviva's process appears to be in line with what I'd expect a business to be doing around this time taking into account the obligations under PRIN and COBS.

There was however a need for businesses to remain vigilant for obvious signs of pension liberation or other types of fraud. Even though some of the regulators' warnings about the threat of pension liberation and wider scams were directed at consumers, I think it's reasonable to conclude that the sources of intelligence informing those warnings included the industry itself. Personal pension providers were therefore unlikely to be oblivious to these threats. And, even if they were, a well-run provider with the Principles in mind should have been aware of what was happening in the industry. So, in adhering to the FSA's Principles and rules, I think a personal pension provider should have been mindful of announcements the FSA and TPR had made about pension liberation, even those directed to consumers. It means if a ceding scheme came across anything to suggest the request originated from a cold call or internet promotion offering access to pension funds – which had both been mentioned by regulators as features of liberation up to that point – that would have been a cause for concern.

However, I'm satisfied nothing along these lines would have been apparent to Aviva at the time of the transfer. Mr A's transfer papers wouldn't have given an indication that his interest in transferring followed a cold call. And, given the guidance in place at the time, there was no expectation for Aviva to contact Mr A to see how his transfer had come about.

Furthermore, it's important to recognise that the more extensive list of warning signs issued in 2013 hadn't yet been published, and it wouldn't therefore be reasonable to use hindsight to expect ceding schemes to act with the benefit of that guidance. This means that I can't fairly expect Aviva to have considered the fact that the Scheme was recently registered (which it would have known from the HMRC registration certificate it was sent) as being suspicious. And it means I don't expect Aviva to have investigated the sponsoring employer's trading status, geographical location or connections to unregulated investment companies.

I'm also satisfied Aviva didn't have to be alarmed at the contact it received from a third party that may have not been authorised by the FSA. The FSA didn't regulate occupational pension schemes at all, so Aviva wouldn't have expected to find the parties running those schemes or helping to administer them (which may include liaising with a member about a transfer-in) to be authorised by the FSA. In any event, as mentioned previously, the FSA announcement about pension liberation mentioned that some advisers it regulated were involved in this very activity. So that doesn't suggest to me that, at that time, it considered the adviser's regulatory status as being a clear determining factor of whether liberation was taking place.

So sending information to the firm it did in these circumstances, ahead of the transfer, wasn't problematic in itself and it wasn't something it needed to be mindful of when it came to processing the transfer. And when Aviva received the transfer request itself, it came directly from the occupational scheme (or those administering it), which again did not require FSA authorisation.

I would expect an FSA-regulated personal pension provider at that time to take a proportionate approach to transfer requests, balancing consumer protection with the need to also execute a transfer promptly and in line with a member's statutory rights. Taking all of this into account, and particularly where transfers to occupational schemes were concerned, my view is that it wouldn't have been practicable for a personal pension provider, in 2012 and the beginning of 2013, to have queried the regulatory status of every contact it had from third parties – or presume that there was a risk of harm from a third party involved in an occupational pension transfer purely because it was not FSA authorised.

So given the time of this specific transfer and what was known within the industry at that *stage I am satisfied that Aviva carried out its duties in relation to the transfer in line with the FSA's principles. I don't think Aviva should have reasonably had cause for concerns about the transfer and I see no reason why it would have needed to carry out any further checks at this time.*

Therefore, to summarise, as I have explained in this decision, at the time of Mr A's transfer, Aviva would have been expected to know the receiving scheme had a PSTR and was correctly registered with HMRC. Aviva had this information. Beyond that, there was no requirement or expectation for it to have undertaken more specific, detailed, anti-liberation due diligence. The FSA's Principles and COBS 2.1.1R meant Aviva still had to be alive to the threat of pension liberation and act accordingly when that threat was apparent. But I'm satisfied there weren't any warning signs that Aviva should have responded to.

Aviva accepted my provisional findings. The CMC on behalf of Mr A didn't accept my provisional findings and provided the following comment:

- It believes that Aviva should have had a conversation with Mr A at the time of the transfer to enquire whether he was aware of the announcement made by the FSA in 2011 entitled "Protect yourself from fraud and unauthorised activity". And if he understood the ramifications of acting on the advice of an unauthorised firm. It feels that had Aviva done this it could have provided Mr A with more details about the risks involved and so Mr A could have sought independent financial help or made his own choices about whether to proceed.

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 not persuaded to change the outcome reached in my provisional decision.

As no comments were provided in relation to whether the complaint had been brought to this Service within the correct timescales my decision remains that it has been made in time.

With regards to the merits of the complaint, I appreciate what the CMC has said, however the fact remains that Aviva, at that particular point, in time was not *obliged* to contact Mr A to check, as the CMC has said, if he was aware of the 2011 announcement by the FSA. As already set out in my provisional decision what Aviva had to do was to make sure the receiving scheme was validly registered with HMRC. And as Aviva had the Scheme's HMRC registration certificate, and PSTR, it didn't need to do anything further in this respect.

Again, as acknowledged in my provisional findings, Aviva did also have to remain vigilant for obvious signs of pension liberation or other types of fraud - keeping the regulators' Principles and rules in mind as well as its warnings about the threat of pension liberation and wider scams even though they were predominantly directed at consumers at that time. But in the circumstances of this complaint, it is clear that there was nothing along these lines that would have been apparent to Aviva at the time of the transfer. Mr A's transfer papers wouldn't have given an indication that his interest in transferring followed a cold call. And, given the guidance in place at the time, there was no expectation for Aviva to contact Mr A to see how his transfer had come about.

Therefore, due to the time this transfer was made I am satisfied that Aviva did what it had to do in terms of what checks it had to carry out before making the transfer. And judging Aviva's actions based on later requirements put on providers wouldn't be fair or reasonable.

My final decision

My final decision is that the complaint was brought to this Service in time.

In terms of the merits of the complaint I don't uphold it and I make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 4 December 2024.

Ayshea Khan
Ombudsman