DRN-5072341

The complaint

Mrs B has complained that Aviva Life & Pensions UK Limited failed to invest her pension funds as intended after they had been transferred to it.

What happened

Mrs B transferred her pension to Aviva on 21 September 2017 through her independent financial adviser (IFA), who requested that her funds be invested in the Brewin Dolphin MPS Balanced portfolio (BD).

However, this didn't happen and her pension funds were placed in "loose funds," although for a period of time Aviva continued to take discretionary investment management (DIM) charges as if she were invested in the managed funds.

Aviva accepted responsibility for this error and agreed to undertake a loss assessment on Mrs B's pension plan (as if it was invested in the managed portfolio) from the date it was opened, until March 2019.

Aviva said that it used the March 2019 date because this is when both Mrs B and her IFA were sent statements that outlined where her pension funds were invested.

Aviva's opinion was that Mrs B or her IFA should have been aware at this stage that her funds weren't invested in the managed funds.

Mrs B didn't accept this, however, and so referred the matter to this service.

Having considered the complaint, our investigator initially thought that the complaint should be upheld. He said the following in summary:

- Aviva said that there were two parts to the process which should have ensured that the account was set up correctly. The first was that the IFA would set up the DIM profile through Aviva's platform and then the IFA would send a form to Aviva so that the latter could connect the DIM profile to the business which was conducting the investment management.

- Initially, Aviva had said that the IFA hadn't completed its part of the process, but it later conceded that the transfer documentation was received on 24 November 2017, but was "just missed".

- However, Aviva did nevertheless establish the plan and begin deducting DIM fees, even though it wasn't invested as intended. This was discovered in January 2018, but the fees weren't refunded until June 2023 when Mrs B raised her complaint. Aviva also hadn't contacted Mrs B or her IFA about this either.

- Aviva had since offered to settle the matter, capping the liability in 2019 on the basis of the statements which would have been received by Mrs B and her IFA. But Mrs B had said that she only used her IFA as and when required, and that they'd had no

further contact since the transfer. She was only made aware of the problem when her IFA noticed the discrepancy in March 2023 and it brought this to Mrs B's attention. The IFA had also confirmed that no ongoing monitoring of the plan, or regular contact with Mrs B, had taken place.

- Mrs B had further said that she hadn't received statements until that for 2021/22. But she'd also said that, now she'd been able to download the statement for 2019, she still couldn't identify from it that there was a problem with the pension funds. Nor did she notice this in 2022.

- The investigator said that, whilst Aviva had said that it would have been clear from the statements that there was a problem, Mrs B wasn't a sophisticated investor, she was paying for a service, and had only just discovered that charges were being taken from her plan.

- He added that Mrs B had no reason to question the accuracy of the statements.

As the investigator didn't think that Mrs B would have been aware of the error until it was brought to her attention by the IFA, he said that Aviva should reconstruct Mrs B's plan as if it had been invested as intended from the date of inception.

He also said that Aviva should pay Mrs B £250 in respect of the trouble and upset she'd experienced.

In response, Aviva said that it had already completed the reconstruction of the policy, and had offered £250 to Mrs B. But it maintained that the separate loss assessment should only run up to March 2019, as this was when the statement would have shown that the investment wasn't as intended.

In support of this, it said that it accepted that Mrs B may not have been aware of the problem, but it said that an ongoing adviser charge was taken from 30 September to 31 December 2017, and that the IFA ought to have been aware at the outset that the policy hadn't been set up properly.

In response to a request from the investigator for clarification on the redress proposal, Aviva said that it had already reconstructed the policy so that it now showed as it would as if the investment had been made correctly from the point of inception. However, it said, the loss assessment was separate from this and it would run from inception up to March 2019.

The investigator put this proposal to Mrs B, saying that he felt it was fair and reasonable. He also cited the following explanation from Aviva:

"I understand that the Financial Adviser has told you that no ongoing service with Mrs B was agreed. However, as stated in my previous emails an ongoing adviser charge was being taken and [the IFA] is still registered as the active service agent on the policy since inception of the policy to date. We've received no notification from them to remove themselves from acting on this policy. Please be aware that access to models is only available to our customers via a Financial Adviser and without this Mrs B wouldn't have had access to any models. As this is an adviser led platform it is the responsibility of the financial adviser to remove themselves from a policy if they are no longer servicing it. If the financial adviser did remove themselves the models would no longer be available to Mrs B and the model would have been disinvested into loose funds which is how this was invested since inception of the policy.

In conclusion, we accept our part in the error and have agreed to complete a loss assessment from inception to March 2019 at which point the statements were produced. We feel that the financial adviser is also partly responsible for this issue as they are still the acting service agent for this policy for not recognising this issue and as the statements clearly show this, we would consider it reasonable for the Financial Adviser to take responsibility from this point. We feel this is a fair outcome however, if you do not agree with this please refer this complaint to an ombudsman for a final decision."

The investigator concluded that Mrs B wouldn't have been able to invest in the required model unless she had a financial adviser, but said that if she had evidence to the contrary, she should let him know.

Mrs B disagreed, saying the following in summary:

- A financial adviser would have been required at the outset to determine her circumstances and objectives, but there was no requirement for ongoing advice after this. She was paying the DIM for the investment management itself.

- There was no ongoing adviser fee. Whenever advice was required, she paid the fee to the adviser at that time.

- Her adviser had confirmed that the provision of services was agreed between the customer and the adviser, and this had nothing to do with Aviva. The adviser was simply registered on the plan as the servicing adviser.

- There would have been no obligation for the adviser to remove themselves under this arrangement, even if no ongoing advice was being provided.

Mrs B also queried as to what was meant by the reconstruction of the policy.

Aviva for its part said the following in response:

- The service Mrs B established with Aviva was only available via a financial adviser,. But it conceded that there was no written agreement between Aviva and the adviser which required the latter to monitor the pension plan.

- If Mrs B was no longer being advised by her adviser, the product would no longer have been available to her. If it had been informed of this, then Mrs B was required by the terms of the plan to notify Aviva and it would then remove the DIM and the pension funds would be held as "loose assets".

Regarding Mrs B's query on the policy reconstruction, Aviva said that no calculations had been undertaken, as it was offering a loss assessment calculation from inception to March 2019. It further said that the plan had already been reconstructed, which meant that it wasn't in the correct model ad initially intended.

As agreement couldn't be reached on the matter, it was referred to me for review.

I issued a provisional decision on the complaint on 4 September 2024, in which I set out my reasons for upholding the complaint. The following is an extract from that decision.

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

And having done so, I've reached different conclusions to the investigator on the outcome here.

To summarise, Aviva's point is that, had the adviser and Mrs B adhered to the terms of the plan agreement, regular ongoing advice would have been provided and the problem ought then reasonably to have been noticed at the latest by March 2019 when the first statement was generated.

On the other hand, Mrs B's – and her adviser's – position is that it doesn't matter whether there was ongoing advice or not. This was a matter between Mrs B and the adviser which didn't concern Aviva. And as there was more of an ad hoc arrangement between the two, there was no real reason, or requirement, for the adviser to check Mrs B's statements after the initial advice had been given. Mrs B simply hadn't noticed that there was a problem before her adviser did.

And having considered those points, I find myself more in agreement with the latter argument.

To explain, as confirmed by Aviva, there was no written agreement between it and the adviser that ongoing monitoring of the plan would occur. But even if this was the case, I can't see that there is any specific definition of how ongoing monitoring or advice might or should have looked. It seems to be quite a nebulous requirement. And if Mrs B was happy to retain her adviser as the servicing agent on the plan but that the actual frequency of any advice would be up to her, then this would seem to me to have been her prerogative. And Mrs B would, after all, be the one paying those fees.

There's also a further consideration here which in my view would quite reasonably have made Mrs B less prone to seek regular advice from her adviser. The active management would have been undertaken by the DIM – as is the point of DIM.

And so, as there seems to have been no contact between the adviser and Mrs B, other than when she required ad hoc advice, then I don't think it can fairly or reasonably be concluded that she either would have been, or otherwise ought to have been, aware of the problem. until her adviser did notice that something was wrong in 2023. Nor, for the reasons given, do I necessarily think that the adviser ought to have been aware of the problem after the policy had been established. It seems to have been the case that the issue came to light when the adviser was looking at another client's financial affairs.

Further, regarding the adviser's responsibilities at the outset, as there is no case here against the adviser, I'm making no specific or firm conclusions – but in terms of the known facts, it does seem to have been the case that the adviser provided the necessary documentation to establish the plan with the associated DIM, as has also been confirmed by Aviva.

Aviva has said that this was unfortunately "just missed", and so the plan wasn't invested as intended. On the face of it, therefore, from the adviser's perspective, they would have done what they needed to do to properly establish Mrs B's plan. And I think it was then entitled to assume that Aviva would adhere to its responsibilities to ensure that the plan was established as intended. I don't think that Aviva can reasonably diminish its own responsibility here by claiming that the adviser should have checked that Aviva had done what it needed to do.

And so my current view is that the complaint should be upheld.

<u>Putting things right</u>

My aim is to place Mrs B as closely as possible in the position she would have been, but for Aviva's error.

It's unclear to me as to what Aviva means when it says that the policy has been reconstructed, but that the loss assessment hasn't yet been conducted. This is further clouded by its more recent comment that the plan has already been reconstructed, which according to Aviva means that it isn't in the correct model as initially intended.

But my understanding of a policy reconstruction for redress purposes is that the value is in essence recreated so that the current position reflects that which it would have been, had the problem not arisen. And so this should mean that it is now in the correct model, as initially intended, and that it has the correct value.

I can't currently see what additional loss assessment might then be required beyond this – although Aviva may be able to explain this in response to this provisional decision.

And so, my current view is that Aviva Life & Pensions UK Limited should reconstruct Mrs B's plan so that it reflects the value that it should have, as at the date of any final decision along these lines, had it been invested as intended from inception. This shouldn't be capped in March 2019, but should reflect investment activity which has actually taken place since the problem was discovered. This may also take account of any fees which may have been payable for Mrs B to have been invested with the DIM, so that it is, as closely as possible, the same position she would now be in had the policy been established correctly.

In terms of the additional payment, I think Mrs B will have suffered not inconsiderable distress and inconvenience as a result of this matter, and would have been alarmed and concerned when she realised that her pension funds hadn't been invested as they should have been. And so I think the proposed payment of £250 is appropriate in respect of this."

Mrs B confirmed that she was happy with the proposed outcome, but queried as to whom Aviva had been paying the regular adviser charge, as it hadn't been to her IFA. She also enquired as to which party would perform the required calculations, and how long they would be given to do so, as she had little faith in Aviva's ability to do them.

Mrs B further queried the possibility of the fund changing between a calculation which would be set at the date of a final decision and the actual change being made by Aviva.

Aviva said for its part that it had new evidence. It said the following in summary:

- Although it had previously agreed to uphold the complaint on the basis that the IFA had sent the DIM model form in 2017, it had since realised that the process in 2017 was different in that the DIM permissions came through Aviva rather than the IFA as they do now.

- The process was for the IFA to request the permissions they required from Aviva and the latter would set these up. Once this was done, the IFA would then log in to the online account and select the required model from the drop down list.

- In this case, a document (which Aviva provided) showed that Mrs B's IFA requested permissions to access the Brewin Dolphin 0.36% models, which would then have enabled them to choose models from the drop down list. This form also started the charging process.

- It also had a record of it emailing the IFA on 29 August 2017 asking it to key the DIM on the platform. When it had first investigated the complaint, it didn't know that this was the process as the processes had changed considerably since then and the note hadn't been considered.

- Mrs B's plan had both a personal pension and an ISA. The IFA had set up the DIM model for the ISA (Brewin Dolphin MPS Passive Plus Balanced), but for the pension plan had selected the "Brewin Dolphin Balanced Portfolio – 0.30%". This wasn't one of the "0.36%" models as requested in the initial form. As the model for the ISA was selected at the same time, this demonstrated that Aviva had set up the permissions correctly and the IFA had access to apply this to the policy as both the ISA and the pension policy were on the same plan.

- The responsibility remained with the IFA to log in and make the selection. As such, Aviva didn't consider that it had caused any error in setting up the plan and it was no longer offering to the undertake the loss assessment for the complaint. However, due to this not being explained in the first place, it would maintain its offer of £250 as compensation for this.

The investigator put this response to Mrs B for her and her IFA to comment further, which they did as follows:

- The Aviva proposition was an "advised" proposition which meant that a client needed to go through a financial adviser each time they wished to transact.

- The process was quite cumbersome, and involved liaising with an account manager who was named in the spreadsheet sent by Aviva. The IFA followed the same process for every investor and relied on the account manager to ensure that everything was as it should be – this was the only such incident out of hundreds of investors they had placed with Aviva over time.

- They had no record of receiving the email referred to by Aviva and it had previously conceded that it had never been sent. The pension and ISA were also dealt with separately, in August and November respectively and so weren't linked.

- The reference to the difference between 0.3% and 0.36% was simply due to legislation which was being considered at the time as to whether VAT should apply to DIM fees. The DIM fees changed from 0.36% to 0.3% after HMRC had approved the removal of VAT.

- But in any case the information from Aviva contradicted itself as it had on the one hand said that no model was selected for the pension, but then also said that the 0.3% Brewin Dolphin Balanced Portfolio had been selected – it was surely one or the other.

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.

And having done so, I'm not persuaded to change my view on the outcome here. I acknowledge what Aviva has said about the process at the time, but I agree with Mrs B's IFA here that what Aviva has said about whether a portfolio had or hadn't been selected is rather confusing.

But as it is Aviva's position that the IFA needed to select a portfolio, and the IFA had in fact selected the Brewin Dolphin Balanced Portfolio, then I can't see how this reasonably changes matters.

My understanding is that Aviva is saying that the IFA had requested that access be granted to the "0.36%" models, but then chose a "0.3%" model. But notwithstanding what the IFA has said about the VAT position at the time, if this was an option for the IFA from a drop down menu, and it was selected, then I can't see that the IFA would reasonably have needed to do anything more.

If it was Aviva's position that the portfolio chosen wasn't acceptable due to the previously requested access to a different range of portfolios, then it was up to Aviva to clearly explain this and request that a different portfolio be selected.

It's unclear to me as to whether the email alluded to in the spreadsheet provided by Aviva was sent before or after the IFA's selection of the portfolio for the pension funds. If it was before this, then the IFA was following the required process. If it was after this, and again notwithstanding what the IFA has said about the email not being received, then it's in any case unclear from the record of the email as to what detail was provided in the email, i.e. whether this simply requested that a portfolio be requested or whether it explained that the selected portfolio wasn't accessible according to the previously requested access.

Had it been clearly set out that a further selection needed to occur, with an explanation for this, then my view on the complaint might be different. But I can't see that this has been adequately demonstrated to be the case here.

And so, for the reasons given in both this and the provisional decision, my view remains that the complaint should be upheld.

Putting things right

As set out in the provisional decision, my aim is to place Mrs B as closely as possible in the position she would have been, but for Aviva's error.

Aviva hasn't specifically addressed the uncertainty I set out previously around what it had said about the policy having been reconstructed, but that the loss assessment hadn't yet been conducted.

But as set out previously, my understanding of a policy reconstruction for redress purposes is that the value is in essence recreated so that the current position reflects that which it would have been, had the problem not arisen. And so this should mean that it is now in the correct model, as initially intended, and that it has the correct value.

And so, as with the provisional decision, Aviva Life & Pensions UK Limited should reconstruct Mrs B's plan so that it reflects the value that it should have, as at the date of this final decision, had it been invested as intended from inception. This shouldn't be capped in March 2019, but should reflect investment activity which has actually taken place since the problem was discovered. This may also take account of any fees which may have been payable for Mrs B to have been invested with the DIM, so that it is, as closely as possible, the same position she would now be in had the policy been established correctly.

I've noted Mrs B's questions relating to the undertaking of the redress payment. It's up to Aviva Life & Pensions UK Limited to calculate the redress, and it will have means of doing so, having received similar redress directions over the years. If Mrs B wishes to have this checked, she may do so, but this service wouldn't typically make any further award to cover

the cost of this, and as I'm satisfied that Aviva Life & Pensions UK Limited ought to be able to accurately calculate any redress due, I don't think it's warranted in this instance.

Any redress due as a result of a reconstruction of the plan should be applied within 28 days of Aviva Life & Pensions UK Limited being notified of Mrs B's acceptance of this decision, and if it isn't, simple interest at 8% pa should be applied to any calculated loss from the date of this decision up to the date of "settlement", i.e. when any required unit adjustment is actually processed.

Mrs B has also queried the recipient of the adviser charges – and so Aviva should also confirm to Mrs B as to what was paid and to whom over the relevant years of fee payments.

In terms of the additional payment, as set out in the provisional decision, I think Mrs B will have suffered not inconsiderable distress and inconvenience as a result of this matter, and would have been alarmed and concerned when she realised that her pension funds hadn't been invested as they should have been. And so I think the further payment of £250 is appropriate in respect of this.

My final decision

My final decision is that I uphold the complaint and I direct Aviva Life & Pensions UK Limited to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B to accept or reject my decision before 23 December 2024.

Philip Miller
Ombudsman