

complaint

Ms P's complaint is, in summary, that Aviva Life & Pensions UK Limited did not provide the relevant information about whether she was entitled to more than 25% tax-free cash, or had other guarantees, in the three policies she had with Aviva. This has caused her to delay her retirement and remain in a cash fund rather than being invested.

background

I issued my provisional decision on 27 February 2020, a copy of which is attached to and forms part of this final decision.

Aviva responded and did not accept my provisional decision. They made the following points:

- A number of different conclusions had been received from this Service.
- They did not agree we were able to consider Ms P's complaint she was entitled to a tax-free cash sum of more than 25% of the fund value. Ms P complained about this in 2013 and did not refer the matter to this service within six months of the letter. She has a higher understanding of pensions than most people.
- Ms P had previously complained about the adviser in 2001. A senior management decision letter was issued in June 2001 with referral rights to the PIA Ombudsman Bureau.
- Information was provided to Ms P in 2007 and again in 2008 about the tax-free cash available and how it was calculated.
- Details of the maximum tax-free cash and final remuneration have been provided on a regular basis. Ms P and later this service chose to keep querying the tax-free cash available. This did not change.
- The information supplied to Ms P in 2016/17 was the same as information supplied since 2007. A complaint about the information is therefore outside this service's jurisdiction.
- Ms P had been provided with information about the tax-free cash and it was her decision to question this again.
- They have provided proof that Ms P had historically been provided with clear answers to her questions about the tax-free cash.
- They did not agree with the methodology to assess loss either. It was Ms P's decision to delay taking her pension benefits until 2018.
- It was Ms P's decision to switch into a deposit fund in 2016. This contradicts Ms P's actions as she chose to leave her funds in a safer deposit fund.
- They suggested an alternative method of calculating any loss by establishing a critical date of when retirement benefits would have been transferred.

Ms P replied. She made the following points:

- Rather than use a benchmark to calculate her loss, the calculations should be made on the funds she actually invested in.
- A start date of 16 January 2017 for the calculations should be used rather than 1 May 2017.
- Aviva's charges should be taken into account in the calculation.

- The compensation of £200 I intended to award was irreconcilable with the consequences of Aviva's failures. She had suffered immense amounts of anxiety, stress and loss of money. And the amount was a mere 10% of the charges made by Aviva during the period she is complaining about.
- She has raised issues about another policy, which is not covered in my provisional decision.
- Additional concerns had been raised. I had said these had not been addressed and she would like to know what this means.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. I am required to reach my own decision about the outcome of this complaint. Although I have considered the opinions expressed by others, I have reached my own decision about what I think is a fair and reasonable outcome.

Ms P raised many issues in her response to the adjudicator before the complaint was passed to me. Most of those issues related to the way the complaint had been dealt with by Aviva and this service. As my view was that the complaint should be upheld, most of those issues have either been addressed by the conclusions I reached, or are no longer relevant. I have not addressed all of the points raised, but have explained the reasons for my decision.

jurisdiction

In 2008 Aviva sent information about the policy to Ms P including an explanation of how the tax-free cash sum would be calculated. They provided a calculation and information used to calculate the tax-free cash sum. If that was incorrect, Ms P was asked to send the correct information. However, I do not think this gave Ms P knowledge about her current complaint. It is true she could have provided further information, but this complaint arises because Ms P was asking for details of what the information could be.

Ms P had been querying the amount of tax-free cash available from her policy for a number of years. She made a complaint in 2013. This followed an incorrect illustration issued by Aviva. In the final response letter Ms P was told she was not entitled to more than 25% of the fund as tax-free cash. She did not refer her complaint to this service within six months of that letter.

The current complaint arose because Ms P asked for information about her pension benefits. In a telephone call with Aviva they explained that she was not entitled to more than 25% of the pension fund value as tax-free cash based on the information they held. However, if Ms P was able to provide more information it was possible she would be entitled to a higher tax-free cash sum. Some of this information was about Ms P's employment history within the group of companies.

I remain of the view that we can consider Ms P's complaint. It arises because there was the possibility she was entitled to more than 25% of her pension fund as a tax-free cash sum. Ms P wanted to understand how this was calculated to decide whether to go to the effort of obtaining more information. Although this was discussed in her telephone call it was possible more tax-free cash would be available. Now we have the information it has been established Ms P is only entitled to 25% of the pension fund as tax-free cash. However, this was not known until further investigation had been made.

delays by Aviva in providing information and the consequences of those delays

Ms P switched into a deposit fund in October 2016 before she took her pension benefits. I think that was reasonable as it protected her funds against short term fluctuations in the value of her pension fund. However, when she transferred her pension funds she invested in assets with some exposure to investment risk.

I have carefully considered when Ms P would have transferred her funds, if she had been given the answers to her questions about how the tax-free cash sum would be calculated. It is possible this could have been obtained by January 2017, but I think that is unlikely. Given the time it has taken to obtain information whilst the complaint has been with this service, I think it should have been possible to have the information required by April 2017. The transfer could then have been made on 1 May 2017. I cannot be precise with that date, but think it is a reasonable estimate of the date the transfer would have been made, if things had run smoothly.

There have been delays whilst the complaint has been with this service. It has taken a long time to resolve. I think this has been a hard fought case. Both parties to the dispute have made a number of arguments and information has been requested. I came to a different conclusion to my colleagues, but that is the nature of our service. The compensation set out is intended to put Ms P back in the position she would have been in, if Aviva had acted fairly.

The benchmark I used for assessing compensation assumed Ms P wanted to invest and was prepared to accept some risk. The switch to a deposit fund was only in the run up to retirement. I am satisfied she was prepared to accept some risk after transferring her pension benefits.

As I think Ms P would not have transferred away from Aviva until 1 May 2017, she would have paid charges until that date. Any charges after that date will be taken into account in the calculation of compensation as the actual fund value will be used in the calculation of compensation.

Ms P also asked about points she had raised about a personal pension plan she started in 1997 on advice from General Accident (now Aviva). Those points were dealt with in letters from our adjudicator of 9 August and 14 September 2018. He explained that any advice about the policy was not part of this complaint. The policy was invested in a fund with some guarantees. This was switched into a deposit fund when Ms P reached age 55.

The information about the personal pension was provided in a letter dated 2 May 2017. This should have been provided to Ms P sooner. However, Ms P was only ever entitled to a maximum of 25% of the policy value as a tax-free cash sum. Any guarantees relating to the fund were used when the fund was switched into the deposit fund. This has not changed since the adjudicator's letters on this issue. Although I did not specifically address this in my provisional decision, these points do not change my decision.

Ms P argues she should be paid more than £200 for the distress and inconvenience she has been caused by Aviva's errors. I accept her retirement was delayed and this must have been stressful. However, in addition to the £200 I am awarding, I have taken account of sums already paid to Ms P. I think the total is appropriate as compensation in this case.

Fair compensation

My aim is that Ms P should be put as closely as possible into the position she would probably now be in if Aviva had provided clear answers to her questions.

Both Aviva and Ms P have said they think the compensation should be calculated by reference to the investments Ms P actually made. I cannot be certain she would have made the same investments in May 2017 as she actually made in October 2018. However, if both parties agree then compensation can be calculated on that basis. This should be agreed and paid within a reasonable time after Aviva is notified Ms P has accepted my decision. If it is not agreed within three months of that time then the loss and compensation should be calculated using the method set out below.

If compensation cannot be calculated on an agreed basis then I'm satisfied that what I've set out below is fair and reasonable given Ms P's circumstances and objectives when she invested.

What should Aviva do?

To compensate Ms P fairly, Aviva must:

- Compare the performance of Ms P's investment with that of the benchmark shown. If the *fair value* is greater than the *actual value*, there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

Aviva should add interest as set out below.

If there is a loss, Aviva should pay an amount into Ms P's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

If Aviva is unable to pay the compensation into Ms P's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Ms P's expected marginal rate of tax in retirement. Ms P is likely to be a basic rate taxpayer in retirement, the reduction should equal the current basic rate of tax. However, if Ms P would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

- Pay Ms P £200 for the distress and inconvenience caused by not providing a clear and concise response to her questions.

investment name	status	benchmark	from ("start date")	to ("end date")	additional return
All three pension policies	transferred	FTSE UK Private Investors Income Total Return Index	1 May 2017	date transferred	The loss should be revalued in line with the same index from the date of transfer to the date of my decision

Simple interest should be added to my award at a rate of 8% gross a year from the date of my decision to the date of settlement.

Income tax may be payable on any interest paid. If Aviva deducts income tax from the interest, it should tell Ms P how much has been taken off. Aviva should give Ms P a tax deduction certificate if she asks for one, so she can reclaim the tax from HMRC if appropriate.

Actual value

This means the actual amount paid from the investment at the end date.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Ms P wanted capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Ms P's circumstances and risk attitude.

my final decision

I uphold the complaint. My decision is that Aviva Life & Pensions UK Limited should pay the amount calculated as set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms P to accept or reject my decision before 9 May 2020.

Roy Milne
ombudsman

Copy of provisional decision

complaint

Ms P's complaint is, in summary, that she did not have the relevant information to know whether she was entitled to more than 25% tax-free cash or had other guarantees in the three policies she had with Aviva. This has caused her to delay her retirement and remain in a cash fund rather than being invested.

background

Ms P started two Executive Pension Plans (EPP) some years ago. Both pensions were then administered by Aviva. They were occupational pension schemes and the benefits available were subject to Inland Revenue limits on the maximum benefits that could be taken.

Ms P started a personal pension with General Accident (now Aviva) in August 1997. This was on advice from General Accident.

In February 2013 Aviva sent retirement quotations to Ms P. A complaint was made about those quotations and the amount of tax-free cash available from Ms P's pension plans. Ms P complained about the information she had been given.

There is very little evidence about what happened in 2013. However, the final response letter dated 12 April 2013 was a reply to a complaint. The letter apologised for the service provided to Ms P and two incorrect retirement quotations being issued to her. It confirmed that after reviewing Aviva's records that the tax-free cash of 25% of the fund value was correct. Ms P wanted to make a complaint about the sale of the policy because she was led to believe that she could receive more than 25% of the fund as tax-free cash.

In September 2016, Ms P instructed her three pension policies held with Aviva to be switched into cash prior to taking benefits. The switch was completed in October 2016.

Ms P asked whether she needed to involve a financial adviser to take her benefits. In a phone call of 5 December 2016 Aviva explained that if she moved her pension to a new provider then advice was not required. However, if switching to a new plan with Aviva then advice was required. Aviva paid her £100 for the incorrect information she had previously been given about requiring an adviser.

In the call of 5 December Aviva explained that two of the policies might allow more than 25% tax free cash to be taken. And that her salary and service details were required for Aviva to perform a recalculation to check the entitlement.

Ms P returned the retirement pack document on 7 December 2016, with a cover letter for each of the three policies. In each letter she asked questions about the respective policy and requested copies of the original policy documentation.

On 3 January 2017 Ms P called Aviva. She had received standard retirement quotes but no answers to her questions. It was re-confirmed in that call that she needed to provide her salary and service details for Aviva to recalculate if there was any entitlement for higher levels of tax-free cash.

Further information was sent to Ms P on 11 January 2017, about two of the policies; however, it was not the answers to the questions she had raised.

Aviva called Ms P on 13 January 2017, to follow up the previous phone call. She explained her reasons for asking the questions about the policies and discussed the method of calculating whether she was entitled to more than 25% tax free cash.

The call was followed up with a letter from Aviva also dated 13 January 2017, in which it apologised for the service it had provided. It said further information regarding the third policy would follow. It also contained more information about the calculation for tax free cash entitlement. Aviva offered to perform a loss assessment on receipt of Ms P's instruction to transfer her pensions within the next 28 days. £100 was also offered as an apology.

Ms P contacted Aviva in early February 2017, and it was identified she had not received the letter of 13 January 2017. A further copy was sent which she received on 10 February 2017.

After further phone calls about the information in the letter of 13 January 2017, and a lack of response about the third policy, Aviva offered Ms P £300 for the upset and inconvenience caused.

On 3 April 2017, Aviva wrote to Ms P confirming that the third policy offered a maximum of 25% tax free cash. It also confirmed the policy had no safeguarded benefits and that it did not hold a copy of the original terms and conditions.

Ms P wrote to Aviva on 12 April 2017. In that letter she asked a number of questions about her pension policies. This included details of the documentation and specifically asking whether she was entitled to more than 25% of the fund as a tax-free lump sum.

Following further communication between Aviva and Ms P, Aviva provided information about the fund the third pension policy had been invested in. It explained that when Ms P reached her selected retirement age of 55, the deferment of her retirement caused the fund to be switched into the deposit fund by default. Aviva also confirmed there were no guarantees applying to the policy.

Ms P referred her complaint to this service. It has been investigated by a number of different adjudicators. After a number of letters and phone calls one of our adjudicators recommended it should be upheld. He said:

- Ms P made a complaint in 2013 about the calculation of the tax-free cash from her policies. He thought any complaint about that calculation was time barred and we could not consider that part of the complaint.
- Two of the pensions were occupational schemes and therefore it was possible they offered more than 25% tax-free cash entitlement. And it was reasonable for Ms P to enquire about additional benefits or guarantees before taking her benefits and that she needed to be confident in the reliability of the answers she was given.
- The issue about how much tax-free cash could be taken from one of the policies had been the subject of a previous complaint. But he thought this complaint was about the service Aviva had provided in answering questions and providing policy documentation.
- The answers about the first two pension plans were provided in the phone call on 13 January 2017 and the letter of the same day. Whilst he accepted that letter was not received until February 2017, he considered it was reasonable that Ms P could have instructed the transfer of those two pensions by mid-February 2017.
- The information about the third policy was not provided until later. He considered Ms P was in a position to instruct the transfer of the third pension by 19 May 2017.
- Aviva paid Ms P £300 as an apology for the upset and inconvenience it had caused by the level of service it had provided. Therefore, recognising it didn't handle her information requests as well as it should have. It also offered to conduct a loss assessment to see if delays in responding to the information requests had caused her a loss. However, Aviva had not been able to do so as Ms P had not transferred her pensions.
- The adjudicator explained how any loss should be calculated. This took account of the dates when he felt Ms P was in a position to have instructed the transfer of her pensions. He also said it was not appropriate to revalue any loss to date as Ms P still hadn't transferred her pensions and had remained in cash funds with Aviva.

Aviva and Ms P both disagreed with the adjudicator's recommendations and so the case has been referred to me for a decision. Ms P's husband provided a response on her behalf. I do not intend to

deal with any of those points at this stage. That is because I think the complaint about the calculation of the tax-free cash is one that we can deal with.

Our adjudicators explained that Ms P made a complaint in 2013 about the calculation of the tax-free cash from her policies. They thought any complaint about that calculation was time barred and we couldn't consider that part of the complaint. Having reviewed the correspondence, I do not agree.

I wrote to Aviva. I explained that, in my view, the letter was in response to a complaint about the information provided in the retirement quotations. Although this related to the tax-free cash available, I think it is a different issue from the one being raised now. The response to the complaint in 2013 confirmed that the tax-free cash was limited to 25%. However, the correspondence and telephone conversations in 2016/17 contradict the outcome of the complaint. In particular, the telephone call of 13 January 2017 explained the formula for calculating the tax-free cash from an occupational pension scheme. This also explained that Aviva made a calculation in 2006 using data that was available. If Ms P had evidence to show her salary was higher, then the tax-free cash could be greater than 25%.

Aviva replied and said they did not agree. They provided another copy of the telephone note of Ms P's complaint in 2013. Aviva issued the final response confirming that she had six months to refer her complaint to this Service. As the complaint was not referred to this Service within six months of that letter it should not be considered. The decision was made by this Service that the complaint was out of time.

I issued my decision that we can investigate Ms P's current complaint. I was satisfied that this was a different complaint to the one made in 2013.

Since then we have received information from Ms P. Aviva explained that the information showed that Ms P was not entitled to more than 25% of her pension fund as a tax-free cash sum.

Ms P has told us that as a consequence of the delay she has felt unable to transfer her pension funds until October 2018.

my provisional findings

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

Ms P contacted Aviva in the autumn of 2016 as she intended to take her pension benefits. She switched into safer funds to avoid investment volatility before she took her benefits. There then followed some correspondence and telephone calls with Aviva.

I think it was appropriate for Ms P to switch to safer funds. And it seems to me that asking about the benefits available from her policy was a sensible step to take. In particular, this included the possibility that she was entitled to more than 25% of the pension fund as tax-free cash.

Aviva did not respond to the questions Ms P asked about the tax-free cash. Although the principles were discussed with Ms P in the phone call of 13 January 2017, she wanted to know more details. It was possible that the tax-free cash would be increased if Ms P could provide details about her salary and service with the employer. So, I think it was reasonable for her to wait until she received answers to her questions before transferring her benefits.

Ms P has now provided us with details of her employment. This has been passed on to Aviva who confirmed that no extra tax-free cash was available. In my view, this should have been provided shortly after Ms P's telephone conversation with Aviva in January 2013. Given that she would need to make enquiries and provide details of her employment it would have taken some weeks to provide the answer.

It has actually taken some time for the information to be supplied. I accept that there have been some delays, but I think Ms P would not have proceeded until she was confident that the answer was correct. In my view, a reasonable estimate of the time at which she could have been informed that no extra tax-free cash was available should be the beginning of April 2017. The transfer could then have been made by 1 May 2017.

The possibility of any additional tax-free cash sums only applied to one of Ms P's policies. She could have taken benefits from the other two policies earlier. However, I think it was reasonable for her to wait to establish the position with the third policy before deciding how to take all of her pension benefits. So, I think she would have taken benefits from all three policies at the same time.

In conclusion, I think Aviva's responses to Ms P did not fully explain how the tax-free cash would be calculated. If they had provided that information sooner, Ms P would have understood there was no extra tax-free cash available and transferred her pension benefits.

Fair compensation

My aim is that Ms P should be put as closely as possible into the position she would probably now be in if Aviva had provided clear answers to her questions. I think Ms P would have invested differently. It's not possible to say *precisely* what she would have done, but I'm satisfied that what I've set out below is fair and reasonable given Ms P's circumstances and objectives when she invested.

What should Aviva do?

To compensate Ms P fairly, Aviva must:

- Compare the performance of Ms P's investment with that of the benchmark shown. If the *fair value* is greater than the *actual value*, there is a loss and compensation is payable. If the *actual value* is greater than the *fair value*, no compensation is payable.

Aviva should add interest as set out below.

If there is a loss, Aviva should pay an amount into Ms P's pension plan to increase its value by the amount of the compensation and any interest. The amount paid should allow for the effect of charges and any available tax relief. Compensation should not be paid into the pension plan if it would conflict with any existing protection or allowance.

If Aviva is unable to pay the compensation into Ms P's pension plan, it should pay that amount direct to her. But had it been possible to pay into the plan, it would have provided a taxable income. Therefore, the compensation should be reduced to *notionally* allow for any income tax that would otherwise have been paid.

The *notional* allowance should be calculated using Ms P's expected marginal rate of tax in retirement. Ms P is likely to be a basic rate taxpayer in retirement, the reduction should equal the current basic rate of tax. However, if Ms P would have been able to take a tax-free lump sum, the reduction should be applied to 75% of the compensation.

- Pay Ms P £200 for the distress and inconvenience caused by not providing a clear and concise response to her questions.

investment name	status	benchmark	from ("start date")	to ("end date")	additional return
All three pension policies	transferred	FTSE UK Private Investors Income Total Return Index	1 May 2017	date transferred	The loss should be revalued in line with the same index from the date of transfer to the date of my decision

Simple interest should be added to my award at a rate of 8% gross a year from the date of my decision to the date of settlement.

Income tax may be payable on any interest paid. If Aviva deducts income tax from the interest, it should tell Ms P how much has been taken off. Aviva should give Ms P a tax deduction certificate if she asks for one, so she can reclaim the tax from HMRC if appropriate.

Actual value

This means the actual amount paid from the investment at the end date.

Fair value

This is what the investment would have been worth at the end date had it produced a return using the benchmark.

Why is this remedy suitable?

I've chosen this method of compensation because:

- Ms P wanted capital growth and was willing to accept some investment risk.
- The FTSE UK Private Investors Income total return index (prior to 1 March 2017, the FTSE WMA Stock Market Income total return index) is made up of a range of indices with different asset classes, mainly UK equities and government bonds. It's a fair measure for someone who was prepared to take some risk to get a higher return.
- Although it is called income index, the mix and diversification provided within the index is close enough to allow me to use it as a reasonable measure of comparison given Ms P's circumstances and risk attitude.

My provisional decision

I uphold the complaint. My provisional decision is that Aviva Life & Pensions UK Limited should pay the amount calculated as set out above.