

## **The complaint**

Mr G complains that Aviva Life & Pensions UK Limited mis-sold him an annuity.

## **What happened**

Mr G contacted Aviva to ask for his annuity with it to be surrendered in February 2023. He was told on the phone that his annuity couldn't be changed or altered – it had been setup to provide a lifetime income in 2004.

Mr G then said he felt his annuity had been mis-sold. He's told us that he's suffered from COPD for 43 years and therefore an annuity was totally unsuitable for his needs. He's said he receives a very small sum yearly which does not cover his costs. He expected a lump sum on retirement which would be a far greater financial help. Mr G said to resolve his complaint he would like a cash value for the remaining value of his annuity.

Aviva didn't uphold the complaint, it said when the annuity was sold, it did not give advice. And Mr G would've either received advice and/or was given all the information required to make an informed decision and he chose to take out an annuity. It said it no longer had the original documentation from the annuity sale.

Aviva told us that it believed the complaint had been made out of time because the sale of the annuity was in 2004 – and this is what Mr G was complaining about so the event was more than six years ago. And Mr G ought to have known his cause for complaint more than three years before he did complain.

Our investigator looked into matters he agreed that the complaint had been raised too late. He said within the information Aviva provided us with he could see that Mr G had asked in 2009 to cash in his remaining pension and he'd been told that Aviva wouldn't allow this. He said this meant the complaint about the annuity sale could've been raised at this point and Mr G was now out of time. However, he felt that as the rules with regards to cashing in annuities had changed and Aviva had given a new answer on this over the phone – this part of the complaint was within time.

Mr G didn't agree, he said in response, Aviva ought to have got him to fill in a health questionnaire which would've highlighted his COPD. He says because it did not, his annuity was mis-sold. Our investigator explained as he'd said this part of the complaint was made outside of the allowed time-limits – we couldn't consider this.

## **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.

We are bound by certain rules that are set by the financial industry regulator; the Financial Conduct Authority (FCA). These are known as the Dispute Resolution Rules (DISP Rules)

and are contained in the FCA's Handbook. In summary, the relevant part of the rules provides that the ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service 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 has a written acknowledgement or some other record of the complaint having been received;*

*unless:*

*(3) in the view of the Ombudsman, the failure to comply with the time limit...was as a result of exceptional circumstances...*

*(5) the respondent has consented to the Ombudsman considering the complaint where the time limits in DISP 2.8.2 R or DISP 2.8.7 R have expired.'*

In this case Aviva hasn't consented to us looking at the complaint, so I need to consider if the complaint has been made in time.

Mr G complained to the firm in February 2023 which is more than six years after the advice that was complained about – in 2004. So, I therefore need to consider whether this complaint was made within the relevant three-year period referred to above.

The three year test is framed quite widely. It isn't just triggered by actual knowledge but also by knowledge that ought reasonably to have alerted someone that there was cause for complaint.

Mr G contacted Aviva in 2023, to ask for his pension to be cashed in. When he was told this wasn't possible, he then said he felt the pension had been mis-sold as the annuity wasn't suitable for him. However, I note Mr G had also been told in 2019 that he couldn't have his annuity cashed in. So he had this initial awareness more than three years before he raised a complaint.

I've considered whether this and any other knowledge means Mr G was aware or ought to have been aware earlier that an annuity might not be suitable for him. Mr G's told us he has COPD and has had it for 43 years – and he thinks therefore annuities aren't suitable for him. He's also said the annuity doesn't cover his costs and he expected a lump sum at retirement.

Mr G would've reached the normal retirement age of the policy at 65 in 2019. This may be what prompted his call to Aviva in 2019 to ask for a cash value. Mr G would've known then the value of his annuity and that he wouldn't receive a lump sum at retirement. I think therefore he was aware of his cause for complaint at the latest in 2019.

I appreciate Mr G has said he's since become aware that he ought to have filled in a health questionnaire and this is what he believes Aviva did wrong. He hasn't said when he became aware of this, however what he refers to is likely only relevant to advised sales and Aviva didn't provide an advice service on this product. And in any event, I think even without this knowledge, Mr G's cause for complaint – the value (or perceived lack of) he was getting from the annuity – was already apparent in 2019 if not earlier. Therefore, Mr G's complaint has been made too late. It has been raised more than six years after the event and three years after he was, or ought to have been, aware of his cause for complaint.

No exceptional circumstances have been presented by Mr G as to why he wasn't able to raise this complaint earlier. So, as set out in our rules, this isn't a complaint we can consider.

It may be helpful to Mr G's understanding to explain that in 2004 when he took his annuity at age 50, he wouldn't have had options such as taking the fund as cash, as is allowed now. Really an annuity was his only option at the time as the rules didn't allow for pensions to be taken as cash lump sums (only 25% as tax free cash). Some smaller pensions were able to be cashed in but not at age 50.

What originally triggered the complaint in 2023 and was also Mr G's solution for putting things right was his wish to have his pension cashed in. Technically as above, Mr G would've been aware more than three years ago that Aviva wouldn't offer this to him. As he was told in 2019 it couldn't do this. However, since that point there have been changes in legislation – some firms have now offered a cash value for annuities. And for the firms that don't, the reasons have changed. As firms are now permitted, if they wish to do so, to allow a pension to be cashed in. And so, I think it's fair to treat Aviva's answer now, as a different event to the answer given in 2019.

The Finance Act which allowed providers/schemes to over-ride the rules of the scheme and make payments that otherwise previously wouldn't have been allowed (which now includes cashing-in of annuities) – was a permissive over-ride. What this means is the schemes are allowed to make these payments if they wish to do so – it isn't mandatory legislation.

So in essence what the legislation says is a person in Mr G's position doesn't have a right to commute their pension pot to a cash lump sum. However, if a provider wants to offer this it can, but only up to a limit of £10,000.

Aviva has told us it's unwilling to offer Mr G a cash value at this point in time. Essentially because the annuity product wasn't designed to be cashed in. And so, this presents a number of difficulties that cannot be overcome without significant undertakings which add risk, inconvenience and cost to its business and could result in poor customer outcomes. It made a number of points about this, for example:

- The government concluded that cashing in annuities may not produce good customer outcomes. Therefore, there is no agreed framework of how and who to offer this to.
- It cannot make exceptions without offering this more widely as it wouldn't be treating customers fairly.
- To offer this to all its qualifying customers could result in poor customer outcomes.
- It would need to do a study of whether it is viable for its business and its customers.
- It would also need to decide a framework of who could be offered this fairly.
- Because of this it is not in position to change its stance regardless of values of individual annuities.

I think Aviva's position is a fair one. On balance, I don't think it was unfair or unreasonable for Aviva to decline Mr G's request. It acted in line with the contract and the rules and treated Mr G in line with other customers.

We have seen that some providers are looking into their stance on cashing-in annuities. If in the future Aviva changes its position on cashing in annuities or legislation changes, it's possible Mr G may benefit from such a change. But I cannot fairly say Aviva must change its

position at present, in the circumstances I've considered in this decision.

I appreciate Mr G will be disappointed with this but for the reasons explained I don't think Aviva has done anything wrong.

### **My final decision**

I do not uphold this complaint and make no award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 22 November 2023.

Simon Hollingshead  
**Ombudsman**