DRN-4206239

## The complaint

Mr C complains that a business which is now part of Aviva Life & Pensions UK Limited (Aviva) gave him unsuitable advice to take out a Free Standing Additional Voluntary Contribution (FSAVC) plan in February 1995. Mr C feels that he should've been advised to choose the in-house Additional Voluntary Contribution (AVC) option instead.

Mr C is represented in his complaint by a claims management company (CMC). But I'll only refer to him in my decision.

## What happened

I understand that Mr C was a member of his Occupational Pension Scheme (OPS) from 1 January 1975. His employee contribution to the scheme was 6% of his pensionable earnings. I understand that Mr C had gaps in his pensionable service from 1 September 2006 to 22 July 2007. And that he left the OPS on 31 August 2012.

Mr C also contributed to his OPS's in-house AVC scheme. The in-house AVC provider confirmed to this service that he had begun to contribute to that scheme with effect from April 1992. It also said that his AVCs were paid up as an annuity with effect from December 2009.

In February 1995, Mr C met with an Aviva tied adviser to discuss improving his pension benefits. Aviva completed a fact find, which Mr C signed on 6 March 1995. This noted the following about him:

- He was 42 and in good health.
- He was married with two dependent children.
- He was employed, earning £29,625 a year.
- He didn't expect to retire until age 60, which was also the normal retirement age in his OPS. Based on his service, he would have a shortfall on the maximum scheme benefits at age 60.
- Mr C confirmed to the adviser that he was aware that he could pay AVCs into his OPS. He was already paying into the in-house AVC scheme and had been since 1992.

Mr C wanted £14,812 annual income in retirement. His shortfall against this target was assessed as £1,502. The adviser recommended that Mr C started an FSAVC plan with a 17-year term and a gross monthly contribution of £140. The fact find recorded that Mr C had an existing in-house AVC into which he was paying a gross monthly contribution of £48. The adviser recommended a gross monthly contribution into the FSAVC plan of £92 to fill the shortfall. But noted that Mr C wanted to invest a gross monthly contribution of £40.

I understand that Mr C made his first contribution to the FSAVC on 26 June 1995.And the

last on 29 April 2003. And that Mr C took the benefits from his FSAVC on 13 August 2007.

Mr C said he hadn't become aware that he had cause for complaint until July 2022, when he'd seen an advert online from his CMC.

Mr C complained to Aviva through his CMC on 30 November 2022. He felt that the advice to take out the FSAVC in 1995, rather than going with the in-house AVC, was unsuitable. And that the FSAVC was unsuitable for him.

Aviva issued their final response to the complaint on 12 January 2023. It didn't think it'd done anything wrong. It considered that the advice had been suitable at the time. And that it'd provided Mr C with enough information for him to make an informed decision.

Aviva said its adviser had completed a fact find which had identified that although Mr C was a member of his OPS, based on his length of service, he would have a shortfall on maximum benefits at the OPS's normal retirement age of 60. It said the fact find also noted that Mr C was aware he could pay in-house AVCs. And that had been doing so since 1992.

Aviva said that the recommendations section of the fact find had stated the maximum Mr C was permitted to increase his contributions by. But that he was only prepared to pay gross monthly contributions of £40. It said that there was also a signed written statement in this section which said: "*I advised [Mr C] on 20.02.95 to investigate and compare costs and benefits of past added years and scheme AVC options. Having had the opportunity to do so, he now wishes to proceed with the [Aviva] contract*".

Aviva also said that its adviser had provided an illustration which confirmed the benefits from Mr C's existing plan and provided a breakdown of the shortfall. This stated: "*You have three options for increasing your main scheme pension. You can purchase added years, pay into the scheme AVC or pay into a free-standing AVC. You MUST consider all three options before making a choice*". It also said that it had sent Mr C a letter confirming its recommendation, and that this had confirmed that he'd been advised to investigate and compare the costs and benefits of the options offered by his OPS.

Aviva said that when Mr C had started his in-house AVC, details of the charges would've been provided. It also that it'd advised him to investigate the costs of increasing his in-house contract before making his decision on which route to take to increase his pension contributions. So it felt it was fair to assume Mr C would've been aware in the difference in costs.

Aviva also felt that as Mr C held other investments with it, he would've been aware of the potential greater returns from the FSAVC compared with the AVC, given the limited options with its provider. And that he would've been prepared to accept the difference in costs for the potential of greater returns over the longer term. It said that Mr C had received annual FSAVC statements. So he would've been able to compare these against those provided by the in-house AVC provider. And if he hadn't been satisfied with the returns on the FSAVC, it felt he would've complained, given he'd taken the benefits in 2007.

Unhappy, Mr C brought his complaint to this service through his CMC. It didn't consider that, as Mr C was already paying into the in-house AVC at the time of the advice, this meant he understood that this could be increased. It also didn't think that Mr C had been provided with details of the charges when he started the in-house AVC. If felt that Aviva had assumed in its final response letter that Mr C would've been aware of the difference in costs. But that it would've expected him to have been given a much clearer explanation of the difference in charges, given that the FSAVC charges were likely to be higher. And that if he had been, he wouldn't have chosen the more expensive FSAVC.

The CMC said Mr C hadn't received specific financial advice to start the in-house AVC scheme. And that any information the in-house AVC provider had given him about it would've simply stated the options available. It felt it was more than likely that such information wouldn't have explained why the benefits would've been better than an FSAVC.

Mr C's CMC also didn't consider that Aviva had advised him to investigate the costs of increasing his in-house AVC before deciding which route to take to increase his pension contributions. It felt that although Aviva considered Mr C had been directed to his OPS to investigate his options, he wouldn't have fully understood the information that needed to be gathered. It also felt there was no evidence that any such information had been sought or received.

Our investigator first thought about whether this service could consider the complaint. Aviva hadn't given its consent to do so. As the advice had been provided more than six years ago, our investigator considered when he felt Mr C had become reasonably aware that he had cause for complaint.

Our investigator considered the points Aviva had raised in its final response letter, but wasn't persuaded that Mr C had become aware that he had cause for complaint until July 2022, after he said he'd seen an advert online from his CMC. So he felt that the complaint had been brought in time and that we could investigate the merits of it.

Our investigator didn't think the merits of the complaint should be upheld. While he said he couldn't be certain why Mr C had chosen to contribute to the FSAVC, instead of increasing the payments to his existing in-house AVC, he felt Mr C was in an informed position when he made his decision. He was also satisfied that the adviser had provided sufficient information and followed the guidance at the time of the advice.

Mr C's CMC didn't agree with our investigator on the merits of the complaint. It said that when the FSAVC was sold in 1995, a tied adviser was required to follow rules set in the 1988 LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation) Code. It felt that as well as highlighting the benefits of the FSAVC, a tied adviser should mention the generic benefits of the in-house options, including that:

- Money purchase in-house AVCs could potentially offer lower charges than the FSAVCs

- Added years might've been available under the OPS. And the consumer's OPS employer might match or top-up the amount they paid into either in-house option.

The CMC acknowledged that the adviser had told Mr C to *"investigate and compare the costs and benefits of the past added years and scheme AVC options available from your current pensions scheme".* And noted that he'd*: "had an opportunity to do this" before* he'd decided to proceed with the FSAVC. But it said there was no other evidence that showed the generic benefits were discussed, or that it was likely that an in-house AVC would be cheaper. It said it would expect to see that the adviser made some note on file or within the recommendations letter that the charges under both the FSAVC and the in-house AVC had been discussed, not just that they'd mentioned the in-house AVC existed.

The CMC felt that if this had been discussed in greater detail, Mr C would've been likely to have taken more time to consider what option would've worked best for him. And that he would've decided to take the in-house AVC option as it was likely that it offered him substantially the same product at a cheaper cost.

I asked our investigator to obtain copies of the historical FSAVC and AVC statements Mr C

had been sent so I could see what charging information he had been provided with over the years.

The in-house AVC provider told Mr C on 20 September 2023 that it couldn't provide historical annual benefit statements. And Aviva told this service on 27 September 2023 that it no longer held copies of the annual statements it'd sent to Mr C. I'm not surprised this is the case given how long Mr C took the benefits from these arrangements. But I've been unable to confirm the information about the charges that Mr C would've been given over the years.

As agreement couldn't be reached, the complaint came to me for a review.

**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.

I first considered whether the complaint was bought to this service in time. As I've been unable to access copies of the historical FSAVC and AVC statements Mr C was sent over the years, I've not seen any evidence that Mr C ought reasonably to have been aware that he may have cause for complaint before July 2022, when he said he saw an advert for his CMC. Mr C brought his complaint in November 2022, so I agree with our investigator that he the complaint was brought in time and that we can investigate the merits of it.

However, having considered those merits, I'm not going to uphold the complaint. I consider that it's more likely than not that Mr C was given sufficient information at the time of the advice to make an informed decision about starting the FSAVC. I know my decision will disappoint Mr C. I'll explain my reasons for it.

I first considered what the adviser was required to do at the time of the advice.

*What did the adviser need to do?*

The in-house AVC was usually part of an OPS. The provider of the AVC was often a competing provider in the marketplace, so a tied adviser of the FSAVC provider wouldn't typically have investigated whether the in-house AVC option was better than the FSAVC – they weren't allowed to. They could only recommend the products provided by the company they were tied to.

I agree with Mr C's CMC that at the time of the advice the tied adviser was required to follow rules set in the 1988 LAUTRO (the Life Assurance and Unit Trust Regulatory Organisation) Code. This said that advisers should've maintained high standards of integrity and fair dealing, exercise due skill, care and diligence in providing any services, and generally take proper account of the interests of investors. It added that businesses should:

- Have regard to the consumer's financial position generally and to any rights they may have under an OPS, and

- Give the consumer all information relevant to their dealings with the representative in question.

We'd expect tied advisers to have known that in-house AVC options might be available to the consumer. And in addition to highlighting the benefits of the FSAVC, mention the generic benefits of the in-house options. These would include:

- Money purchase in-house AVCs could potentially offer lower charges than the FSAVC

- "Added years" might be available under an OPS.

- The consumer's employer might match or top-up the amount the consumer paid into either in-house option

The tied adviser wouldn't need to know anything specific about the Mr C's OPS to mention these things. But we'd expect them to recommend that Mr C explored those options themselves with the OPS, before considering whether to take out an FSAVC.

*Did the adviser meet the requirements?*

Mr C's CMC didn't consider that Mr C understood, at the time of the advice, that his in-house AVC contribution could be increased. It also felt that although the adviser had directed Mr C to his OPS to investigate his options, he wouldn't have fully understood the information he needed to get. It also felt there was no evidence that Mr C had in fact sought or received such information.

The advisor told Mr C he: "*MUST consider all three options*", including paying into the scheme AVC, "*before making a choice*". And the signed written statement noted that Mr C had been advised on 20 February 1995 to: "*investigate and compare costs and benefits of past added years and scheme AVC options*". Mr C then decided that he would start an FSAVC on 6 March 1995, two weeks after he'd been told he must consider all of his options. The Reasons Why letter that Aviva sent Mr C on 24 May 1995 also gave the following reason that the adviser had recommended the FSAVC plan:

"*When advising you to take out an FSAVC, I asked you on 20.02.95 to investigate and compare costs and benefits of the Past Added Years and Scheme AVC options available from your current pension scheme. Having had an opportunity to do this, you now wish to proceed with the [FSAVC] contract*".

I consider that the documentary evidence from around the time of the advice shows that Mr C was given a clear instruction, which I consider he would've followed, before deciding which option he wanted to take. And he was then given time to decide. I can also see that the adviser noted how much Mr C was paying into his in-house AVC at the time of the advice, and told him how much more he was entitled to contribute to his pension arrangements in total. I consider that it's reasonable to assume that given Mr C had been told he had three options, including the in-house AVC, and that he'd also been told how much more he could contribute in total to his pension arrangements, he would've understood that he could increase his contributions to his in-house AVCs.

Therefore I consider that it's reasonable to assume that Mr C did understand that he could increase the payments into his in-house AVC, but that he chose not to after looking into his options in more detail.

Mr C's CMC didn't feel that Mr C had been provided with details of the in-house AVC charges when he'd started it. Nor had he received specific financial advice at that time. Mr C's CMC said the only information he'd been given had been about the options available. So it felt that the Aviva adviser should've given Mr C a much clearer explanation of the difference in charges, given that the FSAVC charges were likely to be higher than the in-house AVC. It said if it had, Mr C wouldn't have chosen the more expensive FSAVC.

I've not been provided with any documentary evidence from the time Mr C started to

contribute to his in-house AVC. So I can't know what he was or wasn't told at that time. But I can see that there's no charging information included in the FSAVC documentation I've been provided with. So I understand why Mr C doesn't feel that Aviva gave him a clear enough explanation of the differences in charges at the time of the advice.

The sale of the FSAVC took place almost 30 years ago. So it's extremely difficult to know exactly what the adviser told Mr C about the difference in costs between the in-house AVC and the FSAVC.

However, based on what I've seen, I'm satisfied that the adviser took reasonable steps towards ensuring that Mr C had all of the information that he needed to be able to make an informed decision about his options. And then to make that choice about his additional pension provision. And although I can't be completely sure that the adviser did do enough to ensure that Mr C was aware that the FSAVC plan was likely to carry higher charges than the in-house AVC plan, on balance of probabilities, I think that he did.

I say this because Mr C didn't finalise his decision to start the FSAVC plan in February 1995 when he first met Aviva's adviser. Instead, he did that two weeks later. And he didn't start contributing to the FSAVC plan until the end of June 1995, after he'd received the Reasons Why letter.

I'm persuaded that it's more likely than not that Mr C followed his adviser's instructions to "*investigate and compare costs and benefits*" of the in-house options against those of the FSAVC. And that having done so, he decided to take out the FSAVC plan. I also consider that it would've been easier for Mr C to simply increase the contributions to his in-house AVC plan than to start a new FSAVC plan. This also persuades me that it's more likely than not that after looking into the costs and benefits of the AVC plan against the FSAVC plan, Mr C made an informed decision to start the FSAVC plan. I can't say why he decided to do so, but it's possible he felt that potentially better investment returns could outweigh the potentially higher costs.

I acknowledge that there's no documentary evidence that shows conclusively that the generic benefits of the in-house options were discussed, or that it was likely that an in-house AVC would be cheaper than the FSAVC.

But from what I've seen, the adviser told Mr C on 20 February 1995 to compare the costs and benefits of the in-house options with the FSAVC plan. Mr C was already contributing to the in-house AVC scheme, and had been for around three years at the time of the advice. So I'm of the view that he would've already been in a somewhat informed position about the in-house AVC scheme.

I'm persuaded that the fact that the adviser told Mr C to compare costs and benefits is a strong indication that he discussed the potential cost differences between the in-house and FSAVC plans with him. I'm also persuaded that there's clear evidence that Mr C's circumstances were discussed and a thorough fact find was completed, including a note being taken of how much Mr C was already contributing to his in-house AVC, and how much more he was entitled to contribute in total.

As such, I'm persuaded that the adviser met all of the LAUTRO code requirements. And therefore I can't fairly or reasonably uphold the complaint.

**My final decision**

For the reasons given above I don't uphold Mr C's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 30 October 2023.

Jo Occleshaw
**Ombudsman**