DRN-4227440

The complaint

Mrs D complains, through a representative, about the advice she received in 1996 from what is now Aviva Life & Pensions UK Limited (Aviva) to start a Free-Standing Additional Voluntary Contributions plan (FSAVC).

Although Mrs D is represented in this complaint, for ease of reading I will generally refer to all of complainant's representations as being made by Mrs D.

What happened

Mrs D was a member of a final salary occupational pension scheme (OPS). In September 1996 she and her husband met with Aviva to discuss making additional provision for their retirement. A "fact find" was completed which showed Mrs D's circumstances at the time were as follows:

- she was 24 years old, married with no dependents
- employed earning around £14,600 per year
- joined her employer's OPS in 1994; the scheme's normal retirement age was 60
- she wasn't expecting to retire until age 60, but hoped to retire at age 55

Mrs D's objective was to provide additional retirement income from age 55 onwards. At this time Mrs D was provided with a comparison leaflet titled "Additional Voluntary Contributions Information on the Options Available to You". Amongst other things, regarding additional voluntary contributions (AVC), it said:

> *The charges on 'In house' AVCs are usually lower than on an FSAVC Scheme. However, charges are difficult to quantify on conventional With-Profit and deposit type funds because investment managers generally retain discretion over the total returns.*

And under the information related to an FSAVC, it stated:

> *Charges are usually higher than on Scheme AVCs although some companies offer products with very low charges specifically for members of certain occupational schemes.*

Mrs D signed a declaration at the bottom of the leaflet confirming that she understood the content of the leaflet and that she had the opportunity to contact the administrator of her employer's OPS and that as a result of her investigations, she decided to proceed with the FSAVC.

Aviva recommended that Mrs D take out its FSAVC and invest 100% in its Managed Fund. Mrs D accepted the advice and began making monthly contributions of £25 (gross) in October 1996.

In 1998, following further advice from what is now Aviva, Mrs D increased her contributions to £64.94 (gross) per month.

In November 2022, Mrs D complained to Aviva that it had failed to provide her a suitable recommendation in 1996.

Aviva didn't uphold the complaint. It said, among other things, that the documents from the time of sale show that the adviser did explain the benefits of an in-house AVC and provided a comparison with an FSAVC arrangement. It also said that Mrs D was provided with written material summarising these. Overall, Aviva thought the regulatory requirements had been met and the advice was suitable.

Aviva also explained it thought Mrs D had brought her complaint too late.

Dissatisfied with this response, Mrs D brought her complaint to this service for an independent assessment. Our investigator first looked into whether this complaint was within our jurisdiction. He concluded that it was, explaining that even though the event being complained of occurred more than six years ago, he didn't think Mrs D ought reasonably to have been aware she had cause to complain more than three years before she did. So it had been made in time.

The investigator then went on to consider the merits of Mrs D's complaint. Having done so, he didn't consider that the FSAVC plan had been mis-sold so he didn't recommend that the complaint be upheld.

Mrs D didn't agree and said that there was nothing in the recommendation about charges and very little about any discussions, so she was unable to agree that the applicable guidance had been followed.

As agreement couldn't be reached, the complaint has been passed to me for a final decision.

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.

In deciding this complaint I've taken into account the law, any relevant regulatory rules and good industry practice at the time. I have also carefully considered the submissions that have been made by Mrs D and by Aviva. Where the evidence is unclear, or there are conflicts, I have made my decision based on the balance of probabilities. In other words I have looked at what evidence we do have, and the surrounding circumstances, to help me decide what I think is more likely to, or should, have happened.

I think it is also useful to reflect on the role of the Financial Ombudsman as an initial matter. This Service isn't intended to regulate or punish businesses for their conduct – that is the role of the regulator, the Financial Conduct Authority (FCA). Instead this Service looks to resolve individual complaints between a consumer and a business. Should we decide that something has gone wrong, we would ask the business to put things right by placing the consumer, as far as is possible, in the position they would have been if the problem hadn't occurred.

I will now address Aviva's objection about the timeliness of Mrs D's complaint.

Was the complaint made in time?

The rules I must follow in determining whether we can consider this complaint are set out in the Dispute Resolution ('DISP') rules, which form part of the FCA's Handbook. In particular DISP 2.8.2R says:

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 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 limits in DISP 2.8.2 R or DISP 2.8.7 R was as a result of exceptional circumstances.

We can only look at cases that fall outside of this time period if the business consents to us doing so or if the delay was due to exceptional circumstances.

Where the business doesn't consent, as is the case here, I must consider whether the complaint has been made in time.

Mrs D's complaint concerns advice provided to her in 1996. As the complaint wasn't raised until 2022, more than six years later, we wouldn't be able to consider this complaint in accordance with DISP rule 2.8.2 (2)(a).

So, I've gone on to consider whether the three-year rule applies. Applying DISP rule 2.8.2 (2)(b), would mean we can look at this complaint if it was made within three years from when Mrs D was aware (or ought reasonably to have been aware) that she had cause for complaint. Mrs D has said that she wasn't aware of a cause to complain until she saw a social media advert in October 2022. Aviva assert that Mrs D ought reasonably to have been aware she had cause for complaint following the subsequent advice she received in 1998 to increase her contribution to the FSAVC.

I've thought about this, but I don't agree that this ought reasonably to have made Mrs D aware she had cause for complaint. I've reviewed the information provided to her at this time and I'm not persuaded it was sufficient to make her aware the initial advice might not have been right for her. And considering that the original advice was given only two years prior and the advice in 1998 was essentially the same, I don't think Mrs D would have had any reason to question it.

So I conclude that it's more likely than not Mrs D became aware that she had cause for complaint in October 2022. She then complained within three years. As there's insufficient evidence that persuades me that she ought reasonably to have known sooner, I'm satisfied the complaint has been brought in time and is therefore something this Service can consider.

Was the advice suitable?

I have carefully reviewed all of the information provided by both parties in order to determine what is fair and reasonable in the circumstances of this complaint. And having done so, I've come to the same conclusion as the investigator and for the same reasons.

In order to decide this complaint, I need to consider whether Aviva complied with the applicable regulatory guidance in place at the time of the advice. And, if there were any failings, whether the failing made a difference. In particular, would Mrs D have still taken out the FSAVC?

The advice was provided in October 1996. So the relevant regulatory guidance was contained in the May 1996 Regulatory Update 20 (RU20), which was produced by the Personal Investment Authority (PIA), one of the predecessors to the current regulator – the FCA. RU20 gave guidance on the procedures for advising clients on the relative merits of FSAVC and in-house AVC plans.

The guidance set out different requirements depending on whether the adviser was an independent financial adviser or a 'tied' adviser – one who is employed by, or contracted to, one organisation and can only recommend and sell that organisation's products. In this case the adviser was tied.

For tied advisers, RU20 specified that:

> *A representative should not recommend his own company's FSAVC until he has:*
>
> - *drawn the client's attention to the in-scheme alternative;*
> - *discussed the differences between the two routes in generic terms (taking account, among other things, of the features described in this article); and*
> - *directed the client to his employer, or to the scheme trustees, for more information on the in-scheme option.*
>
> *When these procedures are followed and documented, it is not necessary for the representative to undertake a full comparison of the in-scheme AVC and his company's FSAVC.*

Among the features referred to in the article were that charges under in-house AVC plans would usually be lower. The regulator also expected the client's advice file to include documentary evidence demonstrating that the requirements of RU20 had been met.

So the adviser needed to make Mrs D aware of the in-house AVC plan and discuss the generic features of the in-house option and the FSAVC. The key difference I would've expected Aviva to discuss with Mrs D would be the likelihood of lower charges for the in-house AVC arrangement. And I would expect Mrs D to have been directed to her employer and/or OPS administrators to obtain more information on her in-house options.

I have reviewed the documents that were given to Mrs D at the time she met with her adviser. I have made particular note of the leaflet, "Additional Voluntary Contributions Information on the Options Available to You".

I am satisfied that this gave an understandable explanation of the choices available to Mrs D and made her aware that she ought to contact her employer's scheme administrators for details of the benefits that might be available to her under the in-house AVC option.

The leaflet also considered the advantages of in-house AVCs in comparison to the alternative of an FSAVC, including that AVCs may be less expensive.

Mrs D signed a declaration in September 1996 confirming the leaflet had been received and that she'd had an opportunity to contact her employer's scheme administrators. And the suitability letter provided to Mrs D in October 1996 explained:

> *You are proceeding with this* [FSAVC] *plan after receiving an explanation of the comparative benefits of in-house AVC and FSAVC Plans, and you have received written material summarising these.*

Given this, I am not persuaded that no reference was made, or discussions held on those options. On the balance of probability, I am persuaded by the evidence I have seen that the adviser complied with the relevant regulatory obligations and made appropriate references to Mrs D's options.

I understand that Mrs D will be disappointed with my conclusions. However, I am unable to conclude in the circumstances of this complaint that the FSAVC was mis-sold, so I will not be upholding this complaint.

My final decision

For the reasons provided, I do not uphold Mrs D's complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 23 November 2023.

Jennifer Wood
Ombudsman