

The complaint

Mr C says Aviva Life & Pensions UK Limited (Aviva) allowed him to access his personal pension, when it was likely he didn't have the mental capacity to make such an important decision. He says this has caused him financial detriment.

What happened

Mr C says in mid-2018 he became unwell and approached Aviva to explore the potential to access his personal pension plan. His policy provided for early access to benefits in the event he was unable to work due to ill-health or incapacity. His plan was worth around £30,000. He was 33 years old at the time.

Mr C had a series of discussions with Aviva's call handlers from June 2018 onwards. During these he was informed about the implications of taking his pension benefits early, in particular the impact on his Money Purchase Annual Allowance (MPAA).

The MPAA was created to stop people from trying to avoid tax on current earnings or gain tax relief twice, by withdrawing pension savings and then paying them straight back into their retirement pots again.

At the time of the events Mr C complained about, up to £40,000 in annual contributions could be made to a person's pension and be eligible for tax relief. But once someone had accessed pension benefits to provide an income, then the MPAA was limited to £4,000.

Mr C decided to progress with taking benefits from his Aviva personal pension. Initially he decided to take tax-free cash (TFC) only, this meant he wouldn't trigger the MPAA restriction. However, as he was taking benefits before his 55th birthday he still needed to obtain certification about his ill-health from a medical professional.

On 2 July 2018 Mr C's GP signed a declaration of ill-health as required under the Finance Act 2004. It confirmed he was and would continue to be incapable of carrying out his occupation because of physical or mental impairment. And that Mr C had actually already ceased to carry on his occupation. Aviva accepted the declaration.

Mr C accessed his TFC. And later in July 2018 he decided to take further funds from his pension, this time triggering the MPAA restriction. He subsequently drew further funds and by November 2018 only a negligible sum remained in his policy.

In February 2023, Mr C complained to Aviva about what had happened in 2018. The basis of his case was that the nature of his illness at that time meant it was likely he didn't have the mental capacity to make important or legal decisions. He said Aviva had failed to enquire to a significant-enough depth what the nature of his illness was. Nor, he says, was this recorded on the form which was submitted to his GP.

Mr C says that he has now recovered from the episode of illness he had in 2018 and that with ongoing treatment and management he's been able to return to work. But he says he's

now faced with a situation where potentially for the rest of his working life, he'll be financially disadvantaged by the application of the MPAA.

In responding to Mr C's complaint in March 2023 Aviva said:

"You made us aware at the time that you suffered with bipolar disorder; a chronic, recurrent, and potentially debilitating illness characterised by fluctuations in mood and energy. This impacted your ability to continue your occupation at the time. While I appreciate this condition has the potential to impair cognitive behaviour, the Mental Capacity Act stipulates we must assume everyone has mental capacity until proven otherwise, even if they suffer from a mental illness."

"An important principle in the evaluation of mental capacity is the freedom of every person to make bad decisions. The fact that a person might make an irrational decision is not proof enough of incapacity. These facts may raise doubts but must not be decisive in the process. To determine that a person does not have the capacity to make their own decisions, a mental disorder of enough severity must appear. Given the many conversations we had with you throughout 2018, as well as the transfer of funds you arranged to move into the pension you held with us, and that your GP was happy to provide us with your ill-health declaration, we had no legal recourse to request proof of capacity."

An Investigator considered Mr C's complaint but didn't uphold it. He thought Aviva acted reasonably in relying on the certification from his GP that he needed to access his pension benefits early.

As both parties couldn't agree with the Investigator's view, Mr C's complaint has been passed to me to review afresh and to provide a 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.

Where there's conflicting information about the events complained about and gaps in what we know, my role is to weigh the evidence we do have and to decide, on the balance of probabilities, what's most likely to have happened.

I've not provided a detailed response to all the points raised in this case. That's deliberate; ours is an informal service for resolving disputes between financial businesses and their customers. While I've taken into account all submissions, I've concentrated my findings on what I think is relevant and at the heart of this complaint.

I'm not upholding Mr C's complaint. I'll explain why.

The first thing I've considered is the extensive regulation around transactions like those performed by Aviva for Mr C. The FCA Handbook contains eleven Principles for businesses, which it says are fundamental obligations firms must adhere to (PRIN 1.1.2 G in the FCA Handbook). These include:

- Principle 2, which requires a firm to conduct its business with due skill, care and diligence.
- Principle 6, which requires a firm to pay due regard to the interests of its customers.
- Principle 7, which requires a firm to pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading.

So, the Principles are relevant and form part of the regulatory framework that existed at the relevant time. They must always be complied with by regulated firms. As such, I need to have regard to them in deciding Mr C's complaint.

Mr C's complaint makes specific reference to his mental capacity in 2018 and the impact this is likely to have had on his decision making. While it's not the role of this Service to say whether a firm has acted unlawfully or not – which is a matter for the Courts – one of the matters we take into account is the relevant law. So, I've also thought about the provisions of the Mental Capacity Act 2005 and the Equality Act 2010.

The Mental Capacity Act enshrines certain principles, including:

- A presumption of capacity. All adults are assumed to have capacity to make decisions for themselves unless it is shown that they are unable to make them. But the presumption of capacity shouldn't be used against someone – it's not a license not to think about it when there's a reason to consider someone's capacity
- Unwise decisions do not necessarily mean a lack of capacity. People have the right to make decisions that others might regard as unwise or strange. A person can't be said to be lacking capacity just because others don't agree with their decision.

I've listened to the calls between Mr C and Aviva between June and August 2018. It's clear that he was made aware of the implications of taking benefits early from his personal pension. Specifically there were conversations around matters such as the effect on his MPAA.

Initially Mr C had decided to take only TFC from his pension. This meant the MPAA provisions wouldn't have been triggered. But a few weeks later he'd decided to access taxable income. In the call Aviva tested whether he understood the implications of doing so.

It's clear from the call recording Mr C had given a lot of thought to his options, and on balance decided to proceed to take income from his pension plan. I think the following matters he relayed are important to my consideration:

- He mentioned he was talking to a financial adviser.
- His critical illness had meant he'd stopped working and he had to find a way to plug the gap in his income. He needed to deal with an acute, immediate situation. He had to be pragmatic.
- He was servicing significant debt which he wanted to pay down. He'd been in conversations with some creditors who, given his situation, were amenable to accepting payments to settle that were lower than the outstanding sums.
- He recognised the risk he was exposing himself to – the triggering of the MPAA was a concern. But reducing his outgoings was important. As was his immediate priority of focusing on getting better.
- He mentioned that he'd worked overseas previously, and that might be an option in the future, taking him outside of UK pension regulations. And he noted the potential for significant legislative change on pensions over the coming decades, which might be helpful. As an aside, since 2018 the MPAA for people in Mr C's situation has increased from £4,000 to £10,000.

In responding to the Investigator's conclusions about the calls he had with Aviva and the forms he signed to access his pension, Mr C said:

“Bipolar disorder and episodes [mean] that individuals may face periods where they lack capacity, but they retain the capability to engage. Again, the whole process would have been highlighted as inappropriate if my GP had been more fully informed through the document which Aviva produced.”

“The fact that I have signed a declaration is not an indication that my medical condition does not impact my ability to make financial decisions. Bipolar disorder is an extremely challenging condition to manage (particularly when it relates to complex decision-making). Again, had my GP had been better informed through a more comprehensive document, I would strongly doubt they would have signed the document having a clear understanding of my condition and the nature of it.”

I've listened to the series of calls Mr C had with Aviva in 2018, I've reviewed the information he was sent and the declarations he signed. I think it's more likely than not he was able to make his own decision because he could carry out the processes involved in doing so. In other words, there is evidence he could do all of the following:

- Understand information relevant to the decision to be made (i.e. the nature of the decision, the reason why the decision is needed, and the likely effects of deciding one way or another, or making no decision at all).
- Retain that information in his mind long enough to be able to make the decision.
- Weigh up the information and use it to arrive at a decision.
- Communicate his decision.

Mr C raises the question of the adequacy of the declaration his GP signed. He says the form didn't mention on it anywhere that it was to access his pension. I understand the point he makes, and perhaps the form could've made this clearer.

But Mr C's GP was a professional and I would have expected them to have conducted proper due diligence. They would've noted Aviva's branding on the form. And that the declaration was in relation to provisions for ill-health under the Finance Act 2004, and therefore about early access to pension benefits. It's also likely his local Practice would've dealt with similar requests before.

The Investigator concluded:

“[Your] GP would need to sign the declaration and truthfully answer if you were no longer able to work - whether it was to access your pension or not. So I can't see how that [information about accessing the pension] would make a difference. The GP wasn't signing a fit note (sick note) to say why you weren't able to work for a short period of time, so the GP would know the difference.”

“Furthermore the paperwork was sent to you, to take to your GP - the onus would be on the policyholder to tell the GP why they need the document signed.”

On balance, I'm not persuaded by Mr C's argument that had the declaration he asked his GP to sign been more explicit about him accessing his pension benefits, then his GP wouldn't have signed. Even if I were to accept that his GP hadn't undertaken proper due diligence before signing the declaration – which I don't – I can't see that better information would've led them to have refused his request.

Mr C's GP was being asked to confirm that he wasn't in work and would continue to be incapable of carrying on his occupation because of his ill-health. There doesn't seem to be any debate on this point.

My final decision

For the reasons I've set out, I'm not upholding 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 12 September 2023.

Kevin Williamson

Ombudsman