DRN-4494948

The complaint

Mr M complains that Aviva Life & Pensions UK Limited gave him incorrect information that caused him to exceed his pensions lifetime allowance (LTA) and potentially incur an avoidable tax charge.

What happened

Mr M had a section 32 pension plan (S32) with Aviva. Mr M was aware that plan had a guaranteed minimum pension (GMP) around £7,245 a year. He would not be able to take retirement benefits from that S32 plan unless the fund value was large enough to be able to provide the GMP. If the fund didn't reach that level, then Aviva would have to provide Mr M's GMP at the plan's normal retirement age in 2018.

Mr M applied for Fixed Protection in April 2012. So had a protected LTA limit of £1.8 million.

In addition to the S32 plan, that is the subject of this complaint, Mr M had two other pensions. One was a defined benefit pension that he was a deferred member of. That had a normal retirement date in 2013. The other was a self-invested personal pension (SIPP) from which benefits could be taken at any point past the normal minimum pension age (NMPA).

In July 2009 Mr M contacted Aviva to explain that the total value of his pension assets would get close to his LTA by age 65. And asked how his S32 plan would be valued against the LTA when it matured at age 65.

Aviva responded by saying,

> "*the LTA takes into account all the pension funds you have at retirement. The fund value of this plan at maturity will be expressed as a percentage of the LTA. Please note: You must take into account the total retirement benefits you have to check if the total exceeds LTA at maturity.*"

And Aviva provided the projected values for the S32 plan's fund value based on illustrative rates of investment returns. The lowest illustrative rate gave a value of £55,300 at the normal retirement age and the highest rate gave an illustrative fund value of £64,900.

In 2013 Mr M obtained valuations from Aviva and from his two other schemes that, he explains, indicated he was within his protected LTA limit. The highest illustrative projected value for the S32 plan that Aviva provided in February 2013 was £83,600. Mr M explains that he was able to monitor the amount of his total pension funds and choose when to crystallise his defined benefit pension and his SIPP to stay within his LTA.

Mr M deferred taking benefits from his SIPP until April 2014 when he moved the pension into drawdown. And in September 2014 he took his benefits from his defined benefit pension. These benefit crystallisation events (BCEs) used up 94.76% of his £1.8 million LTA. This left 5.24% of his LTA (a monetary value of £94,320).

In 2018, ahead of Mr M reaching the normal retirement age for his S32 plan Aviva sent Mr M his retirement options. The fund value was £80,017. And Aviva quoted the fund as using 15.94% of the LTA for the 2018/2019 tax year. The standard LTA for that tax year was £1.03 million.

Mr M queried this and Aviva explained that the amount that would count towards his LTA was based on the cost of providing the GMP. Which it said was £164,181, hence the calculation that it would use 15.94% of a normal LTA.

Mr M complained that the information Aviva had previously provided him was wrong. And he'd used that information to defer crystallising his other two pensions in a way that would keep him within his LTA. Mr M thought that Aviva's mistake meant that he would incur a LTA tax charge around £13,000 that he could easily have avoided if he'd been properly informed.

Aviva didn't uphold Mr M's complaint. It didn't agree that it was reasonable for Mr M to have relied on a letter from 9 years prior to determine the tax impact of the pension policy. It didn't think the content of the letter was wrong. Although it agreed the content could have been clearer. It explained that a policyholder with a high amount of pension savings putting them at risk of exceeding the LTA ought reasonably to have obtained advice.

Mr M didn't agree and referred his complaint to our service. Our investigator looked into what happened and thought that the information Aviva provided Mr M had misled him. And agreed that it was likely he had made decisions based on that information that had led to him being likely to incur a penalty for exceeding his LTA when the benefits in his S32 plan were crystallised. He suggested that Aviva should cover the tax charge that Mr M could reasonably have avoided and should pay Mr M £200 for the distress and inconvenience its mistake had caused him.

Aviva accepted the view in principle and agreed to cover any tax charge that Mr M incurred, subject to evidence being provided of the charge that was incurred. And agreed to pay £200 for the distress and inconvenience.

Mr M explains that he was unable to take his annuity when he wanted to in 2018. The application form Aviva sent him had a declaration that required him to sign to confirm that he had enough unused lifetime allowance to cover the payment of the benefit from the plan. Mr M explains that he didn't think he could sign this declaration once he understood that crystallising this plan would put him over his LTA. He says that he was unable to claim his benefits which meant that he didn't incur the tax penalty. So Aviva didn't ever compensate Mr M for its mistake.

In April 2023 the government changed the rules regarding LTA. It removed any penalty for exceeding the limit. As Mr M is still to crystallise the benefits in his S32 plan, when he does he will no longer face any penalty charge.

As this case remained unresolved by our investigator's view the matter was referred to me for an ombudsman's decision. Circumstances have changed from the time when our investigator gave his assessment of this case. So I issued a provisional decision to explain to both parties what I thought a fair and reasonable outcome would be in this complaint.

In my provisional decision I said

"I think that the request that Mr M made of Aviva in 2009 was very clear. He wanted to know how his S32 plan would be valued for his LTA. At that point he wasn't merely asking what his fund value may get to by the normal retirement age. And the response from Aviva, that I've included in the previous section, told Mr M that the fund value of his plan would be valued

against the LTA. That information in 2009 was incorrect. And it was that mistake that led to Mr M's ongoing misunderstanding about the impact that the S32 plan might end up having on his LTA.

His subsequent requests for fund values were clearly made in the context of wanting to monitor where he was at regarding his total LTA liability. The later responses to those requests weren't factually incorrect as they provided the fund value and also illustrative values at retirement. Which was what Mr M requested. But I think he requested that because Aviva had already told him that is how his LTA would be reckoned for this plan. And I've seen no subsequent information that corrected the misunderstanding that Aviva's mistake created. Not until Mr M approached his normal retirement age. By which time it was too late as Mr M had already made his decisions about when to crystallise his other pensions.

I've considered the impact of this mistake on Mr M. I'm persuaded by his testimony regarding the benefit crystallisation choices he'd have made. He demonstrates an understanding of his overall LTA. He'd secured Fixed Protection in 2012 and from 2009 was already conscious of the fact he could end up being close to his LTA by the normal retirement age for his Aviva plan. He showed an understanding of the fact that he would, most likely, have no flexibility in the way he took the benefits for his S32 plan because the fund wasn't likely to be large enough to purchase the GMP. But he understood that he had flexibility on timing the BCEs for his other pensions. And that deferring those BCEs would increase the amount of his LTA that those events used. So I'm persuaded that he would, more likely than not, have crystallised the benefits in his other pensions earlier and avoided exceeding his LTA if Aviva had correctly answered his query in 2009.

By 2014 Mr M had crystallised his other pensions. And I've no doubt that he intended to crystallise the benefits in his S32 plan at its normal retirement date in 2018. Mr M has shown us part of the declaration from the claim pack that Aviva sent him in May 2018. And I can see that it requested that he sign the declaration to carry out his instruction. And that declaration included the statement, "I have enough unused lifetime allowance to cover the payment of benefits from this plan". So I accept that Mr M was unable to proceed with the application to start the annuity at the time he wanted to with the claim form that Aviva sent him."

I went on to explain my thoughts on putting things right. I said:

"*Circumstances have significantly changed since this complaint was first made to Aviva. That complaint was initially about a tax charge that Mr M estimated would be in the region of £13,000. And that he could have avoided but for Aviva's mistake.*

I've considered the position he'd most likely be in but for that mistake.

There will no longer be a tax charge to be paid for exceeding the LTA. So this is no longer something that Aviva need to compensate Mr M for.

I think he would have crystallised his other pensions at an earlier point. And whilst that would have reduced the likely ongoing benefits, it would also have meant that he'd have been receiving those benefits for longer. Overall I'm inclined to say that this will balance out so I don't intend to factor this in my proposed redress.

But I also think he'd have taken the benefits in his S32 plan at the normal retirement age in 2018. And was prevented from doing so because of the outstanding issue of the likely breach of the LTA.

I understand that Aviva don't think that it should back date Mr M's annuity to 2018. It explains that it sent Mr M annual pension statements and that Mr M hasn't applied to claim the available benefits. Whilst I understand the point that Aviva has made I don't agree that it's fair in these circumstances. Mr M's benefits for this S32 plan weren't actually dependant on the fund value because the value of that fund wasn't ever high enough to provide the GMP. Delaying was of no benefit to Mr M. So I don't think he made a calculated decision to delay taking these benefits.

Whilst I would expect Mr M to mitigate his losses, he was Aviva's customer and I would similarly expect to see that Aviva had contacted Mr M to resolve this issue once a principle for putting things right was agreed. And it didn't. The delay means that Aviva will not now be asked to compensate Mr M for the tax penalty its mistake caused. But I think it is fair and reasonable to put Mr M into the position he'd otherwise have been if he'd been provided his GMP at the normal retirement age."

I then set out a way for Aviva to calculate the loss to Mr M which took into account the past loss in missed annuity payments from 2018. But also offset that for the fact that Mr M's available annuity, if taken now, will be higher than that which was available to him in 2018.

Responses to my provisional decision

I thank both parties for their responses and cooperation in trying to bring this matter to a conclusion.

Mr M has accepted my rationale for upholding his complaint. But disagreed with the method I'd proposed for putting things right. We have engaged in correspondence over this and it is clear that his preference is to have his 2018 annuity put in place even though that would mean accepting a lower annuity now than his policy could provide at this point. He understands that he will not now face any penalty for exceeding his LTA when he takes this annuity. But he remains concerned about future changes in legislation and asks for Aviva to provide him with an indemnity against future changes in the LTA rules that might affect him.

Aviva have offered no arguments against my finding on merits and have been very helpful in trying to reach a method of redress that Mr M is agreeable to. I'm grateful to it for this. Aviva has explained that it is able to put in place Mr M's 2018 annuity and pay him the annuity payments from the scheme retirement age to the date of my decision. Including a payment of 8% simple interest on those lost income payments. Although it also pointed out that Mr M's current annuity would be higher than the 2018 one and offered him the choice of taking his annuity as it is now or having his 2018 annuity put into place.

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've received no comments or evidence to consider that have a bearing on the outcome that I reached in my provisional decision. So it follows, for the reasons that I gave in that provisional decision and set out above, my final decision is that I uphold Mr M's complaint.

In summary, I think that Aviva's incorrect information in 2009 directly caused Mr M to make irreversible decisions about the timing of the BCEs of his other pensions. Those choices were calculated to leave him with sufficient LTA to cover, what he'd been led to believe, would be the LTA impact of his pension with Aviva. And in 2018, when the benefits in his Aviva pension were due, it became apparent that this BCE would exceed his remaining LTA and therefore mean a penalty tax charge. But for this mistake I think that Mr M would, more

likely than not, have simply put in place his Aviva pension in 2018 using the GMP at that time. So it is incumbent on Aviva to put Mr M, as far as is now possible, into the position he'd most likely have been but for this failing.

Putting things right

I think that the offer of putting in place the original annuity, plus compensating for the loss of use of the past annuity payments is a fair way to put things right. I have explained my thoughts on this to Mr M, who has clearly stated his preference of the back dated annuity. So I have let both parties know that my final decision will direct compensation along these lines rather than the approach I set out in my provisional decision.

- Aviva should put in place the annuity that Mr M should be receiving if his annuity had been started using the GMP available on the policy Normal Retirement Age in 2018. That should be done as soon as is practicable after Aviva is informed that Mr M accepts my final decision.

  In accepting this decision Mr M is giving up the annuity that his policy currently offers. He has been shown it is of a higher value currently. But is a pension that he would not have received had he been able to crystallise when he wished to.

- Aviva should pay Mr M compensation equivalent to the total of all the net payments he would have received from his GMP plus 8% simple interest that should be added to each net payment from the date it was due until the date that his annuity is put into place, to reflect Mr M's loss of use of this pension income. This must include the lost net annuity payments from the date of the policy Normal Retirement Age in 2018 to the date that Aviva puts his annuity into place.
- Aviva should also pay Mr M £250 compensation for the distress and inconvenience that he has experienced by Aviva's mistake. This is because he was caused distress at learning that he would incur a LTA tax charge that he'd gone to considerable lengths to avoid and he experienced inconvenience in being unable to claim his benefits because of the declaration that he was unable to honestly sign.

If payment of compensation (in bullet points two and three above) is not made within 28 days of Aviva receiving Mr M's acceptance of my final decision, further interest must be added to the total compensation at the rate of 8% per year simple from the date of my final decision to the date of payment.

Income tax may be payable on this interest if paid. If Aviva deducts income tax from the interest, it should tell Mr M how much has been taken off. Aviva should give Mr M a tax deduction certificate in respect of interest if Mr M asks for one, so he can reclaim the tax on interest from HMRC if appropriate.

Mr M has asked me to consider requiring Aviva to provide him with some form of agreement from Aviva that will indemnify him from a tax penalty arising from a LTA excess. However, the current legal position regarding LTA is clear and I have responded to Mr M explaining that. The Finance (No2) Act 2023 provides the legislative framework that means that from April 2023, although calculations against LTA are still required to be done by pension providers, no penalties are due for exceeding LTA following BCEs after April 2023. And further legislation is intended to remove the LTA from April 2024. Even though the annuity that will be put in place will be done on the terms available in 2018, it will be a BCE occurring now. So will fall within the current rules and face no LTA excess penalty. So, if Mr M accepts my decision and above redress, then it will be in place within these rules. And there will be no LTA penalty due. So I am not making any further direction on Aviva regarding this.

My final decision

For the above reasons I'm upholding Mr M's complaint and direct Aviva to put things right as set out in the preceding section.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr M to accept or reject my decision before 9 February 2024.

Gary Lane
Ombudsman