

The complaint

Mr J complains that Aviva Life & Pensions UK Limited gave him unsuitable advice to transfer his defined benefit (DB) pension to a personal pension.

A different firm gave the original advice, but Aviva has since become responsible for complaints arising from it. So, I'll refer to Aviva throughout this decision.

Mr J has appointed professional representatives to help him bring this complaint. However, for ease of reading, most comments and actions will be noted as Mr J's.

What happened

Mr J worked for a former employer, B, for almost five years during the 1980s and was a member of its DB pension scheme. Membership of the DB scheme entitled Mr J to a guaranteed pension income at age 60 as well as inflationary increases.

In early 1993, Mr J took pension advice from Aviva about transferring out of the DB scheme. According to the fact find completed at the time, he was looking to reinvest his frozen pension by moving it into a personal pension. He would have been around age 38 at the time of the advice. Aviva recorded various details about Mr J and his personal circumstances along with the benefits he'd have been entitled to from the DB scheme.

The adviser recommended that Mr J transfer his DB pension to one of its pensions. Mr J accepted the adviser's recommendation in March 1993 and transferred his DB pension.

Around November 1997, Mr J wrote to Aviva to request documents and a transfer value concerning his pension. He said his intention was to transfer the pension in the near future, but he'd misplaced the paperwork he'd received when first setting it up. He indicated he had some photocopied documents concerning the DB pension he transferred in. In November 1997, Aviva confirmed that the transfer value for Mr J's personal pension was £24,372.11.

In 1999 Aviva invited Mr J to take part in an industry wide review of pensions sales completed between 29 April 1988 and 30 June 1994 (generally known as the pension review). Mr J responded to the invitation and Aviva reviewed the sale of the policy.

It communicated the outcome of the review on 26 June 2001 and told Mr J that it didn't think he'd suffered a loss by transferring his DB pension. It attached some data and assumptions upon which it based its review, which included (but were not limited to) things such as Mr J's marital status (not married) and the benefits he was entitled to under the DB scheme, which would have been payable from age 60. Aviva said Mr J should write to it within one month if he had any comments to make about the outcome of the review. And, if having communicated his concerns to Aviva he wasn't satisfied with its response, he could ask for a review of the decision under its complaints procedure. Following that, if he remained dissatisfied, Aviva said Mr J could refer a complaint to the PIA Ombudsman Bureau (a predecessor to the Financial Ombudsman Service) within six months of the letter.

A 2007 statement from Aviva to Mr J said that the plan's value was £33,432.31 as at 11 January 2007. It suggested that a fund of this value could buy Mr J a total taxable yearly pension of around £1,946 a year (made up of protected rights and non-protected rights).

Mr J switched his personal pension to a different provider, A, around September 2007 so that he could access his pension and take some tax-free cash. According to a statement that Aviva appears to have prepared when completing the switch, the total value for his fund at that time was £58,248.32, (I note Mr J's representative mentions a slightly different figure) with a current fund value of £33,669.56. According to some "*frequently asked questions*" noted on the statement, the current fund value was the value of the units at the current bid price. Whereas the total transfer value took account of things such as final bonuses. I understand that Mr J took a tax-free cash lump sum once the policy was switched and has taken a small amount of pension income in each year since.

Mr J complained to Aviva in March 2023 as he didn't think the advice to transfer out of his DB scheme was suitable. He explained, amongst other things, that he had no real understanding of pensions or the implications of investment risk. He said he transferred his pension purely because he was advised to and wouldn't have done so had he been advised properly. Mr J felt it ought to have been clear to the adviser that it was against his best interests to transfer his DB pension.

Aviva initially responded in May 2023. It said that having reviewed its records, it wasn't upholding the complaint. It thought Mr J had made his complaint too late. It explained Mr J's right to refer his complaint to the Financial Ombudsman Service but said that we might not be able to consider the complaint if we agreed that Mr J hadn't complained in time. Whilst noting that was ultimately a matter for this Service to decide, Aviva said that if we agreed the complaint had been made too late, we wouldn't have its permission to consider the merits of it.

In a further response sent in June 2023, Aviva confirmed that the sale of Mr J's pension was included in the industry wide pension review. The outcome of that review was that Mr J hadn't suffered a loss, so it said it wasn't required to consider the matter again. As far as Aviva was concerned, it had satisfied the regulator's requirements at the time. It enclosed a copy of the review file, which included the questionnaire; scheme benefit details; loss assessment and outcome letter. It also said Mr J could raise any issues within six weeks and it would re-examine the case. Aviva pointed out that when it wrote to Mr J to communicate the outcome of the pension review, it told him he could refer his complaint to the Financial Ombudsman Service within six months if he wasn't happy. As Mr J hadn't made his complaint within that timeframe, it thought he'd likely made his complaint too late - unless this Service decided to waive the rules we'd usually apply when deciding whether a complaint had been made in time.

Mr J wasn't happy with Aviva's response, so he complained to this Service in July 2023. He said that Aviva's advice to transfer his DB pension "*was clearly and obviously unsuitable*" given the guaranteed benefits he'd given up.

One of our Investigators looked into the complaint and sent Mr J and Aviva his findings. He first addressed the question of whether Mr J had brought his complaint in time. He was satisfied that he had. However, as far as the merits of Mr J's complaint were concerned, the Investigator felt that by reviewing the sale of Mr J's policy as part of the pension review, Aviva had already considered that Mr J may have received unsuitable advice. So, the Investigator said that we wouldn't revisit that matter. And, as there was no suggestion Aviva

had based its assessment on incorrect information, the Investigator was satisfied the review had been conducted fairly.

Mr J didn't agree and made a number of comments in response. Those included:

- there was a conflict of interest because the agent who advised on the transfer worked for the same company that administered the pension he took out. He felt that was directly in conflict with the duty to provide suitable advice to a client, because the adviser would likely have received some commission. He suggested that this wasn't an issue considered within the pension review.
- Aviva hadn't explained, nor had we referred to, any particularly unusual circumstances which might explain why Mr J wasn't thought to have suffered a loss when he transferred his DB pension. He said he expected clear and compelling evidence to be available to back up such a conclusion.
- He questioned some of the other figures used, such as the plan's value at the '*effective date*' in 2001 compared to a reduced value six years later. He doesn't think £37,482.97 is the right value at the effective date of 1 May 2001, given that by about September 2007, some six years after the stated effective date, the plan's value was £33,669.56.
- In conclusion, Mr J didn't think there was enough evidence on which to safely conclude that the pension review was carried out properly. So, he thought the fair and reasonable thing to do would be for Aviva to complete another calculation.

As no agreement could be reached, the matter's been passed to me to decide.

Our authority to consider this complaint

Aviva initially told Mr J that it thought his complaint hadn't been made in time, but it explained that was ultimately a matter for this Service to decide. Our Investigator concluded that the complaint had been made in time. From the evidence I've reviewed, I'm also satisfied that the complaint has been made in time. However, as I've reached my decision for slightly different reasons to our Investigator, I've explained my reasoning below.

DISP 2.8 of the Dispute Resolution rules says:

The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service:

(1) more than six months after the date on which the respondent sent the complainant its final response, redress determination or summary resolution communication; or

(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 was as a result of exceptional circumstances; or...

(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.

DISP 2.8.5 states:

Pensions review and FSAVC review

The six-year and the three-year time limits do not apply where:

(2) the complaint concerns a contract or policy which is the subject of a review directly or indirectly under:

(a) the terms of the Statement of Policy on 'Pension transfers and Opt-outs' issued by the FSA on 25 October 1994; or

(b) the terms of the policy statement for the review of specific categories of FSAVC business issued by the FSA on 28 February 2000.

Aviva thought that as Mr J didn't complain within six months of the 2001 pension review outcome letter he hadn't satisfied DISP 2.8.1. I don't agree.

My interpretation of the pension review outcome letter that Aviva sent to Mr J was that it wasn't a 'final response letter' in the normal sense. That's because it didn't give referral rights to this Service as such letters typically would. And DISP 2.8.1 specifically requires a complaint to be made within six months of a *final response* having been sent. So, I don't agree that Mr J ought to have complained within six months of the June 2001 letter as I don't think that's what started the six month 'clock'.

According to DISP 2.8.1 Mr J had six months from when Aviva sent its final response letter on 12 May 2023. As he complained to this Service around 20 July 2023, I'm satisfied he's met the requirements of DISP 2.8.1.

DISP 2.8.2 states that a complaint must be made within six years of the event complained of or three years from when the complainant became aware, or ought reasonably to have become aware, of a cause for complaint. I think the effect of DISP 2.8.5 though is that the six year limit on the complaint is paused whilst the advice was subject to the pension review. And it would have restarted once the outcome of that review was communicated.

Technically, Mr J had until about March 1999 to make a complaint, which was six years following the 'event' (the advice to transfer his pension). However, he responded to the pension review invitation in February 1999, which paused the clock. He then had about another month after the pension review outcome was communicated to him (so until about July 2001) to make his complaint. There's no suggestion that Mr J complained about the advice by that point. So, he hasn't satisfied the six-year part of the rule.

Mr J says he only became aware of a potential issue as he was approaching state retirement age around June 2021. I've thought about this in order to decide whether Mr J has satisfied the three-year part of the rule.

It's not absolutely clear whether Mr J received the pension review outcome letter when it was originally sent. But even if he had, I don't think that alone would have given him cause for complaint. Whilst Mr J certainly appears to have been given some of the assumptions and data used in the review, it's not clear whether he had all of the information that would have been taken into account. In any event, Aviva told Mr J he hadn't suffered a loss and I think he would have been entitled to rely on the outcome that a business like Aviva communicated – especially as it seems Mr J had no pensions experience of his own.

I also thought about whether anything that happened in 2007 when Mr J switched his personal pension between providers ought reasonably to have given Mr J cause for complaint. And, on balance, I'm not persuaded they would have done. Mr J's representative says he hadn't retained documentation relating to the 1993 advice. I haven't seen a copy of the suitability report completed when Mr J sought advice about switching. But it seems unlikely it would have made a fair comparison between the benefits Mr J might have been entitled to from the DB scheme at his normal retirement age versus his personal pension in order to determine there might be a problem. That wasn't the purpose of the advice in 2007. It appears to have been mainly geared towards whether Mr J could release some tax-free cash.

Mr J suggested that he only became aware of a potential issue concerning the advice he received as he was approaching retirement around 2021. And in the course of him raising a complaint with Aviva, concerns about the pension review also became apparent.

In the absence of any other persuasive evidence, I'm satisfied by Mr J's testimony. He complained to this Service in July 2023, which is within three years of when he became aware of a cause for complaint. So, I'm satisfied he's made his complaint in time and it's one that I can consider. I've now gone on to address the merits of Mr J's complaint.

My decision on the merits of this complaint

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

The crux of Mr J's complaint is that he still believes the advice to transfer out of the DB scheme wasn't suitable and that he's lost out as a result. And he doesn't think there is enough evidence on which to safely conclude that the pension review was carried out properly – especially when his representative believes he's likely suffered a loss of about £50,000. I haven't seen detailed analysis to support this figure.

The purpose of the pension review was to address the fact that some consumers may have suffered a financial loss as a result of the advice they received. And whilst Mr J does appear to accept that a genuine '*no loss*' situation could arise for a variety of different reasons (and has sighted some examples to illustrate his point), he doesn't think any of those factors were present in his case. In addition to that he's suggested that some of the figures in the calculation, such as the pension value used in 2001, were probably incorrect. I've thought about Mr J's points carefully.

It's not for me to carry out a new loss calculation for Mr J. I say that for a couple of different reasons. First, the pension review was intended to be a one-off exercise that would bring about a resolution to the complaint for both the consumer and respondent business. It wasn't envisaged that the issue would be revisited many years after the event. Second, pension review calculations are complex and are carried out by professionals with expertise in these matters. We don't have the same level of expertise as the actuaries businesses use and it's not our role to 'check' a calculation thoroughly in the way that Mr J might hope or expect. Third, pension review calculations were subject to supervision and sampling at the time by the then regulator. And it seems likely therefore that errors or non-compliance would have been picked up at the time.

Mr J is aware that if we're to look into complaints such as this now, we'd need to be satisfied the pension review was carried out incorrectly. So, that's the context within which I've considered his complaint.

Mr J thinks one of the valuations used by Aviva as at the effective date of May 2001 (£37,482.97) was probably wrong. His basis for saying so seems to be that had that been the actual value of his pension at that time, it would have been worth about £53,000 in 2007 given stock market movements between 2002-2007. Whereas he says the pension was actually worth around £33,000 in 2007. Therefore, Mr J seems to be suggesting that Aviva inflated the 2001 figure when completing the pension review calculation.

I won't be commenting on stock market movements, or the value of Mr J's pension in 2007, as those are not matters directly relevant to the issues I need to consider here. What I need to decide is how likely it was that the value used for Mr J's pension in 2001 was incorrect, potentially making the pension review outcome incorrect. On balance, after careful consideration, I'm satisfied the figures used were more likely than not to have been correct. I'll explain why.

Aviva has shown me a record from 2001 which reflects the value of the part of the pension Mr J is concerned about. I can see it does show the value used was £37,482.97. Aviva also explained that the 2001 fund value included a final bonus amount in line with the regulator's guidelines for review loss assessments. However, it added that the annual statements sent to Mr J would only have shown the bid value of the units and wouldn't quote a final bonus. So, the figure of £37,482.97 wouldn't necessarily correlate with other figures that may have been quoted on any annual statements Mr J received at the time. That seems a reasonable explanation to me.

In addition, I don't think Mr J is making a fair or 'like for like' comparison when comparing a value of around £37,000 with a reduced value of about £33,000 in 2007. As I've already touched on, Aviva told me that the value in 2001 included a final bonus in line with the regulator's guidelines. But the value of around £33,000 that Mr J seems to be referring to is the value of the units in his fund *minus* a bonus. When he switched his plan to another provider in 2007, the *total* value (including bonuses) was over £58,000. That's much closer to the value that Mr J thinks his pension should have been worth in 2007 if Aviva used the correct figure in its 2001 calculation - in fact it's even higher. I think this adds further weight to the fact that Aviva more likely than not used the right figure in 2001.

Another point Mr J has made is that Aviva wrote 'P' for prospective loss on the review documents. He thought that was at odds with the overall outcome of 'no loss'. I asked Aviva about this too. It explained that there were two types of loss calculations. One was an *actual* loss calculation where the policyholder had already taken their pension benefits. In those cases Aviva could compare the value of the actual policy benefits versus what would have been paid by the previous scheme. If the policy was still in force, then it carried out a prospective loss assessment, hence writing 'P' on the form. I think Aviva's explanations here are also reasonable. Mr J hadn't taken his pension benefits at the time Aviva completed the loss calculation, so based on the descriptors mentioned, I'm satisfied it correctly categorised things according to Mr J's circumstances at the time.

Mr J thinks that a fund value of around £110,000 is mentioned in the review documents. And he's suggested therefore that's further reason to question the 'no loss' outcome that Aviva reached. I can see why Mr J might think that's a fund value. But that's not my interpretation of that particular figure. As I've said, it's not for me to replace my own calculations with those carried out by the actuaries Aviva would have used. But as far as I'm aware when completing loss calculations such as this, a business will revalue a pension to work out what it might cost to provide the same level of benefits at the pension scheme's normal retirement date. That appears to be what the £110,000 figure is referring to. But as Mr J was not at his normal retirement age when Aviva completed the calculation, it would have completed a

further calculation to work out the equivalent cost in 2001. Again, whilst I've carefully considered Mr J's assertions, I've seen no persuasive evidence of mistakes in Aviva's calculations.

Another of Mr J's points is that there was a conflict of interest on the adviser's part by recommending a plan administered by his own company. He says the pension review didn't address this. As far as I'm aware, it wasn't meant to address complaints such as this. It's also worth saying that typically, advice would have been given by an independent financial adviser or a restricted (sometimes called tied) adviser who worked for a specific company. I don't have all of the point of sale documents, but from what's been said, Mr J's adviser seemed to fall into the latter category. The key difference between the two different types of adviser is the range of investment products that each can recommend. Typically, tied advisers can only recommend a limited range of investments. Sales where the business is a provider (as appears to be the case here) is likely to involve a tied adviser. So, the adviser can only recommend products from this particular provider. In that context, the situation that Mr J has described isn't necessarily unusual. And I don't think it means that Aviva (or the firm that gave the advice at the time) did anything wrong. Mr J also says this wasn't considered as part of the pension review. But, as I've said, I'm not aware that it was meant to. Given that, again, there's no suggestion that Aviva did anything wrong.

In summary, whilst I appreciate Mr J's position, overall, I haven't seen any persuasive evidence to suggest that Aviva carried out the pension review incorrectly. I appreciate Mr J will likely be disappointed, but I won't be directing Aviva to do anything more.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr J to accept or reject my decision before 28 December 2023.

Amanda Scott
Ombudsman