DRN-3291375

## The complaint

Mr R says Doug Wade Insurance Consultant (DW) mis-sold him a Free Standing Additional Voluntary Contribution (FSAVC) pension plan.

Mr R is represented by Rightside Financial Services Ltd (RFS)

## What happened

DW provided Mr R with advice around 1994. At the time he was 33 years old. He was a dock worker having joined his then employer 10 months earlier. It's recorded he earned around £20,000 a year. He was a member of an occupational pension scheme (OPS), to which he contributed 5% of his pensionable earnings.

DW advised Mr R to take out a FSAVC plan with Scottish Widows. He decided to make net contributions of £40 a month. Since his contributions were made after tax he also qualified for tax relief to be added to his fund. His plan commenced on 14 July 1994. It included provision for his annual gross contributions to rise automatically by 5% a year. His plan was due to run until he was 63.

The adviser who had given Mr R the recommendation to buy an FSAVC plan left DW in 1995 and took up a role with firm B. Mr R's pension provider sent DW a letter saying it had been instructed by Mr R to cease acting on his behalf. Servicing agency for his plan passed to firm B from April that year. There were further changes. From June 1996 firm C was appointed as the servicing agent. And, firm D took on the role between January 1997 and May 2001.

All these changes appear to relate to the movements of the original adviser between firms, where several of his client accounts followed him between the businesses he worked for.

From May 2001 Mr R's FSAVC plan didn't have a firm attached as servicing agent. He stopped making contributions to his plan in 2006. And in 2014, using the services of firm E, he transferred his funds to a Self-invested Personal Pension (SIPP).

RFS complained to DW in September 2019 about what had happened to Mr R in 1994. It summarised his case in the following terms:

*"[Mr R] would have paid for past added years at the outset rather than in to an FSAVC plan as invaluable benefits were lost as a result of not effecting an in-house arrangement. There is no evidence provided by [DW] to show he was given time to investigate in house arrangements through his employer. It would have also been more beneficial for [Mr R] to put the extra contribution into his existing pension plan with [his employer]. [He should have been] made aware of this alternative option by the [DW] adviser at the point of sale, as it was his duty to point out under FIMBRA and LAUTRO rules."*

DW provided its final response to Mr R in December 2019. It said that as its adviser had moved to firm B in 1995 together with the servicing agreement for his FSAVC plan, it was that business's responsibility to have ensured the ongoing suitability of the plan. It later told this Service it thought the initial advice had been suitable. And it argued that in any event, Mr R had brought his complaint too late for this Service to consider it.

The Investigator thought Mr R had brought his complaint in time. And he went on to uphold the merits of his case. DW disagreed with both conclusions. So, his case was passed to me to review. I issued my provisional decision in January. I invited both parties to provide further information and evidence, which both have done. Where this was material to my consideration, I've addressed matters in this final decision.

**Jurisdiction**

Our service was set up by Parliament under the Financial Services and Markets Act 2000 (FSMA). It's important to make clear that as a public body we don't have a general, 'at large', power to investigate any complaint. We can only investigate what FSMA and the rules made under it say we can – this sets the boundaries of our scheme. And we have no legal power to investigate complaints that are beyond our jurisdiction.

FSMA gives the FCA the power to say what complaints we can and can't consider. The FCA has set these out in the Dispute Resolution chapter of the FCA Handbook (also known as 'DISP' or 'the DISP rules').

If a business doesn't consent, this Service can't consider a complaint which isn't made within specified time limits. Dispute Resolution rule 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:*
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.*

Mr R is worried he's lost out because of the advice he received from DW to set-up an FSAVC in 1994. He thinks he should've been told about options offered by his employer for buying additional pension benefits.

Taking the six-year rule first, a complaint is out of time if it's referred to our Service more than six years after the event complained about. That's unless the complaint was referred to the respondent business within that period and the complainant has a written acknowledgement or other record of the complaint having been received.

Mr R's complaint was raised with DW in September 2019. It issued a final response to him in December that year. As the advice complained about happened in 1994, his case is out of time on the six-year limb of the test.

Turning to the three-year test. When considering if Mr R had a *cause for complaint,* that means whether he was aware of, or ought reasonably to have become aware, there was a problem; that he had suffered or may have suffered a loss; and that someone was responsible for this problem (and who that was).

I need to decide when Mr R became aware, *or ought reasonably to have become aware*, that he had a cause to complain. And having established that date, determine whether he brought his complaint within three years of it.

In making its case to time bar Mr R's complaint, DW said:

*"…with regard to the 3 year rule, we would argue that [Mr R] was aware of the option of an AVC through his employer's scheme from point of sale onwards. We would also argue that these new advising firms in 1995, 1996, 1997 and 2014 would have had the correct systems and controls in place to assess the ongoing suitability of the contract to ensure that the product remained in their client's best interests. So at the very latest, this would have been when [Mr R] received independent financial advice from [firm E] in 2014."*

DW has been unable to provide a business file. Although the sale of the policy happened a long time ago, this is unusual. I say this because in my experience firms retain documents relating to long-term transactions such as pensions indefinitely. It's clearly in their interests to do so.

I can't see that at the point of sale Mr R was alerted to the options available to him for buying increased pension benefits through his employer. I can't see he was provided with a comparison. As such there's no reason to believe he was alerted to a potential problem with the original advice at the time. Indeed, we know he proceeded with the transaction and I don't think he would've done if he thought there was an issue.

I've also thought carefully about whether the transfer of servicing agency for his plan in 1995, 1996 and 1997 meant that Mr R ought reasonably to have been aware that there was a problem with his FSAVC plan.

RFS told us:

*"In relation to Mr R becoming aware at the time ongoing servicing arrangements were changed. Mr R understood that his financial adviser was the same throughout. A change in the advisers trading name would not have alerted him that he had received unsuitable advice."*

Mr R says he didn't receive any advice from firms B, C and D during the relevant period. No evidence has been produced to show he did. And I'm mindful that the common factor at each firm appears to have been the first adviser. As he provided the original advice, it's unlikely he would've re-examined the transaction.

So there's no reason for me to find that Mr R ought to have been aware of cause for complaint at the point when his adviser firm changed.

Mr R has said he doesn't know why his contributions hadn't continued to escalate by 5% each year between 1998-2002 and he doesn't recall being contacted about this. I don't find this surprising as payments were routine and previous increases would've been relatively minor.

Mr R has confirmed he stopped making FSAVC contributions in 2006 because he didn't think they were worth continuing with given his circumstances at the time – again I find this plausible. And I don't think his decision puts him on the road to discovery for the purposes of considering the jurisdiction of his case.

I've considered the switch of Mr R's FSAVC funds into a SIPP arrangement in 2014. RFS has confirmed that this transaction was focussed on the consolidation of his various pension plans into a single pot, as he looked towards taking benefits. Given the framing of the advice he sought, I can't see why the firm involved would've reviewed all the advice he'd previously received from other businesses in respect of his pension plans.

DW hasn't done enough to demonstrate that the changing of the servicing arrangements for Mr R's FSAVC, or his switch to a SIPP in 2014 were events that ought to have given him cause to complain about its original advice in 1994.

RFS said that Mr R wanted this Service to deal directly with it on his behalf. When the Investigator asked about when he became aware of cause for complaint it told us this had happened in 2019 when he sought confirmation from a specialist adviser. I asked for more information about the circumstances surrounding why he brought his case when he did. This time we were provided with a fuller explanation. RFS told us:

*"In 2019 [Mr R] engaged EMCAS to review his circumstances in relation to earlier mortgage and investment advice he had received. When reviewing the documentation and in discussion with [Mr R], Right-Side adviser [Mr X] (himself a DB pension trustee) identified that [Mr R] may have been subject to unnecessary and unsuitable FSAVC pension advice and brought this to [Mr R's] attention. [Mr R] was not aware until this point that in house alternatives were likely more beneficial. Had this been disclosed he would have elected to go the in house route as he had no plans to change employer. With Mr R's permission [Mr X] sought copies of the point of sale and disclosure documents from his pension provider and then Adviser."*

Based on the information available to me, I think Mr R became aware in 2019 when he engaged the services of EMCAS in relation to other financial matters, that there might be a problem with the advice he received in 1994 about his FSAVC policy. As he made his complaint at the end of 2019, his case is in time.

I've concluded this Service can consider Mr R's complaint and I'll now consider the merits of his case.

**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.

The bulk of the contemporaneous documentation we have been provided has come from the pension provider. Both parties have also provided lengthy and conflicting testimony and both have cast doubt on the veracity of elements of each other submissions.

Where there's conflicting information about what happened 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 upholding Mr R's complaint. I'll explain why.

Mr R's OPS provider has helpfully confirmed what options would've been available to him in 1994 to purchase additional pension benefits. It said:

*"I can advise that [Mr R's OPS] was a defined benefits scheme. Active members had the option of paying additional voluntary contributions (AVCs) to the Plan. Any AVCs were*

*invested in one of two investment linked arrangements established with Standard Life or Legal & General. It was not possible to purchase added years in the Plan."*

This information clarifies the scope of any potential problem. For example, although Mr R's complaint indicated he thought he'd lost the opportunity to purchase additional years in his scheme – it's now clear that wasn't a possibility.

Next I've thought about the rules and regulations which DW would've been obliged to follow at the time it gave Mr R advice in 1994. It's confirmed it was providing advice as an independent financial adviser (IFA). The requirements on such firms were clear.

It would've been required to follow the Financial Intermediaries, Managers and Brokers Regulatory Association (FIMBRA) rules. In 1988, FIMBRA said that an adviser should:

- Not make a recommendation unless it believed, having carried out reasonable care in forming its belief, that no transaction in any other such investment (of which it ought reasonably to be aware) would be likely to secure the objectives of the consumer more advantageously.
- Take reasonable care to include in any recommendation to a person, other than a professional investor, sufficient information to provide that person with an adequate and reasonable basis for deciding whether to accept the recommendation.

So, DW was required to have conducted its business taking into account and acting on all these requirements when advising Mr R about the FSAVC. It needed to explicitly compare what the in-house options were and what the FSAVC had to offer. It should've made a recommendation that was in his best interests.

This approach was important. We know that more often than not AVC's were typically a better option for an employee than an FSAVC. That's because these plans often enjoyed lower charges and administration costs as they'd been arranged through an employer. It's also the case that some employers matched or subsidised AVC contributions. These advantages would've meant employees would've been better off at retirement.

There were occasions when an FASVC could've been more suitable. For example, where the AVC offered by the employer didn't provide for equity linked investments, or particular funds of interest to the consumer.

DW has asserted that the advice it provided in 1994 was suitable. In support of its case it points to Mr R's payslip which has, amongst headings for deductions, a line for AVCs. It says this shows he must have been aware of the option. It says his application to the FSAVC provider details information about his employer and OPS membership. It says this shows a conversation about options must've happened. I find DW's arguments weak.

The problem for DW is that there's no evidence to indicate it gave suitable advice to Mr R in 1994. It hasn't been able to produce any telling records to back up its assertion on suitability. There's nothing to demonstrate he was told his employer's in-house options were better; or of a direct comparison between the FSAVC and what was possible via his employer; or that it recommended he shouldn't take out an FSAVC plan. There's nothing to suggest he had specific investment requirements, which meant and FSAVC was appropriate.

I think it's more likely than not, had DW advised Mr R to make any additional contributions to his pension via his employer's AVC, he'd have accepted that recommendation. I say this because it's unusual for a lay person to seek advice from a professional and then to take a different course of action.

So, based on the information available to me, I think the advice DW gave Mr R in 1994 was unsuitable.

Next, I've considered the extent of DW's responsibility and approach to any redress.

As I've already set out, the adviser who gave Mr R the recommendation to buy an FSAVC plan left DW in 1995 and took up a role with firm B. I've seen a letter from Scottish Widows to DW dated 11 April of that year. It says:

*"I have been instructed by the above client [Mr R] that you are no longer to act on their behalf in respect of this policy. To comply with their request I have removed your agency from the policy record."*

Servicing agency for his FSAVC plan passed to firm B from April 1995. There were further changes. From June 1996 firm C was appointed as the servicing agent. And, firm D took on the role between January 1997 and May 2001.

DW has told this Service it didn't receive any commission from the sale of Mr R's plan from the point agency was transferred in 1995. This seems plausible, given we know the servicing arrangements followed the original adviser as he changed firms.

I've no reason to doubt Mr R when he says he didn't know other firms were involved with looking after his plan. But it seems unlikely these changes could've been effected without his endorsement. I don't know what information his adviser gave him about the changes or how significant these would've seemed at the time. And to this I must factor in the passage of a significant amount of time – memories can and do fade.

On balance, I place weight on the contemporaneous letters I've seen from the provider of Mr R's FSAVC, which indicate the changes in the servicing agency for his plan were properly authorised. DW were responsible for the original advice. But it's also clear that firms B, C and D took on the servicing arrangements for his plan in subsequent years and, it seems, likely received commission payments related to the FSAVC.

The then Financial Services Authority (FSA) model guidance from May 2000, indicates an approach here which I think is fair. In the section on redress, under Section 8.2 it says:

*"8.2.1 Where a firm concludes that it may be jointly liable along with one or more other firms for the investor's loss then the firm that gave the first advice should review the whole period (including the period after the other firm(s) became involved) and then seek to obtain redress from the other firm(s)."*

*"8.2.2 Where a firm believes that the causal link between the advice it gave and any ongoing loss has been broken, perhaps because a second firm gave advice at the same time as a change of employment, then the first firm need only consider the period up to the second advice."*

DW argues that if the case is upheld, then its liability should end when the agency for his plan transferred. It says 8.2.2 is the appropriate route. I understand the argument it makes.

But in the absence of evidence the causal link between its initial advice and Mr R's ongoing loss has been broken, I conclude that it's reasonable to apply the provisions of 8.2.1. This still provides it with the opportunity to seek compensation from those other firms involved where it believes they should contribute to the redress it has to pay due to their acts and omissions in this case.

Finally, RFS has asserted that DW should've conducted a review of its sale of Mr R's FSAVC plan following the FCA review in this area in 2000. Following concerns about mis-selling, the regulator did require firms to carry out a review of some plans sold between 29 April 1988 and 15 August 1999. The review was mostly concluded by 2004.

The main aim was to review the FSAVC plans of consumers who might have lost matching contributions or subsidies that the employer would have paid, had AVCs been used instead. Businesses were required to contact those consumers proactively and invite them to have a review if their employers or schemes appeared on the Annex A Update FSAVC document.

Neither Mr R's employer nor OPS scheme appears on this list. So, I can't see DW failed to comply with the regulator's requirements here. Mr R could've requested a review – but as we know, he says he didn't become aware of any cause for complaint until 2019.

**Putting things right**

I'm upholding Mr R's complaint. I require Doug Wade Insurance Consultant to put matters right.

Mr R has confirmed he still worked for the same employer as he did in 1994. And that he hasn't taken any pension benefits at this time. DW may ask Mr R for evidence of these and any other matters that have a bearing on its redress calculations.

DW should undertake a redress calculation in accordance with the regulator's FSAVC review guidance, with the amendment below to take into account that data for the CAPS 'mixed with property' index isn't available for periods after 1 January 2005.

The FSAVC review guidance wasn't intended to compensate consumers for losses arising solely from poor investment returns in the FSAVC funds, which is why a benchmark index is used to calculate the difference in charges and (if applicable) any loss of employer matching contributions or subsidised benefits.

In our view the FTSE UK Private Investor Growth Total Return Index provides the closest correlation to the CAPS 'mixed with property' index. So, where the calculation requires ongoing charges in an investment-based FSAVC and AVC to be compared after 1 January 2005, DW should use the CAPS 'mixed with property' index up to 1 January 2005 and the FTSE UK Private Investor Growth Total Return Index thereafter.

If the calculation demonstrates a loss, the compensation amount should if possible be paid into Mr R's pension plan. The payment should allow for the effect of charges and any available tax relief. The compensation shouldn't be paid into the pension plan if it would conflict with any existing protection or allowance.

If a payment into the pension isn't possible or has protection or allowance implications, it should be paid directly to Mr R as a lump sum after making a notional deduction to allow for income tax that would otherwise have been paid in retirement. 25% of the loss would be tax- free and 75% would have been taxed according to his likely income tax rate in retirement – presumed to be 20%. So, making a notional deduction of 15% overall from the loss adequately reflects this.

The compensation resulting from the loss assessment must where possible be paid to Mr R within 90 days of the date DW receives notification of his acceptance of my final decision.

Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of my final decision to the date of settlement for any time, in excess of 90 days, that it takes DW to pay Mr R this compensation.

## My final decision

For the reasons I've already set out, I'm upholding Mr R's complaint, and I require Doug Wade Insurance Consultant to put things right in the way I've directed.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr R to accept or reject my decision before 16 March 2022.
Kevin Williamson
**Ombudsman**