DRN-3296939

The complaint

Mr A is represented. His representative says Medical Money Management ('MMM') gave him unsuitable advice to undertake a Free Standing Additional Voluntary Contributions ('FSAVC') plan in 1994. They say this was unsuitable advice mainly because:

- It mismatched his personal and professional profile.
- No comparison with, and consideration of, the available in-house AVC option at the time took place – given the cheaper/subsidised charges in an in-house AVC, the FSAVC recommendation cannot be justified.
- There was also no justification in recommending the FSAVC over the other alternative of purchasing added years in his occupational pension, which offered long term guaranteed benefits.
- The unsuitable recommendation in 1994 was compounded by further unsuitable advice, in 1997, to top-up the FSAVC plan.

What happened

One of our investigators looked into the complaint and concluded that it should be upheld. He mainly said:

- Due to the passage of time, the availability of documents related to the recommendation is limited. There is no fact find from 1994, but there is such a document from 1996 (for Mr A's financial review at the time). The 1996 document is reliable evidence of his profile in 1994 because that profile is unlikely to have changed radically in the two years up to 1996. The document says he was in his late 20s/early 30s, was single without dependents, was in a professional occupation (with an occupational pension), had a mortgage linked pension and had a cautious/balanced risk profile.

- MMM's 1994 recommendation did draw a comparison between the FSAVC and the added years alternative, but it made no mention of the in-house AVC alternative. Under the regulations at the time it ought to have addressed the in-house AVC option in its advice to Mr A.

- MMM said control over contributions in an FSAVC was preferred to the fixed percentage (of increasing income) contributions in an added years arrangement. However, there is no evidence that the latter would have been unaffordable for Mr A in his particular career (and given his age and risk profile).

- A comparison between the FSAVC and the in-house AVC alternative would have highlighted the difference in cost between them, with the latter being cheaper, and unless it was demonstrated that the benefits of the former outweighed its higher charges it is unlikely to have been a suitable recommendation.

- For the above reasons, it can be said that Mr A would not have been fully aware of his options at the time of the recommendation. His complaint should be upheld and

MMM should undertake a calculation of redress for him based on the regulator's FSAVC review methodology on an added years basis.

MMM disputes this outcome. It says there is evidence of a full comparison with the added years option within the 1994 recommendation; that this option would not have been viable; that Mr A planned to retire at age 65 and by the time he reached age 64 he would have exhausted maximum service under his occupational pension scheme; so there would have been no scope for added years and the scheme would likely have rejected his application for added years for these reasons. For the same reasons, MMM also objects to the investigator's proposed basis for redress.

The matter was referred to an ombudsman.

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.

MMM will be aware of the basis on which the investigator treated the comparisons that should have been conducted, in 1994, between the FSAVC it recommended to Mr A and the alternatives of an in-house AVC and the purchase of added years. Though documentation from 1994 is limited, its recommendation letter to him in October that year is available and it is clear from it that his objective was to enhance his pension arrangement. That was a reasonable objective and it was equally reasonable for MMM to meet that with its recommendation. However, its recommendation had to be suitable for Mr A (for his objective and circumstances), in comparison with relevant alternatives, and it ought to have given him enough information (including information about such alternatives) to aid his decision making. It is in this context that the in-house AVC and the purchase of added years have been – and must be – considered in this case.

As MMM has stressed, the option of purchasing added years was indeed addressed in its recommendation. I consider this further below. First, like the investigator noted and as Mr A's representative has argued, I find that there was a significant failure on MMM's part in its omission of advice on the in-house AVC alternative. Given that it looked into the FSAVC plan, consideration of the in-house version ought reasonably to have been the automatic and/or logical next step. MMM should have advised upon and enquired into this. In-house AVC plans were broadly better options for occupational pension holders – better than FSAVCs – mainly because of their lower/subsidised charges and the potential for the employer to match the contributions paid by the employee (which was not the case for FSAVCs). Between 1988 and 2006 occupational pension schemes had to offer an in-house AVC plan, so in 1994 Mr A's employer would have been no different in this respect.

On a like for like basis – and in the context that additional contributions were suitable for his circumstances (which is not in dispute) and that he was unlikely to be an early leaver (which appears to have been the case, given his particular profession/career path) – the added benefits of lower charges and potential employer contributions would have meant that an in-house AVC was suitable for Mr A over the FSAVC that was recommended to him. As the investigator addressed, in the absence of evidence that the FSAVC offered something to outweigh such added benefits it cannot reasonably be said that it was a suitable recommendation.

MMM did not commit the same significant failure (by omission) with regards to the option of purchasing added years. It identified and treated this within its recommendation to Mr A. However, it did not do that enough and to the extent that it should have – that extent being, on balance, a recommendation to pursue/explore this option primarily above others.

To set further context, MMM would have known that the two AVC options led to pension fund values, at retirement, that depended on investment performance (amongst other factors); that the purchase of added years provided a more certain outcome for Mr A, who was in a defined benefits pension scheme; that it offered a boost to the number of years he accumulated under the scheme; and therefore a boost to the relatively secured benefits he would draw from it at retirement. This was viable for Mr A. I will not set out the specific personal and professional circumstances he had in 1994, in order to avoid breaching his anonymity. It is sufficient to say those circumstances lent themselves to the purchase of added years being the suitable option for him.

MMM's advice at the time does not quite match the thrust of its argument in response to the investigator's view. It presently says the purchase of added years was essentially a redundant option because there would have been no scope for it – as Mr A already stood to exhaust his maximum service under the scheme through his prospective full period of employment up to retirement. The 1994 recommendation did not say this. It mentioned the *potential* for this, but clearly no enquiries had been made to determine the relevant facts under the scheme and to determine whether (or not) there was scope for the purchase of added years – hence the reason why the adviser went to the extent of providing an illustration of a three added years purchase (which would have been unnecessary if it had been established that there was no scope for any such purchase).

Instead, and overall, the document's contents suggest the adviser had pre-determined a preference for the FSAVC plan as the option for Mr A. This was presented on the grounds of flexibility of contributions and potential overall costs – based on assumptions. I am not persuaded that this was done in a balanced way. Mr A held a cautious/balanced risk profile. The relative certainty and security of the benefits from a viable added years plan would have matched this profile, and this is a quality that neither AVC related option had. Given his risk (and overall) profile it is more likely, than not, that the plan would have remained a suitable match for him even if it cost slightly more than an uncertain alternative.

Presently available evidence, about the scheme, suggests that the maximum service length that would have been relevant to Mr A at the time is five years more than MMM has argued – so the notion, at the time, of a three added years purchase (suggested from the adviser's illustration) appears to have been viable. It is also important that there is no evidence from 1994 that enquiries were made in this respect and that the accurate maximum service length in the scheme was established. On balance, in the absence of such evidence and given the information presently available, I do not consider it safe to accept that there was no scope for purchasing added years and that this option was redundant in 1994.

Overall and on balance, MMM should have recommended to Mr A the purchase of added years, instead of the FSAVC plan that it sold to him – furthermore, the alternative of an in-house AVC plan also made the FSAVC recommendation unsuitable. Mr A was therefore given unsuitable advice by MMM in 1994 and redress for this must be considered and calculated.

Putting things right

A fair and reasonable outcome would be for MMM to put Mr A, as far as possible, into the position he would now be in but for the unsuitable advice it gave him in 1994. MMM must undertake a redress calculation in line with the regulator's FSAVC review methodology on an added years basis. This involves using, in part, the Pension Review methodology as updated by the Financial Conduct Authority in its Finalised Guidance 17/9: Guidance for firms on how to calculate redress for unsuitable defined benefits pension transfers.

This calculation should be carried out as at the date of this decision, and using the most recent financial assumptions. In accordance with the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr A's acceptance of the decision.

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

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

The compensation resulting from the loss assessment must where possible be paid to Mr A within 90 days of the date MMM receives notification of his acceptance of this decision. Further interest must be added to the compensation amount at the rate of 8% per year simple from the date of this decision to the date of settlement for any time, in excess of 90 days, that it takes MMM to pay Mr A this compensation.

compensation limit

Where I uphold a complaint, I can make a money award requiring a financial business to pay compensation of up to £150,000, £160,000, £350,000, £355,000 or £375,000 (depending on when the complaint event occurred and when the complaint was referred to us) plus any interest that I consider appropriate. If fair compensation exceeds the compensation limit the respondent firm may be asked to pay the balance. Payment of such balance is not part of my determination or award. It is not binding on the respondent firm and it is unlikely that a complainant can accept my decision and go to court to ask for such balance. A complainant may therefore want to consider getting independent legal advice in this respect before deciding whether to accept the decision.

In Mr A's case, the complaint event occurred after 1 April 2019 (it happened in 1994) and the complaint was referred to us after 1 April 2020 (it was referred to us in 2021), so the applicable compensation limit would be £160,000.

My final decision

For the reasons given above, I uphold Mr A's complaint and I order Medical Money Management to calculate and pay him redress as I set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 5 December 2022.

Roy Kuku
Ombudsman