

The complaint

Ms B, through her representative, complains that the advice she received from Phoenix Life Limited to take out a Free Standing Additional Voluntary Contribution (FSAVC) plan was unsuitable. She says that if she'd been properly advised she would have contributed to her occupational in-house additional voluntary contribution (AVC) scheme instead and so wants compensating for the loss she has suffered.

What happened

In 1996 Ms B was advised by Phoenix Life to take out a FSAVC plan. Her circumstances at the time, as recorded in the paperwork completed by the adviser, show that Ms B:

- Was aged 36
- Was married with two dependants
- Worked in the NHS
- Had an income of around £22,000
- Had been a member of her occupation pension scheme for around 12 years
- Expected to retire at 60 but her preferred age was 55.

In 2021 Ms B, through her representative, complained to Phoenix Life raising the complaint point detailed above. Phoenix Life didn't uphold her complaint because it said the plan was suitable and Ms B had been provided with the appropriate advice and information at the time.

Dissatisfied with its response, Ms B brought her complaint to the Financial Ombudsman Service.

I issued my provisional decision of March 2022 in which I said I was likely to uphold the complaint. In summary I said I didn't think Phoenix Life had complied with the relevant guidance when it advised Ms B in 1996 and as a result I thought Ms B had lost out because I didn't think she'd have still taken out the FSAVC had things happened as they should have. I said I intended to direct Phoenix Life to carry out a loss assessment in line with our general approach to complaints of this type.

Ms B did not respond to my provisional decision.

Phoenix Life replied to my provisional decision. In summary it said:

- The adviser was unable to give advice on Ms B's employer's scheme, which would suggest that she would have been aware that she needed to seek details from them herself.
- Because the reason for taking out the FSAVC was that she wanted better flexibility and control over contribution levels and both of these things were listed in the booklet provided, this implies the details in the booklet were discussed with Ms B.

- There is no argument the booklet was provided and suggests the onus was on Ms B to read the documentation she was provided with.

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.

In deciding what is, in all the circumstance of the case, fair and reasonable I've also taken into account relevant law, any relevant regulatory rules and relevant guidance and what I consider to have been good industry practice at the time.

Having done so, for the reasons I have set out below I've decided to uphold this complaint.

In deciding this complaint, I need to consider two questions: whether Phoenix Life complied with the applicable regulatory guidance in place at the time of the advice; and then if it didn't, would Ms B have acted any differently had it done so – that is would Ms B have made her additional pension contributions to an AVC arrangement provided by her occupation scheme?

The advice was provided by Phoenix Life in September 1996. So the relevant regulatory guidance was contained in the May 1996 Regulatory Update 20 ('RU20'), which was produced by the Personal Investment Authority (PIA), one of the predecessors to the current regulator – the Financial Conduct Authority (FCA). RU20 gave guidance on the procedures for advising clients on the relative merits of FSAVCs and AVCs provided by occupational pension schemes.

The guidance set out different requirements depending on whether the adviser was an independent financial adviser or a 'tied' adviser – one who is employed by, or contracted to, one organisation and can only recommend and sell that organisation's products. In this case the adviser was tied.

For tied advisers, RU 20 indicated that:

A representative should not recommend his own company's FSAVC until he has:

- drawn the client's attention to the in-scheme alternative;*
- discussed the differences between the two routes in generic terms (taking account, among other things, of the features described in this article); and*
- directed the client to his employer, or to the scheme trustees, for more information on the in-scheme option.*

When these procedures are followed and documented, it is not necessary for the representative to undertake a full comparison of the in-scheme AVC and his company's FSAVC.

Among the features referred to in the article were that charges under in-house AVC's would usually be lower. The regulator indicated that it would expect the advice file to have documentary evidence demonstrating that the procedures in the update had been followed.

So Phoenix Life needed to make Ms B aware of the in-house AVC and to discuss the generic features of the in-house options and of the FSAVC. The key difference I would've expected Phoenix Life to discuss with Ms B would be the likelihood of lower charges for

the in-house AVC. I would also expect Ms B to have been directed to her employer and/or occupational pension scheme trustee to obtain more information on her in-house options.

Phoenix Life has provided the paperwork completed at the time, including the fact-find document, which also records the summary of advice given and why the adviser thought the recommendation was suitable.

Having considered this carefully, I'm not persuaded that the procedures required by the update I've set out above were followed. I say this because the adviser's notes do not say or in my view imply that a *discussion* took place about the differences between in-house AVC's and the FSAVC. Phoenix Life in response to my provisional decision says it should be implied there was a discussion based on the reason Ms B said she wanted the FSAVC – a reason listed in the booklet.

But I disagree. If there was a discussion I would've expected the adviser to have said so. But the adviser simply records that they "*explained there are two alternatives either an in-house scheme or a free standing scheme...*" And this is the limit of what's recorded. There's nothing to say the differences between the two were discussed.

In addition there's nothing recorded here about charges and importantly that the in-house scheme would likely have lower charges – it is silent on this point – or anything to show that Ms B was directed to her employer to find out more information about her in-house scheme.

I can see that the adviser's notes say: "*I gave Ms B the booklet outlining the differences [between the in-house scheme and FSAVC]...*" and Phoenix Life has provided a copy of this booklet. And while I think the information contained here is clear and it does set out the generic differences between the two schemes and talks about the difference in charges, I don't think simply giving Ms B a booklet is enough for me to fairly say that Phoenix Life complied with the regulator's requirements in this case. It's possible Ms B didn't read the booklet.

Phoenix Life has said the onus was on Ms B to read the information she was given. But the guidance in my view is clear - it requires a discussion not just the provision of information. And as I've found, there's simply not enough evidence to show or imply that the contents of the booklet was discussed with Ms B – not even a direction given to her to read it and what she needed to pay particular attention to.

So for these reasons, I don't think that Phoenix Life complied with the guidance in relation to the sale of the FSAVC plan to Ms B.

I now need to consider the second question and decide if Ms B has potentially lost out as result of the failing identified – i.e. would Ms B have likely acted differently had everything happened as it should have and directed her additional pension contribution to her in-house scheme instead?

I can see that Ms B expected to retire at age 60 – but that 55 was recorded as being her preferred retirement age. This preferred age was five years before her normal pension age in her occupational scheme. I can also see that the reason the adviser gave for Ms B choosing a FSAVC plan was for one reason: to provide her with flexibility and control over contribution levels.

While it's not necessarily the case that Ms B's in-house scheme was inflexible - I'm also mindful that Ms B was still more than 15 years away from her preferred retirement age (it

was preferred and perhaps not a set intention) and her plans might change - on the one hand I accept this may suggest that the recommendation to take out the FSAVC remained suitable, despite the difference in charges.

But on the other hand, given the regulator's view that a critical factor driving choice between FSAVCs and AVCs was the typically lower charges, I think, more likely than not that Ms B would've chosen to contribute to her in-house AVC scheme had things happened as they should have and had she been properly advised and informed. I'm not persuaded that what was recorded as the sole reason for choosing the FSAVC – flexibility – would've alone made a difference to her decision. Ms B was working for the NHS and in my view likely to remain within its employment – I've not seen anything to suggest otherwise.

So it is for these reasons that I think Ms B has lost out because I think she would've more likely contributed to her in-house AVC scheme rather than the FSAVC plan if things had happened as they should have and she'd been properly advised and informed.

Putting things right

I think compensation for Ms B should be calculated in line with our general approach to complaints of this type. Phoenix Life should undertake a redress calculation in accordance with the regulator's FSAVC review guidance, incorporating 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, Phoenix Life 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 Ms B'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 Ms B 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 her likely income tax rate in retirement – presumed to be 20%.

So, making a notional deduction of 15% overall from the loss adequately reflects this. Ms B should confirm her tax rate to us as part of her response to this decision.

My final decision

For the reasons I've given above, I've decided to uphold this complaint and I direct Phoenix Life Limited to settle the complaint using the FCA's FSAVC guidance as I have set out in the section 'Putting things right' above. I make no other award.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B to accept or reject my decision before 9 May 2022.

Paul Featherstone

Ombudsman