

The complaint

In summary, Mr W has complained about the advice provided by Zurich Assurance Ltd (trading as Allied Dunbar), to take out a free standing additional voluntary contribution plan (FSAVC).

Mr W is represented in this complaint by a claims management company (CMC), but for the ease of reading I'll mainly refer to Mr W.

What happened

In 1997 Mr W met with one of Zurich's representatives. Mr W was in his mid-40s and a member of the Teachers' Pension Scheme (TPS), which he joined in 1973. A fact find document recording details of Mr W's financial circumstances was completed. This recorded that Mr W was not contributing into an inhouse AVC plan.

Zurich recommended Mr W top up his existing pension arrangements by contributing £60 a month into an FSAVC. This was to enable Mr W to have pension benefits in addition to those provided by the TPS.

When Mr W referred the complaint to our service, Zurich didn't think it had been made in time. One of our investigators explained why he didn't think the complaint had been made in time. Mr W's representative didn't agree.

One of my ombudsman colleagues then looked into whether the complaint was one that our service could look into. They concluded that it was and set out their reasoning in a final jurisdiction decision.

The merits of Mr W's complaint were then looked into by the investigator. He explained why he thought Mr W's complaint should be upheld. In essence, he didn't think Zurich's representative had complied with the regulatory guidance which applied to tied advisers when the FSAVC was recommended to Mr W. And he thought that if Zurich done what it should have, then Mr W would most likely have chosen to use the in house AVC scheme to receive his additional pension contributions.

Zurich didn't agree with what the investigator said, so the case has been passed to me to review. In summary Zurich thought Mr W would have been aware of the inhouse AVC scheme as a result of the reference to this in respect of his wife in the fact find. And it said he was made aware of the difference in costs from the topping up booklets he received.

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.

Having done so, I've decided to uphold Mr W's complaint. I'll explain why.

When Mr W met with Zurich's representative, the individual who advised him was what was known as a "tied adviser". This meant the representative could only recommend products offered by Zurich. They weren't able to recommend any products from other providers, including any options provided by Mr W's occupational pension scheme (OPS). They weren't required to approach Mr W's OPS for details of the scheme or find out what the benefits were.

In addition, there were regulatory rules in place at the time Mr W met with the representative, that set out guidance for tied advisers when providing advice. These were set by the then regulator, the Life Assurance and Unit Trust Regulatory Organisation (LAUTRO). The LAUTRO rules set out that an adviser should:

- Maintain high standards of integrity and fair dealing, exercise due skill, care and diligence in providing any services, and generally take proper account of the interests of investors.
- Have regard to the consumer's financial position generally and to any rights they may have under an occupational scheme and give the consumer all information relevant to their dealings with the representative in question.

The successor regulatory scheme to LAUTRO, the Personal Investment Authority (PIA); codified the requirements for advisers to follow in May 1996. This was contained in Regulatory Update 20. And in essence this said before selling an FSAVC a tied adviser should:

- Draw the consumer's attention to the in-house alternative
- Discuss the generic differences between the two routes '*taking account, among other things, of the features described in this article*'
- Direct the consumer to his employer or the OPS for more information on the in-house option

And given the content of the article, this would also have included referencing the lower charges usually applicable to an in house AVC scheme.

With this regulatory background in mind, I've considered what happened in the particular circumstances of Mr W's complaint. After Zurich met with Mr W it produced a suitability letter which set out the basis of its advice to Mr W.

The letter records Mr W's objective to provide income for early retirement in addition to his employer's pension scheme. And it refers to a booklet; "Topping up your Occupational Scheme benefits – Your choice." The suitability letter said this set out the benefits of the pension being recommended and those typically available under an employer's inhouse AVC scheme.

In the recommendation section it refers to the AVC pension account (the FSAVC) being recommended, as it would provide benefits in addition to those under the employer's scheme. It recorded that Mr W's priority was identified as being to provide an income for early retirement in addition to that provided by his OPS. His existing provision was identified as being insufficient for his needs and that he should build on his existing arrangements. Surprisingly the letter makes no reference to charges usually being lower with the inhouse AVC scheme. And I'm not satisfied that the letter drew attention the inhouse alternative or directed Mr W to his employer for more information about the inhouse option.

I've also considered the "*Topping up your Occupational Scheme benefits – Your choice*" booklet that the suitability letter refers to as being provided to Mr W. Although the suitability letter says the booklet was provided to Mr W, it's not clear to me whether the contents were discussed with Mr W during the advice process. And the suitability letter suggests to me that it may have been given to him to read at some later point.

Nevertheless, I've considered the contents of the booklet. There is a section which is headed "*Charges*". In respect of an AVC, this says that the employer may have agreed enhanced terms with the insurance company. And this may mean that the charges levied on contributions to an in house AVC are lower than the AVC pension account, particularly in the early days. It goes on to say that over the life of the plan these may even out.

I'm not persuaded that even if this information had been brought to Mr W's attention, that he would necessarily have understood from all of the information provided, that the charges under any in house AVC that might be available, would be lower. I say this because whilst I accept the section does say that charges under an in house AVC might be lower, in my opinion this section read as a whole, is equivocal on this point. This is because it goes on to say that over the life of the plan, the charges may even themselves out. And I think that as a result, Mr W could well have been left with the impression that over the life of the plan, charges would have made little difference. And it doesn't specifically direct a customer to their employer or the OPS for more information on the in-house option. So, I'm not satisfied that the suitability letter and booklet together satisfied the regulators requirements in this particular case.

I've also thought about the arguments made by Zurich as to why the complaint should not be upheld. It has highlighted the reference to Mrs W's in house AVC on the fact find, and that the suitability letter records that the topping up booklet and the FSAVC and benefits under the inhouse AVC scheme had been discussed and understood by Mr W. And it referred to the further topping up booklet sent in 2001 and that Mr W made a conscious decision to maintain his FSAVC rather than request a review and made ongoing contributions into the FSAVC until the age 55.

I'm not persuaded by Zurich's arguments in this case. I say that because I don't think the reference Zurich has made to Mrs W's AVC on the fact find, is sufficient evidence to show that Zurich's representative complied with its regulatory requirements at that time. I say this because the fact find merely records that Mrs W had an AVC that she contributed into. And there isn't sufficient evidence in that document or in the suitability letter in my opinion, of any discussion in respect of Mr W's pension options; for example, having his attention drawn to the inhouse alternative and directing him to his employer or the OPS for more information on the inhouse option.

I've already explained why I think in this case that the "Topping up" booklet Zurich says it provided to Mr W in 1997 was inadequate. And in respect of the revised booklet that Zurich says was sent to Mr W in 2001, that was provided some four years after the initial advice and information was given to Mr W. So, it can't have impacted on what he was told when the recommendation was made to him, and his decision to accept that recommendation.

Also, the fact that Zurich felt it necessary to revise the booklet provided to Mr W in 1997 and send an updated version in 2001, suggests to me that Zurich may have believed the original booklet wasn't as clear in respect of charges as it should have been. In addition, the template letter that Zurich says was sent to Mr W (but for which it has provided no evidence that it was sent to him) doesn't indicate or suggest that the original advice needed to be revisited. So, even if Mr W did receive this letter, I'm not persuaded that the letter and

booklet would necessarily have alerted him that the original advice he received needed to be revisited.

I've also considered whether added years would have been a relevant consideration for Mr W. I don't think it would have been in this case. I say this because Mr W made a relatively small monthly contribution of £60 a month into the FSAVC. So, he seems to have had a limited amount of money to pay in respect of contributions. Added years can in my experience be an expensive method of making retirement provision.

It seems Mr W was considering retiring early. And whilst it would not have made any difference in respect of early retirement if an AVC or FSAVC had been used, because added years tend to be geared up over a term to the normal retirement date under a scheme, then get reduced when a policy holder breaks the contract early - firstly for less contributions and then an early retirement factor. So as Mr W seems to have been considering early retirement and seems to have had a limited budget, I don't think added years would have been an appropriate option for him.

Putting things right

Zurich Assurance Limited 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, Zurich Assurance Limited 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 W'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 W 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.

My final decision

For the reasons I've set out above, my decision is to uphold Mr W's complaint about Zurich Assurance Ltd. If Mr W accepts my decision, it should calculate and pay Mr W compensation if he has suffered a loss, using the methodology I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 29 November 2022.

Simon Dibble
Ombudsman