

## **The complaint**

Mr W's representative has complained, on his behalf, that he was unsuitably advised by Utmost Life and Pensions Limited to establish a Free Standing Additional Voluntary Contributions (FSAVC) policy instead of contributing to an "in house" arrangement associated with membership of his occupational pension scheme (OPS).

## **What happened**

On the advice of Utmost, Mr W established an FSAVS policy in September 1990, following which Mr W then increased his contributions in September 1994. Mr W was a member of his employer's OPS) and at both points had the option of investing in the in house AVC arrangement or buying added years.

In March 2021, Mr W's representative complained to Utmost, saying that it ought to have referred Mr W to the company scheme for full details of the options available and compared the benefits of the FSAVC policy and the in house arrangements – particularly in terms of costs.

Had Mr W been suitably advised, the representative said, he would have contributed to the most suitable in house arrangement.

It said that Mr W would have lost out financially as a result and that Utmost should compensate him accordingly.

Utmost declined to uphold the complaint, however, saying that at the time of the advice Mr W would have been provided with the documentation for the FSAVC, which would have explained the terms of the policy and the charges which would apply. Mr W would also have been aware of the benefits of his OPS, it said.

It added that, in December 2003, Mr W retired and took benefits from the OPS. He also took the FSAVC plan benefits as an annuity and so Mr W would have been aware of the exact value of his benefits and the future value they would provide.

As such, Utmost said, Mr W would have been aware, since at least 2003, that he may have had cause for complaint in relation to the policy, and so it thought that the complaint was time barred under the Financial Conduct Authority's dispute resolution rules.

Dissatisfied with the response, Mr W's representative referred the matter to this service, where it was considered by one of our investigators.

He thought that the complaint had been made in time, saying in summary that the available evidence didn't support the position that Mr W would have been aware that he might have had an enhanced pension in 2003, had he contributed to the in house arrangements.

Utmost didn't challenge the investigator's view on this, and so he set out his findings on the merits of the complaint. He thought the complaint should be upheld, saying in summary that, as a tied adviser under the LAUTRO rules in place at the time, Utmost's representative

needed to have regard for Mr W's financial position generally and to any rights he may have under his OPS. They also needed to provide Mr W with all information relevant to his dealings with the representative.

The investigator said that the adviser ought to have been aware that the in house AVC scheme could have been cheaper than the FSAVC policy, that added years might have been available and that Mr W's employer might top up or match the amount he would pay into either option.

Mentioning these things to Mr W would have been consistent with having regard to Mr W's rights to contribute to an AVC scheme – and would have been treating him fairly, the investigator said.

And although a suitability letter may not have been required before 1995, the investigator said that he would have expected there to have been file notes to the effect that charges under the FSAVC policy and the AVC arrangement had been discussed, rather than the existence of the latter simply having been mentioned.

But he was unable to find any reference in Utmost's file to the AVC alternative, nor any discussion on charges.

The investigator thought it likely that, had Mr W been made aware that the charges in the AVC arrangement would have been lower, he would have opted for this instead of the FSAVC policy.

As such, he recommended that Utmost undertake a redress calculation to compare the two arrangements on the basis of the charges which would have been incurred, and if Mr W had suffered a loss, to compensate him accordingly.

Utmost responded, saying that although it acknowledged that there was no documentation on the file to evidence that a discussion had taken place about the in house options, the charges under the FSAVC were lower than those which would have been levied on the in house AVC.

It attached the product particulars which it said showed the annual management charge (AMC) on the FSAVC to be 0.25%, whereas the AMC for the in house AVC, depending on the chosen fund, were between 0.65% and 0.75%. Further, Utmost said 102% of the regular contributions were invested after the deduction of the policy fee of £1.50.

The investigator conveyed this information to Mr W's representative, saying that, on this basis, even if a discussion had occurred on costs comparisons, he thought it more likely than not that Mr W would have opted for the FSAVC policy.

He also said that he'd considered the option of Mr W buying added years instead, but he thought that it was unlikely Mr W would have chosen this, given the higher cost and the inability to identify exactly what benefit they might provide at retirement.

Mr W's representative disagreed, however, requesting the relevant documentation which had been used to substantiate the investigator's revised conclusions.

Having received this, the representative said that the product particulars had been extremely difficult to read and understand, and would have been especially so for a layman such as Mr W.

But it also said that despite the "headline" 0.25% AMC, there was an additional 0.5% pm

charge on the policy's capital units, to which all premiums for the first two years of the plan were allocated.

It therefore didn't consider that it should be assumed that the charges under the FSAVC would have been lower, and as there was no evidence that a conversation had occurred about the charges, Mr W had in any case been denied the opportunity to make an informed decision.

As agreement couldn't be reached on the matter, it was referred to me for review.

I issued a provisional decision on the matter on 30 September 2022, in which I set out my reasons as to why I thought the complaint should be upheld. My findings from that decision were as follows:

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

*And having done so, I think Mr W's representative makes a good point about the effect of the charges on the capital units in the first two years of contributions. If I were to draw any conclusion on that, in the absence of an actual calculation to demonstrate its effects, I'd be second guessing whether the effects of the capital units did outweigh the apparent lower AMC.*

*I'm not in a position to do so, and for the same reason, I don't think that, even if a discussion had occurred between Mr W and Utmost about costs, it would have been clear to him without a comparison projection that this was the case.*

*As such, on the basis that I agree that the available evidence doesn't support the position that a discussion was held with Mr W which would have met the LAUTRO requirements at the time, I think that Utmost needs to undertake the originally proposed redress calculation, which may or may not then demonstrate that Mr W has made an overall gain.*

#### Putting things right

*And so Utmost Life and Pensions 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 – although I appreciate this may not apply here given that it seems that Mr W took the FSAVC plan benefits in 2003.*

*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 my 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, Utmost Life and Pensions 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 applicable – see above).*

*If the calculation demonstrates a loss, the compensation amount should if possible be paid into a pension plan. The payment should allow for the effect of charges and 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."*

Mr W's representative agreed with my provisional findings, and Utmost has said that it will proceed to undertake the loss assessment.

### **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.

My conclusions remain the same as those set out in the provisional decision and for the same reasons.

### **Putting things right**

Utmost Life and Pensions 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 – although I appreciate this may not apply here given that it seems that Mr W took the FSAVC plan benefits in 2003.

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

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### **My final decision**

My final decision is that I uphold the complaint and direct Utmost Life and Pensions Limited

to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 9 December 2022.

Philip Miller  
**Ombudsman**