DRN-3831986

## The complaint

Mr T's representative has complained, on his behalf, that Smith & Williamson Investment Services Limited, trading as Tilney, gave him unsuitable advice in 1996 to begin contributions to a Free Standing Additional Voluntary Contributions (FSAVC) plan instead of opting for one of his "in house" options connected to membership of his occupational pension scheme (OPS).

In particular, Mr T has said that he should have been advised to begin buying "added years".

## What happened

At the time of the advice, Mr T was 28 years old and employed as a qualified doctor, earning around £30,000 pa. He was a member of the defined contribution NHS pension scheme, which had a normal scheme retirement age of 60.

Tilney has said that there's limited documentation from the time of the advice, as it was given by a predecessor firm, which it had since acquired. But it said that Mr T should instead have been advised to contribute to the in house AVC scheme instead of the FSAVC policy.

It didn't think that buying added years would have been a suitable recommendation, as the level of contribution which Mr T was making to the FSAVC policy wasn't sufficient for this. Mr T disagreed, however, saying that the history and duration of the FSAVC contract was at a sufficient level to have funded added years, and, suitably advised, this was the option he would have chosen.

Mr T's representative referred the matter to this service, where it was considered by one of our investigators. He noted that Mr T wasn't married at the time of the advice, and had no financial dependants. Mr T had also said that he had a clear path to an increasing salary. The investigator said that buying added years was usually a more expensive way of enhancing retirement benefits, was inflexible, and provided family benefits which weren't always required.

Further, Mr T would have needed to commit to a set percentage of his salary and so the amount he'd pay for added years would increase each time his salary increased.

On the basis that Mr T had himself said that the in house AVC was cheaper than the FSAVC policy, the investigator thought that this indicated that he would have declined the more expensive option of added years. Mr T might have been prepared to take the investment risk of AVCs which was designed to produce the same outcome as added years, the investigator said, and it was unclear as to whether Mr T would have been prepared to make the required financial commitment of buying those added years.

Although the investigator noted the normal scheme retirement age of 60, he said that it wasn't uncommon for doctors to continue working beyond that, in which case Mr T may in any case have achieved 40 years' scheme membership without needing to buy added years. The investigator further said that, although he accepted that Mr T could more likely than not have afforded to buy added years, he hadn't increased his FSAVC contributions over time, in contrast to the notional increases in the cost of added years over the same period.

Mr T's representative disagreed, however, saying that Mr T had himself confirmed that he had sufficient income, both then and in the future, to buy added years, and that he was intentionally drawn away from that option by the adviser.

It further said that none of the conditions in which an FSAVC policy might be deemed to be appropriate, such as the expectation of regularly moving jobs, income not expected to rise substantially or regularly, where the customer had a desire to retire early, or where the customer required anonymity form their employer, applied here.

Although Mr T may not have increased his contribution over time, this service had previously set out that this lack of escalation should be ignored in any loss calculation. But the adviser could in any case have been considered to be negligent in not recommending, or reviewing the option of, an increasing premium.

The lower cost of the FSAVC plan was also irrelevant, the representative said, as any loss calculation would be based on the equivalent added years being bought with the same premium. And it wished to reiterate that the scheme retirement age was 60.

In conclusion, the representative said that Mr T had now missed out on the opportunity to buy added years as this had been withdrawn in 2008.

The investigator was unmoved, however, reiterating that added years would have been regarded as the expensive option and that the enhanced benefit of that option, whilst now known, couldn't have been anticipated at the time.

Had Mr T increased his FSAVCs over the years, this would, in the investigator's view, have been a clearer indication that he would have opted for added years, as this would have been more aligned with the increase in added years' contributions as his salary increased. But this hadn't been the case, he said.

Mr T's representative continued to disagree, saying that Mr T had commented that he had simply followed the advice given, which had been incorrect. Mr T had also visited the offices of the FSAVC plan provider since the initial recommendation, and had been advised to not increase his contributions on the basis that although the return from the FSAVC policy was still expected to be high, it may not be as high as had originally been anticipated.

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

I issued a provisional decision dated 3 October 2022, in which I set out my reasons for upholding the complaint. The following is an extract from that decision:

*"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 have some sympathy with the points made by Mr T and his representative. I'd firstly echo the observation made by the investigator that it doesn't seem to be disputed by any party that Mr T ought to have been advised to choose one of the in house options. The issue which remains is whether Mr T ought to have been advised, and* *would then have accepted that advice, to buy added years as opposed to choosing the AVC route.*

*I think the uncertainties around what Mr T might have done at the time if presented with the options are validly set out by the investigator, but I have a slightly different take on what, on a balance of probabilities, Mr T would more likely than not have done if suitably informed and advised.*

*For example, Mr T was 28 at the time of the advice, and may not have had a family at that point which might have benefited from added years. But the fact that he was relatively young meant that this might of course change over the coming years.*

*Mr T may also have not increased his contributions over the years, but it's far from clear that this could be attributed to affordability issues. It's just as likely, if not more so, in my view that he simply didn't revisit the matter in the absence of suggested reviews. And although Mr T may have commented on the likelihood of the in house AVC arrangement being cheaper than the FSAVC plan, I don't think this is indicative of affordability issues – rather, Mr T is likely to have been commenting on the simple fact in support of the position that he should have been pointed towards the in house options.*

*An annual salary of £30,000 in 1996 for a single 28 year old was not an insubstantial sum, and in the absence of evidence to suggest that Mr T was significantly encumbered by outgoings either then or in the future, I don't think it can fairly or reasonably conclude that affordability of added years would have been an issue.*

*It would have been a greater financial commitment than investing in AVCs, but Mr T was established as a qualified doctor and was on a career path which is arguably one of the more predictable, both in terms of progression and likely salary increases. And on the basis of a scheme retirement age of 60, it was unlikely, given the training he would have undergone before becoming a member of the NHS scheme, that he would achieve his full 40 years maximum service by that age.*

*So my view is that Mr T was a very credible candidate for buying added years. I think the proposition of the investment risk/reward of AVCs, as opposed to added years, appealing to a 28 year old with more than 30 years to go until retirement is a good point, and the unfortunate aspect here is that we don't know what was recorded about Mr T's attitude to risk at the time. But in the absence of this, I don't think I can fairly and reasonably conclude that it would have superseded the appeal of the zero risk, likely affordable, and guaranteed benefits which would have been provided by buying added years.*

*As such, I think it's more likely than not that Mr T would have opted to buy added years in this instance.*

*<u>Putting things right</u>*

*I'm currently of the view that a fair and reasonable outcome would be for the business to put Mr T, as far as possible, into the position he would now be in but for the unsuitable advice. Smith & Williamson Investment Services Limited should therefore 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 DB pension transfers.*

*This calculation should carried out as at the date of any final decision along these lines, and using the most recent financial assumptions at the date of that decision. In accordance with* *the regulator's expectations, this should be undertaken or submitted to an appropriate provider promptly following receipt of notification of Mr T's acceptance of the decision. If the redress calculation demonstrates a loss, the compensation should if possible be paid into Mr T'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 T 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/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.*

*I am aware that on 2 August 2022, the FCA launched a consultation on changes to this guidance and has set out its proposals in a consultation document - CP22/15-calculating redress for non-compliant pension transfer advice. The consultation closed on 27 September 2022 with any changes expected to be implemented in early 2023.*

*In this consultation, the FCA has said that it considers that the current methodology in FG17/9 remains appropriate and fundamental changes are not necessary. However, its review has identified some areas where the FCA considers it could improve or clarify the methodology to ensure it continues to provide appropriate redress.*

*Nevertheless, the basic objective of the proposed amendments still remains to put a consumer, as far as possible, into the position they would be in if the business had advised them to buy added years.*

*The FCA has said that it expects firms to continue to calculate and offer compensation to their customers using the existing guidance in FG 17/9 during the consultation. But until changes take effect, firms should give customers the option of waiting for their compensation to be calculated in line with any new rules and guidance that may come into force after the consultation has concluded.*

*I think it's fair for me to give Mr T the same choice.*

*I am satisfied that a calculation in line with FG17/9 remains appropriate and, if a loss is identified, will provide fair redress for Mr T. And, having reviewed the FCA's consultation and its proposed updates to the methodology, I'm satisfied that the proposed changes under consultation would, if ultimately implemented, still reflect a fair way to compensate Mr T in this case.*

*Therefore, if Mr T wishes to have his redress calculated in line with any new or updated guidance and rules, I intend to ask Smith & Williamson Investment Services Limited to undertake a redress calculation in line with the updated methodology as soon as any new rules and/or guidance come into effect (rather than to calculate and pay any due compensation now in line with FG17/9). As I have set out above, it is not certain when any updated rules and guidance will come into effect, but the FCA has said that it expects this will be in early 2023.*

*As noted above, the FCA has stated that the aim of any updated guidance and rules would remain the same as in FG17/9, which is to put consumers in the position they would be in if they had bought added years.*

*This Service can't advise Mr T on whether or not Mr T should wait. The FCA has published* *some information and answers to likely questions consumers might have about how redress is calculated. I recommend that Mr T reads this information before he makes his choice. This can be found here: https://www.fca.org.uk/consumers/pension-transfer-defined-benefit/redress-calculations*

*Mr T should let me know in response to this view whether he wishes for Smith & Williamson Investment Services Limited to calculate any compensation that may be owed to him:*

*a) in line with the guidance in FG17/9 (as recommended above)*

*or*

*b) in line with any new rules or guidance that are expected to come into force in early 2023.*

*If I don't receive a response on this point, I'll assume Mr T doesn't wish to wait and I'll continue to direct that compensation be calculated in line with FG17/9.*

*If the complaint hasn't been settled in full and final settlement by the time the outcome of the consultation is published, I'd expect Smith & Williamson Investment Services Limited to carry out a calculation in line with the updated rules and/or guidance in any event."*

Smith & Williamson Investment Services Limited hasn't responded to the provisional decision, but Mr T's representative confirmed acceptance of my findings and that Mr T didn't wish to wait for any updated guidance to be issued.

**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**

Smith & Williamson Investment Services Limited, trading as Tilney, should undertake the above calculation, as set out in the provisional decision, on the basis of the current guidance (unless the complaint hasn't been settled before any updated rules or guidance, as set out above).

**My final decision**

My final decision is that I uphold the complaint and direct Smith & Williamson Investment Services Limited, trading as Tilney, to undertake the above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr T to accept or reject my decision before 27 December 2022.

Philip Miller
**Ombudsman**