DRN-4069664

The complaint

Mrs H complains she was misadvised to take out a Free Standing Additional Voluntary Contribution pension policy (FSAVC) by Zurich Assurance Ltd (Zurich) then trading as Allied Dunbar. She wants to be put back in the position she should have been in.

Mrs H is represented in his complaint by a claims management company (CMC) but for ease I will just refer to Mrs H except where necessary in this decision.

What happened

Mrs H says Zurich advised her to start the FSAVC in 1997 to make additional pension savings on top of the Teachers' Pension Scheme. She says she should have been given more information about the in-house AVC (the TAVC) option. Which may have had lower charges and she may have suffered losses as a result. She says she only realised this during 2022, having contacted the CMC.

Mrs H complained to Zurich, but it said it wouldn't consider her complaint as it had been brought too late. It said Mrs H had six years to bring the complaint from the point the plan was sold to her. Or three years since she knew or reasonably should have known she had grounds for complaint. It said it was more than six years since the plan had been taken out in 1997.

And it said she should have known she had grounds for complaint, by 2001 at the latest. Because, it had sent her a letter and updated booklet in May 2001. Which gave details of in-house options including that these were likely to have lower charges than the FSAVC. Zurich said the letter also advised Mrs H she could contact it to arrange a review or if she had any queries.

Mrs H referred her complaint to our service and our investigator looked into it. He thought it was a complaint our service could consider.

He said issuing the generic letter and booklet several years after the advice had been given wouldn't have reasonably made Mrs H aware there were grounds for complaint. He said the information in the brochure was about in-house AVC's, not that the FSAVC sold might be unsuitable. He said Zurich should look into the complaint and provide a final response to it. Zurich disagreed our service could consider the complaint and asked for a final decision to be made about this. But it also provided a final response to the complaint and didn't uphold it.

Zurich said its advice had been suitable at the time and its adviser could only give advice about its products not the other options. It said the adviser's *"Reason for Recommendation"* letter dated 26 September 1997, confirmed Mrs H had been given a booklet called *"Topping Up you Occupational Scheme Benefits – Your Choice"* (the booklet). And this gave details of in-house AVC and added years options compared to FSAVC's. And that she should contact her employer for more information before deciding what to do. It said as the plan didn't start until several months later, she'd had adequate time to do this.

Our investigator said the complaint should be upheld.

He said the recommendation letter said that the booklet had been provided not that the in-house options had been discussed as required by the regulations at the time. And that no comparison between the options had been carried out despite the regulator saying in 1997 that tied advisers like Zurich:

> *"could be expected to undertake some form of comparison between an FSAVC and the in-house AVC alternative"*

He said Zurich hadn't provided a copy of the booklet it say it gave to Mrs H in 1997. But that the updated booklet from 2001, which it said provided additional details about in house options and FSAVCs, still didn't contain enough information for it to have met its regulatory requirements.

Our investigator said Zurich should undertake a redress calculation in accordance with the regulators' FSAVC review guidance. And calculate the difference in charges between the FSAVC and the in-house AVC assuming both were invested in the same benchmark index. If this calculation showed a loss, then the compensation amount should be paid into Mrs H's pension plan if possible and if not to her directly after making a notional deduction to allow for the impact of taxation at the basic rate.

Mrs H accepted our investigators view. Zurich didn't comment about our investigator upholding the complaint but said it still didn't think the complaint could be considered by our service due to the time limits applying.

As Zurich doesn't agree it has come to me to decide.

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 that our service can consider the complaint and that it should be upheld. I'll explain why.

Why we can consider this complaint

We can't consider every complaint we receive. The complaints we can look into are set down in the rules under which we operate. Our rules are written by the regulator, and flow from legislation, specifically the Financial Services and Markets Act 2000.

The Dispute Resolution (DISP) rules say we:

> *"cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service more than:*
>
> *(a) six years after the event complained of; or (if later)*
>
> *(b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had cause for complaint"*

If a complaint is brought outside these timescales our service can only consider it if either the business consents, or I think something truly prevented it being brought in time.

Zurich gave the advice to take out the FSAVC plan in 1997, this is clearly more than six years ago, and Mrs D is out of time on this part of the rule.

For the second part of the rule, it's important to note that this doesn't require Mrs D to have had certain knowledge of cause for complaint on a specific basis. The sense that something wasn't right might be enough to place an individual on a path to discovery of an actual cause for complaint, if they reasonably acted on that unease, in other words the "ought reasonably to have been aware" part of the rule.

I've thought about the available evidence and arguments made by both parties. And where the evidence is incomplete, inconclusive, or contradictory, I reach my conclusions on the balance of probabilities – that is, what I think is more likely than not to have happened based on the available evidence and the wider surrounding circumstances.

It is generally the case that the in-house Teachers Additional Voluntary Contribution plan (TAVC) had lower charges than FSAVC plans. So, for Mrs D to become reasonably aware that she may have had cause to complain that Zurich's advice to take out the FSAVC may have caused her losses something would have needed to trigger her to consider this. And she says that this was when she recently contacted a CMC.

Zurich argues it's letter to Mrs D in May 2001 enclosing an updated version of the booklet it says was initially provided to her in 1997 (of which it hasn't provided a copy) ought to have made her reasonably aware she had cause for complaint. It says the booklet had been updated with further details about in-house AVC options and FSAVCs including information about charges.

I don't agree. I think this communication was at best confusing and likely to mislead most people receiving it. I don't think it was sufficient to have made Mrs D reasonably aware she had cause to complain for the following reasons:

1. It was a generic letter and booklet. Nothing specifically drew Mrs D's attention that there might be an issue with her plan or the advice she'd been given nearly four years earlier. And the covering letter invites Mrs D to contact Zurich if she had *"any questions arising from this revised booklet*" rather than about the advice she'd been given.

2. Taken together the letter and booklet are confusingly contradictory. The booklet does give information about in-house AVCs and FSAVCs. But I think the information, on charges (the key point here), is contradicted by the letter. And I think it highly probable that the one-page letter which appears to confirm what revisions had been made, would be given more consideration than the eight-page booklet.

   The letter says the updated booklet is enclosed and it *"would draw your attention to the following revisions"*. It states *"Page 1 makes the additional reference …"* And quotes the additional wording in full.

   It then says, *"Page 3 refers to*" and quotes the following:

   > *"The costs associated with setting-up and administering an in-house AVC are often met by the employer, or your employer may have agreed enhanced terms with the insurance company, in the form of reduced charges. This could potentially lead to higher retirement benefits than under an FSAVC offering a similar investment fund. The charges levied on contributions to an in-house AVC are usually lower than those charged under the Allied Dunbar FSAVC*

Pension Account, particularly in the early years, although over the life of the plan these may even out."

This wording strongly suggests that charges would have made little difference overall. And putting it in the letter clearly gives this statement a high degree of prominence. I think given the previous details about page 1 noted above most readers would conclude this was the revised wording.

But this isn't the wording in the booklet provided. This says charges *"may be lower"* rather than *"usually lower"*, which I consider has quite a different meaning. And it omits the "*particularly in the early years, although over the life of the plan these may even out."* part. Providing a fairer, more balanced view of the likely charging situation than the wording set out in the letter.

It isn't exactly clear where the wording quoted in the letter is from. Although I suspect it is from the 1997 version of the booklet. If so, I think it is confusing and misleading to quote the old section in full without specifically stating it was the earlier wording rather than the newer version. I think any updated information in the booklet was skewed by this misleading presentation.

3. The booklet is very much "sales" orientated. It empathises possible advantages of FSAVCs whilst providing limited details of in-house options. I think this undermines the importance of the information about the likely charging differential. For example, the section on the additional *"Privacy"* a FSAVC might offer over in house options is longer than the section on charges.

I think having read the booklet and particularly the letter Mrs D would have been given no reason to think there was any cause for concern about the advice she'd been provided with. That is confirmed by the fact that she continued to pay contributions to her FSAVC after this. And I'm satisfied that our service can consider this complaint.

Was the FSAVC mis-sold

Zurich hasn't disputed our investigators view that the advice didn't meet regulatory requirements at the time, but I will also consider this aspect.

Mrs D made several points about why the advice wasn't suitable. But I think the key issue is whether in-house AVC options were properly discussed and considered as required by the financial service regulations at the time. Zurich argued they were, in part because she was given the 1997 version of the booklet, discussed above. It's unfortunate that a copy hasn't been made available.

What we do have as evidence is the fact find document completed at the time, the Reasons for Recommendation letter and the updated booklet provided in 2001. On the basis of these documents, I don't think Mrs D was given suitable advice.

Zurich's tied adviser couldn't give advice about the TAVC, but by 1997 the regulator (the FSA) expected tied advisers to discuss the generic differences between any in-house AVC option and the FSAVC alternative, taking into account their features. That would have included referring to the charges of each option and that in-house AVC's were usually cheaper. And to also direct the consumer to their employer to obtain more information on in-house options.

The *"Reasons for Recommendation"* letter provided to Mrs D doesn't discuss the differences between the in-house and FSAVC options. It says the booklet has been provided. Which *"sets out the benefits and features"* of the FSAVC *"and those typically available under the employers' in-house scheme".* And that Mrs D had *"advised me that you understand the choices available to you".* It makes no comment at all about charges, which is surprising given how important this consideration was. Nor does it specifically suggest that Mrs H contact her employer or pension scheme for further details about in house options.

Zurich says the updated booklet gave additional information about these points. That it felt the need to issue an updated booklet to existing customers suggests the booklet issued in 1997 was inadequate and didn't meet regulatory standards at the time. A conclusion that was reached in other final decisions made by our service, where the 1997 booklet was made available.

And Zurich's fact find document has a section on *"In house AVC"* which asks a few questions including about the alternative added years option. The whole section has a line drawn through it with no entries made, rather than the questions being answered yes or no. I think this further suggests there was no discussion about in house alternatives and the generic differences and features including charges at the time.

So, from the evidence available it doesn't appear that Zurich's advice complied with the regulatory requirements at the time. That means the policy was mis-sold. And if that has resulted in a loss for Mrs D it is fair that Zurich puts her as closely as possible back into the position she should have been in.

Putting things right

Zurich 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 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 Mrs H'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 Mrs H 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.

My final decision

My final decision is that I uphold this complaint against Zurich Assurance Ltd.

I direct Zurich Assurance Ltd to undertake the loss redress calculation and pay any compensation that may be due as set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs H to accept or reject my decision before 23 June 2023.

Nigel Bracken
Ombudsman